HARPER, J., concurring in part and dissenting in part. I fully agree with the majority's reasoning and conclusions regarding the propriety of the underlying conviction of the defendant, Eduardo Santiago, and I join parts I through X of the majority opinion without reservation. I also agree with the majority's analysis in subparts A, B and C of part XI. I ultimately believe, however, that the trial court's improper decision not to disclose certain portions of those files should not lead us merely to remand the case for a new penalty phase. See part VII B 4 of the majority opinion. Because I am convinced that imposition of the death penalty is unconstitutional per se, I disagree with subpart D of part XI of the majority opinion and would remand the case with direction to sentence the defendant to a term of life imprisonment without the possibility of release, in accordance with General Statutes § 53a-35a (1).

At the outset, I recognize that this court repeatedly has held that the imposition of the death penalty does not violate our state's constitution, most recently in the majority opinion today. See also, e.g., *State* v. *Rizzo*, 303 Conn. 71, 201, 31 A.3d 1094 (2011); *State* v. *Webb*, 238 Conn. 389, 411–12, 680 A.2d 147 (1996), aff'd after remand, 252 Conn. 128, 750 A.2d 448, cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000); *State* v. *Ross*, 230 Conn. 183, 256, 646 A.2d 1318, cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1994). Nevertheless, I follow in the principled footsteps of several of my fellow Supreme Court justices, notably Justice Norcott; see, e.g., *State* v. *Breton*, 264 Conn. 327, 446, 824 A.2d 778 (*Norcott*, *J.*, dissenting), cert. denied, 540 U.S. 1055, 124 S. Ct. 819, 151 L. Ed. 2d 708 (2003); former Justice Katz; see, e.g., *State* v. *Peeler*, 271 Conn. 338, 464, 857 A.2d 808 (2004) (*Katz*, *J.*, dissenting), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005); and former Justice Berdon; see, e.g., *State* v. *Webb*, supra, 551 (*Berdon*, *J.*, dissenting); and I articulate today my own belief that those decisions of this court upholding the constitutionality of the death penalty have failed to extend the full and proper protections of our state's constitution to the citizens whose rights it exists to protect. See Conn. Const., preamble (constitution ordained and established "to define, secure, and perpetuate . . . liberties, rights and privileges").

I

I begin by considering whether the death penalty comports with our state constitution's prohibitions on cruel and unusual punishment. Although Connecticut's constitution does not expressly articulate such a prohibition, this court nevertheless has concluded that "our due process clauses impliedly prohibit punishment that

is cruel and unusual." *State* v. *Ross*, supra, 230 Conn. 246. In assessing the constitutionality of capital punishment, the harshest penalty that may be imposed by law, I "must therefore decide whether contemporary understandings of applicable economic and sociological norms compel the conclusion that any death penalty constitutes cruel and unusual punishment. The question is . . . whether the defendant is correct in his contention that the death penalty is so inherently cruel and so lacking in moral and sociological justification that it is unconstitutional on its face because it is fundamentally offensive to evolving standards of human decency." Id., 251. Although the majority today would defer in this matter to this court's past judgments, I cannot join in this reliance. When this court rules on the constitutional rightfulness of a penalty that not only strips a person of all rights but indeed strips away even " 'the right to have rights' "; *Furman* v. *Georgia*, 408 U.S. 238, 289, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring); in the cutting off of bare life itself, the awesomeness and finality of that judgment is such that we cannot risk the slightest complacency, lest we be blinded to the demands of human decency by the seeming normalcy of routinized inhumanity. In upholding the constitutionality of the death penalty with scarcely a word of discussion, the majority today treats as settled law the most unsettling act the state commits. I am unable to embrace this approach, especially since upon conducting my own thorough consideration of the death penalty, I find myself inexorably led to the conclusion that the death penalty is inherently cruel, offensive to the evolving standards of our community's human decency and utterly without legitimate justification. Accordingly, the imposition of the death penalty must be deemed cruel and unusual punishment, and as such, prohibited by our state's constitution.

In reaching this conclusion, I look first for " 'objective evidence of contemporary values' "; *Atkins* v. *Virginia*, 536 U.S. 304, 312, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); indicating whether the death penalty has grown repugnant to present standards of human decency. It is uncontroversial that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the . . . legislatures." *Penry* v. *Lynaugh*, 492 U.S. 302, 331, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). The Connecticut legislature has spoken clearly on this subject: in recent days it passed legislation that abolishes capital punishment for offenses committed after the law goes into effect.[1] Substitute Senate Bill No. 280, February Sess., 2012. By the will of the duly elected legislature, the death sentence is about to become a dark aspect of our state's history, a shadow that is being dispelled as the state embraces a brighter future. I could ask for no clearer evidence that our state's evolving standards of decency have come to recognize the untenable cruelty of capital punishment.

Although the effects of the present legislation are only prospective in nature, consideration of two recent legislative measures addressing capital punishment provides evidence that the legislative rejection of the death penalty is not a break from the past but, rather, is the political realization of preexisting principles. First, in May, 2009, the General Assembly passed an act that repealed the death penalty. Public Acts 2009, No. 09-107. Then governor M. Jodi Rell vetoed the bill, preventing it from becoming law. M. Jodi Rell, open letter to Secretary of the State Susan Bysiewicz, June 5, 2009, available at http://www.acluct.org/downloads/GovRellvetostatement.pdf (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office). Second, in April, 2011, the judiciary committee favorably reported Senate Bill No. 1035, a piece of legislation that would have abolished the death penalty. All indications were that the bill had sufficient votes to pass and that Governor Dannel Malloy would sign it if it did; J. Reindl, "Senators Change Minds on Death Penalty," The Day, May 12, 2011, available at http://www.theday.com/article/20110512/NWS12/305129297 (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office); Senate Bill No. 1035 ultimately was not brought up for a vote, however, after two members of the state Senate elected to change their positions on the bill.[2]

I highlight these previous legislative developments not only to demonstrate ongoing support for abolition of the death penalty, but also because they cast serious doubt on the proposition that capital punishment has, in recent times, been consistent with the contemporary standards of human decency in Connecticut. Although the failures of the 2009 and 2011 bills suggest that until very recently the death penalty had sufficient political support to withstand legislative challenge, examination of the source of that support—which twice barely saved capital punishment from abolition—is both revealing and disturbing. In vetoing the 2009 bill, then governor M. Jodi Rell declared that "[t]he death penalty is, and ought to be, reserved for those who have committed crimes that are revolting to our humanity and civilized society." M. Jodi Rell, supra, open letter to Secretary of the State Susan Bysiewicz. In 2011, the two senators whose reversal undermined the repeal bill's passage gave statements revealing that they had changed their votes not out of any belief that the death penalty was in fact consistent with our society's standards, but admittedly out of sympathy for a specific victim of a high profile 2007 multiple murder in Cheshire.[3] J. Reindl, supra. One of those senators openly called into question the legitimacy of this shift, acknowledging that "I know that is not a reason to change your mind on the position, but you're suddenly confronted with: What in the world are we doing to people that have suffered these kinds of horrific experiences?" Id. (statement of Senator

Andrew Maynard). The other senator, Senator Edith Prague, stated more bluntly: "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." B. Connors, "Prague: 'Hang the Animal By His . . . .' " NBC Connecticut (May 12, 2011), available at http://www.nbcconnecticut.com/news/local/Prague-Hang-the-Animal-by-His-121670559.html (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office).

I understand that anger and fear play a role in the political process, but revulsion and rank animus must not be taken as sincere expressions of any standard of decency. Proper constitutional analysis looks not to the broad array of political interests and popular desires, but rather to the prevailing standards of human decency, and I must therefore refuse to give weight to any position, however politically popular or strongly felt, that is itself ignorant of—or worse, indifferent to—basic precepts of human dignity. It takes no great speculation to conclude that the one senator's reference to the murder suspects as "animals" flows from a conviction that the men referred to lie *outside* the realm of humanity and that treatment of them is thus not subject to the strictures of human dignity.[4] For reasons that need not be elaborated upon, the categorical exclusion of any person from humanity cannot be reconciled with a legitimate vision of human dignity. Therefore, because "[t]he basic concept underlying [constitutional prohibitions on cruel and unusual punishment] is nothing less than the dignity of man"; *Trop* v. *Dulles*, 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958); my consideration of whether capital punishment is cruel and unusual cannot give evidentiary weight to those views that presuppose the abrogation of *universal* human dignity. The legislative record strongly suggests that it is only on the strength of such views that capital punishment survived in this state for as long as it did, and if the death penalty cannot find support in principles that recognize and respect the humanity of those upon whom it is inflicted, then the death penalty cannot find legal footing at all.

The ultimate question of the death penalty's constitutionality is, of course, one that the court must answer; "the objective evidence, though of great importance, [should] not wholly determine the controversy, for the [c]onstitution contemplates that in the end [the court's] own judgment will be brought to bear on the question of the acceptability of the death penalty . . . ." (Internal quotation marks omitted.) *Atkins* v. *Virginia*, supra, 536 U.S. 312. Consequently, in addition to the legislative evidence, I also consider whether the continuation of the death penalty can be justified with respect to its claimed "social purposes," namely, "retribution and deterrence of capital crimes by prospective offenders . . . . Unless the imposition of the death penalty . . . measurably contributes to one or both of these goals,

it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." (Internal quotation marks omitted.) Id., 319.

In order to properly assess the justifiability of capital punishment, I begin by confronting the precise nature of the " 'imposition of pain and suffering' " that must be justified. I do not pretend to grasp even remotely what it means to be condemned to die at the hands of the state. That does not excuse me from making the effort.

Before addressing the execution itself, I note that even the period of incarceration prior to an execution exceeds the harshness of any other form of punishment lawfully imposed in our society. Ordinary incarceration for a term of years may be unpleasant, but it is not cruel; moreover, in appropriate cases it is wholly necessary to the maintenance of ordered society. Incarceration while under a sentence of death, however, differs from ordinary incarceration in at least one critical respect. The reality of a death sentence necessarily weighs on the condemned at all times. A person under sentence of death wakes and lives each day with the knowledge that at a determinate point in his future, the state will abruptly end his or her very existence. As the European Court of Human Rights recognized, in refusing to allow a prisoner to be extradited to Virginia to face trial for capital murder and potentially to be executed, "[h]owever well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death." *Soering* v. *United Kingdom*, App. No. 14038/88, 11 Eur. Ct. H.R. 439, para. 106 (1989).

The horror attendant to life under a sentence of death, however, pales in comparison to the execution itself. In the days leading to a scheduled execution, as the person condemned to die at the hands of the state is further isolated and clinically prepared for his own death, the mental anguish experienced by the defendant must only be further escalated. The universal human fear of approaching death is, in the condemned prisoner's case, compounded by a realistic fear that the execution itself will come with excruciating physical pain. Presently, Connecticut, like most other jurisdictions that still retain the death penalty, relies on a series of three chemicals injected in sequence to end the life of condemned persons. See *State* v. *Webb*, 252 Conn. 128, 133–35, 750 A.2d 448 (describing Connecticut execution protocol), cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000). Executions carried out by these chemicals carry with them a very real possibility of severe physical pain. So long as the first chemical, gen-

erally sodium thiopental, is properly administered, there is virtually no risk of pain; but there is a risk of improper administration, and if that drug is not properly administered, excruciating pain is guaranteed. See *Baze* v. *Rees*, 553 U.S. 35, 44, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (proper administration of anesthetic both necessary and sufficient to prevent pain during course of execution).[5] Furthermore, in light of recent developments that have seriously restricted the availability of sodium thiopental for use in executions, those death penalty jurisdictions that more actively implement death sentences have turned to pentobarbital as a substitute drug. See D. Freeman, "Pentobarbital, Euthanasia Drug, Used in Oklahoma Execution: Was it Inhumane?" CBS News (December 17, 2010), available at http://www.cbsnews.com/2102-504763 162-20025977.html (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office). It is likely that Connecticut would be forced to take similar steps in the event that we were to undertake executions of those men currently under a sentence of death in our state. The use of pentobarbital on humans is almost wholly untested and unstudied; its inclusion in execution protocols treats death row inmates as human guinea pigs, and introduces a presently unknowable risk of severe pain.

Having given expression, however inadequate, to the anguish attendant to capital punishment's performance of its irrevocable function,[6] I now must likewise carefully weigh whether the death penalty measurably contributes to its claimed social purposes of retribution and deterrence of capital crimes by prospective offenders. *Atkins* v. *Virginia*, supra, 536 U.S. 319; see also *State* v. *Ross*, supra, 230 Conn. 251 (inquiring into whether "the death penalty is so inherently cruel and so lacking in moral and sociological justification that it is unconstitutional on its face").

I look first to the question of retribution. As Justice Thurgood Marshall eloquently observed: "The concept of retribution is one of the most misunderstood in all of our criminal jurisprudence. The principal source of confusion derives from the fact that, in dealing with the concept, most people confuse the question 'why do men in fact punish?' with the question 'what justifies men in punishing?' " *Furman* v. *Georgia*, supra, 408 U.S. 342 (Marshall, J., concurring). There are a great number of reasons why individuals or society as a whole may *want* to punish someone, but this does not render all of those reasons valid justifications for punishment. As demonstrated by the statement of one of the senators quoted previously herein, for instance, it cannot be denied that some individuals within our society harbor intense passions or prejudices that motivate their desire to punish fellow members of our society. B. Connors, supra ("[t]hey 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"). Such feelings are understandable; nevertheless, it is clear that passion and prejudice are forces that *delegitimize* punishment. See General Statutes § 53a-46b (b) (sentence of death invalid if "product of passion, prejudice or any other arbitrary factor"). I acknowledge that many in our society desire the executions of others because of the severity of the crimes they have committed, and I recognize that some of these people hold the principled position that punishment is justified as retribution for past wrongs committed. I nonetheless conclude that particularly with respect to capital punishment, which by definition applies only to crimes of such magnitude that they are likely to incite anger and even hatred, there is no reliable line between retribution and revenge, and too easily rational moral calculus gives way to righteous but unprincipled rage. If it is upon this rage that the death penalty depends, then that penalty cannot stand.

This is true even if—perhaps especially if—that rage is widely felt. I am not blind to the fact that the death penalty presently meets with the approval of a significant portion of Connecticut residents. A recent Quinnipiac University poll indicated that approval of capital punishment had trended upward following the high profile crime referenced previously in this concurring and dissenting opinion; see footnote 3 of this opinion; reaching a record of 67 percent approval rate in 2011, up from 59 percent in 2005, approximately two years prior to the commission of the crime. D. Schwartz, Quinnipiac University Poll (March 10, 2011), available at http://www.quinnipiac.edu/images/polling/ct/ct03102011.doc (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office). Notably, however, preference for the death penalty dropped to only 48 percent when respondents were presented with a choice between the death penalty and life in prison without the possibility of parole (favored by 43 percent) as a punishment for murder. Id. These results show not only the public response to a single horrific event, but also the significant disparity between the results of a question aimed at gauging general sentiment (approval of capital punishment) and the results of a question aimed at provoking more measured moral calculus (choice between death and life in prison without parole). Although popular anger and hatred are understandable responses to the perpetration of heinous crimes, the court cannot be guided by this anger: our role as interpreters of Connecticut's constitution is not to implement the darkest passions of the masses, but, rather, to pay honor to the highest principles of the communal body from which the constitution derives its force. As Justice Brennan has observed: "Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the

[c]onstitution declares that the majoritarian chorus may not alone dictate the conditions of social life." *McCleskey* v. *Kemp*, 481 U.S. 279, 343, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (Brennan, J., dissenting).

I turn next to the other claimed social goal of capital punishment, deterrence of future criminal acts. The ultimate test of this deterrence claim is whether the state, by executing some of its citizens, better achieves the unquestionably legitimate goal of discouraging others from committing similar crimes. As a general matter, the empirical evidence regarding deterrence is inconclusive.[7] Following the abolition of the death penalty for all future offenses committed in Connecticut, however, it is possible to determine the *exact* number of potential crimes that will be deterred by executing the defendant in this case. That number is zero.

Upon review of both the objective evidence of prevailing norms of human decency, as well as other relevant social and legal factors, I cannot but conclude that capital punishment is incompatible with the evolving standards of human decency in our society. All punishment carries with it a certain element of unpleasantness, and this unpleasantness certainly does not render all punishment constitutionally suspect. What sets the death penalty apart is the peculiarly absolute and irrevocable nature of the sanction, which forever exiles an individual not merely from the community of law-abiding citizens, but from the community of humanity completely. In Connecticut this destruction of human life will save no other lives, and it will prevent no future crimes. It is gratuitously inhumane, and, even if meted out only to the worst offenders,[8] it simply cannot be reconciled with the standards of decency that mark our evolving society.

II

Although my conclusion in part I of this concurring and dissenting opinion that the death penalty constitutes cruel and unusual punishment in violation of Connecticut's constitution is itself dispositive, I nevertheless also feel compelled to highlight the deeply troubling question of whether the death penalty also carries an unconstitutional risk of arbitrary and racially discriminatory enforcement.

In 1972, in *Furman* v. *Georgia*, supra, 408 U.S. 239–40, the United States Supreme Court invalidated as unconstitutional all of the death penalty schemes that then existed in the United States. Although there was no clear majority in that decision, each of the concurring opinions expressed grave concerns that the death penalty, as it was then incarnated, was inflicted both arbitrarily and discriminatorily. See id., 240 (Douglas J., concurring); id., 257 (Brennan, J., concurring); id., 306 (Stewart, J., concurring); id., 310 (White, J., concurring); id., 315 (Marshall, J., concurring). Numerous jurisdic-

tions responded to the court's decision in *Furman* by enacting legislative reforms of their death penalty procedures, and in *Gregg* v. *Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), the Supreme Court concluded that Georgia's clearer standards and procedures for guaranteed review of a death sentence were constitutionally adequate protections against racial discrimination and other forms of arbitrary enforcement. I concede, as I must, that Connecticut's death penalty scheme is wholly consistent with the United States Supreme Court's decision in *Gregg*; nevertheless, I believe there is an altogether too serious possibility that the scheme's formal protections against arbitrary and discriminatory enforcement are, in practice, insufficient to satisfy the requirements of our state's constitution.

The question of whether the death penalty is imposed in an arbitrary manner has been thoroughly and intelligently considered by Justice Blackmun, who observed that "the decision whether a human being should live or die is so inherently subjective—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the [c]onstitution." *Callins* v. *Collins*, 510 U.S. 1141, 1153, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994) (Blackmun, J., dissenting from denial of cert.); see also *State* v. *Cobb*, 251 Conn. 285, 544, 743 A.2d 1 (1999) (*Norcott, J.*, dissenting) ("[t]he objective standards needed to ensure a consistent application of the death penalty cannot be reconciled with the subjectivity of the final determination by the sentencer once he is afforded a certain degree of discretion to include such factors as mercy and compassion"), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000). I agree entirely with these assessments and their attendant thorough considerations of the issue of impermissible arbitrariness. I nevertheless want to consider more closely the narrower, but related, question of whether the death penalty is inflicted in a discriminatory manner.[9]

I focus my discussion on the racially skewed imposition of the death penalty, though I note that other forms of invidious discrimination also pave a smoother path to execution for a subset of the population.[10] There are substantial reasons to believe that the death penalty has been pervasively and persistantly enforced in a racially biased manner. The findings of the now famous Baldus study; see *McCleskey* v. *Kemp*, supra, 481 U.S. 286–91; along with the results of numerous subsequent studies; see, e.g., State of Connecticut, Commission on the Death Penalty, "Study Pursuant to Public Act No. 01-151 of the Imposition of the Death Penalty in Connecticut" (2003), pp. 17–25 (characterizing several studies indicating racial disparities in death sentencing); leave little doubt that in general an individual accused of killing a white victim or victims stands a dispropor-

tionately higher chance of being sentenced to death than an otherwise identical individual accused of killing a black victim or victims. There is also little doubt that a black individual accused of homicide stands a significantly higher risk of being sentenced to death than an otherwise identical white defendant. See *McCleskey* v. *Kemp*, supra, 286–91.

In Connecticut specifically, one need only look at the racial statistics of our small death row to recognize that racial disparity is a hallmark of capital sentencing: of the eleven men currently under a sentence of death in Connecticut, including the defendant in this case, six are black and five are white. According to the 2010 census, 77.6 percent of Connecticut citizens are white; only 10.1 percent of the population is black. United States Census Bureau: State & County Quick Facts, Connecticut, available at http://quickfacts.census.gov/qfd/states/09000.html (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office). The results of a recently released and in-depth statistical study of capital punishment in Connecticut accord with the clear implication of these raw numbers. The study, which examined data based on every potential capital murder conviction in the state between 1973 and 2007,[11] observes that "minority defendants who commit capital-eligible murders of white victims are six times as likely to receive a death sentence as minority defendants who commit capital-eligible murders of minority victims (12 percent versus 2 percent). Minority defendants who murder white victims are three times as likely to receive a death sentence as white defendants who murder white victims (12 percent versus 4 percent)." J. Donohue, "Capital Punishment in Connecticut, 1973–2007: A Comprehensive Evaluation from 4686 Murders to One Execution" (October 15, 2011), p. 7, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1095&context=john_donohue (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office). I thus must reiterate the distressing, but compelling warning that there is a serious possibility that in Connecticut "[i]f the defendant is an African-American, he is more likely to receive the death penalty than if he were white. If the victim is white, a defendant also is more likely to receive the death penalty. If the defendant is an African-American and the victim is white, the defendant is highly more likely to receive the death penalty." *State* v. *Cobb*, 234 Conn. 735, 768, 663 A.2d 948 (1995) *(Berdon, J.*, dissenting).[12]

Of course, even if it were undisputed that the death penalty's implementation is racially biased, I recognize that in *McCleskey* v. *Kemp*, supra, 481 U.S. 313, the United States Supreme Court concluded, in part, that evidence of systemic discrimination in the death penalty system could not, by itself, sustain a determination that any individual defendant had been sentenced to death

as a result of racial bias. It is incredibly difficult—bordering on impossible—to demonstrate prohibited animus behind the decision to charge an individual with capital felony, behind the refusal to accept a plea to a lesser penalty, behind the jury's decision to convict or behind the jury's decision to select one of its fellow human beings for death. It is the rare case where a prosecutor foolishly sends out a memorandum instructing his office to charge capitally all eligible defendants of a certain race. It is the rare case where, in negotiations with a defense attorney, a prosecutor states that he would accept a plea to a term of imprisonment but for the victim's race. It is the rare case where the jury foreperson, in delivering a guilty verdict, or a sentence of death, includes a damning racial epithet that may reveal their true motivations.[13] It is not, however, the rare case, where at least one of these decisions—even if unconsciously—is influenced by considerations of the race of the defendant, the victim, or both.

In light of the well developed statistical evidence regarding the impact of race on the American death penalty broadly, and the data suggesting the impact of race on that system in Connecticut specifically, it is impossible to avoid this question: of the eleven men on Connecticut's death row, how many of them are there because of an impermissible racially motivated decision? In light of the significant statistical evidence regarding race in the death penalty system, and in light of the huge disparities between the demographics of our state and the demographics of the men our state hopes to exile from itself entirely, I am left deeply in doubt that the present population of Connecticut's death row reflects a just, reasoned and racially neutral determination of who is most deserving of death.

In the absence of any direct evidence, of course, I am unequipped to determine whether any given person on Connecticut's death row is there for impermissible reasons. The only people who could possibly answer that question—and I acknowledge that many of them may not even realize the answer—are the actors who, guided I strongly suspect at least partially by racial bias, contributed to each individual's ultimate arrival on death row. This creates an obvious problem: assuming that some number of people on death row should not be there, because their death sentences were at least in part a product of racial animus, their death sentences should clearly be vacated.[14] In the absence of direct evidence of such discrimination, however, it is impossible to vacate only those sentences that were produced by prohibited factors. There are, therefore, as far as I can determine only two possible courses of action to address this problem: (1) do nothing, and allow individuals whose sentences were influenced by race to remain under sentence of death; or (2) vacate all death sentences and disallow the imposition of any

further such sentences as racially discriminatory.

Only one of these alternatives offers a legally and morally justifiable way forward. The constitution and the standards of our society cannot possibly countenance ending a human life for racist reasons.[15]

I articulate today my belief that the death penalty, even when implemented consistently with our present statutes, is impermissible, and I "dissent from [the decision] . . . that the death penalty can be administered in accordance with . . . our state's constitution." *State* v. *Breton*, supra, 264 Conn. 447 (*Norcott*, *J.*, dissenting). It is a reality, albeit a difficult one, that even a person who commits the most heinous and unforgivable acts is still one of us—a member of the human community and of our society. In killing those we have condemned, we seek not only to punish by death, not only to punish by declaring another to be undeserving of his status as a human being, but to declare ourselves superior to and fundamentally different from those whom we coldly choose to exile irrevocably from our society. In this, we are misguided. No matter how fervently some may wish it otherwise, all individuals are entitled, as citizens of this state and, more fundamentally, as human beings, to be treated with the dignity and respect that is the hallmark of our society. We should not engage in the same kind of conduct in the name of justice that we, as a civilized society, condemn.

[1] I note that this law is not the subject of the appeal before us, and I therefore express no opinion regarding its validity or its proper interpretation.

[2] I note that both legislators, Senator Edith Prague and Senator Andrew Maynard, have subsequently voted to repeal capital punishment. Vote for Senate Bill No. 280, Sequence No. 76, April 5, 2012, available at http://www.cga.ct.gov/2012/VOTE/S/2012SV-00076-R00SB00280-SV.htm (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office).

[3] Steven Hayes and Joshua Komisarjevsky were convicted, in separate trials, of capital murder in relation to these crimes and were each sentenced to death; neither of these convictions or sentences has yet been reviewed on appeal or under General Statutes § 53a-46b. I therefore do not comment on these cases.

[4] Similarly, as the philosopher Richard Rorty has noted of the atrocities committed in Bosnia, "Serbian murderers and rapists do not think of themselves as violating human rights. For they are not doing these things to fellow human beings . . . . They are not being inhuman, but rather are discriminating between the true humans and the pseudohumans. . . . [Thomas Jefferson] was able both to own slaves and to think it self-evident that all men were endowed by their creator with certain inalienable rights. He had convinced himself that the consciousness of Blacks, like that of animals, 'participate[s] more of sensation than of reflection.' Like the Serbs, Mr. Jefferson did not think of himself as violating *human* rights." (Emphasis in original.) R. Rorty, "Human Rights, Rationality and Sentimentality" in The Politics of Human Rights (The Belgrade Circle ed., 1999), p. 167.

[5] I recognize that the United States Supreme Court recently determined in *Baze* v. *Rees*, supra, 553 U.S. 35, that such methods of execution do not pose an unconstitutional risk of pain under the federal constitution; this does not mean, of course, that the risk of pain posed is consistent with the standards of decency that determine the boundaries of acceptable punishment under the Connecticut constitution.

[6] I note also the obvious fact that the irreversible nature of the death penalty makes the possibility of the conviction and execution of a factually innocent person uniquely dangerous. With the exception of the fact that a substantial question exists as to whether the defendant in the present case

was in fact the "triggerman," a review of the individuals presently under sentence of death in Connecticut reveals that there is no realistic question of guilt in any of their cases. I nevertheless have concerns over the very possible risk that an innocent person could be condemned to death and potentially executed in our state. Although we have apparently avoided that unspeakable pitfall so far, there is nothing inherently more trustworthy about our death penalty system than the death penalty systems of states such as Texas or Missouri, both of which are among the states that have almost certainly sent innocent people to their deaths. See D. Grann, "Trial by Fire: Did Texas Execute an Innocent Man?" The New Yorker, September 7, 2009, available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office) (describing Texas execution of probable innocent Cameron Todd Willingham); Associated Press, "Did Missouri execute an innocent man?" July 12, 2005, available at http://www.msnbc.msn.com/id/8556687 (last visited April 20, 2012) (copy contained in the file of this case with the Supreme Court clerk's office) (describing likely innocence of Larry Griffin, prisoner executed by state of Missouri). I hesitate to accept as a given that Connecticut will somehow continue to avoid the inadvertent and unforgivable sentencing of an innocent citizen of our state to death.

[7] I note that some studies indicate that there is no general deterrent effect to capital punishment and that there may even be a statistically significant correlation between a jurisdiction's retention of the death penalty and a slight increase in violent crimes, while other studies indicate that a deterrent effect may exist. Compare J. Fagan, "Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment," 4 Ohio St. J. of Crim. L. 255, 261 (2006) (describing purported errors in studies purporting to show deterrent effect of death penalty and concluding "[t]here is no reliable, scientifically sound evidence that [shows that executions] can exert a deterrent effect"), with M. Frakes & M. Harding, "The Deterrent Effect of Death Penalty Eligibility: Evidence from the Adoption of Child Murder Eligibility Factors," 11 Am. L. & Econ. Rev. 451, 494–95 (2009) (concluding that death penalty has significant deterrent effect on some crimes).

[8] In light of my conclusions in part II of this concurring and dissenting opinion that the death penalty is imposed arbitrarily and in a racially discriminatory manner, it should be unsurprising that I do not accept the contention that Connecticut effectively directs the imposition of the death penalty against those offenders who are most "deserving" of such punishment.

[9] I treat the question of arbitrariness in enforcement as encompassing questions of whether the death penalty is implemented in unpredictable and random ways that cannot systematically be explained by any factor or set of factors—whether permissible or otherwise. In contrast, my discussion of whether the death penalty is imposed in a discriminatory manner concerns the question of whether the death penalty is imposed consistent with an *impermissible* factor or set of factors.

[10] This discussion does not, for instance, take account of the additional reality that the death penalty is also disproportionately implemented against individuals of significant socio-economic disadvantage. As with my prior discussion of the risk of executing an innocent person; see footnote 6 of this concurring and dissenting opinion; I cannot dedicate the appropriate level of attention to this weighty concern to do it complete justice. Nevertheless, I note briefly that the economically discriminatory nature of the death penalty presents yet another unacceptable defect in the system.

[11] This study, though publicly available, was prepared in connection with an ongoing habeas corpus proceeding in which "[s]everal defendants who have been sentenced to death in Connecticut have filed petitions for writs of habeas corpus in which they claim that the state's capital punishment scheme is illegal, arbitrary, discriminatory, disproportionate, wanton and freakish due primarily to the influence of race and other arbitrary factors on the imposition of capital punishment throughout Connecticut." *State* v. *Ross*, 272 Conn. 577, 582, 863 A.2d 654 (2005). I therefore point to this study not for the ultimate truth of its assertions but as a provocation to critical inquiry. I leave it to the course of judicial process to pass definitive judgment on the soundness of the study's data and its ultimate conclusions regarding the impact of race on the death penalty in Connecticut. The results of the study do not reflect the death sentences imposed on Lazale Ashby, Steven Hayes or Joshua Komisarjevsky, as these convictions and sentences occurred too recently to be included in the study's data set. As I previously have indicated; see footnote 3 of this concurring and dissenting opinion;

the Hayes and Komisarjevsky cases have not yet received appellate review.

[12] It is equally disturbing that in Connecticut, the judicial district in which an individual faces capital charges may well have an enormous impact on whether that person is ultimately sentenced to death. See J. Donohue, supra, pp. 193–94 (identifying dramatic increase in likelihood of death sentence in judicial district of Waterbury relative to other judicial districts); State of Connecticut, Commission on the Death Penalty, supra, pp. 28–35 (describing disparity in geographic distribution of death sentences, offering explanations, and proposing possible remedial measure). It is deeply disturbing—and patently arbitrary—that the judicial district in which a capital crime takes place can serve as a reasonably accurate predictor of outcome in the case.

[13] I acknowledge the possibility that in some small number of death penalty cases, each of these decisions could be made for reasons free of racial animus. It is because I acknowledge that possibility that I must accept the reasoning of the court in *McCleskey*. Nevertheless, even in such cases, the risk of such animus remains intolerably large. Furthermore, even in the total absence of racial or other prohibited animus, the decisions rendered at each of these stages introduces far too great a risk of arbitrary enforcement to allow for legitimacy.

[14] Of course, even that remedy would be inadequate to address the problem that racial animus likely plays a large role in both charging and plea bargain decisions; accordingly, even vacating death sentences fails to remedy those inequalities, as an individual whose death sentence was vacated would instead be sentenced to life in prison, whereas similar individuals who avoided racially motivated decisions at the earlier stages would conceivably serve more lenient sentences.

[15] "Decisions influenced by race rest in part on a categorical assessment of the worth of human beings according to color, insensitive to whatever qualities the individuals in question may possess." *McCleskey* v. *Kemp*, supra, 481 U.S. 336 (Brennan, J., dissenting). All individuals in our society deserve better than to be the object of such judgment, and never more so than when the responsibility for our very existence is placed in the hands of others. In light of certain elements of our nation's recent history, I take it as a matter too obvious to discuss that our state's constitution could not, in the twenty-first century, permit a hateful and vengeful system that takes the lives of predominantly black men generally accused of crimes against whites. The parallels to a prior, equally untenable system of "justice" that once prevailed in much of this country are all too clear. While significant social progress has been made since those days, the continued exercise of a racially charged system of extermination, coupled with the disparate treatment even of *victims* based on their race, is yet another reminder that our society's long path toward equality is far from complete. There is no better next step than the rejection of a system that is, in reality, little more than the heir to lynch mobs.