THE ROAD TO CONSIDER

A Statement by Professor Robert Blecker to the Judiciary Committee

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D. A More Victim Centered Process

1. **The Victim Impact Statement: Real and Clear**
2. **"Living Wills"**
3. **A More Victim-Centered Execution**
4. **Compensating the Victim's Family**

CONCLUSION

Prospective Only?

A Referendum, then Reform

Introduction

When New Jersey made national and international headlines in 2007, becoming the first state in the modern era legislatively to abolish capital punishment, death penalty opponents celebrated. No matter that a lame duck legislative majority had used a "study commission" -- handpicked to recommend abolition -- as political cover: Italy lit up its Colosseum, and voices across the United States proclaimed New Jersey a "beacon" and model for other states to imitate.

Now, with jury selection imminent in the trial of Joshua Komisarjevsky for one of the most gruesome multiple rape-murders in Connecticut or any other state, this Committee, largely abolitionist, considers a bill which would abolish the death penalty, once again providing itself political cover. The Committee holds hearings for one day, preparing to rush the repeal of the death penalty to a Governor who has publicly committed to sign it.

Abolition flies in the face of the popular will. A substantial majority of Connecticut's citizens (64%) generally support the death penalty. In New Jersey they talked of Jesse Timmendequas, rightly condemned to die for raping and murdering little Megan Kanka. Nearly 80% of the people of that state supported his execution. 80% of America supported the execution of Timothy McVeigh, the Oklahoma City Bomber. In Connecticut, nearly 80% support the death penalty for those monsters who raped and murdered Jennifer Hawke Petit, and her daughter Michaela, dousing them in gasoline lighting the match, and thus killing Michaela and her sister Hayley. Of course in the teeth of overwhelming popular support for the death penalty in Connecticut, the People's representatives assure the public that abolition will be prospective only – a position as indefensible as it is dishonest. Even as you move to abolish the death penalty in Connecticut, most of you know deep down that killers who rape and murder and immolate children and their mother deserve to die.

But you see this present death penalty regime as flawed, which it is. So you prepare to abandon justice, comforting yourselves that life without parole operates as a good substitute. It does not.

The bill you consider, abolishing the death penalty prospectively only, in theory leaves death as an option for those who have already been condemned or now face trial. But be honest with yourselves and the People of Connecticut. As Kevin Kane, the Chief State's Attorney, testified before this Commission two years ago, if you abolish the death penalty "prospectively only", it is "very clear what will happen." Connecticut

> could not constitutionally and would not as a matter of public policy seek to execute somebody for a crime they committed today when they could not be executed for committing the same crime tomorrow.

Make no mistake about it. If the judiciary committee recommends it and the legislature enacts this bill, you will inevitably release to live out their lives in general population a man who ordered the killing of an 8-year old and his mother, because the child had witnessed his earlier killing. You will effectively convert a death sentence into life without parole for another depraved monster who lured and beat to death a thirteen year old boy with a sledgehammer to know what it felt like. You will release into general population rapist murderers and other callous killers like them.

If you are so determined to thwart the will of your constituents and abolish the death penalty, why not do it honestly? On what possible principle can you abolish it prospectively only? If, however, you could be informed by the voice of the people you represent, why not submit the question to a popular referendum: "Should Connecticut retain the death penalty or abolish it and substitute life without parole?"

I urge you to consider what happens if you abolish the death penalty. *What happens to justice?* If Connecticut abandons the death penalty, how will these most vicious murderers experience their so-called "punishment" in prison, day to day? Will their punishment fit their crime?

You have another option. Identify the statute's flaws: Some are glaring. Don't let the opportunity to carefully consider Connecticut's death penalty, and its alternative Life Without Parole slip away unnoticed. Revise and *refine* the existing statute. This statement makes many concrete suggestions, but obviously revision requires reflection and collective wisdom. I know my pleas largely fall on hostile ears. But I beg you, just once, really explore the statute you would abolish. Repair and replace its defective parts. If, in the end, you insist on repeal, at least take responsibility for that choice. Don't perpetrate this cruel hoax and call it "prospective only." It demeans you, and the People you purportedly represent.

I. CONSIDER THE ALTERNATIVE: LIFE WITHOUT PAROLE (LWOP)

You do not make your decision to repeal in a vacuum. If you abolish the death penalty, life without parole will replace it.

A. The Mission Inside Prison: Nobody's Job to Punish

"Let the punishment fit the crime." People have mouthed this philosophy for millennia, and seemingly still believe it. Today, death penalty opponents claim life without parole (LWOP) as their genuinely fitting substitute punishment for "the worst of the worst." These abolitionists embrace LWOP as cheaper, equally just, and equally effective—a punishment that eliminates the state's exercise of an inhumane power to kill helpless human beings who pose no immediate threat. Furthermore, they insist, LWOP allows the criminal justice system to reverse sentencing mistakes.

Thousands of hours in several states, interviewing and observing more than a hundred convicted killers, along with dozens of correctional officers who confine them—from wardens down to line officers—have taught me that LWOP cannot substitute for the death penalty.

The current climate regarding punishment, reflected in the mission statements and professional practices of Departments of Corrections throughout the U.S. including Connecticut contributes to the failure of LWOP as substitute for the punishment of death.

This state's mission statement says it all:

> The Connecticut Department of Correction shall protect the public, protect staff and provide safe, secure and humane supervision of offenders with opportunities that support successful community reintegration.

Safety, security, protection. Nowhere does that statement so much as mention *punishment*. The mission statement guides the administration. The simple, disturbing, paradoxical fact is, inside Connecticut's prison system, it's nobody's job to punish.

When I began my prison travels in 1986, I believed that corrections officers saw their mission to help ensure that more or less serious crimes would receive more or less serious punishments. This seemed almost too obvious to discuss, much less dispute. However imprecisely administered, in theory at least, the punishment would be proportionate to the crime.

The public mostly believes this scenario, and I did, too.

The first jolt for me came from David Roach, warden of Lorton Central Prison, the flagship of Washington D.C.'s prison system. Wandering the 68-acre compound, astounded at the freedom and laid-back lifestyle of convicted killers, I protested to the Warden at one of our first interviews. "These guys have done bad things; they *deserve* to be punished."

"The punishment should not be re-punishment," Roach replied. "The punishment is given in the courtroom. When the judge says 'You have been found guilty; you are sentenced to thus and so,' *that's* the punishment. The judge did not send them here, in my opinion, for me or anyone else to punish them."

That statement astounded me. Here was the warden telling me, a criminal law professor, that a convicted killer already had been fully punished by his sentence, before he even began his life in prison. Nobody's job here inside was to further punish him. Corrections should create an environment conducive to rehabilitation, the Warden had explained. On entering the system, each "resident"—a "ward of the court"—should be thoroughly tested, and professional counselors should fashion for each individual a "treatment prescription. Each resident must attain realistic goals that he sets for himself." The "staff" inside Lorton Central was "paid to supervise" that process, the Warden added. "I don't believe that the officers are merely guards. And I don't think the inmates are merely prisoners," Roach explained. This social services speak really jarred me, because I was coming to grips firsthand with some very vicious killers sentenced to life inside Lorton.

When I first encountered him, I suspected Warden Roach was a strange anomaly with a paternalistic, permissive attitude, at odds with his staff who had to deal with these criminals out on the compound. Yet even old-time supposedly tough officers insisted that a man's crime was " none of my business." "What a man is like in here is what I'm concerned with. Not what he did out there." And so it was from top to bottom.

In administering day to day prison life, if the corrections staff consciously ignore or willfully remain ignorant of the prisoner's crime, how can LWOP be expected to substitute for the death penalty as a morally adequate, proportional punishment? When I first heard officers articulate these statements, I dismissed Washington D.C. as wildly eccentric.

But then I heard the same thing in Oklahoma. "Our job is just to follow the law," explained Cameron Harvanik, Oklahoma State Penitentiary's good-natured deputy warden. "I mean, the *judge* says that this man's got the death sentence, or the judge says this guy's doing life without," Harvanik continued. "Our job is to make sure he does it. Our job is not to punish."

"These guys have committed the most heinous crimes," I protested. "Killed and raped and murdered children. Is there ever some part of you that says, 'These guys aren't getting what they deserve?"

"To be honest with you, no. I never really think about it," Harvanik responded.

"So you're not angry?"

"No, I'm not angry."

"No matter what a guy did?"

"When I come to work every day, I flip the switch: 'These people are human beings; it doesn't matter what their crime is, they're still people. They deserve fair treatment, they deserve a quality of life while they're in here. Their punishment is doing the time.'"

"It's not our job to punish people," concurred Layne Davidson, who had worked nearly every unit of Oklahoma State Penitentiary at the time I interviewed him. "Our job is to house them—the punishment comes when he misbehaves while inside. Being here in itself is not a punishment; it's what the courts say we should do. I don't see this as a punishment. I'm not here—and neither is my staff—to judge what's right and wrong. We're here to do and carry out what the courts have set forth."

"Nothing you did in the past matters," I protested.

"Not true," he corrected me. "Assault on staff with an injury, or escaping from maximum you're not beyond level 2 [a restrictive setting] for the rest of your life."

So the past could count. But for those who administer the prisons, life begins when life begins—from day one, inside.

In *Discipline and Punish*, Michel Foucault had seen the great transformation in punishment from the direct application of unpleasant sensations on the prisoner's body to "an economy of suspended rights." The next step beyond Foucault—the threat to withdraw privileges—more nearly describes the experience of punishment for LWOPers today. "They earn any privileges based on their behavior," Davidson continued. "If you don't have privileges, if you don't have anything to offer them, you cannot control them short of physical control. I tell you, in here the pen is mightier than any sword. An inmate would rather me come in that cell with a riot baton and beat on him for punishment than write a report for an infraction, because of privileges he's gonna lose."

It was the same in Tennessee. "I wouldn't call it justice to justify what we do to get them to cooperate," admitted Sgt. Hugh Rushton, officer in charge of security inside Death Row at Tennessee's Riverbend Maximum Security Institution. It puts our staff safer. My job is safety, security. My job is not to punish."

For most officers, I've learned, *professional* means devoid of personal anger. The corrections officer imbibes a credo that it is unprofessional to count the past, to connect crime to punishment: "We don't discriminate; we treat everyone the same." It was the same in Illinois, Florida and New Hampshire.

On March 3, 2011, preparing to testify today, I discovered what I expected: Connecticut is no different. "We're not here to punish people, declared Brian A. Garnett, the DOC Director of External Affairs who accompanied me to three prisons. Two wardens, four deputy wardens, and death row unit manager all spoke with one voice. "My job is staff safety and protecting the inmates in general population in the other 17 facilities," said Warden Quiros who runs Northern, Connecticut's only level 5 Supermax that houses Death Row. The other prisoners have been sent to administrative segregation in Northern because they proved to be a behavior problem in some other prison. And if they acted up during their administrative segregation at Northern, they could be sent to "punitive segregation."

Surely there at least -- in "punitive segregation" -- a place inside Northern reserved for those who assaulted staff or acted out while already on administrative segregation, the Department consciously administered punishment? The very title "punitive" suggested it. "No," explained Warden Quiros, merely "more privileges removed" -- loss of phone calls, visits, his cell stripped of all property. "Punitive" segregation, so called, was nothing more than a "further modification". Its purpose was simple: Safety and control. And of course, even in this most restrictive setting within the entire system, the original crime he committed, no matter how heinous, had nothing to do with how he would experience his life inside. The most wild vicious prisoner might have to be shackled inside his cell. But never as a punishment -- "only if he's a threat. We're not here to punish people," insisted the Warden.

In fact, most officers make it a point *not* to know what a man did to get there. In two years as warden, Quiros had never gone into the master files. "My job is to correct behavior. It must be firm, fair, and consistent. My job as Warden is not to hand out punishment. That's for the judge."

B. The Mission on Death Row

In my visits to death rows and interviews with staff in prisons in several states, I've found that attitude uniformly carries over even to the worst of the worst. While the death penalty acts as Society's ultimate punishment, Officers who administer death row see it as a place where prisoners are housed to await their punishment -- in the execution chamber. It makes it easier to separate life on the row from death in the gurney when separate institutions house the execution chamber and death row. Then, from the perspective of staff who administer life on the Row, the punishment of death takes place elsewhere -- over there.

Death row in Connecticut at Northern was no different. As ironic and perverse as this may seem at first, death row prisoners had "more privileges than most of the rest of the population" inside Northern who were experiencing administrative or punitive segregation, the Warden and death row unit manager confirmed. As long as they behave, the worst of the worst, condemned to die someday, meanwhile on the row have jobs and can earn money to purchase commissary items. They have the same range of commissary options as anyone else in the system. A quick peek inside a cell confirmed it.

There slept Steven Hayes, peacefully, a Hershey bar on his desk, bags of potato chips and other goodies piled on his bunk above. Once a week, I was informed, a recreation director arrives with exercise equipment including exercise balls, and stretch bands for "strength and fitness" for those on the Row.

And why not, as long as they're well behaved? "Ever think about what they did?" I asked Captain Cahill, the death row unit manager. "You don't allow yourself to think about it. I try to avoid delving into their pasts; I deal with them as they are here." That's how professionals in Corrections are taught to act. Over and over, in three separate Connecticut prisons, at three separate security levels I heard the same thing I've heard now for 25 years inside a dozen prisons in several states: "I'm not concerned with what their crime was. I'm concerned with their institutional adjustment," declared Steven Frey, Deputy Warden at Osborn, who had worked for many years inside MacDougall Walker where a convicted rapist murderer will likely spend his life, if the legislature abolishes the death penalty. "Our job is not to punish. We're not here to mete out justice."

C. THE RHETORIC: "Death By Incarceration"

"A better name for this sentence [LWOP] might be 'Death by incarceration,'" declared Professor Robert Johnson, a noted abolitionist, trying to heighten the hyperbole of those who use artful but misleading rhetoric to support the substitution of life without parole for the death penalty. True, almost all aggravated murderers sentenced to LWOP will die *in* prison. But almost none will die *because* of prison. We all live, condemned to die, somehow, somewhere. Some of us will die in old age in our sleep, or watching television, or taking a bath. Should we call these closing scenes "death *by* sleep," "death *by* television," "death *by* bathing?" Or is it simply about *where* we die? "Death by home, death by hospital, death by bowling alley. Death by incarceration." The rhetoric obscures the reality.

The question of justice—whether LWOP can morally substitute for the death penalty—depends not on where these vicious killers die, but on how they live before they die.

If Jennifer Hawke-Petit, 17 year old Hayley and 11 year old Michaela could somehow watch what happens to their rapist-murderers, spending their lives in prison without parole, would they feel satisfied that justice was being done? Read the accounts of abolitionists, and you'd conjure up perpetual misery in dungeons where the LWOPers never see the light of day.

But then why do prison commissaries sell lifers suntan lotion with an SPF 30?

My video camera has recorded LWOPers in Tennessee playing softball—in uniforms, baseball uniforms—on baseball fields with chalked base paths, swinging for the fences (albeit topped with barbed wire), and rounding the bases to the cheers and high-fives of teammates and buddies. "Never again see the light of day . . . a fate worse than death," Steven Hayes' lawyers argued with straight faces.

If Connecticut abolishes the death penalty and substitutes life without parole, the problem of proportionality hardly disappears. Would multiple killers who rape and torture children receive proportional punishment by spending the rest of their lives in prison, no longer under a sentence of death? Would they get what they deserve? Any legislature considering abolishing or restoring the death penalty must face this question. We retributivists detest arbitrary punishment. We disavow disproportionate punishment—punishing too much or too little.

Although the more heinous crimes generally do carry *longer* prison sentences, in fact the most vicious criminals serving life sentences for the worst crimes often have the best jobs, best hustles, and easiest lifestyles. In short, inside prisons, daily life mocks justice: Those who deserve it most suffer least. As long as the Department of Corrections and its staff believe that "what a man did out there is none of my business -- how he acts inside determines how he'll be treated here" the People of Connecticut will never have justice.

D. Permanent Punitive Segregation (PPS): Justice for the Worst of the Worst

A different concept and practice of punishment—call it permanent punitive segregation (PPS)—*could* supply a morally acceptable substitute for many death penalty supporters while satisfying those opponents who recognize that the worst of the worst of the worst do deserve to be punished severely—and forever.

For the worst of the worst of the worst, life itself should be a punishment beyond a permanent loss of liberty. Life should be painful and unpleasant, every day. Perhaps the United States *could* constitutionally maintain a system of justice in which defining and administering a life in prison can be morally substituted for the death penalty. What would it feel like?

Imagine permanent punitive segregation, reserved only for the worst of the worst of the worst—rapist-murderers of children, for example—specially convicted and, in a separate penalty phase, specially condemned by a jury to suffer this fate. Those condemned to PPS would be housed in a separate prison. They would be permanently subjected to the harshest conditions the Constitution allows. Specifically, their food would be nutraloaf—a tasteless patty, nutritious enough not to foreshorten their lives but offering no sensory pleasure. Visits would be kept to the constitutional minimum and none would be *contact* visits, ever. These aggravated murderers would never touch another human being again. They would labor daily and purposelessly—digging holes to fill them up. Other exercise would be Spartan—running in circles. They would not be allowed to play.

These rapist-murderers would be provided no TV's and, of course, no Internet. They would get one brief, lukewarm shower a week. Photos of their victims would adorn their cells—in their faces, but out of reach, reminding these condemned killers daily of their crimes.

The adoption of PPS could sustain that connection between crime and punishment. Every corrections official working in PPS should be required to read a description of the crime of every LWOPer punished with PPS. We should tolerate no abuse of these prisoners, no beatings or sadism on the part of officers guarding them. But no conviviality, either. Officers would be instructed to be proper, but distant and cold. For PPS, Corrections' mission should be punishment. Those most vicious predators punished by perpetual punitive segregation would receive no better food, housing, or medical care than that offered to innocent poor outside.

As it connects crime and punishment, PPS clearly separates LWOP from ordinary life sentences. This hopeless, bleak experience should be reserved only for the worst of the worst of the worst. No "three strikes and you're PPS." No "drug kingpin and you're PPS." PPS should never be a default sentence, as LWOP has become in states such as Connecticut, which abolished parole for all murder. Only if they deserve PPS by their extreme cruelty should they receive it.

PPS should cost not much more to keep society safe. And, while satisfying society's need to justly condemn and punish, PPS may well also act as a more effective deterrent than life in prison today. Under the banner of PPS—the new life without parole—abolitionists who know that evil exists and that some vicious people may deserve to die, but who can never trust the government to kill its own citizens, could unite with reluctant death penalty advocates, haunted by sentencing mistakes or racial discrimination, who seek a real, deservedly harsh permanent *punishment* short of death that happens to deter more effectively and probably no more expensively than today's life in prison.

PPS should never be inflicted because a person, juvenile or adult, is found incorrigible—not subject to change or development. The perpetually dangerous must be incapacitated, but PPS should be reserved only for the deserving. We never forget the victims nor forgive these rapist-murderers. With PPS, we make and keep an unbreakable covenant with the past.

E. Connecticut's Life Without Parole

No state has PPS. By urging the end to the death penalty, however, Connecticut legislators obviously believe that life without parole here in this state sufficiently punishes the worst of the worst. Do these abolitionist committee members know what life is like day to day? In New Hampshire, members of the death penalty study commission were shocked to hear that a rapist murder sentenced to LWOP and perfectly well-behaved inside (as these cowards who prey on vulnerable victims tend to be) **within three years* of being sentenced, can find themselves in a setting where, for the rest of their natural lives they will be free to play ball, or board games, indoors or out, watch movies, garden, or hang out with their buddies from 7AM-11 PM seven days a week!

In Tennessee I recorded those perfectly well-behaved prisoners -- some released from death row into general population, others simply given LWOP in Unit 6 of Riverbend Maximum Security Prison free to play mostly all day, every day.

Is Connecticut any different?

Have you taken the trouble to find out what will happen to the rapist murderers of the Petit family, or Todd Rizzo who lured 13-year-old Stanley Edwards into his backyard, and then hit him 13 times with a sledgehammer merely to experience what it felt like. How would these depraved killers experience their days if they are spared the death penalty and instead sentenced to serve a life in prison without parole? Some of you have conned yourselves into believing that these pitiless killers will essentially be locked in their cells and "never see the light of day".

I did my best to find out. If you abolish the death penalty and death row with it, Connecticut's 10 -- probably soon to be 11 -- condemned killers now housed at Northern, this state's one and only "level 5" supermax, will probably end up is at MacDougall-Walker, a level 4 facility. I'll not go into great detail and the many possible permutations here, but as Warden Murphy and two deputy wardens confirmed, if he signs up to work in the kitchen, he is perfectly well behaved and his schedule works out well for him so that work, recreation and visits don't conflict, ***within a month of being sentenced to LWOP or being released from death row, a person convicted of raping and murdering a child in Connecticut can expect to be out of his cell either working, visiting, showering, talking on the phone, or playing with others, indoors or out 10-12 hours a day for the rest of his life.***

Is that "punishment" proportionate to the crime?

Is that justice?

And when they *are* confined to their cells, they're free to read, watch TV, or listen to music. All night, every night. No lights out policy.

Whether or not Connecticut accelerates their death, someday they will all die. Some of them will die from a painful, incurable disease. It happens to the best of us, and the worst of us. Unfortunately, some of us, desperately isolated, will die alone, uncared for. But probably not in prison. There they have a hospice in which caring fellow inmates provide 24 hour care for the terminally ill.

The DOC web site advertises a host of programs -- including carpentry, choir, computer studies, graphics and print technology, small engine repair, a textile shop. In advance of my visit, I checked with Brian Garnett, the Department spokesman: "As long as they don't have

disciplinary issues," he assured me, "those serving life are eligible for these programs". But ours is a world of scarce resources. Some of the programs are not currently staffed. The Advanced Art program advertised on department's web site as "interdisciplinary" including sculpture dance, creative writing and poetry, when staffed, has many more applicants than the program can handle. How to choose who are the lucky ones?

Were convicted child rapist murderers given lower priority than car thieves or drug dealers? Not in this prison meritocracy. Every applicant submitted a sample of their art, and selections were purely on the basis of talent. The same is true with music. The prison band program offers prisoners the opportunity to "learn and create different styles of music". They audition -- no matter who they are. Everybody is eligible.

Equal opportunity and equal protection remain the credo of this nation -- vital and basic to a humane rule of law. Rightly, the criminal justice system rejects and prevents sadistic or racist armed officers from arbitrarily making captives' lives miserable. When officers of the state inflict pain arbitrarily, when they discriminate on the basis of race, religion, or personal pique, they not only violate equal protection but also undermine retribution. Retributive justice itself requires that the quality of life inside match—be proportioned to—the nature of the crime: Let the punishment fit the crime. But that's not how it is for lifers. And that's not how it is or will be if Connecticut abolishes the death penalty and substitutes Life Without Parole.

Perhaps Lee Mann, warden's assistant at the Oklahoma State Penitentiary summed up best the indiscriminate immorality of life in prison, especially on death row: "We want to make the time for them as easy as we can, because it makes it easy for us if it's easy for them."

F. Special Punishment for the Specially Heinous

Some Connecticut legislators who ardently support the death penalty in principle will nevertheless vote to repeal the statute. They despair that with all the court delays, no condemned in Connecticut will ever be put to death – unless he waives appeals and volunteers. The death penalty in Connecticut seems to them a "joke" perpetrated on the families of the victims.

Even if a death sentence is never administered, however, formally condemning to death a vicious killer who deserves to die lends value in itself. The jury's verdict of death remains a solemn ritual of denunciation. Advocates on both sides of the debate have long recognized that death is different. Thus, a death sentence, even if never actually carried out, marks special condemnation for the worst of the worst.

Although courts and governors may delay or block executions, this legislature can and should continue to specially condemn the most heinous murderers by statutorily specifying that harsher punishment shall attach *on death row*. The legislature could recognize that justice requires a real focus not only on where and when you die, but how you live until you die.

If Connecticut does abolish the death penalty, the state's statute should continue to single out the worst murderers for the worst punishment. When it recently urged the legislature to abolish the death penalty, New Jersey took a small step in that direction, mandating life without parole served entirely *inside a maximum security facility*.

The Connecticut legislature could also specify that all and only those serving life without parole must do their time *entirely* in maximum security. *Where* the worst murderer serves a sentence, however, does not determine *how* that person experiences daily life inside. That uniquely harsh punishment should be *experienced* uniquely. *A person who rapes and murders a child should by statute be perpetually confined in the most punitive setting allowed by law.*

Not yet drafted nor scheduled for a public hearing, Proposed Bill No. 6060 provides that "any person who has been convicted of a capital felony and sentenced to death shall not have access to any recreational facilities within the correctional system. This proposed legislation, referred by **Rep. Adinolfi,** states its purpose straightforwardly: "To provide proper punishment for persons who have been convicted of a capital felony and are on death row."

Punishment, today, plays no part of the misson of the Department of Correction. This bill is a start.

G. Retribution: A Covenant with the Past

Retribution literally means *payback.* Often in disrepute among jurists and other educated elites, retribution persists, and today again has become the primary justification for punishment. I am a retributivist. We retributivists believe in rewarding goodness and punishing sadistic or callous cruelty. Naturally grateful, we reward those who bring us pleasure. Instinctively resentful, we punish those who cause us pain. We believe in payback.

Retributively, society intentionally inflicts pain and suffering on criminals *because and only to the extent* they deserve it. Thus, retribution acts to *limit* punishment as much to *justify* it. Critics wrongly equate retribution with revenge. They disparage retributive punishment's essential measure—like for like—as barbaric. Retribution, as does revenge, motivates punishment. But retribution also limits it. The Biblical "eye for an eye," originally understood as literally *no more* than an eye for an eye, exemplifies retribution as a *restriction* as much as a justification of punishment. Revenge needs no limit: We may wreak revenge on a whole community for the acts of a single member. But that revenge would be unjust. Thus, it could not be retribution.

All retributivists ultimately subordinate the future costs or benefits of punishment, resting justice—limited, proportional punishment—exclusively on a criminal's *past* moral culpability. Retributivists dismiss contemporary utilitarians who declare it irrational to cry over spilt blood; they rebut the humane argument that certain punishments are pointless—"What good will it do to inflict more pain?" utilitarians ask—as beside the point. Justice, a moral imperative in itself, requires deserved punishment.

The past counts.

Many death penalty opponents who support LWOP, however, even as they condemn retribution, fail to grasp fully LWOP's retributive core. Condemning us death penalty supporters for our retributivism—our irrational commitment to the past—abolitionists shamelessly promote LWOP as the better option. But on what basis? If a concern with public safety dominates individual justice, surely in some extreme cases where a LWOPer has become physically or mentally disabled, now suffering from an incurable illness that renders him harmless, we as a rational society should be prepared to release him, now that he no longer poses any threat.

Or, suppose that forty years after his imprisonment, this convicted killer demonstrates beyond doubt that he has thoroughly transformed himself. Now genuinely remorseful for his despicable murders, he has long since embraced and maintained a humane value system, helping others, while educating himself. Rationally, as forward-looking, compassionate people, we should be prepared to forgive and forget. We should allow him to experience his later life, free in a society whose values he now cherishes.

I have visited with these murderers, sometimes decades after their vicious deeds; too often, hearing their gentle sighs and genuine regrets, I, too, cannot help but wonder "What is the point of punishing these lifers until death?" And yet. . . .

With LWOP, we continue to imprison him until he dies. We make a covenant, when we sentence to LWOP. We irrevocably pledge at this moment forever: We will never let our rage and disgust disintegrate and deteriorate. LWOP creates a binding commitment now and forever never to think differently, or feel different—when the future becomes the present and the present is now past. We guard against our own future passion, not of rage and disgust that presently move us, but against the rationally anticipated decay of anger and the sense of forgiveness or mercy that will replace it someday when we would focus exclusively on the living criminal and forget the victim. We determine now and forever never to question how it can serve human dignity to continue to cage a changed, nonthreatening, harmless person who seems genuinely to regret his mistakes.

In sum, if we mean what we declare by LWOP, we can do so only because we have made a covenant with *that* past—that we shall never forget nor forgive; neither review nor revise—a covenant that we bind ourselves to keep. Thus, we reject the problematic question "What good will it do?" and instead continue to focus on the bad that has been done.

If this state does abolish the death penalty, its legislature should replace it with life without parole *in a special punitive setting*, reserved for the worst of the worst. The condemned could serve their sentences under conditions no better than what the Department of Corrections designates as "punitive segregation," presently reserved for inmates who violate internal administrative prison rules, however trivial the original crimes they committed. Thus, especially if it abolishes the death penalty, Connecticut should also *abolish mandatory life without parole generally for murder and save it only for those aggravated murderers found specially to deserve it.*

They should be punished every day, and reminded constantly of what they did and why we're doing what we're doing to them.

Until or unless we embrace a true *punishment* of life, the closest Connecticut can come to real justice for the worst of the worst of the worst is the punishment of death -- but only with a more morally refined death penalty statute.

II. REFINING CONNECTICUT'S DEATH PENALTY: WHO DESERVES THE ULTIMATE SANCTION

A. Modify the Mens Rea for *"Aggravated" Murder*

Add "Recklessly with a Depraved Indifference to Human Life"

Connecticut requires an intent to kill for murder. Thus in Connecticut all capital murders are intentional murders. Even leading death penalty opponents (such as Thorsten Sellin, the reporter for the Model Penal Code) acknowledge what the U.S. Supreme Court has reaffirmed—killing *recklessly with a depraved indifference to human life* may be every bit as heinous as premeditatedly killing.

These callous, indifferent murderers act with cold reckless disregard for human life. They don't purposely kill a specifically intended victim. These depraved, callous killers simply do not give a damn. Taking target practice by shooting into a passing commuter train, randomly poisoning bottles of Tylenol; vastly diluting chemo-therapy to collect more insurance money; starving and beating a child to death over a prolonged period; disfiguring a victim through torture -- by blinding with acid or chopping off limbs -- all these heinous crimes, although without an explicit intent to kill, displays such a depraved indifference to human life that if the victim dies, the killer should potentially be death eligible.

Today, in most states, a depraved indifference recklessness qualifies for murder, although rarely for capital murder. In Connecticut, for some reason, it can be no worse than manslaughter. Society, however, should reserve its ultimate sanction, whether death or life without parole, for all those aggravated murderers who cause death *purposely or recklessly with a depraved indifference to human life.*

B. Modify the Death Qualifying and Aggravating Circumstances

1. Restructure the Statute: Merge the Qualifiers and Aggravators

Connecticut chooses a cumbersome structure for capital murder. The statute lists eight death qualifiers up front. At least one must be proven for the defendant convicted of capital murder, thus becoming death eligible. The statute then lists aggravating circumstances, which often but not always duplicate the initial qualifiers. Once having found the defendant guilty of capital murder, if in a separate trial -- "the penalty phase" -- the jury finds at least one of these aggravators and further finds that either there are no mitigating circumstances, or that the aggravators outweigh any mitigating circumstances, they *must* choose death as the punishment.

Qualifiers and aggravators are too broad and too narrow. They should only be listed once, and found once. But as the statute treats them separately, so shall we.

2. Death Qualifiers

a. Add "Especially Heinous, Atrocious & Cruel"

The death penalty, of course, should be a sanction only for the most culpable – the worst of the worst of the worst. Morally, we measure culpability primarily by the killer's attitude and the victim's experience. Thus, most states aggravate murder into capital murder when the killing was "especially heinous atrocious and cruel" – either in its method, or the victim's experience. This core qualifying-aggravator should be the heart of any death penalty statute. It goes by different names. Some states call it "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated assault to the victim".

An "especially heinous atrocious and cruel" killing by its own terms represents the worst killing. An especially heinous atrocious and cruel killer constitutes the worst killer. Yet an especially heinous, atrocious and cruel murder does not in Connecticut without more, qualify for

the ultimate sanction. Connecticut reserves this language *only* as an aggravator. Something more is needed to make the murder capital. Under a morally refined statute, however, this alone would be enough. Should the new legislation merge the qualifiers and aggravators, the problem disappears. If the statute does not merge them, then perhaps the *qualifier* should be "outrageously or wantonly vile . . ." while the *aggravator* remains "especially heinous, atrocious and cruel." Or the "especially heinous" could operate as both. After all, the present statute repeats less clear qualifiers as aggravators,

Torture provokes near universal condemnation, even among killers themselves, providing retributivist advocates with our strongest case for the death penalty. Unquestionably, the sadist who tortures his helpless victim to death just for the fun of it qualifies as especially heinous, atrocious and cruel and belongs among the worst of the worst. Absent extraordinary mitigating circumstances, he deserves to die.

So too the rapist murderer: "Torture" should specifically include rape. Those who raped and tortured Jennifer Hawke-Petit and Michaela deserve to die. Independently, pouring gasoline and immolating Hayley Petit without rape should be death eligible in itself. So too that depraved indifferent reckless murderer, not caring who or how many innocent people die. (see IIa above).

Perhaps the "outrageously wanton or vile" qualifier-aggravator, or Connecticut's "especially heinous, atrocious, and cruel" alone, should constitute an entire death penalty statute. Of course the danger persists that every murder will be so characterized, and an overzealous prosecutor spurred by popular outrage, aided by a rightly indignant jury could stretch it beyond the truly most aggravated. But with some specific statutory examples, and a developing jurisprudence, this new qualifier-aggravator can function as it should.

b. Refine "police officer, corrections officer . . . acting within the scope"

Most states single out killers of police officers as worthy of the death penalty. Those who would kill a police officer would kill anyone, supporters claim. Police put their lives on the line for us, and an attack on law enforcement is an attack on law itself, threatening the whole criminal justice system.

Murderers who kill police or corrections officer *because* they are police do wage war on the people, and thus deserve our ultimate sanction. An armed robber, however, who does not initiate the gun battle, but only returns fire at a pursuing police officer, may be a murderer, but does not thereby become the worst of the worst, and without more, does not deserve to die. As they say on the street, "it's different when you do someone who's trying to do you."

Prison killings can pose their own problems. Inside Lorton, convicts told me why a fellow prisoner killed an officer who arrested him in possession of contraband. That same officer, long aware of that inmate's sale and possession of contraband, had been borrowing money from the prisoner. Unable to pay his mounting debt, the guard wanted his prisoner-creditor removed from the compound. So he busted him. When the prisoner killed the officer apparently acting "in the course of his duty", the attacker committed murder. Under the statute, that killing could qualify as capital. But that killer didn't arguably deserve to die.

If it retains "while acting within the scope of his employment" Connecticut should add "knowingly" kills a police officer to eliminate the situation where the killer kills an undercover agent, mistaking him or her as a fellow criminal. If the legislation includes this police officer

qualifier, it might add "because of the victim's status as a public servant" thus specially condemning the killer's motive.

Why include a police or corrections officer and not a prosecutor or a judge? And then too, Connecticut should expand its public official victim qualifier specifically to cover *killing a juror*, a good citizen drafted to serve the community, unarmed and for no pay.

c. Split defendant who hires from the hired killer

The statutory qualifier makes no distinction between the hired killer and the person who hires him. But there may be a world of difference between them. The moral assumption behind the statute: Those who pay or kill for pay qualify as the worst of the worst.

But an abuser who beats his wife, who rapes his step daughter may be married to a helpless victim too terrified to leave, and simply unable to summon the strength to kill her abuser. If after deliberation and agony, she hires someone to kill her abusive spouse she may commit murder, but does not thereby even arguably deserve to die. If, however, she pays to have her husband killed to collect life insurance, or pays to have a business partner/rival killed, then she resembles the hired killer she employs. We could imagine endless variations, but the statute should link them only if they "kill from a pecuniary motive." Otherwise, as presently written, it's too broad.

And ironically, as applied, it's too narrow. Like most other states with a death penalty, Connecticut rightly condemns paid assassins who kill for profit. But do we thoroughly condemn killing as a business decision? Unfortunately, like every other society, we are infected by class bias that sometimes blinds us to moral culpability. We rarely prosecute ranking corporate executives, no matter how callous and lethal their actions. Some of us retributivists see them for who they are and would punish them for what they do.

To deter such deadly behavior and diminish class bias, but mostly because they deserve it, states should specifically condemn corporate safety directors and other decision makers -- I call them "red collar killers" -- who, with a depraved indifference to human life, run deadly workplaces or manufacture lethal products that can poison a community's streams or soil, or knowingly and recklessly expose unsuspecting employees, consumers, or local residents to a grave risk of death which kills them, all from that 'purest' of motives—the profit motive.

d. Delete "felony murder"

A person already convicted of murder who murders again, seemingly not only commits murder but becomes a murderer in our eyes. Murder is not only what he's done, but who he is. In theory. Perhaps that's largely true, for a previously convicted intentional murderer who intentionally murders again. But less probably for one previously convicted of felony murder.

Connecticut has largely based its murder statute on the Model Penal Code. That Code eliminates felony murder as a crime entirely. Felony murder is a strict liability crime: It requires no culpable mental state relative to the killing. The intent to commit the underlying felony, through a legal fiction, "transfers" to the killing. Thus a robber who sits in the getaway car commits felony murder when his co-felon, against the expressed agreement that nobody gets hurt, shoots and kills. Or a robber who tries to rob a liquor store and finds himself suddenly the subject of deadly attack cannot claim self-defense to a charge of felony murder. Nor should he be allowed to. If either of these convicted felony-murderers later commits an otherwise

unaggravated murder, he should not because of his prior felony murder conviction become death eligible. Some other factor ought to qualify the murder as capital.

The felony *aggravator*, however, as we'll see, fails more blatantly to separate out the worst of the worst than the qualifier.

e. Delete "while sentenced to life"

Connecticut in common with many other death penalty states singles out a prisoner serving a life sentence who commits murder in prison. Supporters justify this qualifier in one of two ways: they claim lifers have nothing left to lose and are therefore a uniquely undeterrable group. A threat of death, and only a threat of death will keep them in check. Or, supporters claim, a lifer by this latest intentional killing demonstrates that killing is not an aberration, but an essential part of his character.

These arguments are out of touch with reality. Three decades and thousands of hours inside prisons interviewing convicted killers who serve life sentences and yet do not kill the unarmed guards they often despise have taught me that lifers develop the best hustles and live the relatively good life inside. Officers who guard them have consistently confirmed me that lifers have the most to lose and are most deterrable by two simple threats: "You will lose your privileges. You will be transferred."

The Connecticut statute does not even require that the lifer serves his life sentence for murder. But suppose he does. The lifer or convicted murderer who kills again inside the prison does not thereby demonstrate he is the worst of the worst. When I was visiting Lorton Central Prison some years ago, inmates described how a recent prison killing went down: A lifer worked in the kitchen delivering trays of food to other prisoners on lockdown. Without informing or consulting this lifer, another prisoner laced a peanut butter sandwich with cocaine to be delivered to his buddy by the unsuspecting lifer he used as a conduit. Another prisoner who worked in the kitchen snitched. Busted for transporting drugs, the lifer was himself locked down in "punitive segregation", stripped of his job and other perks he had worked years to acquire. When he paid to have the drug smuggler killed, he committed intentional murder. He deserved to be punished – transferred to a more punitive setting – but he did not deserve to die.

The lifer who kills again should not, for that reason alone, be death-eligible. The qualifier should be dropped.

f. Delete "single transaction" for multiple killer

Oddly, when the statute does focus on the multiple killer, it restricts the qualifier to "two or more persons at the same time or in a single transaction". Serial murderers who separately kill many victims over many years after quiescent intervals should definitely qualify for society's ultimate sanction.

It makes no sense to extend the death penalty to a felony murderer who murders once more – really for the first time, or to the lifer who kills again in prison, and yet exclude the serial killer who spreads out his murders. States such as New York, which also had "as part of the same criminal transaction" aggravator, had a separate aggravator: "The defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within twenty four months," thus somewhat alleviating the problem, but still failing to designate as the worst of the worst the serial killer who wanders across the states, killing as he

goes. Perhaps Connecticut's provision -- later added to the original capital statute -- was a political compromise between those who wanted to include mass murderers and those who did not.

Whatever its origin, the legislature should drop the "single transaction" restriction.

g. Substitute "knowingly kills a vulnerable victim" for "under age 16"

Many states including Connecticut single out those who kill children as especially deserving to die. Are the lives of some victims more valuable than the rest? Yes and no. Children represent innocence and unformed potential. But really, I think our instinctive special condemnation of child killers comes as much from the child's vulnerability as anything else. Thus Connecticut's statute should probably expand the qualifier to include "killing an especially vulnerable victim," namely children, the elderly, and the handicapped. Again we're challenged: Are the lives of these victims more valuable than the rest? No. Perhaps we imagine greater pain and suffering attaching as a helpless victim experiences his own helplessness. Ultimately, however, we support a generic "especially vulnerable victim" qualifying aggravator, not primarily because these victims' lives are more valuable, but because their deaths reveal the cowardly and despicable nature of the killers who prey on them. And yet the Connecticut Supreme Court has interpreted the present statute to make knowledge of the victim's age irrelevant. The legislature should correct this.

Although sixteen probably should be reduced to fourteen, those who prey on especially vulnerable victims — who display extreme selfishness combined with extreme cowardice — should qualify as the worst of the worst.

h. Add Bias Motive: "Race, Religion, Gender, National Origin, Sexual preference"

If motive matters, and it does when it's pecuniary, (see c above) then why not also single out those who kill from race or religious hatred, or gender bias?

3. Modify the Aggravating Circumstances

Again, Connecticut separates qualifiers from aggravators. Once a jury convicts a defendant of capital murder, he becomes death eligible. Now in a separate penalty phase, the prosecution must prove one or more aggravating circumstances which the jury will balance against any mitigating circumstances. Some of these aggravating circumstances merely repeat the qualifying circumstances. A few are new. Whether old or new, Connecticut attempts to list its aggravating circumstances exhaustively.

a. Eliminate the Felony Murder Aggravator

First and foremost. Felony murder—the most common death penalty situation—covers many different types of killers and killings. Across the United States, robbery (and burglary) have probably put more killers on death rows than all other aggravating circumstances. Instinctively and morally, most of us feel that a person who kills from a pecuniary motive does commit an aggravated murder.

Robbers almost always rob for money. But they less often kill for it. A robbery alone simply does not elevate an intentional or depraved indifference reckless killing to the worst of the worst,

Statutes, however, make no distinction between killing innocent witnesses—such as robbery victims and bystanders who surrender their money yet are killed to prevent possible future testimony—and killing the robber's co-felons (or paid informants cooperating with the government) who "flip the script" to pin it on their partners in crime.

In short, if it includes this specific aggravator at all, a death penalty statute should distinguish between the innocent witness and the "snitch." The snitch deserves witness protection, but his killer does not thereby deserve to die.

If Connecticut would confine the death penalty to the worst of the worst, the legislature should eliminate the escape aggravator and narrow the statute to the intentional killing of an "unresisting innocent witness."

d. Allow unenumerated aggravators. (Delete "two prior violent felonies; knowingly creating a risk of death of another person; paying anything of pecuniary value; committed the offense with an assault weapon.")

Some listed aggravators are too specific, inadequately defined and don't really reach their targets. Much of the problem stems from Connecticut's decision, contrary to many other states, not only to separate the qualifiers from the aggravators, but then to attempt to *exhaustively* define those aggravators. Although the legislature, wrongly in my view, could continue to separate the qualifiers from the aggravators, they should, as many states do, allow for unenumerated aggravators.

III. THE PENALTY PHASE: PROTECTING AGAINST MISTAKES

Once the jury finds the defendant guilty of aggravated murder, every capital jurisdiction in the U.S. provides a separate penalty phase. Whereas the guilt phase focuses on what the killer did, the penalty phase focuses exclusively on what he deserves. Here, Connecticut can help protect against mistakenly condemning the innocent.

A. Weighing Aggravating Against Mitigating Circumstances

Once the jury finds aggravating circumstances beyond a reasonable doubt and mitigating circumstances by a preponderance, Connecticut's capital statute requires the jury to decide whether the aggravating circumstance(s) simply "outweigh" any one or more mitigating factors. If they do, or if there are no mitigating circumstances, the jury and judge are *required* to sentence the capital murderer to death. The legislature ought to revise the statute, better to protect us against condemning and killing an aggravated murderer who does not deserve to die.

1. Add to the Prosecutor's Burden: "Clearly outweigh"

Death penalty statutes should demand greater certainty before a jury condemns a defendant to death. The jury should have to find "beyond a reasonable doubt that aggravators *clearly* (or substantially) outweigh the mitigators." Barely tipping the scale should not be enough.

2. Make the Death penalty Permissive: Substitute "may" for "shall"

Connecticut's statute speaks in quasi-mandatory language: If one or more aggravating circumstances exist, and no mitigating factor exists or the jury finds that aggravating factors

outweigh beyond a reasonable doubt all of the mitigating factors, "the court *shall* sentence the defendant to death."

The Connecticut Supreme Court has exacerbated this problem holding that once the jury has "found an aggravating factor proven beyond a reasonable doubt, there is no requirement that it go further and make an additional determination that the presence of that factor justifies imposition of the death penalty." The jury should have to determine not only the existence, but also the weight of the aggravator. A relatively weak aggravator simply may not weigh heavily enough to make the convicted murderer deserve to die.

Although no mitigating circumstances have been found, or the aggravators substantially outweigh mitigators, neither the jury nor the court should ever feel legally bound to vote "death" by some mechanical weighing process.

B. Add "Lingering Doubt" and "Moral Uncertainty"

A capital statute must help insure against factual and moral mistakes. Only the worst of the worst should be condemned to die. Connecticut cannot tolerate executing innocent people, nor should it. Today ten condemned killers occupy Connecticut's death row. Not one there even *claims* actual innocence. Before Illinois' Governor George Ryan issued his famous wholesale commutation, emptying that state's death row, supposedly because he feared executing the innocent, he had appointed a Commission to study the death penalty. That Commission made a series of recommendations which the Governor ignored. But the commission could not find one single condemned killer whose innocence was in doubt.

But, still, the fear of executing the innocent haunts us. Retributivists abhor the thought of executing the innocent. Nothing perverts retribution worse than subjecting the innocent to the ultimate punishment. How then to better insure against mistake?

Two years ago, when this committee considered whether to abolish the death penalty prospectively, you also had before you, SB 1027 which would have required "absolute certainty" as the standard of guilt in capital cases. Chief State's Attorney Kevin Kane vigorously opposed this heightened standard. Although it "sounds good on its face," Connecticut's chief prosecutor insisted, "absolute certainty . . can never be attained." Any elevated standard beyond "reasonable doubt" would require acting on "unreasonable" "speculative" doubt.

Rep. Fox, now co-chair of this committee, pressed:

> Is there [no] way to increase the standard without reaching that level of absolute certainty in a capital case? Is there a way to go beyond proof beyond a reasonable doubt to make certain that we're not going to or at least [be] more certain that we're not going to execute somebody wrongfully?

"Not if you want to keep our system a rational system of justice, which I think we have to do," Kane replied, during the course of very thoughtful written and extended live testimony that this committee should carefully reconsider during its deliberations. Proof beyond a reasonable doubt was "as certain as you can get in a rational, logical system of justice", the Chief Prosecutor insisted. "How can you get anything beyond that?"

Senator Kissel supported the State's Attorney here, pointing out the obvious unfairness of a defense attorney having to inform a client charged with non-capital murder or any lesser crime

that if only he had been charged with "this even more horrible offense" he'd have an easier time getting off. Absolute certainty, Senator Kissel concluded, was "completely unworkable" and didn't "deserve any further serious consideration after today."

But searching for some special burden, appropriate to capital cases, Rep. Fox had asked an important question, that troubled **Senator Gomes** as well. It deserved a fuller reply.

Absolutely certainty *is* an impossible unworkable standard. Proof beyond a reasonable doubt belongs in the *guilt* phase of every trial for every crime, from petit theft to capital murder. To attempt to raise that bar would be to act on irrational, speculative doubts.

But capital trials have a second penalty phase. There the question is not simply of fact -- did he do it. It's a moral question -- not what he did but what does he deserve? "If you want to keep our system a rational system of justice, " the Chief State's attorney had insisted, we must reject any burden greater than proof beyond a reasonable doubt. A moral question, however, is never strictly rational. Every moral question is at base emotional. Its answer requires an appeal to a deeper faculty, an emotional one. Does this convicted capital murderer *deserve* to die?

We might be convinced beyond a reasonable doubt he committed capital murder and is thus death eligible without being thoroughly convinced he deserves to die. We may have doubts of his guilt that linger --not rational nor irrational doubts, but real, non-rational doubts nevertheless: Doubts for which we cannot supply a reason. And we may have intuitive, moral doubts that he deserves to die.

Oddly, mathematics, a most precise enterprise, provides us a good working metaphor. "Rational numbers" and "irrationals" -- better called "non rationals" -- together make up the *real* number system. When it comes to just deserts or even guilt-- *in the penalty phase*, doubts can be non-rational, but real.

Therefore, after jurors are instructed that they *may* vote for death only if they are convinced "beyond a reasonable doubt that the aggravators substantially outweigh the mitigators," they should be further instructed: "Although you may be convinced beyond a reasonable doubt that the defendant committed capital murder, if you have even a lingering doubt, *a residual doubt* of the defendant's guilt, you should reject the death penalty." The U.S. Supreme Court recently held that the U.S. Constitution does not require proof beyond a "residual doubt"—but justice does.

Jurors should also be instructed: "Although you have no lingering doubt about the defendant's guilt, before voting for death you must also be convinced *to a moral certainty* that the defendant *deserves* to die." This standard explicitly demands intuitive, emotional certainty that cannot be quantified. Intuitive, emotional, non-rational, but very real.

This extraordinary burden should better allow an individual juror who has found aggravated murder beyond any real doubt, nevertheless to withstand peer pressure and hold out for a sentence of life in prison, although s/he can neither identify nor articulate the basis for mercy. In sum, jurors should be instructed, "only if you *feel certain* that he committed the crime and deserves to die for it are you permitted but never compelled to vote for a punishment of death."

C. KEEPING THE BALANCE TRUE

1. Allow Proof of Aggravators Unrestricted by the Rules of Evidence

During the penalty phase, the jury reflects on the capital murderer's worth as a human being. In arguing for life or death, commonly, neither prosecutor nor defense are constrained by any list of aggravating or mitigating circumstances. Nor are they constrained by the rules of evidence.

The list of morally relevant aggravators is endless, and beyond human ability to exhaustively specify in advance. Yet the current statute restricts the aggravators to those specifically listed. The Courts have been forced to contort their way around it. The absence of remorse, for example is not listed but potentially operates as a morally relevant aggravator. The prosecution may use this unlisted aggravator, the Court has held, to rebut a mitigator. It would be better for the legislature straightforwardly to declare that once at least one listed qualifier or aggravator has been proved, the prosecutor may, in the penalty phase, introduce and prove – unconstrained by the rules of evidence which governed the guilt phase – any additional relevant aggravators. A prosecutor, then, would and should at the penalty phase be free to prove any circumstance about the convicted capital murderer – his "character, background, history" or "the nature and circumstances of the crime" which might incline the jury to decide that he deserves to die.

The jury has this same freedom with the mitigators. Connecticut should join other states and keep the balance true.

2. Protect Against the Stealth Juror: Nearly Unanimous Condemnation

With this Herculean burden operating to preserve the lives of all but our very worst offenders, the legislature should compensate for the inevitable failure of the jury selection process to weed out abolitionist jurors who, contrary to their oaths, are unwilling *under any circumstances* to vote death. Under these heightened standards of persuasion, an 11-1 (or perhaps 10-2) jury should be empowered to condemn the worst among us to suffer society's ultimate punishment.

D. A MORE VICTIM CENTERED PROCESS

One simple fact unites this judiciary committee, the legislature and the people of Connecticut. A too long delayed death penalty imposes unjust suffering upon the victims' families above and beyond the devastating effects of the murder itself.

Recognizing that the worst of the worst do deserve to die, some Legislators would nevertheless spare aggravated murderers an empty threat of death to spare victims' families the real agony of disappointment. Why force them to relive their horrible loss during successive phases of the seemingly endless and frustrating (re)trial and appellate process? These legislators would spare the killer to spare the victim's family. Some legislators who support the death penalty in principle ultimately join its opponents to urge repeal, convinced that the present Governor would ever allow anyone to be executed.

1. The Victim Impact Statement: Real and Clear

Do not confuse the *victim* with the victim's family. Among the survivors, the family often suffers most. The family most pointedly reflects our anger and grief. But with murder, the victim is dead while the surviving family members live. Yet, when someone is murdered, we are all the victim's family. "And for the greater security of the weak," declared Solon, the great ancient lawgiver, "citizens, like members of the same body, should feel and resent one another's injuries."

"The voice of our children's blood" moves us retributivist death penalty supporters. The past counts, and the community remains polluted if the law responds inadequately. We *feel* the need to act on behalf of the victim. Yet in determining and administering punishment, the criminal justice system fundamentally disconnects the crime—murder of an innocent victim—from the experience of punishment for that crime. Whether in the courtroom, at sentencing, or while awaiting death on death row, or serving life in the general prison population, even during the execution ritual itself, crime and punishment are severed. The legislature should consider several victim-centered modifications.

During the penalty phase, the defense will, and should attempt to humanize the defendant. The killer's friends and/or family may recount his good deeds, or emphasize the convicted killer's own traumatic suffering or abuse as a child. The jury has the benefit of viewing the living defendant in court. To allow the jury to strike a moral balance in deciding life or death during the penalty phase, the U.S. Supreme Court has upheld "victim impact" statements. The People may call the victim's family as witnesses to humanize the victim and communicate their own sense of loss.

And officially Connecticut's legislature has embraced this. In theory. In fact, this part of the statute is a disgrace. Weakly and ambiguously, Section 53a-46 d reads: "Victim impact statement read in court prior to imposition of sentence for crime punishable by death."

When may it be read? For it to have an impact, this victim impact statement must be read to the jury deciding the killer's fate. Yet the statute declares "in court prior to imposition of sentence", absurdly implying that it may only be read to the judge after the jury's verdict of life or death which binds the court.

Who may read it? We don't know. The statute leaves it unclear. These ambiguities compelled Dr. William Petit, as he publicly declared, to forego reading a victim impact statement to the jury during Hayes' penalty phase. This absurd, ambiguous statute stripped the surviving victim of his rightful opportunity to talk about his loss, to bring to living memory his wife Jennifer, to humanize his daughters Hayley and Michaela. Dr. Petit could not talk of his family to the jury, lest he later create an appealable issue, and jeopardize Hayes' death sentence. How unfair; unjust.

Why must the statement be read aloud, draining it of its vitality?

The statute must be modified to allow a victim impact statement to be worthy of its name. Live testimony by the victims' family and/or friends should be admissible -- aided by photographs and video -- to bring the victims to life in the jury's consciousness.

2. "Living Wills"

The U.S. Supreme Court held that although the victim's family may portray the victim and their own sense of loss, they may not offer an opinion as to whether the killer should be put to

death. Regardless of how the survivors feel, however, the *victim*'s opinion of her killer's fate *should* count. Abolitionists have devised a "living will" or "declaration of life," which typically reads

> I hereby declare that should I die as a result of a violent crime, I request that the person or persons found guilty of homicide for my killing not be subject to or put in jeopardy of the death penalty under any circumstances, no matter how heinous their crime or how much I may have suffered.

Death penalty proponents generally dismiss these living wills and thus far they are inadmissible at trial. If we truly desire to become more victim-centered, however, we should admit living wills. A statute could declare:

> Once victim character evidence is raised, either side may present written evidence that the victim either supported or opposed the death penalty with such qualifications as the victim made apparent during her or his life. The judge shall examine such evidence, from either side, in camera, and shall permit it only if it clearly and convincingly shows that the victim would have supported or opposed the death penalty under the circumstances of the particular killing. The judge should further inform the jury that they are not bound to effectuate the victim's living will, but should give such weight to it as they see fit.

3. A More Victim-Centered Execution

After the condemned makes a final statement (or perhaps immediately before), the victim's family should have the statutory option to display a brief audio-visual record of the victim. This demonstration may portray the victim at play or in the embrace of family or friends, and may also include crime scene photos and scenes from the victim's funeral, burial and gravesite. We should drive it home to all who witness a state-sanctioned killing that we execute the condemned for the sake of the past. The legislature by statute should do its best to reconnect the ultimate crime with the ultimate punishment.

4. Compensating the Victim's Family

From earliest times, the victim's families could accept a "blood price" in lieu of retaliation. Western Civilization advanced, when the ancient Hebrews rejected the death penalty for property crimes and at the same time abolished the blood price: "You shall accept no ransom for the life of a murderer, who is guilty, but he shall be put to death." The ancient Greeks also independently rejected the blood price at about the same time. A murderer could no longer buy his way out of punishment for homicide.

Death penalty opponents often urge the legislature to apply all cost savings from abolishing the death penalty to victims' services. They urge legislation: "A person convicted of murder . . . shall be required to pay restitution to the nearest surviving relative of the victim." Imagine a family coming to depend upon monthly stipends from the killer of their loved one? This seems obscene to me, but in any case retrograde and wrong.

The Government has failed every murder victim and, by extension, their family in the extreme. While the legislature should mandate financial support to families of murder victims, this support should never come directly from the killer.

CONCLUSION

Two years ago you held hearings on a similar bill. When "people start learning about . . what really happens," **Rep. Lawlor** observed then, "it begins to change people's view from the philosophical issue to the very practical side of this." The Death Penalty exists only in theory, but not in practice, abolitionists assure you. You've never really given it a try. As a distinct "punishment", life without parole itself -- even more clearly than death -- exists only in theory. Investigate it for yourself. What really happens day to day with those serving life without parole? The reality of punishment is not a number, or a sentence declared in court. Punishment is an experience -- day to day. Investigate and you will find in fact, that *inside the Department of Correction this specially harsh, specially deserved 'punishment' of life without parole exists not even in theory much less in practice.*

"If we are honest," former Warden and Deputy Commissioner, Bill Tuthill declared to this Committee two years ago, "you get as much justice as you can afford." That sweeping statement insults the highly skilled and dedicated Capital public defenders who manage to delay executions endlessly by well-crafted arguments, motions and appeals. Because, remember, as the Chief State's Attorney pointed out, for a capital defender, "delay is victory". Inside prison, however, Commissioner Tuttle's accusation has some bite. The worse but wealthy killer obtains a color TV from day one, because he can afford it. The poor, lesser criminal, with no money in his commissary account might have to wait months or even years. Inside prison, you don't get as much justice as you can afford -- you get as much privilege as you can afford.

So yes, let's be honest and realistic -- not theoretical but practical. Acknowledge what you do if you enact this bill. "It is very clear", as Kevin Kane, Connecticut's chief prosecutor, informed this committee two years ago, if you "purport" to abolish the death penalty prospectively only, you will "actually nullify the death penalty for anybody who has not yet been executed." Some of you may continue to resist this truth, at least outwardly. But the fact is, that as long as the death penalty has been abolished -- whether prospectively or not, no one will be executed in Connecticut.

Unlike other punishments, the U.S. Supreme Court has repeatedly informed us, "Death is different." The meaning and scope of the 8th Amendment, the Court has instructed, changes according to the "evolving standards of decency of a maturing society." To determine whether punishment is cruel and unusual -- whether those standards of decency have changed, Courts primarily look to you -- the legislature -- under the assumption that legislators reflect the values of the people they supposedly represent. No matter that a unanimous jury, representing a cross section condemns Steven Hayes to death. No matter that 80% of the public polled in Connecticut favors the death penalty in this instance. If the People's representatives officially abolish capital punishment, the Courts will interpret that as objective evidence -- however false in this case -- that the People's sense of decency now and hereafter prohibits execution. Prosecutors will predict that response and also take their signal from you.

These proposals for refinement do little more than scratch the surface. Statutory revision requires collective wisdom. Hopefully the legislature will submit the question directly to the people, and if they strongly support the death penalty in a referendum, you will embark, thereafter, on a real journey of reform. Or you could conduct an advisory, non-binding referendum. And once you discover that for the worst of the worst, the people overwhelmingly

support the death penalty, you could combine your own abiding conviction that this extreme punishment is inhumane with your political acumen that the time is inopportune, and abolish capital punishment prospectively only. At least you will have allowed the People to go on record: 'On this issue, at this moment in history, our evolving standard of decency does not match yours.'

Still, if you insist on overriding the values of the People you otherwise represent, you ought to do so on the basis of overriding principle, not political expediency. By what principle can you support a law that declares that anyone sentenced to death before time T may die, but not thereafter? Unreflectively it may seem to you that the Legislature's greater power to abolish the death penalty wholesale, includes the lesser power to abolish it prospectively only. But sometimes by doing less than you might you do more than you may.

Be honest with yourselves and the People you represent. Face the problem squarely, refine the statute, or abolish capital murder, but strive to see justice done: Do your utmost to ensure that at least for the worst of the worst, in reality -- not in theory -- the punishment fits the crime.

Respectfully submitted,

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APPENDIX A: Other Issues -- Deterrence, Hypocrisy, Financial & Emotional Costs

Deterrence

The U.S. Supreme Court has held that the death penalty must either generally deter *or* serve retributive ends. Polls show that the American majority who support the death penalty (and probably, too, most of those who oppose it) do not find deterrence their primary issue.

In earlier testimony before the Committee, abolitionists flatly insisted that the death penalty that "the death penalty simply does not deter anybody" – unnecessarily make their own position more difficult. Of course the death penalty deters some people. As the Royal Commission (1949-1953) observed in its lengthy and detailed report, "We can number its failures. But we cannot number its successes." We can never know how many people who would have otherwise committed murder stopped themselves because, and only because of the threat of punishment.

The deterrence question, really, is not whether the death penalty deters – sometimes it surely does -- but whether, on balance, it deters more effectively than its principal alternative, life without parole. Better informed abolitionists, then, make the more modest claim that the death penalty no more powerfully deters than life in prison. They claim that studies either confirm this failure of deterrence, or at least fail to establish the death penalty's marginally more powerful deterrent effect.

Murderers largely moved by momentary passion, the argument goes, give little thought to the consequences as they kill. The very remote possibility of their own execution someday in the distant future cannot and does not stop them here and now.

Many undeterrable passion killings qualify as manslaughter but not murder. And only the very worst passion murderers – such as sadistic torture killers – deserve to die. For centuries we've believed, all other things equal, premeditated cold-blooded killings deserve greater punishment than passion killing. And although certain murderers – international or domestic terrorists who kill in order to achieve a martyr's death – are by definition undeterrable, other cold blooded killers, e.g. professional assassins, may be most deterrable and also deserve to die.

Early deterrence advocates such as Jeremy Bentham portrayed human beings as rational and calculating, weighing costs against benefits, discounting future threats of pain by their uncertainty and delay. Thus, as opponents have emphasized, since less than 1 percent of those who commit murder nationwide ultimately receive the death penalty and less than one-half of that small number are executed, the death penalty could not be expected to deter a would-be murderer who rationally considered the odds.

But this ignores basic human nature: When it comes to dying, most people, except extreme action seekers, go to great lengths to avoid deadly risks. We willingly sacrifice near-certain pleasure to spare ourselves remote risks of disaster. There is nothing "irrational" about this.

Classically, punishment's effectiveness as a deterrent depends not only upon its certainty, but also its swiftness and severity. Opponents note that as a practical matter, the length of time that convicted murderers stay on death row argues against the usefulness of the death penalty as a deterrent. So usually we get the portrait of potential

killers as either passionate and unrestrainable, or rational and dismissing the infinitesimal possibility of being put to death.

Punishment, however, as the Royal Commission noted, may restrain human beings subconsciously. "The deterrent force of capital punishment operates not only by affecting the conscious thoughts of individuals tempted to commit murder, but also by building up in the community, over a long period of time, a deep feeling of peculiar abhorrence for the crime of murder."

Abolitionists counter with the death penalty's so-called "brutalization effect": By condemning and later killing helpless defendants, the Government subconsciously reinforces a belief in all potential killers that killing is alright, they claim.

Earlier testimony before this committee cited the well-known but misleading observation that "states without a death penalty have far *lower* murder rates than the states with the death penalty." Washington D.C., with its own criminal code and prison system, but without a death penalty, has had a much *higher* murder rate than neighboring Virginia or Maryland, both capital jurisdictions. The abolitionist spin can omit this fact, however, because D.C. is a "district" and not a state. Furthermore, comparing *counties* within a state, the effective unit of death penalty prosecution, the death penalty's marginal deterrent effect increases.

If we are really about maximizing capital punishment's deterrent effect, confining ourselves to rational, conscious decision-making, we should refine and narrow the death penalty to the worst of the worst, and thereafter more regularly seek and apply it to a much smaller class of monsters.

So, suppose we join the abolitionists agree that collectively without more, the data to this point fails to clearly and convincingly *prove* the death penalty operates as a marginally more effective deterrent than life in prison. Put the studies aside. What else could support or supplant this latest but not yet conclusive empirical evidence? We're thrown back to human nature.

"No other punishment deters men so effectually from committing crimes as the punishment of death," observed Sir James Fitzjames Stephen, the great 19th century English judge and leading historian of the criminal law.

> This is one of those propositions which it is difficult to prove, simply because they are in themselves more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction . . . 'All that a man has will he give for his life.' In any secondary punishment, however terrible, there is hope; but death is death.

My years interviewing street killers inside maximum security prisons and on death rows confirm this, exploding the categorical myth that the death penalty *never* deters more effectively than life without parole.

"Joe" specialized in robbing drug dealers in the D.C. area. While robbing a middle-level dealer in his house in Virginia, Joe and his partners discovered to their delight in addition to cocaine, their robbery victims also possessed kilos of heroin. Joe told his cohort to wait outside while he dealt with his victims, already tied up and duct taped. Joe had decided to kill them, he recalled. But at the last moment he changed his

mind. Why had he let them live? "When I was doing time in Richmond, I used to see the electric chair when I swept the hall. And what flashed in my mind was that chair, and I didn't want that. I couldn't handle that. So I let them live."

This only shows how the death penalty deterred this one killer at this one moment. It does not demonstrate the more important point that sometimes *only* the death penalty can deter where life in prison will not. But Joe continued, telling me of a similar situation in Washington, D.C., which does not have the death penalty. "What did you do?" He said matter-of-factly, "I killed them. Because I could face life inside this joint. I had done time here before, and I knew I could do it again. But that chair, man. That's something else."

Of course this is but one anecdote – although the most direct kind of evidence on deterrence we can ever hope to have. But why should we consider it freakish? Other stories in the literature and my own interviews confirm it. For most people -- and especially for those who have already served time in prison and do not fear repeating that experience – only the threat of death, and sometimes not even that, will restrain them.

So put the studies aside, in the end, commonsense, human nature, logic, and anecdote strongly that death generally deters more effectively than life. And I'll bet that PPS deters more effectively than today's LWOP.

Deterrence alone, however, should rarely if ever justify death as punishment.

Killing Killers: A Like Kind Response

Early witnesses disparaged retributive support for the death penalty as vestigial hypocrisy. We debase and degrade ourselves by resorting to the same conduct that we condemn for those who kill. Killing because someone else has killed was not consistent with the mores of a civilized society. We cannot teach respect for life by taking life. Or as former Warden Mary Wolff testified to this committee, by killing the heinous killer, we "follow in the footsteps of the criminal." But this well-worn argument -- that we debase life by taking life -- if it proves anything, proves too much. When we imprison kidnappers, do we thereby debase liberty? When we impose fines on thieves, do we debase property? Punishment acts as a like kind response – inflicting justified pain upon a person who earlier inflicted unjustified pain (so, too, of course celebration – returning pleasure for past pleasure). Thus the basic retributive measure – like for like – "as he has done, so shall it be done to him;" "giving a person a taste of her own medicine;" "fighting fire with fire" – satisfies at a primal level. Reciprocity is not hypocrisy.

Two years ago, in your earlier hearings, witnesses disparaged retribution as a synonym for vengeance. Those who insist on equating retribution with revenge must recognize deterrence for what it is. Because if retribution is pure revenge, then deterrence is pure terrorism, as Hobbes – the first and greatest modern utilitarian – said in disparaging retribution and proposing deterrence: "The ayme of punishment is not revenge but terror." Now, we've come to appreciate that deterrence is not pure terror. You should also appreciate that retribution is not pure revenge.

Although they stem from a common desire to inflict pain on the source of pain, revenge may be limitless and misdirected at the undeserving, as with collective

punishment. Retribution, however, must be limited and proportional – no more (or less) than what's deserved.

Retribution provides the basis for limiting punishment as well as for affirming it. We retributive advocates of the death penalty are as concerned that those who do *not* deserve it do not get it, as we are that those who do, do.

Abolitionists who reject retribution -- who do not feel the urge to punish, or do feel it but suppress that feeling of righteous indignation as irrational and shameful -- cannot really grasp what moves us retributivists. Most retributive death penalty supporters, then, define the "worst of the worst" as deserving to die for the extreme harms they cause (rape-murder, mass-murder, child- murder, torture-murder) along with the attitude with which they cause it – sadistically or with a depraved callousness.

According to Immanuel Kant's classic retributivism, we impose punishment as an abstract duty without any emotion. By punishing, we dignify the transgressor, acknowledging the free will that produced the crime. More persistent and popular than Kant's retributivism from an abstract sense of duty, emotive/intuitive retributivism has deeper roots.

Abolitionist critics of retribution insist that emotion may never properly move us individually or collectively. They sympathize with the anger of the victims' friends or family, but insist that no humane person would want to act out of that anger. Emotive retributivists' urge to punish, however, stems directly from a projected empathy with the victim's suffering. "Our heart, as it adopts and beats time to his grief," declared Adam Smith in *A Theory of Moral Sentiments*, the first great work of modern retributive psychology. Haunted by the victim's suffering, retributive death penalty supporters cannot forget or forgive the victim's fate: "We feel that resentment which we imagine he ought to feel, and which he would feel if in his cold and lifeless body there remained any consciousness of what passes upon earth," Smith further explained. "His blood … calls aloud."

Jennifer Hawke-Petit's blood calls aloud. Hayley Petit's blood calls aloud. Michaela's too.

Embracing human dignity as our primary value, emotive retributivists since Adam Smith emphasize "a humanity that is more generous and comprehensive," "opposing to the emotions of compassion which we feel for a particular" criminal, "a more enlarged compassion which we feel for mankind."

Financial costs of the death penalty

The death penalty enhances costs from investigation to appeal. Public Defender's offices estimate that abolishing capital punishment would save money. Departments of Corrections estimate that eliminating the death penalty would save $1 million per death row prisoner over each inmate's lifetime.

The vast majority of criminal cases result in plea bargains which not only save time, effort, and costs of trial and appeal, but also protect against an unpredictable and errant jury ignoring the evidence and acquitting a sympathetic accused. In return for pleading guilty, criminals almost always receive lesser charges or lighter sentences.

Without a death penalty as a threat, what would move an aggravated murderer to waive trial and appeal, and accept life without parole? Perhaps, in a rare case, remorse. Overwhelmingly, however, first degree murderers plead guilty and accept life without

parole only to avoid the death penalty. Each such guilty plea saves the people hundreds of thousands of dollars.

Emotional and psychological costs of the death penalty

Before committee and commission such as this, family members of murder victims testify about the devastating emotional costs of the death penalty. Survivors testify to the pain of being forced to relive the trauma of their loved ones' murders during prolonged appeals. Victims' families talk of the frustration of wanting and waiting for their loved ones' killers to die. Much of the victims' family bitterness and frustration came from the false promise of justice. The system would never deliver on its promise – endless stays and reversals.

Psychologists can testify to the adverse effects of executions on judges, jurors, correctional staff, journalists, clergy and spiritual advisors, as well as the families of the condemned . These intangible emotional and psychological costs must also be taken into consideration in weighing the costs of the death penalty, abolitionists insist.

But if non-quantifiable emotional costs *do* count, then how about the cost of not doing justice? In some cases, abolishing the death penalty -- retributively, the only proportional punishment – abolishes justice.

If you abolish the death penalty, how about the cost to parents who realize their child's rapist murderer now lives in prison playing basketball or watching the Huskies play on a color TV? What does it cost to contemplate the person who tortured your child to death now in art class or lying on a prison bed, lost in a good book?

APPENDIX B:

RACE DISCRIMINATION IN THE DEATH PENALTY

A. Primary Race Discrimination: The Race of the Condemned

Does a black defendant stand a better chance of being put to death because he's black? This is the primary question of race and the death penalty.

The United States has an appalling history of racial discrimination. We who support the death penalty must never forget that capital punishment, especially as a response to rape in the South, has been a prime instrument of domination and oppression directed at black males by powerful whites.

The least informed or most unscrupulous among the abolitionist public still maintains racial discrimination of this most essential type: A black killer, they claim, is much more likely to be executed than a white killer, *because* he's black. If this were true - if a white majority - especially prosecutors and jurors - did devalue black life and thus used the state criminal justice machinery to execute blacks disproportionately frequently - it would violate the basic credo of the United States - equality under law - and should and would damn the death penalty in America.

Some opponents of the death penalty continue to proclaim that blacks who commit the same crimes as whites, under the same circumstances and with the same background, will be prosecuted capitally more often, sentenced to die more often, and executed more quickly and certainly. If this were true, then the death penalty as administered in the United States would be racially biased, and violate equal protection, as well as due process.

But the news is good – indeed very good, unless you're an abolitionist determined to misplay the "race card".

Nearly every study in the modern era since *Furman* was decided in 1972 – largely conducted by abolitionists, has confirmed the essential absence of race discrimination against black convicted killers. In fact, the *famous* original Baldus study of the post Furman death penalty in Georgia, whatever its flaws, indicated the opposite: "Specifically the odds that the average black defendant will receive a death sentence are .56 of those faced by a white defendant in a comparable case."

Let that sink in: A similarly situated *white* defendant was *nearly twice as likely* to receive a death sentence as a black. Let that sink in, but not too deeply: Because when you adjust for case culpability, that bias too, largely dissipates.

What has happened since 1990?

"Right now, we're caught up in this racial disparity claim," Kevin Kane, the Chief State's Attorney explained to this Committee two years ago. "And we can't even get the data on which they claim their studies are based. The racial disparity claim was first filed in 2003." The State's Attorney's office spent years trying to get the data, and when the defense finally turned it over, they said they had abandoned that study. I can't discuss that study or those data.

But I do know that as of 2003, 18 major studies had been conducted. David Baldus, himself, conducted many of them. Baldus, the leading abolitionist scholar of race and the death penalty sums it up, "with few exceptions the pre-1990 pattern of minimal minority-defendant disparities persists". In fact, Baldus continued in this meta-

study, "with few exceptions, unadjusted disparities suggesting more punitive charging and sentencing practices against *white* offenders than black and minority offenders. . . . However, when controls for . . the culpability of the offenders are introduced into the analysis, the results normally show blacks at a slightly higher or lower, but not statistically significant, risk of receiving a death sentence."

So, 18 studies uniformly confirmed the good news. A black murderer is no more likely than a white murderer to be tried, convicted, condemned, and killed by the state.

Of course many other factors also influence the life/death decision, such as the ability of the killer – like the Green River mass murderer, to solve unsolved murders in exchange for his life – a plea deal which retributivists should condemn as undermining the killer's just deserts. But the fact remains, we have somehow largely managed in the death penalty context to overcome centuries of embedded racism, and administer a system of ultimate punishment where defendants will be judged more nearly by the circumstances of their crimes and the contents of their character, rather than by the color of their skin.

Some abolitionists, however, continue to cling to primary racism, knowing it to be against the overwhelming weight of the evidence. Others, undeterred by the basic fact that black defendants are no more likely and perhaps less likely to be condemned and executed than white defendants similarly situated, feel impelled to persuade an unsuspecting public that the death penalty is racially discriminatory. Since the race of the condemned does not support discrimination, they have shifted the attack on the death penalty to the race of the victim.

B. The Race of the Victim. Secondary Racism

Studies do consistently show that during the modern era, since 1977, a defendant who murders a black victim is much less likely to be condemned and executed than one who murders a white victim. A black who murders a white, studies show, is most likely of all to get the death penalty. This proves, declares abolitionist organizations such as Amnesty International, that Society values black life less dearly than white life. I wouldn't be surprised if you hear this claim by a witness testifying before you today.

Thus, because of this 'race of victim' effect, the death penalty remains fundamentally racially discriminatory. So goes the more sophisticated but still not truly informed argument of racial bias these days.

An informed Committee *should* know that the killers of black victims *are* less likely to be condemned to death. But consider the meaning of this apparently troubling fact. First, the overwhelming majority of murders in the U.S. are same race killings - whites killing whites and blacks killing blacks. Three quarters of the remainder are blacks killing whites. In America today, whites very rarely murder blacks, another phenomenon ignored by abolitionists bent on proving the persistence of the racist legacy of the past.

Since the killers of blacks are almost always black, to make black victim murders approach white victim murders in the frequency with which they get the death penalty will be to *increase* the number and frequency with which blacks are condemned to death! Those who trumpet this race-of-victim discrimination rarely emphasize this very troubling side effect of restoring the balance.

C. The Race of Victim Effect: What it is; how it's spun

In 2000, Governors in two states, Illinois and Maryland, declared a moratorium on the death penalty, awaiting the results of studies they commissioned. The Illinois Commission found no innocents on death row but proposed reforms. Outgoing Governor Ryan, perhaps to divert attention from, if not stave off indictment for corruption, commuted all the death sentences in Illinois.

Maryland's outgoing Governor Glendening, however, left it for his successor to lift the moratorium and ponder the study he had commissioned: On January 7, 2003, the Maryland study was released, analyzing the nearly 6000 homicides that took place in that state between 1978 and 1999. And the headlines the next day 'informed' the public: "Race Bias Found on Md death row" declared the Philadelphia Inquirer running the story by Stephen Manning of the Associated Press, but changing the AP headline. Most newspapers ran all or part of the AP story, with their own headlines: "*Racial Inequalities* seen *in pursuit* of death penalty" the Chicago Tribune's declared; "Study points to bias in death penalty cases in Maryland" the Fort Worth Star-Telegram announced. "Maryland study finds racial bias in capital cases" the Albany Times Union simply proclaimed.

The Washington Post which ran its own front-page story, did not claim bias in its headline: "Large Racial Disparity Found Study of Md. Death Penalty". Nor did the Baltimore Sun, nor New York Times' "Death Penalty Found More Likely if Victim Is White". Even Richard Dieter, the executive director of the Death Penalty Information Center, itself an abolitionist clearinghouse of news, declared: "In the death penalty, white lives are counted as more valuable than black lives."

As is well known and widely used in different legal contexts, "disparate impact" is not necessarily disparate treatment". "Disparate impact" as Baldus described it "arises when a decision rule or selection criterion that is facially neutral . . is applied evenhandedly, but its application produces an adverse impact on a protected group." Disparate treatment is sometimes referred to as 'purposeful' or 'invidious' discrimination." The Fourteenth Amendment and 8th Amendment prohibit disparate treatment in capital sentencing on the basis of race.

The Maryland study had shown a racial disparity, but only as to victims. Had it shown an *adverse* effect, necessary to qualify it as "disparate impact"? More importantly, had it shown bias - as many headlines declared, thus violating the 14th and 8th Amendment? In short, because the criminal justice system is more likely to condemn and execute killers of whites than killers of blacks, does that necessarily *mean*, as abolitionist critics claimed, and newspapers proclaimed, that society values white life more, or devalues black life?

Reading the study itself, rather than the accounts of it, ought to help answer the question.

The Maryland study focused on "four critical decision points in the capital punishment process": a. the *initial decision* by the prosecutor to file a notification to seek the death penalty; b. the prosecutorial decision not to withdraw that notification, even after discussion with the defense c. *the decision to advance* a capital case *to a penalty phase;* and finally, d. the decision of the judge or jury *to sentence a defendant to death.*

Examining the 1311 homicides that were death-eligible in Maryland during the modern era, without adjusting for the particular culpability of the defendant, the study found that although black offenders comprised 74% of all death-eligible cases,

prosecutors filed an intent to seek death of black offenders in only 65% of the cases. Although whites comprised 24% of the death-eligible cases, prosecutors sought the death penalty against them in 35% of the cases. "It would appear, then, that relative to black offenders, states' attorneys are more likely to file a death notification against a white offender, given that the homicide is death eligible. Once the death notification is filed, the proportion of white and black offenders remains fairly constant at approximately 35% and 65% respectively."

These are gross statistics. They did not adjust for individual differences in culpability. Separating the worst of the worst from the less bad is a complex and ultimately imprecise process, but the study did its best. After adjusting for differences in individual cases, the authors concluded: "There is no evidence that the race of the defendant matters at any stage once case characteristics are controlled for." Again, "In sum *we have found no evidence that the race of the defendant matters in the processing of capital cases in the state."* (emph. in the original).

This is all well-established good news. There simply is no racial animus towards blacks when it comes to deciding whether they live or die.

Now, let's turn to the race of *the victim*, the apparent bad news:

Unadjusted for culpability, there seems to be a disparate impact. "White victim cases comprise 45% of the total number of death eligible cases, but 65% of the cases where the state's attorney files a notification to seek a death sentence, 74% of the cases where the death notice "sticks" or is not withdrawn, 77% of the penalty trial cases and 80% of the death sentences."

With non-white victims, not surprisingly, the reverse was true: "Non-white victims comprise 55% of all death eligible cases, but only 35% of those where there is a formal death notification, 26% of those where the death notification sticks, 23% of the penalty trials, and [only] 20% of all those sentenced to death."

Thus, unadjusted for cases specifics, "white victim cases are more likely to be moved along in the process than are cases with non-white victims."

This marked disparity was even more extreme where blacks kill whites. They comprise 23% of all death eligible cases, 35% of those where death notification is filed, 40% of those cases where a death notice sticks 43% of cases advanced to penalty trial, and one half of those sentenced to death. "The representation of blacks who kill whites, therefore, doubles from death eligible to death sentenced cases" whereas not surprisingly, black on black murder initially comprises 48% of all death eligible homicides, and only 18% of those actually resulting in a death sentence.

Another way of looking at this apparently stark disparity in the race of victims is that among all death-eligible cases, prosecutors file notice to seek death 43% of the time where there is a white victim, but only 19% of the time where there is a non white victim. Thus, "killers of whites are more than twice as likely to have a death notification filed against them than are killers of non-whites."

Even without adjusting for individual case characteristics, however, once the prosecutors did decide firmly to go for death, the race of victim effect statistically disappears. It does not matter whether the victim was black or white, upon conviction the prosecutors moved the case to the penalty phase, and juries found life or death without regard to the defendant's or victim's race.

Once the study adjusted for individual culpability, "the race of victim effect does not hold up, at the decision of the state's attorney to advance a case to a penalty trial, and at the decision of the judge or jury to impose a death sentence given that a penalty trial has occurred."

"In sum, we find a significant effect for the race of the victim in the way the prosecutor initially handles death eligible homicides. . . . The race of the victim does not appear to matter when the decision is to advance a case to the penalty phase or to sentence a defendant to death after a penalty phase hearing." (p. 29)

So, the race of victim effect appeared real, but was entirely located on the initial charging decision. It does not reappear anytime later in the process.

The well-informed citizen, then, must ask why? Why does the race of victim effect appear only in the prosecutor's decision initially to seek the death penalty, but not later in the process? Does it mean, as critics claim, that prosecutors devalue black life?

What else might it mean? What else could explain the race of victim effect?

D. The Race of Victim Effect: What it means, or might mean.

The informed citizen would be aware of competing explanations: Where blacks are murder victims, factors other than race bias might operate to spare the killers. As a corollary, perhaps, uncaptured by the officially declared aggravators, death-eligible murders of whites – principally committed by whites – morally on the whole are more death-deserving. Finally, for reasons wholly independent of race of defendant/race of victim, prosecutors in predominantly white counties where whites are of course more frequently murdered, might seek the death penalty more frequently than prosecutors from predominantly black or minority counties.

Let's take the last argument first, for this has gotten most of the attention recently among the relatively well-informed, who desire to understand the real meaning of the race of victim effect.

Simply stated it's this: Most of the "race of victim" effect has little or nothing to do with the race of the victim. It has to do with race-neutral policies of each prosecutor's office on whether and when to seek death, and the demographics of the county in which the prosecutor operates.

In Maryland, for example, when it comes to the death penalty, Baltimore City – largely a minority jurisdiction with very stretched budgets is very different from mostly white middle class suburban Baltimore County. During the modern era in Maryland, Baltimore City accounted for 44% of all death eligible homicides, but only 10% of death penalty trials. Baltimore County, on the other hand, accounted for only 12% of the death eligible homicides, but 42% of the death penalty trials. Looked at another way, the Baltimore County Prosecutor sought death in 66% of the death eligible cases while the Baltimore City Prosecutor sought death in only 6% of the death eligible cases.

After adjusting for the particular case characteristics, the contrast remains stark. As the Study declares: "The probability that a notification to seek death will be filed in Baltimore County is over 13 times higher than in Baltimore City, *even after taking into account important case characteristics.*" (emph. in original)

What moves a prosecutor to go for the death penalty? Partly it is budget. Partly priorities or personal morality, partly the views of the locale the prosecutor serves. Support for the death penalty is much higher in white suburban counties than black urban

counties. And not surprisingly the victims are disproportionately white in those white suburban counties where prosecutors frequently seek death, while the victims, of course, are disproportionally black in those urban minority counties where prosecutors rarely seek death. Thus, most of the race of victim effect collapses into geography, and prosecutorial policy.

Now, of course, prosecutorial policy itself could be consciously or unconsiously racist. But again the news is good! In all 18 studies, only in one phase of one jurisdiction's death penalty process was there a statistically significant disadvantage to black defendants – Philadelphia, whose DA, Lynne Abraham, has been notably enthusiastic about the death penalty, and a subject of attack by the Abolitionist media. There, the Baldus study itself, however, gave the Prosecutor's Office a clean bill of health, concluding "the analysis of prosecutorial decision-making in Philadelphia showed no race effects at all (for either the race of the defendant or victim.)" The only place it showed up was when the jury weighed the aggravators against the mitigators. Here, the prosecutors eliminated that disparity when they less than averagely excluded blacks from the jury.

But back to Maryland. The race of victim effect was entirely confined to the decision to charge, and entirely absent from the decision to take the trial to a penalty phase, or the decision to impose the death penalty itself.

The race effect in the initial charging stages mostly disappeared when controlled for case characteristics and geography. Mostly but not entirely. The residue of 'race discrimination' in Maryland is the reduced but still statistically significant fact that a person who kills a white is more likely to be charged capitally than one who kills a black, although again, not more likely to be put on trial for his life, once convicted of murder, nor more likely to be sentenced to death once put on trial for his life.

Can we explain this last small residue of the race of victim effect in the initial charging stages other than by racial animus? For if we can, then race discrimination in the death penalty is a statistical myth; and race bias may be a story concocted by abolitionists, desperate to play on real historical race guilt and chip away at public support any way they can.

Again, most murders are same race killings; thus black victim cases overwhelmingly involve black defendants. Black on black murder tends to be street killing, often drug related, gang related and/or involving robbery. Having spent 2000 hours during thirteen years interviewing black street criminals, mostly killers, I became aware of how often black on black murder grows out of ordinary inner city street crime, and a code that prevails among street criminals. Many factors including the heinousness of the crime, the community's outrage, the strength of the evidence, and the wishes of the victim's family influence prosecutors in deciding whether to seek the death penalty - or not.

My years of interviewing black street criminals and their families, as well as prosecutors, convinces me that often the families of the black victims, while grieving the loss of their children or siblings, have a nuanced appreciation of the ethos of the streets that produced their loved ones' death. They know their child was "running with the wrong crowd"; they recognize that the "streets claimed him." They realize that "there but for fortune," their child or brother could just as easily be the defendant as the victim. They understand that not all murderers are vicious, evil, and beyond reclamation. Thus

they are sad more than angry. Or their anger is directed more at the environment which supplied the guns and drugs, and the street ethos of kill or be killed. All participants in the confrontation that produced the death of their child, including the defendant, are tragic victims to them.

When the prosecutor consults them, more frequently than with the families of white victims, these black victims' families do not seek death for their children's killers. Thus, influenced by the wishes of the (black) victim's families - and studies show support for the death penalty generally among blacks, while substantial, is substantially less than among whites - prosecutors will more often decline in black victim homicides to seek the death penalty under the so-called "same set of circumstances." But although "adjusted", the statistics are never adjusted for the wishes of the victims' families.

When this happens - when knowing, forgiving black families decline the death penalty for their childen's killers, it is not because they value black life *less*. Ironically, and to the contrary, it is precisely because they *continue to value black life*, even that of the black killer, *more* than does the bulk of society.

This perhaps, accounts for the statistically significant residual "race of victim effect". Under the Marshall hypothesis an informed citizenry would know this.

Nor is Maryland unique. New Jersey had commissioned its own study by Judge Baime (2002) which roughly parallels Maryland's findings. First, as to race of defendant, "we found no statistically reliable evidence supporting the thesis that race or ethnicity of the defendant affects whether or not his or her case advances to the penalty phase, or whether the death sentence is returned. Again, as in Maryland, "the statistical evidence indicated the race or ethnicity of the victim had no impact on whether the Defendant was sentenced to death."

"However," the study continued, "there was unsettling statistical evidence indicating that cases involving killers of white victims were more likely to progress to a penalty trial than cases involving killers of African-American victims." But once geography is factored in, the report concludes that there is "no statistically reliable evidence that the race of victim affects whether or not the death penalty is imposed." Again, "the race of the victim effect *essentially disappears* when county variability is introduced." (emph. added) And again, "we are extremely confident that County variability explains why White victim cases seemingly progress to a penalty trial at a higher rate than African American cases."

And what of a race of victim effect *within* a county? "We find no statistically reliable evidence indicating that white or African-American defendants who kill white victims are discriminated against overall within the state, or within the counties studied."

Notwithstanding its racial bill of health, of course New Jersey abolished the death penalty.

E. Pernicious Racism

Having said this, two aspects of race and the death penalty greatly trouble me. The good news -- that race is less a factor than we think in the *administration* of the death penalty should not obscure the bad: That race plays a part, consciously or not in the *definition* of capital murder. Race and ethnicity correlate closely with class. Minorities disproportionately commit robbery. Robbery murder puts more people on death row than any other aggravator and perhaps as many as all others combined. Eliminate the felony

murder qualifier and aggravator, and 12% of the population will no longer account for nearly 50% of the condemned on death row.

The second factor is more pernicious, and pervasive. In their research report "Looking Deathworthy" four psychologists found that "the likelihood of being sentenced to death is influenced by the degree to which a Black defendant is perceived to have a stereotypically Black appearance." Evidence accumulates that Blacks with deeper skin tones, and broader noses will typically get longer sentences and are more likely be sentenced to death, especially for killing whites. "the more Evidence mounts that judges no less than juries unconsciously associate criminality with stereotypical blackness. And I believe, based on my own research and discussion with inmates inside Lorton -- the nation's only all-black prison system, that blacks as well as whites are infected with this skin tone bias.

This mounting evidence is deeply troubling, as it suggests, I suspect accurately, that we do indeed tend to judge a man by the color of his skin rather than the content of his character. I would educate prosecutors on this unconscious and unconscionable bias, and would apply a stricter scrutiny on appeal to the condemned who are perceived as stereotypically black.

even by one previously convicted of robbery. The robbery felony murderer who sticks up a convenience store where the clerk grabs a gun from under the counter and the robber kills him, is not the same type of criminal as Steven Hayes. It was not the robbery or the burglary that sufficiently aggravates their murders. It was the torture, the atrocity, the rape, the gasoline.

Charles Ng who maintained a torture chamber in his basement, kidnaped women with their children, videotaped their torture over weeks, exposing them to unspeakable misery, raped and then murdered and mutilated them does not inhabit the same moral universe as the previously convicted robber who murders while fleeing his latest robbery.

Charles Ng unquestionably deserves to die. The burglary or robbery-felony-murderer, however, without other aggravating circumstances, though commonly death-eligible, arguably does not deserve to die. Nor does burglary, a crime by definition against premises and not person, in and of itself aggravate a murder. In any case, legislatures that insist on retaining a burglary aggravator for their ultimate sanction should confine it to home invasions.

In short, although Connecticut requires proof that the intentional felony murderer has previously been convicted of the same felony, the aggravator should be abolished.

b. Retain and further refine Especially Heinous, Atrocious, and Cruel

The Connecticut Courts have well defined this essential evil. "Especially cruel" must include intentional infliction of extreme pain or torture above and beyond that necessarily accompanying the underlying killing." Hayes need not have given it any thought as they doused their victims in gasoline and lit the match. As the Court rightly held, this aggravator requires proof that "the defendant engaged in intentional conduct that inflicted extreme physical or psychological pain, suffering or torture on the victim above and beyond that necessarily accompanying the underlying killing, and that the defendant specifically intended to inflict such extreme pain, suffering or torture *or was callous or indifferent to the extreme physical or psychological pain, suffering or torture that his intentional conduct in fact inflicted on the victim.*" (emph added)

The Legislature should not have to rely on judicial construction. It should include this word for word in the statute itself.

c. Substitute "killing an innocent witness" for "avoid arrest or prevent detection"

Naturally, we love our own freedom. Intentionally killing another person to avoid arrest or prevent detection should be punished as murder. The love of liberty alone, however, does not *aggravate* murder.

Many jurisdictions but not Connecticut also make death-eligible a close cousin: "killing a witness." But that too, is too broad. A robber or burglar killing an innocent witness to escape detection does aggravate murder. No better example than Hayes immolating his victims to eliminate live testimony or DNA. At first blush it may seem morally supportable to punish most severely robbers or burglars who intentionally kill their victims to eliminate them as witnesses. The special sanction operates either to deter or condemn calculating killers, such as two of Connecticut's current death row inmates: Hayes and Russell Peeler who ordered the killing of a mother and her 8-year old son who happened to witness Peeler's earlier fatal shooting .