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CAPITAL PUNISHMENT IN CONNECTICUT, 1973-2007: A COMPREHENSIVE EVALUATION FROM 4686 MURDERS TO ONE EXECUTION

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June 8, 2013

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I. EXECUTIVE SUMMARY

A. THE THREE MAIN COMPONENTS OF THE REPORT

This study explores and evaluates the application of the death penalty in Connecticut from 1973 until 2007, a period during which 4686 murders were committed in the state.[1] The objective is to assess whether the system operates lawfully and reasonably or is marred by arbitrariness, caprice, or discrimination. My empirical approach has three components. First, I provide background information on the overall numbers of murders, death sentences, and executions in Connecticut. The extreme infrequency with which the death penalty is administered in Connecticut raises a serious question as to whether the state's death penalty regime is serving *any* legitimate social purpose.

Specifically, of the 4686 murders committed during the sample period, 205 are death-eligible cases that resulted in a homicide conviction, and 141 of these were charged with a capital felony. Of the 141, 49 were allowed to plead guilty to a non-capital offense. Of the remaining 92, 66 were convicted of a capital felony and 26 were acquitted of a capital felony. Of the 66, 28 then went to a death penalty sentencing hearing, resulting in 9 sustained death sentences, and one execution (in 2005). A comprehensive assessment of this process of

[1] Table 1 in Section VII of the report notes that there were 4578 criminal, non-negligent homicides in Connecticut between 1973 and 2006, and "Crime in Connecticut 2007" lists an additional 108 such homicides for that year, bringing the total for the period from 1973-2007 to 4686. For ease of reference, the FBI Uniform Crime Reports refer to such crimes as "murders," and I follow that practice unless further refinement is needed.

winnowing 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 deterrence nor retribution.[2]

Second, mindful of the Supreme Court's mandate that "[c]apital 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,'"[3] I evaluate whether the crimes that result in sustained death sentences are the most egregious relative to other death-eligible murders. Any claim to properly punishing such a narrow and specific category of the most serious offenses can definitively be put to rest. The Connecticut death penalty regime does not select from the class of death-eligible defendants those most deserving of execution. At best, the Connecticut system haphazardly singles out a handful for execution from a substantial array of horrible murders.

Third, I conduct a multiple regression to test more formally for the presence of arbitrariness or discrimination in implementing the death penalty. Specifically, I examine the impact on capital charging and sentencing decisions of legitimate factors that bear on the

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[2] The lack of any deterrence effect of the death penalty in Connecticut is widely acknowledged by knowledgeable researchers and law enforcement officials. Donohue and Wolfers, "Estimating the Impact of the Death Penalty on Murder," 11 American Law and Economics Review 249 (Fall 2009); . Donohue and Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," 58 Stanford Law Review 791 (2005); Kovandzic, T. V., Vieraitis, L. M. and Boots, D. P. (2009), Does the death penalty save lives? Criminology & Public Policy, 8: 803–843.

Echoing the comments of famed former Manhattan District Attorney Robert Morgenthau (quoted below at footnote 64), Daryl Roberts noted:

> "As Chief of Police for Hartford, Connecticut for 5 years, it was clear to me that the death penalty did not impact irrational acts of violence. In fact, the death penalty makes a mockery of the idea of prevention. Chasing a handful of executions means that countless other crimes go unsolved. It means fewer cops on the beat. It means that those cops will get less training and be less effective. It means that fewer resources go to support traumatized families in the aftermath of murder. The death penalty drains millions of dollars and resources away from real crime-fighting solutions while it pretends to be that solution." Daryl Roberts, "Academics Confirm What Police Knew," Equal Justice USA Newsletter 4 (August 2012).

Even the famously pro-death penalty (former) Waterbury State's Attorney John Connelly conceded that the death penalty in Connecticut is not a deterrent to murder. *The Death of Capital Punishment?* on *Morning Edition: Where We Live* (WNPR Connecticut radio broadcast, March 10, 2008).

[3] *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

deathworthiness of 205 death-eligible cases, as well as legally suspect variables—such as race and gender of the defendant, race of victim, or judicial district in which the murder occurred. The Connecticut death penalty system decidedly fails this inquiry; arbitrariness and discrimination are defining features of the state's capital punishment regime.[4]

B. THE SEVEN MAIN FINDINGS OF THE REPORT

This section briefly summarizes the seven specific findings I present in this report. First, Connecticut's death penalty regime today is assailable for producing results similar to the Georgia regime indicted by the Supreme Court's 1972 decision, *Furman v. Georgia.*[5] There the Supreme Court denounced an arbitrary and capricious capital punishment system that led to wantonly freakish and rare applications of the death penalty. As the U.S. Supreme Court highlighted in *Furman*, the sheer infrequency of death sentences and executions, given the number of murders, creates a strong suspicion that the determination of who is to die is highly arbitrary. The system could only be saved if it could be shown that those few death sentences and even fewer executions are reserved for the defendants who, because of the nature of their crimes, are most deserving of death.

Connecticut has executed one criminal defendant over a period during which there were 4686 murders. Efforts at sharpening the definition of death-eligible cases have not changed the Connecticut system's essential flaw: once the system has operated through the enormous

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[4] This report supersedes the earlier version of my report and underscores how robust the initial findings have proven to be. Specifically, the core findings of arbitrariness and discrimination along racial and geographic lines have remained strong even as I have refined the sample of death-eligible cases, doubled the number of coders (from 9 to 18) used to assess the egregiousness of 205 cases (University of Connecticut coders have been added to supplement the initial group of Yale coders), and altered the specification of the regressions in various robustness checks. In addition, I have been able to respond to the various criticisms raised by the professional expert witness Stephan Michelson hired by the State in his eight reports (each roughly of 500 pages) and his numerous other memoranda and submissions. These reports are filled both with much irrelevant and hyperbolic commentary and criticisms that are often misleading, incorrect, or inconsequential. I highlight some of the most arresting errors in Michelson's reports, although largely ignore the uniformly inaccurate and unprofessional ad hominem attacks that populate his reports.

[5] 408 U.S. 238 (1972).

discretionary decisions of prosecutors and juries, there is no meaningful basis for distinguishing the very few who receive sentences of death from the many capital-eligible murderers who do not.

As Justice Brennan observed, "Evidence that a penalty is imposed only infrequently suggests not only that jurisdictions are reluctant to apply it but also that, when it is applied, its imposition is arbitrary and therefore unconstitutional. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (1972)."[6] 15 percent of death-eligible murder trial convictions resulted in a death sentence in pre-*Furman* Georgia, a level that was deemed to be freakishly rare and therefore arbitrary and unconstitutional in the *Furman* case itself.[7] But this study reveals that Connecticut imposes sustained death sentences at a rate of 4.4 percent (9 of 205) that is among the lowest in the nation and more than two-thirds lower than the 15 percent pre-*Furman* Georgia rate that gave rise to the finding of a freakishly rare imposition of a penalty.[8] This evidence provides a factual basis for the claim that the Connecticut death penalty regime is unconstitutional because it fails

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[6] Justice Brennan, dissenting in *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676 (1987).

[7] David C. Baldus, George G. Woodward & Charles A. Pulaski Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis at 80 (1990): "In *Furman v. Georgia*, the infrequency with which juries actually imposed death sentences in death-eligible cases concerned each of the concurring justices. The *Furman* opinions suggest that the justices estimated that the national death-sentencing rate among convicted murderers was less than 0.20. Our pre-*Furman* data from Georgia indicated an unadjusted death-sentencing rate of 0.15 (44/294) in cases that resulted in murder convictions after trial, all of whose defendants were death eligible under Georgia law. This figure is quite consistent with the Court's estimate of the national rate."

[8] In an affidavit recently submitted in another case, David Baldus stated that "the post-Furman California death sentencing rate of 4.6% among all death-eligible cases is among the lowest in the nation and over two-thirds lower than the death sentencing rate in pre-Furman Georgia" (p.36). Connecticut's rate is smaller still than California's. The considerably higher rates of death sentencing that were still condemned in *Furman* and the low rates in California are identified in a recent empirical study of the California system conducted by George Woodworth, Michael Laurence, Robin Glenn, Richard Newell, and David Baldus that is based on a 1,900 case sample drawn from a universe of 27,453 California homicide convictions with offense dates between 1978 and 2002. Decl. of David C. Baldus on November 18th, 2010 (Exhibit 219), *Ashmus v. Wong* No. 3:93-cv-00594-TEH, U.S. District Court, ND Calif, page 4, and Table 5 on page 29.

to comply with the Eighth Amendment's "narrowing" requirements recognized by the United States Supreme Court in *Furman*.

Second, there is no meaningful difference between capital-eligible murders in which prosecutors pursue capital charges and those in which prosecutors do not. To assess whether the death penalty is being applied to the worst cases, I evaluated the egregiousness of 205 capital-eligible murders using two different egregiousness measures. I found that cases prosecutors charge as capital are virtually indistinguishable in these measures of deathworthiness from cases where prosecutors choose not to bring capital charges. This finding is difficult to square with the U.S. Supreme Court's Court's command that "[c]apital 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.'"[9]

Third, this command that within the class of death-eligible murders, the death penalty must be limited to the worst of the worst is also violated by the highly arbitrary sentences that capital-eligible defendants receive. For any given sentence, I found wide variations in the degree of egregiousness of the murders that can lead to that sentence. Similarly, at every level of egregiousness, I observed a wide range of sentences. In other words, Connecticut has not limited its use of the death penalty to the "worst of the worst," since many equally egregious or more egregious cases result in non-death sentences. Eight of Connecticut's nine affirmed death sentences were *not* among the 15 most egregious cases. For some cases resulting in a death sentence, literally 60 to well over one hundred cases in the sample of 205 are more egregious yet did not get the death penalty (see Table 9 in Section VII below). For the 8 defendants in our sample that are currently on death row in Connecticut, the median number of equally or more egregious death-eligible cases receiving non-death sentences is forty-six under the Composite

[9] *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quoting *Atkins,* 536 U.S. at 319).

egregiousness measure and thirty-five under the Overall egregiousness score. While this is what one would expect from an arbitrary and capricious process,[10] it is not consistent with the idea of a fair and consistent criminal justice system that limits the death penalty to the worst of the worst within the class of death-eligible cases.

Fourth, while the data analyzed in this report comes from 205 death-eligible cases that end with a conviction, the focus on this limited sample *understates* the degree of arbitrariness in the system. If one widens the lens to focus on *all* death-eligible murders, the system is even less predictable than the above results indicate. Just prior to the adoption of the state's new death penalty statute in 1973, only 7 percent of murder cases were not cleared by arrest or extraordinary means. Since that time, there has been a steady erosion in the fraction of murders that are cleared. Today, roughly 40 percent of all Connecticut murderers go unsolved. If this current rate of clearances and death sentencing were to persist, then for every murderer who receives a sustained death sentence, at least fifteen death-eligible murderers would not be punished at all![11] Thus the wide sentencing disparities I describe above substantially understate the huge disparities in outcomes that are found within the larger class of death-eligible murders. Any retributive justification for the death penalty is severely compromised in a system that would execute nine while 137 comparable killers were able literally to get away with murder.

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[10] An enormous degree of unreviewable (or not effectively reviewable) discretion at many junctures in the criminal justice system—a hallmark of the Connecticut death penalty system—is the breeding ground for the operation of prejudice. *See* IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001). 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. *See, e.g.*, Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees* (Nat'l Bureau of Econ. Research, Working Paper No. 13206, 2007) (noting substantial evidence of racial discrimination among NBA referees despite the claim that they are among the mostly highly reviewed of employees in the world).

[11] If nine of 205 is the rate of death sentencing among capital-eligible murders, then we would expect a similar number of sustained death sentences in the next 205 death-eligible murders that make it into the criminal justice system. Yet at the current clearance rate of 60%, catching 205 murderers means that 342 death-eligible crimes would have been committed and 137 murderers would never be caught. 137 is more than fifteen times the nine we assume will be ultimately sentenced to death. Moreover, not all cases that are cleared lead to a conviction (recall the arrest of OJ Simpson cleared the double-murder he was charged with but did not lead to a conviction). The above numbers do not capture this other avenue in which death-eligible murderers go free.

Fifth, the Connecticut death penalty system results in disparate racial outcomes in the imposition of sustained death sentences that cannot be explained by the type of murder or the egregiousness and other aggravating factors of the crimes involved. Looking at the raw statistics (in Table 20 of Section IX, which is also reproduced in this Executive Summary), one sees that minority defendants who commit capital-eligible murders of white victims are six times as likely to receive a death sentence as minority defendants who commit capital-eligible murders of minority victims (12 percent versus 2 percent).[12] Minority defendants who murder white victims are three times as likely to receive a death sentence as white defendants who murder white victims (12 percent versus 4 percent).

If we control for the factors of the crime through regression analysis, these disparities become even larger outside the Waterbury judicial district, as shown in Tables 24-26 of Section IX. For example, for the most common type of capital felony -- multiple victims cases, which comprise 38 percent of the 205 death-eligible cases -- a minority killing a white victim outside Waterbury is 11 to 13 times as likely to be sentenced to death as a minority killing a minority or a white killing a white. Of course, it is a clear violation of Equal Protection when "members of [one] race [are] being singled out for more severe punishment than others charged with the same offense." Furman v. Georgia, 408 U.S. at 449 (Powell, J. dissenting).

Sixth, the regression analysis of capital felony charging decisions provides further evidence of the arbitrariness and racial bias in Connecticut's capital punishment regime. Specifically, controlling for the type of murder as well as the egregiousness and the number of special aggravating factors in a case, minority killers of whites are treated most harshly, experiencing a charging rate that is roughly 25-28 percentage points higher than those who kill minority victims (see Table 22, reproduced below in this Executive Summary).

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[12] "Minority" refers to Hispanics and non-whites. "White" therefore refers to non-Hispanic whites.

These findings for the Connecticut death penalty system parallel those of recent studies of the application of the death penalty in other states: defendants who murder white victims are more likely to receive death sentences and are more likely to be executed subsequent to a death sentence than are defendants who murder non-white victims, particularly if the defendants are members of a racial or ethnic minority.[13]

Seventh, regression analysis also confirms that there are dramatically different standards of death sentencing across Connecticut. Capital-eligible defendants in Waterbury are sentenced to death at enormously higher rates than are capital-eligible defendants elsewhere in the state (see Tables 22 and 24-26). The arbitrariness of geography in determining criminal justice outcomes is a dominant factor in the Connecticut death penalty regime, despite the fact that, as a small state in which judges and prosecutors are appointed rather than elected, there is no articulated rationale for tolerating such immense geographic variation in capital sentencing.[14] Moreover, race of both defendant and victim is strongly and statistically significantly related to whether or not the state pursues and obtains a death sentence – an indication that the death

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[13] *See, e.g.*, David C. Baldus & 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 & 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. L. 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").

The authors of the empirical study of the Maryland death penalty system that had been commissioned by Maryland Governor Parris Glendening concluded that "Offenders who kill white victims, especially if the offender is black, are significantly and substantially more likely to be charged with a capital crime (state's attorney decides to file a notification to seek the death penalty). ...These effects persist even in the presence of what we think are very rigorous controls for relevant case characteristics. Moreover, while these effects do not appear at other, later decision making points in the capital sentencing process they are generally not corrected." Raymond Paternoster et al, "An Empirical Analysis of Maryland's Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction," Final Report, 2003 at 36-37.

[14] As a legal commentator who *supports* the death penalty recently noted: "[T]he Constitution ... promises equality of treatment under state law, and this guarantee is hard to square with differential treatment of similar crimes within state boundaries.... The state is the level of government responsible for criminal law enforcement, and therefore the most important thing is that each state's rules be applied consistently throughout its jurisdiction." Charles Lane, Stay of Execution: Saving the Death Penalty From Itself 81, 94 (2010).

penalty system in Connecticut is not only arbitrary but is also impermissibly discriminatory (see Table 23, reproduced below in this Executive Summary).

An essential message from the regression analysis across an array of murder categories is that the likelihood that a death-eligible murder will result in a death sentence is at least an order of magnitude higher for minority on white murders (Tables 24-26). Minority on white murders will also have an order of magnitude higher probability of receiving the death sentence in Waterbury versus elsewhere in the state, and all other murders will have roughly two orders of magnitude higher rates of death sentencing in Waterbury versus elsewhere. These are prodigious race and geographic effects on who is sentenced to die in Connecticut.

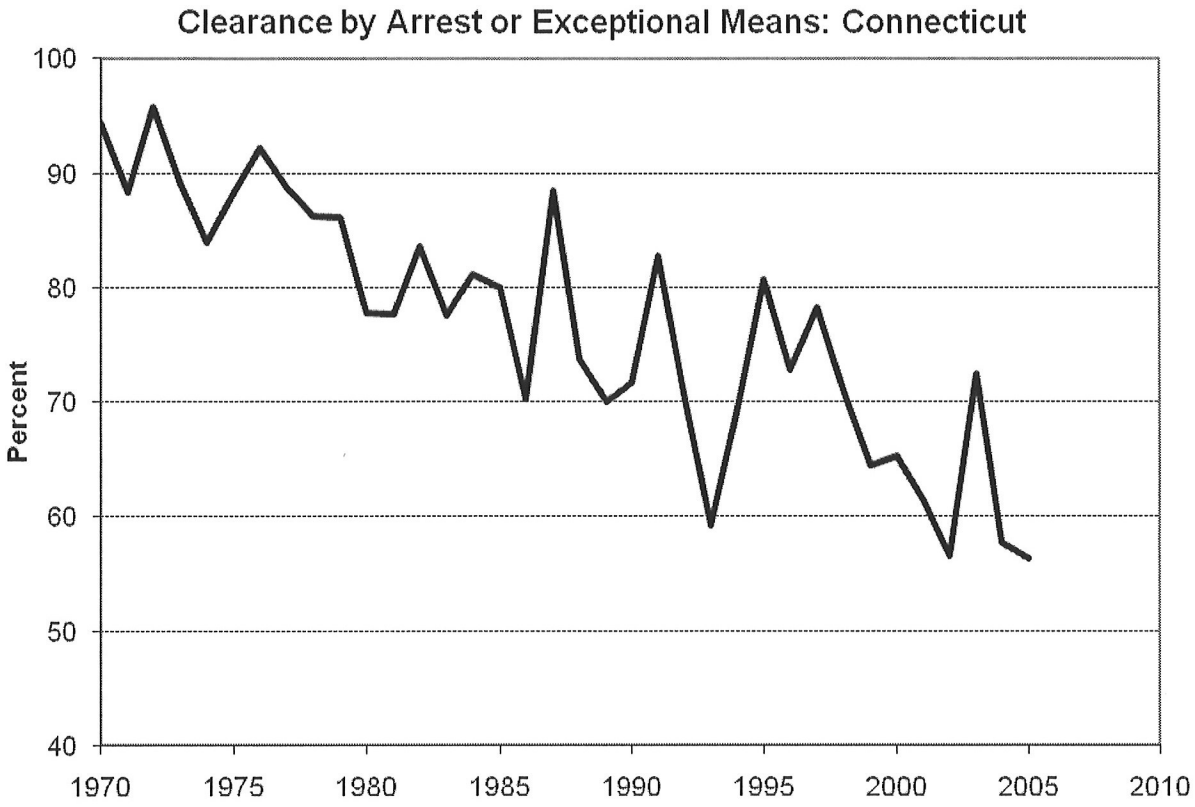
These regression findings—that race and geography are powerful determinants of capital sentencing decisions in Connecticut—are extremely robust to changes in the sample and in specifying the regression models. Within the class of capital-eligible crimes, these impermissible factors are far more consistent and stronger predictors of capital-charging and sentencing outcomes than are legitimate factors—such as the egregiousness of the crime or the presence of special aggravating factors, which of necessity means that Connecticut's death penalty regime fails to single out "the worst of the worst" for execution.

Table 20: Capital Charging and Death Sentencing Rates in Connecticut for 205 Death-Eligible Cases by Race of Defendant/Victim					
	1. Total - 205	2. Minority/White - 34	3. Minority/ Minority - 92	4. White/White - 74	5. White/ Minority - 5
Means for 4-12 and 1-5 Egregiousness & Special Aggr. Fac	(8.4, 3.6, 3.7)	(8.2, 3.6, 3.9)	(8.2, 3.4, 3.5)	(8.6, 3.8, **4.0**)	(**9.0, 3.8**, 2.8)
1. Rate of Capital Felony Charging (% and ratio)	68.8 (=141/205)	**85.3 (=29/34)**	62.0 (=57/92)	70.3 (=52/74)	60.0 (=3/5)
	(8.4, 3.6, 4.0) (8.3, 3.5, 3.3)	(8.2, 3.6, 4.2) (7.9, 3.6, 2.4)	(8.2, 3.4, 3.7) (8.2, 3.5, 3.2)	(**8.7, 3.9, 4.3**) (8.3,3.6, 3.4)	(8.7, 3.8, 1.3) (**9.4, 3.9, 5.0**)
a. Male Defendants	69.6 (=133/191)	**84.8 (=28/33)**	60.9 (=53/87)	73.1 (=49/67)	75.0 (=3/4)
	(8.4, 3.6, 4.0) (8.2, 3.5, 3.4)	(8.3, 3.6, 4.2) (7.9 3.6, 2.4)	(8.1, 3.3, 3.8) (8.2, 3.5, 3.3)	(**8.8, 3.9, 4.3**) (**8.3**, 3.6, 3.6)	(8.7, 3.8, 1.3) (8.0, **3.8 6.0**)
b. Female Defendants	57.1 (=8/14)	**100 (=1/1)**	80.0 (=4/5)	42.9 (=3/7)	0 (=0/1)
	(8.3, 3.8, 2.8) (8.8, 3.7, 2.2)	(7.1, 3.5, **4.0**) (no cases)	(**9.0, 4.0**, 1.8) (8.6, 3.8, 0)	(7.9, 3.5, 3.7) (8.4, 3.5, 2.3)	(no cases) (**10.7, 4.1, 4.0**)
c. Waterbury	75.0 (=9/12)	**100 (=2/2)**	60.0 (=3/5)	75.0 (=3/4)	100 (=1/1)
	(8.9, 4.0, 3.2) (10.3, 4.3, 2.7)	(8.4, **4.3**, 4.0) (no cases)	(8.5, 3.8, 2.0) (**11.0, 4.4, 3.5**)	(9.2, 4.0, **4.3**) (9, 3.9, 1)	(**9.7**, 4.2, 2.0) (no cases)
d. Non-Waterbury	68.4 (=132/193)	**84.4 (=27/32)**	62.1 (=54/87)	70.0 (=49/70)	50.0 (=2/4)
	(8.4, 3.6, 4.0) (8.2, 3.5, 3.3)	(8.2, 3.6, 4.2) (7.9, 3.6, 2.4)	(8.1, 3.3, 3.8) (8.0, 3.4, 3.2)	(**8.7, 3.9, 4.3**) (8.3, 3.6, 3.5)	(8.2, 3.5, 1.0) (**9.4, 3.9, 5.0**)
2. Rate of Death Sentencing (Sustained) (% and ratio)	4.4 (=9/205)	**11.8 (=4/34)**	2.2 (=2/92)	4.1 (=3/74)	0 (=0/5)
	(9.0, 4.2, 4.9) (8.3, 3.6, 3.7)	(8.2, 4.1, 3.8) (8.2, 3.6, **4.0**)	(9.1, 4.2, 5.0) (8.2, 3.4, 3.5)	(**10.1, 4.3, 6.3**) (8.5, 3.8, 3.9)	(no cases) (**9.0, 3.8**, 2.8)
a. Male Defendants	4.7 (=9/191)	**12.1 (=4/33)**	2.3 (=2/87)	4.5 (=3/67)	0 (=0/4)
	(9.0, 4.2, 4.9) (8.3, 3.5, 3.8)	(8.2, 4.1, 3.8) (8.2, 3.6, 4.0)	(9.1, 4.2, 5.0) (8.1, 3.4, 3.6)	(**10.1, 4.3, 6.3**) (**8.6, 3.8, 4.0**)	(no cases) (8.5, 3.8, 2.5)
b. Female Defendants	0 (=0/14)	**0 (=0/1)**	0 (=0/5)	0 (=0/7)	**0 (=0/1)**
	(no cases) (8.6, 3.7, 2.5)	(no cases) (7.0, 3.5, **4.0**)	(no cases) (8.9, 4.0, 1.4)	(no cases) (8.2, 3.5, 2.9)	(no cases) (**10.7, 4.1, 4.0**)
c. Waterbury	33.3 (=4/12)	**100 (=2/2)**	0 (=0/5)	50.0 (=2/4)	0 (=0/1)
	(9.0, 4.2, 5.0) (9.3, 4.0, 2.1)	(8.4, **4.3**, 4.0) (no cases)	(no cases) (9.5, 4.0, **2.6**)	(**9.5**, 4.1, **6.0**) (8.8, 3.9, 1)	(no cases) (**9.7, 4.2**, 2.0)
d. Non-Waterbury	2.6 (=5/193)	**6.3(=2/32)**	2.3(=2/87)	1.4 (=1/70)	0 (=0/4)
	(9.1, 4.2, 4.8) (8.3, 3.5, 3.8)	(8.0, 3.9, 3.5) (8.2, 3.6, 4.0)	(9.1, 4.2, 5.0) (8.1, 3.3, 3.5)	(**11.2, 4.8, 7.0**) (8.5, **3.7, 4.0**)	(no cases) (**8.8**, 3.7, 3.0)
Column Totals for Most "Egregious/Aggravated"	0	5	6	28	22

The first row at the top of the table shows the total number of 205 death-eligible cases and then breaks down that total into four categories based on the minority/white status of the defendant and victim(s). The next row then shows three numbers in parentheses: the means of the 4-12 and 1-5 egregiousness scores and the count of special aggravating factors for every murder in each racial category and overall. Subsequent lines in the top

panel show the numbers and percent of cases that are charged with a capital felony and in the bottom panel those sentenced to death. The two sets of parenthetical numbers below each percent represent the egregiousness and aggravating factor numbers for those charged or sentenced in the top line and for those not so charged or sentenced into the second line. For example, if one looks at Row 1 and Column 2, one sees that 85.3 percent of the 34 minority on white murders led to charge of capital felony. The average 4-12 egregiousness score for all 34 minority on white crimes is given in the row above (8.2), which is also the egregiousness score for the 29 such cases charged with capital felony (the 5 not so charged had an average 4-12 egregiousness score of 7.9.) Note that the 85.3 percent is in a darkened box, which identifies the highest rate of charging or sentencing for any given row. In every case, the harshest treatment is accorded to the minority on white murders. The shaded individual numbers show the highest levels in each row for the two measures of egregiousness and for special aggravating factors. Note that minority defendant cases tend *not* to be the most egregious or aggravated (as seen in the last row of the table): while 28 of the shaded numbers come in the white on white murder category of column 4, only five of the shaded numbers come in columns 2 (minority on white murders) and six in column 3 (minority on minority murders).

Figure 3



VIII. ARBITRARINESS AND DISCRIMINATION: LOOKING AT THE DATA

A. SOME REASONS FOR ARBITRARINESS

Figures 1 and 2 create a strong impression that the Connecticut death penalty system does not confine the death sentence to the most egregious crimes. But what does arbitrariness look like in practice? And why does it occur? To begin to answer these questions, I will introduce five cases (Cases A through E, below), one of which resulted in a death sentence.[229] This section is offered not as statistical proof, but as way of revealing arbitrariness at work. Following the case description, I provide the two egregiousness scores (averaged across the 18 coders), the tally of the special aggravating factors involved in the case, racial information about defendant and

[229] The language shown in these summaries comes directly from the summaries used by the coders, with only minor edits for the sake of clarity and brevity.

victim, and the judicial district of the case. Note that for the three measures of egregiousness/aggravation, I also show where they stand in relation to the entire set of 205 cases (where a "205" would represent the worst case on that particular measure, as our first case Walter gets for the Overall 1-5 egregiousness score).

Case A (**Alan Walter**): On October 21, 1997, the mother of the thirteen-year-old victim reported the child missing after she disappeared from a grocery store parking lot where the child 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 eight 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 two of the co-defendants. 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.

Egregiousness measure 1-5: 4.89 / 205
Egregiousness measure 4-12: 10 / 189
Special aggravating factors: 6 / 165
Race of defendant: White
Race of victim: White
Judicial District: Litchfield

Case B (**Scott Pickles**): 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.

Egregiousness measure 1-5: 4.78 / 197
Egregiousness measure 4-12: 11.44 / 204
Special aggravating factors: 5 / 132
Race of defendant: White
Race of victim: White

Judicial District: New London

Case C (**Scott Smith**): 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 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.

Egregiousness measure 1-5: 4.78 / 197
Egregiousness measure 4-12: 9.67 / 177
Special aggravating factors: 3 / 69
Race of defendant: White
Race of victim: White
Judicial District: Fairfield

Case D (**Jerry Daniels**): Defendant murdered Victim V026A and her three year old daughter V026B. Defendant had gone to the apartment looking for his girlfriend, who was their roommate. Murder victim V026A let him into the apartment but a struggle ensued when she asked him to leave. He stabbed V026A eight times with a kitchen knife, and then sexually assaulted her. He strangled and slashed the throat of the little girl, V026B, to get her to stop crying.
Defendant had a horrific childhood—severe physical abuse by father of mother and all the children, and impaired mental capacity due to brain damage. Two experts testified to the Defendant's intermittent explosive disorder.

Egregiousness measure 1-5: 4.33 / 177
Egregiousness measure 4-12: 10 / 189
Special aggravating factors: 8 / 193
Race of defendant: White
Race of victim: White
Judicial District: New London

Case E (**Eduardo Santiago**): 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.

Egregiousness measure 1-5: 3.44 / 80
Egregiousness measure 4-12: 7.11 / 27
Special aggravating factors: 1 / 8
Race of defendant: Minority

Race of victim: White
Judicial District: Hartford

The last murder—Case E (Eduardo Santiago)—was the only one of the five crimes that resulted in a death sentence. Santiago's two co-defendants were sentenced to eighty years and life without parole. But while Santiago alone in these illustrative five cases is now on death row, the coders deemed his crime to be *less* egregious by a wide margin than most of the 205 death-eligible cases they scored, and far less egregious than the other four cases presented here (which are all in or around the top 10 percent of worst cases according to their two egregiousness scores). Obviously, one cannot draw conclusions about why Santiago got the death penalty and the other more egregious murders did not draw a similar sentence from this selection. For example, although all of the murders were whites killing whites except for Santiago who was a minority killing a white, one needs a regression analysis before one can draw a conclusion that the system is biased against minorities who kill whites (as the regression analysis in fact indicates).

But one can at least rule out the possibility that Santiago was treated so harshly because he had fewer mitigating factors than other cases. Given his horrific childhood circumstances and a history of mental problems, Santiago was clearly someone with an abundance of traits that are often deemed mitigating in death penalty cases. A recent news story on his case noted Santiago's "grim childhood [which] included beatings by his mother and stepfather, sexual molestation, and his nine-year journey through foster care, psychiatric hospitals, orphanages, and shelters."[230]

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[230]Dave Collins, "Conn. high court hears death penalty appeal," Associated Press, April 28, 2011 at http://www.boston.com/news/local/connecticut/articles/2011/04/28/conn_high_court_hears_death_penalty_appeal/. Note these mitigating factors were not mentioned in the summaries reviewed by the coders, so if this information had been included the results would have only strengthened the findings of the anomaly of the Santiago case and of harsher treatment for minority on white murders in the Connecticut death penalty regime.

But the recitation of the five cases is illustrative of the general problem with the Connecticut death penalty regime depicted in Figures 1 and 2 above: death sentences are handed out in a widely scattered fashion with some arbitrary few plucked out for death and many far worse murderers escaping this punishment. As we saw in Table 9, even if one were to take the Connecticut death row inmate with the highest Composite egregiousness score (Rizzo, 9.56), thirty-three cases had equal or higher egregiousness scores and did not result in death sentences.

So what happened in the other four cases?

In Case A (Alan Walter), the defendant was charged with three counts of capital felony, but was allowed to plead 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 sixty years.

In Case B (Scott Pickles), the conviction came through a plea bargain under which the prosecution agreed not to seek the death penalty. Kevin Kane, then New London State's Attorney, decided not to pursue the death penalty on the grounds that death would be an undeserved relief for the defendant.[231] Kane's decision went against the wishes of the victim's sister, who asked, "If this obscene crime does not merit the death penalty, what does?"[232] Kane recently testified that the defendant merited more lenient treatment for voluntarily pleading guilty, which may well be true, but this assertion misses the point. Kane decided one way while another Connecticut prosecutor would readily go the other way, perhaps citing the family's strong desire for the death penalty and the horrendous nature of the crime. The arbitrariness

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[231] Gary Libow, *Life Sentence for Killing Family; Pickles' Motive Finally Disclosed,* HARTFORD COURANT, Oct. 28, 1999, at A3.
[232] *Id.*

comes from the fact that there is no reason to think this case would be decided similarly by different Connecticut prosecutors.

Case C (Scott Smith) avoided a death sentence through a complicated procedural path. In July 1995, Superior Court Judge Joseph Gormley ruled that Scott Smith, who had admitted strangling the victim Melissa Mills, could not be tried on a charge of capital felony, based on evidence presented during a probable cause hearing.[233] Smith was convicted of murder and rape in the ensuing trial that followed in April-May of 1999, and was sentenced to life in prison (60 years).[234] After the Connecticut Supreme Court granted a retrial because of problems with the jury instructions, the State declared they would seek the death penalty in the retrial.[235] In September, 2004, as the trial began, Smith decided to plead guilty to felony murder and was then sentenced to 45 years in prison.[236] According to news accounts: "Senior Assistant State's Attorney C. Robert Satti Jr. told the judge he was ready to proceed with the trial but agreed to a plea bargain because of the threat of appeals in the case. 'This puts an end to a matter that has gone on nine and a half years,' he said."

In Case D (Jerry Daniels), the defendant avoided the death penalty even though he went to a stranger's house at 1 am, and attacked a twenty year old woman in front of her 3 year old daughter, who he nearly decapitated to keep her from crying out for help in front of her mother, who he then raped and killed. As with so many capital defendants, Daniels had a horrific childhood, and the jury deadlocked over whether this was a mitigating factor. As a result, he was sentenced to 130 years in prison.

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[233] "In Brief," New Haven Register, Aug. 5, 1997.
[234] "2 Men Get Life Terms for Rape, Murder of Retarded Woman, 29," New Haven Register, May 9, 1999.
[235] "State to Seek Death Penalty in Rape, Murder Re-Trial," Connecticut Post, May 17, 2003.
[236] "2nd Trial Leads to 45-Year Term in Killing," Connecticut Post, Sept. 14, 2004.

One obvious source of arbitrariness is the discretion that different state's attorneys have in deciding whether to charge defendants with a capital felony and then whether to pursue the death penalty. This would be a potential problem even if Connecticut had uniform standards and processes for deciding when to pursue the death penalty and when to agree to a plea bargain. In the absence of those standards, the problem is considerably worse. In effect, it was the luck of the draw on the prosecutor and not the crime that was the decisive factor in averting a death sentence for Pickles (Case B).

The issue of the preferences of the victim or the victim's family provides a perfect example of the arbitrary nature of the workings of the Connecticut death penalty.[237] Prosecutors disagree on a question as fundamental as whether the opinions of victims or victims' family members should influence charging decisions. In 2007, Waterbury State's Attorney John A. Connelly, discussing the Petit multiple-victim murder in Cheshire where one of the victims had previously expressed strong opposition to the death penalty, told a 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," he said. "If you started imposing the death penalty based on what the victim's family felt, it would truly become arbitrary and capricious."[238] The problem is that other prosecutors in Connecticut have exactly the opposite opinion on this issue, which, according to Connelly makes the Connecticut death penalty regime "truly arbitrary and capricious." Executive Assistant State's Attorney Judith Rossi, addressing the state Commission on the Death Penalty 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

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[237] The case of Michael Ross—who voluntarily waived appeals and remains the only defendant executed by Connecticut in the post-*Furman* period—shows that a defendant's preferences can also play a role in the sentencing decision.

[238] Alison Leigh Cowan, *Death Penalty Tests Church As It Mourns,* N.Y. TIMES, Oct. 28, 2007, at A1.

Attorneys" and these decisions sometimes involve factors "independent of the criminal justice system," such as "intra-family homicides where victims are opposed to the death penalty."[239]

Prosecutorial discretion can even result in inconsistent decisions within the confines of a single case, as illustrated by Connelly's prosecution of the Ivo Colon case. Connelly initially pursued and obtained a death sentence against Colon and vigorously challenged Colon's claims on appeal. The Connecticut Supreme Court agreed with Colon that the faulty jury instructions required reversal of his death sentence but specifically stated that the death penalty was permissible under Connecticut law, if handed down by a properly instructed jury, because the victim was under sixteen and the murder was "especially heinous, cruel or depraved."[240] After the decision, the Hartford Courant reported that Connelly "said he has spoken to [the victim's] family, and they want to go forward with a second hearing, as opposed to agreeing to a life sentence."[241] It is unclear why Connelly would make this announcement in light of his later statement (with reference to the Petit murders) that it would truly be "arbitrary and capricious" to consider the wishes of the families of victims in deciding whether to seek the death penalty. In any event, a little over three months later, Connelly decided *not* to pursue the death sentence[242]—a change in course that seems inconsistent with his self-described responsibility to "enforce the law," which had not changed since he first obtained a death sentence, in deciding when to seek the death penalty.

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[239] COMMISSION REPORT, *supra* note 44, at 25. The second quotation is a direct quotation from Rossi; the other quotations are from the report's summary of her testimony.

[240] *See State v. Colon*, 864 A.2d 666, 690, 804-06 (Conn. 2004).

[241] Lynne Tuohy, "Court Limits Please for Mercy," Hartford Courant, December 18, 2004.

[242] *See* Lynne Tuohy, *Colon Gets Life in Baby's Murder*, HARTFORD COURANT, Apr. 4, 2006, at B1.

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, 270 (Conn. 1996) (Berdon, J., dissenting).

What prompted this abrupt reversal from seeking Colon's death to agreeing to a life sentence without possibility of parole? Connelly told the media, "There's no question in my mind the first jury returned the proper verdict, a death sentence," yet he maintained that "the ends of justice are served by sending him away for the rest of his life." If the jury had returned the proper verdict of a death sentence but justice dictated that the verdict should be life imprisonment, then why hadn't Connelly pursued justice in the first trial? Connelly *claimed* that additional information had been revealed about the defendant, and that because the baby's mother received only a five-year sentence for her role in the victim's death, the jury would be reluctant to sentence the father to death. As the Hartford Courant reported:

> Since Colon was first sentenced to death, Connelly said, there have been juvenile court proceedings that have produced transcripts of testimony that would complicate a quest for a death sentence.
>
> ``The mother said she couldn't do any more to protect the little baby," Connelly said. ``But one concern is if the jury looked at her sentence, where she stood by while this little girl was being beaten and she got five years and we're asking for the death penalty for Colon? I'm sure the defense attorney would argue, `We're not asking for five years or even 10; we're asking you to send him away for life.'"
>
> Connelly said, ``The ends of justice are served by sending him away for the rest of his life. The thing too is, this ends the case. If we got the death penalty again, there'd be another appeal. This case would have dragged on for another who knows how long....
>
> "Connelly said Colon's age at the time of the killing, just three months after he turned 18 and his history of drug abuse, also would likely have made a jury's rendering of a death verdict more difficult."[243]

Of course, one would assume the prosecutor realized at the time of the initial capital felony charged was levelled against Colon that had he been a few months younger at the time of the murder he would not have been eligible for the death penalty. Certainly, Connelly would have known about Colon's history of drug abuse. Why these factors would be relevant to

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[243] Lynne Tuohy, *Colon Gets Life in Baby's Murder*, HARTFORD COURANT, Apr. 4, 2006, at B1.