

# **Mend It, Don't End It**

*A Report to the  
Connecticut General Assembly  
on Capital Punishment*

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## **Executive Summary**

This report examines the death penalty in Connecticut in the context of the debate regarding capital punishment in the United States generally.

### ***Key Findings***

- Connecticut’s capital cases are remarkably free of the problems that have raised concerns elsewhere in the country.
- There is not a single case in the modern era (post-1972) where the death penalty was imposed and the defendant was found to be innocent. Indeed, there are not even any substantial claims of actual innocence.
- There are no cases where the conviction is based on the kinds of evidence that has been problematic in other states. There are no cases where the guilt verdict rests on a pressured confession, a doubtful eyewitness, or dubious forensics.
- Consistently with the findings in other states, the claim that the death penalty is discriminatorily imposed on black defendants is refuted by the opponents’ own study.
- Studies in other states regularly show the claimed “race-of-victim bias” disappears when legitimate factors, including local jurisdiction, are properly accounted for. There is no solid basis for concluding that Connecticut is different in this regard.
- Claims that a large savings in cost would follow from repeal fail to adequately take into account the escalating cost of health care for aging inmates, the indirect savings from plea bargains to life imprisonment, and the potential savings from reform of the review process.
- The one real problem in Connecticut at present is the extreme delay in review of capital cases, worse than most other states with capital punishment.
- The delay problem can be fixed with needed reform with no loss to the fairness of the review.

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## Introduction

The Connecticut General Assembly now faces a critical choice on capital punishment. The choice is not between repeal and the status quo, however. Everyone agrees the status quo is unacceptable.

The choice is between reform and repeal—to mend it, or end it. Before making this choice, the General Assembly should be clear on what needs fixing and what does not. There are many myths and a fog of confusion surrounding the death penalty. To help dissipate the fog, the Criminal Justice Legal Foundation offers this report.

### I. Connecticut’s Death Row—All Guilty, All Deserved Sentences.

An intelligent discussion of capital punishment in Connecticut should begin with a description of the crimes. Antiseptic discourse on this issue detached from the reality of the crimes these people chose to commit removes the question from its essential context. Without exception, these are clearly aggravated cases of murder, and no claims have been made of mistaken identity. There is not a single case that can be credibly claimed to be a miscarriage of justice.

**Michael Ross**—In a series of crimes in 1983 and 1984, Ross abducted four teenage girls, identified in the opinion as Wendy B., 17, Robyn S., 19, April B., 14, and Leslie S., 14. He sexually assaulted three of them, and murdered all four. Ross did not deny committing the crimes.<sup>1</sup>

**Robert Breton**—In 1987, Breton entered the apartment of his former wife JoAnn and their son, Robert, Jr. He stabbed them both, severing the carotid artery in each victim. They both bled to death. The case for guilt was so clear that Breton did not even challenge that part of the verdict on appeal.<sup>2</sup>

**Daniel Webb**—In 1989, Webb abducted Diane Gellenbeck in the parking garage of the bank where she worked and forced her into his car. He drove her to a park four miles away, forced her to disrobe and attempted to rape her. When she resisted and broke free, he shot her in the back. As she crawled away screaming for help, he shot her three more times, the last shot being point-blank in the face.<sup>3</sup> Webb’s

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1. *State v. Ross*, 230 Conn. 183, 191-192 (1994).

2. *State v. Breton*, 235 Conn. 206, 212-215 (1995).

3. *State v. Webb*, 238 Conn. 389, 397-398 (1996).

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guilt was proved by multiple witnesses and forensic evidence.<sup>4</sup> On appeal, Webb made multiple claims regarding the guilt phase of his trial, but none questioned the evidence that he was the perpetrator.<sup>5</sup>

**Sedrick Cobb**—In December 1989, Cobb tricked Julia Ashe into giving him a ride. He forced her to drive to a secluded area near a dam. There he raped her, stuffed a glove in her mouth, taped her mouth and nose shut, and threw her off the dam. She fell 23 feet onto a concrete apron beneath one foot of frigid water. There is also evidence that she survived the fall, and Cobb went down to the water below the dam and strangled or drowned her. Her body was found Christmas day, nine days later.<sup>6</sup> Cobb’s guilt was confirmed by his confession and by the victim’s social security card, credit card, and signed store receipts in Cobb’s apartment.<sup>7</sup> Cobb challenged those items on Fourth Amendment grounds, but not on any claim they were unreliable evidence.<sup>8</sup> Similarly, the confession was challenged on an alleged right-to-counsel violation (a claim found to be without merit),<sup>9</sup> not any claim it was involuntary. Webb’s claims as to sufficiency of the evidence go only to the timing of his intent to kill, the killing, and the rape, not to any dispute he actually committed the acts.<sup>10</sup>

**Terry Johnson**—In 1991, Johnson burglarized a gun store. As Connecticut State Trooper Russell Bagshaw approached the store in his cruiser, Johnson ambushed him and shot him to death. He pleaded guilty and admitted the essential facts of the crime.<sup>11</sup> Although murder of a police officer in the performance of his duties is a capital felony,<sup>12</sup> under Connecticut’s unusual double-narrowing statute another aggravating factor is also required, and the Supreme Court decided that the case did

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4. *Id.*, at 399-400.

5. *Id.*, at 412-464.

6. *State v. Cobb*, 251 Conn. 285, 302-305 (1999).

7. *Id.*, at 314, 350-351.

8. *Id.*, at 306-349.

9. *Id.*, at 349-364.

10. *Id.*, at 364-365.

11. *State v. Johnson*, 253 Conn. 1, 6 (2000).

12. Conn. Gen. Stat. § 53a-54b(1).

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not fit the “especially heinous, cruel or depraved manner” criterion.<sup>13</sup> The sentence was reduced to life in prison. The Legislature subsequently amended the statute so that this crime would now be eligible for the death penalty.<sup>14</sup>

**Richard Reynolds**—In 1992, Waterbury Police Officer Walter Williams stopped drug dealer Reynolds for questioning. Reynolds pulled a gun and shot Officer Williams in the head. He later told another member of his drug organization that he knew he had to shoot the officer in the head because he was wearing a bulletproof vest.<sup>15</sup> Reynolds admitted shooting Officer Williams during questioning.<sup>16</sup> Although he later claimed that statement was involuntary, none of the circumstances of the questioning include the kind of coercion that would cause a person to falsely confess, and the Supreme Court rejected the claim without dissent on this point.<sup>17</sup>

**Todd Rizzo**—“During the evening of September 30, 1997, [Rizzo] murdered the victim, [Stanley Edwards] then age thirteen, at the defendant’s home in Waterbury. He did this by luring the victim into the backyard of the home, where he bludgeoned the victim to death by repeated blows to the head with a three pound sledgehammer.”<sup>18</sup> Rizzo “decided to kill the victim ‘for no good reason and get away with it.’”<sup>19</sup> He pleaded guilty.<sup>20</sup>

**Russell Peeler**—In 1997, Peeler arranged for his brother to murder a young boy, Leroy Brown, and his mother, Karen Clarke, in order to silence Leroy as a witness against Peeler in another murder case.<sup>21</sup> Peeler had stated his intent to murder

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13. *Johnson*, 253 Conn., at 81.

14. Conn. Gen. Stat. § 53a-46a(i)(8) (added 2001).

15. *State v. Reynolds*, 264 Conn. 1, 15, 20 (2003).

16. *Id.*, at 39.

17. *Id.*, at 53-56.

18. *State v. Rizzo*, 266 Conn. 171, 179-180 (2003).

19. *Id.*, at 187.

20. *Id.*, at 179.

21. *State v. Peeler*, 271 Conn. 338, 350-355 (2004).

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Leroy to multiple people before the crime, and he bragged about it to others afterward.<sup>22</sup>

**Ivo Colon**—In 1998, Colon beat to death two-year-old Keriana Tellado, his girlfriend’s daughter, by smashing her head against the shower wall. “The evidence revealed that the defendant dragged the victim into the bathroom, repeatedly thrust the victim’s head against the shower wall and pulled the victim up from the floor by her hair with such force that pieces of the victim’s hair and scalp had been torn off.”<sup>23</sup> Keriana’s three-year-old sister Crystal also “suffered injuries consistent with severe child abuse” and stated when asked that Colon did it.<sup>24</sup> The Connecticut Supreme Court reversed the penalty and remanded for a new penalty hearing because the instructions to the jury on weighing aggravating and mitigating factors were inconsistent with its decision in the *Rizzo* case, “released long after the defendant’s trial.”<sup>25</sup>

**Robert Courchesne**—In 1998, Courchesne murdered Demetris Rodgers, who was 8½ months pregnant.<sup>26</sup> The Connecticut Supreme Court noted “undisputed evidence” “that the defendant had induced Rodgers to get into his car under false pretenses and, thereafter, repeatedly had stabbed her in the chest and back as she fought for her life and the life of her unborn child. When Rodgers finally escaped from the car, the defendant got out of the car, knife in hand, intending to chase her down to make sure that she was dead. Only when he saw other cars in the vicinity and feared that he might be seen did he stop his vicious assault of Rodgers.”<sup>27</sup> Rodgers’ baby, Antonia, was delivered by postmortem emergency cesarean section and was taken off life support 42 days later.<sup>28</sup> The conviction for the murder of Antonia was reversed because the Connecticut Supreme Court decided on a standard for determining whether Antonia was born alive (a requirement under

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22. *Id.*, at 351-352, 385-387.

23. *State v. Colon*, 272 Conn. 106, 127, 273 (2004).

24. *Id.*, at 147, 151, n. 15.

25. *Id.*, at 130, n. 6.

26. *State v. Courchesne*, 296 Conn. 622, 626 (2010).

27. *Id.*, at 785.

28. *Id.*, at 627.

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Connecticut law before she could be said to have been murdered) different from the standard that had been applied by the trial court panel.<sup>29</sup>

**Jessie Campbell**—In 2000, Campbell shot and killed Desiree Privette and Lataysha Logan, and he shot and wounded Carolyn Privette. He was identified by the surviving victim, who knew him personally, his girlfriend who saw him burn bloody clothes shortly afterward, and the taxi driver who dropped him off at the crime scene.<sup>30</sup>

**Eduardo Santiago**—Santiago was hired by Mark Pascual to murder Joseph Niwinski. The price was a broken snowmobile and payment of some credit card bills. “On a cold night in December 2000, Santiago and a friend, Matthew Tyrell, broke into Niwinski’s West Hartford apartment, and Santiago shot him in the back of the head as he slept. The next day, Santiago called Pascual to ask when he would fix the snowmobile so he could use it.”<sup>31</sup> Although Santiago requested, and received, jury instructions that the jury could consider “lingering doubt” as to whether he or Tyrell was the actual shooter,<sup>32</sup> his participation in the conspiracy and guilt of murder are not disputed.

**Lazale Ashby**—In 2002, Ashby raped and murdered Elizabeth Garcia after holding her captive in her Hartford apartment. “The photographs of her apartment displayed during his trial showed blood covering much of Garcia’s bedroom. The bed linens were soaked in it. There were spatters on the walls, drops of blood on a pillow in the baby’s crib and a child’s blow-up plastic chair. There was a dried pool of blood on the kitchen floor and spatters on the hamper.”<sup>33</sup> His guilt was proved

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29. *Id.*, at 634.

30. *State v. Campbell*, No. CR000545101, 2004 Conn. Super. LEXIS 3616 (Dec. 2, 2004) (denying motion to suppress). Campbell’s first name is spelled “Jesse” in the case report but “Jessie” on the Department of Correction’s website.

31. Fitzpatrick, *To the Death*, *The Providence Journal* (Jan. 30, 2005), [http://www.projo.com/news/content/projo\\_20050130\\_death30.2d0218.html](http://www.projo.com/news/content/projo_20050130_death30.2d0218.html) (as visited Apr. 5, 2011).

32. See *State v. Santiago*, No. CR00105095, 2005 Conn. Super. LEXIS 203, 23-24 (Jan. 27, 2005) (trial court denial of motion claiming jury misconduct)

33. Brown, *Killer Given Death Penalty: Ashby Raped, Strangled a Young Hartford Woman*, *Hartford Courant*, Mar. 29, 2008, p. A1.



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by DNA as well as his confession. Aggravating evidence in the penalty phase included an unrelated killing and sexual assaults of two other women.<sup>34</sup>

**Steven Hayes**—Nearly everyone in Connecticut knows of this case.<sup>35</sup> “Hayes and an accomplice, Joshua Komisarjevsky, broke into the Petit home in the middle of the night, according to testimony from Hayes’ trial, which began Sept. 13. Both had recently been paroled from prison. After he was beaten with a baseball bat, [Dr. William] Petit was tied to a pole in the basement. [His wife, Jennifer] Hawke-Petit was strangled. [Their daughters] Hayley and Michaela were left bound in their beds. Michaela was sexually assaulted. The house was doused with gasoline and set on fire. Before Hawke-Petit was killed, she was forced to go to the bank and withdraw money to give to the intruders. Hayes raped her after they returned to the home. Petit, who was unconscious for most of the seven-hour ordeal at his home, escaped from the house shortly before the fire was set and sought help from a neighbor. Police arrested Hayes and Komisarjevsky as they fled the burning home in one of the Petit’s vehicles.”<sup>36</sup> Komisarjevsky’s case is pending as of this writing.

Comparing Connecticut’s cases with those of other states, it is striking how free these cases are of the problems that have raised the primary concerns elsewhere. Not a single guilt verdict has been reversed in any of these cases. Guilt is undisputed in most of them. None of the cases depend on the kinds of evidence that have produced wrongful convictions elsewhere. No one has been sentenced to death on the identification of a single witness who did not know the defendant. No one has been convicted on dubious forensic evidence. When confessions have been challenged, the challenges have largely been on Fourth Amendment grounds unrelated to the reliability of the confession, such as whether the defendant was legally arrested. There are no claims that a confession was beaten out of a suspect or coerced with “third degree” methods.

Penalty verdicts have been reversed in a few cases, but never for any major malfeasance at trial. The reversals have been largely because the Connecticut Supreme Court resolved in the defendant’s favor debatable questions about the

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34. See *id.*

35. Quinnipiac University Poll, Mar. 10, 2011, Question 44 (97%).

36. Griffin, Steven Hayes Sentenced to Death, Hartford Courant, Dec. 2, 2010, <http://www.courant.com/community/cheshire/cheshire-home-invasion/hc-hayes-sentenced-to-death-1203-20101130,0,2840955.story> (as visited Apr. 5, 2011).

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scope of the law or evidence or the wording of jury instructions or verdict forms.<sup>37</sup> All states with capital punishment in the post-*Furman*<sup>38</sup> era have gone through a similar definitional process. The process has taken longer in Connecticut simply because it has few capital cases, but this is now largely water under the bridge.

The trials of these cases establish a record that Connecticut can be proud of. The review of the cases has also been fair in its end result. Many debatable issues are resolved in favor of the defendant, but the Connecticut Supreme Court has not shown the kind of hostility to the death penalty, reversing on any excuse, that was seen in New Jersey before repeal<sup>39</sup> or in California until 1986.

An argument can be made that Connecticut does not sentence enough murderers to death. That argument can and should be considered in the context of a proposal to revise the current statute to include more cases. It has no application to the current question of whether to repeal the death penalty.

In terms of its handling of cases that actually do result in a sentence of death, Connecticut's system has one and only one significant flaw. The review process takes far too long. Given the small number of cases and absence of a backlog problem, that flaw is entirely fixable. Mend it; don't end it.

## **II. Delay—Impact, Causes, and Cures.**

### **A. Delay and the Victims' Families.**

At the hearing on March 7, 2011, and in written statements submitted for that hearing, the Judiciary Committee heard from several family members of murder victims, some supporting repeal and some opposed. One point of agreement, however, was that the lengthy process of reviewing cases revictimizes the families and the surviving victims. Some have concluded that the delays will never be fixed

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37. See *Ross*, 230 Conn., at 272-273 (mitigating evidence); *Breton*, 235 Conn., at 211-212 (ambiguity in form and instructions); *Johnson*, 253 Conn., at 72, 78 (scope of “heinous, atrocious, or cruel” aggravator); *Rizzo*, 266 Conn., at 242-243 (instruction on burden of persuasion following 1995 amendment of statute); *Colon*, 272 Conn., at 274-275 (same); *Courchesne*, 296 Conn., at 752 (standard for determining whether a baby had been born alive so as to be a “person” who could be murdered).

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

39. Scheidegger, Statement Before the New Jersey Death Penalty Study Commission (2006), <http://www.cjlf.org/files/NJDPTestimony.pdf>.

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and therefore it would be better to do away with the death penalty altogether. For example, Gail Canzano testified, “And all of this for a false promise, because in the end we execute no one. One man in 50 years and only because he volunteered. We have people on death row who have been there for more than 20 years with no execution in sight.”

Others, however, have looked to the experience of other states and noted that capital cases can be concluded in far less time where there is the political will to do so. Dr. William Petit noted the case of the D.C. Sniper in Virginia. John Allen Muhammad was sentenced to death on March 9, 2004, and executed on November 9, 2009, five years and eight months later. Within that time, his case was thoroughly reviewed by both the state and federal courts. No one should be fooled by the claim that capital cases inherently take 20 years because they are complex. Cases do not come any more complex than the D.C. Sniper case. Further, the pace of review in this case is not a one-time occurrence based on the notoriety of the crimes. This pace is not unusual in Virginia. In that state, the legislature passed the necessary reforms, and the courts implemented them. That is what it takes.

Not all cases go to trial. Most end in a plea bargain. In some cases, a murderer will plea bargain to a sentence of life imprisonment, or its functional equivalent, a sentence so long that there is essentially no chance of release. This is the disposition that many victims’ families prefer, avoiding both the trial and the appeal. One might suspect that only the threat of the death penalty makes such a bargain possible. Only two studies have been done on this question, but both confirm that suspicion is correct. Ilyana Kuziemko (then at Harvard, now at Princeton) studied New York cases before and after the 1995 restoration of capital punishment in that state. She found that murder defendants were less likely to receive a “sentence bargain,” pleading guilty to murder but with a reduced sentence, after restoration of the death penalty.<sup>40</sup> This result is consistent with my own study, comparing plea bargains and sentences in a variety of cities across the country. I found that the average county with the death penalty disposed of 18.9% of murder cases with a plea and a life or long sentence, while only 5.0% of cases reached this disposition where the death penalty was not an option.<sup>41</sup>

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40. 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 Am. L. & Econ. Rev. 116 (2006).

41. Scheidegger, The Death Penalty and Plea Bargaining to Life Sentences (2009), <http://www.cjlf.org/papers/wpaper09-01.pdf>.

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With the death penalty off the table, there will either be more murder cases going to trial that would have ended with a plea bargain or more cases ending with a plea bargain that will let murderers get out of prison at some point. Neither is good for the victims' families.

### **B. Delay on Appeal.**

In a study funded by the National Institute of Justice, Barry Latzer and James Cauthen studied the delay in the processing of the direct appeal in capital cases in 14 states from 1992 to 2002. The differences among the states are striking. The median time from the sentence to the state supreme court decision varied from 295 days in Virginia to 1388 days in Ohio.<sup>42</sup> Connecticut was not in the sample, but if it had been it would have been last by a wide margin, 2518 days.

One source of excessive delay that Latzer and Cauthen found in some states was involving the intermediate appellate court in cases that nearly always went to the court of last resort anyway. Connecticut does not have that problem, as capital appeals go directly to the Connecticut Supreme Court.

A second factor that was common in states with excessive delay was excessive extensions of time granted to the parties to complete their briefing.<sup>43</sup> This appears to be the primary problem in Connecticut. Appellants have been allowed almost three years, on average, just to file the initial brief, longer than the average for the entire appeals process in the 14 states in the Latzer and Cauthen study.

Why so long? The Connecticut Commission on the Death Penalty found that “defense counsel typically file briefs that address every possible legal or factual error committed by the trial court.”<sup>44</sup> The resulting lengthy briefs required lengthy responses from the state and lengthy work by the Supreme Court.

The Commission accepted the defense argument that this length was necessary. It was mistaken. In *Jones v. Barnes*, the United States Supreme Court held that briefing every conceivable issue is not only not required, it is not good advocacy. “Experienced advocates since time beyond memory have emphasized the

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42. Latzer & Cauthen, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study* 30 (2007).

43. See *id.*, at 38.

44. Connecticut Commission on the Death Penalty, *Study Pursuant to Public Act No. 01-151 of the Imposition of the Death Penalty in Connecticut* 49 (2003).

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importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”<sup>45</sup> And no, despite the loud protests of the capital defense bar, death is not different in this regard. In *Smith v. Murray*, a capital case, the high court said, “This process of ‘winnowing out weaker arguments on appeal and focusing on’ those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.”<sup>46</sup>

The appellant in a capital case has a right to effective appellate advocacy. He does not have the right to consume unlimited time and resources. Writing a phonebook-sized brief and taking three years to write it is not effective appellate advocacy. It is delay for delay’s sake. Tolerating such delays is not constitutionally required, and it is not good policy. The fear that a miscarriage of justice could result from a meritorious argument being barred in the future by the procedural default rule can be allayed by making an appropriate exception to that rule, as described further below.

The answer is to impose deadlines and make them stick.<sup>47</sup> One year is sufficient to write an appellate brief in a capital case, and 100 pages are more than sufficient to brief the “winnowed” issues that the Supreme Court has said are appropriate. With its small number of capital cases, Connecticut is not plagued by the backlog problems that larger states, such as California, have.<sup>48</sup> There is no reason that the entire process of direct review cannot be completed in three years.

Making deadlines stick requires that remedies for noncompliance be available. If the Public Defender will not complete the briefing within the required limits, the General Assembly must be prepared to shift the responsibility and the accompanying budget elsewhere.

### **C. Delays on Collateral Review.**

Collateral review of capital cases in Connecticut has been subject to some astonishing delays. Daniel Webb filed his habeas petition on October 2, 2000, and

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45. *Jones v. Barnes*, 463 U. S. 745, 751-752 (1983).

46. *Smith v. Murray*, 477 U. S. 527, 536 (1986) (quoting *Jones*).

47. See Latzer & Cauthen, note 42, at 49-50.

48. See generally, Alarcon, Remedies for California’s Death Row Deadlock, 80 So. Cal. L. Rev. 697 (2007).

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it was decided by the Superior Court on January 25, 2011, over a decade later.<sup>49</sup> These cases should not be allowed to drag out in this manner. Collateral review should not be a second appeal examining every procedural quirk in the process. The first collateral review should be reserved for two types of claims: (1) those that cannot be made on appeal because they require facts outside the record; and (2) a grave miscarriage of justice, meaning that the defendant is actually innocent of the crime or actually exempt from the penalty (*e.g.*, under 18 or retarded) without regard to procedure. Subsequent reviews should be reserved exclusively for the second type.

In the *Webb* case, the habeas petition was converted into a “do over” of the appeal, litigating weak claims that could have been raised on appeal but were not, none of which raised the specter of a miscarriage of justice.<sup>50</sup> These claims could have been quickly dismissed under the rule *Jones v. Barnes* and *Smith v. Murray*, discussed above, that leaving out the weaker claims on direct appeal is not ineffective.

In terms of specific reforms, Connecticut can learn from the experience of other jurisdictions. In the mid-1990s, Congress and many states enacted reforms of collateral review procedures. These reforms were largely beneficial changes, but as always happens with major legislative changes, it is now apparent that some things should have been done differently. In particular, Congress cracked down too hard on claims of actual innocence and not hard enough on claims that go only to procedure or penalty.

In civil cases, once an appeal is over, the case is over. Collateral attacks on final judgments are rarely allowed. Why do we allow them in criminal cases? What are we worried about?

Clearly, we are most worried about the innocent person wrongly convicted. This concern should be just as strong in life imprisonment cases as it is in capital cases. An innocent man wrongly convicted of murder and sentenced to life in prison may have more time to prove his innocence, but the time is nearly useless without resources.

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49. *Webb v. Warden*, No. CV000003239S, 2011 Conn. Super. LEXIS 225 (Jan. 25, 2011).

50. See *id.*

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However, substantial claims of “got the wrong guy” innocence are rare in capital cases nationally<sup>51</sup> and nonexistent in Connecticut capital cases. Does any other possibility justify the long delays and large expenditures?

Consider all the criteria that a case must meet to even be considered for the death penalty. The crime must be capital murder,<sup>52</sup> not any other crime or any lesser degree of homicide. On top of that, Connecticut requires an additional aggravating circumstance,<sup>53</sup> even though the Constitution does not require this two-stage filtering.<sup>54</sup> On top of that, both Supreme Court caselaw and Connecticut law exempt persons under 18, persons with retardation, and minor accomplices swept up in the felony murder rule, with Connecticut law providing two additional exemptions for mental impairment and unforeseeability.<sup>55</sup>

Given all that, plus the requirement that the jury have discretion to spare the defendant if it chooses to do so, what is the likelihood that a sentence of death imposed on a murderer who is actually guilty and actually eligible could nonetheless be a miscarriage of justice? Do we need to spend vast resources and decades of litigation searching for the possibility that a murderer who meets all the criteria and was sentenced to death pursuant to a unanimous jury finding that he deserves it nonetheless has such powerful, hitherto unknown, mitigating circumstances that there would be a consensus among reasonable people that it would be an injustice to execute him?

In a quarter century of work in this area, I have never seen that case. The hard core death penalty opponents believe every death sentence is an injustice, of course. But taking the viewpoint of the median voter, the justice of the death

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51. The Judiciary Committee has been presented with some misleading information regarding cases in other states, such as the Willingham case from Texas. Refuting this misinformation would require considerable detail, and due to its minimal relevance to Connecticut we will not do so here.

52. Conn. Gen. Stat. § 53a-54b (defining 8 specific types of murder to be “capital felony”).

53. Conn. Gen. Stat. § 53a-46a(I).

54. “The aggravating circumstance [making the case death-eligible] may be contained in the definition of the crime or in a separate sentencing factor (or in both).” *Tuilaepa v. California*, 512 U. S. 967, 972 (1994).

55. Conn. Gen. Stat. § 53a-46a(h); *Enmund v. Florida*, 458 U. S. 782 (1982); *Atkins v. Virginia*, 536 U. S. 304 (2002); *Roper v. Simmons*, 543 U. S. 551 (2005).



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penalty remains at most a matter of opinion in every case where the above criteria are met. Decades of searching the haystack for needles has not turned up a single needle in my experience. If such a rare case did exist, executive clemency remains available as a remedy. There is no need to delay justice for decades in a judicial search for a phantom injustice.

Habeas reform is not complex or difficult. Give every capital defendant one collateral review for the inevitable ineffective assistance claim and any other claim requiring facts outside the trial record. Require it to be filed within a year and decided within another year. From that point on, allow no further litigation except for substantial claims of actual innocence or ineligibility for the penalty.

Claims based on new law which is retroactive on collateral review do not require a separate exception because they are subsumed in the actual innocence/ineligibility category. The Supreme Court has decided that these new substantive rules are the rules that will be applied retroactively. New rules of procedure need not be applied retroactively.<sup>56</sup>

Similarly, claims omitted from the direct appeal can be considered on habeas corpus if the claim is substantial and if the claim would establish a miscarriage of justice—actual innocence or ineligibility for the penalty. Other claims do not warrant the cost of repetitive litigation.

#### **D. Delays on Federal Habeas.**

Connecticut has not yet experienced delay in federal habeas corpus, because only one case, the atypical “volunteer” Michael Ross,<sup>57</sup> has reached federal court. The United States District Court for the District of Connecticut therefore has no track record in a normal case to tell us if capital habeas cases would be handled expeditiously, as they are in Virginia, or at a snail’s pace, as they are in California. The Court of Appeals for the Second Circuit also has no track record, except *Ross*,

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56. See *Schriro v. Summerlin*, 542 U. S. 348, 351 (2004); *Luurtsema v. Commissioner*, 299 Conn. 740, 753-754 (2011). The United States Supreme Court has also recognized a theoretical exception for new rules of procedure of a magnitude comparable to *Gideon v. Wainwright*, 372 U. S. 335 (1963), but no such rule has been created since the high court established its current approach to retroactivity in 1989, and it is extremely unlikely that any will be. See *Schriro*, *supra*, at 352.

57. See *Ross v. Lantz*, 396 F. 3d 512 (CA2 2005), vacated *Lantz v. Ross*, 543 U. S. 1134 (2005).



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because no New York cases reached federal court during the restoration interval there.

Fortunately, Connecticut need not depend on the voluntary efforts of the federal courts to expedite the processing of these cases. Congress has provided for a “fast track” through federal habeas corpus.<sup>58</sup> To qualify, the state need only be certified by the United States Attorney General as having a program to appoint qualified counsel with adequate compensation on state habeas corpus,<sup>59</sup> which Connecticut already does. The implementation of this fast track has been delayed by an excessively long process for promulgating implementing regulations, but that process is near the end.<sup>60</sup> Certification should be pursued promptly upon the finalization of these regulations, so that by the time Connecticut cases reach federal court the fast track will be in place.

The delay in processing capital cases can be fixed. It can be fixed without increasing the risk of a miscarriage of justice by focusing reviews after the first on only the cases presenting such a risk and banning repetitive reviews of issues with no bearing on actual innocence.

### **III. The Race Card and Other “Disparity” Claims.**

#### **A. “Disparity” and Discrimination.**

Opponents of the death penalty speak breathlessly of “disparities” in the application of the death penalty. In its broadest sense, “disparity” simply means that someone compiled some numbers and found that some rate differs among ethnic groups or among localities. Of course rates differ. The country and the state are heterogeneous. Crime rates vary. The extent to which witnesses are willing to come forward varies. Many factors vary. A mere difference in raw data is not proof that invidious racial discrimination is the cause of the difference. It should not even be considered as evidence of such discrimination. Disparity is evidence of discrimination only when a careful analysis of cases rules out legitimate reasons for the difference.

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58. 28 U. S. C. § 2266.

59. See 28 U. S. C. § 2261.

60. See Proposed Rule, Certification Process for State Capital Counsel Systems, 76 Fed. Reg. 11705 (Mar. 3, 2011).

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One way to avoid all sentencing disparities, at least in theory, is to eliminate sentencing discretion and have mandatory sentencing. After the Supreme Court's 1972 *Furman* decision, many states understood that mandatory sentencing was required and proceeded to enact such laws. Four years later, the Supreme Court struck these laws down as well, holding that individualized, discretionary sentencing is not only permitted in capital cases, it is required.<sup>61</sup>

The word "discriminate" has negative connotations from its association with racial discrimination, but in its core meaning "discriminate" simply means "To make a clear distinction; distinguish . . . To make sensible decisions; judge wisely."<sup>62</sup> The Supreme Court's requirement of individualized sentencing is a requirement that sentencers "discriminate" on the basis of legitimate factors that distinguish the more culpable murderers from those that are less so. When the legitimate factors happen to correlate with illegitimate factors, the raw data on demographics tell us nothing.

Studies in this area attempt to cope with this problem by examining case files for the legitimate factors and developing mathematical models to adjust for them. The problem is that the legitimate factors cannot be fully known from the case files, and the studies never include all the legitimate factors even when they are discernable. For example, the model from the Baldus Georgia study primarily used by the petitioner in the *McCleskey* case was held to be invalid by the Federal District Court because (among other deficiencies) it failed to account for the strength of the prosecution's case for guilt.<sup>63</sup> Prosecutors certainly should be more reluctant to seek the death penalty when the case for guilt is less than airtight, and juries certainly should be more reluctant to impose it when they have lingering doubt.

The 2003 Connecticut study makes no attempt to account for the strength of the case for guilt.<sup>64</sup> This is a surprising omission, given the notoriety of the *McCleskey* case and the fact that the best known study in the field was held invalid on precisely this ground.

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

62. *American Heritage Dictionary* 532 (3d ed. 1992).

63. *McCleskey v. Kemp*, 580 F. Supp. 338, 367-368 (ND Ga. 1984).

64. N. Weiner, P. Allison, & G. Livingston, *The Connecticut Study of Capital Case Charging, Advancement and Sentencing*, Table 1 (2003).

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Also missing from this study's list of legitimate factors accounted for is whether the victim was a rival gangster or drug dealer versus an innocent person. Russell Peeler murdered three people: Rudolph Snead, a former partner in drug dealing, Leroy Brown, a boy who witnessed an earlier murder attempt on Snead, and Karen Clarke, Leroy's mother. Peeler was sentenced to death for the murders of Leroy and Ms. Clarke but not for the murder of Snead. Is this "arbitrary"? No, it is a perfectly legitimate difference based on a legitimate factor that the study fails to account for.

Any claim made by the authors of any study that they have accounted for all legitimate factors and that any remaining disparity proves racial discrimination should be taken with a double scoop of skepticism.

### **B. Race of the Defendant.**

By far, the type of potential discrimination of greatest concern is discrimination against racial minority defendants on the basis of their race. This form alone, of all the disparities commonly discussed, would, if true, mean that people are on death row who do not deserve to be there. (The others are discussed below.) Discrimination against black defendants was the great concern looming in the background when the Supreme Court threw out the then-existing death penalty laws in 1972.<sup>65</sup>

Fortunately, nearly all the studies of post-1972 capital sentencing show no evidence of race-of-defendant bias. This result is particularly striking given that many of the studies are conducted or sponsored by opponents of capital punishment for the specific purpose of attacking it. While a study result that supports a sponsor's argument should be regarded with suspicion, a result that contradicts the sponsor's argument conversely warrants special confidence. The authors of the best known<sup>66</sup> of these studies, the Baldus study in Georgia, noted, "What is most striking about these results is the total absence of any race-of-defendant effect."<sup>67</sup> This result has been repeated many times in many jurisdictions, including New

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65. See *Graham v. Collins*, 506 U. S. 461, 479, 484 (1992) (Thomas, J., concurring).

66. Whether this study is "famous" or "notorious" is hotly disputed, but everyone agrees it is well known.

67. D. Baldus, G. Woodworth, & C. Pulaski, *Equal Justice and the Death Penalty* 44 (1990).

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Jersey,<sup>68</sup> Maryland,<sup>69</sup> Nebraska,<sup>70</sup> Virginia,<sup>71</sup> and the federal system.<sup>72</sup> As in any field of study, there are some outliers.<sup>73</sup> Overall, though, this result is sufficiently consistent that even a prominent death penalty opponent concedes, “It’s not the race of the defendant that is the major factor, and I don’t think there are many studies that claim that.”<sup>74</sup>

The result in Connecticut follows the national pattern. A study commissioned by an opponent—the Public Defender—concluded flatly, “There was no evidence that the defendant’s race was related to procedural and sentencing advancement.”<sup>75</sup> Decades of the most strenuous searching for race-of-defendant bias in the post-1972 era has come up empty. This is a success to be celebrated. The post-*Furman* reforms worked.

With the most salient form of discrimination unsupported by their own studies, opponents of the death penalty turned to more esoteric forms. These include the claimed “race-of-victim bias” and “geographic disparity.” We will take

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68. D. Baime, Report to the Supreme Court Systemic Proportionality Review Project, 2000-2001 Term, p. 61 (2001).
  69. R. Paternoster *et al.*, An Empirical Analysis of Maryland Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction 26 (2003).
  70. Baldus, Woodworth, Grosso, & Christ, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973-1999), 81 Neb. L. Rev. 486, 661 (2002).
  71. Virginia Joint Legislative Audit and Review Commission, Review of Virginia’s System of Capital Punishment iii (2002).
  72. Klein, Berk, & Hickman, Race and the Decision to Seek the Death Penalty in Federal Cases 125-126 (2006), <http://www.ncjrs.gov/pdffiles1/nij/grants/214730.pdf>.
  73. The Baldus study in Philadelphia is an outlier, finding a race-of-defendant effect. See Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638 (1998).
  74. Virginia Sloan, President of the Constitution Project, on PBS Newshour, Supreme Court Renews Death Penalty Debate (Nov. 7, 2007), [http://www.pbs.org/newshour/insider/social\\_issues/july-dec07/deathpenalty\\_1107.html](http://www.pbs.org/newshour/insider/social_issues/july-dec07/deathpenalty_1107.html).
  75. Connecticut Study, note 64, Executive Summary.

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them in reverse order, because it is necessary to understand the geographic effect in order to understand the true cause of the numbers claimed to support “race-of-victim bias.”

### **C. Geographic “Disparity.”**

In America, government power and decision making are divided among many levels and many independent branches of government, more so than in any other country. This division is by design, not by accident, and it is an essential part of the genius of the American system. Indeed, one of the reasons we still have the death penalty in most of the United States, while elitists have repealed it over the objections of the people in many other countries, is because our divided-power structure keeps the government more responsive to the wishes of the people.

The fundamental question of whether the death penalty will be an available option for murder is decided at the state level. For the worst murders, the death penalty is available in Connecticut and New Hampshire but not in Massachusetts or Vermont. This is a “geographic disparity.” This is also American federal democracy working as designed. The people of each of these states have chosen to have or not have the death penalty through the democratic process. The same is true of noncapital sentencing. The decision of how many years in prison are sufficient to punish rape, for example, is one the people of each state can make for themselves. “Disparity” is not a defect; it is a virtue.

The actual implementation of the criminal law is, to a large extent, delegated further down to the local level. In almost every state, prosecutors are elected by county or local district. Even more importantly, juries are selected locally. A jury of the “vicinage” is considered an important component of the constitutional right of trial by jury. The jury is expected to represent the “conscience of the community,” not the conscience of the state.

When decisions are made that involve the exercise of discretion, different people will necessarily make different decisions in some cases, particularly the close cases. Local selection of decision-makers necessarily results in variation among localities. This happens all the time in noncapital cases. If a homicide is on the ragged edge between murder and manslaughter, a prosecutor in one jurisdiction may offer a plea bargain to manslaughter that would not be offered in another, or juries in the two localities might come in with different verdicts after trial of similar cases. There is no wailing and gnashing of teeth over these variations in noncapital cases. They are an understood and accepted product of local control.

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The death penalty is for the worst murders and murderers, but “worst” cannot be mechanically defined. Distinguishing the worst from the not-quite-worst is necessarily a matter of discretion. We should not be surprised if an urban community jaded by chronic violence defines the worst murders more restrictively than a community where violence is comparatively rare. As with other “geographic disparities,” this is not a defect; it is local control working as designed. Among the most thorough analyses in this area is by Judge David Baime, appointed as a special master by the Supreme Court of New Jersey. What he concluded could just as easily be said of Connecticut:

“New Jersey is a small and densely populated state. It is, nevertheless, a heterogenous one. It is thus not remarkable that the counties do not march in lockstep in the manner in which death-eligible cases are prosecuted.”<sup>76</sup>

The 2003 Connecticut Study proceeds on the premise that geographic variation is judicially suspect. That is a fundamentally erroneous premise. Geographic variation is a normal and proper product of local elections and juries of the vicinage in the American criminal justice system.

#### **D. Race of the Victim.**

Ever since the Baldus study in Georgia in the 1980s, the primary discrimination claim has been that the death penalty is imposed less often when the victim is black. Even if that were true, it would not mean that a single person is on death row who does not deserve to be there. The race-neutral benchmark for which cases deserve the death penalty is set in cases where race is not a factor, *i.e.*, where the perpetrator, victim, and principal decision-makers are all the same race. In practice, in most of American society traditionally, that has meant when they are all white. If the death penalty is imposed less often when the victim is black, that means that there are perpetrators in black-victim cases who should have been sentenced to death but were not. The unjustly lenient sentences in such a hypothetical case cannot, in any event, be corrected with unjust leniency in another case. Even if the claim were valid, then, it would not be an argument for doing away with the death penalty. It would be an argument for redoubling efforts to obtain death sentences in black-victim cases where the sentence is warranted.

The claim is not valid, though. Time after time, when the data are properly analyzed and confounding factors properly controlled, the claimed race-of-victim bias has vanished into the statistical grass.

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76. Baime, note 68, at 62.

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As noted previously, the Baldus study was found by the Federal District Court not to prove the case for which it is so often cited.

“Neither model produces a statistically significant race of the defendant effect at the level where the prosecutor is trying to decide if the case should be advanced to a penalty trial. Neither model produces any evidence that race of the victim or race of the defendant has any statistically significant effect on the jury’s decision to impose the death penalty. The significance of this table cannot be overlooked. The death penalty cannot be imposed unless the prosecutor asks for a penalty trial and the jury imposes it. *The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables, including strength of the evidence, produce no statistically significant evidence that race plays a part in either of those decisions in the State of Georgia.*”<sup>77</sup>

On appeal, the United States Court of Appeals for the Eleventh Circuit took the unusual step of assuming that the study was valid, despite the District Court’s finding it was not, and then holding that the study would not invalidate McCleskey’s sentence even if it were valid.<sup>78</sup> The Supreme Court’s review of the case followed the same assumption.<sup>79</sup> Neither opinion disturbed the District Court’s finding that the study was invalid, and that finding stands as the definitive ruling on the validity of the Baldus study.

As noted above, the most intense examination of race effects in capital sentencing have been conducted in New Jersey. The New Jersey Supreme Court initially appointed David Baldus as the special master and later replaced him with another. It finally assigned the task to Judge David Baime. After much study and multiple reports over many years, the New Jersey Supreme Court summarized the results thusly:

“Special Master Baime’s latest report on the impact of race on capital sentencing discerns no solid evidence that the race or ethnicity of defendants affects whether the cases progress to the penalty phase or whether the death penalty is imposed. Interim Report 2004 at 1. The Special Master noted that, although two-variable analysis might indicate some disproportionality, that effect was

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77. *McCleskey v. Zant*, 580 F. Supp. 338, 367-368 (ND Ga. 1984) (emphasis in original).

78. *McCleskey v. Kemp*, 753 F. 2d 877, 895 (CA11 1985).

79. *McCleskey v. Kemp*, 489 U. S. 279, 291, n. 7 (1987).

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not sustained when multi-variable analysis was utilized. *Ibid.* Likewise, the Special Master found no statistically significant relationship between race of victim and imposition of the death penalty. *Ibid.* Some evidence exists that White-victim cases are more likely to advance to a penalty trial than African-American-victim cases; however, when county variability was taken into account, the discrepancy largely disappears. *Id.* at 2.

“The Special Master is confident that the administration of capital punishment in New Jersey is not infected with racial or ethnic bias. *Ibid.* He concludes that ‘we do not find consistent, statistically significant evidence of racial or ethnic prejudice in the administration of our death penalty statutes.’ *Id.* at 3. In the absence of any persuasive evidence from defendant to the contrary—and we underscore that, other than policy statements, defendant has tendered no evidence at all in support of this claim—we reject defendant’s assertion that his death sentence is unconstitutionally tainted as a result of racial discrimination.”<sup>80</sup>

The federal system has been the subject of a unique research effort in this regard. A release of raw data in 2000, making no attempt to control for legitimate case characteristics, had raised charges that there was a race-of-victim bias in the Department of Justice’s decision to seek the death penalty. Following the gathering of data needed for proper controls, the analysis was assigned to three independent teams to determine whether the data really did indicate racial bias. The three independent teams came to consistent conclusions: “The disparities disappear when data in the AG’s case files are used to adjust for the heinousness of the crime.”<sup>81</sup>

Results of studies from other states are mostly consistent with the federal result. In California, a study by RAND Corporation found no evidence of discrimination based on either the race of the victim or the race of the defendant.<sup>82</sup> In Nebraska, Baldus *et al.* found “no significant evidence of systemic disparate treatment on the basis of the race of the defendant or the race of the victim in either the major urban counties or the counties of greater Nebraska on the part of either

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80. *State v. Wakefield*, 190 N. J. 397, 536-537, 921 A. 2d 954, 1041 (2007).

81. Klein, Burk, & Hickman, note 72, at 125.

82. Klein & Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 *Jurimetrics J.* 33, 44 (1991).



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the prosecutors or judges.”<sup>83</sup> In Maryland, when the apparent race-of-victim effect was controlled for jurisdiction, it disappeared at some points in the study, but a residual effect remained at other points.<sup>84</sup>

The 2003 study in Connecticut is consistent with these results. As noted previously, there is no evidence of a race-of-defendant bias. The study found a relation between race of the victim and the intermediate step of proceeding to a penalty trial, but none with the important final result of a death sentence.<sup>85</sup> The needed correction for the legitimate variable of jurisdiction could not be done because the sample size was too small.<sup>86</sup> The information available therefore provides no reason to doubt that the situation in Connecticut is consistent with the overall national picture, *i.e.*, that claimed racial disparities would shrink to insignificance if legitimate factors, *including jurisdiction*, could properly be taken into account.

The Chief Public Defender’s testimony also notes one more study by Professor John Donohue. This study was commissioned by the defense for the specific purpose of litigating against the death penalty, and it must be understood as an advocacy piece for one side. The General Assembly would not be justified in relying on it until it is evaluated by other experts. If experience in other states is any guide, the accusation of bias is likely to prove unfounded in the final analysis.

Why is it that more sparing use of the death penalty by jurisdiction correlates with race, such that statewide numbers give a false impression of racial bias that dissipates upon proper correction for jurisdiction? There are two obvious reasons. The first is the unpleasant but undeniable reality in America today that the urban centers with high black populations also tend to have higher crime rates and particularly higher murder rates. As noted in the previous section, when murder is more common, people tend to become jaded and less easily shocked.

The second reason is that opposition to capital punishment is much higher among black Americans than among any other demographic group. Over the past several decades, white Americans have favored the death penalty by overwhelming

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83. Baldus, note 70, at 661.

84. Paternoster, note 69, at 34-35.

85. Weiner, note 64, at 23.

86. *Id.*, at 24 (as noted previously, the study incorrectly lists jurisdiction under “suspect” criteria rather than the legitimate variables).

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margins. Solid majorities are in favor among both Republicans and Democrats, both college graduates and those with high school or less, both young and old, and even liberals and conservatives.<sup>87</sup> Black Americans alone, among all the groups tallied, have been about evenly divided,<sup>88</sup> with relatively narrow majorities shifting between support and opposition.

What happens when a demographic group with unusually strong opposition to the death penalty comprises an unusually large proportion of the population in a particular locality? Charles Lane of the Washington Post notes,

“In jurisdictions with large African-American populations, where most black-on-black crime occurs, persuading a jury to sentence the defendant to death is relatively difficult. . . . Also, in jurisdictions where elected prosecutors must appeal to black voters, prosecutors are that much less likely to support capital punishment.

“This is how race-of-the-victim disparities can be said to reflect racial progress. After all, blacks neither voted in elections nor served on juries in substantial numbers, especially in the South, until the late 1960s. Now that they do, they appear to be using this power to limit capital punishment in the cases closest to them.”

The NAACP’s statement to the Judiciary Committee claims, “Statistics show time and again that the color of skin of victims is one of the most telling indicators of whether or not someone will get a death sentence.” That is simply not true. What the statistics show, when properly analyzed, is that the NAACP and other opponents of the death penalty have succeeded in reducing the application of the death penalty within the communities with the highest black populations and the greatest numbers of black-victim murders.

For those of us who believe that the death penalty is appropriate for the worst murderers, this is not a good result. It is not, however, a product or an indication of racism.

In summary, there is no good reason to believe the claim that race is a predominant factor, or even a major factor, in determining which murderers are sentenced to death. What limited disparities may remain are not even close to a sufficient

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87. See F. Newport, *Sixty-nine Percent of Americans Support Death Penalty* (Gallup, Oct. 12, 2007).

88. See L. Saad, *Racial Disagreement Over Death Penalty Has Varied Historically* (Gallup, July 30, 2007),

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reason to abandon justice and settle for an inadequate, watered-down sentence for the worst murderers, whatever color they may be.

#### **IV. The Cost Mirage.**

Exploiting the financial difficulties experienced by many state governments in recent years, opponents of the death penalty have claimed that the death penalty is vastly more expensive than its abolition. These claims have proved to be quite loose upon closer examination. First, they commonly claim, as costs of the death penalty, expenditures that are actually costs of the obstruction of the death penalty, such as repeated appeals on non-guilt issues or decades of death-row incarceration. Second, they typically ignore or underestimate the true cost of life imprisonment with absolutely no possibility of release, the touted alternative, particularly the high cost of end-of-life medical care. Third, they typically ignore the savings that come directly or indirectly from having the death penalty available, such as plea bargains to life imprisonment.

The Chief Public Defender has testified, “The Division of Public Defender Services incurred expenditures of \$3.4 million in the last FY attributable to capital case defense representation at trial, habeas and appeals.” It does not follow that this entire expenditure is a cost of capital punishment. A portion of this sum would have been spent on these cases if Connecticut did not have capital punishment, and a portion is unnecessary expenditure.

There is presently major, expensive litigation going on regarding the defense’s bias claims. As described in part III, above, the only form of disparity that would provide a valid argument against death penalty generally was unequivocally rejected by the Public Defender’s own study. The dubious claims of “race-of-victim disparity” need not be litigated under federal law, having been rejected by the United States Supreme Court in the *McCleskey* case. This litigation goes on and consumes resources only because of a questionable interpretation of Connecticut’s death penalty statute. This needless litigation could be eliminated simply by amending the statute to clarify that Connecticut follows the *McCleskey* case and that only racial bias in the defendant’s individual case is a basis for attacking the judgment.

As described in part I, the needed expense for review of capital cases is for one appeal, one state habeas proceeding, and further reviews only for substantial claims of actual innocence. Any expense for reviews beyond that should not be considered an expense of the death penalty, but rather an unnecessary expense to be eliminated. The needed expense for an appeal is the expense for a brief that

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identifies the few key issues and focuses on them. A phonebook-sized brief that takes three years to write and addresses every conceivable issue is not a necessary expense, as the Supreme Court has clearly held.

Finally, the Chief Public Defender notes that the high-profile nature of the cases makes them more expensive for her office than the typical murder case. Can anyone doubt that the horrific Chesire murder case would be “high profile” regardless of whether Connecticut had capital punishment? Studies that simply compare cases where the death penalty is sought with those where it is not are invalid because of “selection bias.” The cases where the death penalty is sought are generally the cases that would be the more expensive ones in any event.<sup>89</sup>

The cost of keeping prisoners on death row for decades is often cited as the cost of the death penalty. In reality, only the death-row incarceration for the five or six years actually needed to review a capital case is the portion that should properly be considered a cost of the death penalty. In states where review takes 20 years, death-row incarceration for the 14 unnecessary years of reviews is a cost of the failure of the legislature to enact needed reforms.

Opponents of the death penalty maintain that the penalty is not needed for incapacitation, *i.e.*, to make certain the killer never kills again, because life in prison with absolutely no possibility of parole will achieve that goal at less cost. Putting aside the issues of killings within prison,<sup>90</sup> arranged from within prison,<sup>91</sup> or following escape from prison,<sup>92</sup> the question remains whether the cost of this alternative has been adequately accounted for. The cost of health care is an escalating portion of the cost of prisons, and the cost of health care escalates rapidly from middle age onward. For example, New York was recently prepared to spend \$800,000 for a heart transplant for a prisoner. The taxpayers were spared that expense only when the prisoner voluntarily declined the operation.<sup>93</sup> Al-

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89. See Scheidegger, Statement to the California Commission on the Fair Administration of Justice 8-9 (Apr. 11, 2008), <http://www.cjlf.org/deathpenalty/ScheideggerCCFAJStatement.pdf> (critique of ACLU study).

90. See *Arave v. Creech*, 507 U. S. 463, 465-466 (1993).

91. See *People v. Allen*, 42 Cal. 3d 1222, 1236-1243 (1986).

92. See *Schriro v. Landrigan*, 550 U. S. 465, 469 (2007).

93. Associated Press, NY man imprisoned for raping girl in '96 turns down heart transplant after outcry, Apr. 25, 2011.

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though hard data on overall costs are difficult to come by, KPBS in San Diego made the following estimates from the information that is available:

Assume Inmate X was incarcerated when he was 37.

For now, he costs taxpayers about \$49,000 a year.

That's until he reaches 55.

As he ages, his health care expenses will increase. At this point he could cost the state \$150,000 a year.

If Inmate X lives until he's 77, he will have cost California taxpayers as much \$4 million to keep him in prison for life.<sup>94</sup>

Only the first five or six years of that expense would be needed if the state sentenced Inmate X to death and completed the reviews within a reasonable time. That is not to say that cost should ever be the reason for a sentence of death. It is to say the cost of the death sentence, where it is society's appropriate response to the crime, is not as much greater as life-without-parole as is commonly claimed.

This problem will only get worse as time goes on. Medical science continues to come up with new treatments for previously untreatable conditions, and nearly always at higher costs. There is no sign of this trend abating. Forgoing justice in the worst murder cases just to save money may not actually save any money in the long run, but only kick the can down the road.

Finally, as noted in part II A, above, there is the effect of plea bargaining. The possibility of a death sentence makes possible plea bargains that would not be possible if that penalty were unavailable. Even Joshua Komisarjevsky tried to deal for a life sentence (an offer correctly rejected by the prosecutor). For the cases that are presently plea-bargained to life in prison, though, repeal of the death penalty would mean a different result. Either those cases would go to trial, with a high cost in dollars, or they would end in plea bargains allowing the killer to get out someday, with a high cost to justice and a possible cost in blood.

There is, at least at present, no solid basis for believing that the total savings in dollars from repeal of the death penalty would be greater than the savings that could be achieved by reforming the system. More importantly, repeal would come at a horrific cost to justice, while reform would enhance justice.

How many dollars will Illinois save from their recent repeal, and at what cost to innocent people? Let us look at the record so far.

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94. See Wendy Fry, Costs of Aging Inmates (Jan. 20, 2010), <http://www.kpbs.org/news/2010/jan/20/costs-aging-inmates/>

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In a state that sentenced 23 times as many people to death as Connecticut, it has been reported that the appellate defender will save 37 positions—not 37 lawyers but 37 employees overall.<sup>95</sup> A proportional savings in Connecticut would be one position and a half. Savings elsewhere in the system are likely to be similarly modest. As noted above, there will be increased costs elsewhere.

What of the cost to innocent people? Already, we have anecdotal confirmation of the loss of deterrence.<sup>96</sup> A man plotting a murder researched the Illinois death penalty to confirm it had really been repealed before going through with his plans.<sup>97</sup> Already, Illinois has a serial killer who must be let off with an inadequate punishment because the only adequate punishment has been repealed.<sup>98</sup>

Connecticut should not go down that road. The state has none of the problems with innocent people being sentenced to death that prompted the repeal in Illinois. Connecticut really has just one entirely fixable problem with its death penalty: the reviews take far too long.

Mend it; don't end it.

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95. WBBM (CBS Chicago), Death Penalty Layoffs (Mar. 31, 2011), <http://chicago.cbslocal.com/2011/03/31/death-penalty-layoffs/>

96. John Donohue's testimony discusses his critique of the econometric deterrence studies. He fails to mention that all of the authors he criticized have published follow-up analyses that show that their conclusions still stand after taking his criticisms into account. Abstracts and citations are collected at <http://www.cjlf.org/deathpenalty/DPDeterrence.htm>.

97. Huntley, Repeal of death penalty backfires, *Chicago Sun-Times* (Apr. 19, 2011), <http://www.suntimes.com/news/huntley/4896325-417/repeal-of-death-penalty-backfires.html>.

98. FitzPatrick, Prosecutors: Suspect killed three women, maybe more, *Chicago Sun-Times* (Apr. 21, 2011), <http://www.suntimes.com/news/4940673-418/prosecutors-suspect-killed-three-women-maybe-more.html>.

