CHAPTER 30

THE DARK AT THE TOP OF THE STAIRS: FOUR DESTRUCTIVE INFLUENCES OF CAPITAL PUNISHMENT ON AMERICAN CRIMINAL JUSTICE

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State execution is a tiny part of the nation’s practice of criminal punishment but casts a long shadow over the principles and practice of criminal justice generally. At no time in the last century has the number of executions in the United States exceeded 4 percent of its criminal homicides, and the 98 persons executed in 1999 (the highest number in the last 60 years) were less than 1/100th of one percent of the persons in prison at the end of that year (BJS 2000, 2000a). In 2009, there were more than 14,000 homicides in the United States but only 106 death sentences, making the chance of any particular killer being caught, convicted, and sentenced to death “vanishingly small” (Garland 2010). Execution is not a major element of America’s system of crime control, and yet this drastic punishment for a very few has not only generated huge attention and concern but has also (1) had a powerful negative influence on the substantive criminal law; (2) promoted the practice of using extreme penal sanctions as status rewards to crime victims and their families;
(3) provided moral camouflage for a penalty of life imprisonment without possibility of parole, which is almost as brutal as state killing; and (4) diverted legal and judicial resources from the scrutiny of other punishments and governmental practices in an era of mass imprisonment.

This chapter discusses these four latent impacts of attempts to revive and rationalize the death penalty in the United States. We focus on these effects not because we aim to move the debate about state killing away from its central and most visible harms. Indeed, in some ways the phenomena we discuss here are peripheral to the main political and human issues at the center of the campaign against capital punishment. But at the same time, our focus on the top end of the penalty scale—a frame that includes both death sentences and life without parole—enables us to explore how these most severe sanctions affect each other and also the penalties below them. This focus generates fresh insights about how the death penalty’s ripple effects extend to tens or even hundreds of thousands of offenders beyond those formally charged with capital crimes.

I. The Hyperextension of Substantive Criminal Law

When first-year law students begin to sort through the doctrinal complexities of the criminal law of homicide—the mysterious differences between first degree and second degree murder, the zigs and zags that distinguish murder from various forms of voluntary manslaughter—they are visiting the results of a series of attempts of the substantive criminal law to avoid mandatory capital punishment. The division of murder into a first and second degree in Pennsylvania in 1794 was in order to create with the second degree offense a non-capital category. While the premeditation concept lacked both clarity and moral authority as a life and death legal distinction, the reason for the problematic substantive distinction between the first and second degrees could be justified as the avoidance of executions. The same motive can be found in the origins of manslaughter as a crime encompassing actions intended to cause death or great bodily harm (Kadish, Schulhofer, and Steiker 2007).

But the price of these avenues of mercy was a series of murky distinctions that lacked moral authority and intellectual rigor. The better reform proposals of the Model Penal Code called for the unification of murder into a single grade of crime (with an indeterminate prison sentence as its penalty). Manslaughter, too, was to be restricted to clearly defined emotional mitigations or unreasonable but genuine claims of self-defense (American Law Institute 1962). Whatever the benefits had been in avoiding execution, the lesson by the mid-twentieth century was that subdivisions of murder did not do a good job of bearing the enormous weight of a life versus death distinction. By the time that McGautha v. California and Furman v. Georgia were decided (in 1971 and 1972, respectively), there was no grade of homicide for which a death sentence was mandatory; instead, juries were free to choose
between imprisonment and a death sentence for those convicted of first degree murder with unguided discretion. In *McGautha v. California* (402 U.S. 183), the Supreme Court’s majority opinion approved jury discretion without standards because:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. (*McGautha v. California*)

As an appendix to the Court’s opinion, Justice John Marshall Harlan inserted the Model Penal Code’s death penalty provision, which proposed a framework of “aggravating circumstances,” any one of which could support a death sentence if not offset by “mitigating circumstances” (American Law Institute 1962, § 210.6). The reference was not meant as a compliment, for Justice Harlan presumably saw the provision as evidence of the futility of efforts to produce rational standards that were beyond “human ability.”

Only one year later, the Court reversed course. By a 5–4 vote, the Justices struck down the model of unguided discretion for life-versus-death decisions in *Furman v. Georgia* (408 U.S. 238), effectively invalidating every capital punishment law in the country. This left the states with the need to create new legal standards for death eligibility that would survive constitutional review. What followed was a series of hasty legislative attempts in dozens of states to meet the new requirements, where the legislative goal was not really to distinguish levels of culpability for murder but, rather, to create a formula that would obtain the Supreme Court’s approval for some form of death penalty.

By 1976, the Court gave its seal of approval in *Gregg v. Georgia* (428 U.S. 153) and *Proffitt v. Florida* (428 U.S. 242) to the same Model Penal Code framework of aggravating and mitigating circumstances that Justice Harlan had disapproved five years earlier, as well as to a more mechanical and arbitrary legislative formula from Texas (*Jurek v. Texas*, 428 U.S. 262). A majority of seven of the nine Justices were now satisfied that the constitutional difficulty of unregulated discretion had been solved.

What the Court had demanded in *Furman v. Georgia* in 1972 was a set of principled penal standards to separate cases potentially deserving death from general run-of-the-mill murder cases, in essence a jurisprudence of capital desert. What the *Gregg, Jurek*, and *Proffitt* majorities settled for in 1976 was a list of aggravating and mitigating circumstances without any detailed justification. The formulas accepted from the states were a political success (because they gained the Court’s approval) but a jurisprudential muddle. The single “aggravating factor” in these new statutes that generated more executions than all the others combined was that the killing took place during the commission of a forcible felony such as robbery, rape, or burglary (Turow 2004). But what is it about a killing during a robbery that makes the killer more blameworthy than an attacker who stabs or shoots his victim with the intent to kill but doesn’t wish to take his wallet? The Model Penal Code commentary spends a single sentence on this, the rationale for the majority of modern executions, and gets it wrong. It alleges:
[Felony murder] concerns murder committed in connection with designated felonies, each of which involves the prospects of violence to the person. (ALI Comments on 210.6, 137)

The problem is that non-robbery aggravated assaults lead to victim deaths more than ten times as frequently per thousand acts as robberies, and the death rate from assaults is more than a thousand times higher than the Mode Penal Code’s own studies found for burglary (Zimring 2005, 1404). So why not make malicious assault an aggravating violent intention that makes murder death eligible?

But at least the Model Penal Code provided a single sentence of justification for selecting this critical aggravating factor. The state legislative process usually manufactures or copies a list of aggravating factors with no justification or analysis. Furman requires juries to be guided by rules, but the rules that select candidates for state killings are not subject to any detailed scrutiny in the peculiar jurisprudence of the Eighth Amendment.

The result is an assortment of categorical aggravations—some dealing with the characteristics of the crime (e.g., felony, contract killing, or killing for monetary gain), some dealing with the number or types of victims (e.g., children, law enforcement officers, multiple victims), and some dealing with the status of the offender (killing by prisoner, or by a person previously convicted of murder). Detailed consideration of these factors is almost never evident in the legislative process, nor do constitutional courts question the rationality or moral content of most aggravations, and little legal scholarship has scrutinized the jurisprudence of aggravation.

One consequence of this hasty process has been that several characteristics of homicides do double or triple duty in the grading and punishment of killings. Some legal literature refers to what is called “the felony murder rule,” usually describing a common law doctrine that allows the intention to commit a felony like robbery or burglary to substitute for the intention to seriously injure called “malice,” which is the mental state at common law for murder. This constructive common law shortcut is notoriously unpopular with legal analysts (see ALI 1963; Wechsler and Michael 1938), but it is only the tip of the iceberg in modern death penalty states. In the typical state of California, there are currently three separate penal upgrades using felony status to escalate penal consequences. The common law rule makes the intent to rob or burgle the equivalent of malice. Then the “first degree” statutory felony murder rule makes all killings committed during a listed felony into the first degree crime (Cal. Pen. Code §189). And then the capital statute makes killing during listed felonies eligible for a death sentence (Cal. Pen. Code §190.2). Does this mean that a robber with no intent to injure his victim could be sentenced to death if an accident or a co-felon causes death? Probably. Did the California legislature (or those of 35 other states) consider or discuss this kind of issue?

What happened instead is that state legislative bodies searched around for lists of the usual categories for upgrading the penal stakes in homicide and thought nothing of using them redundantly. Just as the attempt to provide for mercy cluttered up the substantive law of homicide with concepts like premeditation and
intentional but non-malicious killing, when the U.S. Supreme Court required standards for discriminating between death-eligible and other killings, it put more weight on the substantive criminal capacities of those who drafted penal codes in the United States.

The results are redundant, unexamined, and arbitrary. And the Byzantine complexity of all the ascending categories of homicide (manslaughter to murder to first-degree murder to capital murder) is almost a satire on the incoherence of formal legal conceptions of human fault. But the humor is muted by the fact that this apparatus has been the legal boundary between execution and imprisonment for a generation in the United States.

The metaphor we use for the distortive pressure put on the substantive law of homicide by the need to separate killings into capital and normal penal categories is the hyperextension of the criminal law. If you demand from a methodology of classification more than it is capable of producing, the resultant efforts will always be a failure and will frequently appear ludicrous. Asking the criminal law to coherently sort between killings that justify execution and those where protracted imprisonment will suffice is an impossible task in the twenty-first century.

Moreover, pushing the criminal law beyond its capacity may have a destructive impact on domains far removed from the capital section of the modern penal code. When judges encounter obviously vulnerable structures of distinguishing criminal offenses, one tempting alternative to the briar patch of continued judicial scrutiny is to construct doctrines of judicial non-involvement, to assume legislative competence precisely because one's suspicions are that most penal grading is arbitrary. In that way, the flimsiness of the substantive law separating capital from imprisonable murder may have helped create a broader immunity for distinctions of severity in criminal law to continue unchallenged. Once a presumption of non-scrutiny surrounds the rationale of capital statutes, why not extend it to other legislative penalty gradings?

This leaves only Eighth Amendment cruelty as a legal restriction on capital sentencing, and little or nothing in the law to scrutinize penal judgments about prison sentences. In this way, the notoriety of the hyperextended criminal law of capital punishment may have helped maintain a hands-off doctrine on legislative grading practices much broader than the death penalty.

There has been little in the way of scholarly or professional analysis of the standards for choosing between prison and death. The two state government commissions that reviewed current death penalty systems both thought the standards for death eligibility in all operating systems were grossly over-broad, and both commissions urged that a much smaller proportion of murders should be death eligible. Both commissions rejected involvement in a forcible felony as a foundation for a death sentence (Illinois Commission 2002; Massachusetts Commission 2004). But neither of them did a good job of constructing a positive theory of when the commission of a murder might justify or require execution as its criminal punishment.
So the major question looming over the practice of execution—when and why is it necessary?—is a blank page in the otherwise extensive discourse about the death penalty in the United States. And if the most extreme punishment in the system is not justified or scrutinized, then this failure at the very top of the penal enterprise impeaches the legitimacy of the entire system.

II. THE SYMBOLIC TRANSFORMATION TO HARSH PUNISHMENT AS A PRIVATE REWARD

In discussing the shifts in image and justification for capital punishment in the United States after 1979, Zimring has argued that:

The major change in the announced purpose of capital punishment in the U.S. . . . was the transformation of capital trials and of executions into processes that were thought to serve the personal interests of those closely related to the victims of capital murder. The penalty phase of capital trials has become in many states an occasion for telling the jury its choice of sanction is a measure of the value (to the community) of the homicide victim's life. Years after the trial is completed, the execution becomes an occasion to seek psychological 'closure' for the family and friends of the victims . . . The novelty of the emphasis on these aspects of the death penalty after 1977 would be difficult to overstate. The radical degovernmentalization of the death penalty was without important precedent in American history. (Zimring 2003, 52)

The image of state killing as private closure served a number of public relations functions for capital punishment, including reducing the discomfort of citizens worried about the destructive power of the state. If killing is for the benefit of victims, it might seem less worrisome.

The structure of the rhetorical transformation of punishment into a personal benefit can be seen in the facts of the death penalty trial in *Payne v. Tennessee*, where the prosecutor suggested to the jury that a death penalty rather than a life sentence would help the young child of the murder victim when he grows up. “There is something you can do for Nicholas . . . He is going to want to know what happened. With your verdict, you will provide the answer” (*Payne v. Tennessee*, 501 U.S. at 815).³

This sort of status competition between offenders and victims is far from the concept of retribution or just deserts. It asks for punishment to vindicate the value of particular victims, and in doing so assumes that the more punishment that is administered, the better for the victims. There is no obvious limit or excess, no stopping point at which the jury may say “that's more vindication through punishment than little Nicholas will deserve when he grows up.” So the search for punitive symbols as a status reward for victims leads ever upward; it is a one-way penal escalator (Simon and Spaulding 1999).
There is a further strategic advantage to justifying punitive measures as a status reward to victims—the extra harm to the offender need not be based on any other positive impact to the community. As long as the offender’s additional suffering confers extra status on Nicholas and serves as evidence that his mother’s loss saddened the community, who needs extra deterrence, incapacitation, or reform? The open-ended symbolic reward can be construed as all the reason the system needs for a wide variety of penal measures.

The legacy of this symbolic transformation is extensive in American criminal justice. In the past 15 years, there have been a number of settings in which non-capital penal measures have been reimagined as symbolic reaffirmations of the value of victims. First is the use of penal laws as personal memorials or commemorations. Since 1993, 50 states have enacted what they call Megan’s Laws, which the federal government has followed up with the Jacob Wetterling Act and the Adam Walsh Act. The part of the Adam Walsh legislation dealing with juvenile offenders has been dedicated as “Amy’s Law” in honor of a living victim and punishment advocate. California voters enacted “Jessica’s Law” in 2006, providing compulsory geo-tracking of released sex offenders with no apparent supervisory rationale. But, of course, if anything that hurts offenders should make crime victims feel better, who needs more utilitarian justification?

When punishments are used as symbolic rewards, there are two separate effects. One is inflation in the quantity of punishment. If 5 years is good, 10 years must be better, and 15 years would be better still. As long as punishment is a primarily symbolic currency, not even the sky is the limit. That is the central difference between a status competition between victim and offender—with no upward limits—and conventional retribution where penal proportionality is a limiting principle. Twenty-five years to life for a petty theft “third strike” almost certainly offends requirements of proportional justice, but if the point of “third strike” sentences is to make the families of crime victims feel better, then there is no such upper limit to symbolic affirmation.

A second consequence of penal measures having primarily hierarchical and symbolic meanings is that punishments tend to proliferate in kind. Penal confinement certainly remains a mainstay of American punishment, but both the variety of prison terms and the proliferation of penal add-ons are major developments in crime policy after 1990. If every distinction is a new status reward, why not create special forms of imprisonment—“two strikes” sentences, “three strikes” sentences, life without possibility of parole—where each new rung on the penal ladder creates another distinction that is a status reward? Similarly, the registration, residence prohibitions, public notices of address, and drugs called “chemical castration” provide steps up the punishment ladder that are independent of imprisonment for sex offenders and can function as status rewards for sex crime victims imagined as beneficiaries. Thus, the multiplication of forms of punishment can be seen as another by-product of making penal measures into status rewards.
Cause or Consequence?

Are all of these Amy’s Laws and “three strikes” constructions really the bastard offspring of victim impact statements in the capital punishment system that grew in the 1970s and 1980s? One alternative possibility is that the proliferation of punishments as status rewards (à la “three strikes” and Megan's Laws) and the degovernmentalization of state killings were both produced by a changing politics of punishment, so that the death penalty experience did not encourage the non-lethal proliferation of symbolic punishments (see Zimring, Hawkins, and Kamin 2001, 151–180). This view would regard the degovernmentalized death penalty and the Adam Walsh Act as siblings rather than as parent and child.

The question is a close one. The invention of victim impact focus and closure in the death penalty did precede most of the other penal proliferations, but not by much, and it is certainly possible that both are effects of an unspecified prior cause. But another argument for seeing other penal forms as the legacy of the death penalty is that the concentration of these new personal and symbolic measures in the United States is much greater than elsewhere. This is circumstantial evidence that this country’s adventure with the symbolic transformation of the death penalty played a causal role in the proliferation of other victim status rewards. But here again, perhaps the same cultural forces that relaunched and transformed the American death penalty would have produced Megan's Laws as well, even without the peculiar developments in capital punishment. The ambiguity as to the ancestry of this species of American exceptionalism cannot be conclusively resolved.

Regarding some aspects of American penal developments, however, the causal responsibility of capital punishment for non-capital penal innovations is beyond controversy, and one of those, the metastasis of life without the possibility of parole, is the subject of the next section.

III. The Problematics of Life Without Parole (LWOP)

The inclusion of life terms of imprisonment without possibility of parole in the previous section's list of penal innovations may at first glance seem like a logical error. Imprisonment has been a part of punishment for centuries, and life terms are also a long-standing feature of imprisonment for crimes of the highest seriousness. To the extent that parole release became widespread in the United States, one might regard that as the innovation and a Life Without Parole (LWOP) system (where adopted) as merely a return to previous practice. But even then, the life term can always be modified by pardon, commutation, or clemency from the executive branch of government.
While there is technical merit in some of the legal points in the last paragraph, it is a dreadfully inaccurate portrait of the recent history of life without parole. Life without possibility of parole as a distinctive sentencing frame found in legislation was a product of the 1970s. In states that were forced to create a separate category of murder by the Supreme Court’s death penalty discussions in 1976, the alternative to a death sentence that also had to be part of the scheme was usually defined as Life Without Possibility of Parole (see e.g., Georgia, Alabama, and California). In all but four states and the federal system, the life-without-parole sentence was a new subcategory of life terms, which did not replace the old life terms but rather was what the previous section called an “add-on” to conventional life terms, a step up the penal ladder from ordinary life terms. What are the motivations for creating this new step?

In some jurisdictions, LWOP sanctions were welcomed or encouraged by death penalty abolitionists who sought an alternative to the capital sentence that might be attractive to juries at the sentencing stage of capital trials (Liptak 2005; Hood and Hoyle 2008). And in all cases, LWOP provides a symbolically distinct status for victim families, a step up the punishment ladder from ordinary life terms that will certify the importance of the victim’s loss. LWOP also reassures those who distrust government actors and fear that parole will be granted later in a prison sentence. Finally, the LWOP innovation in the 1980s and 1990s provided an enhanced penalty for the symbolic sweepstakes that was of particular importance in murder trials.

Life without possibility of parole becomes a consolation prize in many death penalty states when a capital defendant is convicted of the top grade of the murder offense but does not receive a death sentence (Cal. Pen. Code §190.2). In some states without a death penalty, the special version of life known as LWOP provides a distinct kind of life term to establish the special severity of the crime. This is the evident purpose in states such as Massachusetts, Rhode Island, Maine, Michigan, and Iowa.

Putting aside distrust of government, there is no penal theory to distinguish life without parole from life with parole chances in the 37 states of the United States that have both kinds of life sentence in effect. It certainly is not based on individual predictions of dangerousness, because LWOP is usually mandatory if the defendant has been convicted of the top grade of murder. As discussed in the first section of this chapter, the singling out of felony or multiple killings for retributive reasons is also not an easy matter.

What is clear is that the death penalty is the dominant partner in all places where LWOP became an add-on punishment rather than a new version of all life terms. In non–death penalty states, it is the red meat to symbolize the victim’s special status in the most serious murders. Where capital murder charges do not produce death sentences, the LWOP outcome is frequently the mandatory minimum sentence available if the defendant pleads guilty to the charges or is convicted at trial.

Mercy or Penal Inflation?

While the separate LWOP sentence might have originally been considered an alternative to death sentences, the LWOP population in the United States now far...
outnumbers those under sentence of death, and is growing swiftly. A 2009 report shows an expansion of LWOP prisoners from 12,453 in 1993 to 41,095 in 2008, for an increase of 230 percent (Nellis and King 2009, 10). Table 30.1 presents estimates from an earlier Sentencing Project report (2004) of the number and rate per 100,000 population of LWOP sentences as of 2004 for the seven states with the highest number of LWOPs.

The first finding from table 30.1 is that the large number of LWOP sentences in the United States does not result from non–death penalty states adopting this innovation. Six of the top seven users in 2004 were states with capital punishment, including Louisiana, the runaway leader in LWOPs per 100,000 population, with a rate 2.5 times that of the next highest state (Florida). The second feature of table 30.1 is the tremendous variation in rates of usage. Louisiana (with a death penalty) has an LWOP rate ten times that of retentionist California and eight times higher than abolitionist Michigan. One reason that states like Louisiana and Pennsylvania have such large LWOP populations is that they entirely displaced the standard life with parole structure. But even states that retained standard life terms, like Florida and Alabama, have high LWOP rates, 50 times or more their cumulative execution rates. And California, which restricts LWOP to capital murder convicts who are not sentenced to death, has an LWOP total that is five times its death row population.

So, in the great majority of cases, the LWOP sentence is an expansion of punishment rather than a reduction or an alternative to some standard life term. The LWOP sentence is frequently provided for top grades of murder in non–death penalty states and was thought to be necessary in New Jersey when the legislature abolished the death penalty in 2007. Some analysts contend that an LWOP alternative reduces the rate of death verdicts when states provide both options (Hood and Hoyle 2008, 390), but there is little evidence that the large number of LWOP sentences in death states like Louisiana and Alabama has produced fewer death sentences in either location. While there may be cases in which a jury selects LWOP as a parole-free alternative when they might have rejected a standard life term in favor

<table>
<thead>
<tr>
<th>Number of LWOP</th>
<th>Rate per 100,000 population in 2004</th>
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<tbody>
<tr>
<td>Florida</td>
<td>4,478</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>3,865</td>
</tr>
<tr>
<td>Louisiana</td>
<td>3,822</td>
</tr>
<tr>
<td>California</td>
<td>2,984</td>
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<tr>
<td>Michigan</td>
<td>2,629</td>
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<tr>
<td>Alabama</td>
<td>1,334</td>
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<tr>
<td>Illinois</td>
<td>1,291</td>
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of a death sentence, there is no evidence of systematic decline in death sentencing rates in LWOP states (Harvard Law Review 2006; Appleton and Grover 2007; Hood and Hoyle 2008, 391). A more direct approach to the problem of jury mistrust of parole would be judicial instructions that address the tendency of jurors to underestimate the amount of time that offenders will serve if they are not sentenced to death (Sundby 2005, 184).

One setting where LWOP seems like shipping coals to Newcastle is California, where voter-passed initiatives and politically sensitive governors make the release through parole of any first-degree murderer a very rare and visible event. There were nevertheless 3,000 LWOP terms in place by 2004 (see table 30.1). The demand for LWOP in this environment strongly suggests that the symbolic distinctiveness of the penalty remains attractive even when its practical impact in delaying release from prison is near zero.

There are few penal measures in modern history in which the gap between public perception and actual impact is as great as for LWOP. Here is a mandatory minimum punishment that lasts a lifetime but carries a reputation as an act of mercy. Used now in tens of thousands of cases, it has seldom been subject to serious scrutiny in academic literature or to skepticism in legislative discourse. Nothing combines high fiscal expense with low preventive potential quite as much as a 79-year-old inmate with limited physical mobility and high medical bills who cannot be paroled. So why is the law that leads to this outcome immune from criticism?

It is capital punishment that provides LWOP with moral camouflage as the lesser of evils in American criminal justice. Death penalty opponents delight when survey research shows the public closely divided between the death penalty and LWOP, and they think that this capacity to compete with capital punishment reflects the operational significance of LWOP in legislation and in the judicial system. But only a tiny fraction of the many thousand LWOPs are really death penalty substitutes. And while life without parole is sometimes useful as a rhetorical substitute for death in efforts to legislate abolition (as it was in New Jersey in 2007 and the Philippines in 2006), it should be used carefully (Johnson and Zimring 2009, 103). It is essential that any use of LWOP be restricted to the most serious punishment available for the highest grade of murder and never as the only punishment available for any grade of crime.

The causes of the proliferation of LWOP and its remedy deserve far more attention from legal scholars and social scientists than they have received. Any cluster of penal sanctions that includes state killing will divert attention from everything in the cluster except execution, and that is why so little attention has been focused on LWOP. Executions provide moral camouflage for the next most severe sanction—an emotional innocuousness and innocence by comparison—because state killing makes everything else appear merciful and mild. This insight also raises the question of whether the American focus on capital punishment has desensitized public concern about the huge growth of imprisonment in the generation after 1975, a question that some scholars answer in the affirmative (Gottschalk 2006).
The big gap between how most people think life without parole works and its actual operation suggests one reasonable strategy for law reform. The best approach may be to propose changes in law and practice that would make LWOP in practice conform to its image as a sanction for only the most extreme cases. The tactic would be to replace 120 death sentences a year in the United States with 160 or 200 LWOPs, rather than with 3000! This would require routine administrative review of most long and life sentences, a sharply restricted category of LWOP cases for the most culpably guilty of the highest grade of murder, where any prospect of release would demigrate the seriousness of the crime committed. But the distance between such a system and a current jurisprudence in which the LWOP sanction takes out the garbage left in the legal and administrative death penalty process must be measured in light years.

In the best of all possible American legal systems, there would be no LWOP or any need for it. In the near term, however, the best we can expect is to rationalize and reduce the scope of the penalty by making it live up to its advertised image.

There is one other reason that the death penalty has diverted attention from extreme penal measures like LWOP. The amount of resources and attention that can be devoted to preserving liberty and limiting the exercise of state power is limited. The need to spend time, care, and effort on limiting the use of capital punishment diverts these scarce resources from being used to examine other governmental threats. In this way, the need to struggle against the death penalty has limited the capacity to scrutinize and protect against other abuses of state power, in many more arenas than life without possibility of parole (Hood and Hoyle 2008, 383). The impact of the revival of the death penalty on the priorities and limits of the guardians of justice is the final effect that we consider.

**IV. Diversion of Legal and Judicial Resources from the Scrutiny of other Uses of State Power**

The legal and material resources devoted to maintaining the death penalty in the United States play a prominent role in discussions of the economic cost of capital punishment, as they should. Capital punishment systems in the United States are always more expensive than punishment systems without death as a sanction because “super due process” is required in the former but not in the latter and because lawyers are a lot more expensive than prison guards (Bohm 2003, 592).

But the *opportunity costs* of the legal concentration on capital cases may be more important than the monetary expenditures. In any developed nation, there are only a limited number of lawyers with the political values and special skills required to defend against governmental excess in the prohibition of conduct and
the punishment of crime. The death penalty is, and should be, a magnet for those attorneys concerned with excessive governmental power of this type. But when most of these fine lawyers are concentrating on the 3,500 capital defendants on death row in the United States, the result is a shortage of resources to monitor state authority in a nation with more than 2 million persons behind bars. In the generation since the death penalty was reintroduced in the United States, imprisonment has expanded more than sevenfold and the jail population has tripled. The opportunity costs of putting so many resources into the death penalty system for human rights and procedural justice in the rest of the criminal justice system are uncounted but no doubt substantial (Steiker and Steiker 2006).

There may also be a drain on judicial and administrative actors who become preoccupied with due process in the death penalty system (Dickson 2006; Gillette 2006; Goldberger 2006; Hawkins 2006; Hintze 2006; Leyte-Vidal and Silverman 2006; Walker 2006; Kozinski 2004). Since the number of resources devoted to quality control in criminal justice is limited, the opportunity cost of super due process in the capital system is less scrutiny on other parts of the criminal justice system. The docket of the U.S. Supreme Court reflects the diversionary impact of the death penalty. From 1976 to 1996, death penalty cases flooded the Court from the state systems, but only the tiniest trickle of cases dealt with the rules and discretion that generated explosive growth in American imprisonment.

In order to investigate this phenomenon, we counted criminal cases granted full review by the Supreme Court in 1995 and 2005. In 1995, the Court heard 12 criminal cases (out of 82 granted full review), and 5 of the 12 were capital. In 2005, the Court heard 9 criminal cases, and 4 were capital. So nearly half of all criminal cases (9 of 21) reviewed by the Supreme Court during this period have been death penalty matters, while the ratio of imprisonment to execution in the United States is more than 15,000 to 1, and the ratio of imprisonment to death sentence is more than 500 to 1. There is an acute shortage of resources and concern to scrutinize the vast expansion of state punishment in the United States.

The opportunity costs of capital punishment are also evident at the state level. In California, home of the largest death row in America,5 the safeguards in place to protect the wrongly convicted are especially small for prisoners with long or life sentences. Defendants facing a death sentence get two court-appointed trial lawyers in addition to funds for investigators and expert witnesses. If they are convicted, the state pays for multiple appeals in the California Supreme Court and in the federal courts. Lifers, by contrast, are entitled to a single lawyer at trial and another one for a state court appeal, with almost no chance of review by the state Supreme Court. After that, they are on their own. The state also pays to reinvestigate cases that result in a death sentence, but not botched cases that lead to life imprisonment. So capital cases get a decade or more of appellate scrutiny, while lifer cases get only a year or two. And according to the U.S. Supreme Court, “actual innocence” is reason to reverse a conviction only if someone is on death row—not if the sentence is life. Thus, an innocent Californian convicted of murder may be better off being sentenced to death than to life, for a miscarried capital case will at least get a long look.
Lawyers find death cases more appealing, too. Jeff Adachi, San Francisco’s public defender, once tried to arrange pro bono legal assistance for a prisoner named John Tennison. Several large law firms initially expressed interest, but when they learned that Tennison was only a lifer, they refused to get involved (Martin 2004).

It is difficult to measure the aggregate damage inflicted on the institutions and objects of American criminal justice because the best human resources in the legal profession were diverted to the struggle against capital punishment. But missing protections against governmental excess may be the most enduring legacy of the American resurgence of capital punishment, a burden that could continue long after the executioner has been retired.

NOTES

1. Technically the cases presented different constitutional claims. The challenge in McGautha was based on the Due Process Clause, while Furman was premised on the Cruel and Unusual Punishment Clause.
2. Justice Harlan retired in 1971, and was replaced by Justice William Rehnquist. Also new to the Court after the Furman decision were Justices Louis Powell and John Paul Stevens.
3. In its Payne decision of 1991, the Supreme Court held that the Eighth Amendment does not bar the admission of victim impact evidence during the penalty phase of a capital trial.
4. Search conducted by Christopher Felker at Boalt Hall School of Law.
5. As of May 2009, more than 20 percent of America’s death row convicts (678 out of 3297) were incarcerated in California (Death Penalty Information Center 2009).

REFERENCES


*Furman v. Georgia*, 408 U.S. 238.


