CAPITAL PUNISHMENT IN CONNECTICUT, 1973-2007:

A COMPREHENSIVE EVALUATION FROM 4600 MURDERS TO ONE EXECUTION

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EXECUTIVE SUMMARY

This report evaluates the overall application of the death penalty apparatus in Connecticut, from the time the state adopted a post-*Furman* death penalty statute in 1973 through 2007, a period during which roughly 4600 murders were committed in the state. The objective is to assess whether the system furthers rational and legitimate criminal justice goals while operating lawfully and reasonably, or is marred by arbitrariness, caprice, and/or discrimination. A comprehensive assessment of the process of winnowing from 4600 murders to 10 death sentences and one execution reveals a troubling picture. Overall, the state's record of handling death-eligible cases represents a chaotic and unsound criminal justice policy that serves neither deterrent nor retributive goals.[1] Here we provide a brief summary of our findings.

First, the Supreme Court's 1972 indictment in Furman v. Georgia of arbitrary and capricious processes that lead to wantonly freakish and rare applications of the death penalty applies to the Connecticut death penalty system as practiced over the last 34 years. So far, the state has executed one criminal defendant over a period during which there were in excess of 4600 murders. Efforts at sharpening the definition of death-eligible cases have not changed the basic fact that there is no meaningful basis for distinguishing the few who receive sentences of death from the many capital-eligible murderers who do not.

Second, if one looks only at the population of capital-eligible murders that the state manages to solve, one is struck by the enormous randomness of the process on the path to a capital sentence. The one individual who has been executed under this death penalty statute actually preferred

[1] Waterbury State's Attorney John Connelly recently noted that the death penalty in Connecticut is not a deterrent to murder. "The Death of Capital Punishment?" Morning Edition: Where We Live. WNPR. Connecticut, March,10, 2008.

execution to imprisonment. (Ironically, in another horrible murder case, discussed further below the Connecticut prosecutor claimed he did not seek the death penalty against defendant Scott Pickles because he felt life imprisonment would be a harsher sanction for Pickles, who had savagely killed his wife and then murdered his two children.) To assess whether the death penalty is being applied to the worst cases, we evaluated the egregiousness of 207 capital-eligible murders, using two different egregiousness measures. Using this information, we found that the cases that are charged with capital felonies are no worse than those that are not charged with capital felonies: in fact, the average egregiousness score for capital-eligible crimes *not* charged as capital felonies is actually *higher* than for those crimes that were so charged. The cases that receive life imprisonment without parole are no worse than the cases that receive death sentences.

Third, this random pattern of sentencing in death-eligible cases reveals substantial horizontal and vertical arbitrariness. For any given sentence, one observes wide variations in the degree of egregiousness of the murders that lead to that sentence, and any given level of egregiousness can generate an extremely wide range of sentences. In no sense can it be said that Connecticut has limited its use of the death penalty to the "worst of the worst," since many equally egregious or more egregious cases receive non-death sentences. Depending on the measure of egregiousness, either 10 or 11 of the 12 cases where the defendant received a death sentence were *not* among the ten highest-egregiousness cases.

Indeed, for some cases resulting in a death sentence, literally scores of more egregious cases exist that did not get the death penalty. For those defendants who are currently on death row, the median number of cases leading to conviction that are equally or *more* egregious yet did not result in a death sentence is between 40 and 48 (depending on the egregiousness measure). Of course, these numbers don't include all the other egregious cases that are never solved or lead to no conviction;

these cases result in zero sanctions for a large and growing proportion of homicides, while a small handful of no more deathworthy murderers are selected for the ultimate punishment. While this is of course what one would expect from a random or arbitrary and capricious process, it is not consistent with Eighth Amendment principles of consistency and rationality in capital punishment.

Fourth, the focus in the previous point on death-eligible cases that end with a conviction *understates* the degree of the horizontal and vertical arbitrariness. Just prior to the adoption of the state's death penalty statute in 1973, only 7 percent of murder cases were not cleared by arrest or other means. In the 34 years since adoption of the death penalty, there has been steady erosion in the fraction of murders that are solved. As a result, today, roughly 40 percent of all Connecticut murderers go completely free. This implies that, under current circumstances, for every defendant who receives a sentence of death, sixteen equally egregious murderers will essentially have a zero sentence.

Fifth, black defendants have received a death sentence at three times the rate of white defendants in cases involving white victims (15 percent versus 5 percent), and in general nonwhite defendants have statistically significantly higher rates of receiving death sentences than whites in such cases.

Sixth, a regression analysis of capital felony charging decisions and the probability of receiving a death sentence for death-eligible murders provides further evidence of the arbitrariness of Connecticut's capital punishment regime, and the significance of defendant's and victim's race. Specifically, controlling for the egregiousness and the number of special aggravating factors in a case, the killers of white victims are treated more severely in terms of capital-felony charging rates than killers of nonwhite victims; nonwhite killers of whites are treated most harshly, experiencing a charging rate that is 17-18 percentage points higher than white killers of whites (other things equal).

For capital-eligible cases, nonwhite killers of whites also receive death sentences at dramatically higher rates than white killers of whites. Numerous studies indicate that in death penalty jurisdictions throughout the country for decades, defendants who murder white victims are more likely to receive death sentences, and to be executed, than defendants who murder non-white victims. Since 1976, approximately half of all murder victims throughout the United States have been white and yet approximately 80% of all murder victims in cases resulting in an execution were white.[2] Recent studies of the application of the death penalty within states produce similar results: race of the victim continues to play a role in the administration of many death penalty regimes throughout the country.[3]

Seventh, the statistical evidence suggesting that different standards of capital-felony charging and death sentencing occurs across Connecticut is confirmed by our regression analysis. A capital-eligible defendant in Waterbury is charged at a 15-18 percentage point higher rate and sentenced to death at a 17-36 percentage point higher rate than would be the case if the identical case had arisen elsewhere in the state. In other words, the rate of receiving a sentence of death is roughly 7-8 times as great in Waterbury as it is in the rest of Connecticut. Again, the arbitrariness of geography is a dominant factor of the Connecticut death penalty regime.

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[2] "Facts About the Death Penalty," http://www.deathpenaltyinfo.org/FactSheet.pdf.

[3] *See, e.g.,* David C. Baldus and George Woodworth, Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception, 53 DePaul L. Rev. 1411, 1425 (2004) (reviewing race of victim data within states and concluding that "[t]hese data strongly suggest that defendants with white victims are at a significantly higher risk of being sentenced to death and executed than are defendants whose victims are black, Asian, or Hispanic."); David C. Baldus and George Woodworth, Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research," 41 No. 2 Crim Law Bull 6 (2005) ("on the issue of race-of-victim discrimination, there is a consistent pattern of white-victim disparities across the systems for which we have data."); *McKleskey v. Kemp*, 481 U.S. 279 (1987).

Eighth, the regressions findings that race and geography are powerful determinants of capital sentencing decisions in Connecticut remain robust when controls are added for female defendants as well as for the various categories of capital felonies. Within the class of capital-eligible crimes, illegitimate factors, such as race, gender, and geography, play a bigger role in capital sentencing than the legitimate factors of egregiousness of the crime or the presence of special aggravating factors.

In sum, our findings do not support the statement that the death penalty is imposed only in the "worst of the worst" cases. Approximately 40 percent of the worst cases end up with zero punishment because of the declining clearance rates of Connecticut murders. While some very low egregious capital murders that are solved get relatively more lenient sentences, after that, it is largely a roll of the dice as to what the sentence will be in terms of the impact of the egregiousness of the crime on the ultimate case outcome. Within the class of death-eligible murders, the discretion exercised across judicial districts and throughout the post–arrest criminal justice system leads to arbitrary, irrational, or discriminatory outcomes. Indeed, consistent with a large body of evidence from around the country over an extended period of time, the evidence suggests that race of both defendant and victim is strongly and statistically significantly related to determinations of whether or not the state pursues and achieves a death sentence for capital-eligible defendants.

I. INTRODUCTION

A. The Study's Charge

In 2006, I was retained by Attorneys David Golub, Paula Montonye, Craig Raabe, and Michael Sheehan, et. al. to assist in a systemic evaluation of capital punishment in the State of Connecticut. I was asked to look at every phase of the operation of the State's death penalty regime to see if the system in its entirety or in particular aspects was operating in an arbitrary and capricious manner, and specifically, whether there was racial or geographic disparity or arbitrariness in capital prosecution and/or the imposition of death sentences in the State of Connecticut.

Unfortunately, this is a daunting task given the failure of the State to maintain comprehensive records about the treatment of cases that could be prosecuted as capital felonies. Unlike those states that take seriously their responsibilities to ensure that the death penalty is not being administered in an arbitrary, capricious, or discriminatory fashion by maintaining comprehensive records on all felony arrests and the subsequent disposition of death-eligible cases, Connecticut has no central repository for all of the relevant data needed to undertake a study such as this one.[4] The Report of the Connecticut Commission on the Death Penalty, which was submitted to the Connecticut General Assembly on January 8, 2003, recognized the state's troubling incapacity to understand whether its

[4] For example, in New York, the State of New York Division of Criminal Justice Services maintains "individual-level data on all felony arrests in the state …, including the approximately 500 first- and second degree murder cases each year in the state. This data set includes information on each suspect's demographic characteristics, prior record, arrest charge, the final disposition of his case (acquittal, trial conviction, or plea), and the final disposition charge. The data set also includes a variable that identifies the county in which the case was tried. One of the key advantages of the data is that the universe is all suspects arrested, not all defendants indicted or convicted." Ilyana Kuziemko, "Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment," 8 (1) American Law and Economics Review 116. 117 (2006).

death penalty system was complying with relevant state and federal constitutional requirements and specifically recommended remedial action:

> "All agencies involved in capitol felony cases should collect and maintain comprehensive data concerning all cases qualifying for capital felony prosecution (regardless of whether the case is charged, prosecuted or disposed of as a capital felony case) to examine whether there is disparity. This should include information on the race, ethnicity, gender, religion, sexual orientation, age, and socioeconomic status of the defendants and the victims, and … geographic data…. This data should be maintained with respect to every stage of the criminal justice process, from arrest through imposition of the sentence." (Id. At 27.)

To address this extraordinary deficiency in the state's criminal justice data in the face of serious concerns about arbitrary and discriminatory application, a major data collection effort was undertaken to compile the information necessary to understand the operation of Connecticut's death penalty regime.[5] This report relies on this major data collection effort, as well as on other publicly available crime data for the state of Connecticut.

In order to identify the factors leading to the capital prosecution of criminal defendants and the imposition of the death penalty for particular defendants, I analyzed a data set that included information on all cases resulting in a criminal conviction where the crimes were deemed to be capital-eligible (whether or not they were prosecuted as such), and where the crime was committed after the adoption of the Connecticut death penalty statute in 1973.[6] This data was divided into two parts: the first, which included all death-eligible cases where the crime was committed after October 1, 1973 and the sentence was imposed prior to December 31, 1998, which was collected by

[5] An enormous degree of unreviewable (or not effectively reviewable) discretion – a hallmark of the Connecticut death penalty system -- is the breeding ground for the operation of prejudice. Ian Ayres, "Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination" (2001). For example, discriminatory patterns have been identified even in systems that take far greater care to avoid racially discriminatory decisions than are made in the operation of the Connecticut death penalty regime. Indeed, despite the claims by NBA Commissioner Stern that NBA referees "are the most ranked, rated, reviewed, statistically analyzed and mentored group of employees of any company in any place in the world," there is now substantial credible evidence of racial discrimination among NBA referees. Joseph Price and Justin Wolfers, "Racial Discrimination Among NBA Referees," NBER Working Paper No. 13206, June 2007.

[6] The earliest murder to appear in our data set occurred on March 9, 1974, and the latest occurred on July 13, 2003.

researchers associated with the Office of the Chief Public Defender between 1998 and 2002.[7] The second, which included all cases where the sentence was imposed between January 1, 1999, and June 30, 2006, was collected by researchers connected with this study. With the help of my research assistants, I created a unified and cleaned data set that was the primary basis for the analysis in this report.

B. Background of the Principal Investigator

I, John J. Donohue III, joined the faculty of Yale Law School in July 2004, where I am the Leighton Homer Surbeck Professor of Law. (My c.v. is attached as Appendix F.) I am an economist/lawyer and a Research Associate of the National Bureau of Economic Research, who has used large-scale statistical studies to estimate the impact of law and public policy in a wide range of areas from civil rights and employment discrimination law to school funding and crime control. I am a Phi Beta Kappa graduate of Hamilton College, and received my JD from Harvard, and a Ph.D in economics from Yale. Prior to joining the Yale faculty, I was a chaired professor at both Northwestern Law School and Stanford Law School, and visited at the law schools of Harvard, Yale, University of Chicago, Cornell, and the University of Virginia.

I was a Fellow at the Center for Advanced Studies in Behavioral Sciences in 2000-01, and edited Foundations of Employment Discrimination Law, Foundation Press, 2d edition (2003) and the two-volume Economics of Labor and Employment, Edward Elgar Publishing (2007). I recently published Employment Discrimination: Law and Theory, Foundation Press (with George Rutherglen), 2005. I was selected to deliver the 2006 Rosenthal Lectures at Northwestern Law School as well as the Keynote Address at the November 2007 Conference on Empirical Legal

7 For ease of exposition, these cases will be referred to as the pre-1998 cases, but that should be taken to mean cases in which the sentence was imposed prior to the *end* of 1998.

Studies held at NYU Law School, both of which involved a discussion of my work demonstrating the absence of any credible empirical support for the conjecture that the death penalty in the United States deters murder. At present, I am writing a book on this and other empirical issues in law and policy. I am currently the co-editor (handling empirical articles) of the American Law and Economics Review.

After serving as a law clerk to then Chief U.S. District Court Judge T. Emmet Clarie in Hartford, Connecticut in 1977-1978, I practiced law at Covington and Burling in Washington, D.C., where I first became involved in capital punishment appellate work, leading to the publication of an article on the capital case Godfrey v. Georgia. During my Washington practice, which lasted for three years, I testified before the United States Senate on a then-proposed federal death penalty statute.

In Spring 2007, I taught a course at Yale Law School focused on the issue of the deterrent effect (or lack thereof) of the death penalty. Later in 2007, I taught courses on empirical law and economics issues involving crime and criminal justice at Tel Aviv University Law School, the Gerzensee Study Center in Switzerland, and St. Gallen University School of Law (in Switzerland). At present, I am teaching a similar course at Yale Law School in the Spring Semester 2008.

C. Overview of the Report

This study explores and evaluates the application of the death penalty in Connecticut since 1973. The objective is to assess whether the system operates lawfully and reasonably, or is marred by arbitrariness, caprice, and discrimination. Our empirical approach has three components. First, we begin our evaluation of the state's death penalty regime by giving background information on the overall numbers of murders, death sentences and executions in Connecticut. The latest evidence on

the freakish infrequency with which the death penalty is administered in Connecticut raises a serious question of whether the state's death penalty regime is serving *any* legitimate social purpose.

Second, mindful of the Supreme Court's mandate that "within the category of capital crimes, the death penalty must be reserved for the 'worst of the worst,'"[8] we evaluate whether or not the crimes that result in death sentences in the state of Connecticut are the most egregious relative to other death-eligible murders. The claim can definitively be put to rest: in Connecticut, the apparatus of the death penalty regime is not targeted at the "worst of the worst." At best, the Connecticut system haphazardly singles out a handful for execution from a substantial array of horrible murders. At worst, the defect of the evident arbitrariness of the sentencing of convicted capital-eligible defendants is further tainted by elements of discrimination based on the race of defendants and victims.

Third, we conduct a multiple regression analysis to explore whether the system is working appropriately and to test for the presence of arbitrariness and/or discrimination in implementing the death penalty. Specifically, we examine whether decisions reflect legitimate factors, such as the deathworthiness of the cases, and whether or not "legally suspect" variables such as race of the defendant or the victim or the judicial district in which the murder occurred have any effect on the outcomes in our universe of death-eligible cases. Again, the Connecticut death penalty system is found to be wanting: arbitrariness and/or discrimination are defining features of the implementation of the state's capital punishment regime.

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[8] *Kansas v. Marsh*, 126 S.Ct. 2516, 2542 (2006)(Souter, J., dissenting). Justice Souter went on to quote from earlier Supreme Court death penalty decisions: "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.'" *Roper v. Simmons*, 543 U. S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U. S. 304, 319 (2002)).

Section II of the report discusses some of the core elements of the U.S. Supreme Court's insistence that the Eighth Amendment prohibits wantonly and freakishly rare, as well as arbitrary and capricious decision-making. Section III provides background on the nature of the Connecticut death penalty statute, which was adopted in 1973 and has been periodically amended since that time.

Section IV provides a dramatic illustration that death-eligible cases in Connecticut do not select the most egregious cases for the most severe punishment but rather are subject to haphazard arbitrary patterns. Cases that are not charged as capital felonies are actually, if anything, *more* egregious than the cases that are charged. Overall, the picture is one of strikingly arbitrary decision-making with respect to the key egregiousness measure, whether one looks overall at the identified population of death-eligible cases or individual cases that have worked their way through the arbitrary and capricious machinery of death. In fact, things are even worse than the focus on the identified cases suggests because Connecticut continues to catch fewer and fewer murderers. Today, roughly 40 percent of the potentially death-eligible cases are not even solved (let alone prosecuted to a conviction), and hence the enormous outcome disparities that are generated by the system are in fact growing.

Section V provides a review of the data that was used in this report, which includes data on all Connecticut murder cases, solved and unsolved, as well as detailed data on the roughly 230 solved death-eligible cases. The Section also provides a brief overview of the 12 cases that have resulted in sentences of death, of which two have been reversed and one has led to an execution.

Section VI describes the egregiousness study, in which we were able to attach egregiousness scores to 207 death-eligible cases. The first part of this section then uses the egregious scores to evaluate capital-felony charging decisions made by Connecticut prosecutors. That is, we examine whether the crimes that have been charged as capital felonies are the most egregious relative to other

crimes and, in particular, other death-eligible crimes *not* charged as capital felonies. This section analyzes charging decisions across a number of dimensions, including offense category, levels of egregiousness, levels of egregiousness within offense categories, race of the defendant, race of the victim, race of the defendant and the race of the victim, judicial districts, egregiousness within each judicial district, and egregiousness and race within each judicial district.

The second part of Section VI examines evidence of arbitrariness in the ultimate sentence imposed. Relying on the Supreme Court's understanding that death is a "punishment different from all other sanctions,"[9] this section analyzes sentencing using a dichotomy of death and non-death sentences. As with charging decisions, the main purpose of this section is to determine whether the defendants who have received death sentences in Connecticut are those who have committed the most egregious offenses.

Section VII further examines the issues discussed above using multiple regression, where possible given small sample sizes, to explore the factors that influence decisions at the crucial stage of capital-felony charging as well as in the ultimate outcome of who receives a death sentence. This part of the analysis probes whether legally suspect variables such as defendant or victim race or the judicial district of the murder, as well as legitimate variables such as the case's egregiousness or deathworthiness, have any impact on the probability of a defendant being charged with a capital felony or ultimately receiving the death penalty. The evidence shows that illegitimate factors such as race and geography *do* infect the death penalty process in Connecticut, and that by contrast, legitimate factors such as case egregiousness and the number of special aggravating factors have relatively limited influence on capital sentencing outcomes.

[9] *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976).

Section VIII offers concluding observations, and notes that the finding of arbitrary and capricious capital decisionmaking is not surprising in a system that confers so much unbridled discretion to an array of actors that hold widely divergent views on the value and propriety of the death penalty and who can at times be influenced, perhaps unconsciously, by racial biases. In the absence of systematic efforts of data collection and analysis, the state has not been in a position to adequately identify these problems, or to attempt to correct them.

II. THE LEGAL LANDSCAPE

Modern death penalty jurisprudence in the United States began with the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972). The *Furman* Court was concerned that the unchanneled discretion of prosecutors, judges, and juries led to the death penalty being administered in a rare and arbitrary manner. In its per curiam decision, the Court held "that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Many states, including Connecticut, responded to the concerns expressed in *Furman* by enacting more specific death penalty statutes. Four years later, in *Gregg v. Georgia*, 428 U.S. 153 (1976) and related cases, the Supreme Court ruled that "the punishment of death does not invariably violate the Constitution" and indicated that statutes such as the one enacted in Connecticut were facially constitutional.

At the same time, the Court in *Gregg* indicated that "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society." The Court described at length the factors that must be considered in evaluating whether a state's capital penalty regime fails to meet constitutional standards:

> The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. *Trop v. Dulles*, 356 U.S. at 100 (plurality opinion). Although we cannot "invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology," *Furman v. Georgia*, supra, at 451 (POWELL, J., dissenting), the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering….
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> The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.
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> …
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> While Furman did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that *the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, Furman held that it could not be*

> *imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner*. [Emphasis supplied.] MR. JUSTICE WHITE concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes, and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. 408 U.S. at 313 (concurring).
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> Indeed, the death sentences examined by the Court in *Furman* were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [capital crimes], many just as reprehensible as these, the petitioners [in *Furman* were] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [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." Id. at 309-310 (STEWART, J., concurring).

As Justice Brennan stated in his concurring opinion in *Furman*:

> [W]hen a severe punishment is inflicted "in the great majority of cases" in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is "something different from that which is generally done" in such cases, *Trop v. Dulle*s, 356 U.S., at 101 n. 32*,* there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily. (at 276-77)….

The Court in *Gregg* held that certain sets of capital penalty procedures designed to correct the problems of arbitrary and capricious implementation of the death penalty could facially satisfy the demands of the Eighth Amendment, but then cautioned:

> We do not intend to suggest that … any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis. (footnotes omitted)

The Supreme Court in *Gregg* underscored that state appellate review must play a vital role to ensure that that "the concerns that prompted our decision in *Furman*" do not infect the implementation of a facially constitutional death penalty scheme in practice. We now have almost 35 years of experience with Connecticut's post-*Furman* death penalty regime. This report will examine whether the concerns that moved the Supreme Court to action in *Furman* have been

adequately addressed under Connecticut's experience with a *Gregg*-approved statutory scheme.

The lessons of *Gregg* for our inquiry are clear: "Because of the uniqueness of the death penalty," it is essential that it not be "inflicted in an arbitrary and capricious manner." As the Supreme Court in *Gregg* stated, the death penalty cannot permissibly be imposed if it is "exacted with great infrequency even for the most atrocious crimes" with "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." "[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." Moreover, as the Court further admonished in *Gregg*, the Eighth Amendment commands that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering."

III. OVERVIEW OF THE STATUTORY SCHEME

Before launching into a detailed examination of the cases, it is useful to give a general overview of Connecticut's post-*Furman* death penalty statute -- C.G.S.A. § 53a-54b – which was enacted in 1973 and has been amended a number of times over the years, as we describe in detail in Appendix A. Five categories of murder have *always* been death-eligible under the Connecticut Statute:

- 1. The murder of a police officer, judicial marshal, firefighter, corrections officer, or other law enforcement officer in the performance of his or her duties. (*See Subsection 1*)
- 2. Murder committed for pecuniary gain, where either the defendant committed the murder or hired someone else to commit the murder. (*See Subsection 2*)
- 3. Murder committed by a defendant with a prior conviction for either intentional murder or felony murder. (*See Subsection 3*)
- 4. Murder committed by a defendant who was under a sentence of life imprisonment at the time of the murder. (*See Subsection 4*)

- 5. Murder committed by a kidnapper of a kidnapped person during the course of the kidnapping. (*See Subsection 5*)

A sixth category of capital felony was included in the original 1973 statute but deleted in 2001. It had provided that the seller of certain illegal drugs could be deemed to have committed a capital felony if the purchaser died from using the drug. The Connecticut legislature expanded the universe of possible capital felonies beyond the factors specified above in both 1980 and 1995. In 1980, two additional categories became classified as capital felonies: 1) murder committed in the course of a sexual assault (rape-murder), and 2) murder of two or more persons at the same time or in the course of a single transaction. Then, in 1995, it became a capital felony to murder a person under 16 years old. [10]

The Connecticut death penalty statute also requires in §53a-46a(i) that an aggravating factor be present before the death sentence can apply. The aggravating factors specified are limited to: (1) murder during a felony by one previously convicted of the same felony; (2) murder after being convicted for two felonies inflicting serious bodily harm; (3) murder accompanied by knowingly creating a grave risk of death to others; (4) especially heinous murders; (5-6) murder for hire or pecuniary gain; (7) murder using an assault weapon; or (8) murder of an official or to avoid arrest. [11]

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[10] For a detailed description of how capital felonies have been defined under Connecticut Statute C.G.S.A. §53a-54b since 1973, *see* Appendix A.

[11] The complete language of this section defining statutory aggravating factors is as follows: "(1) The defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, a felony and the defendant had previously been convicted of the same felony; or (2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or (3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or (4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or (5) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or (6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or (7) the defendant committed the offense with an assault weapon, as defined in section 53-202a; or (8) the defendant

Another major feature of the Connecticut death penalty regime concerns the jury's treatment of mitigating factors. Initially, the finding of a mitigating factor prevented the imposition of a death sentence. After 1995, a death sentence could be imposed as long as the aggravating factor or factors outweighed any mitigating factors. The statute continues to specify some factors that will bar the imposition of the death, but post-1995, the presence of non-statutory mitigating factors does not automatically outweigh the presence of one or more aggravating factors. The mitigating factors originally included in the statute were:

> "That at the time of the offense (1) he was under the age of eighteen or (2) his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution or (3) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution or (4) he was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or (5) he could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing, death to another person."

A. The Statutory Basis for Review of Death Penalty Sentences in Connecticut

Section 53a-46b(b) of the Connecticut General Code governs the automatic appellate review of death sentences in Connecticut. The statute currently provides that "[t]he Supreme Court shall affirm the sentence of death unless it determines that: (1) The sentence was the product of passion, prejudice or any other arbitrary factor; or (2) the evidence fails to support the finding of an aggravating factor specified in subsection (i) of section 53a-46a."

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committed the offense set forth in subdivision (1) of section 53a-54b to avoid arrest for a criminal act or prevent detection of a criminal act or to hamper or prevent the victim from carrying out any act within the scope of the victim's official duties or to retaliate against the victim for the performance of the victim's official duties."

Prior to 1995, Section 53a-46b(b) included a third test under which death sentences were reviewed. Section 53a-46b(b)(3) provided that the Supreme Court shall affirm the sentence of death unless it determined that the defendant's "sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant." Even though this provision was repealed twelve years ago,[12] Section 53a-46b(b)(3) has continued to be the primary vehicle through which death sentences have been challenged on the grounds that they have been applied unfairly in a particular case. In *State v. Cobb*, the Supreme Court of Connecticut held that the proportionality review required by that section "is still mandatory for all capital felony cases pending at the time that the repealing statute became effective."[13] Accordingly, §53a-46b(b)(3), which has constitutional underpinnings, is still being applied and interpreted by Connecticut courts. Moreover, because the analysis of "similar cases" and proportionality is closely related to the determination of whether a death sentence "was the product of passion, prejudice, or any other arbitrary factor" under § 53a-46b(b)(1), the following sections analyze proportionality review in Connecticut, and then consider how statistical evidence could be used to show a violation of Section 53a-46b(b)(1).

B. The Incorporation of the Supreme Court's Death Penalty Jurisprudence into Connecticut's Statutory 1980-1995 Requirement of Proportionality Review

Connecticut's now-repealed statutory provision mandating proportionality review of death sentences incorporated the U.S. Supreme Court's jurisprudence on the review of death sentencing for capital felonies. Enacted in 1980, the proportionality language in §53a-46b paralleled the

[12] *See* Public Acts 1995, No. 95-16, §3(b)).
[13] *State v. Cobb,* 663 A.2d 948, 954 n.10 (1995).

language of the Georgia death penalty statute affirmed by the Supreme Court in *Gregg v. Georgia*.[14] The Georgia death penalty statute mandated that the Georgia Supreme Court review sentences of death to determine whether they are "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[15] In *Gregg,* the Supreme Court noted that the Georgia statute created a legal apparatus to address the problems of arbitrariness that the court described in *Furman v. Georgia*,[16] where the Court invalidated death penalty statutes on the grounds that they were applied arbitrarily and capriciously.

In *State v. Webb*,[17] the Connecticut Supreme Court noted that the Connecticut "proportionality review statute was enacted against [the Supreme Court's] jurisprudential background" as developed in *Furman* and *Gregg.*[18] In an analysis of the Supreme Court's death penalty jurisprudence, the Connecticut court concluded, *inter alia*, that the "appellate focus on the risk of wantonness, freakishness and aberrance" meant a focus on "whether the death penalty imposed was *disproportionate* to sentences imposed in other similar cases"—not on whether it was "by application of the statutory standards, *proportional* in some relative sense to other similar cases."[19]

[14] *Gregg v. Georgia*, 428 U.S. 153 (1976).
[15] Ga. Stat. § 27-2537 (c)(3) (Supp. 1975).
[16] *Furman v. Georgia*, 408 U.S. 238 (1972).
[17] *State v. Webb*, 680 A.2d 147 (Conn. 1996).
[18] *Id.* at 179.
[19] *Id*.

IV. THE FREAKISHLY RARE RESORT TO EXECUTION AND THE RANDOM IMPOSITION OF DEATH SENTENCES

A. Does the Connecticut Death Penalty Serve a Legitimate Retributive Function?

In light of these principles, it is helpful to have a sense of how Connecticut's death penalty system has operated both before and after the *Furman* decision. Table 1 provides some background information on murders, executions, death sentences, and murder clearance rates in Connecticut. Over the periods shown from 1933-1959, the execution rate for all murders ranged from 1.4 to 2.8 percent. For the decade of the 1960s, this rate plummeted to 0.19 percent – one execution for 536 murders -- and in the three years prior to *Furman*, none of the 293 murders led to an execution. It is not hard to understand why the Supreme Court would deem the implementation of capital punishment in this way to be arbitrary, capricious, wanton, and freakish.

Table 1

Years	Murders[1]	Clearance rate[2]	Executions	Execution Rate[3]	Death Sentences	Death Sentences Per Murder
1933-1939	172		3	0.0174		
1940-1949	357		10	0.0280		
1950-1959	356		5	0.0140		
1960-1969	536		1	0.0019		
1970-1972	293	0.93	0	0.0000		
1973-1979	750	0.88	0	0.0000	0	0.0000
1980-1989	1509	0.78	0	0.0000	0	0.0000
1990-1999	1615	0.72	0	0.0000	6	0.0037
2000-2006	704	0.62[4]	1	0.0014	4	0.0057
Total: 1933-1972	1714		19	0.0111		
Total: 1973-2006	4578	0.76[4]	1	0.0002	10	0.0022
Total: 1933-2006	**6292**		**20**	0.0032		

[1] We follow the Uniform Crime Reports approach of referring to these crimes as "murders" even though the precise definition is "Murder and nonnegligent manslaughter," which is the willful (nonnegligent) killing of one human being by another.

[2] Clearance By Arrest or Exceptional Means

[3] Ratio of Executions in a given year to Murders

[4] Up until 2005

Crime Reports (1970-2005)
Source for Murders, 2006: UCR Report, 2006
Source on Murders Before 1970: Summarized UCR Reports, FBI
Source on Executions: Connecticut State Library

What is striking about the information in Table 1 is that the post-*Furman* period presents an even stronger case for wanton and freakish implementation than the pre-*Furman* period. For all the years from 1973-2006 under the new death penalty regime in Connecticut, there were 4,578 murders, (and many additional murders have since occurred in 2007 and early 2008), yet there has only been one execution. One execution in 4,578 murders implies an execution rate of 0.0002. To put this microscopic proportion in context, note that if the execution rate were an astounding *ten* times higher,

it would then be at the same rate that Connecticut experienced in the constitutionally defective pre-*Furman* decade of the 1960s. Moreover, the one execution that actually did occur – that of Michael Ross in 2005 – was with the consent of the defendant, and effectively represented a form of state-assisted suicide.[20] Executions have become dramatically rarer in the post-*Furman* period given the larger population of the state and the large number of murders committed over the last 35 years. The exceedingly rare implementation of the penalty is a striking feature of the Connecticut death penalty system and strongly implicates the concerns in *Furman* of unconstitutional arbitrariness that warrants particular scrutiny.

B. The Pattern of Capital Sentencing Exhibits High Degrees of Horizontal and Vertical Arbitrariness.

At first, we must acknowledge that a system that serves up one execution out of 4,600 murders is presumptively not furthering any rational goal of retribution. But retributive goals might still be achieved if the system somehow managed to focus its death penalty fury on the most egregious murderers. To explore this issue, we assembled a team of nine Yale law students and

[20] According to state Representative Michael Lawlor, the hearing Chairman at an informational session prior to the execution of Michael Ross, "For 10 years he has been asking, if not begging, to be put to death…." Apparently, Ross wrote a note to a psychiatrist who had evaluated him in connection with his decision to die, and mailed it so that the letter would arrive after Ross' death. The letter said, "Checkmate," expressing an apparent belief that Ross had triumphed in his battle to be executed.

In fact, Ross was not alone among Connecticut's most deadly killers in finding the prospect of life without parole to be a fate worse than death. Perhaps Connecticut's worst mass murderer – Geoffrey Ferguson – who murdered five young men in their early twenties in 1995 killed himself at the Garner Correctional Center in Newtown. The news account of Ferguson's suicide first noted the horrific details of his crime "Prosecutors said Ferguson was angry that the men were late with their rent and had thwarted his attempts to evict them. The victims were Scott Auerbach, 21; David Froehlich, 22; Jason Trusewicz, 21; David Gartrell, 25; and Sean Hiltunen, 21. Each of the men was shot in the head; four of the bodies were burned beyond recognition when he set the house they were living in on fire. It remains the worst multiple murder in Connecticut in more than a decade, police said." The newspaper account then went on to note that "Family members of the slain men said news of Ferguson's death gave them little relief. 'I don't want to waste any emotions on Geoffrey Ferguson. It's not going to bring my son back, and it's not going to bring back those other dear boys,' said David Froehlich's father John Froehlich." The death penalty was not sought in the Ferguson case, again showing the arbitrariness of the infliction of capital punishment in Connecticut. Dwight Blint, "Murderer Commits Suicide in Prison," Hartford Courant B1 (May 8, 2003).

alumni and asked them to evaluate the egregiousness of 207 of the capital-eligible death cases that occurred over the last 35 years. The details of this study will be discussed in greater detail below, but, for the moment, it is useful to see the overall picture that emerges from this analysis, as captured in Figure 1 below. Figure 1 shows the sentences received for capital-eligible cases in Connecticut from 1973-2007, with the top horizontal line showing the cases that generated a death sentence and the next lower horizontal line showing those cases that received life without parole.[21] Sentences of terms of years or categorical sentences, such as a death sentence or life without parole, can be read off the vertical axis, while the horizontal axis tells us how the coders evaluated the egregiousness of each case on a scale ranging from 4 to 12 (with egregiousness rising as the egregiousness index increases – moving to the right).

While a rational system of retribution would ensure that the most egregious cases get the worst punishments, Figure 1 reveals an uncomfortable truth about the Connecticut death penalty system: death-eligible murderers in Connecticut over the last 35 years have received sentences all over the map. The pattern suggests a largely cacophonous, capricious process with a high degree of randomness – the exact opposite of a system designed to promote some rational retributive goals. Given the facts of a number of horrible, death-eligible murder cases in Connecticut, there is virtually no way to distinguish on some legitimate grounds, why one case ends up with a death sentence while many others simply receive long prison terms.

To see this, note that arbitrariness in sentencing of capital-eligible cases can occur in two dimensions: a lack of consistency, which is referred to as horizontal arbitrariness, and improper

[21] Cases in which the defendant was sentenced to death are arbitrarily assigned a value of 150 years.

selectivity, which is termed vertical arbitrariness.[22] A capital sentencing regime that ensures that cases with similar levels of culpability are treated alike would have a low level of horizontal arbitrariness because it would consistently give cases with the same degree of egregiousness a similar sanction. Conversely, a high degree of horizontal arbitrariness exists when cases with the same degree of culpability and egregiousness get widely disparate sentences.

Figure 1

[22] See David Baldus et al, "Equal Justice in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)" (June 29, 2006). Available at SSRN: http://ssrn.com/abstract=91495.

If a capital sentencing regime does a good job of limiting the death penalty to the most aggravated and death-worthy cases, then it would have a low level of vertical arbitrariness. The cases at the very top of the punishment severity index – those getting death sentences – would truly be the "worst of the worst." On the other hand, if death cases look very much the same as non-death cases that, say, get life sentences, then the system is not selecting properly and is marred by vertical arbitrariness.

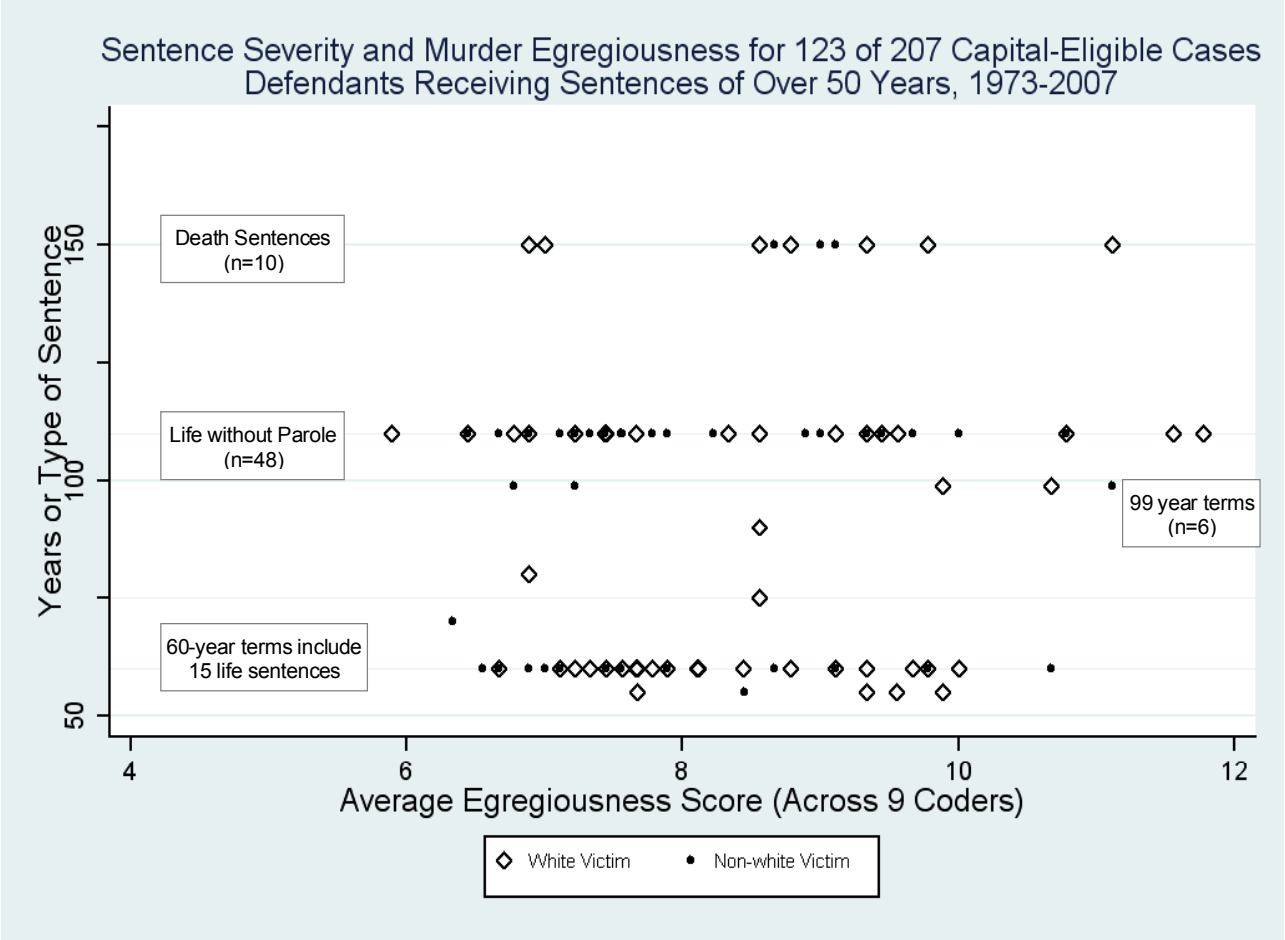
A capital sentencing regime that has appropriately constrained horizontal and vertical arbitrariness should have a very pronounced characteristic: a depiction such as that in Figure 1 should be like a series of narrow steps starting in the lower left corner of the figure and rising to the right. The most egregious cases (on the right) will get the most severe penalty and thus be found in the upper right hand corner of the figure. Moreover, at any given sanction, the range of egregiousness should be limited (the steps are narrow rather than wide). While Figure 1 does reveal a bit of a tendency for the very lowest egregiousness death-eligible cases to receive relatively short term of year sentences, beyond that the Figure is the exact opposite of what one would expect from a legitimate capital sentencing regime. First, the "steps" are extremely broad rather than narrow: for any given sanction, there is a wide range of egregiousness scores rather than a narrow band reflecting consistent treatment. Hence, the system is marred by horizontal arbitrariness. Second, in addition to encompassing a very broad range, the "death penalty step" is not in the upper right of the figure, but rather looks very much like the lower steps denoting life without parole, life imprisonment or other severe penalties. The Connecticut system is marred by vertical arbitrariness in failing to limit the death sentences to the most aggravated cases.

C. The Utterly Random Selection Across the Most Severe Murder Sentences

The extent of the arbitrariness in Connecticut's capital sentencing scheme is highlighted in Figure 2, which focuses on the most severely punished 123 of the 207 coded death-eligible cases. All of these defendants received sentences greater than 50 years, and those not receiving a term of years were either sentenced to life, life without parole, or to death. There is not even the faintest hint of the step function that must be present (moving from lower left to upper right) if the system is not to be plagued by vertical and horizontal arbitrariness.

Instead, one sees what appears to be a completely random pattern. There is absolutely no discernible difference in the egregiousness scores of the ten individuals who received death sentences versus the 114 who received life without parole, a life sentence, or any term of years greater than 50. It would be impossible for a system of channeled discretion focused on legitimate sentencing principles to mimic this random sentencing pattern if the egregiousness index is capturing, even imperfectly, important factors relevant to deciding who should live and who should die.

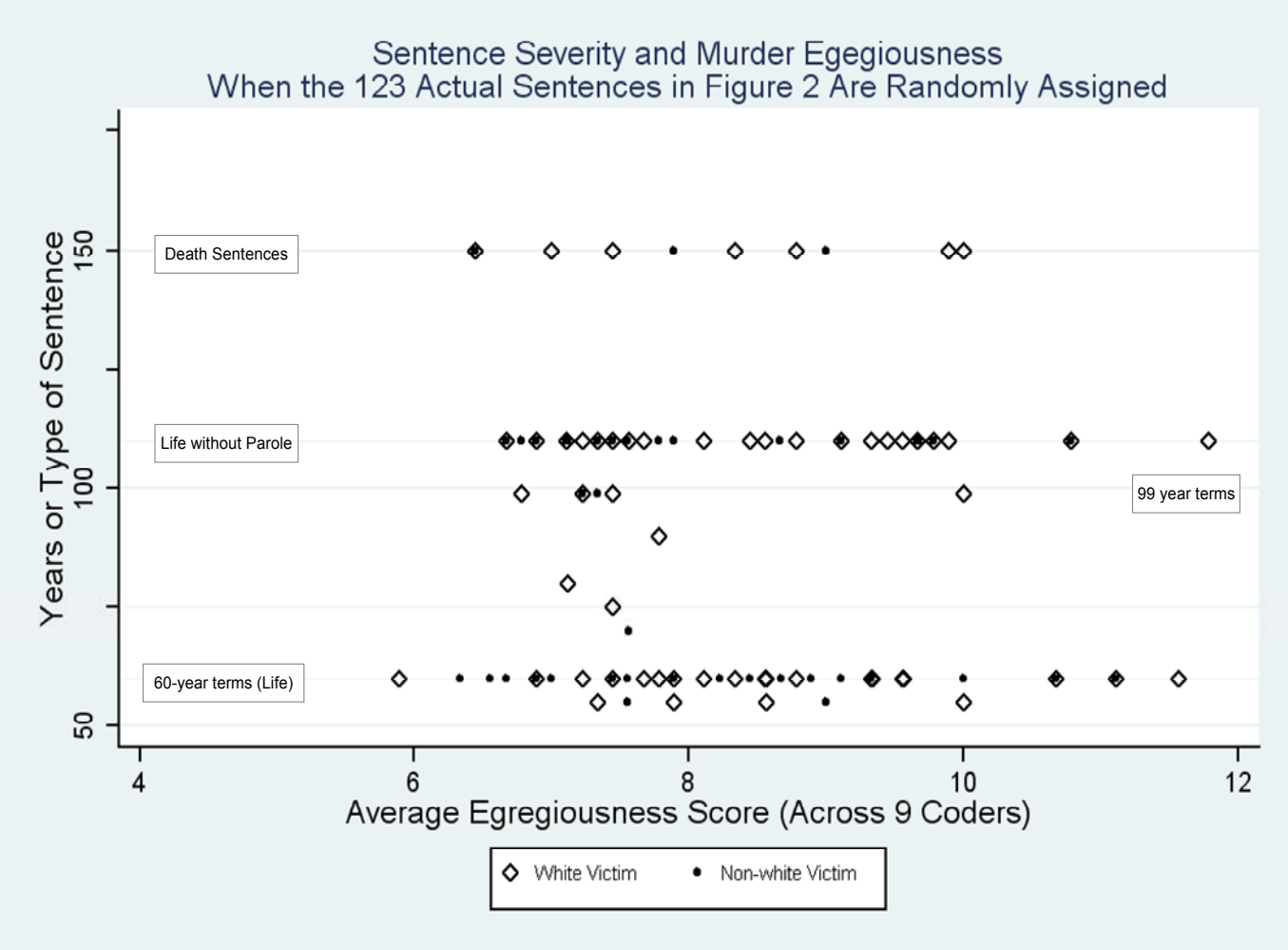
Figure 2



To further illustrate the capriciousness of the sentences depicted in Figure 2, I engaged in an exercise of deliberately assigning the sentences in each case in a random fashion. Specifically, for the 123 cases depicted in Figure 2, we randomly shuffled the deck of existing sentences. Essentially, this ensured that nothing but chance dictated what the sentence would be for each of these existing cases. Figure 2a, then replicates Figure 2 but using the randomly shuffled sentences (linked to the various egregiousness scores) rather than the actually awarded sentences. The striking fact is that Figure 2a looks very much like Figure 2. In neither figure do we see any indication that cases that

get selected for death rate any higher on the egregiousness scale than the cases that receive life sentences or term of year sentences over 50 years in length.

Figure 2a



D. The Vertical Arbitrariness is Dramatically Greater Than Even Figures 1 and Figure 2 Reveal

As dramatic as the evidence of arbitrariness in capital sentencing is in Figures 1 and 2, these figures actually wildly understate the range of sanctions that cases of equal degrees of egregiousness or deathworthiness experience. The first decision that the State makes in deciding who shall live and who shall die for murder is deciding how to allocate resources to apprehend and prosecute murderers. In this respect, the performance of the criminal justice system in Connecticut during its experiment with the death penalty could hardly be more discouraging.[23] Before the passage of the 1973 death penalty legislation, the rate at which the police were able to identify and apprehend murderers was an impressive 93 percent. Over the next three and one-half decades that percentage has steadily fallen, as Figure 3 illustrates. The rate at which murders in Connecticut are now solved is down to about 60 percent. In other words, roughly forty percent of murderers not only do not face the threat of the death penalty; these murderers get away with their crimes completely. Even this understates the problem if any guilty individuals are acquitted (or even if a "cleared" case incorrectly identified the perpetrator), thereby turning a cleared offense into a zero penalty for the murderer.[24] This means that a complete picture of the extent of the horizontal and vertical arbitrariness would

[23] The Report of the Connecticut Commission on the Death Penalty, which was submitted to the Connecticut General Assembly on January 8, 2003, documents the considerably higher expenses associated with capital cases at every phase of the criminal justice process from the selection of jurors, the conduct of the trial and appeals, through post-conviction proceedings, and including cost of maintaining death row facilities. Pp. 12-16. As one scholar notes, "Studies of California, New York, and North Carolina suggest that a capital trial alone (not including any subsequent appeals) costs the state anywhere from $200,000 to $1,500,000. Capital trials rarely reduce prison costs, as less than 10% of those sentenced to death are executed (see Cook and Slawson, 1993)." Ilyana Kuziemko, "Does the Threat of the Death Penalty Affect Plea Bargaining in Murder Cases? Evidence from New York's 1995 Reinstatement of Capital Punishment," 8 (1) American Law and Economics Review 116,. 117 (2006).

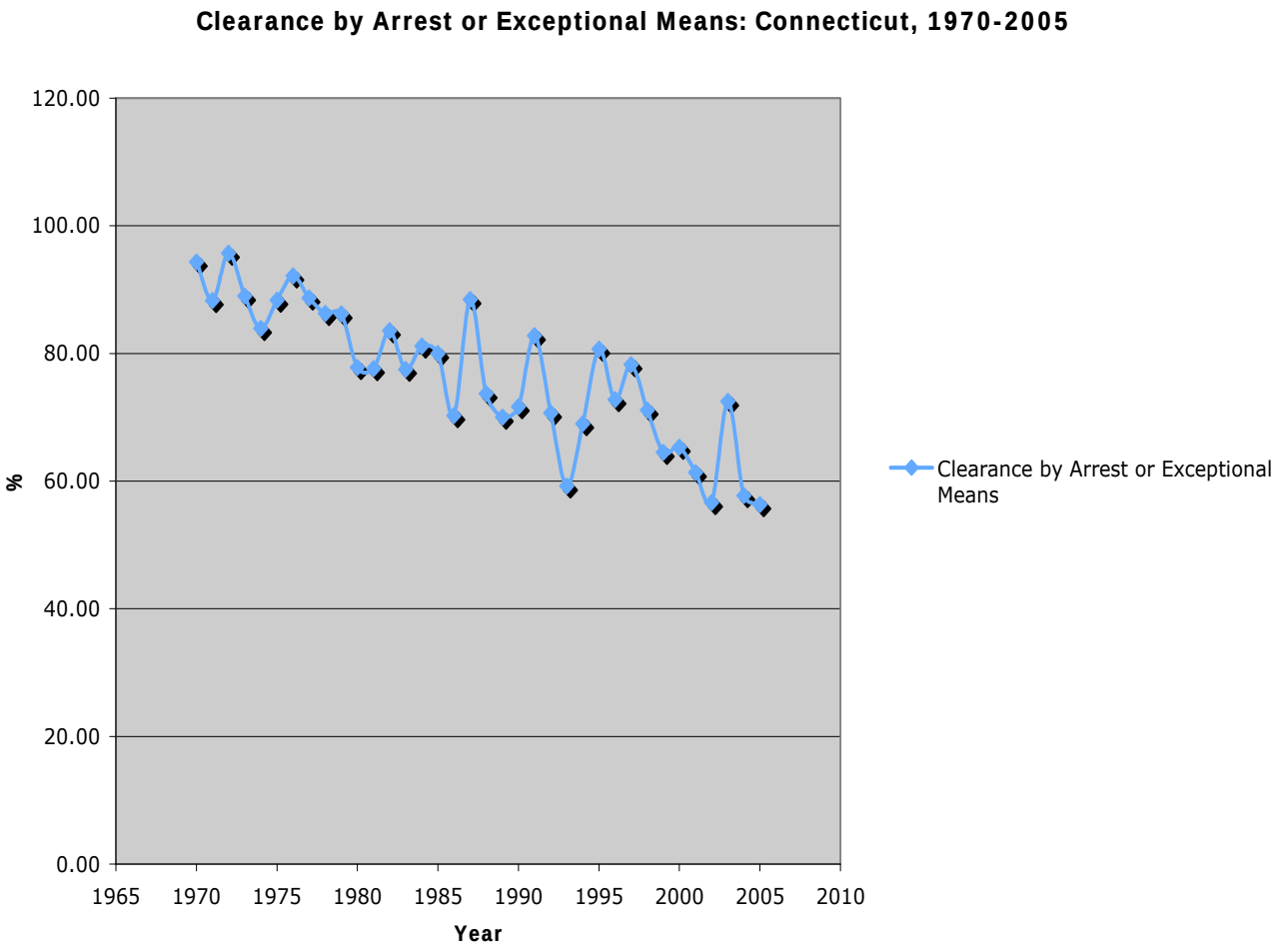
One simple illustration of the burdens on the system that the death penalty imposes is afforded by the Connecticut Supreme Court's decision in State v. Reynolds, 836 A. 2d 224 (2003). This case was argued on September 28, 2001, and ultimately decided in a 171 page opinion over two years later on Oct. 14, 2003. The Court admirably grappled with an enormous array of issues relating to the defendant's sentence of death, illustrating that a huge investment of high-end legal resources was expended only because of the presence of Connecticut's death penalty statute.

[24] I tried to find data on acquittals for those charged with murder, but was informed by Larry D'Orsi in the Connecticut Court Operations Division that such information is not compiled and cannot be re-created because, in Connecticut, police and court records are erased by statute after an acquittal.

depict the large number of cases that would appear at a *zero sanction* line in Figures 1 and 2. The range in sanctions for cases of equal degrees of deathworthiness could not be wider: it spans outcomes ranging from death to nothing, with the percentage now receiving no sentence at 40 percent and climbing.[25]

[25] To illustrate the divergence between the actual numbers of murders and the murders that are subsequently prosecuted, one can look to the two categories of murders for which we have other independent information about the total number of occurrences. For police killings, which are high priorities for resolution, there were eight killings in Connecticut between 1977 and 2004 according to the Supplemental Homicides Reports, which corresponds with the eight killings in our sample, one of which led to a sustained sentence of death. For murders of those under age 16, which became a capital crime on October 1, 1995, the SHR shows 65 such murders from the effective date of the statute through 2004, yet our sample contains only 45 such cases, four of which resulted in a death sentence. Thus, the true number of murders of those under 16 during our time period is 44 percent higher than our data shows, illustrating that our data substantially *understates* the extent of the horizontal and vertical arbitrariness in the administration of Connecticut's administration of death-eligible offenses.

Figure 3



E. A Closer Look at Seven Death-Eligible Cases and the Extreme Arbitrariness in Capital Sentencing in Connecticut.

Unless something is dramatically wrong with the average coder evaluations of egregiousness, Figures 1 and 2 constitute a devastating critique of the Connecticut death penalty system. This degree of arbitrariness simply cannot be squared with the constitutional dictates articulated by the U.S. Supreme Court in *Furman* and *Gregg*. At this point, in my opinion, a heavy burden has been

shifted to the State to justify a capital punishment regime that is so facially at odds with the requirements of the Eighth Amendment.

But what can the State possibly offer as justification? Figures 1 and 2 reveal an overwhelming pattern of arbitrary and capricious decision making that provides no basis for distinguishing the many cases that escape death sentences from the few that receive it and fails to limit the death penalty to the most extreme cases. The powerful conclusion of arbitrariness in the Connecticut death sentence can be readily confirmed with a brief examination of the facts of seven cases (Cases A through G, below).[26] Six of these cases did not lead to a death sentence, and one did. I invite you to see if you agree that the Connecticut death penalty system has picked out "the worst of the worst" to receive the most extreme sanction.

CASE A: *Defendant, a neighbor of the victims, was charged with unlawfully entering their home to commit a larceny of money that Victim 1 was known to keep in the house. Defendant stabbed three victims with a knife, inflicting multiple stab wounds. Victim 1 was a 72 year-old, retired nurse. She took care of her 46 year old retarded and legally blind son, Victim 2, who was also attacked and killed while he was sitting on the toilet. Victim 1's 8 year old granddaughter, Victim 3, who happened to be staying over at the house that night, was also killed.*

CASE B: *Defendant and Co-Defendant, both intoxicated, went to the victim's apartment late at night. The victim, a mentally disabled female acquaintance, invited them inside. Thereafter, Co-Defendant argued with the victim and she ordered Co-Defendant out. Defendant got behind the victim and started choking her. Co-Defendant stabbed her with a can opener and hit her in the head with a clothes iron, kicking her several times until she spit up blood. Defendant then performed*

[26] This language comes directly from the summaries used by the coders, with only minor edits for the sake of clarity and brevity.

cunnilingus on her, and Co-Defendant had vaginal and anal sex with her. Defendants then left the victim's apartment. It was later determined she died from strangulation.

CASE C: *Despairing his family was about to leave because his fledgling law practice couldn't pay the household bills, Defendant, 42, took his wife and two young children out for dinner on June 18, 1997. Defendant's wife had previously given him two months to straighten out his life or she and the children would leave. Returning home from the restaurant, Defendant stabbed his wife (V1) of 13 years as many as 60 times. Defendant then killed his 6-year-old daughter (V2) and his 3-year-old son (V3) as they slept. Defendant then drove South to his brother's house with stolen license plates, leaving behind a note stating, "I expect to spend eternity in hell." He confessed his crime to his brother, who called the police, and then turned himself in and confessed.*

CASE D: *In the very early hours of July 9, 1998, Defendant, a 23 year-old licensed nurse, broke into her boyfriend's ex-wife's house (Defendant's cousin) with an 18 year-old male (Co-Defendant), both wearing coveralls with nylon stockings over their heads. Co-Defendant held Defendant's cousin down while Defendant searched the children's bedrooms then found them, a boy aged seven (V) and a girl aged two, asleep in their mother's bed. Defendant then used a phone cord to strangle the boy and slashed his wrists and neck with a boxcutter, nearly decapitating him. He died within minutes of the attack. The girl's neck and wrists were also cut however she survived her injuries. Another child, the victim's baby cousin, was also asleep in a crib in the room but was left unharmed. Co-Defendant fled the scene when V's mother begged them not to hurt the children.*

Pursuant to a deal, Co-Defendant testified at trial that Defendant paid him $4,000 to break into the house to scare V's mother and claimed no knowledge of Defendant's plans to harm the children. Defendant testified she did not participate in the break-in but only planned Co-Defendant's

break-in to scare V's mother due to her belief she was interfering with Defendant's relationship with V's father.

V's blood was found in Defendant's car and she confessed to police during questioning though at trial she claimed the confession was fabricated. Police also found a receipt for the coveralls in Defendant's bedroom.

CASE E: *On October 21, 1997, the mother of the 13 year old victim reported the child missing after she disappeared from a grocery store parking lot where she was waiting while her mother was in the store. On July 15, 1998, the victim's body was found floating in a nearby lake, wrapped in a blanket that was held together with heavy chains, hooks and a padlock. The cause of death was determined to be asphyxia. Police investigated the case for the next four years and obtained numerous statements from most of the co-defendants. According to these statements, the 8 co-defendants conspired to abduct assault and intimidate the victim in order to get her to withdraw sexual assault complaints she had made regarding Defendant and a co-defendant. On October 19, 1997, members of the group located the victim in the grocery store parking lot and abducted her. They drove her to a secluded area near the Housatonic River. Male members of the group, including Defendant, forcibly sexually assaulted the victim and all members of the group took part in beating her. Defendant and a co-defendant then drowned her and wrapped her body in a blanket bound by a heavy chain with hooks and a padlock. Members of the group then transported the victim's body to a marina and dumped her body in the Housatonic River.*

CASE F: *Defendant, who was on parole, lived with the victims (Vs), his girlfriend and their infant son. Defendant came home from work around 6:00 PM and argued with his girlfriend, V1, about money. Defendant left for a drink, got angrier, returned home and they continued to argue. Defendant hid a steak knife in the back of his shirt and went for a walk with the Vs. When they*

reached a secluded wooded area, Defendant stabbed female V1 thirty-four (34) times and infant male, V2, twelve (12) times and left their bodies there. Defendant cut his finger during crime.

A man and his son were fishing in the area of the crime, heard screams, and later found Vs' bodies. Defendant had been complaining to co-workers that he and V1 argued frequently about money. Defendant also told co-workers V1 was cheating on him and on the day of incident, D told one co-worker he was going to kill V1

The next day, Defendant telephoned police to report Vs missing, but confessed to killing them when interviewed later at police station.

CASE G: Co-Defendant A hired Defendant and Co-Defendant B to kill the victim because he was infatuated with the victim's girlfriend and thought that the victim treated her poorly. Co-Defendant A drove Defendant and Co-Defendant B to the victim's house where they entered, and, while the victim was sleeping, Defendant shot him in the head with a rifle. After the shooting, all three took items from the victim including cash, Movado watches, a cell phone, a handgun and title to a vehicle. As payment for the killing, Co-Defendant A planned to give Defendant and Co-Defendant B a $2500 snowmobile and some cash.

While all murders are horrible and all of these crimes are clearly horrifying, to overturn the strong conclusion of arbitrariness that emerges from Figures 1 and 2, one would have to establish that the first six cases were measurably or intrinsically less depraved than the final one. Indeed, according to the Connecticut death penalty regime, the crime of the defendant in this final case G is so much more extreme that he should have received a "punishment different from all other sanctions,"[27] while the defendants in cases A through F did not. Our examination of death-eligible

[27] *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976).

cases in Connecticut since 1973 demonstrates that, in Connecticut, the imposition of a death sentence does not reflect the relative egregiousness of the crime being punished. Although the defendant in Case G is now on death row in Connecticut, our coders deemed his crime to be *less* egregious than roughly three-quarters of the death-eligible cases they scored (which totaled 207 cases). The coders found 153 death-eligible murders that did *not* receive a death sentence were more egregious than Case G. Of course, Case G is representative of the general problem with the Connecticut death penalty regime depicted in Figures 1 and 2 above: death sentences are handed out in a random fashion. Even if one were to take the Connecticut death row inmate with the highest egregiousness score (Rizzo, 9.78), one would find that there are 19 cases with equal or higher egregiousness scores (17 are higher) that were not sentenced to death.

Of course, there is always some "reason" for all of these outcomes. For example, in Case A,[28] the court found a mitigating factor in the defendant's good prison conduct and sentenced him to life without parole.[29] In Case B,[30] the defendant was charged with a capital felony, but no probable cause was found and so the defendant didn't face this charge at trial, despite being found guilty at trial of murder and sexual assault and ultimately being sentenced to 45 years. In Case C,[31] the conviction came through a plea bargain under which the prosecution agreed not to seek the death penalty. In Case D,[32] the death penalty was sought but the jury found mitigating factors outweighed

[28] The defendant was Derek Roseboro. Egregiousness scores were 4.78 and 11.56.
[29] Note that the description of the murder of the eight-year-old child was muted in the summary that went to the coders. The description of this murder in a recent news article indicated that "The granddaughter had tried to hide under a bed but Roseboro found her after following her bloody footprints." Ben Conery, "Yale Professor, Prosecutor Clash Over Charges Levied in Deadly Arson," Waterbury Republican American January 27, 2008, p. 5A. This is illustrative of the evenhandedness of the summaries, which were not prepared to emphasize the horrors of non-death penalty cases or minimize those receiving the death penalty, but rather to provide a neutral description of the facts.
[30] The defendant was Scott Smith. Egregiousness scores were 4.89 and 9.67.
[31] The defendant was Scott Pickles. Egregiousness scores were 5.00 and 11.78.
[32] The defendant was Chastity West. Egregiousness scores were 4.89 and 9.67.

the aggravating factors. In Case E,[33] although the defendant was charged with three counts of capital felony, the defendant pled guilty to the lesser charges of felony murder, kidnapping in the first degree, conspiracy to commit kidnapping in the first degree, conspiracy to commit sexual assault in the first degree, witness tampering, and tampering with physical evidence, and received a total sentence of 60 years. In Case F,[34] the conviction was the result of a guilty plea under which the prosecution agreed not to seek the death penalty, and defendant received a sentence of life without parole plus 20 years. Finally, in the one case in which the defendant received the death penalty,[35] his two co-defendants were sentenced to 80 years and life without parole.

A system that allows one state's attorney to derail a capital prosecution while another Connecticut prosecutor would eagerly push for the death penalty will necessarily have a large random and capricious dimension. In case C above, Kevin Kane (then New London State's Attorney and now Chief State's Attorney) decided not to pursue the death penalty for defendant Scott Pickles because, Kane stated, death would be an undeserved relief for Pickles.[36] But the sister of the murdered victim decried Kane's decision: "If this obscene crime does not merit the death penalty, what does?" she asked. The sister said that Kane was completely wrong in his stated reason for passing on the death penalty, contending that "giving her former brother- in-law life in prison would not eat at his conscience because he lacks remorse." (Id.) According to the Hartford Courant account of the sentencing hearing, "In dramatic fashion, the grieving sister then counted slowly to 40 to impress upon Pickles, the judge, and the rest of the courtroom the brutality her sister must have endured as she was stabbed.

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[33] The defendant was Alan Walter. Egregiousness scores were 4.89 and 10.00.
[34] The defendant was David Stone. Egregiousness scores were 4.78 and 10.78.
[35] The defendant was Eduardo Santiago. Egregiousness scores were 3.56 and 6.89.
[36] Gary Libow, "Life Sentence for Killing Family; Pickles' Motive Finally Disclosed," Hartford Courant, October 28, 1999, p. A3.

"One . . . two . . . three . . . four . . . five . . . six . . . seven . . . eight . . . nine . . . 10!" she said, her voice rising in anger.

"Eleven . . . 12 . . . 13 . . . 14 . . . 15 . . . 16 . . . 17 . . . 18 . . . 19 . . . 20 . . . 21 . . . 22 . . . 23 . . . 24 . . . 25 . . . 26 . . . 27 . . . 28 . . . 29 . . . 30 . . . 31 . . . 32 . . . 33 . . . 34 . . . 35 . . . 36 . . . 36 . . . 37 . . . 38 . . . 39 . . . 40!"

Other Connecticut prosecutors doubtless would find as many as 60 stab wounds inflicted to the throat, chest, abdomen, side and back to the first victim in a triple murder as she fought for her life to make a strong case for the death penalty, and might trust a relative's view of the defendant's level of remorse more than their own speculation. In other words, it is the luck of the draw on the prosecutor and not the crime that was the decisive factor averting a death sentence in the Pickles case.

Waterbury State's Attorney John A. Connelly appropriately acknowledged that when all sorts of irrelevant criteria influence who gets the death penalty for murder in Connecticut, then the system "truly become[s] arbitrary and capricious." He is absolutely correct. All sorts of arbitrary factors influence who gets the death penalty in Connecticut, and the system truly is arbitrary and capricious. Three examples are illustrative.

First, the quote from Connelly came during his discussion of recent murders in Cheshire where one of the victims had apparently expressed a strong opposition to the death penalty in her church prior to the horrible crime that took her life. Connelly told the newspaper reporter that the victim's preferences were irrelevant. "'Our job is to enforce the law no matter who the victim is or what the victim's religious beliefs are,' said John A. Connelly, a veteran prosecutor in Waterbury who is not involved in the Cheshire case. 'If you started imposing the death penalty based on what

the victim's family felt, it would truly become arbitrary and capricious.'" [37] The problem is that other prosecutors in Connecticut have the exact opposite opinion on this issue. Executive Assistant State's Attorney Judith Rossi, addressing the Commission on behalf of the Division of Criminal Justice, noted that "the decision to pursue the death penalty is within the discretion of the 13 individual State's Attorneys" and these decisions sometimes involve factors "independent of the criminal justice system," such as "where victims are opposed to the death penalty." In other words, Connelly believes that the practices followed by Connecticut State's Attorneys in implementing the death penalty as described by the Executive Assistant State's Attorney speaking on behalf of the Division of Criminal Justice are "arbitrary and capricious."

Second, a stunning illustration of the unfettered and unaccountable discretion that underpins the arbitrary and capricious treatment of death-eligible cases in Connecticut is provided by Connelly's treatment of the Ivo Colon case. Given Connolly's statement quoted above, one would assume that his efforts to enforce Connecticut's death penalty law led him to push for a death sentence in the case of Ivo Colon. Indeed, the State's Attorney was successful in his efforts, and vigorously challenged Colon's appellate claims in the Connecticut Supreme Court that the jury instructions in the capital sentencing phase were flawed and that the death penalty was inappropriate. The Supreme Court agreed with Colon that the faulty jury instructions required reversal of his death sentence, but it specifically stated that the death penalty was permissible under Connecticut law, if handed down by a properly instructed jury, because the victim was under 16 and the murder was "especially heinous, cruel or depraved." At that point, Connelly was certainly free to "enforce the

[37] Alison Leigh Cowan,,"Death Penalty Tests Church As It Mourns." New York Times, 28 Oct. 2007, Late Edition (East Coast).

law" by seeking a new death penalty hearing for Colon. Indeed, if one credits the quote above from Connolly, then it was his job to "enforce the law." But instead Connelly chose to drop the death penalty charges – and he did so with not a word of explanation. One day, enforcing the law means fighting from trial through the Connecticut Supreme Court to execute a defendant; the next day, apparently, it means something else. No one would be surprised to learn that many if not all of the other State's Attorneys would not have sought the death penalty in the Colon case, but the arbitrariness and capriciousness could not be more plain when the disparities are not only across the judicial districts but also equally extreme within a judicial district – even on the *identical* case! Such is the government of men, not of laws.

Third, one can also see the sharply differing treatment across judicial districts in yet another Waterbury case where Connelly decided *not* to pursue the death penalty. In 1993, Lloyd Satchwell poured gasoline on an occupied apartment building that his wife owned so that they could collect insurance money after the fire. Satchwell's arson occurred at 3 am when all of the occupants would be expected to be asleep and their chance at escape would be minimized. Four people died in the blaze, including a husband and wife and their young grandchildren aged 1 and 3. In the face of speculation that Connelly departed from his customary pro-death penalty inclinations in the Satchwell case because of the minority status of the victims (black in this case and Hispanic in the Colon case), Connelly recently told a Waterbury reporter that "it would have been illegal for him to seek the death penalty against Satchwell."[38]

[38] Ben Conery, "Yale Professor, Prosecutor Clash Over Charges Levied in Deadly Arson," Waterbury Republican American, January 27, 2008, p. 5A. I checked with the author of the article who confirmed that "John Connelly was quoted accurately in the story." Email from Ben Conery, February 15, 2008.

Connelly apparently concluded that he could not prove that Satchwell had the intent to cause the death of another person and therefore declined to charge Satchwell with intentional murder.[39] But interestingly back in the 1990s other Connecticut prosecutors were willing to seek the death penalty under similar circumstances by relying on Connecticut's arson murder statute, which imposes heavy criminal penalties for setting any fire that results in death, as a means to justify a sentence of death for multiple murders even if there were no intent to kill. So when Connelly states that it would have been "illegal" back in 1993 to seek the death penalty for Satchwell, one wonders whether Connelly took action to stop such "illegality" when other Connecticut prosecutors were doing just that in the 1990s – seeking the death penalty based on a conviction under the arson murder statute without the need to establish intent. Specifically, in April 1996, Connecticut prosecutors argued to the Connecticut Supreme Court in *State v. Harrell* that an arson murder with no evidence of intent to kill would be a basis for a capital prosecution when two individuals died (thereby meeting the multiple murder element of the capital felony statute): "the state contends that the term 'murder' in the capital felony statute is a generic term that broadly and unambiguously refers to alternate methods for committing the crime of murder, and thus encompasses unintentional as well as intentional conduct."[40]

While in August 1996, the Connecticut Supreme Court indicated that this proffered statutory interpretation of the Connecticut death penalty statute was incorrect, prosecutors in Connecticut

[39] The Connecticut murder statute provides in relevant part: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes suicide by force, duress or deception...." State v. Harrell, 238 Conn. 828, 681 A.2d 944 (1996), fn.10.

[40] State v. Harrell, 238 Conn. 828, 681 A.2d 944 (1996). Harrell was charged with the killing of a young, disabled girl and an elderly woman, who lived in an apartment house with many more units and residents than in the Satchwell case. The arson occurred after dark, when Harrell, who was in his friend's apartment, lit some paper and threw it onto or near a couch. Either the couch or some curtains ignited and rapidly burned out of control. The victims died of smoke inhalation.

were engaging in exactly the sort of capital prosecutions that Connelly now claims was the basis of his decision not to proceed with the death penalty back in 1993. Either Connelly is mistaken about the state of Connecticut law at the time he made his 1993 prosecutorial decision in the Satchwell case, or he has shown once again the arbitrariness of the Connecticut death penalty regime where prosecutors are either acting on directly opposing views of the Connecticut death penalty statute and/or acquiescing in the conduct of their fellow prosecutors that they find to be "illegal." At the hearing in this case, I will be interested to see the documents from 1993 that Connelly will present to support his claim of "illegality" of a capital prosecution in the Satchwell case and the subsequent records indicating his opposition to his fellow prosecutors who were pursuing such an "illegal" capital prosecution in the *Harrell* case before the Connecticut Supreme Court in 1996.

Table 2

Number of Non-Death Cases with Equal or Higher Egregiousness Scores than the Current Death Row Cases

Defendant	Year of Conviction	Composite Score (4-12)	# of Non-Death Cases with Equal or Higher Scores	Overall Score (1-5)	# of Non-Death Cases with Equal or Higher Scores
Santiago	2004	6.89	160	3.56	87
Reynolds	1995	7.00	153	3.56	87
Webb	1991	8.56	59	4.67	16
Campbell	2004	8.67	52	4.22	35
Cobb	1991	8.78	48	4.78	14
Courchesne	2004	9.00	42	3.89	60
Peeler	2000	9.11	38	4.11	40
Breton	1998	9.33	32	4.11	40
Rizzo	2005	9.78	19	4.56	20

Table 2 underscores that what the Supreme Court condemned in *Furman* is still true of the Connecticut death penalty regime. Under two different measures of egregiousness, an identical pattern can be seen for the defendants on death row in Connecticut: many equally or more serious crimes lead to non-death sentences. Explaining away a case here or there cannot change this dramatic pattern. The median number of equally or more egregious cases receiving non-death sentences is 48 under the composite measure and 40 under the overall score. Even taking the case and egregiousness measure that generates the *strongest* case for prosecution – Cobb using the overall score – 14 other cases for which the state secured a conviction were equally or more egregious, yet did not receive a sentence of death. Indeed, adding in the growing number of egregious cases that never get solved would only exacerbate the pattern of arbitrariness as the number of equally or more egregious cases avoiding death sentences could only make the Table 2 numbers even more extreme.

Such an arbitrary and capricious system cannot serve legitimate goals of deterrence or retribution. The distraction of the death penalty, and its diversion of resources away from true

crime-fighting approaches, poses an ominous threat given the serious declines since the death penalty law went into effect in the solving and apprehension of murderers.

F. The Arbitrary Selection of a Handful for Death

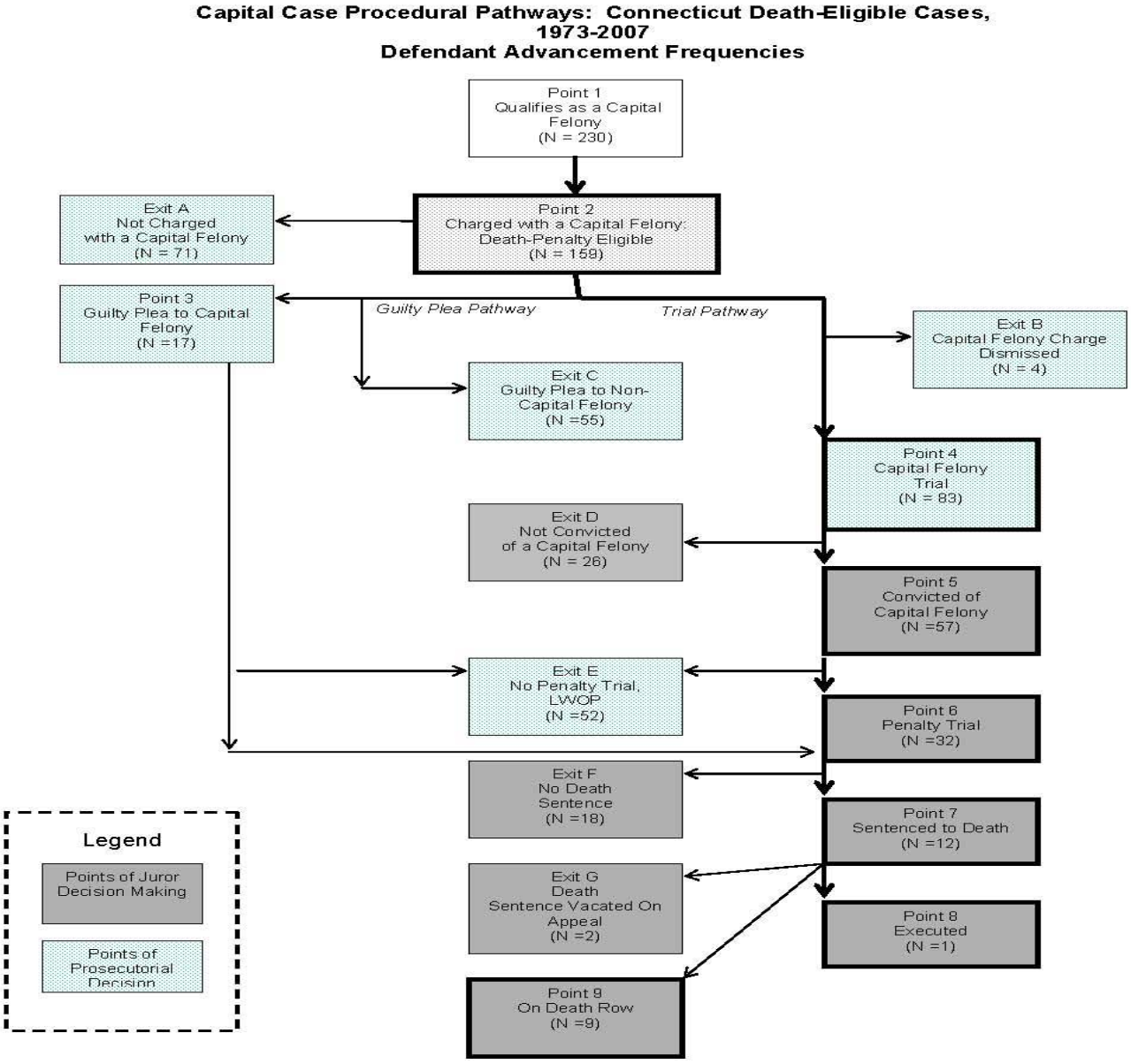
While below we will delve into the numbers in great detail, it may be useful to step back for a moment and reflect on where the Connecticut death penalty system is and where it is heading. Figure 4 illustrates the pathway of all 230 Connecticut death-eligible cases identified for the period from 1973 to the present. Note that close to one-third of the death-eligible cases are not charged as capital felonies (Exit A), and are therefore removed from the path of cases potentially heading down to the nine on death row (Point 8) and the one execution (Point 9). One remarkable fact that will be shown below is that the cases that are *not* charged as capital felonies are essentially identical to -- in fact, on both measures they are actually slightly *more* egregiousness than – the cases that are charged as capital cases.

What can we expect from the Connecticut death penalty system if it stays on its present course? Over the next decade, roughly 200 death-eligible murders will be committed, with 80 murderers (40 percent) going free because the murder was never solved. Of the remaining 120 cases, roughly 40 (one-third) will not be charged as capital felonies, even though they constitute equally egregious murders as the other 80. This leaves 80 cases that are charged as capital felonies, which implies that for every capital felony case that Connecticut prosecutors launch into the elaborate "machinery of death," there will be one other equally egregious murderer who walks away with no punishment. Of the 80 who are charged, five will be sentenced to death (roughly the 1 in 16 rate shown in Figure 4, going from 159 capital felony charges down to 10 death sentences). How many of these will be executed is uncertain, but note that roughly 16 times as many equally

egregious murderers will never be caught as will end up with a death sentence. That is truly arbitrary and capricious.

In all our thinking, therefore, about the functioning of Connecticut's death penalty system and its arbitrariness and undermining of traditional goals of deterrence, incapacitation, and retribution, we must always keep in mind that the 230 death-eligible cases in Figure 4 are only the ones where someone was caught and convicted of a crime. The true number of capital-eligible murders is substantially higher, and, as noted, all of those additional murderers go completely free, including the murderers never apprehended (the cases are not cleared) as well as those that are wrongfully not convicted. It is obviously hard to conclude too much about the greater than 40 percent of the cases coming down the road today that do not end up in Figure 4, except to say that there are reasons to think that they contain a similar percentage of egregious cases as the 60 percent of cases that are cleared.

Figure 4


Capital Case Procedural Pathways: Connecticut Death-Eligible Cases, 1973-2007
Defendant Advancement Frequencies
Point 1
Qualifies as a Capital Felony
(N = 230)
Exit A
Not Charged with a Capital Felony
(N = 71)
Point 2
Charged with a Capital Felony: Death-Penalty Eligible
(N = 159)
Point 3
Guilty Plea to Capital Felony
(N =17)
Guilty Plea Pathway
Trial Pathway
Exit B
Capital Felony Charge Dismissed
(N = 4)
Exit C
Guilty Plea to Non-Capital Felony
(N =55)
Point 4
Capital Felony Trial
(N = 83)
Exit D
Not Convicted of a Capital Felony
(N = 26)
Point 5
Convicted of Capital Felony
(N =57)
Exit E
No Penalty Trial, LWOP
(N =52)
Point 6
Penalty Trial
(N =32)
Exit F
No Death Sentence
(N =18)
Point 7
Sentenced to Death
(N =12)
Exit G
Death Sentence Vacated On Appeal
(N =2)
Point 8
Executed
(N =1)
Point 9
On Death Row
(N =9)
Legend
Points of Juror Decision Making
Points of Prosecutorial Decision

First, the web is full of descriptions of post-1973 egregious death-eligible murder cases in Connecticut that have not been solved.[41] Second, if we compare an attribute for which we have excellent data on the entire universe of murders in Connecticut from 1973 to 2004 we see that there is a close similarity in this dimension between all murders and our Figure 4 sample of 230 death-eligible cases. Specifically, Table 3 reveals that just under 45 percent of those murdered in Connecticut between 1973 and 2004 have been nonwhites (adding nonwhite plus an adjustment for the unknown race cases). Of murders that were "capital eligible" under the standards of Connecticut death penalty law over this period (and thus appear in Figure 4), the percentage of nonwhite victims is virtually identical – 44.7 percent (=103 of 230 murders). In other words, we have reason to believe 40 percent of death-eligible murders today get zero punishment by virtue of escaping apprehension and thus cannot appear in Figure 4. Some additional percentage of death-eligible murderers are apprehended, but do not make it into the Figure 4 sample because they are not convicted of a crime. Again, these egregious murderers receive a zero sentence, further exacerbating the enormous sentencing disparities that plague the Connecticut death penalty regime.

[41] Just one of the many web pages outlining unsolved murders in Connecticut is http://www.angelfire.com/ct3/unsolvedct/homicides.html.

Table 3

Homicides per Decade for Nonwhite and White Victims
Connecticut (1973-2004)

	Victim Race			
Decade	**Nonwhite**	**White**	**Unknown**	**Total**
1973-1979	275 38.5%	409 57.3%	30 4.2%	714
1980-1989	601 40.2%	879 58.8%	16 1.1%	1496
1990-1999	807 47.9%	853 50.7%	24 1.4%	1684
2000-2004	233 45.6%	269 52.6%	9 1.8%	511
Totals 1973-2004	1,916 43.5%	2,410 54.7%	79 1.8%	4,405

*"Percent nonwhite" is calculated by dividing the number of nonwhite victims by the total number of victims (including victims of unknown race). A similar calculation is performed for white victims.
*Data back to 1976 are taken from Supplementary Homicide Reports (SHR). The source data are published as the Uniform Crime Reports [United States]: Supplementary Homicide Reports, 1976–2003 (ICPSR Study No. 4351, 2005), available at http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/04351.xml.
*Data for 2004 are published in the Uniform Crime Reporting Data [United States]: Supplementary Homicide Reports, 2004 (ICPSR Study No. 4465), available at http://www.icpsr.umich.edu/cgi-bin/bob/newark?study=4465&path=NACJD.
*Data for the years 1973-1975 are taken from the SHRs directly.
*Nonwhite victims include victims who are black, American Indian, Asian, or Pacific Islander.

V. DATA OVERVIEW

We analyzed several state and national data sources to develop a general picture of the distribution of murders and capital-eligible cases in Connecticut. These data sources include the Supplementary Homicide Reports (SHR) and the Uniform Crime Reports from the FBI, the Connecticut Court Operations Division, and detailed information concerning all death-eligible homicides resulting in a conviction in Connecticut from 1973, when the death penalty was re-

enacted, to the present. This data contained two types of information: coded machine-readable information for 230 cases, and detailed case summaries for 207 of these 230 cases.

The 207 case summaries each provide a brief narrative describing the crime, the cause of death, the race of the defendant and victims, the age of victims if under 16, charges filed by the state, outcome (such as whether or not the defendant was convicted; what, if anything, the defendant pled guilty to; the sentence; and any action on appeal that affected the sentence), and judicial district. In addition, if the case had a death penalty trial, information is provided about the penalty trial, such as aggravating or mitigating factors that were presented and found to exist. We used these case summaries to identify the degree of egregiousness of all 207 cases, and to analyze how case egregiousness influenced different sentencing outcomes in that universe of death-eligible cases.

The machine-readable data set had more detailed, coded case-specific variables relating to the universe of 230 death-eligible cases (of which the 207 cases were a subsample). The key dependent variables in this report will be the binary variables for the initial capital-felony charging step in the sentencing process and for the final step of handing down a sustained sentence of death, as shown in Figure 4.[42] Our explanatory variables of interest were victim and defendant race, judicial district, and a tally of "special aggravating factors of the offense."[43] We employed all of the above data to estimate the effect of both legally relevant and legally suspect factors on different case outcomes.

[42] For example, a binary variable for charging would equal one if a defendant was charged with a capital felony and zero otherwise. Similar binary variables were used to indicate if a defendant was convicted of a capital felony, if he progressed to a penalty trial, and if he ultimately received a death sentence. Figure 4 illustrates how many cases reach each point in this chain, while Figure 5 allows us to identify the egregiousness scores on 207 cases as they follow this pathway.

[43] This list (one could tally up to ten factors) included among other things: mutilation, multiple gunshot wounds, attempt to dispose of/conceal body after death, and victim killed in the presence of family members or friends.

Table 4a lists the nine capital felonies ever defined by Connecticut statute and the 12 offenders in Connecticut to have ever been on death row under the post-1973 Connecticut death penalty regime.[44] Before a defendant who is convicted of one of these capital felonies can receive a death sentence, the prosecution must establish the presence of a statutory aggravating factor. Table 4b lists the aggravating factors that were charged and found in the 12 cases that resulted in sentences of death. Although the Connecticut death penalty statute specifies 8 aggravating circumstances, which are set forth in footnote 11 above, Table 4b reveals that only five factors have ever been found in any of the 12 cases that received a death sentence. The most important point of the table, though, is that the catchall aggravating circumstance – that the murder was "heinous, cruel, or depraved" – has been the dominant aggravating factor. This factor was found in ten of the 12 cases resulting in a death sentence – seven times as the sole aggravating factor and three times in conjunction with one or more aggravating factors. Clearly, egregiousness of the murder is the primary gateway for a Connecticut prosecutor to secure a death sentence from a capital-felony conviction. In other words, the central focus of this report on egregiousness is mandated both by the constitutional requirement that the death penalty be restricted to the "worst of the worst," and by the dominant pattern of capital sentencing under Connecticut's death penalty regime.

One can immediately see the difficulty inherent in the structure of the Connecticut death penalty statute. On the one hand, it specifies some precisely defined aggravating factors that limit the discretion of the fact-finder but do not provide a tight link to any intuitive notion of deathworthiness. For example, the i(7) aggravating factor will turn a capital felony committed with

[44] Russell Peeler was formally sentenced to death on December 10, 2007, but had been included in our death sentence count when the jury recommended a sentence of death. As the table indicates, two defendants who were sentenced to death have had that sentence reversed.

an assault weapon into a presumptive death penalty case even if the same crime when committed with a shotgun would not carry this presumption. Of course, it would be odd to provide a greater sanction for killing someone with an assault weapon, especially if it diminished the suffering of the victim, if the same killing committed with a dull axe would not be subject to the death penalty, particularly in cases where the less lethal weapon contributed to a greater degree of victim suffering. It is for that reason that the catchall aggravating circumstance of heinous, cruel or depraved is added to the law, but this means that imprecise and uncertain judgments of what is especially heinous or cruel must now be made. The precisely defined aggravating factors reduce discretion while introducing the possibility of puzzling outcomes, while the catchall aggravating factor increases discretion to avoid anomalous results but then creates arbitrariness as decisionmakers differ on what is especially heinous or cruel.

An example of the inherent arbitrariness that can result from having sharply defined aggravating categories is provided by the case of Richard Reynolds, who was sentenced to death for killing a Waterbury police officer while Reynolds was selling drugs.[45] Under the statute in effect at the time this killing occurred, Reynolds was only subject to the death penalty because he had a previous drug conviction in New York (Connecticut changed that law in 2001).[46] In other words, if Reynolds' prior conviction had instead been for a sadistic rape, the death penalty would not apply. Only because his prior conviction was for drug dealing, he has received the death penalty. Which criminal history would make Reynolds a more culpable and deathworthy defendant – the prior conviction for selling drugs (something done on a daily basis by tens of thousands of Americans) or

[45] State v. Reynolds, 836 A. 2d 224 (2003).
[46] The Court ruled that the jury finding of the catchall aggravating circumstance for the 1992 murder was unwarranted given the limited suffering inflicted on his victim. In 2001, the Connecticut legislature added an eighth aggravating factor that would apply for murders of police officers acting in the line of duty (see footnote 11, *supra*).

the hypothetical conviction for a horrible rape? The inherent arbitrariness of sharply defined aggravating factors is clear.

Table 4a

Classification of 12 Death Penalty Cases in Connecticut Since 1973

Defendant Name	Year of Sentencing	Murder of Law Enforcement Officer (1)	Murder for Hire (2)	Previous Conviction (3)	During Life Imprisonment (4)	Kidnapping (5)	Drugs* (6)	Rape (7)	2 or more Victims (8)	Victim less than 16 yrs (9)
Robert Breton	1989								X	
Sedrick Cobb	1991					X		X		
Daniel Webb**	1991					X		X		
Richard Reynolds	1995	X								
Todd Rizzo	1999									X
Robert Courchesne	2003								X	X
Eduardo Santiago	2004		X							
Jessie Campbell III	2007								X	
Michael Ross	Exec 2005					X		X	X	
Terry Johnson	Red.Sent. 2000	X								
Ivo Colon	2000; plea bargain									X
Russell Peeler	2007								X	X

*"Drugs" indicates that a case qualified as a capital felony through the "illegal sale of cocaine, heroin or methadone to a person who dies as a direct result of the use of those drugs.

**Daniel Webb was convicted of *attempted* sexual assault. Of the 12 defendants, Ross has been executed, and Johnson and Colon have had their sentences reduced and are no longer on death row.

***Information about each defendant is taken from the case summaries of the Connecticut Homicide Review Study.

****A thirteenth defendant, Lazale Ashby, was sentenced to death on March 28, 2008 for the December 2, 2002 murder of Elizabeth Garcia. However, his case concluded too recently to be included in our study.

Table 4b

10 of the 12 Cases in Connecticut Receiving Death Sentences Involved Finding of the "Especially Heinous, Cruel, or Depraved" Aggravating Factor – i(4)

i(4) is SINGLE Charged Aggravating Factor			
Defendant	**Aggravating Factors Charged**	**Aggravating Factors Found***	
Brenton	i(4)	i(4)	
Cobb	i(4)	i(4)	
Courchesne	i(4)	i(4)	
Rizzo	i(4)	i(4)	
Ross	i(4)	i(4)	

i(4) is Single Aggravating Factor; Death Penalty is OVERTURNED			
Defendant	**Aggravating Factors Charge**	**Aggravating Factors Found***	**Notes**
Colon	i(4)	i(4)	Prosecutor declined to seek death penalty on remand after sentence reversed on appeal due to faulty jury instructions re: weighing aggravating and mitigating factors.
Johnson	i(4)	i(4)	Finding of aggravating factor reversed on appeal.

i(4) is NOT Sole Aggravating Factor Charged			
Defendant	**Aggravating Factor Charge**	**Aggravating Factors Found***	**Notes**
Peeler	i(3); i(4); i(5)	i(3); i(4); i(5)	
Reynolds	i(1); i(3); i(4)	i(1); i(4)	Offense occurred during attempted drug transaction; defendant had previous felony drug conviction in New York. Finding of i(4) aggravating factor reversed on appeal.
Webb	i(1); i(4)	i(1); i(4)	Offense occurred during attempted sexual assault; defendant has previous sexual assault (1st) felony conviction.

i(4) is NOT Charged as an Aggravating Factor			
Defendant	**Aggravating Factor Charge**	**Aggravating Factors Found***	
Campbell	i(3)	i(3)	
Santiago	i(6)	i(6)	

* Aggravating factors are those provided in Conn. Gen. Stat. 53a-46a(i)

i(1): The defendant committed the offense during the commission or attempted commission of, or during the immediate flight from, the commission or attempted commission of, a felony and the defendant had previously been convicted of the same felony

i(3): The defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense

i(4): The defendant committed the offense in an especially heinous, cruel or depraved manner

i(5): The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value

i(6): The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, or anything of pecuniary value

But the catchall aggravating circumstance is problematic in the opposite way. First, if read broadly, it potentially captures every murder since they are all especially heinous and cruel in some sense. To avoid this problem, the Connecticut Supreme Court has reversed some findings of the catchall aggravating circumstance by giving the section a narrower interpretation. The result is that a horrifying murder of five young men – the Geoffrey Ferguson cases, described in footnote 20 above – is deemed by the relevant prosecutor not to be a death penalty case because no aggravating factor applies to that crime even though police called it one of the worst mass murder cases in Connecticut history. The public must surely be confused if they know that a defendant who commits multiple murders is guilty of a capital felony, and then learn that Ferguson was not subject to the death penalty even though he killed five young men.

Presumably, many would find a killing of five young men in a case where the killer drove all the way from North Carolina to kill tenants with whom he had been feuding, shoots them all, lights the house on fire and one of the young victims is found clinging to a stairway in the burning house alive, only to die later, to be an unusually egregious crime. Maybe even one of the worst of the worst. If you are going to have a death penalty system that focuses on the worst murderers, how can Geoffrey Ferguson and Scott Pickles (whose case was discussed above) be off the list? Should we give credence to Justice Souter's assertion that "within the category of capital crimes, the death penalty must be reserved for the 'worst of the worst.'"[47] The next section describes our egregiousness study, which affords a mechanism for testing whether these arbitrary outcomes are mere anomalies or defining features of the Connecticut death penalty system.

[47] *Kansas v. Marsh*, 126 S.Ct. 2516, 2542 (2006)(Souter, J., dissenting).

VI. EGREGIOUSNESS STUDY

In the following section, we outline our study design and coding methods used in evaluating the 207 case summaries of capital eligible cases, described above, for the period from 1973 to the present. The subsequent section presents our findings for both charging decisions and sentencing decisions for life versus death sentences.

A. Methodology

In order to measure the egregiousness of each of the capital-eligible murders, we developed a scale based on the following four factors: victim suffering (intensity and duration), victim characteristics (including characteristics that might render a victim particularly vulnerable), defendant intent/culpability, and number of victims.

Our coders were given case summaries scrubbed of information about the race of the victim and defendant and charging and sentencing information, and were then asked to evaluate the egregiousness of all 207 cases using these scrubbed summaries.[48] We sought to include sufficient information for study participants to have adequate information to make judgments about egregiousness for each case, but to exclude information that might bias their judgments. Each case summary included the facts of the case, as well as any relevant information about the defendant that might bear upon the defendant's intent or mental state, such as expert or court findings of mental illness. See Appendix C for two complete summaries and their accompanying scrubbed versions used by the coders.

[48] The coders were initially all Yale Law students who coded the first set of summaries covering the period from 1973 – 1998 during the Spring semester of 2007. When the second batch of summaries arrived in the Fall of 2007, the same nine coders were used, and by then two of the nine had graduated and were working as attorneys.

To generate an egregiousness score for every case, our coders were asked to rank each of the following four factors on a scale from 1-3 (low (1), medium (2), or high (3)):

1. **Victim Suffering – Intensity and Duration.** In this category, the coders were asked to rank the intensity and duration of the victim's suffering. The coders were asked to consider 1) intensity as measured by the degree of physical pain and/or mental anguish, and 2) duration, the amount of time that a victim suffered.

2. **Victim Characteristics.** In this category, study participants were asked to rank special characteristics of the victim. Study participants were asked to consider 1) vulnerability of the victim relative to the defendant, as signaled by factors such as age; disability (mental or physical); being outnumbered; a defendant in a position of authority over the victim; whether the victim was intoxicated or high. 2) Whether the victim was a law enforcement officer.

3. **Defendant Intent/Culpability.** In this category, the coders were asked to assess and rank the defendant's intent and culpability. They were encouraged to consider, for example, the defendant's motive for committing the murder; whether the death of the victim was planned; whether the defendant acted rashly or in the heat of the moment; and whether the defendant's judgment was compromised by, for example, psychiatric problems, drugs/intoxication.

4. **Number of Victims.** This was the most straightforward factor, in which study participants were asked to account for the number of deaths caused by the defendant. They were

instructed that one victim is "low" and receives a ranking of 1; two victims is "medium" and receives a ranking of 2; three or more victims is "high" and receives a ranking of 3.

For each of these four categories, we used a simple 1-3 scale of low, medium and high to provide greater uniformity among coders in ranking. The lowest a case could score, therefore, was a 4, and the highest was 12.

In addition, the coders were asked to rank each case overall on a scale of 1-5 (the "overall scale"), with 5 being the most egregious. The purpose of this second overall 1-5 egregiousness scale was to ensure that we were able to capture more general reactions to each case, and to compensate for any over- or under-inclusiveness of the 4-12 scale (the "composite scale"). For example, we realized that murders of law enforcement officers may tend to receive lower scores on the composite scale, because each of these cases involved only one victim and rarely involved prolonged or brutal victim suffering. The overall scale, on the other hand, could account for a belief that murders of police officers are particularly egregious, notwithstanding the low number of victims and victim suffering. Interestingly, when the scores were standardized according to each coder's mean scores, we found that the egregiousness scores on both scales are extremely similar—frequently within one-tenth of one decimal point of each other, which suggests that the composite scale adequately captured participants' sense of egregiousness. Appendix D describes the high degree of inter-coder agreement in more detail.[49]

[49] It is important to note that the data from the egregiousness scales reflects each coder's views on the *relative* egregiousness of offenses. We did not ask participants whether they thought the death penalty should be imposed in each case, nor did we ask participants what punishment they thought was appropriate for each offender. Thus, even if a coder believed that *no* offender should ever get the death penalty, she would still be able to score the offenses' egregiousness. Similarly, a coder who believed that *all* murderers should receive the death penalty would also be able to rank the different offenses. By having each participant score every case on the egregiousness scales, we sought to determine whether the most egregious cases—the "worst of the worst"—were the ones in which the death penalty was

To give a sense of how cases were arrayed by the coders, I have taken, for each egregiousness score, the case closest to one standard deviation below the mean as well as one standard deviation above the mean. One standard deviation below the mean was 6.62 on the composite 4-12 index and 2.63 on the overall 1-5 scale. The two less-egregious cases were Ibrahim (**6.67**, 2.78) and Ortiz (7.78, **2.67**), where I have bolded the relevant egregiousness score that is closest to one standard deviation below the mean on the two egregiousness scales.

Cases One Standard Deviation Below the Mean Egregiousness Score

Composite 4-12 scale: Ibrahim (6.67, 2.78)

Cause of death: Gun shot wounds

D and coD abducted V outside a crackhouse in Springfield, MA, after V had participated in a drug-related robbery of co-D. V was driven down I-91 to Hartford area, where he was shot multiple times with a .9mm and .380. V's remains were discovered two years later in the woods near the highway. (1 victim)

Defendant was charged for an incident involving the abduction and shooting death of Victim. Victim had participated in the knifepoint robbery of drugs and money from a co-defendant, who was selling drugs for Defendant in a crack house in Springfield, MA. Following the robbery, Defendant and his co-defendant compelled Victim to get into a car driven by Defendant, on the pretext of looking for the others who were involved in the robbery. Instead, they drove Victim down I-91 into CT, where he was shot multiple times after trying to jump from the moving car. The two defendants dumped the body in the woods. Victim's remains were not discovered for two years; he was identified through dental records.

Overall 1-5 scale: A. Ortiz (7.78, 2.67)

Cause of death: Gun shot wounds

D and co-D kidnapped and shot VV(2) in a drug-related incident. (2 victims)

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imposed. Whether the students are more or less liberal than the general population in Connecticut is largely irrelevant to this study because it is only relative egregiousness across cases that matters. Even someone who thinks *no* cases should get the death penalty is capable of scoring the egregiousness of 200 cases, and that *relative* scoring is not likely to be influenced by one's political views. Both liberals and conservatives would agree, e.g., that killing three is worse than killing one, or that torture + death is worse than a stray bullet fired in the course of a robbery that kills a bystander.

Defendant and his co-Defendant were charged for an incident in which victims V028A and V028B were forced into a van on a Hartford street and driven to a remote location, where they were shot and killed. The objective was to obtain drugs and money that V028A was believed to have in a lockbox at his home.

One standard deviation above the mean was 9.28 on the composite 4-12 index and 4.25 on the overall 1-5 scale. The two higher egregiousness cases were Marra (**9.33**, 4.56) and Campmire (8.33, **4.22**), where I have again bolded the relevant egregiousness score closest to one standard deviation above the mean on the two egregiousness scales.

Cases One Standard Deviation Above the Mean Egregiousness Score

Composite 4-12 scale: Thomas Marra (9.33, 4.56)

Date of offense: February 4, 1984

Cause of death: Beating w/ bat, drowning

D and coDs detained V in D's garage and beat him with baseball bat. V was then placed in a refrigerator and transported to a river, where refrigerator was placed in the water and sank. V still alive at time placed in water, according to coD/witnesses.

Victim was 15 years old. Defendant had the victim brought to his house by a co-defendant, where an argument ensued about Defendant's desire for Victim to go to Italy for a while (presumably so as not to testify against Defendant in another pending case) and Victim's refusal to leave the country. Defendant handed an aluminum baseball bat to a co-D, with instructions to keep Victim in the garage. When Victim tried to leave the garage, co-D hit him several times with the bat. Victim was then forced into a refrigerator, which was padlocked. The refrigerator was taken to a nearby river, and thrown into the river, where it sank. The co-D who hit the victim with the bat said that Victim was still "mumbling incoherently" when the refrigerator was put into the river. The victim's body was never found, but a sneaker and part of a foot, believed to be his, were discovered months later.

Overall 1-5 scale: Mark Campmire (8.33, 4.22)

Cause of death: Slashed throat

D killed a woman, V, he encountered on a remote road while she was walking her dog by slashing her throat.

D, a 40-year-old male, was looking for someone to rob when he came upon the Victim (V), a woman walking her dog between 12:30 and 2:30 p.m. on a remote access road. D grabbed V and choked her with her dog's leash, then used it to restrain her. V pleaded for her life and promised to take him to get the money he wanted. D slit V's throat with a Buck knife and pushed her down the embankment, leaving her to die.

Given that there have only been 10 sustained death sentences from the 207 death-eligible cases that were evaluated by the nine coders (that is, less than 1 in 20 *death-eligible* defendants who are *convicted* of murder receive a death sentence), it is not remarkable that none of these cases received this ultimate penalty.[50] Nonetheless, even this brief examination can give insight into what drove the different egregiousness rankings. First, while all four of these cases involved kidnap and murder and are thus immediately eligible as capital felonies, the two lower-egregiousness crimes involved murders of victims caught up in the illegal drug trade. Despite this similarity, Ibrahim and Ortiz differed in that Ibrahim murdered one individual and Ortiz killed two. The Composite score directed the coder to focus on this factor and awarded a 1 point higher score for the extra murder committed by Ortiz (hence the roughly one-point higher score for Ortiz on the composite score, even though their overall 1-5 scores were quite similar). Thus, one difference in the two egregiousness scoring schemes is that the Composite score explicitly and automatically provides additional points for multiple murder cases, while the Overall egregiousness measure does not.

[50] For the less egregious crimes, Ibrahim received 50 years for felony murder and 25 years for kidnapping, to run concurrently, and Ortiz received life without parole *after going to a capital felony trial*. Ortiz was tried with his co-defendant Diaz Marrero. At the capital sentencing hearing, the jury found that Marrero was guilty of committing the murders in an "especially heinous, cruel, or depraved manner," but was hung 11-1 in favor of finding a mitigating factor based on Marrero's deprived childhood. The trial judge declared a mistrial and then sentenced Marrero to life without parole. At that point, the state withdrew its request for the death penalty against Ortiz, who was then sentenced to life without parole. For the more egregious crimes, Marra was not prosecuted capitally, and he received a life sentence (60 years), while Campmire pled guilty and was sentenced to life in prison, plus 65 years.

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Second, the two lower egregiousness cases involved relatively rapid deaths from gunfire, while the two higher egregiousness cases involved more prolonged deaths that were likely to lead to greater physical suffering (in Marra, from the beating and the torture-drowning as part of a plan to protect Marra from prosecution in another case; in Campmire, from the slashing knife attack and strangling at the hands of a stranger).

Third, note that in three of these four cases, the prosecutors did not seek the death penalty. Perhaps unsurprisingly, given the haphazard application of the death penalty in Connecticut, the state chose one of the cases at the low end of deathworthiness as assessed on the overall 1-5 scale (Ortiz) to push for a sentence of death. Ortiz was tried together with his co-defendant, for whom the jury found an aggravating factor but was split on the presence of a mitigating factor. After the jury split on the co-defendant's sentence, the State withdrew its death penalty notice for Ortiz. He was subsequently sentenced to life without possibility of parole. In the other three cases, two of which were much higher on the egregiousness scale, including a horrible stranger murder by a man with a criminal history of three prior assaults on women (Campmire) and the horrendous Marra case, the death penalty was not sought by the state.

Fourth, one frequently hears claims that decisions not to prosecute as a capital felony, such as that in the high-egregiousness Marra case, are often driven by the relative weakness of the prosecutor's case. But that does not explain the treatment in Marra, where a Connecticut Superior Court Judge declared just this month that "overwhelming evidence" supported Marra's murder conviction.[51]

[51] This according to Superior Court Judge Richard Comerford. Daniel Tepfer, "Judge Denies Request for DNA Testing," Connecticut Post (Bridgeport, CT) (April 6, 2008).

The egregiousness scores serve a number of goals in our analysis. First, they provide a mechanism for assessing which murders can be thought of as falling into the category of the "worst of the worst." This information can be used to explore whether the system is operating rationally, consistent with constitutional mandate, or arbitrarily and capriciously. Without a demonstrably tight link between deathworthiness (as measured by egregiousness and our measure of special aggravating factors), there will be no meaningful basis for deciding who will be punished by death for committing a capital felony and who will not. Second, while one can present evidence showing the extent of the racial and geographic disparities in the administration of the death penalty system, such showings always invite the claim that the murderers that are treated most harshly merited that treatment because they committed more egregious murders. By controlling for this measure of egregiousnees, the study enables more accurate conclusions about the intrusion of illegitimate factors into the operation of Connecticut's death penalty system.

Note that while our coders' task of assessing case summaries has some similarities to the actions of the Connecticut Supreme Court in conducting proportionality reviews of death sentences, there are some important differences. First, in implementing its proportionality reviews, the Connecticut Supreme Court has not examined all cases that were death-eligible under the Connecticut death penalty statute nor has it even looked at all cases charged with a capital felony or even convicted of a capital felony. Instead, the Court limited its analysis to cases that went to a penalty hearing.[52] While eliminating disparate outcomes among the narrow class of cases that reach death penalty hearings is laudable, such cases represent only a small portion of the overall number of death-eligible cases. For example, as Figure 4 illustrates, over our entire sample period, there were

[52] The Connecticut Supreme Court has limited its analysis of similar cases under the requirements of proportionality review to those cases in "which hearings on the imposition of the death penalty have taken place, whether or not the death penalty has been imposed…." State v. Reynolds, 836 A. 2d 224 (2003).

only 32 cases that went to a penalty trial from among the 230 cases resulting in convictions that qualified as capital felonies under Connecticut law.[53] This report must assess the overall operation of the Connecticut death penalty system, and not simply its final phase of operation after the vast majority of death-eligible cases have been winnowed out. A system could conceivably be legally beyond reproach in the operation of its death penalty hearings, yet still be marred by overall arbitrariness, as well as impermissible racial and geographic disparities. For example, if all of the defendants in death penalty hearings were black or from Waterbury, a finding that similar cases were receiving similar treatment at the penalty phase would not insulate such a system from constitutional attack. Accordingly, we examine the entire apparatus of Connecticut's death penalty regime, and not just one final (albeit obviously important) part.

Second, under proportionality review, the Court was only evaluating whether something was amiss with a single case. As a result, the Court had held in State v. Reynolds, 836 A. 2d 224 (2003), that "We will not vacate a death sentence as disproportionate under § 53a–46b (b)(3) unless that sentence is truly aberrational with respect to similar cases." For a single case to stand out as aberrational, it would have to be a very extreme outlier. In contrast, the value of the type of statistical analysis that we perform below is that it can establish the presence of illegitimate or arbitrary patterns, such as racial or geographical disparities, that could not be discerned by a focus on a single case.

[53] All of these 230 cases both resulted in a conviction and met the definition of a capital felony. Since a very substantial portion of capital murders in Connecticut are never solved and not all of the solved cases lead to conviction, this set of 230 cases is still only a portion of the larger universe of all death-eligible murders committed in Connecticut since 1973. Nonetheless, it is obviously far more comprehensive than the 32 cases that went to a death penalty hearing.

B. Findings

We divide our initial discussion of the capital-eligible cases into two parts: an analysis of capital felony charging decisions and an evaluation of the decision to receive a death sentence. In both cases we explored whether these decisions were influenced by the particular offense, its egregiousness, race of the defendant and victims, and judicial district.[54]

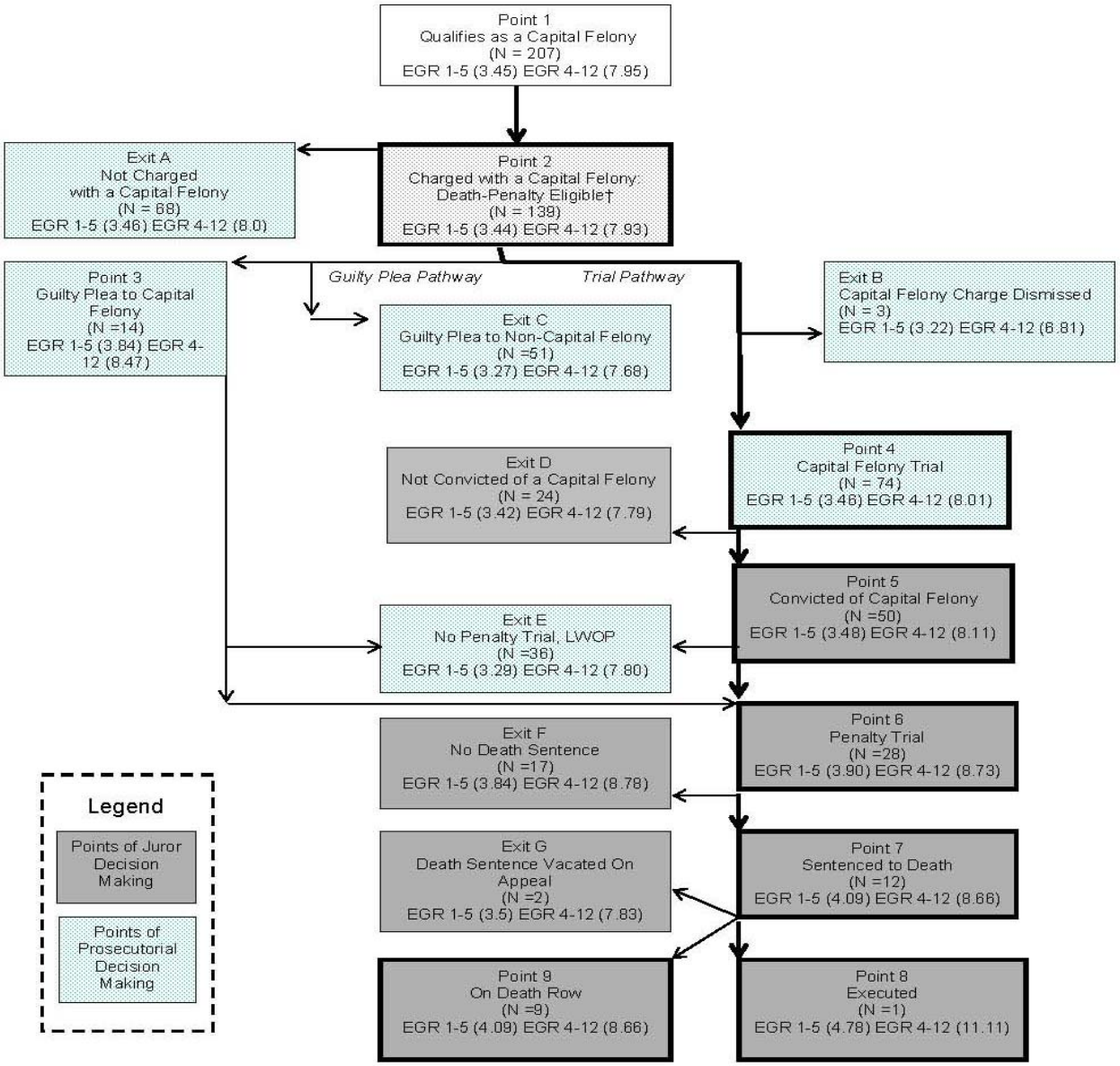
1. Charging Decisions

Figure 5 replicates Figure 4 for the 207 cases for which we developed egregiousness scores. As the Figure reveals, prosecutors charged capital felonies in 139 of the 207 death-eligible cases analyzed in this egregiousness evaluation. Of those defendants charged with capital felonies, twelve were sentenced to death. One of the twelve, Michael Ross, was executed on May 13, 2005, after he voluntarily agreed to stop all appeals and to proceed with the execution and two subsequently had their sentences reversed, as noted in Table 4.

[54] For a catalogue of the major findings, in abbreviated form, from this intensive examination of egregiousness and capital sentencing, see Appendix B.

Figure 5

Capital Case Procedural Pathways: Connecticut Death-Eligible Cases, 1973-2007
Two Egregiousness Scores for 207 Cases At the Various Advancement Points



i. Egregiousness

If the death penalty statute works to ensure that only the "worst of the worst" receive a sentence of death, then we would expect that the crimes charged as capital felonies are significantly more egregious than those that are not. Remarkably, Figure 5 illustrates that this is not the case. In fact, of the 207 death-eligible cases analyzed in this study, the average level of egregiousness is actually slightly *higher* for the 68 crimes *not* charged with a capital felony than for the 139 that were: on the composite scale the average egregiousness score for crimes charged with a capital felony is 7.93, while the average of those *not* so charged is 8.00; on the overall egregiousness scale the average score for crimes charged with a capital felony is 3.44, while the average score for those *not* so charged is 3.46 (see Table 5). Essentially, this means that cases of virtually identical egregiousness start out getting very different treatment, with one-third of the total death-eligible cases removed from the prospect of a capital sentence at the outset by charging decision, even though these murders are, if anything, slightly worse than the cases that are charged as capital felonies.

Table 5

Egregiousness Scores (4-12) and (1-5) According to Whether Charged

	Composite (4-12)		Overall (1-5)	
	Charged	Not Charged	Charged	Not Charged
Mean	7.93	8.00	3.44	3.46
Highest Egregiousness Score	11.78	11.11	5.00	4.78
Lowest Egregiousness Score	4.11	6.00	1.00	2.22
Number of Cases	139	68	139	68

ii. Egregiousness Across Offense Categories

The data in Table 6 shows the charging rates and egregiousness scores for the nine capital felony categories. The average level of egregiousness does not correspond tightly to the prosecutorial decision to charge a case as a capital felony.

Table 6

CAPITAL FELONY (CF) CHARGING AND EGREGIOUSNESS ACROSS DIFFERENT OFFENSE CATEGORIES

				Egregiousness of Row Totals	
CATEGORY OF OFFENSE	Total N*	Number Charged CF	% Charged CF	Composite (4-12)	Overall (1-5)
Murder by Someone with a Previous Murder Conviction	4	4	100	7.39	3.08
Murder of a Law Enforcement Officer	8	8	100	6.85	3.06
Death Resulting from Drug Sale	5	5	100	4.56	1.09
Defendant Serving Life Sentence	1	1	100	6.89	3.00
Murder during Commission of Sexual Assault	22	18	82	9.27	4.51
Murders with Multiple Victims	70	55	79	8.33	3.42
Murder for Hire	17	13	76	6.48	2.83
Murder of Victim Under 16 Years of Age	45	28	62	8.73	3.80
Murder during Commission of Kidnapping	69	34	49	8.22	3.78

*The total number of cases adds up to more than the 207 cases because some cases were death-eligible under more than one provision of the statute, and are thus included in more than one offense category.

For example, less than half (49%) of murders committed during the commission of a kidnapping were charged as capital felonies, although these cases had higher average egregiousness scores on both scales than the four categories of cases in which capital felonies were charged 100% of the time. The five cases of death resulting from a drug sale were all charged as capital felonies despite their low egregiousness levels.

iii. Egregiousness Within Offense Categories

The previous section compared egregiousness scores across the nine categories of capital felonies, while this section looks at charging decisions within each category. For most of these nine categories, the average egregiousness scores for crimes charged with a capital felony is roughly equal to those crimes not so charged. For example, consider the capital felony category with the most death-eligible cases: multiple victim murders. Multiple victim murders charged as capital felonies average 8.36 on the 4-12 composite egregiousness scale and 3.46 on the 1-5 overall egregiousness scale. Those not charged score an average of 8.24 on the composite scale and 3.27 on the overall scale.

Similarly, sexual assault cases charged as capital felonies averaged 9.29 on the composite scale and 4.54 on the overall scale; cases that were not charged averaged 9.19 and 4.33. Cases charged as capital felonies involving victims under 16 years of age averaged 8.55 and 3.86; such cases that were not charged averaged 8.54 and 3.69. Kidnapping cases charged as capital felonies averaged 8.50 and 3.97; kidnapping cases not charged averaged 7.95 and 3.60. In addition, murder for hire cases charged as capital felonies averaged *lower* egregiousness scores (6.28 on the composite scale and 2.74 on the overall scale than such cases not charged (7.11 on the composite scale and 3.11 on the overall scale).

iv. Egregiousness and Race of Defendant

Table 7 presents data on the average egregiousness of death-eligible felonies by the race of the defendant and by charging status. The table invites two comparisons: within race, are the most egregious cases being charged, and across race, are there differences in egregiousness levels? As we saw in Section VI.B.1 above, cases charged with capital felonies are if anything slightly less

egregious than those that are not charged. This small but perverse difference persists for both white and Hispanic defendants, for whom the average egregiousness score is *lower* for defendants charged with a capital felony than it is for those who were *not* so charged. The egregiousness scores for black defendants tip slightly the other way, in that there is a slightly higher egregiousness score for the black capital-felony charged defendants than for black non-charged defendants.

Table 7

EGREGIOUSNESS BY DEFENDANT RACE AND CHARGING STATUS						
	COMPOSITE INDEX (4-12)			OVERALL INDEX (1-5)		
Defendant Race	Charged	Not Charged	Total	Charged	Not Charged	Total
Black	7.86	7.82	7.85	3.38	3.30	3.35
White	8.25	8.35	8.28	3.65	3.71	3.67
Hispanic	7.51	7.67	7.55	3.17	3.29	3.20

Table 7 also illustrates that white defendants overall committed murders with the highest average egregiousness scores. The table reveals another potentially troubling finding: on average, white defendants have avoided a capital felony charge for cases that are significantly more egregious than the cases for which both black and Hispanic defendants were charged with capital felonies. The average egregiousness score for white defendants who were *not* charged is 8.35 on the composite scale and 3.71 on the overall scale, while the average egregiousness score for black defendants who were charged with a capital felony is 7.86 and 3.38. Hispanic defendants charged with capital felonies average egregiousness scores of 7.51 and 3.17, which is also lower than the average scores of white defendants who *avoided* capital felony charges. This evidence suggests two possibilities. The fact that the black-white difference is marginally significant, and the white-Hispanic difference is statistically significant at the .05 level may reflect impermissible racial discrimination in the

charging decision. Alternatively, the pattern may simply reveal the utter arbitrariness of capital charging decisions.[55] Of course, whether the charging patterns are discriminatory or simply arbitrary, the Connecticut system would be assailable on both statutory and constitutional grounds.

Table 8, below, shows that, when broken down by only the race of the defendant, Hispanic defendants were charged with capital felonies at a slightly higher rate (31 of 43 = 72%) than white defendants (56 of 83 = 69%) or black defendants (51 of 80 = 63%). Yet, as reflected by the egregiousness scores described above, these charging rates do not correlate with the relative egregiousness scores by race of defendant—Hispanic defendants were charged at a higher rate, but have the lowest egregiousness scores on both scales.[56]

Table 8

RATE OF CHARGING BY DEFENDANT RACE				
Defendant Race	Charged	Not Charged	Total	% Charged
Black	51	29	80	63%
White	56	27	83	69%
Hispanic	31	12	43	72%

[55] The difference in egregiousness scores between a black defendant charged with a capital felony and a white defendant not charged with a capital felony is only marginally statistically significant (based on the assumption of nonpaired observations with unequal variances using Satterthwaite's approximation for degrees of freedom): a *t*-test comparing the mean of composite egregiousness scores (values 4-12) of charged black defendants and that of non-charged white defendants yields the value $|t| = 1.766$, which is less than the 5% critical value of 1.997 in the Student's *t* distribution with 66 degrees of freedom. The t-test comparing these same populations of defendants using overall egregiousness scores (values 1-5) yields the value $|t| = 1.951$, which is again slightly below the 5% critical value of 1.996 in the Student's *t* distribution with 67 degrees of freedom.

On the other hand, a *t*-test comparing the egregiousness scores of charged Hispanic defendants with those of non-charged white defendants shows that the means of the two populations are statistically significantly different from each other at the .05 level. For the composite score, $|t| = 2.898 > 2.004$, with df=55; for the overall score, $|t| = 2.749 > 2.005$, with df=54.

[56] Table 8 excludes the case of the only Asian defendant (Phetsaya), whose victim was also Asian, Phetsaya was charged with a capital felony but ultimately only prosecuted for aiding and abetting manslaughter. He entered an Alford plea and was sentenced to 10 years.

v. Egregiousness and Race of Victim

The most extreme racial disparities in capital felony charging rates occur with respect to race of the victim, as summarized below in Table 9. Defendants accused of killing a white victim were charged with a capital felony at a rate of 73%, while only 54% of defendants accused of killing a black victim, and 69% of defendants accused of killing a Hispanic victim were so charged. The 19 percentage point difference between defendants accused of killing white and black victims is highly statistically significant.[57]

Table 9

AVERAGE EGREGIOUSNESS SCORES AND CHARGING PROBABILITIES BY VICTIM RACE, 207 Cases

	Charged			Not Charged			Total			
Victim Race	Composite (4-12)	Overall (1-5)	# Cases	Composite (4-12)	Overall (1-5)	# Cases	Composite (4-12)	Overall (1-5)	# Cases	% Charged
Black	7.91	3.32	32	7.86	3.29	27	7.89	3.31	59	54
White	8.03	3.59	79	8.15	3.6	29	8.06	3.6	108	73
Hispanic	7.55	3.14	24	7.79	3.3	11	7.7	3.19	35	69
Other	7.66	3.17	4	10	4.11	1	8.13	3.35	5	80
Total	7.93	3.44	139	8	3.46	68	7.95	3.44	207	67

* "Other" refers to cases in which there were multiple victims of different races or the single case involving an Asian victim.

In general, the relative similarity of the egregiousness rankings across victim race contrasts with the striking disparity in charging rates, again suggesting either possible discrimination against black victims in charging decisions or further evidence of arbitrariness.

[57] Using the Fisher exact probability test, the p-value for testing the statistical significance of the higher probability of capital charging in cases with white victims as opposed to cases with black victims is a miniscule 0.00676 (indicating a highly statistically significant disparity). However, the probability of being charged in a case with a Hispanic victim is *not* significantly different from the probability of being charged in a case with a white victim (p=0.146 > α=0.05).

vi. Egregiousness and Race of Defendant and Victim Combined

Table 10 depicts the charging decision by the race of both the defendant and the victim. The most striking percentage in the table is that 90 percent of the murders by black defendants of white victims led to a capital felony charge. There are two natural comparisons to explore whether this 90 percent charging rate is unusually high: one can look one box up in the first column of Table 10 to see the charging rate for black defendants with black victims or one box over to column 2 to see the charging rate for white defendants with white victims. In both cases, the charging rates are statistically significantly *lower* even though the mean egregiousness levels of the crimes are equal or *higher*.

Taking these two comparisons in turn, we see that black defendants accused of murdering a white victim have been charged with capital felonies at almost twice the rate (90%) that black defendants have been charged in the death of black victims (52%). This disparity is highly statistically significant.[58] Note that the mean egregiousness levels of both these crime categories is an identical 7.89, so the massive victim-race disparity in charging rates for black defendants is *not* reflecting more deathworthy attributes of the black on white murder cases. Regardless of whether this disparity reflects prosecutors' failure to treat murders of black persons as equally blameworthy as the murders of white persons because of racial animus or some other impermissible factor, the disparity is arbitrary.

The second comparison holds white victim constant and compares the charging rates for white defendants to black defendants: white defendants were charged in 69% of cases involving

[58] Using Fisher's Exact test for this comparison yields a p-value of 0.0018 – the difference between capital-felony charging rates for murders involving black and white victims given that the defendant is black is highly statistically significant.

white victims, while black defendants were charged with capital felonies in 90% of cases involving white victims. Again, this difference in probability of being charged if a defendant is white versus if a defendant is black is statistically significant at the 5% significance level, but it is not explained by the differences in egregiousness scores for these two sets of murders.[59] In fact, white defendants consistently have the highest mean egregiousness scores. This indicates that black defendants who have murdered a white victim have a significantly higher probability of getting charged with a capital felony than white defendants who have murdered a white victim, when no legitimate factor would seem to explain this racial disparity.

[59] The relevant p value for this comparison is $0.0371 < \alpha = 0.05$.

Table 10

Composite Egregiousness Scores (4-12) ***and Capital Felony (CF) Charging Decision by Defendant and Victim Race/Ethnicity, 207 Cases***					
	Black Defendant	**White Defendant**	**Hispanic Defendant**	**Other Defendant**	**TOTAL**
Black Victim	7.89	8.56	7.44	NA	7.89
# Cases	54	2	3	NA	59
# CF (% CF)	28 (52%)	2 (100%)	2 (67%)	NA	32 (54%)
White Victim	7.89	8.26	6.95	NA	8.06
# Cases	20	77	11	NA	108
# CF (% CF)	18 (90%)	53 (69%)	8 (73%)	NA	79 (73%)
Hispanic Victim	6.52	8.5	7.71	NA	7.7
# Cases	3	4	28	NA	35
# CF (% CF)	2 (67%)	1 (25%)	21 (75%)	NA	24 (69%)
Other Victim	8.19	NA	10	6.11	8.13
# Cases	3	NA	1	1	5
# CF (% CF)	3 (100%)	NA	0 (0%)	1 (100%)	4 (80%)
Total	7.85	8.2	7.55	6.11	7.91
# Cases	80	83	43	1	207
# CF (% CF)	51 (64%)	56 (67%)	31 (72%)	1 (100%)	139 (67%)

- "Other Victim" represents one case in which there was an Asian victim and four cases with multiple victims of different racial backgrounds. "Other Defendant" represents one case in which there was an Asian defendant.

vii. Egregiousness Across Judicial Districts

Table 11 summarizes capital-felony charging decisions and average egregiousness scores of death-eligible cases for each of the judicial districts.[60] One is immediately struck by the considerable variation in capital-charging rates across the various judicial districts, ranging from a low of 29 percent in Middlesex to roughly 90 percent in Hartford and Hartford-New Britain (among districts with at least 5 death-eligible cases). Moreover, we once again observe that these charging

[60] Note that the Hartford-New Britain judicial district was divided into two separate districts in 1998. We consider cases in Hartford, Hartford-New Britain, and New Britain separately for purposes of determining charging practices by judicial district.

disparities are not driven by the egregiousness of the cases. Notably, death-eligible cases in New Haven were charged as capital felonies at a rate of only 32%, while, as noted, the charging rate in Hartford and Hartford-New Britain were roughly 90%. At the same time, both sets of egregiousness scores of cases in the three districts were very similar: 7.55 and 3.18 in New Haven, 7.51 and 3.32 in Hartford-New Britain, and 7.63 and 3.31 in Hartford.

One striking finding in Table 11 is that, in Waterbury, cases that were *not* charged as capital felonies averaged 10.11 on the composite scale, which is higher than the average composite score for *charged* cases in every judicial district (including Waterbury itself). On the overall scale, cases that were *not* charged in Waterbury averaged 4.15—higher than the average overall score for charged cases in all but one judicial district.

Table 11

Capital Felony Charging Practices and Egregiousness by Judicial District, 207 Cases									
District	**# Cases**	**# Charged**	**% Charged**	**Composite**			**Overall**		
				All	Charged	Not Charged	All	Charged	Not Charged
Ansonia-Milford	4	4	100	8.94	8.94	N/A	3.86	3.86	N/A
Danbury	7	3	43	7.65	8.04	7.36	3.38	3.44	3.33
Fairfield	36	24	67	8.10	7.95	8.42	3.40	3.31	3.57
Hartford	47	42	89	7.63	7.66	7.40	3.31	3.33	3.20
Hartford-New Britain	10	9	90	7.51	7.40	8.56	3.32	3.22	3.42
Litchfield	9	5	56	9.74	9.64	9.86	4.54	4.42	4.69
Middlesex	7	2	29	8.30	8.44	8.24	3.59	3.67	3.56
New Britain	9	3	33	7.51	7.85	7.33	3.20	3.30	3.15
New Haven	34	11	32	7.55	7.63	7.52	3.18	3.23	3.15
New London	13	12	92	8.05	8.05	8.11	3.56	3.56	3.56
Stamford-Norwalk	6	4	67	7.30	6.86	8.17	3.07	2.75	3.72
Tolland	1	1	100	4.67	4.67	N/A	1.22	1.22	N/A
Waterbury	13	10	77	8.99	8.66	10.11	4.00	3.96	4.15
Windham	11	9	86	8.28	8.37	7.89	3.79	3.80	3.72

viii. Egregiousness Within Judicial Districts

As we saw in Figure 5 above , the pool of death-eligible cases *not* charged with capital felonies are (slightly) worse on average than the cases that are charged. We can see this same pattern in six of the fourteen judicial districts. Specifically, in Fairfield, Hartford-New Britain, New London, Litchfield, Stamford-Norwalk, and Waterbury, the cases that were charged as capital felonies have equal or *lower* average egregiousness score than cases not charged as capital felonies. For example, in the Fairfield judicial district, the 24 death-eligible cases that were charged as capital

felonies average 7.95 on the composite scale and 3.31 on the overall scale, while the 12 cases that were *not* charged average 8.42 and 3.57.

In a number of judicial districts, the most egregious cases were not charged as capital felonies. In New Haven, six of the ten most egregious cases on the composite scale, and seven of the ten most egregious on the overall scale were not charged as capital felonies. For both New Britain and Middlesex, the most egregious case in each district on both the composite and overall scales was *not* charged as a capital felony.

Additionally, some judicial districts presented noticeable disparities with respect to race of the victim and/or race of the defendant. For example, in the Hartford judicial district, which had 47 death-eligible cases (the highest of any judicial district), 55% (6/11) of cases involving only black victims were charged as capital felonies, but 100% of cases involving white victims (25/25) or Hispanic victims (9/9) were charged. Egregiousness does not explain this wide disparity: scores for cases with only black victims are marginally *higher* than cases with white or Hispanic victims on both the composite and overall scales. Specifically, in Hartford, cases involving only black victims average 7.85 and 3.43; cases involving only Hispanic victims average 7.42 and 2.85; cases involving only white victims average 7.54 and 3.40.

Similarly, in the New Haven judicial district, cases involving white victims were charged at a rate (56%) that was four times as high as the rate for cases involving Hispanic victims (14%), yet their egregiousness scores are almost identical: 7.73 (composite) and 3.32 (overall) for cases involving white victims versus 7.68 (composite) and 3.27 (overall) for Hispanic victims. Cases with black victims were charged at half the rate (28%) of cases involving white victims, but twice the rate of cases involving Hispanic victims. But cases with black victims had the lowest egregiousness scores of all three victim categories: 7.41 (composite) and 3.07 (overall) for cases involving black

victims. Also, only five of the eighteen cases involving black defendants and only black victims were charged as capital felonies, but three of four cases involving a black defendant and white victim were charged as capital felonies.

In Waterbury, the only three cases that were *not* charged as capital felonies involved only minority victims. Notably, neither of the two most egregious cases on the composite scale were charged as capital felonies (the most egregious case – the Satchwell case discussed above -- involved four black victims, and the second most egregious involved a black victim and a Hispanic victim). All five cases involving a white victim were charged as a capital felony, while only two of the four cases involving only black victims were so charged. But the egregiousness scores do not explain this disparity: 8.17 (composite) and 4.18 (overall) for cases involving white victims, and 9.47 (composite) and 4.06 (overall) for cases involving only black victims.

In Fairfield, cases with white defendants were more egregious than cases with either black or Hispanic defendants on both the overall and composite scales. However, white defendants in Fairfield were charged with capital felonies in only 42% of death-eligible cases. Black defendants were charged in 75% of cases and Hispanic defendants were charged in 88% of cases. Thus, minority defendants were charged at nearly twice the rate of white defendants for cases that were less egregious.

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In a system in which the death penalty should only be applied to the “worst of the worst" offenders, one would expect the offenders who are charged with capital offenses would be those who commit the most egregious offenses. Our data demonstrate that this is not the case in Connecticut. Since uncharged offenses are equally egregious as, or in many cases *more* egregious than, charged

offenses, the Connecticut death penalty system is not focusing on the worst offenders. Moreover, when analyzed by judicial district, by race (of both defendant and victim), and by type of offense, the data suggest that capital felony charging decisions reflect factors other than the relative egregiousness of death-eligible offenses in Connecticut. Arbitrariness – whether in the form of unprincipled caprice, randomness, error, or discrimination -- seems to be a defining feature of prosecutorial charging decisions for capital felonies in Connecticut.

2. Sentencing: Death vs. Non-Death

Since 1973, of the 139 cases charged as capital felonies in the egregiousness sample, only 12 resulted in death sentences.[61] This section considers how these 12 cases differ from the other death-eligible cases in which non-death sentences were imposed. Once again, if the death penalty were only imposed on the "worst of the worst" offenders, then we would expect only the most egregious cases to result in a death sentence. Our findings below reveal that this has not been the case.

[61] Of the twelve defendants who have received death sentences, two have had their sentences overturned and are no longer on death row. In one such case involving a white defendant and a white victim who was a law enforcement officer, the Connecticut Supreme Court ruled that a death sentence could not be imposed under the "heinous, cruel or depraved" catchall aggravating circumstance (State v. Johnson, 253 Conn. 1, 751 A.2d 298 (2000)). The second case involved a Hispanic defendant (Colon) and a Hispanic victim who was under the age of 16, and after the death sentence was overturned because of improper jury instructions, the Waterbury prosecutor, *without explanation*, chose not to seek the death penalty again. That the prosecutor would seek a death sentence and fight to retain it all the way up to the Connecticut Supreme Court, only to drop the demand after an appellate decision that specifically sanctioned the finding of the catchall aggravating circumstance is yet another illustration of the untrammeled prosecutorial discretion that contributes to the pattern of arbitrariness in the Connecticut capital sentencing regime.

This potential for capricious prosecutorial decisions is a central feature of the Connecticut system, as Justice Berdon noted in giving an example of the "capriciousness of prosecutorial discretion:" "The state's attorney who [was then prosecuting Michael Ross], while arguing a collateral matter before this court, stated that *he* may decide not to seek the death penalty again: "[The case] could go back. It could be that somehow I've reviewed the file and decided that *I don't want to proceed with a death penalty hearing* on behalf of the state. That, in fact, we will recommend no further hearing, thus recommend life imprisonment." *State v. Webb*, 680 A.2d 147 (Conn. 1996), Berdon, J., dissenting (emphasis added).

i. Egregiousness

Cases resulting in a death sentence had an average egregiousness score of 8.66 on the composite scale. But these were not the most egregious cases: the ten highest-scoring cases had an average score of 10.87, which is strikingly higher than for those that yielded a death sentence. Yet the sentencing on these ten highest-scoring cases is highly variable – reaching from twenty years, to life without parole, to death. Thus, only one case in which a death sentence was imposed scores among the top ten most egregious cases—and that is the unique case of serial killer Michael Ross (who actively pursued his ultimate execution). On the overall scale, the disparity is equally striking. The highest ten scores average 4.84, while the average of death-sentenced cases is 4.09. Only two of the 12 cases in which the death sentence was imposed rank among the top ten scores on this scale.

It is true that the average egregiousness score of the cases in which a death sentence was imposed (8.66 on the composite scale and 4.09 on the overall scale) is higher than that for the 195 cases in which there was a non-death sentence (7.95 on the composite scale and 3.44 on the overall scale). However, more than a quarter (27%--52 of 195) of all non-death cases scored *higher* than the average composite egregiousness score (8.66) of all 12 death cases, and more than one-fifth (21%--40 of 195) of non-death cases scored higher than the overall average (4.09) of these cases.

The failure of egregiousness as an explanatory variable becomes even clearer when the unique case of serial killer Michael Ross, who ultimately waived his appeals and asked to be executed, is excluded. The 11 remaining death sentences have average egregiousness scores of 8.43 on the composite scale, and 4.03 on the overall scale. Further, 17 non-death cases scored higher on the composite scale than the *highest-ranked* of these 11 cases (Rizzo, with a 9.78 score). In addition, two non-death cases have the same score: 9.78. Five non-death cases scored higher on the overall

scale than the highest ranked case of these 11 death cases (Cobb, with a 4.78 score), and nine additional non-death cases are equal.

Last, it is notable that 153 non-death cases scored higher on the composite scale than the *lowest* ranked of the 12 death cases (Santiago, 6.89), and 103 cases scored higher on the overall scale than the *lowest* ranked of these cases (Johnson, 3.33). That means that, on the composite scale, about *three-fourths of all death-eligible cases that did not result in death scored higher than a case in which a death sentence was imposed*. Similarly, about half of these non-death cases scored higher on the overall scale than the lowest-scoring death case.

ii. Egregiousness Across Offense Categories

Across the different categories of offense, we observe wide disparities in the proportion of death-eligible cases that actually receive a death sentence. Table 12 presents data on the distribution of death sentences across offense categories and the egregiousness of death and non-death cases across each category.

Although only eight death-eligible cases have involved the murder of a law enforcement officer, two of the defendants in those cases (25%) received death sentences. Murders of law enforcement officers account for only 4% of the cases in the egregiousness study (8 of 207), but 17% of all death sentences handed down (2 of 12) and 10% of those sustained (1 of 10). The average egregiousness scores for cases in which defendants were sentenced to death for the murder of a law enforcement officer is lower than the average *non-death* scores for sexual assault, kidnapping and victim-under-16 murders on both the composite and overall scales.

Table 12

PERCENT RECEIVING DEATH ACROSS DIFFERENT CATEGORIES OF OFFENSE									
				Egregiousness					
				Composite (4-12)			**Overall (1-5)**		
Category of Offense	**Total N**	**Number of Death Sentences**	**% Sentenced to Death**	Death	Non-Death	All	Death	Non-Death	All
Murder by Someone with a Previous Murder Conviction	4	0	0	NA	7.39	7.39	NA	3.08	3.08
Murder of a Law Enforcement Officer	8	2	25	7.22	6.72	6.85	3.44	2.93	3.06
Death Resulting from Drug Sale	5	0	0	NA	4.56	4.56	NA	1.09	1.09
Defendant Serving Life Sentence	1	0	0	NA	6.89	6.89	NA	3.00	3.00
Murder during Commission of Sexual Assault	22	3	14	9.48	9.24	9.27	4.74	4.47	4.51
Murders with Multiple Victims	70	5	7	9.44	8.24	8.33	4.22	3.35	3.42
Murder for Hire	17	1	6	6.89	6.45	6.48	3.56	2.78	2.83
Murder of Victim Under 16 Years of Age	45	4	9	9.03	8.70	8.73	4.03	3.78	3.80
Murder during Commission of Kidnapping	69	3	4	9.48	8.16	8.22	4.74	3.74	3.78

The category with the next highest rate of death sentences is sexual assault, which had a death-sentence rate of 14% (3 of 22). All of the sexual assault cases that resulted in death sentences also involved kidnapping and were the only kidnapping cases in which a death sentence was imposed. Defendants in cases involving kidnapping received a death sentence in only 4% of those cases (3 of 69). By comparison, about 7% (5 of 70) of defendants in multiple victim cases received death sentences.

iii. Egregiousness Within Category of Offense

For all categories of offenses in which at least one defendant has received a death sentence, the average egregiousness scores for cases with death sentences is higher than those cases in which non-death sentences were imposed (Table 12). However, death sentences are *not* the highest-scoring cases within most categories—particularly when the case of serial killer Michael Ross is excluded:

- **Murder of law enforcement officers**: The average egregiousness scores for the cases in which a death sentence was imposed are 7.22 (composite) and 3.44 (overall). For non-death sentence cases, the average scores are 6.72 (composite) and 2.93 (overall). On the composite scale, one of the death sentences ties with a non-death case for the highest-egregiousness score (7.44) in this category. On the overall scale, neither death sentence case is the highest-scoring.

- **Kidnapping**: The average egregiousness scores for cases in which a death sentence was imposed are 9.48 (composite) and 4.74 (overall). For non-death cases, the average scores are 8.16 (composite) and 3.74 (overall). None of the death cases is the highest-scoring in this category on the overall scale. One death penalty case scores the highest on the composite scale, and that is the unique case of serial killer Michael Ross.

- **Sexual Assault**: The average egregiousness scores for cases in which a death sentence was imposed are 9.48 (composite) and 4.74 (overall). For non-death cases, the average scores are 9.24 (composite) and 4.47 (overall). None of the death cases is the highest-scoring in this category on the overall scale. One death penalty case scores the highest on the composite scale, and that is the unique case of serial killer Michael Ross.

- **Multiple Victims**: The average egregiousness scores for cases in which a death sentence was imposed are 9.44 (composite) and 4.22 (overall). For non-death cases, the average scores are 8.24 (composite) and 3.35 (overall). None of the death cases is the highest-scoring on either the composite or overall scales.

- **Murder for Hire**: Only one death sentence was imposed for a murder-for-hire case. The egregiousness score for this case was 6.89 (composite) and 3.56 (overall). For non-death cases in this category, the average scores are 6.45 (composite) and 2.78 (overall). The case in which a defendant was sentenced to death was not the highest scoring on the composite scale; it tied with a non-death case for the highest score on the overall scale.

- **Victim Under 16**: The average egregiousness scores for cases in which a death sentence was imposed are 9.03 (composite) and 4.03 (overall). For non-death cases, the average scores are

8.70 (composite) and 3.78 (overall). None of the death cases is the highest-scoring on either the composite or overall scales.

This within-category analysis controls for the justification for seeking capital punishment and thus constitutes especially strong evidence of arbitrariness in the ultimate outcomes.

iv. Egregiousness and Race of Defendant

We have already alluded to the consistent finding in numerous studies conducted across the country both in recent years and over time that killers of black victims are not treated as harshly as killers of white victims. As noted above, this is true in Connecticut as well. One consequence of this phenomenon, given that most murders are intra-racial, is that black murderers (who typically kill blacks) appear to get a break, in that the system seems to value their victims less highly than white victims. Thus, we do not see a major disparity in the overall rates of death sentences awarded to white and nonwhite defendants. Since 1973, five white defendants, five black defendants, and two Hispanic defendants have received death sentences in Connecticut (with one white and one Hispanic defendant subsequently relieved of their death sentence). Of the 207 cases in the egregiousness study, there were 83 with white defendants, 80 with black defendants, 43 with Hispanic defendants, and 1 with an Asian defendant.

v. Egregiousness and Race of Victim

Cases with white victims account for 52% of the 207 death-eligible cases, but 67% of all death sentences. Seven percent of all cases involving only white victims (8 of 108) resulted in a death sentence; four percent of cases involving only non-white victims resulted in a death sentence (4 of 97); and no case involving a combination of white and non-white victims (0 of 2).

vi. Egregiousness and Race of Defendant and Victim Combined

Offenses that involved black defendants and only-white victims accounted for one-tenth of all death-eligible cases, but one-fourth of all death sentences. Specifically, death sentences were imposed in 15% of all cases that involved a black defendant and white victim (3 of the 20 cases). In other words, one of every seven black defendants who killed a white victim received a death sentence. By contrast, only one out of every *twenty* white defendants (5%) who killed a white victim received a death sentence.[62] Importantly, this wide disparity does not emerge because black defendant/white victim cases are more egregious than white defendant/white victim cases: white defendant/white victim cases average 9.42 (composite) and 4.19 (overall), while black defendant/white victim cases average 8.11 (composite) and 4.33 (overall). There is a substantial risk that race is a significant factor in charging and sentencing decisions, as the following summary underscores.

Summary of Egregiousness Scores for black, Hispanic, and white defendants who murder white victims; and …

1) were sentenced to death:

- On the composite scale, the average egregiousness score for cases in which a black defendant was sentenced to death for the murder of a white victim is 8.11; on the overall scale this score is 4.33.
- On the composite scale, the egregiousness score for the case in which a Hispanic defendant was sentenced to death for the murder of a white victim is 6.89; on the overall scale this score is 3.56.
- On the composite scale, the average egregiousness score for cases in which a white defendant was sentenced to death for the murder of a white victim is 9.42; on the overall scale this score is 4.19.

[62] Using the Fisher exact test, we find that this difference in sentencing probability, though sizeable, is only marginally significant owing to the small numbers problem (p=0.120 >α=0.05).

2) were not sentenced to death:

- On the composite scale, the average egregiousness score for cases in which a black defendant was *not* sentenced to death for the murder of a white victim is 7.85; on the overall scale this score is 3.50.

- On the composite scale, the average egregiousness score for cases in which a Hispanic defendant was *not* sentenced to death for the murder of a white victim is 6.96; on the overall scale this score is 3.04.

- On the composite scale the average egregiousness for cases in which a white defendant was *not* sentenced to death for the murder of a white victim is 8.26; on the overall scale this score is 3.67.

The harsher treatment of black defendant/white victim cases primarily emerges in the kidnapping and sexual assault murders, but can also be seen in the numerically less frequent categories of police murders and murders for hire. Offenses involving black defendants and white victims account for 12 % of all kidnapping cases (8 of 69), but two of the three kidnapping cases (67%) in which a death sentence was imposed. In contrast, offenses involving white defendants and white victims account for nearly half -- 49% (34 of 69) -- of all kidnapping cases, but only one kidnapping case in which a death sentence was imposed (33% = 1 of 3). This stark difference is not explained by egregiousness—on both the composite and overall scales, cases involving white defendants and white victims score *higher* (8.80;4.07) than cases involving black defendants and white victims (7.72;3.83).

Half of all sexual assault cases involving a black defendant and a white victim resulted in a death sentence. Offenses involving black defendants and white victims account for 18% (4/22) of all sexual assault cases, but 67% (2/3) of all sexual assault cases in which a death sentence was imposed. By contrast, offenses involving white defendants and white victims account for more than two thirds of all sexual assault cases (68% = 15 of 22), but only one sexual assault case resulting in a death sentence—and that was the case of serial killer Michael Ross. Again, this marked difference

in outcome cannot be explained by egregiousness: on both the composite and overall scales, cases involving white defendants and white victims are *more* egregious (9.58; 4.60) than cases involving black defendants and white victims (8.67; 4.50).

In the category of murder of law enforcement officers, the only case involving a black defendant and a white victim resulted in a death sentence. Of the five cases involving a white defendant and a white victim (63% of all murder of a law enforcement officer cases), one resulted in a death sentence, which was then overturned on appeal (Johnson, with egregiousness scores of 7.44 and 3.33). The black defendant/white victim cases scored 7.00 (composite) and 3.56 (overall), and cases involving white defendants and white victims averaged 6.76 (composite) and 2.76 (overall).

In the category of murder for hire, the only case of 17 death-eligible cases to result in a death sentence involved a Hispanic defendant and a white victim (there were 3 Hispanic/white cases in total). Yet there were three times as many cases involving white defendants and white victims (a total of 9). The difference in egregiousness does not track this disparity: cases involving Hispanic defendants and white victims averaged 7.04 (composite) and 3.15 (overall), and cases involving white defendants and white victims averaged 6.65 (composite) and 3.04 (overall).

vii. Egregiousness Across and Within Judicial Districts

Despite the fact that the laws governing the death penalty are state statutes, Connecticut's death penalty regime is marred by substantial within-state geographic disparities. There is dramatic variability in the ratio of death-eligible cases to death sentences imposed across judicial districts. Table 13 summarizes the imposition of death sentences across judicial districts.

The three districts with the most death-eligible offenses together comprise more than half of all death-eligible cases (111 of 207): Hartford (47), Fairfield (36), and New Haven (34). However,

together, these three districts account for only three of the 12 cases in which a death sentence was imposed. By contrast, Waterbury accounts for 6% of death-eligible cases (13 of 207), but 50% (6 of 12) of all death sentences imposed. In other words, fully half of all those on death row come from Waterbury, which has only 1/16th of all the cases that were eligible for the death penalty. In addition to Hartford and Fairfield, the other death sentences were imposed in Windham, New London, and Hartford-New Britain, which had 11, 13, and 10 death-eligible cases respectively.

Table 13

DEATH SENTENCES AND EGREGIOUSNESS BY JUDICIAL DISTRICT, 207 Cases									
District	**Number of Death-Eligible Cases**	**Number of Death Sentences Handed Down**	**Percent Receiving Death Sentences**	**Composite Egregiousness** (4-12)			**Overall Egregiousness (1-5)**		
				All	Death	Non-Death	All	Death	Non-Death
Ansonia-Milford	4	0	0	8.94	N/A	8.94	3.86	N/A	3.86
Danbury	7	0	0	7.65	N/A	7.65	3.38	N/A	3.38
Fairfield	36	1	2.8	8.10	9.11	8.08	3.40	4.11	3.38
Hartford	47	2	4	7.63	7.78	7.62	3.31	3.89	3.29
Hartford-New Britain	10	1	10	7.51	8.56	7.40	3.32	4.67	3.17
Litchfield	9	0	0	9.74	N/A	9.74	4.54	N/A	4.54
Middlesex	7	0	0	8.30	N/A	8.30	3.59	N/A	3.59
New Britain	9	0	0	7.51	N/A	7.51	3.20	N/A	3.20
New Haven	34	0	0	7.55	N/A	7.55	3.18	N/A	3.18
New London	13	1	8	8.05	11.11	7.80	3.56	4.78	3.45
Stamford-Norwalk	6	0	0	7.30	N/A	8.17	3.07	N/A	3.07
Tolland	1	0	0	4.67	N/A	4.67	1.22	N/A	1.22
Waterbury	13	6	46	8.99	8.69	9.25	4.00	4.07	3.95
Windham	11	1	9	8.28	7.44	8.37	3.79	3.33	3.83

Waterbury

Of 13 death-eligible cases, six resulted in death sentences. On the composite scale, cases resulting in a death sentence have a *lower* average egregiousness score than those that did not result in death sentences (8.69 vs 9.25). On the overall scale, the difference in scores for death and non-death cases does not track the difference in outcomes: 4.07 for defendants sentenced to death vs. 3.95 for those not so sentenced.

In Waterbury, 80% of cases involving only white victims resulted in death sentences (4 of 5), while only 25% (1 of 4) of cases involving only black victims resulted in a death sentence. (There is an additional non-death case with two victims – one Hispanic and one black.) The egregiousness

scores for these two victim group cases are (8.71, 4.18) for only white victims and (9.47, 4.06) for only black victims. One of the three cases involving only Hispanic victims resulted in a death sentence, yet these cases involving only Hispanic victims have lower egregiousness scores than cases involving only black victims on both the composite (8.48 vs. 9.47) and overall (3.59 vs. 4.06) scales.

Given the high egregiousness scores of the *non*-death cases in Waterbury, the imposition of the death sentence in Waterbury cannot be explained by egregiousness of offense alone. Table 14 sharpens this conclusion by comparing Waterbury with the rest of the state. While Waterbury cases on the whole are somewhat more egregious than those in the rest of Connecticut, what is especially striking is that non-death cases in Waterbury are much more egregious than elsewhere in the state. Conversely, cases that receive the death penalty in Waterbury have virtually identical egregiousness scores on average as cases receiving the death penalty in the rest of the state.

Table 14

	Comparison of Egregiousness in Waterbury vs Rest of State					
	Composite Egregiousness (4-12)			**Overall** Egregiousness (1-5)		
	All	Death	Non-Death	All	Death	Non-Death
Rest of State	7.88	8.63	7.89	3.41	4.11	3.38
Waterbury	8.99	8.69	9.25	4.00	4.07	3.95

Windham

In Windham, one of 11 death-eligible cases resulted in a death sentence. Its egregiousness scores are 7.44 (composite) and 3.33 (overall). The non-death sentence cases in Windham average 8.37 (composite) and 3.83 (overall). On the overall scale, nine of the ten non-death sentence cases have higher egregiousness scores than the case in which the death sentence was imposed; on the composite scale, eight of ten non-death cases have higher egregiousness scores. Thus, in Windham, a case with the second and third lowest egregiousness scores on the overall and composite scales, respectively, resulted in a death sentence. Once again, egregiousness alone cannot explain the imposition of the death sentence in Windham.

New London

In New London, one of 13 death-eligible cases resulted in a death sentence. Its egregiousness scores are 11.11 (composite) and 4.78 (overall), and it is the case of serial killer Michael Ross. Remarkably, this case does not have the highest egregiousness scores in the New London judicial district, and the Pickles case (the gruesome triple murder discussed in Section IV.E above) with the highest scores -- 11.78 (composite) and 5.00 (overall) -- did not even result in a death sentence. The 12 non-death sentence cases in New London average 7.80 (composite) and 3.45 (overall).

Hartford-New Britain

In Hartford-New Britain, one of the ten death-eligible cases resulted in a death sentence. Its egregiousness scores are 8.56 (composite) and 4.67 (overall). The nine non-death cases in Hartford-Britain average 7.40 (composite) and 3.17 (overall).

On the composite scale, the case that resulted in a death sentence was not the most egregious. Two cases have higher egregiousness scores within the district (8.78 and 9.33). On the overall scale, one non-death case has the same egregiousness score (4.67).

The one case that resulted in a death sentence in Hartford-New Britain was also the only case in which a black defendant murdered a white victim.

Hartford

In Hartford, two of 47 death-eligible cases resulted in a death sentence. The cases that resulted in death sentences have higher egregiousness scores on both scales than the average scores of non-death cases (7.78 vs. 7.62) (composite) and (3.89 vs. 3.29) (overall).. Notably, however, nearly half – 22 cases—had scores higher than the average death sentence case on the composite scale, and one fourth of all non-death cases in this district had higher egregiousness scores than the average death sentence case on the overall scale. Neither of the cases resulting in a death sentence in the Hartford judicial district had the highest egregiousness score on either the composite or overall scales, and neither case made it into the top 10% of egregiousness scores on either scale.

Fairfield

In Fairfield, one of 36 death-eligible cases resulted in a death sentence. While the egregiousness of this case is above the average scores of non-death cases -- 9.11 vs. 8.08 on the composite scale and 4.11 vs. 3.38 on the overall -- this death case is still far from the worst. Nine non-death cases scored higher than this case on the composite scale, and seven non-death cases scored higher on the overall scale.

VII. REGRESSION ANALYSIS

This section discusses our regression analysis of capital charging and death sentence decisions using data on all 207 capital-eligible cases from 1973 to the present for which we have egregiousness scores. The data set includes all of the information discussed in the egregiousness analysis above, but also has additional information, including additional coded variables that describe aggravating elements of the murders and information on the race of the defendant and the race of the victim. Using binary-choice regression models, we estimate the effect of legally relevant and legally suspect variables on the issues that we have discussed throughout the report – who gets charged with a capital felony and who receives a sentence of death. Of course, it is impossible to explore the issue of who gets executed in Connecticut using a statistical model since only one individual has been executed pursuant to Connecticut's post-*Furman* death penalty regime.

A. Methodology

Our goal in this section is to produce a model that explains which cases are charged with a capital crime, and which cases ultimately result in a death sentence. Both outcomes can be viewed as binary in that a death-eligible defendant who makes it into our sample of 207 cases is either charged with a capital felony or not, and is either sentenced to death or not. The standard techniques for modelling these kinds of dichotomous outcomes are logistic regression and the linear probability model, and we present the results using both statistical approaches below.

Table 15 lists summary statistics for the relevant variables.

Table 15: Summary Statistics for 207 Death-Eligible Cases, 1973 - 2007

Independent Variables	Mean	Std. Dev.	Min	Max	Number of Obs. for which Binary Variable =1	N
Defendant White	0.401	0.491	0	1	83	207
Victim White	0.531	0.500	0	1	110	207
Defendant Nonwhite/Victim Nonwhite	0.440	0.498	0	1	91	207
Defendant Nonwhite/Victim White	0.159	0.367	0	1	33	207
Defendant White/Victim Nonwhite	0.029	0.168	0	1	6	207
Defendant White/Victim White	0.372	0.485	0	1	77	207
Special Aggravating Factors	3.628	2.258	0	10	--	207
Composite Egregiousness Score 4-12	7.952	1.326	4.1	11.8	--	207
Overall Egregiousness Score 1-5	3.444	0.810	1	5	--	207
Waterbury Indicator	0.063	0.243	0	1	13	207
Pre-1998 Cases Indicator	0.478	0.501	0	1	99	207
Defendant Female	0.092	0.289	1	0	19	207
Murder for Hire	0.082	0.275	1	0	17	207
Kidnapped	0.333	0.473	1	0	69	207
Sexual Assault	0.106	0.309	1	0	22	207
Multiple Victims	0.338	0.474	1	0	70	207
Under Sixteen	0.217	0.413	1	0	45	207
Law Enforcement Victim	0.039	0.193	1	0	8	207
Previous Murder Conviction	0.019	0.138	1	0	4	207
Defendant Sold Drugs	0.024	0.154	1	0	5	207
Dependent Variables						
Capital-Felony Charge	0.671	0.470	0	1	139	207
Death Sentence (Not Overturned)	0.048	0.215	0	1	10	207

*There is one case of a defendant serving life, but we include it in the category of "Previous Murder Conviction."
**Because of the small number of cases in the categories of "Law Enforcement Victim," "Previous Murder Conviction," and "Defendant Sold Drugs," we don't separately control for these categories in our regressions.

A few points should be noted from the above summary table. First, roughly 40 percent of the sample defendants were white, as were 53 percent of the victims. Second, 81 percent of capital-eligible murders were same-race killings, with 44 percent involving nonwhites and 37 percent involving whites. Third, the table shows the mean values for the number of special aggravating

factors (somewhat over 3.5 per case), as well as the two egregiousness score values.[63] Fourth, only 13 cases were from the Waterbury judicial district, but, as we will see, they are vastly disproportionately charged as capital felonies and lead to death sentences. Fifth, one sees that fewer than 10 percent of capital-eligible defendants are female, and that kidnapping and multiple victim cases are the most common death-eligible cases with 69 and 70 cases (out of a total of 207), respectively.

Sixth, just under half of the cases (99 of 207) occurred before the end of 1998. Appendix E reports summary statistics for the pre- and post-1998 cases, and one sees that they generally look similar in all respects, with 5 of the sustained death sentences generated during the first period and another 5 generated during the second period. Overall, two thirds of death-eligible cases were charged as capital felonies and 4.8 percent resulted in a sustained death sentence.

1. Specifying The Statistical Model

To generate estimates using binary-choice models, one must first specify an appropriate statistical model. Turning first to the charging outcome, our Model 1 specification relates the probability that an individual defendant in our sample of 207 death-eligible cases will be charged with a capital felony, controlling for race of the defendant, race of victim, and the degree of deathworthiness of the crime, as follows:

$$(1)\ PR(\text{Capital Charge} \mid \text{Death Eligible}) = f(\text{Constant}, DNW\_VNW, DNW\_VW, DW\_VNW, \text{Special Aggravating Factors}, \text{Egregiousness Score}, \text{Waterbury}, \text{Pre-1998 case}, \varepsilon)$$

[63] The special aggravating factors are listed in the next section.

Here, DNW_VNW is a dummy variable that takes on the value of 1 if both the defendant and victim are not white; DNW_VW is a dummy that is 1 if the defendant is not white and the victim is white; and DW_VNW is a dummy that is 1 if the defendant is white and the victim is not white.[64]

The Special Aggravating Factors variable is the sum of Variables 315 through 324 on the coding instrument. The factors included (in the order they appear on the Data Collection Instrument) are: (1) Methodical infliction of severe pain to punish victim, to extract information, or to satisfy sadistic urge; (2) Brutal clubbing or other unnecessarily painful method of attack; (3) Brutal stomping or beating with hands or feet; (4) Mutilation during the homicide; (5) Multiple gunshot wounds; (6) Single shot to head; (7) Multiple gunshots to head; (8) Slashed throat; (9) Multiple stabbing; (10) Other mode of multiple lethal or painful attack; (11) Extremely bloody; (12) Victim or a nondecedent victim held hostage (other than kidnap); (13) Victim or a nondecedent bound or gagged; (14) Victim or a nondecedent forced to disrobe or disrobed by perpetrator (in whole or in part); (15) Attempt to dispose of/conceal body after death; (16) Multiple victims; (17) Bodily harm to one other than a decedent; (18) Sniper killing; (19) Luring/ambushing/lying in wait; (20) Victim killed in presence of family members or close friends; (21) Ten or more stab wounds or shots, except when murder weapon was a penknife or other small cutting instrument; (22) Physical details of the crime are unusually repulsive (*e.g., victim drowned in own blood*); (23) Sexual assault of victim prior to killing. Since there are as many as ten potential aggravating factors coded, this variable ranges from 0 to 10.

[64] Our data allows us to identify a greater number of demographic categories, such as Hispanic and other race, but we simplify our coding of race to allow for easier interpretation of interaction effects, so that there are only two possible races, white and non-white. This generates four possible defendant race×victim race interactions: white defendant/white victim; white defendant/nonwhite victim; nonwhite defendant/nonwhite victim, and nonwhite defendant/white victim. A specification that includes a constant term and dummies for all four of these cannot be estimated because the variance-covariance matrix is not invertible. Hence, one must omit one dummy from the complete set of variables, and we omit the white defendant/white victim variable. This then means that the coefficients on the other dummies are to be interpreted as measuring effects *relative* to those for a white defendant killing a white victim.

The Egregiousness Score has been extensively discussed earlier, and it is a continuous variable constructed either as a composite number ranging from 4 to 12 or an overall score ranging from 1 to 5. Waterbury is a dummy variable equal to one if the case is from the Waterbury judicial district. The inclusion of this variable allows one to test whether, holding other factors constant, Waterbury cases are treated differently in capital charging and sentencing. The Pre-1998 indicator is a dummy variable that reveals whether the data was collected in the initial data collection phase which went through 1998 cases, or in the second phase. When coding is conducted at different times, it is customary to include such controls in the statistical analysis to ensure greater uniformity across the entire data period.[65]

Finally, ε is a random error, and throughout, the *i* subscript designates the individual case, and runs from 1 to 207 for the full sample of death-eligible cases for which we have egregiousness scores.

Model 2 then seeks to explain who actually receives a death sentence, conditional on being one of the 207 death-eligible cases, using the same basic specification as model 1. That is

(2) $PR(\text{Death Sentence} \mid \text{Death Eligible}) = f(\text{Constant, DNW\_VNW, DNW\_VW, DW\_VNW, Special Aggravating Factors, Egregiousness Score, Waterbury, Pre-1998 case, } \varepsilon)$

Logistic regression is non-linear, which means that the raw regression coefficients are not interpretable as the effect of a change in the independent variable on the probability of a positive

[65] This variable can also help control for the effect of the exclusion of 17 cases, 15 of which were post-1998 cases, that were not included in the egregiousness coding because their summaries were not available at the time the second wave of coding had to proceed.

outcome (i.e., the probability that a defendant is charged or sentenced to death). Standard transformations of these coefficients, however, can generate average probability point estimates, and we use STATA's MFX command to produce these marginal effects.[66] In addition, as the name suggests, our linear probability model estimates linear effects, and is thus directly interpretable as the change in the percentage-point probability of either capital-charging or receiving a death sentence for each explanatory variable in the model. The linear and non-linear results are generally similar in any case.

2. Distinguishing Controls from Intermediate Outcomes

It is the task of every analyst to be clear about the relevant outcome variables to be explained, as well as the appropriate controls that are to be included in the researcher's statistical model. A substantial literature has developed over the proper approaches in testing for the presence of racial discrimination in social outcomes.[67] (For example, see the report and articles cited by the Panel on Methods for Assessing Discrimination, National Research Council, Measuring Racial Discrimination (National Academy Press, 2004), of which I was a member.)

In Turner v. Murray, 476 U.S. 28, 33-6 (1986), the U.S. Supreme Court acknowledged that capital sentencing juries are given such broad discretion to choose a sentence of death that the opportunity for race to influence their decisions can be substantial:

> In a capital sentencing proceeding before a jury, the jury is called upon to make a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" *Caldwell v. Mississippi,* 472 U. S. 320, 472 U. S. 340, n. 7 (1985) (quoting *Zant v. Stephens,* 462 U. S. 862, 462 U. S. 900 (1983) (REHNQUIST, J., concurring in judgment)). The Virginia statute under which petitioner was sentenced is instructive of the kinds of judgments a capital sentencing jury must make. First, in order to

[66] The transformation into probabilities is purely algebraic, and simply expresses the same information in more readily comprehensible terms.
[67] Similar considerations would apply to testing for geographic arbitrariness in the implementation of the death penalty.

> consider the death penalty, a Virginia jury must find either that the defendant is likely to commit future violent crimes or that his crime was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." …Second, the jury must consider any mitigating evidence offered by the defendant. Mitigating evidence may include, but is not limited to, facts tending to show that the defendant acted under the influence of extreme emotional or mental disturbance, or that at the time of the crime the defendant's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired." …Finally, even if the jury has found an aggravating factor, and irrespective of whether mitigating evidence has been offered, the jury has discretion not to recommend the death sentence, in which case it may not be imposed. …
>
> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate, but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.
>
> The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos,* 463 U. S. 992, 463 U. S. 998-999 (1983). We have struck down capital sentences when we found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake.'" …
>
> In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized. By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury. (footnotes omitted).

While the death penalty statute in Connecticut is different in some details from the Virginia statute, it also requires the jury to make highly subjective decisions. As noted, a crucial element of every capital sentencing hearing in Connecticut is establishing the presence of an aggravating factor, which most commonly requires a judgment that the murder was committed in an "especially

heinous, cruel, or depraved manner." Once that hurdle is reached, highly subjective judgments about anything from the demands of "mercy" to the nature of the defendant's history of abuse or current psychological burdens to present-day virtues must be evaluated to see if these factors are both mitigating in nature and sufficient to outweigh the aggravating factors to such a degree that the defendant's life should be spared. The Supreme Court was clearly correct in recognizing that the opportunities for racial or other biases to influence these decisions is not inconsiderable.

This discussion not only informs us of the need to test for the presence of racial discrimination in capital sentencing, but also guides us in the process of that testing. Obviously, as the Supreme Court made clear in Turner, one needs to consider both the race of the defendant and the victim in testing for the possibility of racial bias, which has led to our decision, discussed above, to include an array of such race of defendant, race of victim controls. At the same time, the facts of the murder itself are relevant to a model explaining capital sentencing outcomes, and these facts are presumably ascertained without reference to (and perhaps without even knowledge of) the racial characteristics of the defendant. As a result, our race-blind egregiousness measures and our count of the special aggravating factors are legitimate control variables. Similarly, controls for the time period and judicial district in which the crime was committed are also appropriate controls that influence capital outcomes without a high potential for taint from a biased decisionmaker. Accordingly, all of these appropriate pre-treatment controls are included in the statistical models that are presented in this report.

These objective, pre-treatment variables should be contrasted to indicators, such as the presence or absence of aggravating or mitigating factors. Such indicators are likely to be the very vehicle through which discriminatory judgments are made and thus are not appropriate controls.

Rather these are deemed to be "intermediate outcomes" (on the path to ultimate outcomes such as a death sentence). Indeed, Samuel Gross and Robert Mauro discuss empirical evidence that "official *descriptions* of homicides by prosecutors were affected by racial considerations."[68] Accordingly, it should not be surprising that race would influence the highly subjective judgments that must be made before a sentence of death is handed down. It is clearly established in the literature that one should *not* control for such post-treatment intermediate outcome variables, which are likely to be influenced by the treatment of interest (the criminal justice system's perception of the racial characteristics of the defendant and victim).[69] Panel on Methods for Assessing Discrimination, National Research Council, Measuring Racial Discrimination 77-89 (National Academy Press, 2004); Daniel Ho, "Why Affirmative Action Does Not Cause Black Students to Fail the Bar," 114 Yale L.J. 1997 (2005).

Consequently, rather than relying on a post-treatment decision that identifies whether the trier of fact found an aggravating or mitigating factor, we provide a pre-treatment egregiousness assessment of each case based on a scrubbed summary that concealed evidence of the race of both defendant and victim. This egregiousness score is a better measure of deathworthiness than an indicator of a finding of an aggravating or mitigating factor, which may be tainted by discrimination. Moreover, at the penalty phase of a capital trial, a Connecticut defendant is free to introduce any evidence of mitigation. This information will generally not be available to the prosecutor at the time that he or she is making his capital felony charging decision and may not be available when the

[68] Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stanford L. Rev. 27, 78, 96 (1984).

[69] The analogy often used is that if one were testing for whether smoking increases one's chance of death, one should not control for the presence of lung cancer, since that is not an appropriate pre-treatment covariate but is rather a post-treatment intermediate outcome, which will in turn influence the ultimate outcome of death. A researcher who failed to heed this advice might well find that, controlling for lung cancer, smoking does not increase one's risk of death – an obviously erroneous conclusion.

decision to push ahead for the death sentence is made. This means that for the vast bulk of cases, mitigating factors are not the central elements in capital sentencing decisions even though they are obviously critical in the roughly 15 percent of the cases that get to the penalty hearing. Indeed, as a practical matter, such information will be much less likely to be ascertainable for the vast bulk of death-eligible cases that never go to a penalty trial.

Furthermore, under the Connecticut death penalty regime, juries need not specify what factor they found to be mitigating, so that even when a mitigating factor is found, there is no way to know what the factor is. To see this, consider the case of State v. Griffin, 251 Conn. 671, 741 A.2d 913, as described by the Connecticut Supreme Court in State v. Breton, 264 Conn. 327, 824 A.2d 778 (Conn. 2003):

> On November 1, 1993, the defendant and another individual, Gordon ‘‘Butch’’ Fruean, Jr., entered the home of the defendant’s former girlfriend….While there, the defendant and Fruean attacked two individuals. The defendant shot each victim, one of them multiple times. Upon realizing that the victims were still alive, the defendant stabbed them both multiple times….Again realizing that the victims were still alive, the defendant smashed a glass mason jar over one victim’s head and a ceramic lamp over the other victim’s head…. The state, at the defendant’s penalty phase hearing, sought to prove the aggravating factor that the defendant had committed the murders in an especially heinous, cruel or depraved manner.
>
> The defendant claimed twenty mitigating factors.…These were: (1) the role and actions of Fruean remain uncertain; (2) the defendant had no record of criminal activity other than a juvenile matter; (3) there was no evidence that the defendant had a violent nature other than the crime for which she was convicted; (4) the defendant had been a productive member of society for thirty years; (5) the defendant was an active and involved mother; (6) the defendant was a loving and devoted grandmother; (7) the defendant took handicapped children into her home for visits; (8) the defendant took care of a profoundly retarded child, making the child part of the defendant’s family; (9) the defendant welcomed her children’s friends into her home when they were in need; (10) the defendant was a hard worker and provided financial support to her family; (11) the quality of the defendant’s work with the handicapped; (12) the defendant went back to school to earn her high school degree and attend college after raising her children; (13) the defendant’s voluntary involvement in community activities; (14) the defendant’s generous dealings with others; (15) the defendant’s background character and history suggest that she is unlikely ever to be a violent

> threat to others in the future; (16) the defendant provides positive contributions to the lives of her children, grandchildren and friends; (17) the nature of the defendant's crimes is so out of character that a death sentence would be inappropriate; (18) a factor concerning the nature of the crime that in fairness or mercy constitutes a basis for a life sentence; (19) a factor concerning the defendant's character, history or background that in fairness or mercy constitutes a basis for a life sentence; and (20) the combination of any or all of the factors, in fairness or mercy, provides a reason for sentencing the defendant to life in prison.
>
> The jury returned a special verdict finding that the state had proved the aggravating factor beyond a reasonable doubt for both of the murders…. The jury further found that the defendant had proved the existence of an unspecified mitigating factor or factors….The trial court imposed a sentence of life imprisonment without the possibility of release.

Obviously, there is no way to identify what fact or set of considerations led the jury to find a mitigating factor in the *Griffin* case. Perhaps the jurors were persuaded that the defendant did not have a violent nature, despite the evidence of this atrocious crime, or perhaps for religious or moral reasons they felt mercy should be extended to all criminal defendants. All that can be said is that the jury extended leniency to the defendant, and by *not* controlling for the finding of a mitigating factor, we can assess whether that judgment was based on the nature of the crime or instead was a product of race, gender, geography, or other illegitimate factors.

It thus must be underscored that our goal of learning whether capital sentencing decisions appropriately adhere to our measures of deathworthiness will not be undermined by our decision not to include controls for aggravating and mitigating factors found by the trier of fact. Specifically, omitting these factors from our statistical model will not lead to a downward biased estimate of the impact of egregiousness and our pre-treatment measure of special aggravating factors. We know this because if the (statutory) aggravating and mitigating factors are uncorrelated with our deathworthiness variables, then it is well-known that our models will generate unbiased estimates of the impact of these two deathworthiness variables. On the other hand, if these aggravating and

mitigating factors are correlated with egregiousness, then it is highly likely the correlation will be positive for aggravating factors and negative for mitigating factors. This implies that our omission will serve to *increase* the size of the estimated effect of "egregiousness" on the risk of receiving a death sentence. Thus, one should expect that our statistical models will either correctly estimate the impact of egregiousness on capital sentencing or tend to exaggerate this effect rather than to minimize it.[70]

B. Results

Tables 16 and 17 present the estimated effects derived from our regression analysis, with columns 1–3 presenting the results for capital-felony charging decisions and columns 4–6 depicting the results for the imposition of a death sentence. These tables are identical except that Table 16 uses the composite egregiousness measure ranging from 4-12, while Table 17 uses the overall egregiousness measure on a 1-5 scale. For each of the capital outcomes, the first column (thus, columns 1 and 4) presents our logit coefficient estimates. Just to the right of these logit coefficients (columns 2 and 5), we present the related marginal effect of the particular explanatory variable. Finally, the third and sixth columns show the corresponding linear probability estimates.

[70] The only situation under which our estimated effect of egregiousness on capital sentencing would be downward biased would be if more egregious cases were associated with a reduced likelihood of finding statutory aggravating factors and an increased likelihood of finding mitigating factors. In other words, our estimate of the impact of our deathworthiness factors on capital sentencing would be understated only in the situation in which the worse the crime, the less likely a defendant would be to receive the death penalty. I assume the state is not anxious to make that claim.

1. The Effect of Race and Egregiousness on Capital Charges

Columns 1-3 of both Tables 16 and 17 show the effect of various explanatory variables on the probability that a defendant will be charged with a capital felony. One striking feature of these regressions is the irrelevance of the two measures in the model that are designed to capture the aggravated nature or deathworthiness of the case: the Egregiousness variable and our measure of Special Aggravating Factors. This finding provides strong additional support for the conclusions we drew above in Sections IV and VI about the arbitrary and random processing of death-eligible cases. Knowing the egregiousness of the murder (measured in two separate indices) and the number of special aggravating circumstances does *not* help explain whether or not the defendant is charged. Both these factors are small in absolute value and neither is statistically significantly different from 0. They explain virtually none of the variation observed in the data concerning who gets charged with a capital felony and who does not. In fact, in both tables, the coefficient on Egregiousness is even *negative*, which implies that higher values of this variable are associated with lower probability of being charged with a capital felony. As columns, 2 and 3 reveal, each one-unit increase in the 4-12 Egregiousness score is associated with a roughly 3 percentage point *drop* in the likelihood of being charged as a capital felony (which for the data as a whole is 67.1 percent, as shown in summary Table 15). The comparable Table 17 coefficients on the 1-5 Egregiousness measure show the same pattern.

Table 16: Explaining Capital Charging and Death Sentences in 207 Connecticut Death-Eligible Cases, 1973 – 2007, Using Composite Egregiousness Measure

	Dependent Variable = Capital Charges | Death Eligible			Dependent Variable = Death Sentences | Death Eligible		
	(1)	(2)	(3)	(4)	(5)	(6)
	Logit	Logit Marginal Effects	Linear Prob. Model	Logit	Logit Marginal Effects	Linear Prob. Model
Explanatory Variables						
Defendant Nonwhite/ Victim Nonwhite	-0.427 (0.345)	-0.092	-0.089 (0.074)	-0.706 (1.236)	-0.010	-0.021 (0.026)
Defendant Nonwhite/ Victim White	0.949 (0.534) *	0.174	0.155 (0.079) *	1.900 (0.628) **	0.060	0.082 (0.051)
Defendant White/ Victim Nonwhite	-0.800 (0.943)	-0.189	-0.169 (0.226)	0.735 (1.293)	0.016	0.038 (0.119)
Composite Egregiousness (4-12)	-0.158 (0.139)	-0.034	-0.032 (0.028)	0.289 (0.270)	0.004	0.003 (0.012)
Special Aggravating Factors	0.121 (0.077)	0.026	0.024 (0.016)	0.276 (0.143) *	0.004	0.011 (0.006) *
Waterbury	1.035 (0.754)	0.178	0.179 (0.122)	3.584 (0.990) **	0.298	0.356 (0.132) **
Pre-1998 Cases	0.849 (0.319) **	0.178	0.171 (0.064) **	-0.207 (0.654)	-0.003	0.003 (0.026)
Constant	1.212 (1.053)		0.766 (0.214) **	-7.598 (2.269) **		-0.043 (0.088)
R2 or Pseudo R2	0.076		0.088	0.330		0.206
N	207		207	207		207
Test for Joint Difference from Defendant White/Victim White						
Defendant Nonwhite *p* -value	$\chi^2(2)$=7.47** [0.0239]		F(2,199)=4.97** [0.0078]	$\chi^2(2)$=10.30** [0.0058]		F(2,199)=1.99 [0.1396]
Def. & Victim of Diff. Races *p* -value	$\chi^2(2)$=4.22 [0.1214]		F(2,199)=2.43* [0.0903]	$\chi^2(2)$=9.17** [0.0102]		F(2,199) =1.32 [0.2699]

Robust Standard Errors in Parentheses, ** = p < 0.05, * = p < 0.10

The omitted category from the race of defendant and victim variables is defendant white/victim white.

Table 17: Explaining Capital Charging and Death Sentences in 207 Connecticut Death-Eligible Cases, 1973 – 2007, Using Overall Egregiousness Measure

	Dependent Variable = Capital Charges | Death Eligible			Dependent Variable = Death Sentences | Death Eligible		
	(1)	(2)	(3)	(4)	(5)	(6)
	Logit	Logit Marginal Effects	Linear Prob. Model	Logit	Logit Marginal Effects	Linear Prob. Model
Explanatory Variables						
Defendant Nonwhite/ Victim Nonwhite	-0.455 (0.351)	-0.098	-0.097 (0.075)	-0.290 (1.344)	-0.003	-0.010 (0.029)
Defendant Nonwhite/ Victim White	0.986 (0.529) *	0.180	0.163 (0.078) **	2.011 (0.779) **	0.041	0.086 (0.053)
Defendant White/ Victim Nonwhite	-0.836 (0.959)	-0.198	-0.178 (0.229)	0.948 (1.390)	0.014	0.038 (0.119)
Overall Egregiousness (1-5)	-0.252 (0.238)	-0.054	-0.054 (0.047)	1.723 (0.495) **	0.016	0.032 (0.021)
Special Aggravating Factors	0.123 (0.079)	0.026	0.025 (0.016)	0.115 (0.170)	0.001	0.005 (0.006)
Waterbury	0.990 (0.773)	0.172	0.177 (0.127)	3.371 (1.041) **	0.171	0.338 (0.132) **
Pre-1998 Cases	0.801 (0.330) **	0.169	0.161 (0.066) **	-0.214 (0.701)	-0.002	0.012 (0.027)
Constant	0.848 (0.814)		0.700 (0.158) **	-11.365 (2.222) **		-0.116 (0.070)
R2 or Pseudo R2	0.075		0.088	0.376		0.214
N	207		207	207		207
Test for Joint Difference from Defendant White/Victim White:						
Defendant Nonwhite *p* -value	$\chi^2(2)$=8.14** [0.0170]		F(2,199)=5.63** [0.0042]	$\chi^2(2)$=7.44** [0.0242]		F(2,199)=1.84 [0.1614]
Def. & Victim of Diff. Races *p* -value	$\chi^2(2)$=4.65* [0.0978]		F(2,199)=2.81* [0.0626]	$\chi^2(2)$=6.75** [0.0343]		F(2,199) =1.36 [0.2584]

Robust Standard Errors in Parentheses, ** = p < 0.05, * = p < 0.10
The omitted category from the race of defendant and victim variables is defendant white/victim white.
This table is identical to Table 16 in all but one respect - that table used the composite egregiousness measure (4-12), and this table uses the overall egregiousness measure (1-5). As one can see, the basic findings of the two tables are unaffected by the choice of egregiousness scale.

We have therefore now confirmed a finding discussed earlier in the report: roughly one-third of death-eligible cases (Figure 5 shows the numbers to be 68 of 207) drop out of the pathway to execution even though they are no different in egregiousness, number of aggravating factors, or deathworthiness than the other two-thirds that move on. This is a damaging indictment of any death

penalty regime that is supposed to be designed to limit its application to the cases that are the worst of the worst. Arbitrary and capricious factors—or at least utterly random factors virtually unrelated to deathworthiness—determine which among the entire array of death-eligible cases in Connecticut will be taken off the death-penalty track and which shall move on.

What about the effects of victim and defendant race? Controlling for Egregiousness and the presence of Special Aggravating Factors (as well as the Waterbury district and a Pre-1998 indicator), one sees that a pattern that has been found throughout the country for decades is present in the Connecticut capital-sentencing regime as shown in Tables 16 and 17: felony charging outcomes are significantly influenced by the race of both the victim and the defendant. For example, consider the three race dummies in columns 2 and 3 of Table 16, which show the effect of race on probability of being charged, relative to a capital-eligible murder in which the defendant and victim were both white. Perhaps not surprisingly from the perspective of decades of experience with the death penalty around the country, whites who kill nonwhites have the lowest probability of being charged with a capital felony controlling for deathworthiness of the murder—roughly 19 percentage points below the charging rate for white on white murders.[71] The second lowest rate of capital-felony charging is for nonwhite-on-nonwhite murders, roughly nine percentage points below white-on-white murders. Again perhaps unsurprisingly, those committing nonwhite-on-white death-eligible murders are charged with a capital felony at 17 percentage points *higher* rates than murders of similar egregiousness and other deathworthy factors committed by whites on whites. Importantly, as the penultimate row at the bottom of columns 1 and 3 reveals, nonwhite defendants do indeed experience statistically significantly different capital-felony charging rates than those committing

[71] Given the small sample size for this category – only 2.9 percent of the 207 capital-eligible murders fall into this category – this coefficient is not statistically significantly different from the omitted category of white on white murders.

white-on-white murders.[72] In other words, race matters in capital-felony charging in much the way that your average citizen might predict, even after controlling for the egregiousness and aggravating factors of the crime.

Table 17 presents the same regressions shown in Table 16, but instead measures murder egregiousness using the overall 1-5 scale. The basic story of the impact of race and egregiousness on capital charging is virtually identical. Indeed, the racial disparities even grow slightly in Table 17. Illegitimate factors have substantial impact on charging decisions while legitimate factors bearing on deathworthiness have no impact (or in the case of egregiousness, even perverse impacts) on which death-eligible cases will be charged as capital felonies. In other words, the conclusions discussed above are not sensitive to the choice of the two egregiousness measures that we used to evaluate the 207 death-eligible cases.

2. The Effect of Race and Egregiousness on <u>Death Sentences</u>

Since there have only been 10 (sustained) sentences of death in Connecticut, the probability of receiving a (sustained) death sentence from within the 207 death-eligible cases analyzed in our sample is relatively small: Table 15 shows the percentage is 4.8 percent, a figure that is far smaller than the 67.1 percent probability that a death-eligible case will be *charged* as a capital felony. Nonetheless, in broad contours, the basic story of arbitrariness and the importance of race that we have just seen for capital-felony charging comes through in analyzing which capital-eligible defendants will receive death sentences, albeit with some differences in detail.

[72] The test for joint differences examines whether the 9.2 percentage point *lower* rate of capital charging experienced by nonwhite defendants who murder nonwhite victims and the 17.4 percentage point *higher* rate of capital charging experienced by nonwhites who kill whites is statistically significantly different from the capital charging rate experienced by whites who murder whites. In both columns 1 and 3, these capital-felony charging probabilities are significantly different at the .05 level.

We just saw in the regression models discussed in the previous section that, controlling for the deathworthiness of the case, nonwhite defendants with white victims are *charged* with capital felonies at a substantially higher rate than others. A similar pattern for death sentencing can be seen in both Tables 16 and 17: nonwhite defendants with white victims have roughly double the risk of being sentenced to death as other convicted death-eligible defendants, holding the egregiousness of the crime constant. One can see this in Table 16 by looking at the estimated marginal effect in column 5, which shows that nonwhite defendants with white victims are sentenced to death at a rate 6 percentage points higher than white defendants with white victims. This figure is more than twice the size of the overall rate of death sentences in our sample of 4.8 percent. Table 17 generates a similar pattern in terms of sign and significance, although the elevated rate of death sentencing of 4.1 percentage points is somewhat less than a doubling of the risk under this column 5 logit estimate.[73]

3. Summary: The Effect of Race and Egregiousness on Capital Charging & Sentencing

When one looks across the entire array of estimates depicted in Table 16 and 17, the bottom line is the following: the overwhelming evidence is that arbitrary and capricious elements, rather than legitimate egregiousness and aggravating factors, influence charging and sentencing in death-eligible cases in Connecticut. The race of defendants and victims still has a statistically significant impact on both who gets charged with a capital felony and who gets sentenced to death. Connecticut's death penalty regime fails to single out the worst of the worst for execution, and is marred by racially disparate charging and sentencing outcomes.

[73] Note that the column 6 estimates in Tables 16 and 17 of the higher risk of death sentencing of nonwhite defendants with white victims are both in excess of 8 percentage points.

Looking across all six columns in both Tables 16 and 17, one sees that three rows provide consistent and statistically significant evidence that race of victim and defendant matter for both capital charging and capital sentencing, while two other rows measuring egregiousness and special aggravating factors do not reveal a similar consistent pattern of statistical or practical significance in effecting capital sentencing decisions.[74] In other words, deathworthiness in the sense of identifying the "worst of the worst" capital-eligible murders (as measured in our two variables) is not a substantial influence in Connecticut's capital punishment system, while race is. More specifically, for race, both Tables 16 and 17 reveal that nonwhites who kill whites face both higher rates of capital charging (an increase of roughly 17-18 percentage points against an overall charging rate of about 67 percent) and a higher likelihood of receipt of a death sentence (an increase of 4-6 percentage points against an overall death sentencing rate of 4.8 percent). Moreover, the picture across all models in both Tables 16 and 17 is that charging and death sentencing decisions are statistically significantly different for nonwhite defendants compared to white-on-white murderers and for cross-race murders compared to white-on-white murders, as shown in the joint tests for significance appearing in the last two rows of these tables.

The impact of race on capital *sentencing* is strongest for the defendant nonwhite, victim white category, and similar in direction for both capital charging *and* sentencing. That is, the harsher treatment for these cases by prosecutors in charging is compounded and exacerbated in the subsequent stages on the path to a sentence of death. In contrast, death-eligible cases involving nonwhite victims are *charged* at *lower* rates: the point estimates in Table 16 for the two nonwhite victim categories are *lower* charging rates of 9.2 and 18.9 percentage points for nonwhite and white

[74] The egregiousness and special aggravating factor variables are not consistently statistically significant, consistently correctly signed or large in magnitude for either capital charging or sentencing.

defendants, respectively. These racially disparate charging rates are slightly more extreme in Table 17. But defendant white, victim nonwhite death-eligible cases appear to get death sentences at a somewhat higher (albeit statistically insignificant) rate than defendant white, victim white cases, despite the more lenient treatment the former cases receive from Connecticut prosecutors in initial capital-felony charging.

4. Geographic Arbitrariness in Death Penalty Outcomes: The Impact of Waterbury

Given the constitutional demand that the death penalty be limited to the "worst of the worst" cases, geographic disparity in the administration of a state's death penalty regime is highly problematic: it cannot be the case that a murder that is not "the worst of the worst" in one part of the state somehow becomes among the most egregious if committed in another judicial district. Of course, geographic disparities may be found in other elements of the criminal justice system, but what is accepted in those areas is not permissible in the administration of a capital sentencing scheme: the U.S. Supreme Court has been unwavering in the view that "death is different."

We have already noted the serious concerns about geographic disparities as part of an overall pattern of arbitrariness in the implementation of the Connecticut death penalty. Recent studies in New York, Nebraska, and Virginia have all identified geography within the state as a potent determinant of who receives the death penalty.[75]

[75] "Capital Punishment in New York State: Statistics from Six Years of Representation (1995-2001)," A Report from Capital Defender Office; The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis (10/11/02); [http://www.nol.org/home/crimecom/homicide/homicide.htm]; "Review of the Virginia System of Capital Punishment," issued January 2002 by the Joint Legislative Audit and Review Commission. [http://jlarc.state.va.us/reports/rpt274.pdf].

Chief Public Defender Gerard Smyth, appearing before an informational hearing on the Connecticut Death Penalty before a joint committee of Connecticut House and Senate lawmakers on January 31, 2005, testified as follows on the issue of the arbitrariness of the state's death penalty system:

> I have heard Mr. Connelly [Waterbury State's Attorney John Connelly] recently, and Mr. Morano [the Chief State's Attorney] this morning, say that the death penalty is reserved for the worst of the worst. And while I would not suggest in any way that the people on death row have not committed highly egregious crimes, in reality, that statement that they are the worst of the worst is simply not true.
>
> For example, we have had 33 convictions of multiple murders since the early 1980's, when prosecutions began under this statute. Of those 33 people convicted of multiple murders, only 2 have been sentenced to death, Robert Breton and Robert [Courchesne], both out of the Waterbury Judicial District. All the others, the 31 others, have been sentenced to life imprisonment without the possibility of release or some lesser sentence.
>
> We are talking about people who have killed, in some instances three or four or even five people at the same time. Quite frankly, there are many people who are doing life sentences who are worse than the people on death row.
>
> And when I say that, what I mean is that they are worse in terms of their prior record, they are worse in terms of mitigating evidence they had available to present, they are worse in terms of their degree of remorse, and they are worse in terms of the number of persons they killed and the amount of damage and harm they have caused to their victims.
>
> And so, when you look at what differentiated those 2 people who got death from the other 31 who didn't, I would point out that both came from the Waterbury Judicial District.
>
> …
>
> The point is that there is a lot of money and a lot of effort expended on everyone's part for a very small of number of death sentences that are actually imposed. And in terms of arbitrariness, of the ten death sentences that have been imposed under our statutes, one was reduced to life imprisonment by the Supreme Court. So there are then a total of nine death sentences. And of the nine, six were in the Waterbury Judicial District, two were in the Hartford Judicial district, and one, the Ross case, was in the New London Judicial District.
>
> And so there are no death sentences in the remaining ten judicial districts throughout the state. So I think it is clear that there is no consistency in which the manner the death penalty

> is administered. The law is not being applied evenly around the state, and it is indisputable that it is arbitrary factors that determine who it is that is actually sentenced to death.

While the numbers presented in this report are more up to date than those presented by the Chief Public Defender in early 2005, the evidence presented earlier in this report strongly supports his conclusion concerning the arbitrariness of the Connecticut death penalty regime and his position that the death penalty in Connecticut is *not* reserved for the worst of the worst. A persistent element of the charge of geographic arbitrariness in the implementation of the Connecticut death penalty has been that Waterbury is the outlier judicial district in Connecticut. Our regression analysis in Tables 16 and 17 is well suited to test the proposition of whether, holding legitimate deathworthiness factors constant, death-eligible cases in Waterbury are treated more harshly in capital charging or in death sentencing.

If one looks at either Table 16 or Table 17, the evidence suggests unequivocally that death-eligible cases are substantially more likely than otherwise identical cases to receive a sentence of death in Waterbury than in the rest of the state. The effect is very large and highly statistically significant. While only 4.8 percent of the 207 capital-eligible cases in our sample received a (sustained) sentence of death, capital-eligible defendants in Waterbury are sentenced to death, holding the other specified factors constant, at a rate 17-36 percentage points higher than non-Waterbury defendants.[76]

One question that has been debated is whether the Waterbury prosecutor brings capital charges at a higher rate than other jurisdictions, or simply prevails in securing a death sentence at a higher rate than other jurisdictions. Tables 16 and 17 generate point estimates that the impact of

[76] The lower figure is found in Table 17 column 5 (the estimated marginal effect from the logit model using the overall egregiousness measure) in the row identifying the Waterbury judicial district as an explanatory factor; the higher figure can be found in Table 16 column 6 (the linear probability estimate using the composite egregiousness score).

being in Waterbury is to elevate the probability of having a death-eligible case charged as a capital felony by 17-18 percent. Despite the low level of significance given the small sample size, this point estimate suggests a non-trivial increase in the likelihood of capital charging in Waterbury and thus undermines the claim that Waterbury's higher death sentence rate comes purely from more vigorous pressing for the death penalty after capital charging and better success at capital penalty trials. Nonetheless, most of the increased capital sentencing comes not from the higher charging rate but from the vastly higher rate of securing death sentences. This higher capital sentencing rate is so considerable that one can think of Waterbury as having a functionally different death penalty regime than exists in the rest of the state.

Reading descriptions of the Waterbury State's Attorney's conduct in capital cases suggests that he may be more aggressive than other Connecticut prosecutors in his efforts to secure sentences of death in capital cases. For example, the Connecticut Supreme Court majority opinion in State v. Reynolds, 836 A. 2d 224 (2003) is replete with admonitions concerning improper conduct by the State's Attorney during the course of the penalty trial that led to a sentence of death for Richard Reynolds. Presumably, the State's Attorney engages in this conduct because he believes it will increase the chance of securing a death sentence, which may reflect a greater enthusiasm for capital prosecution, leading to the observed dramatic geographic disparity in the implementation of the death penalty. Admittedly, the court found that the series of improper remarks did not warrant reversal of Rynold's death sentence, but I suspect that few prosecutors are singled out for the type of rebuke that Justice Katz offered in dissenting in that case.

Specifically, in his dissent in Reynolds, Justice Katz deemed the Waterbury prosecutor to have engaged in "flagrant prosecutorial misconduct:"

> The state's attorney's behavior in this case was calculated to undermine the legitimacy of the defendant's mitigating factors on the basis of a wholly irrelevant consideration, namely, the extent to which defense counsel personally believed in the merits of the defendant's case. Additionally, the conduct of the state's attorney improperly was ‘‘‘directed to passion and prejudice’ ’’ and ‘‘calculated to incite an unreasonable and retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence.’’ Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir.1991). By injecting inflammatory emotional considerations, expressing his personal opinions about the merits of the defendant's case, vouching for the credibility of the state's witnesses and injecting his oath into the jury's deliberative process, the state's attorney invited the jury to reach a verdict, in a capital case, based on factors outside of the evidence. This invitation allowed an improper and, indeed, unconscionable diminishment of the jury's responsibility….
>
> Past experience has demonstrated that merely to reprimand, *once again*, a state's attorney who engages in deliberate misconduct that undermines the fairness of a trial does not sufficiently convey disapproval of those tactics. I would conclude, therefore, that nothing short of reversal will deter similar misconduct in the future. Accordingly, mindful of all of the circumstances involved in this case, I would reverse the judgment imposing the death sentence and order a new penalty phase hearing. (Id. at 393-4; emphasis in original.)

It is difficult to state whether, and to what extent, this potentially overzealous conduct on the part of the Waterbury State's Attorney explains the aberrationally large probability that death-eligible cases in Waterbury will result in capital sentences.

Justice Katz's comments illustrate the difficulties of policing overzealous prosecutorial conduct, which, if unchecked, can contribute to arbitrary outcomes across judicial districts. The arbitrariness that results from allowing individual State's Attorneys to decide which cases to pursue for the death penalty, however, would seem to be easily addressed. Instead of the current system, one could simply require that all the State's Attorneys must unanimously agree to seek the death penalty in a given case. This allows any individual prosecutor to exercise his existing discretion to be lenient, which is necessary to ensure that the system operates with a sense of proportion. If the prosecutor decides *not* to bring the case as a death penalty case, no change is needed in current practice. Conversely, if the prosecutor decides to seek the death penalty, the other State's Attorneys could be convened to evaluate the prosecutor's arguments, with the case allowed to proceed if

unanimous consent could be generated. This would not be a burdensome requirement since only in the relatively limited number of cases where a prosecutor believes the death penalty is warranted would the collective judgment need to be made.[77] The gains in uniformity of application of the death penalty system would seem to dwarf any logistical costs. In this way, the system would ensure that a case that could never get a death sentence in, say, New Haven doesn't receive one in Waterbury.

Note that implementing the above ex ante procedure would be a simpler and more effective process to ensure greater uniformity in the death penalty process than relying upon ex post review for uniformity. But at present the Connecticut system offers neither this ex ante nor any reliable ex post protection against arbitrariness. Indeed, since 1995 when Connecticut's original statutory requirement of proportionality review was legislatively repealed, the state has had even less protection against arbitrariness than it had initially. The 2003 Report of the Connecticut Commission on the Death Penalty noted that proportionality review served

> "a purpose … not addressed by other existing forms of review. Without it, no review is undertaken to address the problem of inconsistency from case-to-case in the imposition of the death penalty statewide or to insure that the death penalty is being administered in a fair and even-handed manner." Id. At 44.

Given the strong influence of race and geography on death penalty decisions in Connecticut, a move towards providing greater safeguards against arbitrary, capricious, and discriminatory capital sentencing decisionmaking is desperately needed. Accordingly, the Connecticut Commission made the following recommendation:

> "To (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, Connecticut should

[77] As the 2003 Report of the Connecticut Commission on the Death Penalty observed, "Connecticut has had far fewer death penalty convictions than most other states with the death penalty."

> reinstate proportionality review of any death sentence to ensure that it is not excessive or disproportionate to the sentence imposed in similar cases." Id. At 46.

For any scheme of review to police the boundaries of arbitrariness in implementation of the Connecticut death penalty, it is necessary to collect detailed information about death-eligible cases, preferably "contemporaneously with the prosecution of such cases." (The 2003 Report of the Connecticut Commission on the Death Penalty, at p. 21.) Although many states mandate the collection of such data, Connecticut has studiously avoided the collection of the type of data that was amassed and analyzed in this report – even though it is precisely this information that is essential to ensure that the system is operating in a permissible fashion.[78] Again, the 2003 Report of the Connecticut Commission on the Death Penalty made a relevant recommendation on this point:

> "All agencies involved in capitol felony cases should collect and maintain comprehensive data concerning all cases qualifying for capital felony prosecution (regardless of whether the case is charged, prosecuted or disposed of as a capital felony case) to examine whether there is disparity. This should include information on the race, ethnicity, gender, religion, sexual orientation, age, and socioeconomic status of the defendants and the victims, and the geographic data collected as recommended by Item 4. This data should be maintained with respect to every stage of the criminal justice process, from arrest through imposition of the sentence." Id. at 27.

***

The table below can be used to illustrate the differences in which different racial combinations of defendant and victim will receive death sentences inside and outside Waterbury. These predictions come directly from the logit estimates of Tables 16 and 17. While the actual probability predictions vary across the two tables (because they use different measures of

[78] Prior to their relatively recent moves toward abolition of the death penalty, New York and New Jersey authorized the collection of detailed contemporaneous death penalty data by the State Capital Defender's Office and the Judiciary, respectively. The 2003 Report of the Connecticut Commission on the Death Penalty, at 21.

egregiousness), the basic patterns are quite similar: race and geography have a major impact on the probability of receiving a death sentence. Looking at the first row of the Table based on the Table 16 logit estimates, one sees that holding the egregiousness of the case and the special aggravating factors at mean levels, a white killer of a white defendant (during the post-1998 period) had a 1.3 percent probability of receiving a sustained sentence of death if the crime occurred outside Waterbury. The same crime committed inside Waterbury would generate a probability of a death sentence of 32.8 percent – a value 25 times as high (as shown in column 4).

Comparing the row 1 and row 3 probabilities, one sees that a nonwhite defendant killing a white victim would have a substantially greater chance of receiving a death sentence relative to the row estimates for white/white murders, and this is true whether one is inside or outside Waterbury. Again, the probability of receiving a death sentence is dramatically higher within Waterbury. While point estimates of these probabilities by racial category, period, and judicial district are inevitably less precise than overall effects, the range in estimated effects is nonetheless striking. The probability of a sentence of death being handed down to a death-eligible defendant, holding the egregiousness and special aggravating factor scores at mean levels, ranges from a low of .49 percent for nonwhite/nonwhite murders occurring outside Waterbury (using the 1-5 egregiousness score estimates) to a high of 76.6 percent for a nonwhite/white murder in Waterbury.

Predicted Probabilities That a Capital-Eligible Case Will Receive a Sustained Death Sentence

Predicted Probabilities That A Capital-Eligible Case Will Receive a Sustained Death Sentence				
Death Sentences - Table 16 (EGR 4-12)	Predicted Pr(Death Sentence) Outside Waterbury (1)	Predicted Pr(Death Sentence) In Waterbury (2)	Difference vs. "Outside" Waterbury [95% Confidence Interval] (3)	(2)/(1) (4)
Post-1998				
White Defendant/White Victim	0.0134	0.3288	0.3154 [-0.0454, 0.6762]	24.54
Nonwhite Defendant/Nonwhite Victim	0.0067	0.1947	0.188 [-0.1131, 0.4892]	29.06
Nonwhite Defendant/White Victim	0.0834	0.7662	0.6828** [0.3688, 0.9968]	9.19
White Defendant/Nonwhite Victim	0.0276	0.5053	0.4778 [-0.0923, 1.0478]	18.31
Death Sentences -Table 17 (EGR 1-5)				
Post-1998				
White Defendant/White Victim	0.0066	0.1618	0.1552 [-0.1069, 0.4173]	24.52
Nonwhite Defendant/Nonwhite Victim	0.0049	0.1262	0.1212 [-0.0862, 0.3287]	25.76
Nonwhite Defendant/White Victim	0.0472	0.5906	0.5434** [0.0624, 1.0243]	12.51
White Defendant/Nonwhite Victim	0.0168	0.3325	0.3156 [-0.2246, 0.8559]	19.79
These calculations assume a case with mean values for other variables.				

5. Controlling for Gender of the Defendant

Not surprisingly, the vast majority of capital-eligible defendants are male, which is true of serious violent crime more generally across the state and nation. Specifically, only 19 of our 207 death-eligible defendants (=9.2 percent) were female. Of these 19, ten have been charged with capital felonies, and none has been sentenced to death. To test whether defendant gender influences capital outcomes in Connecticut, Tables 16 and 17 were replicated adding an indicator for female defendants.

The addition of this female dummy variable has virtually no impact on the size or significance of the coefficients estimated for either the legitimate or illegitimate factors influencing capital outcomes, with one exception. The elevated risk of capital sentencing for white/nonwhite murders grows and becomes statistically significant, thereby further increasing the predicted significance of race. In other words, just as we saw in Tables 16 and 17, race of defendant and race of victim influence capital outcomes, as does the fact that the crime occurred in Waterbury, which are far more important in overall impact than legitimate elements dealing with egregiousness of the crimes. Consequently, our prior results are robust, or even strengthened, when one controls for the gender of the defendant.

What can one conclude from looking at the estimated coefficients on the female dummy variable? Not surprisingly, it appears that women are charged less frequently for capital felonies, holding constant the factors set out in Tables 16-19. While this charging effect is not statistically significant, the coefficient in column 6 (using the linear probability model) reveals that, other things being equal, women are much less likely than men to be sentenced to death. This effect is statistically significant at the .05 level. Note that the logit model does not generate estimates in columns 4 and 5 for female defendants. The reason for this is that being female is a perfect predictor for *not* getting the death penalty. When that happens the logit estimator is undefined (either because of division by zero or the inability to take the log of zero), and the logit function will drop all 19 perfectly predicted cases (all cases of female defendants). Since the female dummy variable does not alter our previous conclusions, I do not use it in other models in order to avoid dropping 19 observations.

Table 18: Explaining Capital Charging and Death Sentences in 207 Connecticut Death-Eligible Cases, 1973 – 2007, With Control for Female Defendants, Using Composite Egregiousness Measure

	Dependent Variable = (Capital-Felongy Charges|Death Eligible)			Dependent Variable = (Death Sentences|Death Eligible)		
	(1)	(2)	(3)	(4)	(5)	(6)
	Logit	Logit Marginal Effects	Linear Prob. Model	Logit	Logit Marginal Effects	Linear Prob. Model
Explanatory Variables						
Defendant Nonwhite/ Victim Nonwhite	-0.462 (0.350)	-0.099	-0.096 (0.075)	-1.006 (1.399)	-0.017	-0.027 (0.026)
Defendant Nonwhite/ Victim white	0.899 (0.537) *	0.166	0.144 (0.080) *	1.657 (0.632) **	0.052	0.073 (0.051)
Defendant White/ Victim Nonwhite	-0.747 (0.893)	-0.176	-0.156 (0.215)	1.614 (0.938) *	0.062	0.048 (0.112)
Defendant Female	-0.439 (0.513)	-0.099	-0.098 (0.118)			-0.083 (0.037) **
Composite Egregiousness (4-12)	-0.153 (0.139)	-0.033	-0.031 (0.029)	0.331 (0.258)	0.006	0.004 (0.012)
Special Aggravating Factors	0.113 (0.078)	0.024	0.022 (0.016)	0.200 (0.144)	0.003	0.009 (0.006) *
Waterbury	1.098 (0.766)	0.186	0.190 (0.124)	3.729 (1.023) **	0.361	0.365 (0.130) **
Pre-1998 Cases	0.821 (0.319) **	0.172	0.164 (0.065) **	-0.300 (0.643)	-0.005	-0.003 (0.027)
Constant	1.278 (1.062)		0.782 (0.216) **	-7.319 (2.270) **		-0.030 (0.090)
R2 or Pseudo R2	0.078		0.092	0.357		0.217
N	207		207	188		207
Test for Joint Difference from Defendant White/Victim White:						
Defendant Nonwhite *p* -value	$\chi^2(2) = 7.34$** [0.026]		F(2,198) =4.71** [0.010]	$\chi^2(2) = 8.57$** [0.014]		F(2,198) =1.97 [0.142]
Def. & Victim of Diff. races *p* -value	$\chi^2(2) = 3.80$ [0.150]		F(2,198) =2.07 [0.130]	$\chi^2(2) = 7.91$** [0.019]		F(2,198) =1.11 [0.333]

Robust Standard Errors in Parentheses, ** = p < 0.05, * = p < 0.10

The omitted category from the race of defendant and victim variables is defendant white/victim white.

Table 19: Explaining Capital Charging and Death Sentences in 207 Connecticut Death-Eligible Cases, 1973 – 2007, With Control for Female Defendants, Using Overall Egregiousness Measure

	Dependent Variable = (Capital-Felongy Charges|Death Eligible)			Dependent Variable = (Death Sentences|Death Eligible)		
	(1)	(2)	(3)	(4)	(5)	(6)
	Logit	Logit Marginal Effects	Linear Prob. Model	Logit	Logit Marginal Effects	Linear Prob. Model
Explanatory Variables						
Defendant Nonwhite/ Victim Nonwhite	-0.490 (0.357)	-0.105	-0.104 (0.077)	-0.469 (1.575)	-0.005	-0.016 (0.029)
Defendant Nonwhite/ Victim white	0.936 (0.533) *	0.172	0.152 (0.079) *	1.797 (0.786) **	0.036	0.077 (0.053)
Defendant White/ Victim Nonwhite	-0.782 (0.900)	-0.184	-0.165 (0.217)	2.065 (1.031) **	0.062	0.049 (0.113)
Defendant Female	-0.443 (0.516)		-0.099 (0.119)			-0.084 (0.038) **
Overall Egregiousness (1-5)	-0.245 (0.241)	-0.052	-0.053 (0.048)	1.806 (0.513) **	0.018	0.033 (0.021)
Special Aggravating Factors	0.115 (0.079)	0.025	0.023 (0.016)	0.040 (0.167)	0.000	0.004 (0.006)
Waterbury	1.057 (0.789)	0.181	0.188 (0.129)	3.542 (1.085) **	0.217	0.348 (0.130) **
Pre-1998 Cases	0.773 (0.330) **	0.163	0.154 (0.067) **	-0.319 (0.693)	-0.003	0.006 (0.027)
Constant	0.926 (0.833)		0.718 (0.163) **	-11.110 (2.348) **		-0.101 (0.071)
R2 or Pseudo R2	0.077		0.091	0.409		0.226
N	207		207	188		207
Test for Joint Difference from Defendant White/Victim White:						
Defendant Nonwhite *p* -value	$\chi^2(2) = 7.94$** [0.019]		F(2,198) =5.28** [0.006]	$\chi^2(2) = 6.33$** [0.042]		F(2,198) =1.75 [0.177]
Def. & Victim of Diff. races *p* -value	$\chi^2(2) = 4.23$ [0.120]		F(2,198) =2.40* [0.093]	$\chi^2(2) = 7.15$** [0.028]		F(2,198) =1.15 [0.319]

Robust Standard Errors in Parentheses, ** = p < 0.05, * = p < 0.10
The omitted category from the race of defendant and victim variables is defendant white/victim white.
This table is identical to Table 18 in all but one respect - that table used the composite egregiousness measure (4-12), and this table uses the overall egregiousness measure (1-5). As one can see, the basic findings of the two tables are unaffected by the choice of egregiousness scale.

6. Controlling for Capital-Felony Crime Categories

We have already shown in Tables 16 and 17 that race of defendant and race of victim, as well as the arbitrary factor of geography, matter in the application of the Connecticut death penalty. Indeed, these factors are far more influential than the legitimate deathworthiness factors of the

egregiousness of the crime and the special aggravating factors. Moreover, this conclusion was not changed in Tables 18 and 19, when we controlled for the gender of the defendant. Indeed, another discriminatory factor was added to the list since gender also influenced capital sentencing in Connecticut.

Tables 20 and 21 replicate Tables 16 and 17 while adding five additional explanatory variables designed to capture the nature of the applicable capital-felony crime category that applied to each murder case, whether or not that factor was charged. The five crime categories included in the model are 1) Murder For Hire, 2) Kidnapped, 3) Sexual Assault, 4) Mulitiple Victims, and 5) Under Sixteen Years of Age.[79] While using five scarce degrees of freedom is putting demands on our small data set, the same basic story emerges: race matters, Waterbury is still a huge outlier, and depending on the egregiousness measure, the deathworthiness factors can either have small effect, no effect, or even perverse effects.

For example, we see in Table 20 (using the composite 4-12 egregiousness score), controlling for the appropriate capital-felony category, the egregiousness score is actually *negatively* correlated with the probability of receiving a death sentence, while the special aggravating factors have only a small, positive, yet statistically insignificant effect – half the size of the estimate shown in Table 16 when no controls for crime category were included (compare the column 5 estimates for Special Aggravating Factors in Table 16 and 20 -- .004 versus .002). In contrast, the effect of particular race of defendant/victim configurations on the probability of receiving a death sentence is vastly more potent. For example, the probability of a death sentence jumps by 5 percentage points if a black kills a white than if a white kills a white, which is a much bigger percentage jump than would result if a

[79] Other possible categories were Police Killings, Murder by Lifer, Murder by One with Prior Murder Conviction, and Death by Illegal Drugs. These then are the reference crimes against which the other crime probabilities are to be assessed.

more aggravated murder occurred (as proxied by the Special Aggravating Factors variable). In addition to the overall importance of race to the probability of getting a death sentence (note the high significance on the nonwhite kills white variable as well as the somewhat lower level of significance of race in three of the four joint tests), the effect of Waterbury on the probability of a death sentence is enormous (and highly statistically significant).

Again, the same basic story comes through in Table 21 – race and Waterbury matter a great deal and remain consitently statistically significant. The legitimate consideration of Special Aggravating Factors has virtually no impact and the 1-5 egregiousness scale has a small but significant impact. Using the column 5 estimates in Table 21 to assess the relative importance of egregiousness and race to the likelihood of receiving a death sentence, note that learning that a black rather than a white defendant had killed a white victim would cause your estimate of the probability of a death sentence to jump by almost the same amount (2.7 percentage points) as increasing the egregiousness of the murder from the lowest in the sample (1) to the highest (5), which would increase the probability of a death sentence by 4*.007 = 2.8 percentage points). In both cases, this effect on the probability of receiving a death sentence would be swamped by the effect of having an identical murder occur on one side or the other of the boundary demarcating the Waterbury judicial district.

Table 20: Explaining Capital Charging and Death Sentences in 207 Connecticut Death-Eligible Cases, 1973 – 2007, With Controls for Capital Felony Type, Using Composite Egregiousness Measure

	Dependent Variable = Capital Charges | Death Eligible			Dependent Variable = Death Sentences | Death Eligible		
	(1)	(2)	(3)	(4)	(5)	(6)
	Logit	Logit Marginal Effects	Linear Prob. Model	Logit	Logit Marginal Effects	Linear Prob. Model
Explanatory Variables						
Defendant Nonwhite/ Victim Nonwhite	-0.710 (0.400) *	-0.147	-0.135 (0.073) *	-0.656 (1.853)	-0.005	-0.017 (0.027)
Defendant Nonwhite/ Victim White	0.744 (0.650)	0.135	0.119 (0.086)	2.385 (1.019) **	0.050	0.089 (0.055)
Defendant White/ Victim Nonwhite	-1.052 (0.857)	-0.247	-0.219 (0.200)	0.660 (1.502)	0.007	0.049 (0.110)
Composite Egregiousness (4-12)	-0.363 (0.188) *	-0.074	-0.065 (0.033) *	-0.134 (0.342)	-0.001	-0.006 (0.013)
Special Aggravating Factors	0.252 (0.099) **	0.052	0.040 (0.017) **	0.266 (0.176)	0.002	0.003 (0.007)
Waterbury	0.682 (0.719)	0.121	0.117 (0.117)	5.252 (2.111) **	0.516	0.372 (0.133) **
Pre-1998 Cases	0.706 (0.346) **	0.143	0.129 (0.067) *	-0.458 (1.220)	-0.004	0.002 (0.030)
Murder for Hire	0.045 (0.713)	0.009	0.062 (0.125)	3.961 (1.888) **	0.226	0.114 (0.072)
Kidnapped	-1.372 (0.527) **	-0.299	-0.238 (0.089) **	1.395 (1.365)	0.015	0.069 (0.049)
Sexual Assault	1.107 (0.854)	0.182	0.177 (0.123)	2.562 (1.152) **	0.067	0.106 (0.066)
Multiple Victims	0.402 (0.546)	0.080	0.110 (0.093)	2.739 (1.234) **	0.043	0.100 (0.057) *
Under Sixteen	0.493 (0.599)	0.095	0.122 (0.119)	0.509 (1.954)	0.005	0.038 (0.057)
Constant	2.816 (1.333) **		1.011 (0.231) **	-7.054 (2.342) **		-0.036 (0.087)
R2 or Pseudo R2	0.158		0.182	0.432		0.241
N	207		207	207		207
Test for Joint Difference from Defendant White/Victim White:						
Defendant Nonwhite *p* -value	$\chi^2(2)=7.56$** [0.0229]		F(2,194)=4.52** [0.0120]	$\chi^2(2)=5.75$* [0.0563]		F(2,194)=2.57* [0.0791]
Def. & Victim of Diff. Races *p* -value	$\chi^2(2)=3.39$ [0.1835]		F(2,194)=1.80 [0.1688]	$\chi^2(2)=5.59$* [0.0611]		F(2,194) =1.38 [0.2546]

Robust Standard Errors in Parentheses, ** = p < 0.05, * = p < 0.10

The omitted category from the race of defendant and victim variables is defendant white/victim white.

Table 21: Explaining Capital Charging and Death Sentences in 207 Cases, With Controls for Capital Felony Type, Using Overall Egregiousness Measure

	Dependent Variable = Capital Charges | Death Eligible			Dependent Variable = Death Sentences | Death Eligible		
	(1)	(2)	(3)	(4)	(5)	(6)
	Logit	Logit Marginal Effects	Linear Prob. Model	Logit	Logit Marginal Effects	Linear Prob. Model
Explanatory Variables						
Defendant Nonwhite/ Victim Nonwhite	-0.603 (0.383)	-0.126	-0.119 (0.072) *	-0.222 (2.138)	-0.001	-0.007 (0.029)
Defendant Nonwhite/ Victim White	0.855 (0.648)	0.153	0.136 (0.086)	2.521 (0.988) **	0.027	0.092 (0.055) *
Defendant White/ Victim Nonwhite	-0.992 (0.948)	-0.233	-0.213 (0.215)	1.232 (1.601)	0.008	0.050 (0.112)
Overall Egregiousness (1-5)	-0.293 (0.282)	-0.060	-0.057 (0.051)	1.949 (0.883) **	0.007	0.026 (0.024)
Special Aggravating Factors	0.220 (0.100) **	0.045	0.036 (0.018) *	0.150 (0.211)	0.001	-0.002 (0.007)
Waterbury	0.542 (0.798)	0.100	0.101 (0.129)	4.617 (2.132) **	0.215	0.354 (0.134) **
Pre-1998 Cases	0.618 (0.341) *	0.126	0.116 (0.068) *	-0.668 (1.538)	-0.002	0.005 (0.029)
Murder for Hire	0.179 (0.723)	0.036	0.079 (0.128)	4.594 (1.935) **	0.197	0.116 (0.070)
Kidnapped	-1.445 (0.527) **	-0.316	-0.254 (0.088) **	0.748 (1.343)	0.003	0.058 (0.049)
Sexual Assault	0.986 (0.847)	0.168	0.160 (0.125)	1.483 (0.921)	0.011	0.085 (0.067)
Multiple Victims	0.122 (0.495)	0.025	0.058 (0.086)	2.090 (1.071) *	0.013	0.090 (0.057)
Under Sixteen	0.159 (0.546)	0.032	0.063 (0.111)	-0.188 (2.033)	-0.001	0.016 (0.053)
Constant	1.212 (0.889)		0.741 (0.157) **	-14.621 (3.611) **		-0.142 (0.076) *
R2 or Pseudo R2	0.147		0.171	0.472		0.244
N	207		207	207		207
Test for Joint Difference from Defendant White/Victim White:						
Defendant Nonwhite *p* -value	$\chi^2(2)$=6.78** [0.0338]		F(2,194)=4.27** [0.0153]	$\chi^2(2)$=6.62** [0.0364]		F(2,194)=2.23 [0.1103]
Def. & Victim of Diff. Races *p* -value	$\chi^2(2)$=3.31 [0.1908]		F(2,194)=1.99 [0.1398]	$\chi^2(2)$=7.54** [0.0231]		F(2,194) =1.45 [0.2372]

Robust Standard Errors in Parentheses, ** = p < 0.05, * = p < 0.10

The omitted category from the race of defendant and victim variables is defendant white/victim white.

This table is identical to Table 20 in all but one respect - that table used the composite egregiousness measure (4-12), and this table uses the overall egregiousness measure (1-5). As one can see, the basic findings of the two tables are unaffected by the choice of egregiousness scale.

VIII. CONCLUSION

The Connecticut Supreme Court has ruled that, facially, the structure of the Connecticut death penalty regime comports with federal and state constitutional standards. State v. Cobb, 663 A.2d 948, 954 n.10 (1995); State v. Webb, 680 A.2d 147 (Conn. 1996). These decisions do not address whether, looking beyond the facial structure of the legislative scheme, the implementation of the Connecticut death penalty regime in fact violates the principles that have been enumerated in numerous federal and state court decisions prohibiting the arbitrary, capricious, or racially disparate implementation of a death penalty regime. This report furnishes substantial and compelling evidence that indicts the Connecticut death penalty on these grounds. Despite all the elaborate processes and procedures designed to eliminate arbitrariness in the infliction of the ultimate sanction, in terms of the outcome that emerges from this process, the Connecticut death penalty regime shows all of the defects that prompted the Furman decision. There is no way to distinguish the few that are singled out for the death penalty from the many cases that receive lesser sentences (leading to both horizontal and vertical arbitrariness); there is geographic arbitrariness in the implementation of the state's death penalty regime; and there is substantial racial disparity based on the race of the defendant and the victim in who is charged with a capital felony and who is ultimately sentenced to death.

The pattern of arbitrary, capricious, and discriminatory capital sentencing decisions that has been identified as a defining feature of the Connecticut death penalty regime is not, ultimately, surprising to those who understand the operation of this part of the Connecticut criminal justice system. Leaving so much discretion in the hands of 13 different State's Attorneys invites the

immense geographic disparities because a prosecutor in one judicial district can act on a belief that any case that can be construed to fit within the contours of Connecticut's capital sentencing statute should lead to a death sentence, while other prosecutors believe that the death penalty should truly be limited, as the U.S. Supreme Court has instructed, to the "worst of the worst" murder cases. Other Connecticut prosecutors no doubt feel considerable ambivalence about the death penalty in light of the increasing evidence concerning its lack of deterrent benefit, high cost of imposition, infrequent application, and the unavoidable concerns of racial discrimination and simple error. The end result from the Connecticut death penalty regime as currently administered is inevitable that identical murders within the state of Connecticut will be treated very differently depending on illegitimate factors such as race or the judicial district in which they occurred.

Of course, some effort was made to control the widespread horizontal and vertical arbitrariness in implementation under the requirement of proportionality review, but that review was narrowly limited in scope and was ultimately overturned by statute. Therefore, nothing in the state's current death penalty system looks to see whether like crimes are being treated in a similar fashion from the point of initial charging to ultimate sentencing or whether these decisions are being marred by discriminatory or arbitrary patterns of capital sentencing. Indeed, since the state doesn't even collect let alone analyze this information, it has had no capacity to identify these serious problems, and hence has done little to address them.

APPENDIX A: THE EVOLVING CONNECTICUT DEATH PENALTY LAW

Substantive Revisions in Connecticut Death Penalty Statue, 1973-Present

Part I of this appendix highlights the various changes in the substance and statutory language of Connecticut's Death Penalty Statute from the statute's enactment in 1973 to the present. Part II highlights the post-1993 amendments in the statute's aggravating and mitigating factors.

Part I

Five categories of murder have *always* been death eligible under the Connecticut Statute, C.G.S.A. § 53a-54b. They are, summarily:

- 1. The murder of a police officer, judicial marshal, firefighter, corrections officer, or other law enforcement officer in the performance of his or her duties. There have been some minor changes to this subsection in various amendments, which we note below.[80] (*See Subsection 1*)
- 2. Murder committed for pecuniary gain, where either the defendant committed the murder or hired someone else to commit the murder. (*See Subsection 2*)
- 3. Murder committed by a defendant with a prior conviction for either intentional murder or felony murder. (*See Subsection 3*)
- 4. Murder committed by a defendant who was under a sentence of life imprisonment at the time of the murder. (*See Subsection 4*)
- 5. Murder committed by a kidnapper of a kidnapped person during the course of the kidnapping. (*See Subsection 5*)

A number of amendments to C.S.G.A. § 53a-54b have changed the scope of death-eligibility in Connecticut. The following summarizes the different versions of the statute, beginning with the original in 1973. Each section provides a complete version of the statute as it existed during that time period. Changes that occurred at the beginning of each time period are referenced by highlighting the date of their enactment.

- **1973 (original statute)-July 6, 1977**:
  - **Subsection 1**—The original statute made the murder of a "county detective" a capital felony, which differs from the current statute (as amended on July 6, 1977) which replaced "county detective" with "chief inspector or inspector in the division of criminal justice."

[80] Subsection 1 of each version of the statute makes reference to §29-18, "Special Policemen for State Property," which reads: "The Commissioner of Public Safety may appoint one or more persons nominated by the administrative authority of any state buildings or lands including, but not limited to, state owned and managed housing facilities, to act as special policemen in such buildings and upon such lands. Each such special policeman shall be sworn and may arrest and present before a competent authority any person for any offense committed within his precinct."

- **Subsection 6**—In addition to the above, the original statute contained a subsection 6, which made the following a capital felony:
  - "the illegal sale, for gain, of cocaine, heroin, or methadone, to a person who died as a direct result of the use by him of such cocaine, heroin or methadone, provided that such seller was not, at the time of such sale, a drug dependent person."
- **The statute in its entirety during this time period read as follows:**
  - *A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the Department of Public Safety or of any local police department, a county detective, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18 , an official of the Department of Correction authorized by the Commissioner of Correction to make arrests in a correctional institution or facility and the actor is confined in such institution or facility, or any fireman, while such victim was acting within the scope of such victim's duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone, provided that such seller was not, at the time of such sale, a drug dependent person.*

- **July 6, 1977- October 1, 1980:**
  - **Subsection 1**—As noted above, on July 6, 1977 it became a capital felony under subsection 1 to murder a "chief inspector or inspector in the division of criminal justice," which replaced the term "county detective."
  - **Subsection 6**—Remains in the statute exactly as it was in the original statute, making the following a capital felony:
    - "the illegal sale, for gain, of cocaine, heroin, or methadone, to a person who died as a direct result of the use by him of such cocaine, heroin or methadone, provided that such seller was not, at the time of such sale, a drug dependent person."
  - **The statute in its entirety during this time period read as follows:**
    - *A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the Department of Public Safety or of any local police department, a chief inspector or inspector in the Division of Criminal Justice, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18 , an official of the Department of Correction*

authorized by the Commissioner of Correction to make arrests in a correctional institution or facility and the actor is confined in such institution or facility, or any fireman, while such victim was acting within the scope of such victim's duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone, provided that such seller was not, at the time of such sale, a drug dependent person.

- **October 1, 1980-October 1, 1985:**
  - **Subsection 1**—As noted above, in 1977 it became a capital felony under subsection 1 to murder a "chief inspector or inspector in the division of criminal justice," which replaced the term "county detective."
  - **Subsection 6**—Remains exactly as it was in the original statute, making the following a capital felony:
    - "the illegal sale, for gain, of cocaine, heroin, or methadone, to a person who died as a direct result of the use by him of such cocaine, heroin or methadone, provided that such seller was not, at the time of such sale, a drug dependent person."
  - **Subsection 7**— Subsection 7 took effect on October 1, 1980. It makes the following a capital felony:
    - "murder committed in the course of the commission of sexual assault in the first degree."
  - **Subsection 8**— Subsection 8 took effect on October 1, 1980, making the following a capital felony:
    - "murder of two or more persons at the same time or in the course of a single transaction."
  - **The statute in its entirety during this time period read as follows:**
    - *A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the Department of Public Safety or of any local police department, a chief inspector or inspector in the Division of Criminal Justice, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18 , an official of the Department of Correction authorized by the Commissioner of Correction to make arrests in a correctional institution or facility and the actor is confined in such institution or facility, or any fireman, while such victim was acting within the scope of such victim's duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to*

commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone, provided that such seller was not, at the time of such sale, a drug dependent person (7) murder committed in the course of the commission of sexual assault in the first degree; (8) murder of two or more persons at the same time or in the course of a single transaction.

- **October 1, 1985-October 1, 1995:**
  - **Subsection 1**—As noted above, in 1977 it became a capital felony under subsection 1 to murder a "chief inspector or inspector in the division of criminal justice," which replaced the term "county detective."
  - **Subsection 6**— Two changes to subsection 6 took effect on October 1, 1985. The changes added the word "economic" before the word "gain," and deleted the provision, "provided that such seller was not, at the time of such sale, a drug-dependent person," so that the subsection read:
    - "the illegal sale, for economic gain, of cocaine, heroin, or methadone, to a person who died as a direct result of the use by him of such cocaine, heroin or methadone."
  - **Subsection 7**—Subsection 7 took effect on October 1, 1980. It makes the following a capital felony:
    - "murder committed in the course of the commission of sexual assault in the first degree."
  - **Subsection 8**—Subsection 8 also took effect on October 1, 1980, making the following a capital felony:
    - "murder of two or more persons at the same time or in the course of a single transaction."
  - **Note:** Another amendment took effect on October 1, 1992, but made only technical, and no substantive changes to the statute. Therefore, these changes did not affect the coding of case summaries.
  - **The statute in its entirety during this time period read as follows:**
    - *A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the Department of Public Safety or of any local police department, a chief inspector or inspector in the Division of Criminal Justice, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18 , an official of the Department of Correction authorized by the Commissioner of Correction to make arrests in a correctional institution or facility and the actor is confined in such institution or facility, or any fireman, while such victim was acting within the scope of such victim's duties;*

(2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone (7) murder committed in the course of the commission of sexual assault in the first degree; (8) murder of two or more persons at the same time or in the course of a single transaction.

- **October 1, 1995-October 1, 1998:**
  - **Subsection 1**—As noted above, in 1977 it became a capital felony under subsection 1 to murder a "chief inspector or inspector in the division of criminal justice," which replaced the term "county detective."
  - **Subsection 6**—two changes to subsection 6 took effect on October 1, 1985. The changes added the word "economic" before the word "gain," and deleted the provision, "provided that such seller was not, at the time of such sale, a drug-dependent person," so that the subsection read:
    - "the illegal sale, for economic gain, of cocaine, heroin, or methadone, to a person who died as a direct result of the use by him of such cocaine, heroin or methadone."
  - **Subsection 7**—Subsection 7 took effect on October 1, 1980. It makes the following a capital felony:
    - "murder committed in the course of the commission of sexual assault in the first degree."
  - **Subsection 8**—Subsection 8 also took effect on October 1, 1980, making the following a capital felony:
    - "murder of two or more persons at the same time or in the course of a single transaction."
  - **Subsection 9**— Subsection 9 took effect on October 1, 1995. It made the following a capital felony—
    - "murder of a person under sixteen years of age."
  - **The statute in its entirety during this time period read as follows:**
    - *A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the Department of Public Safety or of any local police department, a chief inspector or inspector in the Division of Criminal Justice, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18 , an official of the Department of Correction authorized by the Commissioner of Correction to make arrests in a correctional institution or facility and the actor is confined in such institution or facility, or any fireman, while such victim was acting within the scope of such victim's duties;*

(2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone (7) murder committed in the course of the commission of sexual assault in the first degree; (8) murder of two or more persons at the same time or in the course of a single transaction; or (9) murder of a person under sixteen years of age.

- **October 1, 1998—December 1, 2000:**
  - **Subsection 1**— Subsection 1 was broadened on October 1, 1998 when it made it a capital felony to murder "an employee of the Department of Correction or a person providing services on behalf of said department when such employee or person is acting within the scope of his employment or duties in a correctional institution or facility and the actor is confined in such institution or facility." This replaced the language which made it a capital felony to murder "an official of the Department of Correction authorized by the Commissioner of Correction to make arrests in a correctional institution or facility."
  - **Subsection 6**—Two changes to subsection 6 took effect on October 1, 1985. The changes added the word "economic" before the word "gain," and deleted the provision, "provided that such seller was not, at the time of such sale, a drug-dependent person," so that the subsection read:
    - "the illegal sale, for economic gain, of cocaine, heroin, or methadone, to a person who died as a direct result of the use by him of such cocaine, heroin or methadone."
  - **Subsection 7**—Subsection 7 took effect on October 1, 1980. It makes the following a capital felony:
    - "murder committed in the course of the commission of sexual assault in the first degree."
  - **Subsection 8**—Subsection 8 also took effect on October 1, 1980, making the following a capital felony:
    - "murder of two or more persons at the same time or in the course of a single transaction."
  - **Subsection 9**—Subsection 9 took effect on October 1, 1995. It made the following a capital felony—
    - "murder of a person under sixteen years of age."
  - **The statute in its entirety during this time period read as follows:**
    - *A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the Department of Public Safety or of any local police department, a chief inspector or inspector in the Division of Criminal Justice, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman*

appointed under section 29-18 , an employee of the Department of Correction or a person providing services on behalf of said department when such employee or person is acting within the scope of such employee's or person's employment or duties in a correctional institution or facility and the actor is confined in such institution or facility, or any fireman, while such victim was acting within the scope of such victim's duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone (7) murder committed in the course of the commission of sexual assault in the first degree; (8) murder of two or more persons at the same time or in the course of a single transaction; or (9) murder of a person under sixteen years of age.

- **December 1, 2000-July 1, 2001:**
  - **Subsection 1**— Subsection 1 was broadened on December 1, 2000, making it a capital felony to murder a "state marshal who is exercising authority granted under any provision of the general statutes, a judicial marshal in performance of the duties of a judicial marshal." This replaced the narrower, "sheriff or deputy sheriff."
  - **Subsection 6**—Two changes to subsection 6 took effect on October 1, 1985. The changes added the word "economic" before the word "gain," and deleted the provision, "provided that such seller was not, at the time of such sale, a drug-dependent person," so that the subsection read:
    - "the illegal sale, for economic gain, of cocaine, heroin, or methadone, to a person who died as a direct result of the use by him of such cocaine, heroin or methadone."
  - **Subsection 7**—Subsection 7 took effect on October 1, 1980. It makes the following a capital felony:
    - "murder committed in the course of the commission of sexual assault in the first degree."
  - **Subsection 8**—Subsection 8 also took effect on October 1, 1980, making the following a capital felony:
    - "murder of two or more persons at the same time or in the course of a single transaction."
  - **Subsection 9**—Subsection 9 took effect on October 1, 1995. It made the following a capital felony—
    - "murder of a person under sixteen years of age."
  - **The statute in its entirety during this time period read as follows:**
    - *A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the*

Department of Public Safety or of any local police department, a chief inspector or inspector in the Division of Criminal Justice, a state marshal who is exercising authority granted under any provision of the general statutes, a judicial marshal in performance of the duties of a judicial marshal, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18 , an employee of the Department of Correction or a person providing services on behalf of said department when such employee or person is acting within the scope of such employee's or person's employment or duties in a correctional institution or facility and
the actor is confined in such institution or facility, or any fireman, while such victim was acting within the scope of such victim's duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone (7) murder committed in the course of the commission of sexual assault in the first degree; (8) murder of two or more persons at the same time or in the course of a single transaction; or (9) murder of a person under sixteen years of age.

- **July 1, 2001-Present:**
  - **Subsection 1**— Subsection 1 was further amended and expanded on July 1, 2001, when it was made a capital felony to murder "a conservation officer or special conservation officer appointed by the Commissioner of Environmental Protection under the provisions of section 26-5."
  - **Subsection 6**— Subsection 6 was **DELETED** on July 1, 2001. Thus, in the present statute, the "illegal sale, for economic gain, of cocaine, heroin, or methadone, to a person who died as a direct result of the use by him of such cocaine, heroin or methadone" is NO LONGER a capital felony.
  - **Subsections 7, 8, and 9** were renumbered as subsections 6, 7, and 8.
    - **Subsection 6**—makes the following a capital felony:
      - "murder committed in the course of the commission of sexual assault in the first degree."
    - **Subsection 7**—makes the following a capital felony:
      - "murder of two or more persons at the same time or in the course of a single transaction."
    - **Subsection 8**—makes the following a capital felony:
      - "murder of a person under sixteen years of age."
  - **The current statute reads as follows:**

- *A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the Department of Public Safety or of any local police department, a chief inspector or inspector in the Division of Criminal Justice, a state marshal who is exercising authority granted under any provision of the general statutes, a judicial marshal in performance of the duties of a judicial marshal, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18, a conservation officer or special conservation officer appointed by the Commissioner of Environmental Protection under the provisions of section 26-5, an employee of the Department of Correction or a person providing services on behalf of said department when such employee or person is acting within the scope of such employee's or person's employment or duties in a correctional institution or facility and the actor is confined in such institution or facility, or any firefighter, while such victim was acting within the scope of such victim's duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit thesame for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) murder committed in the course of the commission of sexual assault in the first degree; (7) murder of two or more persons at the same time or in the course of a single transaction; or (8) murder of a person under sixteen years of age.*

Part II

In 1995, the statutory requirements for imposing the death penalty in Connecticut changed drastically. Prior to the amendment that initiated this change, Connecticut General Statute §53a-46a provided several factors—called mitigating factors—which, if found to be existent, prohibited the imposition of the death penalty:

> The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict . . . that any mitigating factor exists. The mitigating factors to be considered concerning the defendant shall include, but are not limited to, the following: That at the time of the offense (1) he was under the age of eighteen or (2) his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution or (3) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution or (4) he was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by

> another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or (5) he could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing, death to another person. Conn. Gen. Stat. § 53a-46a(g) (1993) (now, in amended form, § 53a-46a(h)).[81]

Under the pre-1995 version of the statute, a finding of any mitigating factor prevented a defendant from receiving the death penalty. A defendant could only receive the death penalty if the court or jury found no mitigating factor and at least one of the following six aggravating factors:

> (1) the defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, a felony and he had previously been convicted of the same felony; or (2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or (3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or (4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or (5) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or (6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

In 1993, the statute was amended to make an offense committed with an assault weapon an aggravating factor, the seventh such factor under the statute. P.A. 93-306, § 12. Once the court found that any of the aforementioned aggravating factors existed, it was required to impose the death penalty unless a mitigating factor was found.

In 1995, the Connecticut legislature enacted P.A.95-19, "An Act Concerning the Death Penalty." P.A. 95-19 instructed judges and courts to consider three categories of factors when determining whether to impose a death sentence: factors that automatically prohibit the imposition of the death penalty, mitigating factors, and aggravating factors. The revised statute provided four factors that, if found to be in existence, prohibited the death penalty. These factors were four of the five mitigating factors under the pre-1995 version of the statute:

> [T]hat at the time of the offense (1) [the defendant] was under the age of eighteen or (2) his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to

[81] Conn. Gen. Stat. §§ 53a-8-10 address criminal liability for the acts of another.

> constitute a defense to prosecution or (3) he was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or (4) he could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing, death to another person. Conn. Gen. Stat. § 53a-46a(h) (1995).

The fifth mitigating factor in the pre-1995 version of the statute was whether the defendant "was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution." P.A. 95-19 deleted this provision, and thus a finding of "unusual and substantial duress" no longer prohibits the imposition of the death penalty. While P.A. 95-19 stated that a finding of any of the four factors under §53a-46a(h) would prevent a death sentence, it did not refer to these factors as "mitigating" factors. Rather, P.A. 95-19 seemingly distinguished the factors that prevent the death penalty from mitigating factors, defined as "such [factors] as do not constitute a defense or excuse for the capital felony of which the defendant has been convicted, but which, in fairness and mercy, may be considered as tending either to extenuate or reduce the degree of his culpability or blame for the offense or to otherwise constitute a basis for a sentence less than death." Conn. Gen. Stat. §53a-46a(d).[82] Under P.A. 95-19, the jury or court must conduct a balancing test of aggravating and mitigating factors in order to determine whether one outweighs the other: "If the jury or, if there is no jury, the court finds that (1) none of the factors set forth in subsection (h) exist, (2) one or more of the aggravating factors set forth in subsection (i) exist and (3)(A) no mitigating factor exists or (B) one or more mitigating factors exist but are outweighed by one or more aggravating factors set forth in subsection (i), the court shall sentence the defendant to death." Thus, under the revised statute, a finding of a mitigating factor does not necessarily prevent the imposition of a death sentence.

Conn. Gen. Stat. §53a-46(a) was most recently amended in 2001, when the legislature added an eighth aggravating factor to consider when weighing aggravating and mitigating factors: under the current version of the statute, the court or jury should consider whether "the defendant committed the offense set forth in subdivision (1) of section 53a-54b to avoid arrest for a criminal act or prevent detection of a criminal act or to hamper or prevent the victim from carrying out any act within the scope of the victim's official duties or to retaliate against the victim for the performance of the victim's official duties." Conn. Gen. Stat. § 53a-46a(i)(8).[83] The 2001 amendment to the statute also added a fifth factor that, if found by the judge or jury, prohibits the imposition of the death penalty: a defendant cannot be sentenced to death if, at the time of the offense, he "was a person with mental retardation." Conn. Gen. Stat. §53a-46a(h)(2).

[82] P.A. 95-19 did not amend this definition of "mitigating factors."

[83] Conn. Gen. Stat. §53a-54b(1) makes the murder of a police officer or other law enforcement officer a capital felony.

APPENDIX B: KEY FINDINGS FROM EGREGIOUSNESS EVALUATIONS

CHARGING

1. There is no meaningful difference between the average egregiousness scores for crimes not charged as capital felonies as compared to crimes that were so charged, despite our expectation that crimes charged as capital felonies should be significantly more egregious.

2. White defendants avoid capital felony charges for cases that are significantly more egregious than the cases for which both Hispanic and black defendants are charged with capital felonies.

3. 73 percent of defendants accused of killing a white victim have been charged with a capital felony versus only 54 percent of defendants accused of killing a black victim, and egregiousness does not explain this 19 percentage point disparity.

4. Even after controlling for egregiousness, black defendants charged in the murder of a white victim have been charged with capital felonies at almost twice the rate that black defendants have been charged in the death of black victims: a black defendant who kills a black victim has a 0.52 probability of being charged with a capital felony, but a 0.90 probability of being charged with a capital felony when the victim is white—despite identical egregiousness scores.

5. For crimes involving white victims, the rate at which black defendants have been charged with capital felonies is 21 percentage points higher than the rate at which white defendants are charged (90 percent versus 69 percent).

6. For both white and Hispanic defendants, the average egregiousness scores for cases that were charged as capital felonies are lower than the average egregiousness scores of cases that are not charged.

7. In six of the judicial districts—Fairfield, Hartford-New Britain, New London, Litchfield, Stamford-Norwalk, and Waterbury—the cases that were charged as capital felonies had a *lower* average egregiousness score than cases not charged as capital felonies.

8. There are striking capital felony charging disparities within some of the judicial districts with respect to race:

    - In Fairfield, cases with white defendants were more egregious than cases with either black or Hispanic defendants, but white defendants were charged with capital felonies in only 42% of death-eligible cases, while black and Hispanic defendants were charged at rates of 75% and 88%, respectively.

- In Hartford, where egregiousness scores were essentially constant across race of the victim, cases involving white victims and Hispanic victims were charged as capital felonies 100% of the time, while cases involving black victims were charged only 55% of the time.

- In New Haven, despite relatively constant egregiousness scores across race of the victim, cases involving black victims were charged at half the rate (28%) of cases involving white victims (56%), and cases involving Hispanic victims were charged at one-fourth the rate (14%) of cases involving white victims.

- In Waterbury, the only three cases that were not charged as capital felonies involved minority victims. Two of these three cases were among the most egregious cases in Waterbury. All cases involving white victims were charged as capital felonies.

9. There is little consistency across judicial districts with respect to charging rates—even though egregiousness scores were relatively constant. For example, death-eligible cases in New Haven were charged as capital felonies at a rate of 32% (11 of 34), cases in Fairfield were so charged at a rate of 67% (24 of 36), and death-eligible cases in Hartford were charged as capital felonies 89% of the time (42 of 47).

10. Egregiousness scores do not track disparities in charging outcomes across different categories. For example, kidnapping cases have higher average egregiousness scores than murder for hire cases, but are charged as capital felonies at a rate that is 27 percentage points lower (49 percent v. 76 percent). Similarly, murders of law enforcement officers have lower average egregiousness scores than murders committed in the course of sexual assault, murders of victims under the age of 16, murders with multiple victims, and murders committed during the course of a kidnapping. Yet murders of police officers were charged as capital felonies 100% of the time—a much higher rate than these other categories of offenses.

11. Egregiousness scores often cannot explain the decision of whether or not to charge a capital felony within categories of offenses. For example, in the category of murders of multiple victims, the average egregiousness scores for such crimes charged with a capital felony are essentially equal to those crimes not so charged. In the murder-for-hire category, the average egregiousness scores for cases that were *not* charged as capital felonies are *higher* than the average egregiousness of cases that were so charged.

Death Sentences

12. Offenses that involved black defendants and only-white victims accounted for only one-tenth of all death-eligible cases, but one quarter of all death sentences.

13. Black defendants received a death sentence at three times the rate of white defendants in cases involving white victims (15 percent versus 5 percent).

14. Cases with only white victims account for 52% of all death-eligible cases, but 67% of all death sentences.

15. Egregiousness does not explain why Waterbury accounts for less than *one-sixteenth* of the state's death-eligible cases, but *half* of all death sentences.

16. Offenses involving black defendants and white victims account for 12% of all death-eligible kidnapping cases, but 67% (2 of 3) of kidnapping cases in which a death sentence was imposed. Cases involving white defendants and white victims account for 49% of all death-eligible kidnapping cases, and have higher average egregiousness scores, but only one such kidnapping case involving a white defendant resulted in a death sentence—the case of serial killer Michael Ross.

17. Offenses involving black defendants and white victims account for 18% of all sexual assault cases (4 of 22), but 67% (2 of 3) of sexual assault cases in which a death sentence was imposed. Despite the fact that cases involving white defendants and white victims account for more than two thirds (68%) of all sexual assault cases, and have higher average egregiousness scores than cases involving black defendants and white victims, only one sexual assault case involving a white defendant resulted in a death sentence; again, this was the case of serial killer Michael Ross.

18. A startlingly high number of death-eligible cases that did *not* result in a death sentence had *higher* egregiousness scores than the lowest-scoring case in which there was a death sentence (Santiago). Specifically, under the composite 4-12 scale, 160 of the 195 cases that did not receive a sentence of death were at least as or more egregious as Santiago (who is now on death row). The comparable number under the overall 1-5 scale is 87 of 195 more egregious cases did not receive a sentence of death.

19. More than one-fifth of all cases that did *not* result in a death sentence were *more* egregious than the average case to result in a death sentence. For those defendants who are currently on death row, the median number of cases leading to conviction that are *more* egregious yet did not result in a death sentence is 48 under the composite egregiousness score and 40 under the overall score.

20. Eleven of the twelve cases where the defendant received a death sentence were not among the highest-scoring cases with respect to egregiousness on the composite score, and ten of the twelve cases in which a defendant received a death sentence were not among the highest-scoring cases on the overall scale—suggesting that the death penalty is not imposed only in the "worst of the worst" cases in Connecticut. (The twelfth case which was among the most egregious involved Michael Ross, who, as noted above, has already been executed.)

21. Murders of law enforcement officers account for only 4% of the cases in this study (8 of 207), but 17% of all death sentences (2 of 12).

22. Across the different categories of offenses, we observe wide disparities in the proportion of death-eligible cases that actually receive a death sentence. For example, 25% of all murders of law enforcement officers resulted in death sentences, but only 4% of kidnapping cases and 7% of multiple victim cases resulted in death sentences. Egregiousness does not explain the disparity: murders of law enforcement officers had lower average egregiousness scores than either of these other two categories.

APPENDIX C: CASE SUMMARIES - COMPLETE AND SCRUBBED

This Appendix provides two examples of cases that were used in the egregiousness study. For each case, we provide the complete summary in its original form followed by the scrubbed summary that was used by the nine coders.

EXAMPLE ONE

COMPLETE SUMMARY

Project No. [Rasheen Giraud]

Hartford JD
Dkt. No. CR95482272T

Sources of information: Trial court opinion, Appellate court opinion, PSI, Record, Affidavit of probable cause/police reports, Complaint/information, Autopsy/medical examiner's report, Defendant brief, Media reports

Def atty: Zeldis
State's Atty: O'Connor

Judge: Barry

Date of offense: 11/26/95
Date of conviction: 6/22/98
Date of sentence: 8/17/98 85 years on all charges (see below)

Charges: Murder, felony murder, kidnap 1st deg, robbery 1st deg, larceny 2nd deg

Cause of death: Gunshot wound to neck and head

D(H) asked V(B) to give him and coD a ride, directed V an uninhabited area, forced V to gunpoint to remove and turn over his clothing, and then shot V in the head

At around 2:00 am on 11/26/95 defendant observed the victim pull up in a car to use the telephone at a Hartford gas station. Defendant approached the victim and asked for a ride. When the victim

agreed, defendant called over the codefendant and they joined the victim in the car, after which defendant directed him to drive to a boarded up housing complex. Defendant pulled out a gun, put it to the victim's head and ordered him out of the car. Defendant ordered the victim to remove his clothes, which he did, and then directed the victim to a grassy area, where defendant forced him to kneel before shooting him in the head. Defendant and codefendant then left in victim's car with victim's clothing. After discovering the victim's body, police identified him through fingerprints and from his mother identified the car he had been driving. Defendant was arrested driving that car and wearing victim's clothing with victim's electronic organizer in pocket. Additional items of victim's clothing were discovered at the apartment where defendant had been staying, and codefendant gave a statement describing the homicide and implicating the defendant.

D was charged with murder, felony murder, kidnap 1st deg, robbery 1st deg, larceny 2d deg, and carjacking. After jury trial D was convicted of all charges. Trial court vacated carjacking count and sentenced D on remaining charges: 60 years for murder (felony murder merged), 10 years consecutive (5 years nonsuspendable) for robbery, 5 years concurrent for larceny, 10 years consecutive for kidnap plus an additional 5 years nonsuspendable and nonreducable as a sentence enhancement. Total effective sentence of 85 years to serve.

SCRUBBED SUMMARY

Project No. 141

Cause of death: Gunshot wound to neck and head

D asked V to give him and coD a ride, directed V to an uninhabited area, forced V to gunpoint to remove and turn over his clothing, and then shot V in the head

At around 2:00 am, Defendant observed the victim pull up in a car to use the telephone at a Hartford gas station. Defendant approached the victim and asked for a ride. When the victim agreed, defendant called over the codefendant and they joined the victim in the car, after which defendant directed him to drive to a boarded up housing complex. Defendant pulled out a gun, put it to the victim's head and ordered him out of the car. Defendant ordered the victim to remove his clothes, which he did, and then directed the victim to a grassy area, where defendant forced him to kneel before shooting him in the head. Defendant and codefendant then left in victim's car with victim's clothing. After discovering the victim's body, police identified him through fingerprints and from his mother who identified the car he had been driving. Defendant was arrested driving that car and wearing victim's clothing with victim's electronic organizer in pocket. Additional items of victim's clothing were discovered at the apartment where defendant had been staying, and codefendant gave a statement describing the homicide and implicating the defendant.

EXAMPLE TWO

COMPLETE SUMMARY

Project No. [Quincy Roberts]

Hartford JD
Dkt. No. CR99053155

Sources of information: Affidavit of probable cause/police reports, DOC records, Autopsy/ME report

Def atty: Barrs
State's Atty: Unknown

Judge: Clifford

Date of offense: 1/5/99
Date of conviction: Unknown
Date of sentence: 6/21/00 18 years

Charges: Manslaughter, Risk of injury to a minor

Cause of death: Craniocerebral trauma

Six week old V(B) died of head injuries incurred while in the care of D(B), her father

The defendant was alone caring for his six week old daughter. He stated that he left her on a bed for a short time and when he returned she had vomited and was choking and gasping for breath. Defendant first claimed that he shook the baby in an effort to help her breathe and then later stated that he may have shaken her harder than he realized. Defendant called 911 and the victim was taken to the hospital, where she died two days later. An autopsy revealed that the victim had a broken skull and broken clavicle which had occurred shortly before she was taken to the hospital.

Defendant was charged with capital felony (victim under 16), murder and risk of injury to a minor. He pled guilty to manslaughter and risk of injury and received a sentence of 18 years.

SCRUBBED SUMMARY

Project No. 205

Cause of death: Craniocerebral trauma

Six week old V died of head injuries incurred while in the care of D, her father.

The defendant was alone caring for his six week old daughter. He stated that he left her on a bed for a short time and when he returned she had vomited and was choking and gasping for breath. Defendant first claimed that he shook the baby in an effort to help her breathe and then later stated that he may have shaken her harder than he realized. Defendant called 911 and the victim was taken to the hospital, where she died two days later. An autopsy revealed that the victim had a broken skull and broken clavicle which had occurred shortly before she was taken to the hospital.

APPENDIX D: INTERCODER RELIABILITY

Panels A and B of Table D.1 provide information on the inter-coder reliability of the egregiousness scale. A high degree of uniformity suggests that the different coders were indeed measuring the same underlying factor when they scored each case. (It is worth noting that the egregiousness assessments were made independently of each other, based on case summaries stripped of identifying information such as the sentence ultimately received, and during a tight time frame on two separate occasions.)

Both panels reveal that inter-coder reliability is high. The correlation matrices for both the Composite (4-12) and Overall (1-5) measures exhibit strong positive correlations among the coders, and no significant outliers. Cronbach's α is a measure of how strongly the score obtained from the actual panel of coders correlates with the score that would have been obtained by another random sample of coders (drawn from the same population). Values of α of 0.95 for Composite Egregiousness and 0.93 for Overall Egregiousness demonstrate a high degree of consistency across coders, and are highly desirable since they are very close (and in one case equal) to the gold standard of 0.95.[84]

[84] On the standards for Cronbach's α, see, e.g., J.C. Nunally & I.H. Bernstein, *Psychometric Theory* (3rd ed., 1994) at 265 (suggesting that a value close to 0.95 is desirable).

Table D.1: Summary Statistics on Intercoder Reliability

Panel A: Correlation Coefficients, N = 207 Case Codings, Composite (4-12) Scale of Egregiousness

	Coder a	Coder b	Coder c	Coder d	Coder e	Coder f	Coder g	Coder h	Coder i
Coder a	1								
Coder b	0.705	1							
Coder c	0.565	0.658	1						
Coder d	0.696	0.683	0.738	1					
Coder e	0.628	0.656	0.604	0.701	1				
Coder f	0.607	0.707	0.571	0.640	0.695	1			
Coder g	0.696	0.710	0.647	0.660	0.584	0.629	1		
Coder h	0.665	0.746	0.669	0.660	0.541	0.680	0.769	1	
Coder i	0.662	0.699	0.738	0.735	0.556	0.633	0.723	0.764	1

Average inter-item covariance:	1.664	Scale reliability coefficient (Cronbach's α):	0.947
Number of items in the scale:	9	Minimum Intercoder Correlation:	0.541

Panel B: Correlation Coefficients, N = 207 Case Codings, Overall (1-5) Scale of Egregiousness

	Coder a	Coder b	Coder c	Coder d	Coder e	Coder f	Coder g	Coder h	Coder i
Coder a	1								
Coder b	0.620	1							
Coder c	0.430	0.527	1						
Coder d	0.338	0.607	0.658	1					
Coder e	0.364	0.600	0.620	0.674	1				
Coder f	0.442	0.593	0.552	0.601	0.599	1			
Coder g	0.668	0.694	0.490	0.534	0.517	0.596	1		
Coder h	0.611	0.706	0.613	0.646	0.603	0.598	0.720	1	
Coder i	0.507	0.676	0.659	0.656	0.598	0.637	0.656	0.730	1

Average inter-item covariance:	0.608	Scale reliability coefficient (Cronbach's α):	0.927
Number of items in the scale:	9	Minimum Intercoder Correlation	0.338

APPENDIX E:
SUMMARY STATISTICS BEFORE AND AFTER 1998

TABLE E.1: SUMMARY STATISTICS FOR THE 99 DEATH-ELIGIBLE CASES FROM 1973-1998

Independent Variables	Mean	Std. Dev.	Min	Max	Number of Obs. for which Binary Variable =1	N
Defendant White	0.414	0.495	0	1	41	99
Victim White	0.545	0.500	0	1	54	99
Def. Nonwhite, Vict. Nonwhite (DNW_VNW)	0.434	0.498	0	1	43	99
Def. Nonwhite, Vict. White (DNW_VW)	0.152	0.360	0	1	15	99
Def. White, Vict. Nonwhite (DW_VNW)	0.020	0.141	0	1	2	99
Def. White, Vict. White (DW_VW)	0.394	0.491	0	1	39	99
Special Aggravating Factors	3.859	2.369	0	10		99
Composite Egregiousness Score 4-12	7.914	1.476	4.44	11.56		99
Overall Egregiousness Score 1-5	3.332	0.902	1.00	4.78		99
Waterbury Indicator	0.061	0.240	0	1	6	99
Pre-1998 Cases Indicator	1	0	1	1	99	99
Dependent Variables						
Capital-Felony Charge	0.768	0.424	0	1	76	99
Death Sentence (Not Overturned)	0.051	0.220	0	1	5	99

TABLE E.2: SUMMARY STATISTICS FOR THE 108 POST 1998 DEATH-ELIGIBLE CASES

Independent Variables	Mean	Std. Dev.	Min	Max	Number of Obs. for which Binary Variable =1	N
Defendant White	0.389	0.490	0	1	42	108
Victim White	0.519	0.502	0	1	56	108
Def. Nonwhite, Vict. Nonwhite (DNW_VNW)	0.444	0.499	0	1	48	108
Def. Nonwhite, Vict. White (DNW_VW)	0.167	0.374	0	1	18	108
Def. White, Vict. Nonwhite (DW_VNW)	0.037	0.190	0	1	4	108
Def. White, Vict. White (DW_VW)	0.352	0.480	0	1	38	108
Special Aggravating Factors	3.417	2.141	0	10		108
Composite Egregiousness Score 4-12	7.986	1.179	4.11	11.78		108
Overall Egregiousness Score 1-5	3.546	0.704	1.11	5.00		108
Waterbury Indicator	0.065	0.247	0	1	7	108
Pre-1998 Cases Indicator	0.000	0.000	0	0	0	108
Dependent Variables						
Capital-Felony Charge	0.583	0.495	0	1	63	108
Death Sentence (Not Overturned)	0.046	0.211	0	1	5	108

APPENDIX F:

JOHN J. DONOHUE, III

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http://works.bepress.com/john_donohue/

EMPLOYMENT

Yale Law School, Leighton Homer Surbeck Professor of Law, July 2004 to present.

Schmidheiny Visiting Professor of Law and Economics, St. Gallen University, November – December, 2007.

Visiting Lecturer in Law and Economics, Gerzensee Study Center, Switzerland, June 2007.

Visiting Professor, Tel Aviv University School of Law, May 2007.

Herbert Smith Visitor to the Law Faculty, University of Cambridge, England, February 2006.

Stanford Law School, Professor of Law, September 1995 to June 2004.
- William H. Neukom Professor of Law, February 2002 – June 2004.
- John A. Wilson Distinguished Faculty Scholar, March 1997 – January 2002.
- Academic Associate Dean for Research, since July 2001 – July 2003.
- Stanford University Fellow, September 2001 – May 2003.

Visiting Professor, Harvard Law School, January 2003.

Fellow, Center for Advanced Studies in the Behavioral Sciences,
Stanford, California, Academic year 2000-01.

Visiting Professor, Yale Law School, Fall, 1999.

Professor, Center for the Study of American Law in China, Renmin University Law School,

Beijing, July 1998.

Visiting Professor of Law and Economics, University of Virginia, January 1997.

Lecturer, Toin University School of Law, Yokohama, Japan, May-June 1996.

Cornell Law School, Distinguished Visiting Fellow in Law and Economics, April 8-12, 1996 and September 25-29, 2000.

Northwestern University School of Law:
Class of 1967 James B. Haddad Professor of Law, September 1994-August 1995
Harry B. Reese Teaching Professor, 1994-1995
Professor of Law, May 1991-September 1994
Associate Professor, May 1989-May 1991
Assistant Professor, September 1986-May 1989.

Research Fellow, American Bar Foundation, September 1986-August 1995.

Visiting Professor, University of Chicago Law School, January 1992-June 1992.

Visiting Professor of Law and Economics, University of Virginia Law School, January 1990-May 1990.

Fellow, Yale Law School Program in Civil Liability, July 1985-August 1986.

Private Practice (part-time), New Haven, Connecticut, September 1981-August 1986.

Instructor in Economics, Yale College, September 1983-August 1985.

Summer Associate, Donovan Leisure Newton & Irvine, New York, Summer 1982.

Associate Attorney, Covington & Burling, Washington, D.C., October 1978-July 1981 (including last six months as Attorney, Neighborhood Legal Services).

Law Clerk to Chief Justice T. Emmet Clarie, U.S. District Court, Hartford, Connecticut, September 1977-August 1978.

Summer Associate, Perkins, Coie, Stone, Olsen & Williams, Seattle, Washington, Summer 1976.

Research Assistant, Prof. Laurence Lynn, Kennedy School of Government, Harvard University, Summer 1975.

LSAT Tutor, Stanley Kaplan Education Center, Boston, Massachusetts; Research Assistant, Prof. Philip Heymann, Harvard Law School; Research Assistant, Prof. Gordon Chase, Harvard School of Public Health. (During Law School)

EDUCATION

Yale University, 1981-1986

University Fellow in Economics; M.A. 1982, M. Phil. 1984, Ph.D. 1986.

Dissertation: ″A Continuous-Time Stochastic Model of Job Mobility: A Comparison of Male-Female Hazard Rates of Young Workers.″
Awarded with Distinction by Yale.

Winner of the Michael E. Borus Award for best social science dissertation in the last three years making substantial use of the National Longitudinal Surveys--awarded by the Center for Human Research at Ohio State University on October 24, 1988.

National Research Service Award, National Institute of Health.

Member, Graduate Executive Committee; Graduate Affiliate, Jonathan Edwards College.

Harvard Law School, 1974-1977 (J.D.)

Graduated Cum Laude.

Activities: Law Clerk (Volunteer) for Judge John Forte, Appellate Division of the District Court of Central Middlesex; Civil Rights, Civil Liberties Law Review; Intra-mural Athletics; Clinical Placement (Third Year): (a) First Semester: Massachusetts Advocacy Center; (b) Second Semester: Massachusetts Attorney General's Office--Civil Rights and Consumer Protection Divisions. Drafted comments for the Massachusetts Attorney General on the proposed U.S. Department of Justice settlement of its case against Bechtel Corporation’s adherence to the Arab Boycott of Israeli companies.

Hamilton College, 1970-1974 (B.A.)

Departmental Honors in both Economics and Mathematics
Phi Beta Kappa (Junior Year)

Graduated fourth in class with the following academic awards:
Brockway Prize
Edwin Huntington Memorial Mathematical Scholarship
Fayerweather Prize Scholarship
Oren Root Prize Scholarship in Mathematics

President, Root-Jessup Public Affairs Council.

PUBLICATIONS

Books:

Economics of Labor and Employment Law: Volumes I and II, Edward Elgar Publishing, 2007.

Employment Discrimination: Law and Theory, Foundation Press, 2005 (with George Rutherglen).

Foundations of Employment Discrimination Law, Foundation Press, 2d edition (2003).

Foundations of Employment Discrimination Law, Oxford University Press (1997)(Initial edition).

Articles:

"Economic Models of Crime and Punishment," Social Research, Vol. 74: No. 2, Summer 2007, pp. 379-412.

"Rethink the War on Drugs," Yale Law Reports, Summer 2007, pp. 46-47.

"Understanding the 1990s Crime Drops in the U.S. and Canada," Canadian Journal of Criminology and Criminal Justice (forthcoming October 2007) at http://www.ccja-acjp.ca/en/cjcr.html

"Murder in Decline in the 1990s: Why the U.S. and N.Y.C. Were Not That Special," Punishment and Society (forthcoming 2007).

Introduction and two-volume edition, "AntiDiscrimination Law," The New Palgrave Dictionary of Economics, 2d Edition, forthcoming 2007.

"Studying Labor Market Institutions in the Lab: Minimum Wages, Employment Protection, and Workfare: Comment," Journal of Theoretical and Institutional Economics, 163(1), 46—51 (March 2007).

"The Impact of Damage Caps on Malpractice Claims: Randomization Inference with Difference-in-Differences," (with Daniel Ho), 4 Journal of Empirical Legal Studies 69 (2007).

"The Discretion of Judges and Corporate Executives: An Insider's View of the Disney Case," The Economists' Voice: Vol. 3: No. 8, Article 4.
Available at: http://www.bepress.com/ev/vol3/iss8/art4

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"The Death Penalty: No Evidence of Deterrence," The Economists' Voice, (with Justin Wolfers) (April 2006), http://bpp.wharton.upenn.edu/jwolfers/Press/DeathPenalty(BEPress).pdf.

"The Law and Economics of Antidiscrimination Law," A. M. Polinsky and Steven Shavell, eds., Handbook of Law and Economics, forthcoming 2006, http://papers.nber.org/temp/25899.w11631.pdf and http://ssrn.com/abstract=763486.

"The Costs of Wrongful-Discharge Laws," 88 Review of Economics and Statistics (with David Autor and Stewart Schwab)(2006), pp. 211-31.

"Security, Democracy, and Restraint," 1 Opening Argument 4 (February 2006).

"Uses and Abuses of Empirical Evidence in the Death Penalty Debate," 58 Stanford Law Review 791 (2005)(with Justin Wolfers).
-- Reprinted in Steve Levitt and Thomas Miles, eds., Economics of Criminal Law, Edward Elgar Publishing, 2008.

"Does Terrorism Increase Crime? A Cautionary Tale," (with Daniel Ho), 2005.

"The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Evaluation" (with Peter Siegelman), in Laura Beth Nielsen and Robert L. Nelson, eds., Handbook of Employment Discrimination Research (2005).

"Fighting Crime: An Economist's View," 7 The Milken Institute Review 46 (2005).
-- Reprinted in Kurt Finsterbusch, ed., Social Problems (McGraw-Hill, 2006).

"Does Greater Managerial Freedom to Sacrifice Profits Lead to Higher Social Welfare?" In Bruce Hay, Robert Stavins, and Richard Vietor, eds., Environmental Protection and the Social Responsibility of Firms: Perspectives from Law, Economics, and Business (2005).

"Guns, Crime, and the Impact of State Right-to-Carry Laws," 73 Fordham Law Review 623 (2004).

"Clinton and Bush's Report Cards on Crime Reduction: The Data Show Bush Policies Are Undermining Clinton Gains", The Economists' Voice: Vol. 1: No. 1, Article 4. 2004, http://www.bepress.com/ev/vol1/iss1/art4

"The Employment Consequences of Wrongful-Discharge Laws: Large, Small, or None at All?" American Economic Review: Papers and Proceedings May, 2004 (with David Autor and Stewart Schwab).

"Further Evidence that Legalized Abortion Lowered Crime: A Reply To Joyce," 39 Journal of Human Resources 29 (Winter 2004)(with Steven Levitt).

"The Final Bullet in the Body of the More Guns, Less Crime Hypothesis," Criminology & Public Policy (July 2003, Volume 2, Issue 3) at pp. 397-410.

"Shooting Down the 'More Guns, Less Crime' Hypothesis," 55 Stanford Law Review 1193 (2003)(with Ian Ayres).

"The Latest Misfires in Support of the 'More Guns, Less Crime' Hypothesis," 55 Stanford Law Review 1371 (2003)(with Ian Ayres).

"Can Guns, Or Gun Violence, Be Controlled?" (Reviewing James Jacobs, Can Gun Control Work?), The American Prospect (December 16, 2002), p. 35.

"Divining the Impact of Concealed Carry Laws," in Jens Ludwig and Philip Cook, Evaluating Gun Policy: Effects on Crime and Violence (Washington D.C.: Brookings, 2003).

"The Search for Truth: In Appreciation of James J. Heckman," 27 Law and Social Inquiry 23 (2002).

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--Reprinted in Legal Decisionmaking section of the American Bar Foundation Anthology, ABF Press (2007).

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-- reprinted in Steven D. Levitt and Thomas J. Miles, eds., "Economics of Criminal Law" (2007).

"Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers," 53 Stanford Law Review 897 (2001).

- Reprinted in Michael Zimmer, Charles Sullivan et al, Cases and Materials on Employment Discrimination (6th edition)(2003).

"Nondiscretionary Concealed Weapons Law: A Case Study of Statistics, Standards of Proof, and Public Policy," 1 American Law and Economics Review 436 (1999)(with Ian Ayres).

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- Excerpted in Lynne Dallas, Law and Public Policy: A Socio-Economic Approach (2003).

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-- Excerpted in Sanford Kadish & Stephen Schulhofer, Criminal Law and Its Processes (8th ed. 2007),

"Guns, Violence, and the Efficiency of Illegal Markets," 88 American Economic Review 463 (May 1998)(with Steve Levitt).

"Did *Miranda* Diminish Police Effectiveness?" 50 Stanford Law Review 1147 (1998).

"Some Thoughts on Affirmative Action," 75 Washington University Law Quarterly 1590 (1997).

"Executive Compensation," 3 Stanford Journal of Law, Business & Finance 1 (1997).

"Some Perspective on Crime and Criminal Justice Policy," Lawrence Friedman and George Fisher, eds., The Crime Conundrum: Essays on Criminal Justice 45 (1997).

″The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest/Klein Hypothesis,″ 24 Journal of Legal Studies 427 (1995) (with Peter Siegelman).

″Employment Discrimination Law in Perspective: Three Concepts of Equality,″ 92 Michigan Law Review 2583 (1994).

- Reprinted in Frank Ravitch, Janis McDonald, and Pamela Sumners, Employment Discrimination Law (2004).
- Translated into Chinese and published in Peking University Law Review (2007).

″The Effects of Joint and Several Liability on Settlement Rates: Mathematical Symmetries and Meta-Issues in the Analysis of Rational Litigant Behavior,″ 23 Journal of Legal Studies 543 (1994).

″Liberal Law and Economics,″ (reviewing Rethinking the Progressive Agenda by Susan Rose-Ackerman), 13 Journal of Policy Analysis and Management 192 (1994).

Review of Richard Epstein's Forbidden Grounds: The Case Against Employment Discrimination Laws, 31 Journal of Economic Literature 1477 (1994).

″Law and Macroeconomics: Employment Discrimination Over the Business Cycle,″ 66 University of S. Calif. L. Rev. 709 (1993) (with Peter Siegelman).

″Advocacy Versus Analysis In Assessing Employment Discrimination Law,″ 44 Stanford Law Review 1583 (1992).

- Reprinted in Christopher McCrudden, Anti-Discrimination Law (2003).

″The Changing Nature of Employment Discrimination Litigation,″ 43 Stanford Law Review 983 (1991) (with Peter Siegelman).

″The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees,″ 54 Law and Contemporary Problems 195 (1991).

″Re-Evaluating Federal Civil Rights Policy,″ 79 Georgetown Law Journal 1713 (1991) (with James Heckman).

″Opting for the British Rule; Or, If Posner and Shavell Can't Remember the Coase Theorem, Who Will?″ 104 Harvard Law Review 1093 (1991).

- Reprinted in Saul Levmore, Foundations of Tort Law 160 (1994).

″Continuous versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks,″ 29 Journal of Economic Literature 1603 (December 1991) (with James Heckman).

- Reprinted in Paul Burstein, ed., Equal Employment Opportunity, Aldine De Gruyter, New York (1994).

"The Impact of Federal Civil Rights Policy on the Economic Status of Blacks," 14 Harvard Journal of Law and Public Policy 41 (1991).

"Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases," 24 Law and Society Review 1133 (1990) (with Peter Siegelman).

"Prohibiting Sex Discrimination in the Workplace: An Economic Perspective," 56 University of Chicago Law Review 1337 (1989).

"The Law & Economics of Tort Law: The Profound Revolution," 102 Harvard Law Review 1047 (1989).

"Using Market Incentives to Promote Auto Occupant Safety," 7 Yale Law and Policy Review 449 (1989).

"Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells," 99 Yale Law Journal 549 (1989).
--Winner of the 1989 Scholarly Paper Competition,
Association of American Law Schools.

"Reply to Professors Ellickson and Stigler," 99 Yale Law Journal 635 (1989).

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"Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner," 136 U. Pa. L. Rev. 523 (1987).

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"A Comparison of Male-Female Hazard Rates of Young Workers, 1968-1971," Working Paper #48, Center for Studies in Law, Economics and Public Policy; Yale Law School (1986).

″Hazard Rates of Young Male and Female Workers--Recent Developments,″ Working Paper #51, Center for Studies in Law, Economics and Public Policy; Yale Law School (1986).

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″Section I Cases,″ Sherman's Summations, Vol.3, No.2, Sherman Act Committee of the A.B.A. Antitrust Section, Fall, 1982, at 49.

″An Evaluation of the Constitutionality of S. 114, The Proposed Federal Death Penalty Statute,″ Hearings before the U.S. Senate Judiciary Committee, April 27, 1981, at 151.

″Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death,″ 30 Catholic University Law Review 13 (1980).

″Criminal Code Revision--Contempt of Court and Related Offenses,″ Hearings before the Subcommittee on Criminal Justice of the House Judiciary Committee, July 18, 1979, at 1087.

WORKSHOPS AND ADDRESSES

"The Empirical Revolution in Law and Policy: Jubilation and Tribulation," **Keynote Address, Conference on Empirical Legal Studies, NYU Law School,** Novermber 9, 2007.

"The Death Penalty in the U.S. and Connecticut," **The Whitney Center**, Hamden, CT, November 5, 2007.

"Empirical Evaluation of Law: The Impact on U.S Crime Rates of Incarceration, the Death Penalty, Guns, and Abortion," Law and Economics Workshop, **St. Gallen Law School, Switzerland**, June 25, 2007.

"Assessing the Relative Benefits of Incarceration: The Overall Change Over the Previous Decades and the Benefits on the Margin," **Russell Sage Foundation**, New York, May 3, 2007.

Comment on Eric Baumer's "A Comprehensive Assessment of the Contemporary Crime Trends Puzzle," Workshop on Crime Trends, **National Academy of Sciences**, Washington, D.C., April 25, 2007.

"Can You Believe Econometric Evaluations of Law, Policy, and Medicine?" **Stanford Law School**, Legal Theory Workshop, March 1, 2007; Faculty Workshop, **Tel Aviv University School of Law**, May 14, 2007; Faculty Workshop, **University of Haifa Law School**, May

16, 2007; Law and Economics Workshop, **Georgetown Law School**, September 19, 2007; Faculty Workshop, **Yale Law School**, November 5, 2007.

Comment on Bernard Harcourt, Third Annual Criminal Justice Roundtable Conferemce, **Yale Law School, "**Rethinking the Incarceration Revolution Part II: State Level Analysis," April 14, 2006.

"Corporate Governance in America: The Disney Case," **Catholic University Law School**, Milan, Italy, March 19, 2007.

"The U.S Tort System," (Latin American) Linkages Program, **Yale Law School**, February 13, 2007.

Panel Member, "Guns and Violence in the U.S.," **Yale University, International Center**, January 24, 2007.

"Economic Models of Crime and Punishment," Punishment: The U.S. Record: A Social Research Conference at **The New School**, New York City, Nov. 30, 2006

Comment on Baldus et al, "Equal Justice and the Death Penalty: The Experience fo the United States Armed Forces, Conference on Empirical Legal Studies, **University of Texas Law, School**, Austin, Texas, October 27, 2006.

"Empirical Evaluation of Law: The Promise and the Peril,"**Harvard Law School**, October 26, 2006.

"Estimating the Impact of the Death Penalty on Murder," Law and Economics Workshop, **Harvard Law School**, September 12, 2006; Conference on Empirical Legal Studies, **University of Texas Law School**, October 28, 2006; Joint Workshop, Maryland Population Research Center and School of Public Policy, **University of Maryland,** March 9, 2007.

"Why Are Auto Fatalities Dropping so Sharply?" **Faculty Workshop, Wharton**, Philadelphia, PA, April 19, 2006.

"The Law of Racial Profiling," Law and Economic Perspectives on Profiling Workshop, **Northwestern University Department of Economics**, April 7, 2006.

"Landmines and Goldmines: Why It's Hard to Find Truth and Easy To Peddle Falsehood in Empirical Evaluation of Law and Policy," **Rosenthal Lectures, Northwestern University School of Law**, April 4-6, 2006.

"The Impact of Legalized Abortion on Crime," **American Enterprise Institute**, March 28, 2006.

"The Impact of Damage Caps on Malpractice Claims: Randomization Inference with Difference-in-Differences,"**Conference on Medical Malpractice, The Rand Corporation**, March 11, 2006.

"Powerful Evidence the Death Penalty Deters?" **Leighton Homer Surbeck Chair Lecture, Yale Law School**, March 7, 2006.

"Uses and Abuses of Empirical Evidence in the Death Penalty Debate," Faculty Workshop, **University of Connecticut Law School,** October 18, 2005; Faculty Workshop, **UCLA Law School**, February 3, 2006; Law and Economics Workshop, **Stanford Law School**, February 16, 2006; ; Law Faculty, **University of Cambridge, Cambridge, England**, February 28, 2006; **University of Illinois College of Law,** Law and Economics Workshop, March 2, 2006; Faculty Workshop, **Florida State University Law School**, March 30, 2006; **ALEA**, Berkeley, CA May 6, 2006; **University of Chicago Law School,** Law and Economics Workshop, May 9, 2006.

"Is Gun Control Illiberal?" Federalist Society Debate with Dan Kahan at Yale Law School, January 31, 2006.

"Witness to Deception: An Insider's Look at the Disney Trial," **2005-2006 Distinguished Lecture, Boston University School of Law**, November 10, 2005; Center for the Study of Corporate Law, **Yale Law School**, November 3, 2005; **Law Offices of Herbert Smith, London, England**, February 23, 2006; Law Faculty, **University of Cambridge, Cambridge, England**, February 27, 2006.

"Understanding the Surprising Fall in Crime in the 1990s," **Rotary Club**, Orange, CT, August 5, 2005; Faculty Workshop, **Yale School of Management**, September 21, 2005.

Panel Member, "The Board's Role in Corporate Strategy," The Yale Global Governance Forum, **Yale School of Management**, September 8, 2005.

"Crime and Abortion," **Museo de la Cuidad de Mexico**, Mexico City, October 20, 2003.

"Allocating Resources towards Social Problems and Away From Incarceration as a Means of Reducing Crime," **MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice**, San Francisco, CA, February 28, 2003.

"Shooting Down the More Guns, Less Crime Hypothesis," **Stanford Law School**, Law and Economics Seminar, January 28, 2003; Faculty Workshop, Center for the Study of Law and Society, **Boalt Hall**, University of California, Berkeley, Feb. 24, 2003; Development Workshop, **Stanford Law School**, April 25, 2003; Faculty Workshop, **Stanford Law School**, July 2, 2003; Law and Public Affairs Program Workshop, **Princeton University,** September 29, 2003; Stanford Alumni Weekend, **Stanford University**, October 17, 2003; Faculty Workshop, **CIDE**, Mexico City, October 20, 2003.

"The Impact of Legalized Abortion on Teen Childbearing," **NBER Labor Summer Institute**, Cambridge, MA, July 30, 2002.

"Do Concealed Handgun Laws Reduce Crime?" Faculty Workshop, **Stanford Law School**, October 4, 2000; First-Year Orientation, **Stanford Law School**, September 5, 2001; Faculty Workshop, **Harvard Law School**, April 26, 2002; Faculty Workshop, **Columbia Law School**, April 29, 2002.

"The Evolution of Employment Discrimination Law in the 1990s: An Empirical Investigation," Fellows Workshop, American Bar Foundation, February 11, 2002.

"The Role of Discounting in Evaluating Social Programs Impacting on Future Generations: Comment on Arrow and Revesz," Colloquium on Distributive Justice, **Stanford Law School**, Oct. 18, 2001.

"The Impact of Wrongful Discharge Laws," **NBER Labor Summer Institute**, Cambridge, MA, July 30, 2001; Labor and Employment Seminar, **NYU Law School**, October 16, 2001; Faculty Workshop, **Stanford Law School**, September 18, 2002; **Yale Law School**, January, 2004.

"Racial Profiling: Defining the Problem, Understanding the Cause, Finding the Solution," **American Society of Criminology Conference**, San Francisco, CA, November 15, 2000.

"Institutional Architecture for Building Private Markets," Conference on "Latin America and The New Economy" at **Diego Portales University** in Santiago, Chile, October 26, 2000.

"The History and Current Status of Employment Discrimination Law in the United States," Unicapital School of Law, (Centro Universitario Capital), Sao Paulo, Brazil, March 10, 2000.

"Corporate Governance in Developing Countries: Opportunities and Dangers," Conference on Neoliberal Policies for Development: Analysis and Criticism," University of Sao Paulo Law School, March 13, 2000

"Legalized Abortion and Crime," Law and Economics Workshop, **University of Pennsylvania Law School**, September 21, 1999; Faculty Workshop, **Yale Law School**, September 27, 1999; **John Jay College of Criminal Justice**, October 7, 1999; Faculty Workshop, **Quinnipiac Law School**, October 13, 1999; Faculty Workshop, **University of Connecticut Law School**, October 19, 1999; **University of Virginia Law School**, October 25, 1999; Faculty Workshop, **Baruch College**, November 9, 1999; MacArthur Foundation Social Interactions and Economic Inequality Network Meeting, **Brookings Institution**, December 4, 1999; Faculty Workshop, **NYU Law School**, January 21, 2000; Faculty Workshop, **University of San Diego Law School**, February 18, 2000; Public Economics Workshop, Department of Economics, **Stanford University**, April 28, 2000; Law and Economics Workshop, **University of California at Berkeley Law School**, September 18, 2000; Faculty Workshop, **Cornell Law School**, September 26, 2000; OB-GYN Grand

Rounds, **Stanford Medical School**, October 2, 2000; **Center for Advanced Studies in the Behavioral Sciences,** October 11, 2000; Faculty Workshop, **Graduate School of Business**, February 5, 2002.

Panel member, Session on Executive Compensation, Director's College, **Stanford Law School**, March 23, 1999.

"Exploring the Link Between Legalization of Abortion in the 1970s and Falling Crime in the 1990s," Law and Economics Workshop, **Harvard Law School**, March 16, 1999; Law and Economics Workshop, **University of Chicago Law School**, April 27, 1999; Faculty Workshop, **Stanford Law School**, June 30, 1999.

"Is the Increasing Reliance on Incarceration a Cost-Effective Strategy of Fighting Crime?" Faculty Workshop**, University of Wisconsin School of Social Science**, February 19, 1999.

"What Do We Know About Options Compensation?" Institutional Investors Forum**, Stanford Law School**, May 29, 1998.

Commentator on Orlando Patterson's presentation on "The Ordeal of Integration," **Stanford Economics Department**, May 20, 1998.

"Understanding The Time Path of Crime," Presentation at Conference on Why is Crime Decreasing? **Northwestern University School of Law**, March 28, 1998; Faculty Workshop, **Stanford Law School**, September 16, 1998; Faculty Workshop, **University of Michigan Law School**, February 18, 1999.

Commentator, Conference on Public and Private Penalties, the **University of Chicago Law School**, Dec. 13-14, 1997.

"Some Thoughts on Affirmative Action," Presentation at a conference on Rethinking Equality in the Global Society, **Washington University School of Law**, November 10, 1997.

Commentator on Chris Jencks' Presentation on Welfare Policy, **Stanford Economics Department**, October 8, 1997.

"The Impact of Race on Policing, Arrest Patterns, and Crime," Faculty Workshop, **Stanford Law School**, September 10, 1997; Law and Economics Workshop, **University of Southern California Law School**, October 23, 1997; Law and Economics Workshop, **Columbia University Law School**, November 24, 1997; Law and Economics Workshop, Haas School of Business**, University of California at Berkeley**, February 19, 1998; Annual Meeting of the American Law and Economics Association, **University of California at Berkeley**, May 8, 1998; Conference on the Economics of Law Enforcement, **Harvard Law School**, October 17, 1998.

"Crime in America: Understanding Trends, Evaluating Policy," **Stanford Sierra Camp**,

August 1997.

″Executive Compensation: What Do We Know?″ TIAA-CREF Committees on Corporate Governance and Social Responsibility, Center for Economic Policy Research, **Stanford University**, June 27, 1997; NASDAQ Director′s Day, **Stanford University**, June 30, 1997.

Panel Chair, Criminal Law (Theory), Criminal Law (Empirical), and Labor/Discrimination/Family Law, American Law and Economics Association, **University of Toronto Law School**, May 9-10, 1997.

Commentator, ″Diversity in Law School Hiring,″ **Stanford Law School**, February 25, 1997.

Keynote Speaker, ″The Optimal Rate of Crime,″ 11th Annual Conference, **The Oklahoma Academy for State Goals**, Tulsa, Oklahoma, May 7, 1996.

Panel member, Session on Executive Compensation, Director's College, **Stanford Law School**, March 28-29, 1996.

″The Power of Law: Can Law Make a Difference in Improving the Position of Women and Minorities in the Labor Market?″ The Fellows of the **American Bar Foundation**, Baltimore, Maryland, February 3, 1996.

″Public Action, Private Choice and Philanthropy: Understanding the Sources of Improvement in Black Schooling Quality in Georgia, 1911-1960,″ **Stanford Faculty Workshop**, January 24, 1996; Faculty Workshop, **University of Virginia Law School**, January 22, 1997; **National Bureau of Economic Research**, Cambridge, Massachusetts, Labor Studies Conference, April 3, 1998.

Commentator, ″The Effect of Increased Incarceration on Crime,″ Meetings of the **American Economics Association**, San Francisco, January 6, 1996.

Commentator, Symposium on Labor Law, **University of Texas Law School**, November 10-11, 1995.

Panel Member, Symposium on Criminal Justice, **Stanford Law School**, October 6-7, 1995.

Commentator, ″The Litigious Plaintiff Hypothesis,″ Industrial and Labor Relations Conference, **Cornell University**, May 19, 1995.

Commentator on Keith Hylton's, ″Fee Shifting and Predictability of Law,″ Faculty Workshop, **Northwestern University School of Law**, February 27, 1995.

″The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest/Klein Hypothesis,″ **Stanford University**, Law and Economics Seminars, October 31, 1994.

″Is the United States at the Optimal Rate of Crime?″ Faculty Workshop, **Indiana University School of Law**, Indianapolis, November 18, 1993; Faculty Workshop, **Northwestern University School of Law**, April 18, 1994; Law and Economics Workshop, **Stanford Law School**, April 28, 1994; Meetings of the American Law and Economics Association, **Stanford Law School**, May 13, 1994; **American Bar Foundation**, September 7, 1994; Faculty Workshop, **DePaul Law School**, September 21, 1994; Law and Economics Workshop, **University of Chicago Law School**, October 11, 1994; Faculty Seminar, **Stanford Law School**, October 31, 1994; Law and Economics Luncheon, **Stanford Law School**, November 1, 1994; Faculty Seminar Workshop, **University of Illinois College of Law**, Champaign, November 22, 1994; Law and Economics Workshop, **Harvard Law School**, November 29, 1994; School Alumni Luncheon, Chicago Club, December 13, 1994; **Northwestern Law School**; Law and Economics Workshop, **Yale Law School**, February 1, 1996; Faculty Workshop, **Cornell Law School**, April 10, 1996; Faculty Workshop, **Tokyo University Law School**, June 4, 1996; Panel on ″The Economics of Crime,″ **Western Economics Association** Meeting, San Francisco, July 1, 1996.

″The Broad Path of Law and Economics,″ Chair Ceremony, **Northwestern University School of Law**, September 30, 1994.

Commentator on Paul Robinson's ″A Failure of Moral Conviction,″ **Northwestern University School of Law**, September 20, 1994.

″The Do's of Diversity, The Don'ts of Discrimination,″ Kellogg School of Business, **Northwestern University**, May 17, 1994.

″Does Law Matter in the Realm of Discrimination?″ **Law and Society Summer Institute**, Pala Mesa Lodge, Fallbrook, California, June 25, 1993.

Commentator, ″The Double Minority: Race and Sex Interactions in the Job Market,″ Society for the Advancement of Socio-Economics, **New School for Social Research**, March 28, 1993.

″The Effects of Joint and Several Liability on Settlement Rates: Mathematical Symmetries and Meta-Issues in the Analysis of Rational Litigant Behavior,″ Economic Analysis of Civil Procedure, **University of Virginia School of Law**, March 26, 1993.

Debate with Richard Epstein on Employment Discrimination Law, **Chicago Federalist Society**, February 23, 1993.

Panel Chair, ″Optimal Sanctions and Legal Rules in Tort and Criminal Law,″ Meetings of Annual Association of Law and Economics, **Yale Law School**, May 15, 1992.

Panel Member, ″The Law and Economics of Employment at Will,″ **The Institute For Humane Studies**, Fairfax, Virginia, March 27, 1992.

″The Efficacy of Title VII,″ Debate with Professor Richard Epstein, **University of Chicago Law School**, February 26, 1992.

Moderator, ″Using Testers to Demonstrate Racial Discrimination,″ **University of Chicago Law School**, February 13, 1992.

″Law & Macroeconomics: The Effect of the Business Cycle on Employment Discrimination Litigation,″ Law and Society Workshop, **Indiana University**, November 6, 1991; Faculty Workshop, **University of North Carolina Law School**, Chapel Hill, November 8, 1991; Faculty Workshop, **Northwestern University School of Law**, December 11, 1991; Law and Economics Conference, **Duquesne Law School**, March 14, 1992; **University of Chicago Law School**, April 2, 1992.

Panel Chair and Commentator, ″New Perspectives on Law and Economics,″ **Society for the Advancement of Socioeconomics**, Stockholm, June 17, 1991; **Law and Society Meetings**, Amsterdam, June 29, 1991.

Panel Chair, ″Regulation of International Capital Markets,″ **Law and Society Meetings**, Amsterdam, June 27, 1991.

Panel Chair, ″The Law and Economics of Discrimination,″ American Association of Law and Economics, **University of Illinois Law School**, May 24, 1991.

″The Economics of Employment Discrimination Law,″ **Industrial Relations Research Association**, Chicago, Illinois, March 4, 1991.

″Does Current Employment Discrimination Law Help or Hinder Minority Economic Empowerment?″ Debate with Professor Richard Epstein, The Federalist Society, **Northwestern Law School**, February 26, 1991.

Panel Member, ″The Law and Economics of Employment Discrimination,″ **AALS Annual Meeting**, Washington, D.C., January 6, 1991.

″Re-Evaluating Federal Civil Rights Policy,″ Conference on the Law and Economics of Racial Discrimination in Employment, **Georgetown University Law Center**, November 30, 1990.

″Opting for the British Rule,″ Faculty Seminar, **Northwestern Law School**, September 11, 1990; Faculty Seminar, **University of Virginia Law School**, September 14, 1990; Law and Economics Seminar, **University of Michigan Law School**, October 18, 1990; Faculty Workshop, **NYU Law School**, November 14, 1990; Faculty Workshop, **University of Florida Law School**, March 18, 1991.

″The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees,″ at the **Yale Law School Conference** ″Modern Civil Procedure: Issues in Controversy,″ June 16, 1990.

″Studying the Iceberg From Its Tip?: An Analysis of the Differences Between Published and Unpublished Employment Discrimination Cases,″ **Law and Society Meetings**, Berkeley, California, May 31, 1990.

Panel Discussion on Tort Reform, **University of Pennsylvania Law School**, April 27, 1990.

Panel Discussion of ″The Role of Government in Closing the Socio-Economic Gap for Minorities,″ at the Federalist Society National Symposium on ″The Future of Civil Rights Law,″ **Stanford Law School**, March 16, 1990.

″Continuous versus Episodic Change: The Impact of Affirmative Action and Civil Rights Policy on the Economic Status of Blacks,″ **University of Virginia Economics Department**, February 15, 1990; **Princeton University Department of Economics**, February 21, 1990 (with James Heckman); Law & Economics Workshop, **University of Toronto Law School**, October 8, 1991.

″Sex Discrimination in the Workplace: An Economic Perspective,″ Fellows Seminar, **American Bar Foundation**, October 16, 1989.

″The Changing Nature of Employment Discrimination Litigation,″ Law and Economics Workshop, **Columbia Law School**, March 23, 1989; Faculty Seminar, **University of Virginia Law School**, March 24, 1989; Law and Economics Workshop, **University of Chicago**, April 25, 1989; **Law & Society Meeting**; Madison, Wisconsin, June 8, 1989; Labor Economics Workshop, **University of Illinois**, Chicago, November 1, 1989; Law & Economics Workshop, **University of Pennsylvania Law School**, November 9, 1989; Law and Economics Seminar, **University of California at Berkeley**, October 4, 1990; Law and Social Science Workshop, **Northwestern University**, February 3, 1991; Law and Economics Seminar, **Stanford Law School**, March 21, 1991; Faculty Workshop, **Cornell Law School**, April 3, 1991; Visiting Committee, **Northwestern Law School**, April 5, 1991.

″Law & Economics: The Third Phase,″ The Association of General Counsel, **Northwestern University School of Law**, October 14, 1988.

″Employment Discrimination Litigation,″ **Northwestern Law School** Alumni Monthly Loop Luncheon. **Chicago Bar Association**, May 31, 1988.

″The Morality of the Death Penalty.″ A debate with Ernest Van Den Haag. **Northwestern University School of Law**, April 19, 1988.

″Models of Deregulation of International Capital Markets.″ A presentation with David Van Zandt, Faculty Seminar, **Northwestern University School of Law**, April 1, 1988; Visiting Committee, May 5, 1988.

″Is Title VII Efficient?″ A debate with Judge Richard Posner, Faculty Seminar, **Northwestern University School of Law**, November 20, 1987.

″The Senate's Role in Confirming Supreme Court Nominees: The Historical Record,″ **Northwestern University School of Law**, September 22, 1987.

″Diverting the Coasean River: Incentive Schemes to Reduce Unemployment Spells,″ **Yale Law School** Civil Liability Workshop, March 30, 1987; Faculty Seminar, **Northwestern University School of Law**, March 18, 1987; **University of Southern California Law Center**, May 1, 1987; and Seminar in Law and Politics, Department of Political Science, **Northwestern University**, May 8, 1987; Labor Workshop, Department of Economics, **Northwestern University**, October 27, 1987; **AALS Annual Meeting**, New Orleans, January 7, 1989.

″Women in the Labor Market--Are Things Getting Better or Worse?″ **Hamilton College**, February 23, 1987.

″The Changing Relative Quit Rates of Young Male and Female Workers,″ **Hamilton-Colgate Joint Faculty Economics Seminar**, February 23, 1987.

″Living on Borrowed Money and Time--U.S. Fiscal Policy and the Prospect of Explosive Public Debt,″ **Orange Rotary Club**, February 22, 1985.

″Capital Punishment in the Eighties,″ **Hamilton College**, April 6, 1981.

″Terms and Conditions of Sale Under the Uniform Commercial Code,″ Executive Sales Conference, **National Machine Tool Builders' Association**, May 12, 1980.

PROFESSIONAL ACTIVITIES

Co-Editor (with Steven Shavell), American Law and Economics Review, May 2006 – present.

Board of Advisors, Yale Law School Center for the Study of Corporate Law, July 2004 – present.

Member, Panel on Methods for Assessing Discrimination, National Academy of Sciences, September 2001 – June 2004. Resulting Publication: National Research Council, Measuring Racial Discrimination (2004), http://www.nap.edu/catalog/10887.html

Member, National Science Foundation Review Panel, Law and Social Sciences, September, 1999 – April 2001.

Editorial Board, Journal of Empirical Legal Studies, July 2003 – present.

Editorial Board, International Review of Law and Economics, October 1999 – present.

Editorial Board, Law and Social Inquiry, February 2000 – present.

Board of Editors, American Law and Economics Review, August 1998 – present.

Consultant, Planning Meeting on Measuring the Crime Control Effectiveness of Criminal Justice Sanctions, National Academy of Sciences, Washington, D.C., June 11,1998

Member, Board of Directors, American Law and Economics Association, June 1994-May 1997. Member, ALEA Nominating Committee, July 1995-May 1996. Member, Program Committee, July 1996-May 1998 and July 2000 – May 2002.

Statistical Consultant, 7th Circuit Court of Appeals Settlement Conference Project (December, 1994).

Testified before U.S. Senate Labor Committee on evaluating the Job Corps, October 4, 1994.

Assisted the American Bar Association Standing Committee on the Federal Judiciary in evaluating the qualifications of Ruth Bader Ginsburg (June 1993) and David Souter (June, 1990).

Chair, AALS Section on Law and Economics, January 1990-January 1991.

Economic Consultant to Federal Courts Study Committee. Analyzing the role of the federal courts and projected caseload for Judge Richard Posner's subcommittee. February 1989-March 1990.

Member, 1990 AALS Scholarly Papers Committee.

Member, Advisory Board, Corporate Counsel Center, Northwestern University School of Law. Since December 1987.

Associate Editor, Law and Social Inquiry. Summer 1987-December 1989.

Interviewed Administrative Law Judge candidates for U.S. Office of Personnel Management. Chicago, Illinois. May 23, 1988.

Member, Congressman Bruce Morrison's Military Academy Selection Committee. Fall 1983.

1982 Candidate for Democratic Nomination, Connecticut State Senate, 14th District (Milford, Orange, West Haven).

PRO BONO LEGAL WORK

Death Penalty case: Heath v. Alabama. Fall 1986-Fall 1989.

Wrote brief opposing death sentence in Navy spy case. Court ruled in favor of defendant on September 13, 1985.

Staff Attorney, Neighborhood Legal Services, January-July 1981.

Appealed sentence of death for Georgia defendant to the United States Supreme Court. Sentence vacated on May 27, 1980. Baker v. Georgia.

Court-appointed representation of indigent criminal defendant in District of Columbia Superior Court, February-July 1980.

RESEARCH GRANTS

Stanford University Research Fund, January 1997 and January 1998.

The National Science Foundation (project with James Heckman), December 1992; (project with Steve Levitt), July 1997.

Fund for Labor Relations Studies, University of Michigan Law School, March 1988.

BAR ADMISSIONS

Connecticut - October 1977; District of Columbia - March 1978 (Currently Inactive Status); United States Supreme Court - November 1980.

PROFESSIONAL ASSOCIATIONS

American Bar Association
American Economic Association
American Law and Economics Association
Research Associate, National Bureau of Economic Research (since October 1996) – in Law and Economics and Labor Studies.

PERSONAL

Born: January 30, 1953.