

Running Head: BLEAK HOUSE: AGGRAVATING FACTORS IN CAPITAL PUNISHMENT

Bleak House: Aggravating Factors in Capital Punishment Sentencing  
and Legislative Sub-plots in the Attempt at Abolition

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## Abstract

Attempts at abolition of capital punishment have recently recognized the value of having law enforcement support but it has often been compromised by legislative sub-plot and agenda when it comes to key votes to abolish a state's death penalty statute. Efforts in law enforcement outreach in this area needs to recognize what we refer to as "the Dickensian dilemma" confronted by most officers and the political cache of aggravating factors in the sentencing process for those who support the death penalty. This paper exposes these legislative sub-plots which directly affect capital sentencing, using the experiences of abolition efforts in both Illinois and Connecticut to highlight these sub-plots. We then closely examine death sentences in the State of Connecticut and finish by highlighting line-of-duty police officer murders in Connecticut and the results of those case dispositions. We find an uneven and disparate application of death sentences in the State of Connecticut.

**Key Words:** sentencing, sentencing disparity, criminal justice policy, punishment, policy implications

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There is a metaphor at work when it comes to capital punishment and there is a reason it is meant to be so – no one wants the reality, its truths and utter consequences. This metaphor may be in the form of the retributive model, “an eye for an eye”, or the deterrent as in the expression that capital punishment should be reserved for the “worst of the worse” in order to protect society. Metaphors in this regard are easier and less confrontational for conveying meaning, no matter how illusory that meaning may be. The problem with this use of metaphor is that rather than convey clearer meaning or understanding through illustrative example it is used to obfuscate and deceive. Nowhere is this deception more obvious than in the hyperbole that the death penalty is necessary for law enforcement – that is as typically stated, for the protection of law enforcement and to assist law enforcement in resolving murder cases. This is the politically expedient argument, the raw, emotional heart-tug, usually prompted after the line-of-duty murder of a police officer. The scene has become familiar, the politician vowing to re-instate the death penalty in states without capital punishment or to quicken the process for sending those responsible to death row in states that have capital punishment in name only. It has become the equivalent of the campaign-trail “kissing a baby” photo op.

We have come upon our own metaphor for what is wrong with the capital punishment debate in the United States and once again we find it in the writings of Charles Dickens. It is a metaphor more analogous to the present reality of the death penalty debate in America. Additionally, it is blended with the personal internal debate over capital punishment and societal

resolution of how far the state can go in seeking and implementing the sanction for crime that plagued Dickens himself. In *Bleak House* Dickens gives us a tale of the tortured path of the fictional estate litigation in *Jarndyce v. Jarndyce* and the case's interminable progress in the Chancery Court. The Chancery becomes for Dickens symbolic of all that is wrong with the law, using fogs varying imagery for a metaphorical stance criticism of the law:

*“Well may the court be dim, with wasting candles here and there; well may the fog hang heavy in it, as if it would never get out; well may the stained-glass windows lose their colour and admit no light of day into the place; well may the uninitiated from the streets, who peep in through the glass panes in the door, be deterred from entrance by its owlish aspect and by the drawl, languidly echoing to the roof from the padded dais where the Lord High Chancellor looks into the lantern that has no light in it and where the attendant wigs area all stuck in a fog-bank!”* (Dickens, *Bleak House*, 2003)

This imagery is not epochal; its criticisms have not dimmed with time. When it comes to the debate on capital punishment, specifically the performance of state legislative bodies and the role that they play in influencing sentencing, we find a similar fog and density. Nowhere is this more clouded than in the statutory language of aggravating factors as the predicate for a capital case. Further, abolitionist efforts to reach out to law enforcement have withered in this fog, victim of political hyperbole and Orwellian “double-speak.” Even though law enforcement over the past two decades has become more responsive to socio-legal criticisms there has been a deaf ear turned to those same criticisms when it comes to capital punishment in America. Law enforcement has been a sacrificial lamb at the altar of political rhetoric in the capital punishment debate. In a prior paper (Dwyer and Kain, 2012), we argued for the necessity in reaching out to law enforcement officers at the line and supervisory level, but more specifically at the line level, in an attempt to shift the death penalty debate away from the disingenuous support model based on the needs of law enforcement. We used a comparison of two strikingly similar cases, one from New York the other from Connecticut, along with statistical reference to police officer line

of duty homicides to highlight the problems encountered with the reliance on the legal justification for the death penalty based on aggravating factors. In that paper, *A Tale of Two Towns: Why Relying on Aggravating Circumstances to Support Capital Punishment in Law Enforcement Has Become So Aggravating*, we began with a loosely based Dickensian theme as a backdrop to our argument but since then we have made a more in-depth exploration into this thematic expression for what our own experience in the abolition movement has presented to us. Dickens himself is central to this discussion since his observations of the relevant mood of 19<sup>th</sup> century England and his own views on the matter depict not only the timelessness of the debate but more fundamentally the error of the process. This paper is divided into three parts: the first part explores the Dickensian dilemma as we see it from the 19<sup>th</sup> century perspective and as it is carried over into the present day discussion; the second part discusses our own experiences in the state legislative process and the successes and failures in obtaining political support for abolition. Finally, in part three we address the statutory use of aggravating factors to justify capital cases and point to the obvious shortcomings in this purported objective legal standard in the sentencing process. We do this with a view to informing and gathering law enforcement support for abolition and shifting political debate away from arguments which complicate relevant sentencing decisions.

### **1. The Dickensian Dilemma: Conflict and Resolve in the Death Penalty Debate**

The discussion of the death penalty and aggravating factors begins with our own metaphorical inference from the works of Charles Dickens, particularly here with *Bleak House*, and the broader views of Dickens on the death penalty as practiced in 19<sup>th</sup> century England. His views are instructive not only in the context of the metaphor we have sought to employ but also more pointedly in the recurring theme when it comes to aggravating factors and the imposition of

the death penalty. As a social critic Dickens' observations were not only astute but largely experiential. Like any good writer his material came from his own life. But success and wealth did not temper his observations. Later social commentary, as in *Bleak House*, became more critical. By the time he had published *Bleak House* in 1853 he had already made a celebrated journey to America in 1842 and published a series of letters on capital punishment in 1846 in the London *Daily News* and later in 1849 in the London *Times*. The 1842 journey to the United States resulted that year in the publication of his *American Notes* a compendium of observations and impressions gathered on that trip. Throughout the text there are vignettes of trips Dickens made to local jails or prisons beginning with his visit to a prison in Hartford and culminating with a chapter devoted to Philadelphia and its Eastern State Penitentiary at the end of Volume I. Volume II contains a short description of a local penitentiary visit and two cases that caught his attention in Baltimore and concludes with a chapter on slavery. There is an innate interest with the human condition that Dickens exhibits in these writings especially when liberty is constrained by government conduct. While Dickens exhibits no obvious objection to the ability to punish wrongdoers his inquiry focuses more on the means and methods. In a subtle reference to the incongruity of capital sentencing Dickens recounts a visit to the infamous Tombs in lower Manhattan. During his visit he encounters a cell in which the inmate's clothes are scattered on the floor and inquires of his escorting guard why they are not placed on a hook. The guard informs the visiting Dickens that there used to be hooks in the cells for the clothes but that some inmates would commit suicide by hanging themselves from the hooks so the administration had them removed. Dickens notes that only the holes where the hooks had once been are left in the cell wall. The following paragraph exhibits the ultimate irony in this scene:

*“The prison-yard in which he pauses now, has been the scene of terrible performance. Into this narrow, grave-like place, men are brought out to die. The wretched creature stands beneath he gibbet on the ground; the rope about his neck; and when the sign is given, a weight at its other end comes running down, and swings him up into the air – a corpse.*

*The law requires that there be present at this dismal spectacle, the judge, the jury, and citizens to the amount of twenty-five. From the community it is hidden.”* (Dickens, 1842)

The last line referring to the hidden nature of capital punishment in the United States stood at the time in contrast to England where executions were public displays up until 1866. Troubling as this may have been to Dickens then the public nature of execution in England would later come to present its own troublesome aspect as indicated in his 1846 *Daily News* letters. However, it is Volume II Chapter the Ninth, Slavery, which foreshadows much of Dickens later arguments against the death penalty and provides a prescient glimpse of subsequent United States court challenges to capital punishment as developed in cases like *Furman v. Georgia* and *McClesky v. Kemp*. Dickens in this chapter denounces the atrocities of the slave trade in America but more pointedly attacks the attitude of the citizenry which allows the practice to continue. Dickens writes, “*Public opinion has made the law*”, thus allowing an abhorrent practice to continue. The incongruity between public opinion and what should be proper legislative function becomes a problem when it is focused on the death penalty debate. Public fiat pandered to for votes and tough on crime agendas fails to comprehend the enormity of failure that modern day capital sentencing has become. Yet the dilemma remains -- how does one propose to be tough on crime when they do not support the state’s mechanism of death for the most depraved of murderers? This is the heart of the problem we first addressed in *A Tale of Two Towns* when discussing law enforcement attitudes toward capital punishment and abolitionist outreach to that important political segment in the debate (Dwyer and Kain, 2012). We have labeled it a Dickensian Dilemma for the reason that Dickens himself saw the need to

address that issue in his first letter to the *Daily News* on February 23, 1846: “*I wish to be distinctly understood, in the outset, as writing in no spirit of sympathy with the criminal.*”

(Dickens, Letter to the *Daily News*, 1846) This prefacing remark indicates that the dialogue on capital punishment is not one about relative positions on crime control but on more profound questions relating to punishment and state sanctioned sentencing behavior. Dickens follows his comment with his initial two inquiries into the subject: first, whether the true object of all punishment is not to reform the offender and second, whether such an extreme sanction can be pronounced by fallible and erring officials. These questions and concerns continue to this day.

For Dickens the answers were simple. Capital punishment was not a palpable reformation:

*“But I do distinctly challenge and dispute this kind of reformation. Besides that the reformation brought about by legal punishment, should be, to be satisfactory, a living, lasting, growing one: working on, in degradation and humility, from day to day; and striving, in its chains, and labour, and long-distant Hope, to make some atonement always;-- besides this, I doubt the possibility of a great change being wrought in any man’s heart and nature, in the flush and fever of that flying interval between the Warrant and the Noose.”* (Dickens, Letter to the *Daily News* February 23, 1846)

But, in reinforcing his earlier line of inquiry, he subsequently asks again, “*whether an irrevocable punishment be, on principle, justifiable; ordained as it necessarily is, by men of fallible judgment, whose powers of arriving at the truth are limited and in whom there is the capacity of mistake and false deduction.*” (Dickens, Letter to the *Daily News* February 23, 1846)

This is the launching point for Dickens’ attack on capital punishment, more poignant perhaps due to his prior support for the death penalty. A change in position which undoubtedly led to the opening remark regarding his general position on crime and criminals. The dilemma is further complicated with Dickens later conservative shift after 1850 and his refutation of his earlier abolitionist position. He would continue to only speak out against the public nature of executions, attacking them as he had in the earlier *Daily News* letters as being degrading to the impression left of the law itself. In his February 28, 1846 letter to the *Daily News* Dickens wrote



of a public execution he witnessed, the hanging at Newgate Prison of Francois Benjamin Courvoisier, a valet who murdered Lord William Russell, a Member of Parliament for whom Courvoisier was employed as a valet: “*It was so loathsome, pitiful, and vile a sight, that the law appeared to be as bad as he, or worse; being very much the stronger, and shedding around it far more dismal contagion.*” (Dickens, Letter to the *Daily News* February 28, 1846)

By the time of the publication of *Bleak House* Dickens had returned to his support of the death penalty but in his writing still derided the complexities and shifting “fog” created by the legal system’s capital sentencing structure. The difficulty Dickens himself had with the subject of capital punishment reflects the conflict with internal beliefs and social views on the subject. This is a dilemma faced by two disparate but wedded groups in our discussion – law enforcement and crime control legislators responsible for promulgating support for the ultimate sanction. The problem is an enduring one, carried over from the 19<sup>th</sup> century concerns of an English novelist to the present day debate. Just as Dickens wrote in 1846 about the lack of deterrent effect public executions had on crime control (referencing the pickpockets who would troll the gathering at public hangings), the undeserved curiosity and celebrity that transfers to condemned murderers, the debasement of life that attends to a system of capital punishment (he cites in the March 9, 1846 letter the fact that murders in London and Middlesex went down in years when public executions were reduced), and the moral issues of the penalty (neither slavery or execution he commented could be considered a Christian law) so too do these criticisms resonate today. These recriminations should have more value today based on the “evolving standards of decency” rationale first articulated by the U.S. Supreme Court in *Atkins v. Virginia*. Still, the weight of public opinion in support of the death penalty remains, caught in the “fog” of aggravating factors and the fiction that the legal system can truly separate the “worst from the worse” of society. We

are left with a broken machinery which Justice Blackmun in his 1994 *Callins v. Collins* dissent indicated was beyond repair. Our own metaphor which we have borrowed from *Bleak House* has been used in the past to symbolize this broken machine. In a 2008 article on indigent defense Gould writes: “*With caseloads more than double the level recommended by the American Bar Association and salaries significantly lower than those available in private practice, public defenders...inhabit a professional world that at times resembles a scene out of Charles Dickens’ Bleak House.*” (Gould, 2008) Clearly within the realm of death penalty appellate litigation in the United States equal access to justice and effective assistance of counsel claims have been laid at the feet of the availability and quality of indigent defense. Yet, the vitality of our metaphor more clearly finds its home in the frustrations of Justice Rehnquist’s 1981 dissent in *Coleman v. Balkcom* wherein he writes: “...*this Court and the lower federal courts have converted the constitutional limits upon imposition of the death penalty by the States and the Federal Government into arcane niceties which parallel the equity court practices described in Charles Dickens’ Bleak House.*” Rehnquist’s dissent is in response to the Court’s denial of certiorari for a capital defendant. He dissented not from a conversion of belief but from the fact that the Court’s denial of certiorari will not end the defendant’s appeals and attempts to avoid his capital sentence. Rehnquist seeks finality in his dissent and favors review so as to end any alternate claim the petitioner may make before a lower federal court on habeas appeal. The system has, in Rehnquist’s view, provided too many obstacles to a punitive remedy the Court has previously held constitutional, thereby clouding the administration of justice. Herein lies the problem, can we realistically expedite the constitutionally approved remedy without diminishing the very rights and protections that we acknowledge are the foundation of its constitutionality? Conversely, how can we rationalize the fiction of constitutionality and its corresponding fiction

of aggravating factors when we have a workable option in life imprisonment? These are further proof of the Dickensian Dilemma. It is a dilemma carried forward into the state house as legislatures independently struggle with the question of whether or not to continue to fund capital punishment in their state. It is struggle seeking light through the fog.

## **2. Lifting the Fog: Lessons from Legislative Interaction**

It serves no purpose to simply pose the questions to a problem without suggesting an answer or a solution. Our own suggestions at solution take us from Illinois to Connecticut in proposing abolition. In doing so there are two core constituencies of death penalty proponents that must be confronted -- victim families and law enforcement. The first has been equally matched in legislative chambers with victim families in opposition to the death penalty, perhaps even overmatched, with clear and convincing evidence that victims do not receive the "closure" they seek through execution and their travails through the capital conviction process (Murder Victims Families for Human Rights, 2012; Vollum, 2010). But the second, law enforcement, has not been equally represented in abolition circles. As we indicated in our previous paper the ingrained culture of law enforcement has much to do with their silence and absence on this issue despite what may be personal attitudes opposing the death penalty (Dwyer and Kain, 2012). The political weight which law enforcement carries in the legislative discussions on the death penalty cannot be underestimated. Recent studies have revealed that the views of police executives and criminologists alike have called into question the validity of claims that the death penalty is a deterrent to crime (Dieter, 2009; Dieter, 1995; Radelet and Akers, 1996). Most recently a prominent law enforcement official, former FBI Director William Sessions, spoke out in opposition to a specific case in Georgia where evidence of innocence claims in a capital case involving the death of a police officer were summarily dismissed by

every possible court or administratively powered agency rather than calling for an investigation (Sessions, 2011). Other law enforcement officers have begun to write publically in opposition to capital punishment as well (May, 2008; Urbina, 2008).

We first discuss the Illinois experience relative to the process leading to abolition of capital punishment in 2011. We then examine the State of Connecticut, which just abolished capital punishment in April 2012 after three consecutive years of failed attempts toward death penalty abolition. An examination of both states reveals to us the operation of the Dickensian dilemma surrounding the capital punishment debate in legislative circles – that is, how does one propose to be tough on crime but not in support of the death penalty?

### **2.1 The Illinois Experience**

In Illinois the decade long focus on wrongful conviction and errors in the application of capital punishment statutes opened the door for many law enforcement officials to criticize capital punishment. The experience in Illinois and the legislative lobbying prior to Governor Ryan's issuance of a moratorium and ultimately a pardon of all capital felons in 2005 is illustrative of the efforts which ultimately led to repeal of the Illinois capital statute in 2011. The critical statements from the law enforcement community regarding debates on abolition are worthy of note.

Much of the criticism of capital punishment from the law enforcement community centered on the wasting of scarce crime prevention resources and the time spent chasing a handful of executions when countless other crimes remained unsolved while the criminals who committed them remained free. Many law enforcement officials found it a distraction from their goal of public safety and were able to make their voices and opinions heard due to the creation and existence of a state-wide task force, The Illinois Commission on Capital Punishment, which

was designed to examine capital sentencing. Among those who voiced their concern was Ken Jones, a retired commander of the Cook County, Illinois Sheriff's Department, who stated:

“What does the death penalty do for us? Without any deterrent value, it certainly is not an effective law enforcement tool. Effective law enforcement and crime prevention requires precious resources that are being wasted on this ineffective and broken program. In times of fiscal crisis the programs that fail to achieve their own goals should be the first to go.” (Illinois Coalition Against the Death Penalty, 2010)

Even former Illinois prosecutors David Joslyn and Jim Lavine made their position on capital punishment known:

“The death penalty makes no sense as a law enforcement tool. Any law enforcement officer will tell you that it has no deterrent effect. Coupled with how much time, energy and money we pour into the death penalty system, it is nothing but a burden on prosecutors, the courts and the taxpayers. If we get rid of the death penalty, prosecutor's offices and the courts would be more effective and the public will be safer as a result.” (Joslyn, ICADP)

“I was a special prosecutor in Cook County. I know the pressures and demands that law enforcement officials have, and I am certain that the death penalty is not needed to keep our cities safe. On the contrary, the millions of dollars and thousands of hours or prosecutorial time that we spend on a handful of capital cases would be much better invested in effective programs to prevent crime and prosecute offenders. The death penalty is a costly distraction from real programs that could help our communities.” (Lavine, ICADP)

Still, the fog referenced by Dickens remained as dense during the abolition debate as it might have first appeared in Illinois ten years earlier. Despite overwhelming evidence of major errors in the capital process which resulted in numerous erroneous convictions, Illinois legislators remained staunchly in support of capital punishment, even criticizing Governor Ryan's decision to rescind death sentences in the face of this overwhelming evidence. The Illinois Coalition Against the Death Penalty (ICADP) developed and maintained a focused campaign to repeal capital punishment, which along the way developed a strategy designed to overcome legislative resistance. Rather than fight against and contradict the claims nestled within the ingrained

culture of law enforcement support for capital punishment, the ICADP enlisted the assistance of and support of the law enforcement community to strengthen their efforts. Although current prosecutors remained steadfast in their opposition to anti-death penalty legislation, police agencies in Illinois began to listen carefully to the constructed arguments proffered by the ICADP. These arguments actually developed and strengthened law enforcement initiatives to reduce crime, the kinds of initiatives which many law enforcement officials acknowledged were far better tools in the fight against crime than what can be promised through capital punishment (Dieter, 2009; Dieter, 1995). The ICADP focused their anti-death penalty campaign in large part on strengthening law enforcement efforts through diverting funds from a \$114 million capital trial fund to enhanced law enforcement training and crime laboratory improvements. At the same time the ICADP called for a similar diversion of capital trial funds to enhanced services for victims of violent crimes, specifically to those who are surviving family members of murder. This two-pronged strategy formed the backbone of the ICADP campaign but the battles which would ensue would once again release the illusory fog which permeated the state house in Springfield.

Legislators encountered some of the very men falsely condemned to die in their state. Many were left speechless as former death row inmates such as Randy Seidel, one of Illinois' falsely convicted and condemned but now exonerated, stood before them and challenged their support of capital punishment, a process which would have killed him if not nullified by a gubernatorial order. Numerous surviving family members of murder, who lost loved ones and friends, testified to the pain and suffering they endured by being paraded through a faulty, slow and painfully grueling death penalty process. Co-author Kain, was summoned by the ICADP to assist in their efforts to communicate with the law enforcement community and pro-death

penalty legislators to gain support for their initiative. Interestingly, support was garnered more easily from the law enforcement community than from legislators. After a meeting between the ICADP law enforcement outreach committee, of which (author name omitted) was a member, and the Illinois Association of Law Enforcement Executives (IALEE), the IALEE executive membership voted to support the effort toward abolition and forwarded their support to the Illinois legislature. Meanwhile meetings with Illinois legislators appeared less productive in the few months prior to abolition. Many legislators were afraid their support of the anti-death penalty bill would be seen as a soft approach to crime and a slap in the face to prosecutors and police. When Kain met with one retention-minded legislator to discuss abolition he was met with the response that the legislator was pro-law enforcement. Kain, a former probation officer and current police commissioner, responded that he too was “pro-law enforcement” and provided reasons why a vote for abolition would actually help the law enforcement community. As the discussion continued the legislator voiced his concern that present abolition efforts if successful would eventually lead to abolishing life without parole. This is a surprisingly familiar response given along with the line of the “slippery slope” theory and closely aligned with the idea that prosecutors, without capital punishment in the picture, might not be able to secure convictions if life without parole is the most severe sentence available. The reality is, that even without capital punishment available, good prosecutors will be able to secure convictions in good cases. This reality was noted by a Cook County, Illinois prosecutor:

“If the voters of the state of Illinois don’t want it (the death penalty), we’re still going to do our job, and we’re still going to do our job well.” (ICADP, 2010)

Former New York Police Commissioner Patrick Murphy might have best characterized this kind of thinking which clouds objectivity, when he stated: “Like the emperor’s new clothes, the

flimsy notion that the death penalty is an effective law enforcement tool is being exposed as mere political puffery” (Murphy, 1995). Nearing the end of the debate, it appeared that the legislators in Illinois who were proponents of capital punishment prevailed. On the final evening of the regular 2010 session of the House of Representatives it became clear that the roll call would be one vote shy of passage of the anti-death bill, which would have ended the chance for passing it on to the Senate which had already committed to a repeal vote. Rather than risk calling for a vote and falling shy the House bill proponents suggested that a vote not be taken at all. This strategy allowed for the repeal bill to be introduced again and voted on when the lame duck session of the legislature convened in January, 2011. A defeat in November, 2010 would have been a tremendous set-back for the abolition movement. Death penalty abolitionists initially went home empty. In the weeks that followed, however, it appeared that support for the abolition bill had not lost any steam. Momentum appeared as sustained as had been in November. Abolitionists were poised to introduce the bill once again, as swing vote-legislators began to firm their position in line with passage. As the final days of the session approached a vote was ready to be taken. Not surprisingly a last second recantation by a wavering swing vote legislator seemed to dash the bill for good. That was until the legislator’s wife, who was promised by her spouse that he would vote in favor of abolition, suddenly learned that he again changed his mind in favor of retention. The ever watchful abolitionist crowd, mindful of the promise made, saw to it that an important message was delivered to the wavering legislator, that he would not be welcomed home again if he did in fact follow through with a vote for retention. The vote carried in favor of abolition and was ultimately signed into law by Governor Quinn. The State of Illinois, suffering for years due to judicial indiscretion and constitutional furor, became the 16<sup>th</sup> state to abolish capital punishment. The ordeal was over, and the battle for



abolition had succeeded. Dickens might have commented that the fog had been blown away, but the political truth is that the prospect of a failed marriage might have saved the prospect of a failed bill. During January, 2012 the Coliseum in Rome was illuminated for the third consecutive year to signify the abolition by one of the states. Connecticut, as it has now unfolded, is scheduled to visit Rome in November, 2012

## **2.2 The Connecticut Experience**

On April 25, 2012, Governor Dannel Malloy signed Senate Bill 280, which enacted legislation to prospectively repeal capital punishment in the State of CT, and replaced it with life without the possibility without parole for those henceforth convicted of the state's newest, and now most serious felony, Murder with Special Circumstances. The signing was done in the presence of few witnesses and with little fanfare, although the event marked the culmination of a total of 20 hours of debate in the House and Senate in the preceding 3 weeks. An amendment to the original bill filed in the state senate added provisions for near-death row institutional conditions for all future convicts of the newly created substitution for capital felony. Never to be lost in the debate, hours of proposed amendments to attempt to retain capital punishment for those "extreme" cases involving aggravating factors, failed one-by-one in both the Senate and then in the House of Representatives. From the attempt to retain capital punishment for the murder of a child, or the murder of more than one person at the same time, to a newly crafted and proposed aggravating factor for murder as a result of terrorism (never clearly defined in the proposition), the illusory fog surrounding the debate was summoned and circulated for hours on end. The fog, alluded to by the opening prayer offered as the state senate commenced its debate, warned the legislators to be mindful of the "clouds of self-deception" which might attempt to permeate their debates. Politicians to the end, House and senate members took parting shots at

one another as the debate came to a close in both chambers. Claims of disingenuous on the part of retentionists were hurled at abolitionists who proposed the prospective abolition bill, who alleged that if abolitionists were truly against capital punishment, they would propose total abolition, including sparing the lives of the eleven men currently on death row in Connecticut. Counter claims included allegations that lies had been manufactured to distort the reality of true prison conditions for those currently on death row, and about how the new class of murderers (post-abolition) would be treated in the future. The truth is that the close vote of 20-16 in the Senate and the lopsided vote of 86-62 in the House favoring abolition had been predetermined before the debates began. Even more anticlimactic is the fact that the Governor's signature on the bill was not even necessary, as Connecticut law does not allow for a pocket veto, and the Governor had noted on many prior occasions that he would sign any bill calling for repeal.

It is now hard to believe that only three years ago, prospects for abolition in Connecticut had been ongoing as long as in any state that has either abolished capital punishment or is currently attempting to do so. Most state efforts toward legislative abolition have taken between 8-10 years before a significant vote is actually taken. The two years prior in Connecticut have had a vote in 2010 for abolition in both chambers of the legislature only to be vetoed by the Governor and a vote in 2011 with abolition derailed by a last minute change by two state senators which ended the prospect of the bill passing in the Senate. Familiar legislative territory when it comes to repeal legislation. We note here that politicians as well as law enforcement must take into account that policy decisions about the death penalty do not take place in a vacuum. In any state, given the current fiscal crises that are faced, the substantial costs of the death penalty must be factored into decisions as to whether or not it is a public expenditure worth maintaining. The presence of a death penalty statute in Connecticut costs four million dollars

annually (Connecticut Office of Fiscal Analysis, 2009). While capital cases in Connecticut account for just .06% of cases in the Public Defender's office, the cost to defend these cases was nearly \$3.5 million, over 7% of the office's entire budget. If an offender is sentenced to death, the costs to house him on death row at Northern Correctional Institution is more than double that of the average annual incarceration rate for non-death row prisoners. Connecticut spends approximately \$100,385.00 annually for each death row prisoner, compared to approximately \$44,385.00 annually for non-death row inmates. There are currently ten inmates on death row in Connecticut at an annual total housing cost in excess of \$500,000.00. The cost of the death penalty to Connecticut from 2001-2010, based on the above numbers, amounts to \$40 million for public defender services and over one-half million dollars extra per inmate on death row. This number has increased over the last two years due to two significant offenders tried as capital felons – Steven Hayes and Joshua Komisarjevsky – who were arrested in connection with a high profile murder of Petit family members in Cheshire.

The economic argument trickles down further. The nation's law enforcement community, after enjoying decades of growth in manpower, have recently suffered massive layoffs as well as cuts in training and equipment and attrition based hiring. This reduction in manpower, experience and training has occurred in Connecticut as well. The presence of an exorbitantly expensive death penalty in Connecticut adds to this problem. As noted earlier, the lack of necessary law enforcement funds was one of the core issues that prompted Illinois to repeal their death penalty statute last year. The abolition arguments to take the millions of dollars previously spent on capital cases and invest those funds in the more appropriately utilized law enforcement and victim services funding are not only more pragmatic but better result-oriented. Obviously this is ample fodder enter in the public debate on capital punishment. Co-author Dwyer, a retired

New York State Police Major Crimes detective, testified before the Connecticut legislator in favor of abolition citing the failed New York experience with capital punishment from 1995-2004 and his own investigation of homicide offenses during that period. His testimony also brought to the legislature's attention a brutal quintuple homicide of five family members which included a father, mother and three male children ages 13, 10 and 6, which he investigated in January 2007, seven months prior to Connecticut's Cheshire case. In the New York case the suspects were captured, tried and convicted in the span of a year for one suspect and sixteen months for the second suspect. Their appeals were denied three years from the date of the crime. During that same time period in the Cheshire case neither defendant had been even brought to trial. Dwyer's testimony spoke to the practical issues regarding investigation and trial of such brutal crimes as well as the gross public expenditure of funds. Both New York defendants were convicted and sentenced to life without parole for a considerably less expenditure of public funds and resources. However, this testimony and similar compelling and rational arguments in favor of abolition were muted at the time of the 2011 legislative debate. In Connecticut's case, it was not the threat of a failed marriage in the offing which changed the mind of one legislator, but one case. The infamous Cheshire Murders drew statewide and national attention since July 2007. The case became the central rallying point for the retention crowd in the legislature. Largely as a result of the advocacy of the surviving family member, Dr. William Petit, who stated that justice for his family demanded that the death penalty statute remain in place so the second of two suspects would be sentenced to death, the legislature turned a deaf ear to other arguments. This time, however, unlike the year before when the Governor vetoed a bill passed by both chambers, because of this one horrific case, it was the debate on the House of Representatives floor which stirred the most controversy. Ironically, the focus of debate shifted from discussing the relative

merits of the justification for capital punishment, to debate on the alternative punishment of life without the possibility of parole. The debate shifted when a law professor from New York Law School testified to the relative comfort of prisoners who are housed on the death row unit in Connecticut and how the comfortable quarters would only improve if “death row” were to be removed from Connecticut prisons. In this matter, the legislative fog had been summoned from out-of-state. Legislators were led into believing that the conditions of confinement would not be severe enough for those convicted of murder if the death penalty statute were repealed. Any moral, ethical or legal justification to abolish capital punishment was clouded with the erroneous consideration that an inmate sentenced to life without parole would not suffer enough. Although constitutionally mandated provisions for fair and equitable conditions of confinement are required by law, legislators were convinced into believing that life without parole would not be cruel enough punishment for murderers (or in this instance, the two murderers at the center of the debate) to repeal capital punishment. Interestingly, the testimony from administrators in the Connecticut Department of Correction (DOC) was not sympathetic to the idea of harsher punishment needed for convicted murderers. Rather, they defended their long-standing risk-needs classification system, which follows both constitutional and federally mandated guidelines. When questioned directly by legislators as to the conditions of confinement for those serving terms of life without parole versus those condemned to die the distinction in their classification were confirmed. As they were further questioned on this matter the DOC administrators would not commit to maintaining the current custody level for those on death row who might have their sentences commuted to life without parole. This revelation opened the door for legislators to summon the illusory fog once again, broadening their platform for retention on the illogical grounds of potentially less painful conditions of confinement for the “worst of the worse.” Life

in prison with no chance for release, in their opinion, was not punishment enough for certain murderers. During this debate legislators agreed with a suggestion that murderers should sit in their cells all day long with nothing on their walls to view except pictures of their murdered victims. How many surviving family members would support such an idea? We should not be surprised that such grand ideas would be postulated since this venue of testimony was a compilation of diverse critical minds that were desperately trying to develop a fair and equitable solution to one of society's most complicated experiments of justice while deferring to decades of constitutional rulings regarding cruel and unusual punishment.

Although the abolition vote would have passed the House chamber two senators recanted their support. Both of the senators changed their vote after meeting with Dr. Petit. One of them, Senator Edith Prague, was then quoted by the news media to state, "They should bypass the trial and take that second animal and hang him by his penis from a tree out in the middle of Main Street." (Musante, 2011) The vote therefore, was never called. Although there is still much fog currently permeating the state capital, it now appears that there might be some degree of waffling on the part of the senators who withdrew their support last year. Now that the second of the two offenders in the infamous case have both been sentenced to death, it appears that Connecticut may be ready to discuss abolition once again. It would not be any surprise however, if a new twist is created to cloud the most relevant issues once again. Note here the difference between the observations and commentary on this subject proffered by Dickens noted earlier in this paper versus those observations and commentary put on display in the Connecticut state house. For Dickens, his views were developed as a result of internal conflict both with his beliefs on the human condition, and with a broader and critical social welfare perspective. The debate in the state house focused on a wanton expansion of the nature and severity of punishment, while

Dickens, although himself concerned with the methods of punishment raised serious questions about the limits and bounds of state sanctioned controls. These higher level moralistic issues were never addressed in the debate in the Connecticut State House in 2011.

The lessons for these interactions point to an abolitionist advocacy that has only recently begun to take shape. The law enforcement community, along with victim family members, has a significant voice in the debate. The involved nature of surviving family members is an obvious and natural constituency. But the myth of law enforcement need has been perpetuated in state legislative bodies across the United States. By deconstructing these arguments and pointing to the real needs of law enforcement to keep society safe the retention fervor starts to dissipate. The issue of aggravating factors and the lack of uniformity in their assessment and value in sentencing, which is conspicuously absent from any legislative debate, brings to light the crux of the problem concerning capital punishment for legislators, for the Judiciary, for law enforcement, and for all of us.

### **3. Aggravating Factors as Uneven Value Judgments**

The concept of aggravating factors brings with it an implied insult to the victims and family members of murder victims whose deaths have not been determined to be under statutorily created “aggravating circumstances.” The aggravating factors amount to value judgments which have no consistency or universally accepted rationale in fact-finding or in sentencing. Still the political insistence upon and the legal justification for capital punishment rely on these uneven value judgments. Sadly the use of aggravating factors is divisive. In the words of Dr. Khalilah L. Brown-Dean, a Quinnipiac University professor of political science and a member of Connecticut Family Members of Murder Victims Against the Death Penalty, the death penalty “divides murder victims into two classes” – death penalty eligible murders which

would seem to contain aggravating factors and non-death penalty eligible intentional murders which might not. This crass minimization of the tragic and brutal end of one victim's life to the aggrandizement of another victim's murder was exemplified in the 2011 testimony of Connecticut State's Attorney Kevin T. Kane before the Connecticut Legislature when he distinguished a "regular murder" from those that are death penalty eligible. The notion that there is such an occurrence as a "regular murder" shows little sympathy for the victim, the victim's family and is further evidence of the detachment the criminal justice system has with crime victims. Though concern should always be exhibited for the effect of crime on the victim, having the death penalty alters that focus primarily to concern for the aggravating circumstances of the murder. Murder, specifically the methodology of murder, becomes a commodity and unfortunately it has become a valuable political commodity for prosecutors and politicians. The way it has been packaged and sold to the public and to law enforcement professionals is nothing more than a "junk bond" with little intrinsic present value and no hope for future valuation. This is and has always been a problem relating to sentencing.

The U.S. Supreme Court's attempt in *Gregg v. Georgia* to apply a uniform constitutional standard to the implementation of the death penalty did nothing to dispel pre-*Furman v. Georgia* concerns over the arbitrary and capricious nature of the death penalty (Adams, 2005). The introduction of statutory aggravating factors as a prerequisite to trying a capital case and mitigating evidence to provide a defense to a death penalty sentence have further complicated the process and politicized the use of this punishment. Furthermore, in a study of capital jurors it was found that neither aggravating nor mitigating circumstances in these cases made a significant difference in whether jurors voted for the death penalty (Polzer & Kempf-Leonard, 2009). Such studies point increasingly to the problematic nature of trying to balance aggravating



and mitigating circumstances in a capital case but moreover begs the question of what were the decision points for those jurors in the capital cases studied. If the supposed objective determinants are removed from the deliberation we are left with a system of capricious choice in which the constitutional safeguards labored over for years by the U.S. Supreme Court are unbalanced by the fickle choice of juror selection.

To understand the application of capital punishment in Connecticut, it is necessary to examine both the statutory eligibility criteria for capital murder, as well as the statutory requirements for consideration of aggravating factors post conviction. The statutory eligibility criteria govern whether the elements of the crime of murder qualify for a capital charge and conviction, while any aggravating factors must be deemed to exist during the penalty phase. At least one statutory eligibility criterion must be deemed to be present to sustain a capital conviction and, if that threshold is met, the presence of any aggravating factors must outweigh any mitigating factors to sustain a sentence of death during the penalty phase.

Appendix A describes the list of statutory eligibility criteria (State of Connecticut, 2012, Connecticut General Statutes §53a-54b), and Appendix B lists the aggravating factors which may be considered (State of Connecticut, 2012, Connecticut General Statutes §53a-46a(i)).

As a result of the recent legislation which abolished capital punishment in Connecticut prospectively, any consideration of aggravating factors are no longer relevant. However, the statutory eligibility criteria remain as the legal elements necessary to sustain a conviction for “Murder with Special Circumstances” which has replaced Connecticut’s death statute, and for which an offender could receive a sentence of “Life without Parole” in stringent, death row-like conditions of confinement.

In order to support the incongruity of consideration of aggravating factors in the death penalty debate we highlight a recent study conducted by Stanford Law School Professor John Donohue, which examined the dispositions of murders committed in the State of Connecticut from 1973-2007. Donohue's report found that of the 4,600 murders committed, only 10 resulted in death sentences, with only one execution resulting. A brief summary of the research revealed the following:

- 1) There is no meaningful basis to distinguish the few who received a death sentence from the many capital eligible cases that did not.
- 2) Those charged with capital felony are no "worse" or egregious than those that were not charged with capital felony. Similarly, the cases that received life imprisonment without parole were no worse than the cases that received death sentences.
- 3) Many more egregious cases did not receive a death sentence, compared to the egregiousness of some of the cases which resulted in a death sentence.

Donohue concluded: "Within the class of death-eligible murders, the discretion exercised throughout the post-arrest criminal system leads to arbitrary, irrational, or discriminatory outcomes" (Donohue, 2011).

To further illustrate the findings of the Donohue study, we highlight four recent cases in Connecticut which fuel the argument made that aggravating circumstances are uneven value judgments in the application of the death penalty. We use Connecticut as the focus of this debate, even in light of the recent vote for abolition here, since both research done in Connecticut as well as notorious cases recently decided highlights the importance of these claims, and have nationwide implications. (One particular case has been used by death penalty proponents,

particularly those in public office, as the reason for the continuance of the death penalty in Connecticut, until both offenders were ultimately sentenced to death.)

The four cases are compared in the following manner:

1) In our main comparisons we discuss two time-proximate cases in Connecticut, both of which were tried as capital cases, but which yielded different sentence recommendations, one for death and the other for life in prison without parole.

2) We then add another time-proximate case to the comparison noted above where a murder which arguably contained aggravating factors was tried as a non-capital case and resulted in a plea of guilty and a 44 year sentence.

3) Lastly, we again look at another brutal murder case which involved a sexual assault but resulted in a plea agreement with a 60 year sentence.

### **3.1 Comparison #1: The Cheshire, Connecticut Petit family**

On July 23, 2007 two career criminals forced their way into the Petit family home located in an affluent area of Cheshire, Connecticut. The pair encountered Dr. Petit who was asleep on the enclosed back porch to the home. They disabled then bound him and left him unconscious in the basement while they terrorized his wife Jennifer and two daughters Hayley and Michaela. Ultimately, after several hours in the home, one of the intruders, Steven Hayes, would take Jennifer Petit from the home to her bank and have her withdraw \$15,000.00 while the other intruder, Joshua Komisarjevsky, remained at the Petit home with Hayley and Michaela. Their burglary took a turn for the worse when they decided to sexually assault the women and set fire to the rooms where the women were bound. Dr. Petit was able to escape and make his way to the rear of his yard while the intruders made their escape. Local police, alerted by an alert clerk at the bank, responded to the Petit home as Hayes and Komisarjevsky made their attempted

escape. Both intruders were captured yards from the scene as they drove off in the Petit family car only to crash into a responding police vehicle. What ensued from that point on was a case that gained national attention and immediate calls for a capital case prosecution. Dr. Petit, a one-time death penalty opponent, would become a tireless advocate for the death penalty in this case. Despite offers from defendant Steven Hayes to plead guilty and accept a term of life imprisonment the Connecticut State's Attorney Office for the District of New Haven proceeded with its capital case. It would take vast state resources and 2½ years to convict and sentence to death Steven Hayes and an additional year to convict and sentence to death Joshua Komisarjevsky.

### **3.2 Comparison #2: The Fairfield, Connecticut Donnelly family Murders**

The Fairfield case unfolded on February 2, 2005 as Christopher DiMeo and his girlfriend Nicole Pearce decided to rob a jewelry store in Connecticut. DiMeo had previously robbed two New York jewelry stores on December 21, 2004, during one in which he fatally shot a 48 year old father of two in Glen Head, New York. With New York police on their heels DiMeo and Pearce came to Connecticut with a copy of the Yellow Pages in their possession as they drove up the Connecticut Turnpike in search of their next victims. They stopped at two other jewelry stores in Fairfield before deciding to rob a small, family owned store with no surveillance cameras. Shortly before closing time on February 5, 2005 DiMeo and Pearce entered the store and engaged the owners, Tim and Kim Donnelly, in conversation, telling them that they were interested in buying an engagement ring and other items. After Kim Donnelly modeled a bracelet for them DiMeo pulled out a recently stolen handgun which had been used to kill the victim in the New York robbery-murder, and fired four shots into Tim Donnelly as wife watched and screamed in horror. DiMeo then turned and shot Kim Donnelly five times in the chest and

back at close range. DiMeo and Pearce quickly raided the store, left with thousands of dollars in jewelry and drove to Atlantic City, New Jersey. After a two day manhunt police were able to surround an Atlantic City motel and arrested the two perpetrators. DiMeo later confessed to the murders in both New York and Connecticut. He was sentenced to life without parole in New York within one year of the murder he committed there. It would take another two years and numerous appeals before DiMeo was brought to Connecticut to face capital murder charges for the Fairfield episode.

DiMeo admitted his guilt from the outset. His factual guilt was thus never really an issue during the trial, and he was subsequently found guilty of capital felony-murder. The actual focus of the trial was designed to set the stage for what was to come in the penalty phase, where Connecticut prosecutors argued and focused their energy, claiming that DiMeo should forfeit his life due to the presence of two aggravating factors: one, that he was a prior felony-murder convict, and second, that he had caused Kim Donnelly “extreme physical or psychological pain, suffering or torture” through the sequence of events that transpired prior to her death. At the penalty phase the jury found for the existence of the first aggravating factor but not for the second. Now able to proceed to the issue of whether death or life without parole was to be determined, jurors would weigh the aggravating factors against the mitigating factors presented to them. In the end due to expert psychiatric testimony which described DiMeo as an individual unable to control his actions because of extensive heroin use and a dismal upbringing during which he was surrounded by drug users and criminals for most of his young life, the same jury which convicted him opted for a sentence of life without parole rather than the death penalty. The jury noted that they “found value” in DiMeo’s life.

By way of analysis many have argued that we need a death penalty for the “worst of the worse” cases in order to provide justice for the victims. If this is true there are two questions which we claim arise in this debate: first, is it only the “worst of the worse” murderers that receive the death penalty? And, second, do the “worst of the worse” *always* receive the death penalty in Connecticut? Therein lays the problem with rationalizing capital punishment in Connecticut and by extension to other death penalty jurisdictions. It is a system that cannot be fixed in the presence of immense human judgment and interpretation. It should be noted here that co-defendant Pearce died from cancer while held in custody pending disposition of her case.

### **3.3 Comparison #3: The New Haven, Connecticut murder of Annie Le**

Our next comparison is that of the capital murder cases in Cheshire and Fairfield with the non-capital murder case of a young Yale University student in New Haven, Connecticut which occurred in September 2008. In the New Haven case 24 year old Annie Le, a third-year doctoral candidate in pharmacology from California was found murdered at Yale University. She had been stuffed inside a laboratory wall. A post-mortem examination indicated evidence of a sexual assault. Her body had not been found until a week after she was reported missing, on the day she was to have been married. Speculation that Le was a “runaway bride” was quickly dismissed after the gruesome discovery and the subsequent arrest of Steven Clarke, a lab technician who worked with Le. This case occurred in the same Judicial District as the Cheshire case and contingent to the Judicial District where the Fairfield murders occurred. As for a motive in the case Clarke was portrayed as a control freak who had disagreements with Le regarding her use of the lab and what he viewed as her cavalier regard for the lab protocols. A post-mortem on Le would show that her jaw and collarbone were broken and that she was strangled. Clarke would plead guilty to murder and receive a 44 year prison term on June 3, 2011. He would also take an

Alford plea to attempted sexual assault. Prosecutors claimed that they had overwhelming forensic evidence with which to secure a conviction but that Clarke was allowed to plead guilty to spare the victim's family the ordeal of having to sit through a trial.

#### **3.4 Comparison #4: The Danbury, Connecticut murder of Laura Mancini**

On March 3, 2010 Laura Mancini was reported missing by her employer when she did not show up for work. Concerned co-workers went to her apartment where they found her car was gone but her back door was open. When police were summoned to check her apartment they discovered her lifeless body. Her vehicle was later found along an interstate highway exit ramp at the New York State border with Connecticut. Police quickly tied the homicide to Mancini's next door neighbor Christopher Pounce. Investigation determined that Mancini was killed either late night on March 2, 2010 or early in the morning of March 3. The post-mortem examination would also indicate that Mancini was raped by Pounce and stabbed twelve times. Pounce was connected to the crime through telephone calls he made from Mancini's apartment on the night of the murder, his DNA and a statement from the mother of his two children that he had asked to her lie for him regarding his being at home the night of the murder. Originally charged with capital felony murder, aggravated sexual assault and home invasion Pounce agreed to a plea bargain in November 2011. The plea agreement came after authorization by the Connecticut State Attorney's Office despite the fact that Pounce was a career criminal with a pronounced history of violence. He pled guilty to the murder of Mancini and was sentenced to sixty years in prison. Under Connecticut sentencing law he faces a mandatory minimum of 25 years with a total maximum exposure of 75 years, though he will have an expected incarceration period of 60 years based on his plea.

We assert that the research done by Donohue and our recent case-by-case comparison, illustrate the problems associated with relying of the presence of or the absence of aggravating factors to sustain a murder conviction and death sentence. Table 1 illustrates the specific 4 cases cited in this paper, and compares them by the presence (or not) of both statutory eligibility criteria and the presence of aggravating factors, the prosecutorial decision on how to charge, the verdict, and ultimate finding or sentence. It becomes clear that the random fashion in which the death penalty has been recently applied in Connecticut underscores the argument as to the arbitrary nature of aggravating factor prerequisites for capital cases. The variables for a death penalty qualified case, that is one in which the prosecution will truly seek the expenditure of funds and resources, seem to fit only truly special circumstances not the least of which is the socio-economic identity of the victim and the advocacy of the surviving family members. There is the added extent to which public and media interest is swept to frenzy over the existence of these aggravating factors in a particular case. While there has been a struggle in the U.S. Supreme Court over the years with the admission of aggravating and mitigating evidence this conflict has done little to remove the capriciousness of capital case selection and determination (Hurwitz, 2008). An element of the capricious nature of who deserves a capital trial – both in terms of victim and perpetrator – is the widened discretion of the prosecutorial role in deciding which defendants face capital murder charges (Adams, 2005).



Table 1

An Examination of 4 Time-Proximate Cases Involving the Consideration of Aggravating Factors

Variables Examined	Cases Examined			
	Hayes/Komisarjevsky	DiMeo	Clarke	Poucie
<i>Eligibility Criteria for Felony Murder (Listed by number below according to CGS §53a-54b)*</i>	5,6,7,8	7	6	6
<i>Prosecutorial Decision</i>	Capital Trial	Capital Trial	Plea Bargain	Plea Bargain
<i>Length of time to Disposition</i>	Hayes: 3.5 years Komisarjevsky: 4.5 years	3 years	2.5 years	1.5 years
<i>Verdict/Sentence</i>	Jury Verdict: Guilty on all counts Death Sentence	Jury Verdict: Guilty on all counts Sentence: Life in Prison	44 years	60 years
<i>Aggravating Circumstances Considered (Listed by number below according to CGS§53a-46a (i))**</i>	2, 3,4	1,3,4	4	2,4

\* (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety;  
 (6) murder committed in the course of the commission of sexual assault in the first degree;  
 (7) murder of two or more persons at the same time or in the course of a single transaction; or  
 (8) murder of a person under sixteen years of age.

**Source: State of Connecticut (2012) Connecticut General Statutes §53a-54b**

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

(2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or

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

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

**Source: State of Connecticut (2012) Connecticut General Statutes §53a-46a(i)**

The political nature of the death penalty is advanced when law enforcement is co-opted into the process and led to believe the death penalty is a necessary device to keep them and the community safe. But this fallacy has worn out its welcome. There is no statistical correlation between officer safety and the presence of a death penalty statute (Bailey & Peterson, 1994). In fact over the past two years wherein officer line of duty fatalities increased nationally by 40% the five states with the highest number of officer homicides were death penalty states. When discussing aggravating factors one such factor universally found in state statutes is the murder of a law enforcement officer in the line of duty (Death Penalty Information Center, 2012). The disparity of death penalty application for this representative crime is no less significant than in other cases.

#### **4. Law Enforcement Line of Duty Murders in Connecticut and Capital Sentencing Disparity**

Since 1980, there have been nine-line-of duty murders of police officers in Connecticut, except for one of those cases in which the defendant was an off-duty correction officer who claimed to have accidentally shot and killed a state conservation officer and was charged with manslaughter, the other cases were intentional homicides by gunfire. In one of the cases the officer, Robert Fumiatti of the New Haven Police Department, died five years later from complications of his wounds and his killer was already serving a forty-five year sentence. In another case, that of Officer Peter Lavery, Newington Police Department, the suspect committed suicide at the scene. These are the two most recent line of duty police officer homicides in Connecticut. In an older case, that of Patrolman Kenneth Bateman of the Darien Police Department the case is unsolved. Lastly, in the case of Bridgeport Police Officer Gerald T. DiJoseph who was shot in the neck and succumbed to those wounds in 1980 his alleged killer

Eugene Powell was acquitted after trial. Of the eleven inmates on death row only one is a convicted cop-killer. The inmate, Richard Reynolds, has been on Connecticut's death row for sixteen years after his conviction for the murder of Waterbury police officer Walter T. Williams on December 18, 1992. That leaves three cases of police officer line of duty homicides from 1980 in which the killers were spared death row. Thomas Hoyeson the confessed killer of Milford police officer Daniel Wasson was allowed to plead guilty to capital murder and avoid death row in the 1987 murder of Wasson. Hoyeson who was high on cocaine at the time of the shooting was stopped in the early morning hours by Wasson for a traffic violation. Hoyeson, who had a prior prison sentence for shooting at police officers, fired a single .44 caliber round into Wasson's chest. Terry Johnson, the convicted murder of Trooper Russell Bagshaw who died in a hail of gunfire in 1991, was tried for capital murder and sentenced to death but had his death sentence converted to life in 2000 by the Connecticut Supreme Court. In a 4-3 decision the Connecticut top court said Trooper Bagshaw did not suffer the degree of pain or torture necessary to sustain a death sentence. At the time of the Connecticut Supreme Court's decision in the Johnson case another capital case was pending in the state. Noel "Alex" Sostre was charged with the murder of East Hartford police officer Brian Aselton who responded to a noise complaint in an apartment building. Aselton confronted a blood-covered Sostre who he struggled with; the suspect produced a gun and fired at Aselton striking him in the forehead. Aselton had interrupted a home invasion robbery from which the murder weapon was stolen. Sostre was tried for capital murder and convicted but sentenced to life imprisonment.

These police officer line of duty murder cases, often used as an example for the need for capital punishment, point to their own disparities in the way the death penalty is utilized and the

eventual outcomes. There is clearly no uniformity in jury determination, plea authorization or legal definition over aggravating factors.

## 5. Conclusion

The efforts we have undertaken at understanding capital punishment sentencing and law enforcement outreach in support of abolition efforts have encountered the Dickensian Dilemma. In fact our own individual conversions from pro-death penalty positions to that of repeal have had to confront that conflict. Abolition advocacy in the state legislature have brought us in contact with pro-death penalty politicians who firmly and sincerely believe in the righteousness of their position. However, the arguments in favor of repeal centering on diversion of funding from an expensive process to victim and law enforcement resources seem to resonate with these same politicians, especially when life without parole remains untouchable. This view mirrors public opinion regarding support for appeal – those in favor of the death penalty decrease when a life without parole guarantee is in place (Death Penalty Information Center, 2011). Significantly the views of law enforcement professionals hold considerable sway with these same legislative bodies. This is an important ally in the abolition movement, especially as the discussion of aggravating factors finds new audiences and a renewed interest in fairness in sentencing. The looming shadow of the aggravating factor analysis in the death penalty debate can carry beyond the discussion of capital murder cases. We need go back only as recent as 2008 and the dissent of Justice Alito in *Kennedy v. Louisiana* to understand the emotional sway of these arguments. His dissent to the Court's reversal of the defendant's capital sentence for the brutal rape of a twelve year old child embarks on a moral deprivation analysis in response to the Court's "evolving standard of decency" argument (Kennedy v. Louisiana, 2008). Justice Alito writes, "*Is it really true that every person who is convicted of capital murder and sentenced to death is*

*more morally depraved than every child rapist?...it is certainly true that the loss of human life represents a unique harm, but that does not explain why other grievous harms are insufficient to permit a death sentence.”* (Kennedy v. Louisiana, 2008). The inherent flaw in the reasoning is obvious, moreso in light of the Court’s 1977 decision in Coker v. Georgia, but the fact it has come from a sitting U.S. Supreme Court Justice indicates the extent to which aggravating factors can displace reason and sound policy. Much like the fictional litigation of Jarndyce v. Jarndyce this debate will drag on for years, the question will be what we have to show for it in the end.

**Appendix A**

**Capital Felony, Eligibility Criteria, State of Connecticut\***

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

\*State of Connecticut (2012) CGS § 53a-54b

**Appendix B**

**Capital Felony, Aggravating Factors, State of Connecticut\***

The aggravating factors to be considered shall be limited to the following:

- (1) The defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, a felony and the defendant had previously been convicted of the same felony; or
- (2) the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or
- (3) the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or
- (4) the defendant committed the offense in an especially heinous, cruel or depraved manner; or
- (5) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or
- (6) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or
- (7) the defendant committed the offense with an assault weapon, as defined in section 53-202a; or
- (8) the defendant committed the offense set forth in subdivision (1) of section 53a-54b to avoid arrest for a criminal act or prevent detection of a criminal act or to hamper or prevent the victim from carrying out any act within the scope of the victim's official duties or to retaliate against the victim for the performance of the victim's official duties.

\*State of Connecticut, (2012) CGS § 53a-46a (i)

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