

UC Berkeley

JSP/Center for the Study of Law and Society Faculty Working Papers

Title

No Rationale for the Law of Homicide, How Governing Through Crime Has Devolved the Law of Homicide and Locked in Hyper-Punishment

Permalink

<https://escholarship.org/uc/item/2rs5m17q>

Author

Simon, Jonathan S

Publication Date

2009-06-26

No Rationale for the Law of Homicide
How Governing through Crime Has Devolved the Law of Homicide and Locked
in Hyper-Punishment

4th Annual Roger Hood Public Lecture
Centre for Criminology
University of Oxford
May 21, 2009

Jonathan Simon, UC Berkeley, School of Law
May 2009

“[T]he law of homicide is but one element in a vast legal cosmos
serving the purpose of protecting life.”

Herbert Wechsler and Jerome Michael (1937)¹

Introduction: Mass Imprisonment and the Law of Murder

California and to a lesser extent the US as a whole, remains caught in a crisis of over-punishment, anchored in the phenomenon that has come to be known as mass imprisonment,² i.e., the extension of imprisonment indiscriminately to whole categories of people and on a scale well beyond historical or comparative experience. There are promising signs of change in American governance that would predict a turn away from mass imprisonment. The economic crisis, and the long term challenge of climate change will require a new set of priorities, ones deeply incompatible with the war on crime (and terror), the practice of governing through crime, and the culture of control we have created.

¹ Herbert Wechsler and Jerome Michael, *A Rationale of the Law of Homicide*: I, 37 *Col. L. Rev.* 701-761, 729.

² David Garland, ed. *Mass Imprisonment: Social Causes and Consequences* (Sage 2001).

But escaping this practice and its legacies turns out to be hard work. The hardest part of this work involves the over punishment of violent crime among youth and adult men. It is now relatively easy to argue that we should find alternatives to imprisonment for people convicted of many drug crimes, and even many non-violent property crimes. Likewise some categories of prisoners, especially women and the very young and old, now also seem to be better placed outside the prison. In contrast, fear of the potential violence of adult men convicted of violent crimes, makes it very hard to argue for reducing prison sentences for violent crimes. Indeed, part of what makes it easy to talk to the public about removing these kinds of prisoners (drugs, non violence, women, etc.) is because the prison in the era of mass imprisonment has become about controlling adult male violence. Consider that in that era where prisons were thought of as hospitals for antisocial behavior disorders it would be drug users, low level property crimes, and women who might be seen as the prime candidates. Instead, it is masculine bodies, raced yes, but above all masculine that the now vast prison system calls out for.³

This link between mass imprisonment and the fear of adult male violence is what I call metaphorically, the “hardback” in contrast to the “soft underbelly” of mass imprisonment. My fear is that this hardback is larger than we imagine and that it operates to draw softer tissues toward it (promoting the growth of incarceration for low level crimes whenever fear is stirred deeply). It does this directly by expanding the category of violent crime,⁴ for example by making a non-violent crime by a person with a previous conviction for a violent crime receive a sentencing enhancement as if it was a violent crime. The use of firearms has also been coded as a violent crime whether or not it results in actual injuries. Indirectly, harsh penalties for violent crime exerts a pull on the penal treatment of non-violent property and drug crimes through operating as a powerful referent category for scaling all punishment. When murderers are punished with natural life sentences, it becomes plausible to punish burglars and drug dealers with decades in prison.

Opponents of mass imprisonment have focused their critique on the war on drugs, but America has also been engaged in a war on violence. Support for the suppression of violence crosses all major divides in American life. It is not a liberal or conservative issue. To an important degree it is not racially defined (although to an important degree it is). All of which means there are few built in barriers to the growth of penal severity when it is successfully framed as about making America violence free. Indeed all the extreme governmental behavior that emerged in our war on terror has been repeatedly demonstrated in our war on violence.

In short, we cannot extricate ourselves from mass imprisonment with a strategy exclusively based on moving drug offenders out of prison. As Marie

³ Even our prisons for women built in the era of mass imprisonment have been designed along a masculinized security model. See, Kruttschnitt and Gartner 2004.

⁴ Alice Ristorph, *The Law of Violence* (forthcoming).

Gottschalk argued several years ago in her very fine book on mass imprisonment and the death penalty:

While the drug and sentencing ballot initiatives vary greatly, they share some common features. They risk reinforcing a disturbing distinction between deserving and undeserving offenders. Many of these initiatives sanction throwing the book at drug dealers, recidivists, and violent offenders, thus reinforcing powerful stereotypes about crime and criminals that may help bolster the fundamental legitimacy of the carceral state.⁵

At its best, the drug reduction strategy will produce an incarceration rate in America that is 25 to 45% lower than it is now, but which remains two or three times the norm for US in the 20th century. This prison population will be just as concentrated with people of color and from neighborhoods (now often rural as well as urban) of multiple disadvantages. At worst, given our current practices of excess punishment for violent crime, a drug reduction strategy may only anchor a sensibility that will lock us into mass imprisonment and distort the way America rebuilds its urban landscape over the coming decades. We have lost the capacity to judge appropriate punishment. We must confront our fears rather than avoid them.

In this lecture I want to explore the role that the law of homicide⁶ plays in this “war on violence” and the mass imprisonment it anchors. When we shift from the war on drugs to the war on violence a number of familiar frames are displaced. We are used to attacking drug use (and the markets that provide for it) as socially constructed, a problem that needs to be deconstructed rather than solved. But while violence has plenty of social construction to it, the core area of aggravated assaults on the body and murder (those such assaults carried out with intent to kill, and causal efficacy) are as ontologically firm as things get in human affairs. Neither will it do to talk of a “moral panic” about murder. Sociologists have usefully described moral panics when relatively low levels of crime or simply deviance are blown up into major social problems, usually disclosing some underlying tensions in the moral economy of contemporary society.⁷ But if Americans have invested too much in the wrong kinds of solutions to violent crime and to murder, it will not do

⁵ Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge 2006), 258

⁶ This lecture will deal primarily with the law of non-capital murder, making only a glancing comment on capital murder and pretty much ignoring manslaughter as well as special theories of murder in the US like “felony murder.” In the book version of this I hope to provide a more adequate account of the overall structure of contemporary homicide law in the US.

⁷ Stanley Cohen, *Folk Devils and Moral Panics* (1972, 2002)

to ignore the huge social impact of murder and the fact that the US remains uniquely violent among wealthy industrialized societies.⁸

Finally, for many critics of mass imprisonment, ending the war on drugs would involve decriminalization for drugs and alternatives to incarceration for non-violent property crimes. But if we in the US are to come to grips with our complex of over punishment around violent crime and murder, it will not be by abandoning the use of the prison but by restoring our capacity to set rational limits on that imprisonment. Currently those limits are gone. While our murder law recognizes three distinct levels of murder, special circumstances (capital), 1st degree, and 2nd degree, all are in an important sense serving one sentence, decades in prison followed by death (and not execution). Meanwhile our political leaders have flatly denied any importance to these distinctions in culpability for homicide, a trend to which the judiciary has put up only the faintest resistance.

In the first part of this lecture, I will re-examine the recent past of homicide law in California, during which efforts by criminal law theorists and imminent judges, produced a functional modern system of homicide law based largely on the indeterminate sentence and the administrative law of parole. In this period which lasted from 1944 until around 1980 homicide law operated to keep punishment levels and prison populations low, even during a period of ascending crime rates and politicization of crime.

Most of the distortion of the law of murder took place in the 1970s and 1980s and have only continued since. Between 1966 and 1980, California saw its already rising homicide rate triple. In that era lethal violence was playing out against a background of social change. I will argue that California's problem is not just lethal violence, but lethal violence in the context of wrenching changes in the California economy that would see it move from an advanced industrial state to a largely post industrial state with an economy driven largely by real estate and finance capital.

It was not California's suburbs that experienced the rise of homicides in the late 1960s and 1970s, and once again in the mid to late 1980s, but it was there that a "culture of control"⁹ based on single family subdivisions deliberately distanced from the city and public spaces found its most politically salient public. It is not, of course, as if growing suburbs produced city violence (indeed one might well expect the causal arrows to have run the other way), but they did produce and promote a risk mentality or sensibility that has made of homicide a risk with profound claims on government. This risk mentality has led to a flattening out of homicide into a generic risk whose threat can be mediated by personal wealth and choices, but never fully eliminated and to which government therefore has a profound obligation to produce the maximum possible repression of this risk.

⁸ Franklin Zimring and Gordon Hawkins, *Crime is not the problem: lethal violence in America* (Oxford 1999)

⁹ David Garland, *The Culture of Control* (Oxford 2001)

In the second part of this lecture I will examine how this flattened conception of murder pervades the contemporary law of homicide. The historic legal structures of 1st and 2nd degree murder are one of the great innovations in American jurisprudence.¹⁰ English common law treated all criminal homicides, except a few narrow categories treated as manslaughter, as murder carrying a mandatory death sentence. In the American colonies (beginning in Pennsylvania) murder was early on divided into two levels, 1st and 2nd degree murder, for which capital punishment was available only for 1st degree (and then only at the discretion of the jury). This became the nearly universal rule in the United States (until it was further complicated by the US Supreme Court's death penalty decisions in the 1970s). England did not follow this solution until the Homicide Act of 1957 created a category of less serious homicide for which a life sentence in prison, subject to administrative release, was the normal punishment.¹¹

The law of murder, which consists of the legal adjudication of murder, together with the operation of the sentencing and parole systems, might be thought of as a kind of radiator regulating the overall level of penal intensity being produced (both in the Durkheimian¹² sense of an emotional desire to punish and in the empirical sense of greater levels of punishment).

That radiator is broken today in California. Instead, the law of homicide is operating more as "reactor", a machine designed to intensify the heat and energy available to the system. A full treatment of that brokenness would include a survey of California Supreme Court jurisprudence well beyond my capacity or your tolerance. It would include a vast and logically challenged capital punishment jurisprudence, an unembarrassed abandonment of a once serious intellectual effort to maintain a meaningful distinction between 1st and 2nd degree murder, and finally an exploration of the world of "unreasonable risk to public safety" in appeals by 1st and 2nd degree murderers of parole denials. Because the last has received the least attention either at home or abroad, and is in my view, by the far the most important, I will concentrate on the third.

¹⁰ H. L. A. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 *Nw. L. Rev.* 433, 437 (1957).

¹¹ Hart, *supra* note 10, Hart reports that the introduction of degrees was periodic cause in parliament including in 1866, 1948, and with the Homicide Act of 1957. Americans also innovated in manslaughter jurisprudence. While common law only permitted the mitigation of murder down to manslaughter in a narrow set of categories (the most famous being "sight of adultery"), American judges began broadening these categories from the beginning and in the 20th century most states (following the Model Penal Code) have made it open to any killing done under circumstances likely to create an extreme emotional disturbance in ordinary people.

¹² Emile Durkheim, *The Division of Labor in Society*; David Garland, *Punishment and Modern Society* (University of Chicago Press 1993).

In the end I would like to reflect with you on the interaction between the cultural context of the law of murder and the law. Is our legal conception of murder flattening as a result of a popular risk mentality about homicide that favors zero tolerance toward any future risk from those who have already killed? Or does our garbled and contradictory narrative about murder in the law help to sustain a high and flat level of fear about murder? If the latter, is there any way that we as criminal lawyers, legal scholars, and criminologists can contribute to a restoration of a structure of homicide law that can help establish a meaningful sense of proportion to punishment and thus bring an end to our (in the US) era of mass imprisonment?

I. Progress by Degrees: Reforming Homicide Law in the 20th century

The modern law of murder and manslaughter, from the 18th century through the middle of the 20th, can be considered, in some respects, an example of progressive social change through law. In the vast majority of US jurisdictions juries had the power to decide for life even in aggravated cases. Indeterminate sentencing (life terms with a possibility of parole after a minimum) and parole, began to spread in American states in the first decades of the 20th century, and become far broader and deeper after World War II. Perhaps its most widely recognized success was in limiting capital punishment by reducing the field of convicted killers required or even exposed to being sentenced to death but it may have played an even more important role in limiting the severity of prison sentences. For much of the 20th century I hypothesize, the law of murder as it existed in the larger industrialized states played an important role in containing demand for severe punishment and in regulating the overall scale of punishment.

The structure of the modern law of homicide was well adapted to mediating social demand for harsh punishment. The death penalty was available (and widely used in the first half of the twentieth century) to address those killings that most alarmed the public (we can presume that this was determined by race in many cases and by other salient sociological dimensions of proximity).¹³ For the vast majority of others convicted of murder, either a very long term of years in a prison, or often, a life sentence was formally imposed. Few however served such long times, as actual prison terms were set by administrative bodies operating less visibly to the public and with a strong presumption in favor of an eventual release date for all life sentenced prisoners who avoided trouble and actively sought rehabilitative programming.

Under this system, the length of punishment for virtually all felons, including those convicted of murder but not sentenced to death for murder was largely transferred to administrative agencies commonly known as “parole boards” (the Adult Authority in California once, and now the Board of Prison Terms or BPT hereinafter) with authority to decide when imprisoned felons could be released

¹³ Donald Black, *Behavior of Law* (Academic Press 1976).

(usually after a minimum term of years, as little as three for 2nd degree murder for example). Much of what we know about the decision making of the Adult Authority during the second half of the twentieth century is due to research carried out by two of my mentors, Sheldon Messinger and Caleb Foote.¹⁴ Their prime conclusion about the Adult Authorities sentencing principles was that they sought retributive equity among similar crimes and between crimes of different seriousness, even though the official focus was supposed to be on predicting success on parole based on prison programming and behavior.

By paroling prisoners serving life for 2nd degree murder in as little as three years, and 1st degree murder in as little as seven years, the Adult Authority was setting a kind of cap on the initial prison sentences it was likely to exact from robbers, burglars, and thieves. This left the Authority free to hold those they found threatening on disciplinary or political grounds (like radical prison leader George Jackson who went to prison on a robbery charge that his public defender told him to expect to do as little as six months on, he had served eleven when killed at San Quentin in a gun fight with correctional officers). At the same time it kept a very heavy down pressure on the punishment to be accorded less serious crimes.

It is difficult to assess empirically how effective this structure of law and administration was at dissipating populist demands for severe punishment. While homicide is never one of the most frequent commitment offenses for persons in prison, homicide sentences wield a disproportionate impact on prison populations because of the relatively long sentences. The parole board was an excellent administrative solution to extend the punishment limiting capacity of the law of murder and manslaughter generally, because it moved a decisive portion of the punishment allocation decision to a point in time quite distant from the crime or even the trial, and set it apart from the public eye, in the inner workings of a supposedly expert based administrative agency.¹⁵

This is especially salient in light of the most important difference between the United Kingdom and the United States on matters of criminal law, i.e., the role of popular sentiment as expressed through juries and elected prosecutors in the latter. Overall control of English sentences, whether by judges or by ministry, remains largely out of the hands of juries¹⁶ or of local elected officials to which US criminal

¹⁴ (little of it published)

¹⁵ Sheldon Messinger, John Berecochea, David Rauma and Richard Berk, "Foundations of Parole in California," *Law & Society Review* (1985)

¹⁶ Hart, *supra* note 10, 438. Hart notes that English practice gives the Home Secretary, as Her Majesties representative, discretion over which murderers to commute from death to life. Since this accomplishes the same thing as degrees of murder and jury discretion in ridding murder of its mandatory capital punishment stain, Hart with chilling subtlety notes the apparent comfort of English lawyers in "entrusting to a single man, in the person of the Home Secretary, a discretion which they would withhold from the court and above all from the jury."

law by institutional design naturally tends toward by giving local prosecutors power to charge the full range of crimes limited only by which elements she can prove at trial (if need be). Since these elected officials, local and if potent enough, statewide, are most likely to feel pressure from victims or local law enforcement personnel on particular crimes, they are likely to be potent transmitters of popular fear and anger about crime and murder in particular.¹⁷

Observing the differences between England and the United States on precisely the question of murder and the principles of punishment, the great HLA Hart noted:

[T]he attitude, common in English penological thought, that a sentence of imprisonment longer than ten years should not be served except under the most extreme circumstances. The general English view is that a sentence in excess of this renders a man useless, and the average sentence served in English prisons among those who have been sentenced to death but reprieved is about ten years. By contrast, in some states in America sentences of twenty-eight years are not uncommonly served for first-degree murder and seventeen years for 2nd degree murder.¹⁸

Hart chose Minnesota, a low homicide state compared to California (then and now), and a place where sentences for murder were probably much longer. Murder sentences probably declined in both places during the 1960s and 1970s as the homicide rate tripled, before beginning a substantial rise in California in the 1980s. But while the vicissitudes and timing of these penal trends are of interest, Hart's point should not be lost that there is a feature of English penal justice, the role of penological thought itself, which only hoped to play the same role in the United States than and cannot even hope that today.

Indeed, as we survey mid 20th century efforts to reform the law of murder in the US, including the *Model Penal Code* and judicial efforts to modernize murder statutes adopted from the common law in the 19th century, parole appears to be the key function. The most significant effort to rethink and modernize the American law of homicide in the middle of the 20th century, Herbert Wechsler's *Model Penal Code*, relied significantly on the operation of the parole system to realize its vision of grading. Wechsler and the MPC abandoned the American tradition of degrees of murder, creating a uniform crime of murder. Wechsler could abandon the troubled premeditation and deliberation doctrine which had historically defined the more aggravated and capital eligible grade of murder, because he believed in the individualizing capacity of a forward looking administrative parole board. In the MPC's sentencing provisions the sentencing role of the judge was limited to

¹⁷ Zimring; William A. Stuntz, *The Pathological Politics of Criminal Law*, 10_ Mich. L. Rev.

¹⁸ Hart, *supra* note 10, at 440

selecting the minimum term in prison, after which a presumption in favor of parole would kick in. As Zimring and Hawkins (1987, 780-1) explain:

Herbert Wechsler's rationale for authorizing the court to impose a minimum sentence within statutory limits but not to control the maximum is as follows: "The point on which the court can make the best and most decisive judgment at the time of sentence is [that] which calls for an appraisal of the impact of the disposition on the general community, whose values and security have been disturbed." The court should therefore "be empowered to prescribe a minimum duration for the term."¹⁹

On the other hand, Wechsler stated that:

"the court is poorly equipped at the time of sentence to make solid and decisive judgments on the period required for the process of correction to realize its optimum potentiality or for the risk of further criminality to reach a level where the release of the offender appears reasonably safe."²⁰

He felt that:

"the organs of correction ...[were] best equipped to make decisions of this order and to make them later on in time, in light of observation and experience within the institution ... Whether and how long the prisoner should be held beyond the minimum, if any, fixed by the court should therefore, be remitted to ... the Board of Parole --- within statutory limits varying with the degree of the offense."²¹

As Zimring and Hawkins pointedly note. "These general theories of sentence setting and penal treatment are well suited to a single grade of murder as defined in the Code."²²

In California, which like many states in the 1950s and 1960s chose not to revise its murder statutes, the state Supreme Court struggled hard to develop a meaningful distinction between 1st degree and 2nd degree murder that could be defensible in light of the emphasis on subjective mental states promoted by the Model Penal Code and other reform theories. Then as now, the primary difference between 1st degree and 2nd degree murder was whether an unlawful killing was either "willful, deliberate and premeditated" or "committed in the perpetration or

¹⁹ Zimring, Franklin and Gordon Hawkins (1987) "Murder, the Model Code, and the Multiple Agendas of Reform," Rutgers Law Journal, Vol. 19: 773-796, 780-1

²⁰ quoted in Zimring and Hawkins, supra note 19.

²¹ Quoted in Zimring and Hawkins, supra note 19.

²² Id. at 781

attempt to perpetrate any arson, rape, robbery, or burglary (many other felonies have been added most since 1981). Either one could establish “express malice” in the common law language used by the statute, and thus 1st degree murder.²³

As any first year law student in a common law jurisdiction discovers, these lines are incredibly difficult to draw and courts have historically been reluctant to say that evidence was lacking to support a jury verdict for express malice based on some objective requirement like actual time to deliberate, or specific evidence of planning. Beginning in the 1940s, the California Supreme Court began a four decade long effort to clarify this distinction and provide firmer guidance and oversight over juries. The contours of this effort have been identified with precision and great insight by Professor Suzanne Mounts in her article on the history of the premeditation and deliberation standard in California from statehood until the present penal state.²⁴

After many decades of largely deferring to jury verdicts and trial court instructions on the degrees of murder, the court began to articulate a more demanding structure of proof in the 1944 case of *People v. Holt*.²⁵ In a crucial interpretation of the statute, the Court noted that:

[D]ividing ... homicides into murder ... and manslaughter was a recognition of the infirmity of human nature. Again dividing the offense of murder into two degrees is a further recognition of that infirmity and of the difference in the quantum of personal turpitude of the offenders. The difference is basically in the offenders but is to be measured by the character of the particular homicide. The victim of manslaughter or second degree murder is just as dead as the victim of first degree murder.²⁶

²³ California law first defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought” (Penal Code Section 187), and then distinguishes 1st degree murder: “All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.” (Penal Code Section 189)

²⁴ Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction Without a Difference*, 36 U.S.F. L. Rev. 261-333 (2002), 289-305

²⁵ 153 P.2d 21 (Cal. 1944), quoted in Mounts, *supra* note 24, at 289.

²⁶ *Holt*, 153 P.2d at 37, quoted by Mounts, *supra* note 24 at 289.

A year later in *People v. Thomas*,²⁷ the court addressed one of the great contradictions of the premeditation and deliberation doctrine, i.e., the frequently noted jury instruction that they could occur “as instantaneously as successive thoughts of the mind.” In *Thomas*, the court rejected that as misleading:

The adjective “deliberate” means “formed, arrived at, or determined upon as a result of careful thought and weighing of considerations; as a deliberate judgment or plan; carried on coolly and steadily, especially according to a preconceived design ... given to weighing facts and arguments with a view to a choice or decision; careful in considering the consequences of a choice or decision; careful in considering the consequences of a step;unhurried; Characterized by reflection; dispassionate; not rash” . The word is an antonym of “hasty, impetuous, rash, impulsive.” It has been judicially declared that ...“Deliberation means careful consideration and examination of the reasons for and against a choice or measure.” The verb “premeditate” means to “think on, and revolve in the mind, beforehand; to contrive and design previously.”²⁸

In the 1964 case of *People v. Wolff*,²⁹ the court further elaborated this standard in the context of a case involving serious mental illness (even though not sufficient to establish the legal defense of insanity). That the defendant suffered from schizophrenia and had killed his own mother in order to facilitate a plan to have sex with girls in his community was uncontested, but the state had presented evidence that Wolff had carefully planned the crime for a preconceived purpose and the jury convicted of 1st degree murder. The California Supreme Court reduced it to second degree noting that the essence of premeditation and deliberation was not time but actual evidence of reflection.³⁰ *Wolff* was particularly important for its suggestion that a progressive understanding of mental illness needed to be integrated into murder analysis.

This effort at judicial clarification of the 1st and 2nd degree murder distinction reached its peak in the spectacular 1968 case of *People v. Anderson*. The defendant was accused of stabbing his 10 year old stepdaughter over sixty times. The jury convicted Anderson of 1st degree murder and sentenced him to death. The court reduced his conviction to 2nd degree murder after noting the absence of any of three categories of evidence that could determine the existence of premeditation and deliberation.

²⁷ *People v. Thomas*, 156 P.2d 7, 10 (Cal. 1945)

²⁸ *Thomas*, 156 P.2d at 19, quoted by Mounts, *supra* note 24, at 295, citations omitted.

²⁹ 394 P.2d 959, 964 (Cal. 1964)

³⁰ Mounts, *supra* note 24, at 298.

(1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing --- what may be characterized as “planning activity;” (2) facts about the defendant’s prior relationship and/or conduct with the victim from which the jury could reasonably infer a “motive” to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of a “pre-existing reflection” and “careful thought and weighing of considerations” rather than “mere unconsidered or rash impulse hastily executed ...;” (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a “preconceived design” to take the victim’s life in a particular way for a “reason” which they jury can reasonable infer from the facts of type (1) or (2).³¹

The California Supreme Court’s efforts to clarify the law of murder³² represent an alternative to Wechsler’s Model Penal Code in its decision to eliminate the distinction altogether. The two projects should be seen as closely related since the California Supreme Court could not abolish the degrees of murder on its own and so chose to rationalize the distinction in line with the same principles of rationality as Wechsler’s. But as noted above both also share the presumption of the existence of a parole system that was able to ameliorate the inevitable faults of drawing the line between degrees of murder. In both cases the parole board can undertake its own analysis of the rationales of the law of murder after the fact and assign a specific term of imprisonment correspondent with those features of the case. Moreover, as parole systems, especially in California, delivered steadily shorter sentences for murder throughout the 1960s and 1970s, the distinction between 1st degree and 2nd degree murder mattered less because prisoners under both headings could win parole in a matter of years (typically under ten).

Comment [ph1]: In footnote: “holding that a long build of provocative conduct...” seems like an incomplete clause.

If murder has attracted so much attention from legal theorists and law reformers it is because in the popular imaginary, murder is not just one crime, but

³¹ *People v. Anderson*, 447 P.2d 942, 949 (Cal. 1968), quoted in Mounts, supra note 24, at 302-3

³² While this lecture is concentrating on the distinction between the degrees of murder, the California court also operated to liberalize the state’s provocation manslaughter doctrine by removing the absence of “cooling time” as a distinct element for which the defense had a burden of production, and holding that a long build up of provocative conduct could substitute for a particularly strong provocation proximate to the killing. See, *People v. Berry*, 18 Cal. 3d 509 (1976). *Berry* moved California much closer to the MPC’s doctrine of “extreme mental or emotional disturbance” than the 19th century common law language of “heat of passion” would have suggested possible.

the crime which organizes all crime.³³ This is a point where it becomes clear how important the integration of criminal law and criminology in popular thinking (rather than elite silos like the Home Office) has been in US penalty. What joins murder to all other crimes is a criminological presumption that the highly malignant criminality manifest in murder is latent in all kinds of other seemingly lesser crimes. This was expressed cogently at the center of Wechsler and Michael's seminal work (the progenitor of the Model Penal Code), and which I draw on for my title, *A Rationale of the Law of Homicide*³⁴:

It will be well, in closing this brief survey of the law of homicide, to recall that the rules defining criminal homicides are not the only rules of the criminal law which have for their end or among their ends the protection of life. Even though life is not destroyed, a multitude of acts entailing unjustifiable risk of death is made criminal by the law governing other common law offences, arson, burglary, robbery, assault, battery, mayhem and rape, as well as by the general law of attempts, solicitation, conspiracy, riot, disorderly conduct and others of the heterogeneous mass of lesser offences created because the behavior involved is deemed to be dangerous to life or limb. Indeed, most behavior which is inspired by an intention to kill, or is characterized by an unjustifiable risk of killing, conscious or inadvertent, falls, where death does not ensue, within some wider or narrower, more or less specific category of criminal behavior, calling for the treatment which may be as drastic as that for homicide or as gentle as a stereotyped fine. Moreover, any provision of the criminal law serves the end of protecting life in so far as it makes possible the incapacitative or reformatory treatment of persons who, unless they were subjected to such treatment, would engage in behavior threatening life.

Wechsler and Michaels manage to join the common law crimes, to the already large body of statutory criminal law enforcing administrative and police norms of security, all the way down to disorderly conduct. Moreover, thanks to the *Janus* faced rationale of "incapacitative or reformatory treatment", i.e., the system of

³³ Indeed as Professor Carlton Lawson has forcefully argued, one could construct a whole different way to present substantive criminal law pedagogically that would place treason rather than homicide at its center. This criminal law, among other things, would make it far clearer that criminal law is a form of state power rather than a private right of action (which even in the US where private prosecution was never the rule, we often treat it as). See, Carlton F. W., Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*. University of Pennsylvania Law Review, Vol. 154, p. 853, 2006; University of California, Davis Legal Studies Research Paper No. 69. Available at SSRN: <http://ssrn.com/abstract=885584>

³⁴ Wechsler and Michael, *supra* note 1, 729

parole release, even those crimes which seem to pose no threat to life or limb, could be rationally dealt with on the grounds that the persons engaged in that otherwise innocuous act was on the road to "behavior threatening life."

Having descended from murder, through rape, down to disorderly conduct and administrative violations, to show the inchoate seeds of violence in even the most mundane offense, Wechsler and Michaels pivot and underscore the urgency of their mission by framing homicide as the super crime that in essence creates all crimes at once (or offends all the interests that criminal law can hope to protect):

Similarly, behavior endangering life is not the only undesirable behavior that the law of homicide may operate to prevent. For one thing, behavior which endangers life also threatens bodily injury. But more than this, individuals who engage in behavior which causes death may also be dangerously likely to engage in behavior which is undesirable for other reasons, for example, because it interferes in an unjustifiable way with the enjoyment of property. In so far as the law of homicide makes possible the incapacitation or reformation of such persons it obviously serves the end of preventing such behavior.³⁵

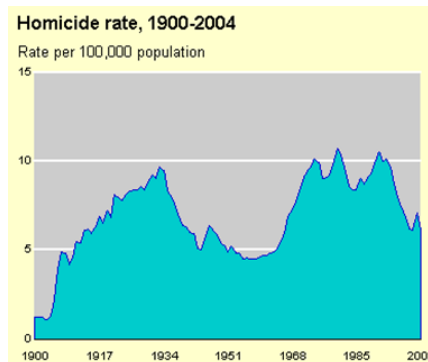
Thus for Wechsler, rationalizing the law of homicide was only putting the camel's nose under the tent of the need to rationalize the whole of criminal law (a project on hold due to the Great Depression). A fear against murder, something the public already had plenty of following the violent upsurge in homicide during the 1920s and early 1930s provided an overarching democratic mandate to undertake a systematic reform of American criminal law.

Wechsler was not naive about the dangers of populist responses to fear of crime and of violence in particular, indeed, he seemed to be suggesting to the elite readers of the *Columbia Law Review* that only a concerted effort to maximize the efficacy of the criminal law in serving to protect those interconnected ends between homicide and private ordering could assure that more drastic, less democratic responses, responses like lynching, or the creation of highly authoritarian police forces might follow (recall that Wechsler and Michael could not foresee in 1937 the continued dropping of the homicide rate for another twenty five years).

At the same time, the reform agenda in criminal law was now heavily hitched to the operation of a largely indeterminate sentencing system premised on a limited judicial role in setting minimum prison terms, and an extensive administrative discretion to parole prisoners. California between 1944 and 1978 was close to the ideal of that configuration for reform. If something should come along to disable that administrative release function, than much of the modern sensibilities of murder that Wechsler and other reformers were responding to could lead to a very nasty

³⁵ *Id.*

expansion of imprisonment, both downward to less serious crimes, and in extension toward natural life sentences.



Criminal law scholars from HLA Hart to Franklin Zimring have identified comparatively high US homicide rates as an important driver in the distinctive patterns of US penal politics and policies.³⁶ The tripling of the homicide rate between the early 1960s and the late 1970s can be assumed to be an important input to the transformation of the political context for the law of murder. The crime of murder plays an important role culturally in activating the project of mass imprisonment in the 1970s, when most of the alarming gains in homicide took place, especially in California. The assassinations of political leaders in the 1960s helped promote the idea that no one could be protected and that this was a national political imperative. Historic American violence seemed to have broken free of its previous restraints and now menaced Americans in their homes and neighborhoods in ways that they could do little individually to protect against (with the controversial exception of arming themselves).

Nowhere did this take a clearer direction than California where the state's capital punishment law was struck down by the state high court just months ahead of the US Supreme Court decision in *Furman*.³⁷ This important sense of threat from homicide in the early 1970s was anchored in two cultural features that have not been adequately considered in the historical and sociological analysis of American capital punishment, the politicization of murder associated with the high level assassinations and riots of the late 1960s and the powerful interaction effect between homicide as a specific fear and the sensibilities emerging in the new kind of single family free standing household that was becoming the American residential ideal (and the standard in the high growth sunbelt states). Here I can only give a

³⁶ Hart, supra note 10; Zimring and Hawkins, note 8.

³⁷ Gottschalk, supra note 5, 219.

bullet point version of these background factors around which the law of homicide began to be remade in the 1970s and 1980s.

First was assassination and riots that marked the 1960s beginning with the assassination of President Kennedy in 1963, and intensifying five years later with the back to back assassinations of Civil Rights leader Martin Luther King and Senator Robert Kenney (the latter in California). To many Americans, these assassinations were political murders in the sense that they may have been motivated by political objectives and carried out with the complicity of some in government or the political establishment. But to an even greater portion of Americans these assassinations were powerful lessons in the vulnerability of all Americans to violent crime, especially in the public spaces of large cities (all three killings took place in downtown settings, in public or semi-public places). If the President, a Senator, and a celebrated clergyman leading an internationally renowned movement, could not be protected as they navigated urban public spaces, who could consider themselves safe in those spaces. If men of this magnitude and importance could be killed, apparently by lone individuals, how could citizens expect protection from over-worked police?

The rioting in major cities that began with Los Angeles in 1965, and included Newark, Detroit, and Washington DC may have interacted with the assassinations to launch a common politicization of violence in general and murder in particular. Scores of victims were killed in the riots, many by police, but others in beatings and shootings by rioters against other citizens. Like the assassinations, the riots posed urban central city neighborhoods as particularly associated with violence and the possibility of being killed. They also highlighted the limits of law enforcement capacity to protect people from violence. In each instance, regular police were unable to contain outbreaks of lawlessness and ultimately fell back, leaving it to military units of the national guard being brought in to suppress looting and sniper fire.³⁸

³⁸ We know these images from the late 1960s weighed heavily on the minds of the Supreme Court Justices as they turned to consider the constitutionality of capital punishment in the *Furman* case. In his dissent to the Supreme Court's opinion in *Furman v. Georgia* (1972), Justice (and Virginian) Lewis Powell pointed to this history of murder in the 1960s as forming a powerful influence on public attitudes:

...brutish and revolting murders continue to occur with disquieting frequency. Indeed, murders are so commonplace in our society that only the most sensational receive significant and sustained publicity. It could hardly be suggested that any of these highly publicized murder cases—the several senseless assassinations or the too numerous shocking multiple murders that have stained this country's recent history --- the public has exhibited any signs of "revulsion" at the thought of executing the convicted murderers. The public outcry,

California in this period was ground zero for this combination of a new risk mentality³⁹ based on the suburban housing boom and horrifying crimes amplified by the media that seemed to suggest that ordinary citizens were far from safe in their homes. From the Watts riot in 1966, to the assassination of Robert Kennedy in 1968, to the Tate-Labianca murders in 1969, to the never solved “Zodiac” murders in the same years, California and its mega media markets, experienced one sensational murder after another, a trend that continued unabated through the 1970s. ⁴⁰

II. Unreasonable Risk: The Jurisprudence of Lifer Hearings and the Law of Murder

By the middle of the 1970s, California’s law of murder had been reworked through a series of state supreme court decisions that had produced a more exacting distinction between the degrees of murder, and which had expanded the mitigation of intentional murder to manslaughter. At its peak in 1972, this judicial reform included the abolition of capital punishment and the introduction of firm evidentiary boundaries between 1st and 2nd degree murder. At the same time, liberal parole policies assured that most life sentenced prisoners who cooperated could be paroled in as little as three years for 2nd degree or seven for first degree.

as we all know, has been quite the contrary. (quoted in Simon 2007, 119)

In his concurrence in Furman, Justice Marshall who would have preferred to find capital punishment unconstitutional under any circumstances, pointedly referenced the climate of violence (note his direct reference to the urban context as well):

At a time in our history when the streets of the nation’s cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But, the measure of a country’s greatness is its ability to retain compassion in time of crisis. (quoted in Gottschalk 2006, 216)

³⁹ The sociology and criminology of risk needs to be canvassed more thoroughly here. Whether this is a distinctive US (or even Sun Belt) risk culture, or one that can be found elsewhere is unclear. Middle England? See, Evi Girling, Ian Loader, Richard Sparks, Crime and social change in Middle England: questions of order in an English town (Routledge 2000), 61 (“Others felt - largely it seems on the basis of local stories and rumour - that certain parts of the town centre were prone to violence”);

⁴⁰ “Murder in California,” Time, Monday, Nov. 19, 1973, Time CNN, <http://www.time.com/time/magazine/article/0,9171,944720,00.html>

However, the war on crime and the politicization of punishment decisions that it has produced have fundamentally transformed this modern structure into a monolithic edifice of extreme punishment. The first push came with a voter initiative that amended the California Constitution to restore capital punishment after it had been struck down by the California Supreme Court in *People v. Anderson*.⁴¹ The initiative passed, opening the door to a new capital punishment statute which after a false start was established in 1977 by new legislation and made even harsher by another initiative in 1978.⁴²

In 1981 the legislature once again adjusted the law of murder, this time amending the murder statute to effectively overturn the *Wolff* decision with its implication of a demanding showing that the defendant actually was capable of and engaged in meaningful reflection. The amendment provided: "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his act."⁴³ The California Supreme Court responded by backing away from the demanding standards of the *Anderson* decision, a process that accelerated after the 1986 recall election in which a campaign that focused on the death penalty led to the removal of three liberal justices from the court.⁴⁴ In *Anderson* the court had stressed importantly that the actual means of killing, by itself, could not establish premeditation and deliberation:

[I]t is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. "if the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations."⁴⁵

Professor Mounts shows in her article that recent opinions "now indicate that the court disagrees with this view,"⁴⁶ and although it has not overturned *Anderson*, the California Supreme Court has increasingly viewed it as only descriptive of the kinds of evidence relevant to distinguishing the degrees of murder.

But by far the most consequential changes from the law of homicide as it had operated between 1944 and 1980 took place in the arena of parole. The devolution process began with the end of indeterminate sentencing and the general parole

⁴¹ 493 P.2d 880 (Cal. 1972)

⁴² See, Steven F. Schatz & Nina Rivkind, "The California Death Penalty Scheme: Requiem for Furman?", 72 N.Y.U. L. Rev. 1283, 1310

⁴³ Mounts, *supra* note 24, at 304.

⁴⁴ *Id.* at 307-8

⁴⁵ *Anderson*, 447 P.2d at 947, quoted in Mounts, *supra* note 24, at 325.

⁴⁶ *Id.*

release process. The 1976 Determinate Sentence Law established a range of prison sentences (or probation in some cases) based on the seriousness of the offense. After the law was implemented in 1978, 95 percent of felons sent to prison had a date certain after which they would be released without operation of any parole board. The same law retained indeterminate sentences for small range of very serious crimes including non-capital 1st and later 2nd degree murder,⁴⁷ kidnapping, and more recently 3rd strike convictions and established a new parole process.

Under the California Penal Code section 3041, the parole authority, now known as the BPT (for Board of Prison Terms) is mandated to meet one year prior to the prisoner's minimum eligible parole date, and at that meeting to "normally set a parole release date." In setting this date, subsection (a) instructs the BPT to:

provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates.

Uniformity was one of the dominant themes of the determinate sentencing legislation in 1976, and was further implemented by a matrix adopted by the BPT in 1981 that provides ranges for both 1st and 2nd degree murder. For 1st degree murder from a low of 25, 26, or 27 years for a prisoner indirectly responsible for the death of a victim who was an accomplice in the crime, to a high of 31, 32, or 33 years for the torture of a victim who was a stranger to the prisoner and a target inducing greater public harm (like a police officer or correctional officer). For second degree murder the range is from a minimum of 15, 16, or 17 years for indirectly causing the death of an accomplice in the crime, to a high of 19, 20, or 21 years for a death caused with "severe trauma" to a victim unknown to the prisoner or the motivation for the killing was linked to another crime (in many cases these bases could be reduced by good time credits amounting to a reduction of one-third).

As explained by the California Supreme Court, this mechanism sets very clear constraints on the discretion of the parole authority.

The first step in the calculation is to determine where the particular murder fits, in terms of its relative seriousness, on a bi-axial "matrix" of factual variables. (Ibid.) The matrix specifies lower, middle, and

⁴⁷ Remarkably, the legislature originally made 2nd degree murder a determinate sentence of 5, 7, or 11 years, reflecting the original DSL design of using the average terms for various crimes under the previous indeterminate sentencing system as the basis for establishing the ranges. 1st degree murder was punished, as it had been under the previous law as "straight life" meaning parole was possible after seven years. Citizen initiative in 1978 reset the penalty for non-capital 1st degree murder at twenty-five to life and 2nd degree at fifteen to life. *In re Dannenberg*, 104 P.3d 783 (Cal. 2005).

upper “base terms” for each matrix category. For second degree murderers, serving statutory sentences of 15 years to life, these “base terms” range from 15, 16, or 17 years for the least serious matrix category to 19, 20, or 21 years for the most serious.⁴⁸

But this focus on uniformity through control over discretion (the hallmark of the determinate sentencing movement in the 1970s) was largely neutralized by the second paragraph of section 3041 by an overwhelming focus on risk to public safety. Subsection (b) of section 3041 provides that:

The panel or the board, sitting en banc, shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting. Once the proper matrix category is selected, the Board must impose the middle term unless it finds aggravating or mitigating circumstances not accounted for in the matrix. If the Board finds mitigating circumstances, it “shall impose the lower base term or another term shorter than the middle base term”; if it finds aggravating circumstances, it “may impose the upper base term or another term longer than the middle base term.”⁴⁹

The BPT’s suitability determination under section 3041 has long been set by the BPT’s own administrative regulations. These factors, basically unchanged since 1978 defined the following criteria for unsuitability:

(1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:

(A) Multiple victims were attacked, injured or killed in the same or separate incidents.

(B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.

(C) The victim was abused, defiled or mutilated during or after the offense.

(D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.

⁴⁸ In re Dannenberg, 104 P.3d 783, 791 (2005), citations ommited.

⁴⁹ West's Ann.Cal.Penal Code § 3041

(E) The motive for the crime is inexplicable or very trivial in relation to the offense.

(2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.

(3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.

(4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

(5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.

(6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.⁵⁰

In 1988 the voters adopted a constitutional amendment initiative establishing a new role for the governor in the parole process:

No decision of the parole authority of this State with respect to granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action.⁵¹

Under present practice, parole is rarely granted. Citing the provision that the “offense in an especially heinous, atrocious or cruel manner”, the parole authority has refused in more and more cases to even set a parole date. Thus between 1999 and 2001 the BPT considered 4800 eligible lifers and set a parole date for 48 of them. Of these, Governor Gray Davis reversed 47.⁵² As a result, all of these lifers are serving a form of life without parole. Fewer than five-percent of the more than

⁵⁰ Cal. Admin. Code tit. 15, § 2402

⁵¹ Article V, Section 8 (b) California Constitution

⁵² In re Rosenkrantz, 59 P.3d 174, 228 (Cal. 2003)

3,000 life prisoners who have served their minimum sentence and are thus eligible to have a parole release date set by the Board, get such a date. Since 1988, California law requires the governor to review each parole release granted and either approve or disapprove of it. Recent governors have rejected over ninety-percent of parole releases approved by the Board. Thus a mere fraction of one percent of the thousands of eligible lifers gets an approved release date in a typical year. Thus while more than 1,000 new life prisoners arrive in California prisons every year, only 4 or 5 leave. There are now more than 30,000 life prisoners in California.

The core of the law of murder in California, than, has come to be centered in the parole process. For many years this was largely invisible as prisoners sentenced under the new regime waited to reach their parole eligibility levels in the early 1970s. Courts had historically given the parole process significant deference as an expert judgment by the state as to when to limit its legitimate power to continue to confine a felon. Only the most basic requirements of due process applied to this process. Yet as the number of paroles was reduced to single digits, the building up of cases of exemplary prisoners who had served well beyond the parole guidelines began to percolate in the California courts, and ultimately the California Supreme Court which, as we have already noted, has already signaled a grave reluctance to tamper with either capital punishment or the distinction between degrees of murder.

However in three decisions between 2003 and 2008, the Court has issued three complex opinions on the problem of when the BPT and or the Governor can deny a parole date to a life prisoner who has served more than the presumptive matrix sentence and has had an exemplary prison record, based primarily on the judgment that the murder itself was “especially heinous, atrocious or cruel.” In this final section of this paper I want to highlight some of the features of the law of murder as it has been refined by the litigation over this issue.

A. A Bias Against Murderers? Governors and the Power of Parole in *In re Rosenkrantz*⁵³

One of the great ironies in the history of parole is that it was invented, at least in California, largely to spare the governor the political burden of using his pardoning power to address sentence inequities among state prisoners,⁵⁴ but with the advent of Proposition 89 in 1988, the voters have required the governor to personally approve of each parole of a murderer. After the initiative, parole grants dropped to single digits. After running for governor as a tough-on-crime liberal in 1998, Gray Davis widely announced his intention to keep murderers of any stripe in prison for life.

⁵³ 59 P.3d 174 (Cal. 2003)

⁵⁴ Messinger, et. al., supra note 15.

An article appearing in the April 9, 1999, edition of the Los Angeles Times stated: “[I]n an interview, the governor was adamant that he believes murderers—even those with second-degree convictions—should serve at least a life sentence in prison. Asked whether extenuating circumstances should be a factor in murder sentences, the governor was blunt: ‘No. Zero,’ he said.” ... The article further quoted the Governor as stating: “‘They must not have been listening when I was campaigning.... If you take someone else’s life, forget it. I just think people dismiss what I said in the campaign as either political hyperbole or something that I would back away from.... We are doing exactly what we said we were going to do.’ ” ... Petitioner entered into evidence the deposition of the news reporter who conducted the Governor’s interview for this article. The reporter stated that his recollection was that the Governor made the statements attributed to him in the article.⁵⁵

In 2005 the governors’ stance reached the California Supreme Court in the case of Robert Rosenkrantz who in 1986 was convicted of 2nd degree murder after shooting a young man who had outed Rosenkrantz as gay to his father. The jury had rejected both the prosecution’s 1st degree theory, even though Rosenkrantz had purchased an Uzi to commit the crime (which required a waiting period of 48 hours) and had planned his confrontation with the victim. The jury also rejected the defense argument for manslaughter on the grounds of Rosenkrantz’ extreme emotional distress. Sentenced to 15 to life for 2nd degree murder, with an additional year for using a weapon, began to be considered for parole in 1994 with a minimum eligibility date of 1996.

After several denials Rosenkrantz challenged the BPT’s refusal to set a date based on the finding that “petitioner’s offense was committed in a dispassionate and calculated manner, and that petitioner therefore would pose an unreasonable risk of danger to society if released.”⁵⁶

In response to a habeas order from a superior court the Board conducted a new hearing in 1999. The board again found Rosenkrantz unsuitable for parole,

again determining that the positive aspects of petitioner’s behavior did not outweigh the circumstance that the offense was carried out in an especially cruel or callous manner, in a dispassionate or calculated manner (such as an execution-style murder), and in a manner demonstrating an exceptionally callous disregard for human suffering.⁵⁷

⁵⁵ Rosenkrantz, 59 P.3d at 223

⁵⁶ Rosenkrantz, 59 P.3d at 187

⁵⁷ Id.

But interpreting itself as obliged by the superior court order to set a parole date, the board granted parole, but put off setting a parole date until the governor could review the case.

The governor exercised his authority under Article V, section 8(b) and reversed the finding of suitability. His lengthy memo, summarized by the Supreme Court, again emphasized mostly the nature of the crime:

The Governor's decision concluded that petitioner was not suitable for parole, because he would pose a significant risk of danger to society if released from prison. His decision stated: "[Petitioner] brutally murdered his victim, firing 10 bullets into the victim's head and body. This was not a spontaneous crime. The murder was preceded by a full week of careful preparation, rehearsal and execution. The stress [petitioner] felt over disclosure of his homosexuality does not minimize the viciousness of the murder. In addition to the gravity of the offense itself, I also considered [petitioner's] demonstrated lack of remorse as evidenced by his continued efforts to mitigate his role in the crime by painting himself as a victim, and by lying about numerous aspects of the murder. In assessing the risk of danger that [petitioner] poses, in my opinion these factors outweigh the arguments advanced for release, such as his motivation for killing Mr. Redman, his prison record or his parole prospects."⁵⁸

The governor relied primarily on the facts of the crime:

“ [Petitioner's] act of arming himself with a semi-automatic weapon after practicing its use on a shooting range, his statements to others, his successful attempt to locate the victim's residence, and the confrontation of the victim outside the residence after waiting there for many hours would have supported a conviction of premeditated first degree murder.' ” The Governor's decision further relied upon the opposition of the Los Angeles County Sheriff's Department and the Los Angeles County District Attorney to parole because of the gravity of the crime. One of the investigating deputies stated: “This cold-blooded murder required planning, lying in wait, and a degree of sophistication unusual in youthful offenders.” Similarly, the report prepared for petitioner's probation and sentencing hearing stated that the aggravating factors included the planning, sophistication, or professionalism with which the crime was carried out. In the Governor's view, the seriousness of the crime, as reflected by the foregoing evidence, demonstrated that petitioner would pose a significant risk of danger to society.⁵⁹

⁵⁸ Rosenkrantz, 59 P.3d at 215

⁵⁹ Rosenkrantz, 59 P.3d at 216

In rejecting Rosenkrantz's disciplinary and rehabilitative record in prison, the Governor seemed to dismiss that prison behavior could ever reduce the risk posed by the original crime.

“Although [petitioner] has been discipline free and continued his education while in prison, the State of California expects this of all prisoners.” Therefore, the Governor concluded that petitioner's good behavior in prison did not outweigh the circumstances of the crime with regard to his suitability for parole.⁶⁰

Rosenkrantz again sought habeas relief in the superior court. In June 2001 the court granted the petition.⁶¹ After this decision was upheld by the Court of Appeals, the Governor appealed to the Supreme Court, asserting that his authority to deny parole was reviewable only to insure that proper procedures were followed.

The California Supreme Court rejected the governor's theory that his judgment under Article V was beyond appeal:

Because prisoners possess a protected liberty interest in connection with parole decisions rendered by the Board, it would be anomalous to conclude that they possess no comparable interest when such decisions are reviewed by the Governor, where such review must be based upon the same factors considered by the Board. Under California law, this liberty interest underlying a Governor's parole review decisions is protected by due process of law.⁶²

But while the Court rejected the governor's remarkable assertion of an unreviewable power in the area of parole denials, the level of review it defined and applied in the Rosenkrantz case was one of whether or not the governor's decision was supported with “some evidence.” A standard the court itself described as “extremely deferential.”

Thus, the “some evidence” standard is extremely deferential and reasonably cannot be compared to the standard of review involved in undertaking an independent assessment of the merits or in considering whether substantial evidence supports the findings underlying a gubernatorial decision. If we were to adopt the Governor's position, a parole review decision with no basis in fact and not supported by any evidence in the record would be upheld as long as the decision, on its face, recited supposed facts corresponding to the specified factors and appeared reasonable. Such a decision, however, would be arbitrary and capricious and, because it affected a protected liberty interest, would violate

⁶⁰ Rosenkrantz, 59 P.3d at 216

⁶¹ Rosenkrantz, 59 P.3d at 189

⁶² Rosenkrantz, 59 P.3d at 207

established principles of due process of law. Although the Governor concedes that a gubernatorial parole decision is subject to judicial review to determine whether it is arbitrary or capricious, we reject his implicit contention that a decision without any factual basis in the record would not constitute an arbitrary and capricious decision.⁶³

The court acknowledged that a denial might violate due process if based solely upon the facts of the crime but only where:

no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense. Denial of parole under these circumstances would be inconsistent with the statutory requirement that a parole date normally shall be set "in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public...." "The Board's authority to make an exception [to the requirement of setting a parole date] based on the gravity of a life term inmate's current or past offenses should not operate so as to swallow the rule that parole is 'normally' to be granted. Otherwise, the Board's case-by-case rulings would destroy the proportionality contemplated by Penal Code section 3041, subdivision (a), and also by the murder statutes, which provide distinct terms of life without possibility of parole, 25 years to life, and 15 years to life for various degrees and kinds of murder. ...Therefore, a life term offense or any other offenses underlying an indeterminate sentence must be particularly egregious to justify the denial of a parole date." ...As we have seen, however, the Governor has emphasized certain circumstances of petitioner's offense, as well as his post-offense conduct, that involve particularly egregious acts beyond the minimum necessary to sustain a conviction for second degree murder. Accordingly, the Governor properly could consider the nature of the offense in denying parole.

Rosenkrantz asserted that the governors stated policy of not granting parole to murderers documented that he was "biased against murderers as a class."⁶⁴ The court rejected this theory:

We conclude that the evidence relied upon by the trial court does not support its finding that the denial of petitioner's parole was based upon a policy of automatically denying parole to all murderers. As the Governor contends, the circumstance that the Governor has permitted the parole of two persons convicted of murder is inconsistent with the conclusion that he has adopted a blanket policy of denying parole to all murderers. Even if the quotations in the above newspaper article accurately reflected the views the Governor held at the time the statements were made, the

⁶³ Rosenkrantz, 59 P.3d at 210

⁶⁴ Rosenkrantz, 59 P.3d at 189

Governor's subsequent actions, both in granting parole in some instances and in providing individualized analyses for each of his parole decisions in the cases that have come before him, belie the claim that the Governor has adopted a blanket policy of denying parole without regard to the circumstances of the particular case.⁶⁵

While contemporary commentators⁶⁶ have seen in the Bush administration's legal theories of its war on terror the pursuit of what political theorist Carl Schmitt⁶⁷ described as the power to decide when a state of exception shall overturn the normal rules, *Rosenkrantz* affirms the same logic to be operating at the core level of our state criminal justice systems. And while the court rejected the most comprehensive version of this assertion of unitary executive authority, its deferential "some evidence" standard, left little chance that governors would be forced to follow the law's express implication that parole should normally happen.

B. Minimum Elements: Infinite Degrees of Murder in *In re Dannenberg*⁶⁸

The parole process created by Section 3041 was a grab bag of considerations including the facts of the murder, the views of victims, law enforcement, and court personnel, the prison record and the prisoner's attitude expressed in the parole hearing itself. In cases where prisoners face strong opposition from victims and their allies in the community, or from law enforcement, the BPT can take these views into account in finding unreasonable risk to public safety. Likewise the failure of a prisoner to make use of rehabilitative opportunities (few as they are in the California system), let alone a serious prison disciplinary violation, would generally be fatal to a parole application. Thus the individuals whose cases reached the Supreme Court of California in this period on parole denials tended to be those without strong community opposition, with near perfect prison records and with nothing but the most minor administrative violations (being late for a program).

In 2005, John Dannenberg,⁶⁹ a prisoner with exemplary rehabilitative and disciplinary record, lack of community opposition, and extraordinary pro se legal

⁶⁵ *Id.*

⁶⁶ Giorgio Agamben; Judith Butler

⁶⁷ Carl Schmitt, *The Crisis of Parliamentary Democracy*. Translated by Ellen Kennedy (Cambridge: MIT Press, 1996).

⁶⁸ 34 P.3d 783 (Cal. 2005)

⁶⁹ This is how the court summarized the crime: "John E. Dannenberg is serving a sentence of 15 years to life for the second degree murder of his wife, committed in 1985. He beat her with a pipe wrench during a domestic argument. Thereafter, she drowned in the bathtub. Exactly how this happened is unclear. However, despite Dannenberg's insistent denials, the circumstances permit an inference that, while she was helpless from the beating, Dannenberg placed or forced her head under water, or at least allowed it to remain there, until she died." *In re Dannenberg*, 104 P.3d 783, 785 (Cal. 2005)

skills, compelled the court to consider the balance of the two clear mandates in Section 3041 one emphasizing uniformity (the hallmark of the retributive philosophical arguments that had helped motivate the determinate sentence law), and the other emphasizing suitability in terms of public danger. Uniformity implied comparison with other cases. Unsuitability, in contrast, might allow for an individualized inquiry into the prisoner's record or background. In most of these cases, however, the BPT (or the governor) was relying on the fact that the murder was "especially heinous, atrocious or cruel" in finding that life prisoner posed an unreasonable risk to public safety. Could that be a purely individual judgment, or did it not call for a comparison with other cases of murder?

There are many fascinating issues raised by Dannenberg in his appeal but perhaps the most important was this issue of uniformity and risk. As the court summarized Dannenberg's position:

subdivision (a) of section 3041 says the Board "shall normally" fix a parole date, pursuant to principles of term uniformity..., and that subdivision (b) confirms the Board "shall" do so "unless" it finds that public safety considerations prevent such action in the particular case. This wording, it is asserted, makes clear that "uniform" parole release, influenced in part by the distinct minimum term set by statute for the inmate's offense, is the mandatory "norm[]"... , while the refusal to set a parole release date must be reserved for cases which, in comparative terms, are exceptional.⁷⁰

In an extraordinary recasting of the meaning of normality, the court asserted a view of public danger in murder that is unique, part neither of a recognizable scientific assessment of risk, nor a juridical assessment of relative severity.

The word "shall" in a statute is generally deemed mandatory ... but that presumption is not conclusive. ... In section 3041, "shall" is not used in an absolute sense. Instead, the word is qualified in subdivision (a) by "normally"-a word not susceptible to precise application -and is further limited in subdivision (b) by "unless," followed by the rule that the Board should not set a release date if "consideration of the public safety" requires lengthier incarceration for the particular inmate. ...

The word "normally," as used in subdivision (a) of section 3041, may denote a legislative assumption, or hope, that uniform release dates would be a typical or common result for indeterminate life inmates... . But, as we have seen, the Legislature provided an express "public safety" exception and placed that determination within the Board's broad discretion. Moreover, both the Legislature and the voters have otherwise indicated, in

⁷⁰ Dannenberg, 104 P.3d at 796

multiple ways, their abiding concern that the Board not schedule the release of any life-maximum prisoner who is still dangerous.⁷¹

The court's recognition of the populist basis for risk assessment under the law of murder is decisive. The PBT and the governor may rely on the heinousness of the murder without recourse to any facts other than the singularity of that particular murder, but only if the facts of the murder go beyond what the court described as the "minimum elements" of the degree of murder to which the prisoner has been convicted. Reviewing its recent *Rosenkrantz* decision, the court noted that:

[W]e cautioned, sole reliance on the commitment offense might, in particular cases, violate section 3041, subdivision (a)'s provision that a parole date "shall normally be set" under "uniform term" principles, and might thus also contravene the inmate's constitutionally protected expectation of parole. We explained that such a violation could occur, "for example[,] where no circumstances of the offense reasonably could be considered more aggravated or violent than the minimum necessary to sustain a conviction for that offense."⁷²

Reviewing Dannenberg's murder, the court had no problem affirming that his crime went beyond the minimum elements of 2nd degree murder.

Here, as in *Rosenkrantz*, the parole authority pointed to circumstances of the inmate's offense suggesting viciousness beyond the minimum elements of second degree murder. As the Board noted, Dannenberg reacted with extreme and sustained violence to a domestic argument. He struck multiple blows to his wife's head with a pipe wrench. Bleeding profusely, she then "fell or was pushed" into a bathtub full of water, where she drowned. Though he vehemently denied it, the evidence permitted an inference that, while the victim was helpless from her injuries, Dannenberg placed her head in the water, or at least left it there without assisting her until she was dead. The parole panel's questions to Dannenberg showed its reasonable skepticism about his surmise that, while he was briefly unconscious during their struggle, the victim crawled to the tub, placed her face under the faucet, accidentally struck her head on the tap, and fell into the water.⁷³

In Dannenberg the court affirmed a cultural conception of murder as a crime not divided into a degrees, but into infinite degrees of dangerousness. Thus even 2nd degree murder could result in a natural life sentence despite a perfect record in prison and excellent prospects in the community, based purely on the

⁷¹ Id. at 797

⁷² Id. at 802

⁷³ Id.

facts of the murder itself, so long as the authorities could point to some aspect of the murder that went beyond the minimum legal elements necessary.

But as the dissenter recognized there is no murder than cannot be depicted as more heinous than was absolutely necessary to establish the elements of murder.

How is a court to review that determination? The majority gives us no clue, because the concept of a crime being “more than minimally necessary to convict [a prisoner] of the offense for which he is confined” ... is essentially meaningless. Second degree murder is an abstraction that consists of certain legal elements. Particular second degree murders have facts that fit within these elements. These facts are never “necessary” or “minimally necessary” to convict someone of a second degree murder, because we can always imagine other facts that would also lead to a second degree murder conviction. Furthermore, these facts, because they are facts about a second degree murder, will almost invariably involve the defendant acting violently, cruelly, and, if acting out of provocation, greatly out of proportion to the provocation (otherwise the defendant would have been convicted of manslaughter or exonerated through self-defense). If the Board labels a second degree murder “especially callous and cruel” and exhibiting “an exceptionally callous disregard for human suffering,” then recites the facts of the case, is there any way for a court to review that finding and, on occasion, to find it untrue? The majority provides no explicit answer. Its implicit answer appears to be “no.”⁷⁴

C. Rediscovering a Law of Murder? In re Lawrence⁷⁵

Prisoner Sandra Lawrence was unusual in every respect, which made her case the perfect vehicle for the California Supreme Court to provide the first hint in two decades of attempting to find in the law of murder some restraints on executive power. Her crime was far worse than usually associated with female killings. A spurned lover, she arranged to meet the wife of the dentist she had been having an affair with, where upon she shot her several times, finishing her off by stabbing her repeatedly with a potato peeler. Shortly before fleeing, she told her sister that she had done it as a birthday present to herself.

Since coming to prison in 1983 she has been the proverbial model prisoner. She had availed herself of as much educational and psychological programming available in California’s custody oriented prisons. The PBT repeatedly noted her improved psychiatric assessment (the prison psychiatrists essentially denied her further therapy on the grounds that she was completely normal) and the fact that she had taken full responsibility for the crime. She was only a few credits short of a

⁷⁴ Id. at 808, Moreno, J. dissenting.

⁷⁵ 44 Cal.4th 1181, 190 P.3d 535 (Cal. 2008)

Masters Degree in Business (a near miracle given educational access for prisoners), was a fully credited member of plumber's union (a factor in post release employability) and in the summary of the court, "had made major contributions to a number of educational and public service programs at the prison."⁷⁶

Lawrence also benefitted from an extremely favorable documentary record before the BPT. I quote from the court's summary of the prior parole proceedings at length.

Additional developments described in the Board's report include the circumstance that petitioner obtained her master's degree in business administration in June 2005. She also updated her computer skills and received above-average evaluations in her "office services" assignment. The file also contained a letter from a lieutenant on the prison staff commending petitioner for her work as a physical fitness trainer during the previous five years, stating she is "a superb motivator and trainer." This was accompanied by a letter bearing the signatures of 78 physical fitness trainees praising petitioner for what she "has done for us in reference to getting some self-esteem, along with some know-how, along with mental strength and physical strength." This letter proceeds "to commend [petitioner] on being just one person that has to deal with hundreds of women with different personalities and attitudes, and still continues to get up each morning and encourage and teach us how to be just as strong.... I truly believe that if a person such as [petitioner] gives so much of herself to so many people, then the least we can do is give something back."

The Board's report also discussed numerous other letters written by persons outside the institution in support of petitioner's parole, which variously describe petitioner as a good student and a "remarkable woman." A letter from the coordinator^{***179} of the Partnership for Reentry Program stated that petitioner had applied for and been accepted into the Los Angeles Archdiocese's Partnership for Reentry Program, a four-year program in which, upon release, a mentor and a team meet with the participant weekly. The coordinator expressed confidence that petitioner would succeed in the program and in reentry into society. Additional letters from various clergy and social workers who knew petitioner stated the writers' belief that petitioner would be a productive member of society if released from prison. With the sole exception of a pro forma argument from the District Attorney, no one spoke or wrote in opposition to a grant of parole.⁷⁷

⁷⁶ In re Lawrence, 44 Cal.4th at 1196

⁷⁷ Lawrence, 44 Cal. 4th at 1198

In terms of uniformity and the residual retributive dimension of the case, Lawrence was a ghost from the previous regime when very early parole was practiced. Her crime was committed in 1971, when seven years was the statutory minimum for 1st Degree murder. By the time she voluntarily returned to the state to face trial in 1983, the new regime requiring a 25 year minimum sentence for 1st Degree murder was in place and the new emphasis on using the facts of the crime to deny parole as an unreasonable risk. At the time of her first assessment, with the most aggravated assessment possible under the matrix and an extra year for using a gun in the crime, Lawrence's minimum term as assessed by the BPT was only 12 years.

Despite the pattern of contemporary BPT practice, the BPT made a positive parole recommendation at the first of four assessments in December 1993, setting a release date in July 1997. Each time the recommendation has been reversed by one of three governors who have served during the period of Lawrence's parole eligibility (Wilson, Davis, Schwarzenegger).

At the most recent occasion, Governor Arnold Schwarzenegger rejected the BPT parole recommendation noting that her release "would pose an unreasonable risk of danger to society." As summarized by the court:

[T]he Governor again relied upon the circumstances of the offense to justify his reversal of the Board's decision: "[T]he murder perpetrated by [petitioner] demonstrated a shockingly vicious use of lethality and an exceptionally callous disregard for human suffering because after she shot Mrs. Williams-four times-causing her to collapse to the floor, [petitioner] stabbed her repeatedly. And the gravity alone of this murder is a sufficient basis on which to conclude presently that [petitioner's] release from prison would pose an unreasonable public-safety risk." The Governor described petitioner's crime as "a cold, premeditated murder carried out in an especially cruel manner and committed for an incredibly petty reason."⁷⁸

The Supreme Court took her habeas case as the opportunity to revisit when the facts of the murder can provide "some evidence" for finding that the prisoner would be an unreasonable risk of release on the theory that her crime was particularly heinous. Acknowledging candidly that courts had struggled to apply its "some evidence standard" to balance deference to the executive branch actors (BPT and governor) while offering some "meaningful" review of parole denial.

A growing tension has emerged in the decisions regarding the precise contours of the "some evidence" standard of review. This

⁷⁸ Lawrence, 44 Cal. 4th at 1200. The governor also cited the statements made by the prisoner which appeared to minimize her responsibility by blaming the victim, but the court found no evidence in the record to support this.

conflict is rooted in the practical reality that in every published judicial opinion addressing the issue, the decision of the Board or the Governor to deny or reverse a grant of parole has been founded in part or in whole upon a finding that the inmate committed the offense in an “especially heinous, atrocious or cruel manner,” and in the growing recognition that in some instances, the circumstances of the underlying offense, remote in time and attenuated by post-conviction rehabilitation, bear little relationship to the determination we recognized in *Rosenkrantz* and *Dannenberg* as critical--whether the inmate remains a threat to public safety. Accordingly, a conflict has emerged concerning the extent to which a determination of current dangerousness should guide a reviewing court's inquiry into the Governor's (or the Board's) decision and, more specifically, as to whether the aggravated circumstances of the commitment offense, standing alone, provide some evidence that the inmate remains a current threat to public safety.⁷⁹

The court surveyed numerous published opinions trying to resolve this conflict. Noting that a majority of courts were beginning to resist an inquiry focused only on the existence of the unsuitability factor by expanding “some evidence” to address not simply that factor but the underlying statutory standard of “threat to public safety” the court joined them. The court reviewed its earlier *Rosenkrantz* and *Dannenberg* decisions as affirming the centrality of public safety as “fundamental consideration in the parole process.”

Preserving the “some evidence” standard now wrapped up in public safety, the court killed off its only recently created “minimum elements” test.

The minimum elements test, because it functionally removes consideration of relevant suitability factors and fails to assess current dangerousness, substantially undermines the rehabilitative goals of the governing statutes. Moreover, because the minimum elements test would mandate affirmance in every parole-denial case in which the crime is aggravated, and we have determined that there are few, if any, cases in which the underlying offense is not aggravated in some way, the minimum elements inquiry has proved to be incompatible with our earlier recognition that the “some evidence” standard of review contemplates review of a parole decision on the merits in order to prevent arbitrary and capricious decision-making.⁸⁰

It is odd to see rehabilitation rear its head at the culmination of this mini series in the law of California parole. There is resonance here with the incessant buzz about rehabilitation from the current governor (the same one who rejected

⁷⁹ Lawrence, 44 Cal.4th at 1206

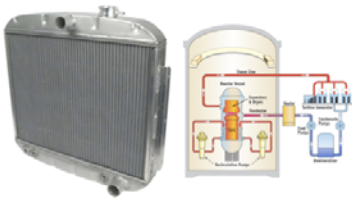
⁸⁰ Lawrence, 44 Cal. 4th at 1220

Sandra Lawrence as an unreasonable risk to society) and the recently renamed Department of Corrections and Rehabilitation. However it floats here in a veritable stew of penal rationales, including retribution in the form of uniformity, and always, incapacitation (deterrence is oddly missing). We have, I would argue, no rationale here of the law of murder beyond a nod to public safety as the dominant value.

Lawrence appears to be making a difference in the cases of certain lifers whose favorable recommendations from the BPT have been approved without comment by the governor.

Conclusion. The Law of Homicide: Radiator or Reactor of Penal Severity

Law of Homicide: Radiator or Reactor?



When we consider the law of homicide as a whole⁸¹ in relationship to public fears of violence and popular penal sensibilities we can imagine two metaphors or ideal types that operate at polar extremes. As a “radiator,” the law of homicide operates to channel and dissipate any threat to political stability from popular concerns about violence in general and homicide particularly. It does this by breaking homicide into multiple layers of seriousness, in which fear, moral outrage, and access to extremely punitive sanctions are separated by both narratives (premeditation and deliberation) and institutions (appellate courts, parole boards). On this model, the law of homicide cannot completely prevent escalations in penal severity driven by upsurges in violence, or the political and cultural context which makes homicides particularly threatening to citizens but it can help modify these effects, to reduce upward pressure on prison sentences in particular.

As a “reactor,” the law of homicide helps build up the intensity of fear and support for severe punishments. It can do so by evacuating the narratives that separate degrees of threat, outrage, and severity, and by collapsing the institutions that separate decisions and allow the cooling processes of time or perspectival change to take place. During times when violent crime is diminished the reactor model helps keep public sentiments punitive on crime, and during spikes of violence it can discharge great amounts of heat and energy into the political system.

⁸¹ Once again noting that we have focused on a small part, albeit a zone that I am arguing has become central to the practical reality of the law of homicide.

These are metaphors, of course, and only a starting point, but if we contrast the law of homicide in California as it operated in the period 1944 to 1980, with the period, 1981 to the early 2000s, we can observe something like the radiator and the reactor in operation. In the first period, while homicide rates were rising alarmingly and political investment in the meaning of violence was building, the law of homicide operated to keep homicide sentences low and the prison population at a historic low. In contrast, in the 1990s, while homicide rates dropped to their lowest levels in three decades, murder sentences in real terms reached historic highs.

Consider our reactor at each level. At the core, most infamously, remains the death penalty, which California practices mostly in theory.⁸² Indeed, for purposes of this presentation, I want to suggest to you that we would do better to think of California's death penalty primarily as a form of premium level life imprisonment without parole (premium from the perspective of the public, in the sense of extra punitive imprisonment for those elected as the state's most feared or hated murderers). Unless something happens to fully disrupt the system, either ending it or producing routine executions of 25 or more executions a year, the vast majority of prisoners on California's death row can expect to die in prison hospital beds, the tubes connecting them not to a lethal injection but to the perhaps subprime treatments available for end stage cancer, heart disease, or diabetes.

The result is a system in which billions of dollars are spent to identify a small but growing population of killers whose crimes have been proven to be aggravated in some ways and who are commonly described as the worst and most dangerous people in the state. The growth of death penalty aggravators in California (and elsewhere) means there are hardly any 1st degree murders that could not be charged as special circumstances murders under some theory. So while this population of menace grows (death row now encompasses nearly 800 souls and the state is debating spending billions it does not have to build a new super death row and execution chamber in a bid to address numerous court cases).

Just down from them in this hierarchy of punishment would come life without parole, for capital murder (murder with special circumstances) in which the prosecution has not sought death, or the jury has chosen the LWOP alternative. Unlike death row inmates, LWOP prisoners enjoy the amenities of the general population (such as they are). Still further down, in theory, are those convicted of 1st and 2nd degree murder, or those on a third-strike (which need not even be a serious let alone a violent crime), all of whom have the possibility of being paroled after serving at least a minimum sentences (fifteen years for 2nd degree murder, twenty five years for 1st degree or 3rd strike) less good time credits of about four months for every year of disciplinary incident free custody (about a third off). But in practice the law has left all of these prisoners in limbo, with the theoretical possibility of parole, but the practical reality of permanent imprisonment.

⁸² Although a flurry of two executions at the beginning of 2006 gave one a taste of what it must be like to live in Texas.

What story does this indigestible block of lifers tell California's public? Our leaders have expressly noted the lack of any meaningful difference in the danger posed, or the appropriateness of severe punishment for murder. Murder, is murder, is murder. Likewise, under our current parole practices, validated by the highest authorities in the state, there are no significant differences between the prisoners belonging to all of these groups. All of them belong to a single mass of risk to which there is no real means or purpose in differentiating. For all a state of posing a permanent risk to public safety can only be dissipated by the extreme deprivations of old age.⁸³ This is indeed the victim's viewpoint, but for the law to adopt it leaves no meaningful narrative to separate levels of fear, outrage, and access to severe punishment.

I must leave off this lecture at this most unsatisfying place. You may, if you like, take the whole thing as exotic tale from the deranged former colonies.⁸⁴ In 1957, HLA Hart visited Northwestern to talk about the differences between English and US homicide law.⁸⁵ His immediate thoughts were on the Homicide Act of 1957 and the near miss at abolition, which he clearly supported. But there was optimism to his lecture (republished as a chapter in *Punishment and Responsibility*) that responded to what he took to be the growing strength of criminal law reform in both the UK and the US to confront both publics with the tools for a democracy to reduce and eventually eliminate this excess in punishment. I do not think, at the present moment, we can offer the same optimism.

⁸³ And I mean extreme. In June of 2007, Governor Schwarzenegger turned down the parole of John Rodriguez, at 95 the state's oldest inmate. Rodriguez was imprisoned more than twenty-five years ago on 2nd degree murder for killing his estranged spouse.

⁸⁴ Indeed this entire evening's account might serve as a footnote to the decisions of the European Court on Human Rights insisting that judicial rather than political bodies decide on the discretionary release of life prisoners. See Thynne, Wilson and Gunnell v. UK, 13 EHRR 666 (1990); Weeks v. UK 10 EHRR 293 (1987).

⁸⁵ Hart, *supra* note 10.