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HOW SHOULD WE PUNISH MURDER?

JONATHAN SIMON*

One of the “law jobs” of the law of murder is to regulate the level of “penal heat” produced in society by violent crime and its state punishment. The history of the law of murder in both England and the United States can be read as a series of adjustments aimed at ventilating penal heat under particular historical conditions with the aim of protecting increasingly sensitive democratic political institutions from the damage caused by excessive penal heat. In distinguishing murder and manslaughter, and later recognizing degrees of murder and later still the potential for early parole release, the law of murder regulated penal heat by opening up a field in which both crimes and punishment could be ordered in morally satisfying and culturally coherent ways and by involving local decision makers, judges and juries, in decisions that determined the application of the harshest punishments. By these criteria, the contemporary law of murder is failing, producing a leveling in the grading of murder toward a flat and severe level. Ironically, the abolition of the death penalty, long a source of penal heat, is now helping to create a dangerous flattening of the law of murder toward the norm of life in prison. The result is a build up of penal heat, which is helping to anchor the larger spectrum of punishments for crime at too high a level. This article reviews the history of the law of murder in the United States and England from this penal heat perspective, and examines the contemporary situation California and England. The article concludes that criminal law can contribute to a rebalancing of our excessive level of punishment by self consciously seeking to restore the regulative role of the law of murder.

I. INTRODUCTION	1242
II. EVOLUTION OF MURDER AS PENAL MODERATOR	1257
A. The Common Law System: Murder and Manslaughter.....	1257
B. Degrees of Murder	1262
C. 20th Century Reform: Abolition and Parole.....	1267

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1. Parole	1268
2. Abolition	1273
3. Summary.....	1277
III. HOT, FLAT, AND CROWDED: THE FLATTENING OF THE LAW OF MURDER	1280
A. California.....	1280
B. England: From Abolition to the Criminal Justice Act of 2003—Extending Life Imprisonment.....	1283
III. REFORMING THE LAW OF HIGHLY CULPABLE KILLING	1291
A. How Many Crimes?	1291
1. Two is Better than One	1292
2. Three is Better than Two.....	1294
B. Mens Rea and Meaning	1297
C. How Should we Punish Murder?	1304
IV. CONCLUSION: TURNING DOWN THE HEAT	1310

I. INTRODUCTION

The law of murder¹ is perhaps the most significant place in the substantive law of crimes where the practice and purpose of punishment in contemporary society becomes a problem both for legislative drafting and for judicial interpretation of the law.² In this article I argue that is of more than analytic and pedagogic interest. The law of murder is, in fact, an important device within the substantive law of crime through which the overall scale and severity of punishment can be adjusted. To introduce a metaphor I shall return to throughout this article, I argue that one of what Karl Llewellyn would have called the “law jobs” of the law of murder, is to regulate the penal heat generated by violent crime—the often politicized fear of violent crime, and sometimes the law’s own response to violent crime.³

1. Throughout, I will be talking about both murders and those other highly culpable killings that have been treated as manslaughter through various partial defenses to murder, as well as by designation of distinct culpable mental states. For brevity sake I will refer to the legal rules governing this upper portion of the somewhat larger category of unlawful killings as the law of murder, but I mean to include all highly culpable killings.

2. LOUIS BLOM-COOPER & TERRENCE MORRIS, WITH MALICE AFORETHOUGHT: A STUDY OF THE CRIME AND PUNISHMENT FOR HOMICIDE 59 (2004) (“Perhaps as with no other criminal offence, discussion about its definition became increasingly inextricable from consideration of its penalties.”)

3. See generally Karl N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L. J. 1355 (1940).

Ian Loader and Richard Sparks use the metaphor of heat to describe how the politicization of crime policy over the last decades of the 20th century has transformed the conditions under which criminologists produce and disseminate knowledge about crime and crime policies.⁴ Uprooting that metaphor from that context, I want to suggest that crime and crime policies have always generated political heat and that one of the key jobs of the law of murder, historically, has been to help adjust the temperature. Mostly, the goal has been to turn the heat down in order to protect the political and legal institutions most likely to be damaged by the too much penal heat. Occasionally, the goal of the law of murder is to turn up the penal heat when public concerns about other kinds of injustice threaten the established order.⁵ While various substantive crimes and their punishments can contribute to the level of penal heat, I argue that murder plays a distinctive role—one that has become especially important since the 19th century as the most serious punishments have been limited in application to the crime of murder.

From this perspective, the well-known history of the transformations in the law of murder in the common law world—the emergence of the distinction between murder and manslaughter in the 14th century and the creation of degrees of murder in the American states in the late 18th century—can be read as a series of adjustments to make it more effective as a “radiator” of penal heat.⁶ The law of murder, in this sense, acts a radiator by breaking up the field of criminal killing into morally coherent and culturally appropriate divisions, separated and ranked in a way that should presumptively parallel the intensity of heat generated by killing itself. It also operates to expand the range of participation in the process of differentiation, giving power to judges and to juries and, by doing so, channeling some of the heat away from the center of government. In recent decades, however, the decades in which as Loader and Sparks note, the climate around penal policy has grown

4. See, e.g., IAN LOADER & RICHARD SPARKS, PUBLIC CRIMINOLOGY? 63–64 (2011). Loader and Sparks argue that, like climate scientists, criminologists now find themselves in a paradox where scientific knowledge is seemingly more and more critical to the future of societies but at the same time is itself surrounded by public contention. *Id.*

5. Something like this happened in the 17th and 18th century when England added scores of new capital offenses to its criminal code in response to increasing social conflict generated by the emergence of capitalism. For a leading discussion of a central episode in that period, see EDWARD PALMER THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 22–23 (1975).

6. Jonathan Simon, U.C. Berkeley Sch. of Law, Roger Hood Lecture at the Oxford Centre for Criminology: No Rationale for the Law of Homicide 5 (May 21, 2009) (transcript available at <http://www.crim.ox.ac.uk/lectures.php>).

markedly hotter, the law of murder has increasingly ceased to operate as a radiator by losing its ability to differentiate and distribute and, instead, become something more like a “reactor”—a machine that operates to recycle and intensify penal heat.⁷

For more than 500 years the primary problem punishment posed to the law of murder was that of capital punishment and its over production. While murder was hardly the only crime punished with death, capital eligibility was one of the chief features of the category of “felony” fundamental to both English and American criminal law, it was the crime most likely to generate heat both on its occasion and upon its punishment.⁸ Even limited to murder, as capital punishment was in the colonies, criminal justice produced more candidates for the gallows than society (which means both politics and norms) apparently wanted to allow (or grant executive discretion over).

In England, the historic solution was the crown’s pardoning power that permitted a very fine-grained filtering of who actually got executed.⁹ From the penal heat perspective, the heavy reliance of the English system on pardoning was a dangerous strategy. It gave the executive center of politics unmediated power to fine tune state killing, but also deprived it of the opportunity to channel away the collective emotions stirred by crimes and by rituals of state punishment. Monarchy was, in this respect, well suited to handle this kind of heat and perhaps to redirect it for its own purposes.¹⁰

7. *Id.*

8. Some crimes might be even more frequently punished by death, for example “coining” or counterfeiting in 18th century England was one such crime, but coining would not have generated as much heat. See V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770–1868*, at 525 (1994).

9. To what end the pardoning power was used was, of course, controversial. For information on the pardoning power as a tool of deft class control in the 18th century, see generally Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION’S FATAL TREE* 17 (Douglas Hay et al. eds., 1975). The English case was very different at the end of the 18th century because of the continued vigor for executing property criminals in England, a practice mostly abandoned in the U.S. (at least for the North) by then. By the second third of the 19th century, however, when after 1830, execution was removed as a possible sanction for most crimes, leaving murder the major focus of the death penalty. See GATRELL, *supra* note 8, at 10.

10. This is Foucault’s important argument about the role of scaffold executions in producing the spectacle-based power of monarchical government. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 48–50 (Alan Sheridan trans., Pantheon Books 1st ed. 1977).

In the United States, the already limited scope of the death penalty permitted by colonial law and then later by state law was further limited by degrees of murder, an innovation first adopted by the state of Pennsylvania.¹¹ It was the first great change in the common law world of murder since it began to be formulated by Coke and subsequent digesters in the 17th century. Degrees of murder—first and second—were adopted by most other states. In a parallel innovation, juries were given the power to decide whether or not to impose capital punishment even after a conviction for first-degree murder. From the penal heat perspective, degrees of murder were a successful and much copied innovation. This statement is so not just because they opened a channel by which most murders could be prosecuted and punished without frequent recourse to either executions or executive pardons,¹² but because they accomplished this reduction through an elaboration of meaningful differentiations among killings, and through moving power (and heat) farther away from government to the institution of the jury.

In the 20th century, the law of murder was further recast by the introduction of parole, which allowed refinement of long non-capital murder sentences based on administrative release procedures. From the penal heat perspective, parole is a major innovation both because it allows individualized differentiation in the punishment for murder (and other crimes), and because it removes this power to a specialized and politically insulated institution and shifts it in time to a period considerably after both the crime and the trial. While often ignored in the history of the law of murder, parole clearly influenced the most significant effort at reform of the law of murder in the United States during the 20th century, the Model Penal Code (“MPC”) first promulgated in 1962.¹³ The MPC eliminated the degrees of murder altogether in favor of a complex weighing formula of aggravating and mitigating factors to determine capital punishment and parole to set the length of prison sentences those cases where death was rejected.¹⁴

11. See generally Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759 (1949).

12. Both of which were, at the least, politically troublesome, especially when they involved sympathetic local perpetrators and victims.

13. See generally MODEL PENAL CODE (1980).

14. The Model Penal Code defined murder as a felony of the “first-degree,” punishable by either death or an indeterminate sentence of life in prison. *Id.* § 210.2(2).

Today, in many states of the United States and in other nations, the law of murder is in need of reform, as it is producing an excess of harsh punishment. California and England shall be my primary examples, and while there may be good counter examples in the United States and other common law jurisdictions, I propose that we consider these examples of a more general problem of penal overproduction afflicting much of the common law world. In both polities (although to different degrees and for different reasons), legal principles intended to separate murders in terms of severity of punishment have broken down leaving a penal response to murder that is too flat and too severe.¹⁵ The law of murder has increasingly lost its capacity to limit punishment and is becoming an anchor of a system of over-punishment.

Currently, and for the first time in history, it is not the overproduction of capital punishment that seems to be overheating the penal and political fields. Indeed, it is the abolition of the death penalty in England and Wales in 1965 and its constitutionalization in the United States in 1972 (which has greatly reduced death sentences and executions from earlier norms) that has helped to produce the breakdown by removing the most emotionally charged differentiation available to the penal field of modern societies. For centuries, the life sentence has been offered as the most humane and rational alternative punishment to the death penalty for the crime of murder.¹⁶ But today, with the death penalty eliminated in England and largely ineffectual even in those states of the United States that retain it outside of a few in the South, the life sentence has become the primary vessel for channeling the heat of violent crime. As a result, life sentences (never intended to actually last for the entire remainder of a prisoner's life in most cases) have become longer in both England and the United States, ultimately (in the U.S.) tending to become whole life sentences. Sometimes this takes the form of a mandatory or judicially selected "life without parole" (LWOP) sentence, as it is known in the United States, or a "whole life tariff," as it is known in England. Even where life sentences include a parole option, political pressure on parole authorities in many states has pushed up actual time served (and in

15. I do not mean to imply that law is the sole or even the most important source of this result. It is, however, one of sources that lies internal to law and is thus a proper target for lawyers and legal scholars to take on.

16. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 92-93 (2002) (describing William Blackstone's *Commentaries on the Laws of England* and his adoption of Cesare Beccaria's two-pronged argument against capital punishment, which was published almost 250 years ago in 1769).

California virtually eliminated the chance of release for most eligible life prisoners).

From a penal heat perspective, this change is producing a flattening effect on the law of murder, eliminating the possibility of making a range of differentiations and distributing power (and heat) away from the centers of government. In most states, including California, degrees of murder remain the law, ostensibly creating a multi-tiered system. Depending on its circumstances, an unlawful killing in California can range from first-degree murder with special circumstances, which is punished by death or life in prison without parole (LWOP),¹⁷ to voluntary manslaughter with a determinate sentence of up to 11 years.¹⁸ In between these sentences is first-degree murder, with a life sentence and a 25 year minimum sentence before parole consideration,¹⁹ and second-degree murder, with a potential life sentence and a 15 year minimum sentence before parole.²⁰ However, in practice, the virtual elimination of executions,²¹ and the dramatic reduction in the portion of persons under a life sentence for murder who actually receive parole (to far fewer than one percent of the eligible pool annually) means that first-degree murder with special circumstances, first-degree murder, and second-degree murder, are all punished with life imprisonment with little or no chance of release.

In England (and Wales), life imprisonment has been the mandatory sentence for murder since the abolition of the death penalty in 1965.²² In practice, the power to release by executive decision (pardon or Parole in U.S. terms) and exercised until 2002 by the Secretary of State for the Home Department assured that actual sentences were far shorter and reflected a wide range of factors.²³ More recently, however, the Criminal Justice Act of 2003 (in response to pivotal court decisions

17. CAL. PENAL CODE § 190.2(a) (West 2008).

18. *Id.* § 192(a).

19. *Id.* § 190(a).

20. *Id.*

21. Only 13 condemned prisoners have been executed since the current death penalty statute came into effect in 1974, leaving nearly 700 prisoners on death row. Death Penalty Information Center, State by State Database, http://www.deathpenaltyinfo.org/state_by_state (last visited May 19, 2011).

22. THE LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE: PROJECT 6 OF THE NINTH PROGRAMME OF THE LAW REFORM—HOMICIDE, LAW COM. NO. 304, 9, 19 (2006), available at http://www.justice.gov.uk/lawcommission/docs/lc304_Murder_Manslaughter_and_Infanticide_Report.pdf [hereinafter MURDER, MANSLAUGHTER, AND INFANTICIDE].

23. BLOM-COOPER & MORRIS, *supra* note 2, at 127–32.

discussed below) established a system of guidelines for judges in setting the tariff, or minimum sentence before a prisoner under a life sentence could be considered for release which codifies a significant shift upwards in the length of imprisonment for persons convicted of murder in England and Wales. Under the guidelines the most aggravated murders are to be assigned a whole life sentence (meaning, in theory, no parole). The most mitigated murders are assigned 15 years (significantly longer than previous norms) with an interim category set at 30 years.²⁴

Thus, despite quite different doctrinal histories, both California and England have ended up in a similar place, with less ability to differentiate in the severity of punishment among those convicted of murder than they had in the past, and a relatively flat and high level established as the normal punishment for murder. In both societies (but especially the United States), political leaders have explicitly questioned the moral significance of the degrees of murder and promoted the justness of this flat and hot approach to murder as an appropriate rebalancing of the criminal justice system toward what could be called a “victim’s perspective.”²⁵

The formation of a hotter and flatter law of murder has worrying implications for the well-recognized problem of excessive punishment in both the U.S. and the U.K.²⁶ The substantive criminal law, especially in its high visibility role of grading harmful conduct, plays an important if hard to measure role in the moral stability of a society.²⁷ As William Wilson has argued:

24. Criminal Justice Act of 2003, c. 44, § 239(7), sched. 19 (Eng.); *A New Homicide Act for England and Wales?* 19 (Law Comm’n, Consultation Paper No. 177, 2005), available at <http://www.law.upenn.edu/cf/faculty/cfinkels/workingpapers/Report%20for%20British%20Law%20Commission%20cp177.pdf> [hereinafter *A New Homicide Act*].

25. The emergence of crime victims as central referent for the criminal law and for citizenship more broadly has been identified as a key determinant of mass incarceration. See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 11–12 (2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 8 (2007). The image of rebalancing criminal justice in favor of the victim was invoked frequently by former British Prime Minister Tony Blair. See Joshua Rozenberg, *Blair Vows to “Rebalance” Justice Towards Victims*, TELEGRAPH, June 19, 2002, <http://www.telegraph.co.uk/news/uknews/1397692/Blair-vows-to-rebalance-justice-towards-victim.html>.

26. GARLAND, *supra* note 25, at 1–8; see also Tim Newburn, “Tough on Crime”: *Penal Policy in England and Wales*, 36 *CRIME & JUST.* 425 (2007). See generally SIMON, *supra* note 25; BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN THE AMERICA* (2006).

27. Emile Durkheim, one of the founders of modern sociology, saw punishment as anchored in the shared moral assumptions that unify a society. EMILE DURKHEIM, *THE DIVISION OF LABOUR IN SOCIETY* 62–63 (1984).

Precise, meaningful offence labels are as important as justice in the distribution of punishment. These labels help us to make moral sense of the social world—a matter of key concern, as society becomes increasingly heterogeneous. A criminal provision is better able to communicate the boundaries of socially acceptable behaviour if it packages crimes in morally significant ways.²⁸

Such a flattened law of murder creates a severe and uniform punishment despite the widely shared moral intuition that some killings are much worse than others.²⁹ The flattening of murder reinforces a new morality of law that takes the perspective of the victim as the ground for assessing the appropriateness of punishment. From the victim perspective, all killings have the same result of the loss of life—there is no moral distinction among them.³⁰ Such a moral revaluation of penalties cannot be easily limited to murder, but informs the entire view of punishment for crime.

The disproportionate role that murder plays in the media and popular culture reflects its role in ordering our broader conception of crime and its appropriate punishment. Because of its role at the penal summit of crime where life is most threatened, murder establishes the top of the penal scale. At the very least, a flat and severe sentence for murder has an inflationary effect on the whole structure of punishment through adjusting the scale of pricing of criminal penalties overall.³¹ Thus, the high price for murder, at the very least, makes it far easier to set high sentences for all manner of less serious offenses. If murderers

28. William Wilson, *What's Wrong with Murder?*, 1 CRIM. L. & PHIL. 157, 162 (2007).

29. Reflected ironically in its support, the death penalty singles out some murders and reinforces a widely shared construction that death rows hold the worst of the worst killers. See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L. J. 1835 (1994). Naturally, but also persuasively many defense advocates retort that it is those with the worst lawyer, not the worst crimes that are condemned. *Id.*

30. Some historians of the common law argue that all killing, even in necessity or self-defense against the assailant, was a felony, with justifications only calling for the King's pardon. See Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L. J. 537, 539–40 (1934).

31. Behavioral economists have long noted the power of influential price signals to anchor expectations about reasonable choices for decisions under uncertainty. See Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 ORG. BEHAV. & HUM. DECISION PROCESSES 296, 297–300 (1992).

serve ten or twenty years one is not likely to see repeat burglars or drug traffickers serving for decades.³² It follows that where murder punishments are extreme, there is the potential and perhaps an inexorable pull toward more severe punishments for all the lesser crimes; and where murder punishments are moderate, the overall array of punishments will be moderate.

In modern society, this price logic is accelerated by a criminological logic that extends the threat of murder into the larger structure of crimes. In the past, the law of crimes reflected a variety of social functions including the protection of religious values (blasphemy was a capital crime), status hierarchies, and property. In modern society, however, the preservation of life has become the overwhelming value expressed through the criminal law. Herbert Wechsler and Jerome Michael's in their seminal analysis of the law of murder, written at the end of America's first great wave of violence in the mid-1930s, captured this sense that all of criminal law, and not just the law of homicide, was concerned with preservation of human life:

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 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

32. This might create too much of a squeeze for serious crimes like rape, aggravated assaults, and violent robberies, not to mention non-lethal acts of terrorism. It seems to me that very serious crimes can share the same sentence in principle as murder without violating the ladder principle (as they did in the era of the common law when death was also a possible sentence for robbery, rape, and kidnapping as well as burglary).

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.³³

Instances of less serious crimes, such as vandalism, minor theft, or drug possession, can be viewed as legal violations calling for only modest punishment from either a retributive or a deterrence perspective. However, they can also be viewed as evidence of “criminality” for which the present modest offense may be part of a potentially escalating pattern of crime whose increase tends toward violence and murder.³⁴ Thus, a flattening of the law of murder, especially at a severe level, will tend to create pressure to revalue all criminal punishments upwards. Or, to return to the thermal metaphor with which we began, the job of the law of homicide is to dissipate penal heat through the measured separation of terrible violence into morally meaningful substantive crimes, and to link these crimes through a ladder principle to the severity of punishment. When the law of homicide fails at that job, penal heat builds up as fear and outrage at the worst crimes infects the public response to all crime.

Mass incarceration might be thought of as the visible symptom of an underlying problem in our penal culture. Just as obesity can mean that a person has lost the ability to regulate their own appetite for food, mass incarceration is evidence that our collective appetite for punishment is out of whack.³⁵ Earlier I suggested a thermal metaphor for this function, the law of murder as a kind of radiator. Here, I suggest a somewhat different consumption based metaphor of appetite where murder functions as a key anchor for changes in our overall appetite for punishment. The ability of set a proper scale of punishment when it

33. Herbert Wechsler & Jerome Michaels, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 729 (1937).

34. This “criminological” view of crime has always been a bit more visible in America, largely due to the populist nature of crime policy, compared to Europe where law experts have historically had more influence. See Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-first*, 84 TEX. L. REV. 2135, 2167 (2006). Still, the basic dynamic described here applies to all modern societies that place life at the center of the values protected by criminal law.

35. I develop this analogy further in Jonathan Simon, *Do These Prisons Make Me Look Fat?*, 14 THEORETICAL CRIMINOLOGY 257 (2010), available at <http://tcr.sagepub.com/content/14/3/257>.

comes to murder is crucial than to establishing an overall sense of proportionality for punishment.

I am not suggesting that the law of murder alone drives over punishment in contemporary society. We know from extensive scholarship by now that many features of contemporary U.S. society help to drive mass incarceration.³⁶ One of the most important features is the political structure of crime policy, which is extremely decentralized,³⁷ and creates pathological incentives for both individual lawmakers and individual prosecutors.³⁸ The U.S. and the UK have also experienced a significant increase in economic inequality over the past generation and growing insecurity of working and middle class families, and both societies continue to struggle with an incomplete resolution of our histories of organized racism.³⁹ Many countries, not just the U.S. and the U.K., have experienced a long-term crisis of the conditions under which liberal governance is carried out that has made government appear weaker and less legitimate.⁴⁰ But while all these factors may contribute to the heating up of the crime policy field,⁴¹ the law of murder represents a unique mechanism within the substantive law of crimes that permits a kind of internal effort at homeostasis by dissipating and channeling penal heat. Perhaps only at the margins, a well delineated and differentiated law of murder permits a cooling process. This process occurs by describing morally meaningful and culturally resonant differences between events that, from the victim perspective, are identical, and by creating pathways of responsibility. These pathways channel popular outrage about the legal response to violent crime away from the centers of political power and towards judges, parole boards, and juries. Likewise, and perhaps at the margins, our garbled and incoherent law of murder contributes to this epic problem.

36. There are so many features of contemporary U.S. society that Michael Tonry has usefully described them as risk factors. See Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 13–16 (2004).

37. See Joachim J. Savelsberg, *Knowledge, Domination, and Criminal Punishment*, 99 AM. J. SOC. 911, 919–20 (1994).

38. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546–57 (2001); Franklin E. Zimring, *Penal Policy and Penal Legislation: Recent American Experience*, 58 STAN. L. REV. 323, 324–26 (2005).

39. See generally LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNING OF SOCIAL INSECURITY* (2009).

40. David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. CRIMINOLOGY 445, 445 (1996); SIMON, *supra* note 25 at 22–31.

41. LOADER & SPARKS, *supra* note 4, at 17.

Could this be the right time to look for a major rethinking of the law of murder? The last great recasting of the law of homicide (and the criminal law more generally) began more than eighty years ago in the scholarship of figures like Rollin M. Perkins⁴² and Herbert Wechsler.⁴³ Today we are once again in a time when criminal law theorists are returning to fundamental questions about the law of murder.⁴⁴ There are a number of reasons this is a promising moment for such a return.

First, the law of murder today comes into question in a time of “mass incarceration” in the United States, and arguably in England as well.⁴⁵ Between the 1930s when Wechsler began thinking about the rationale of the law of homicide, and 1981 when he produced his last revised edition of the Model Penal Code, the imprisonment rate for the United States had changed only modestly from around 130 prisoners per hundred thousand free adult residents, to around 154 per hundred thousand (for many of the intervening decades it was in decline). In 2009, the national imprisonment rate was leveling off for the first time in decades at around 504 per 100,000 free adults.⁴⁶ Broad agreement exists among criminologists that current levels of imprisonment are unneeded to control crime, which is at a level much reduced from the heights of the 1970s and 1980s and that states cannot afford to maintain these high

42. Perkins, *supra* note 30.

43. Wechsler seems particularly important, as the primary author of the Model Penal Code, the very influential mid-century American Law Institute commissioned effort to systematically restate and reform American criminal law. Wechsler’s approach, modernizing the common law around the creation of risk as the principle of grading, began with his work (in collaboration with Jerome Michaels) in the mid-1930s on the law of homicide. *See generally* Guyora Binder, *Meaning and Motive in the Law of Homicide*, 3 BUFF. CRIM. L. REV. 755 (2000); Wechsler & Michaels, *supra* note 33.

44. *See generally* CYNTHIA LEE, *MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURT ROOM* (2003); SAMUEL H. PILLSBURY, *JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER* (1998); Guyora Binder, *Felony Murder and Mens Rea Default Rules: A Study in Statutory Interpretation*, 4 BUFF. CRIM. L. REV. 399, 400–01 (2000); Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965 (2008); Tom Stacy, *Changing Paradigms in the Law of Homicide*, 62 OHIO ST. L.J. 1007 (2001).

45. Mass incarceration is defined by sociologists as a penal regime that is both operating at an unprecedented scale and in which imprisonment is applied to whole categories of offenders rather than on an individualized basis. *See* DAVID GARLAND, *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1–2 (2001); WESTERN, *supra* note 26, at 12–15.

46. 2009 marked the first year since 1977 when the national prison population declined in absolute (as well as per capita) terms. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.6.28.2009 (2010), available at <http://www.albany.edu/sourcebook/pdf/t6282009.pdf>. England and Wales have also experienced an unprecedented rise in imprisonment rates since the early 1990s. *See* Newburn, *supra* note 26, at 427–33.

levels of imprisonment, especially as aging prisoners drive up health care costs.⁴⁷ While homicides are down considerably,⁴⁸ the life sentence for murder, and the very long prison sentences that it produces, are becoming a major part of that cost in at least some jurisdictions (California in particular).⁴⁹

Second, there has been a sea change in penal rationales. When most of the modern reforms of the law of murder were developed in the middle of the 20th century, the dominant penal rationale in both England and California was rehabilitation. By the 1980s a comparatively extreme version of penal incapacitation had emerged as the dominant rationale for the law of homicide (and everything else) in California.⁵⁰ England has also increasingly embraced incapacitation as the master rationale governing punishment (and especially the punishment of murder). From a penal heat perspective, the dominance of incapacitation is critical because it has removed any potential for the correctional enterprise to contribute to a cooling of emotions generated

47. See generally MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS IMPRISONMENT* (2009); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both be Reduced?*, 10 *CRIMINOLOGY AND PUB. POL'Y* 1, 13 (2011).

48. From a high of 9.8 homicides (murder and non-negligent manslaughter) per 100,000 inhabitants in the U.S. in 1991 to 5.0 in 2009, the lowest figure since 1965. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.3.106.2009 (2010), available at <http://www.albany.edu/sourcebook/pdf/t31062009.pdf>.

49. Recent data from the California auditor's office underscores this problem. Out of a total correctional budget of 5.4 billion in 2009, health care costs were 2.1 billion, a quarter of that on specialty medical needs, with the sickest 1,175 inmates costing an estimated 185 million dollars in 2009. See generally CAL. STATE AUDITOR, CAL. DEP'T OF CORR. AND REHAB., *INMATES SENTENCED UNDER THE THREE-STRIKES LAW AND A SMALL NUMBER OF INMATES RECEIVING SPECIALTY HEALTH CARE REPRESENT SIGNIFICANT COSTS* (2010), available at <http://www.bsa.ca.gov/pdfs/reports/2009-107.2.pdf>.

50. While California's primary penal rationale today is acknowledged to be incapacitation, see *Ewing v. California*, 538 U.S. 11, 14 (2003), this overlooks how extreme a form of incapacitation the state's penal policies embrace. Historically incapacitation is thought of as the inhibiting effect of penal measures on the personal offending of the subject punished. While imprisonment may be the paradigm form of incapacitation it also long included other penal measures that inhibit offending including controls imposed by probation sanctions, which can include requirements that the offender avoid contact with potential victims, certain occupations, former accomplices, and certain geographical locations. In its strongest form, these orders can be reinforced with electronic monitoring. Other preventive measures include drugs that inhibit drinking, or hormone therapy to reduce sex drive in sex offenders. California's penalty is distinctive in its commitment to incarceration as the only credible form of penal incapacitation. I use the term "total incapacitation," to capture this extreme approach to incapacitation. This logic relentlessly pushes for longer and more secure imprisonment. In this penal vision an LWOP sentence under supermax prison conditions would be the ideal sentence, not just for murder, but for any serious crime.

by crime in society. Appeals to rehabilitation, or retribution understood as just deserts, point to factors that can encourage sympathy for the offender and acceptance of limits to punishment. Rehabilitation helps define the violence of the offender as, at least in part, due to factors beyond his or her control, and promises to utilize the punishment experience to address those factors and reform the likely future behavior of the offender. Just deserts presents the offender as an equal member of the community who must be called to account for his or her usurpation of the victim's rights, but who can "pay their debt" to society through the expiation of just punishment. In contrast, incapacitation calls attention only to the dangerousness of the offender and promises only to contain that threat, not redress it.

Third, the rise of human rights law internationally, and the growing significance of international human right treaties like the Universal Declaration of Human Rights and the Torture Convention, highlight dignity as a central positive value that must be protected by the law including the law of murder.⁵¹ In England, the law of murder today is also determined in important respects by European Convention of Human Rights. As enforced by the European Court and promoted by European Community administrative organs like the Committee for the Prevention of Torture and Degrading Punishment, this new background law has been a significant counterweight to the political pressure of populist punitiveness, especially in sustaining an institutional commitment to resocialization, individualization, progressivity, and potential for release within the penal establishments of treaty member state. In the U.S., the emergence of dignity as an influential substantive norm for the criminal law only just begun and is likely to move more slowly as it is limited to the interpretation of the "cruel and unusual" punishment ban under the 8th Amendment and the meaning of "degrading and inhumane" punishments under the Torture Convention.⁵²

Fourth, there are signs that some process of revaluation of punishment and the law of murder is already beginning. In England, which has experienced a less extreme but similar pattern of escalating

51. As James Whitman has argued, dignity has historically been a much greater influence on the development of penal law in Europe than in the United States. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICAN AND EUROPE* 7–8 (2003).

52. *But see* *Graham v. Florida*, 130 S. Ct. 2011 (2010) (finding LWOP for a juvenile convicted of a non-homicide offense cruel and unusual) and *Brown v. Plata*, 131 S.Ct. 1910 (2011) (describing dignity as a core principle behind the 8th Amendment).

punishment in recent decades⁵³ is, after a long period of increasing its penal severity and incapacitation orientation of its justice system, in a period of reconsidering its heavy reliance on imprisonment—while there are political and economic factors that have driven this reconsideration, there is also a significant concern with the legitimacy of the penal law in a period of mass incarceration. In particular, the law of murder in particular has come under scrutiny. In 2005, the Law Commission, a chartered expert body on law reform, published its consultation paper, *A New Homicide Act for England and Wales?*⁵⁴ The consultation paper specifically cited the harsh minimums for life sentences established by the 2003 Criminal Justice Act as requiring an effort to reform and rationalize the law of murder. The Law Commission published its final report in 2006 recommending a three-tier structure to the law of murder.⁵⁵ The New Labour government then in power in England and Wales, whose policy choices largely lay behind the growth in imprisonment, was unwilling to bring the report to Parliament for any serious consideration as legislation, instead issuing its own pointedly different consultation paper in 2008 and later adopted only a series of changes to the affirmative defenses to murder while leaving its basic structure the same.⁵⁶ Yet despite the failure of reforming legislation on the structure of murder to emerge thus far, I take the Law Commission's report and the broad discussion engendered by them to be a significant indication the growing problem of legitimacy for criminal law and particularly the law of murder. Specifically, the Commission's call to adopt a three tier structure of murder is an invitation for American

53. GARLAND, *supra* note 25, at 8; Newburn, *supra* note 26, at 433–35.

54. MURDER, MANSLAUGHTER, AND INFANTICIDE, *supra* note 22, at 2 n.3.

55. *See id.* at 15–18. Thus far there has been no action in Parliament on the paper's recommendations. However, the Labour government in power in Westminster until May, 2010, which formed in August of 2007, was successor to the Labour government which adopted the harsh features of the 2003 Criminal Justice Act and was unlikely to take any steps which would appear to dampen the force of one of New Labour's signature initiatives. The coalition government (of the Conservative Party and the Liberal Democratic Party) has publicly questioned the wisdom of the mandatory minimums in the 2003 Act. *See generally* LORD CHANCELLOR AND SECRETARY OF STATE FOR JUSTICE, *BREAKING THE CYCLE: EFFECTIVE PUNISHMENT, REHABILITATION AND SENTENCING OF OFFENDERS 2010*, Cm. 7972 (U.K.). While repealing these minimums might take away some of the pressure to reform the overall law of murder, the current government may find the direction taken in the consultation paper more to its liking than the last one clearly did.

56. *See Murder, Manslaughter and Infanticide: Proposals for Reform of the Law 5* (Ministry of Justice, Consultation Paper No. 19, 2008) (putting off for the future consideration of the Law Commission's recommendations on the structure of the law of murder).

readers to consider whether we have lost something in the emergence of flat and high defacto single degree of murder in states like California.

In the remainder of this article I will describe in more detail the evolution of the law of murder in the England and the United States from the penal heat perspective. Specifically, I will examine four change points; the emergence of the murder-manslaughter distinction in the 17th century; the emergence of degrees of murder at the end of the 19th century, the emergence of parole in the 20th century; and the abolition, or near abolition in the case of the U.S., of the death penalty in the last third of the 20th century. Next, I consider the present, when in both England and at least some jurisdictions in the United States there is a collapse of the law of murder toward a higher flatter grading. In the final section, I will offer some tentative propositions toward reform on questions considered by the English Law Commission consultation paper: How many crimes of murder? And how should these crimes articulate into the structure of punishment?

II. EVOLUTION OF MURDER AS PENAL MODERATOR

A. *The Common Law System: Murder and Manslaughter*

The first great distinction in the law of murder was between murder and manslaughter. At the dawn of the common law, any killing was a felony violating the King's peace and was a capital crime. Justifications like necessity and even self-defense were grounds on which a royal pardon was to be expected as an entitlement, but did not occur automatically.⁵⁷ Accident, or "misadventure" in the words of the common law, along with infancy and insanity were also strong grounds for a royal pardon, but still were not an entitlement. Those without such a justification or excuse could still evade a sentence of death by pleading the "benefit of clergy." This legal device was originally an expression of the jurisdictional separation between church and state. Clerics charged with felonies could not be sentenced by a secular court (at least without first being stripped of their clerical immunity by an ecclesiastical court). In the 12th century, this rule expanded so that virtually any first time felon could claim the "benefit" through demonstrating the ability to recite, in Latin, the first lines of Psalm 51.⁵⁸ The typical punishment of one who successfully pled the benefit was branding on the hand,⁵⁹ and

57. Perkins, *supra* note 30, at 540.

58. BLOM-COOPER & MORRIS, *supra* note 2, at 21.

59. This practice was designed to detect repeat offenders who were not eligible for the

continued confinement in the jail for the balance of a year from the time of their arrest.⁶⁰ Benefit of clergy was available whether the behavior and mental state of the defendant approximated what we would today call murder or manslaughter.

The birth of murder as a distinct crime for which the most severe penalties were available (even if not necessarily reserved yet) was a product of the Tudor period (1485-1603), as legislation withdrew the benefit of clergy from those felonious killings associated with “malice aforethought” (or *malice prepensed*).⁶¹

From this time on it seem clear that what been the old felony of murder was now divided into those offences which were ‘willful and of malice aforethought’, not clergyable and consequently capital, and those which, being neither in self-defence nor a result of misadventure, nevertheless bore culpability. . . . The effect was to drive a great wedge into the law of homicide, splitting off the discrete crime of murder from those other killings which were to become known as manslaughter.⁶²

By the 17th century, Lord Coke defined murder in express reliance on the concept of malice aforethought:

Murder is when a man of sound memory and of the age of discretion, unlawfully killeth within any County of the Realm any reasonable creature in rerum natura under the King’s peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded or hurt, etc. die of the wound or hurt, etc. within a year and a day after the same.⁶³

benefit. *Id.*

60. The plea was apparently not always successful even for those who met its formal test. *Id.*

61. Perkins, *supra* note 30, at 543–44.

62. BLOM-COOPER & MORRIS, *supra* note 2, at 21–22.

63. 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 47 (1669).

Modern criminal lawyers have been understandably short tempered with this archaic sounding term and have viewed it as providing little real guidance to prosecutors, judges, or jurors today.⁶⁴ Since the end of the 19th century, both English and American lawyers have claimed that the term is little more than a signifier for whatever mental state is required by law to establish the crime of murder.⁶⁵ But to Coke's era, and well into the modern period, the term borrowed directly from what could be presumed to be a widely shared religious sensibility to describe those persons whose acts of killing manifested a corrupted soul, an evil disposition. "The concept of *sin* was predicated upon the notion of a wrong act having been freely willed by the sinner, the evil intention having been translated into the physical deed."⁶⁶

Instead of the modern search for a mental state underlying this concept, the early common law world expected criminality to be manifest and visible. Malice aforethought stood out in a world where killing was far from uncommon, because it took forms specifically indicating a deliberate purpose to kill a particular individual rather than a violent assertion of personal honor invoked by a social interaction. Indeed, one original use of the French term *murdrum* was for killings that were done in secret.⁶⁷ Lord Bracton, often considered the founder of the common law conception of murder, defined "malice aforethought" as a killing "where one in anger or hatred or for the sake of gain, deliberately and in premeditated assault, has killed another wickedly and in breach of the king's peace."⁶⁸ But in Coke's formulation, this manifestly deliberately performed killing only constituted one form of malice aforethought, "express malice." Other killings could manifest evil, because they were done with no provocation at all, or because the victim was a magistrate or public official (generally a higher status person), or because it had been carried out in the course of another crime like robbery. These killings, which Coke described bearing "implied malice," were also murder (and non clergyable), an

64. *E.g.*, Perkins, *supra* note 30, at 548.

65. *See id.* at 567–68.

66. BLOM-COOPER & MORRIS, *supra* note 2, at 20.

67. *Id.*

68. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 34 (George E. Woodbine ed., Samuel E. Thorne trans., The Belknap Press 1968); Wilson, *supra* note 28, at 161. In Scotland, Lord Hume described murder as a killing with a wicked intent or wicked recklessness, or in the Scots, *dole* from the Latin *dolus*. *See* DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIME, 21 (B.R. Bell ed., Edinburgh, Law Society of Scotland 1986) (1797). *See generally* T.H. JONES & M.G.A. CHRISTIE, CRIMINAL LAW (4th ed. 2008).

approach that survives to this day in many U.S. states that retain the common law categories.⁶⁹

At this point killing becomes a two-tiered crime. One crime, malice aforethought killing, including deliberate killings, and those where malice was implied by the context of the crime, were murder and in theory punished by mandatorily by execution (Royal pardon continued to be available however). The other crime, manslaughter, originally those killings that were overt and responded to provocative action by the victim following the predictable channels of social custom in an armed and violent society, were manslaughter, resulting possibly in execution, but more typically, at the judge's discretion, in benefit of clergy for first offenders. With some judicial sculpting along the way, this two tiered system of murder and manslaughter, with murder presumptively subject to execution and manslaughter presumptively limited to a relatively modest of penalty of branding plus a jail sentence of less than a year,⁷⁰ lasted in England until second half of the 20th century. At that time, in an effort to limit the death penalty, Parliament passed the Homicide Act of 1957, which defined several categories of aggravated murder as capital crimes and subjected the rest to a life sentence—in effect, creating degrees of murder.⁷¹ The abolition of the death penalty for England and Wales in 1965 essentially undid this statutory structure, rendering the categories of aggravated murder essentially nugatory and making a mandatory life sentence the singular punishment for murder.

From a penal heat perspective, there are several points to note about the two tiered murder manslaughter system. First, it was the opposite of flat. The difference between murder and manslaughter was not just between death and life, but between death and a largely symbolic punishment (branding on the thumb) with only a minimal amount of jail time associated mostly with waiting for the trial.⁷² Second, while the conceptual divide between murder and manslaughter through the notion of malice aforethought may confound modern lawyers looking for a mental state or states that corresponds to its various express and implied forms, in the Sixteenth and Seventeenth century it probably did an

69. BLOM-COOPER & MORRIS, *supra* note 2, at 26.

70. Perkins, *supra* note 30, at 541.

71. Albeit these degrees were quite different in their *mens rea* requirements than those in the degrees in most U.S. states.

72. This would change in the 19th century when transportation and later prison sentences became the punishment for manslaughter.

excellent job mapping on to widely shared religious and social conventions. The idea that those whose killing indicated a deeper kind of sin should be punished far more severely than those whose killing resulted from a lapse in virtue had purchase in a deeply religious and very violent society. Likewise, the separation between killings that occurred in the content of an open clash among armed men, and others precipitated by stealth, or crime, captured significant features of the sociology of killing in the early modern world.

On closer inspection, however, the system concentrated power at the center in ways that must have limited its capacity to channel penal heat away from the political center. English judges tightly controlled when a manslaughter instruction was given.⁷³ Only in some cases could juries choose between death and symbolic punishment. More importantly, the political executive left even these controlled choices subject to its own power of revision (at least for those convicted of murder). Instead, while death was the mandatory punishment for murder, far fewer than half of all those so sentenced actually died at the gallows. Moreover, death was also a possible punishment for manslaughter; so the substantive law did little work in separating the doomed from the returnable. Most received a Royal pardon permitting them to return to society after some months of languishing under the threat of death (and later after a period transportation or imprisonment).⁷⁴ Historians disagree over what logics governed pardons, whether a subtle and precise instrument of class governance in an increasingly unequal and unstable society, or as a way of reflecting the complex moral view of violence beyond the crude outlines of murder law; but in either case select they did, and without the burden of public justification. By retaining and frequently using the power to pardon, the executive kept the penal heat of violent crime and execution close to its own quarters.

This may have been a worthwhile tradeoff for the political value that pardon gave the sovereign to adjust the level of mercy or terror required by a particular political moment.⁷⁵ No doubt the nature of monarchy, without the problem of being accountable to elections, made it far easier for the system to withstand penal heat, and in a sense, may have

73. JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW* 332 (5th ed. 2004).

74. After 1837, the royal prerogative of mercy, as it was formally known, was exercised by the Secretary of State for the Home Department acting at the sovereign's behalf but under the political control of the government. See BLOM-COOPER & MORRIS, *supra* note 2, at 112.

75. For an account that stresses these political calculations, see FOUCAULT, *supra* note 10, at 48–50.

required its energy and emotional force to sustain its majesty.⁷⁶ It does appear that this became more of a problem in the 19th century as law enforcement and prosecution both improved, creating an ever larger number of candidates for the gallows and widening the gap between those threatened with execution and those actually receiving execution.⁷⁷ We can observe series of moves in the 19th century that seem designed to lessen the penal heat produced by these actions. The spectrum of crimes subject to capital punishment, which remained very broad up through the 1820s, was essentially narrowed to murder in 1831.⁷⁸ In 1860, public executions completely disappeared, and the gallows were moved inside prisons and deprived of their audience.⁷⁹ Also in the 1860s, Parliament, for the first time, gave serious consideration to creating degrees of murder such as those introduced in the United States at the end of the previous century (and which we address further in the next section) in which only first-degree murders would be subject to capital punishment.⁸⁰ While the move did not carry, it suggests not only a perceived need to reduce the number of executions (and pardons), but also the need to give juries more authority and thus reduce the penal heat channeled to the center.

B. Degrees of Murder

The colony of Pennsylvania began to modify the common law of murder under Governor William Penn between 1682 and 1683.⁸¹ Repudiating the language of “malice aforethought” and seeking to reduce the use of capital punishment, Penn’s legislation abolished the death penalty for all crimes except murder, which it defined as “willfully or premeditatedly kill another person.”⁸² The innovation was soon reversed as the colony sought to win approval from the English crown for reforms of court procedure designed to allow Quakers to serve as judges.⁸³ The push for limiting the death penalty, however, returned with the first state constitution in Pennsylvania following the Declaration of Independence in 1776.⁸⁴ In 1792, after considerable

76. See FOUCAULT, *supra* note 10, at 48–50.

77. See GATRELL, *supra* note 8, at 19–20.

78. See *id.* at 22–23.

79. *Id.* at 10.

80. BLOM-COOPER & MORRIS, *supra* note 2, at 60.

81. Keedy, *supra* note 11, at 760.

82. *Id.* at 761.

83. *Id.* at 761–63.

84. *Id.* at 766–67.

advocacy for limiting the death penalty by leading citizens and jurists, the Governor proposed limiting the death penalty to “High Treason and Murder.”⁸⁵ Finally, in 1794 the state assembly approved the following language:

Whereas the design of punishment is to prevent the commission of crimes, and to repair the injury that hath been done thereby to society or the individual, and it hath been found by experience, that these objects are better obtained by moderate but certain penalties, than by severe and excessive punishments: And whereas it is the duty of every government to endeavor to reform, rather than exterminate offenders, and the punishment of death ought never to be inflicted, where it is not absolutely necessary to public safety: Therefore,

Sect. I. Be it enacted by the SENATE and the HOUSE OF REPRESENTATIVES of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by authority of the same, That no crime whatsoever, hereafter committed (except murder of the first-degree) shall be punished with death in the state of Pennsylvania.

Sect. II. And whereas the several offences, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment: *Be it further enacted by the Authority aforesaid*, That all murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first-degree; and all other kinds of murder shall be deemed murder in the second-degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find the person guilty thereof, ascertain in their verdict, whether it be murder of the first or second-degree.⁸⁶

85. *Id.* at 770.

86. *Id.* at 772–73 (citing 4 JOURNAL OF THE SENATE 242 (Pa. 1794)).

Pennsylvania had split the old English crime of “malice aforethought” murder, creating for the first time in the common law world a three-tier structure for murder. “First-degree” murder was “all murder perpetrated by poison or lying in wait or by any kind of willful, premeditated and deliberate killing,” plus what would come to be known as “felony murder.”⁸⁷ Manslaughter would remain what it was for English common law, a killing that would otherwise be murder, which took place under circumstances that were considered sufficiently provocative by the judge to warrant an instruction.⁸⁸ Second-degree murder was the residual category, an intentional killing that was not “willful, premeditated and deliberate,” or a killing that did not occur during one of the listed felonies.⁸⁹ By the end of the 19th century, most U.S. states had adopted some version of the two degrees of murder (with slight variations in the specific terms used to define first-degree murder).⁹⁰

This new structure of murder was tightly linked to the grading of punishment. Death was limited to first-degree murder. This division of malice aforethought murder limited the most severe penalty of death to the first-degree murder. By the middle of the 19th century, Tennessee granted the jury, which already had the power to select between first and second-degree murder, the additional power to sentence even a first-degree murderer to life imprisonment.⁹¹ Unlike the old benefit of clergy however, American states with their new penitentiaries offered long sentences of imprisonment and hard labor for both second-degree murder and manslaughter, with a substantial separation.

The key terms of “premeditated” and “deliberate,” along with the illustrative categories of “murder perpetrated by poison or lying in wait,” seemed designed to reinforce what malice aforethought had suggested—killing that proved the killer’s evil character by manifesting

87. The original proposal voted in Pennsylvania senate in 1793 would have been limited to the “willful, premeditated and deliberate killing” but the felony murder rule was inserted during while the measure was being debated in the assembly. *Id.* at 772.

88. American courts would expand the categories of such provocation more rapidly than their English counterparts. See Victoria Nourse, *Passions Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1340–41 (1997) (describing the move in modern U.S. law toward more subjective definitions of adequate provocation and away from the strict categorical approach of the common law).

89. Frederick W. Danforth, Jr., *The Model Penal Code and Degrees of Criminal Homicide*, 11 AM. U. L. REV. 147, 149 (1962).

90. Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 146 (1999).

91. Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 375 n. 4 (1994).

settled determination to kill. By the end of its first century, however, the concept of a clear subset of manifestly evil killings was breaking down. Prosecutors began to seek—and win—first-degree murder convictions where evidence of such a well-settled determination to kill was circumstantial and where the facts of the killing were not inconsistent with a sudden argument. Simultaneously, state supreme courts held that “willful, premeditated, and deliberate,” meant little more than intentional.⁹² Indeed, standard judicial instructions of the 20th century cited in horn books was that no time was too short for the evil mind to determine on itself to kill and to formulate a plan to carry that out.⁹³

From the penal heat perspective we can see the adoption of degrees of murder in its revolutionary context of the late 18th century as a repudiation of both the high level of execution, which made England stand out, even in the European context,⁹⁴ and the extensive use of royal pardons, which must have been inherently distasteful to the revolutionary generation, even when exercised by elected rather than monarchical sovereigns. Discretion remained rampant, but now it belonged to more popular bodies, including the prosecutor (almost always a locally elected executive) and, of course, the jury. The English two tiered system kept the jury under tight control by the judge who had to decide whether or not to instruct them on manslaughter (if he did not, the jury could only decide between hanging and acquitting). Thus to a far greater degree, the American three tier approach channeled the penal heat of murder away from the center of political authority and toward popular decision makers. Of course, they had little insulation against this heat, a factor that may have helped push marginal cases toward first-degree murder; but that was the point, they could be responsive to public opinion, and when they were not, backlashes were likely to come quickly (prosecutors having to face election as well as the street level pressure that jurors must have felt). There was very little effort to rationalize the substantive law of murder as a sorting mechanism.

Compared to the English two-tiered model, the American system offered a more gradual slope of severity. Under the benefit of clergy system, those killings found to lack malice aforethought might well be

92. Keedy, *supra* note 11, at 773; Danforth, *supra* note 89, at 150.

93. *Id.* at 151.

94. An 18th century political cartoon satirizes the phrase “Merry England” with a depiction of a crow or raven alighted on top of a gallows. GATRELL, *supra* note 8, at 192.

punished only symbolically. If the point of tiers is to open up space within punishment for morally and culturally satisfying distinctions among killings, that model was hard to exceed. However, it may well have been too wide. Hesitation to allow a killer to walk free (with essentially promise to be executed next time) may have made judges reluctant to give the manslaughter instruction and made jurors reluctant to choose it. Second-degree murder led to the potential for spending long terms in prison, providing a form of incapacitation (and deterrence) unavailable to the two crime English system.⁹⁵

The Pennsylvania version of the three-tiered model also expanded the narrative structure of the law of murder. Prosecutors had two theories with which they might prove first-degree murder, “willful, premeditated and deliberate,” or that the killing occurred during a serious felony. The famous preface to the Pennsylvania statute adopting degrees of murder gives primary emphasis to the reduction of the death penalty (and the promotion of utilitarian purposes to the criminal law), but the first sentences of the second section suggested a concern with the narrative coherence of murder that may, at a distance, be an acknowledgement of penal heat as a problem. “[Whereas the several offences, which are included under the general denomination of murder, differ so greatly from each other in the degree of their atrociousness that it is unjust to involve them in the same punishment.”⁹⁶ While the “willful, premeditated, and deliberate” formula may have become quickly attenuated as a matter of appellate court doctrine, it remained an arc of narrative that the prosecutor had to present and that defense had an opportunity to counter narrate. In contrast, unless the English murder defendant received a manslaughter instruction they could only offer justification defenses (like self defense), excuse defenses like insanity, or attempt an alibi defense. The American defendant had all of these, plus a fall back that even if none of these were strong enough to establish the full defense, they could perhaps negate the “willful, premeditated and deliberate” element.

95. Proposals to add degrees of murder to the English system were made periodically after the middle of the 19th century including in 1866, 1948, and 1957. H.L.A. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. L. REV. 433, 437 (1958).

96. Keedy, *supra* note 11, at 772.

C. 20th Century Reform: Abolition and Parole

The two great developments shaping reform of the law of murder during the 20th century in both England and the U.S. were the growing pressures to abolish the death penalty and the adoption of parole as an administrative release mechanism. Parole enabled life sentenced murderers to obtain release through a more routine and less politically volatile mechanism than seeking clemency or a pardon from the Governor had provided. Parole release was widely adopted in the U.S. in the early years of the 20th century.⁹⁷ Parole can be seen as extending the penal heat regulating function of the law of murder in two respects. First, parole was able to create an even finely graded system of punishment by individualizing the length of prison sentences to incorporate not only features of the crime but the character of the offender and his post-conviction conduct in prison. Second, parole could channel responsibility for determining the ultimate extent of punishment to an administrative process separated both institutionally and temporally.⁹⁸ Parole can also be seen as taking much of the pressure off of the legal system to maintain the cultural salience of the substantive law of murder. This release of pressure results because the considerations that drive the parole process extend well beyond the conduct of the crime and the intentions of the offender and because criteria are not typically express.

The abolition of the death penalty, a process experienced in both societies since World War II (although incompletely in the US), can be seen from the penal heat perspective as creating a problem. Historically limiting the death penalty to narrower categories of murder has been a way to diminish and channel penal heat. Today however it may be the absence of the death penalty that contributes to the building up of political pressure to extend the length of life imprisonment and reduce the role of administrative release, each to the detriment of the ladder principle of punishment.

97. For the U.S., see JONATHAN SIMON, *POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990*, at 33 (1993). For England, see generally DAVID GARLAND, *PUNISHMENT AND WELFARE: THE DEVELOPMENT OF PENAL STRATEGIES* (1985).

98. Thus, the amount of time a person convicted of murder spends in prison will depend on the choices of the jury as well as the decision of a parole board sitting years after the crime and the trial.

The major reform efforts of the law of murder during the 20th century presupposed both the role of administrative release and the pressure to reduce if not abolish the death penalty. Yet today, the quite unanticipated interaction of them has undermined the historic effort to differentiate among unlawful killings leading to a flattening of the punishment of murder toward an unacceptably severe life sentence.

1. Parole

At the start of the 19th century, a murderer spared the death penalty by the Pennsylvania statute, or one of its many offspring, would have faced either life or a very long determinant sentence in one of the penitentiary prisons built in most Northern and Midwestern states (as well as many Southern and Western ones) in the first half of that century. Whether spared by the jury's sentencing decision for life, or by being convicted of second-degree murder for which capital punishment was not an option, the prisoner would have anticipated the real prospect of dying in prison unless a campaign by friends and relatives (supported perhaps by prison officials) led to an eventual successful petition for clemency. For governors, this process was inherently fraught and generated equal and opposite pressures from victims' families, local law enforcement, and other members of the community.⁹⁹

The adoption of parole as a release program began in the last decade of the 19th and first decades of the 20th centuries.¹⁰⁰ Often murderers were excluded from the initial parole laws but were generally included in due course.¹⁰¹ Parole changed the condition of murderers (and other life sentenced felons) in two important respects. It gave them a far more routinized and promising vehicle of winning release, and it went a long way to normalizing their position *vis* other prisoners. For example, by the post-World War II era in California and in many other states that adopted a full-scale version of indeterminate sentencing, not only murderers and other "capital" felons but virtually all felons faced a theoretical life term.

99. Sheldon L. Messinger, et al., *The Foundations of Parole in California*, 19 LAW & SOC. REV. 69, 100 (1985).

100. See generally GARLAND, *supra* note 97; SIMON, *supra* note 97.

101. The original 1893 parole law excluded murderers and other prisoners serving life sentences, but in 1901 the law was extended to murderers and other life prisoners who had served at least seven years. By the end of the first decade of parole, nearly 10 % (or ten percent) of the prisoners who had been granted parole were murderers. Messinger et al., *supra* note 9, at 90.

From a penal heat perspective, parole also went a long way toward channeling the ongoing contention about particular cases away from politically accountable governors.¹⁰² The pardon process had taken the decision right to the political center. Parole in contrast was separated from the political chief executive by an administrative board. Parole boards were insulated both by their appointment (rather than election) and by the concept that they were making penological judgments based on expert knowledge and detailed information about the prison records of individuals not generally available to the public. As rehabilitation became the dominant penal rationale of imprisonment, the release decision would be justified not on the facts of the crime but on whether the release posed a risk to public safety and the parallel question of whether rehabilitative programming had achieved its goals and transformed the criminal deviance of the prisoner that led to his (or more rarely, her) crime.

An example of how this system could work during the 20th century was Nathan Leopold, who along with his friend Richard Loeb kidnapped and murdered a little boy from their own neighborhood, in a version of “thrill murder” that became one of the 20th centuries several “crimes of the century.”¹⁰³ Charged with first-degree murder, the two defendants, not yet twenty, faced a high likelihood of being sentenced to death by the jury given the enormity of the crime (murder plus kidnap for ransom of a child) and the considerable sensationalistic and prejudicial press coverage of both the crime and the defendants. Famously Clarence Darrow took on their defense in which the two pled guilty and put on a sentencing defense to a judge.¹⁰⁴ Based on one of the most extensive forensic case studies of the medical and psychological condition of the defendants ever assembled at that time, Darrow persuaded Judge John R. Caverly to spare them hanging. The punishment however must have sounded quite was severe. In a phrase he would use as the title of his autobiography, Nathan Leopold (and

102. Murderers continued to be a worry for governors in the early days of parole in California. *Id.* at 91.

103. On the Loeb and Leopold murder, see generally Paula S. Fass, *Making and Remaking an Event: The Leopold and Loeb Case in American Culture*, 80 J. AM. HIST. 919 (1993); Jonathan Simon, “A Situation So Unique That it Will Probably Never Repeat Itself”: *Madness, Youth, and Homicide in Twentieth Century Criminal Jurisprudence*, in LAW’S MADNESS 79 (Austin Sarat ed., 2003).

104. On Darrow’s defense of Loeb and Leopold, see Scott Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow’s Defense of Loeb and Leopold*, 79 IOWA L. REV. 989, 990–91 (1994).

Loeb) were each sentenced to “life plus 99 years” in the Illinois penitentiary. For Loeb it would be a life sentence, and a relatively short one, he died in a murderous attack by another inmate a decade into his incarceration.¹⁰⁵ Leopold became the poster child for rehabilitation, using his formidable education and intellect to teach other prisoners, participate in medical experiments and publish his own criminological findings on recidivism before being paroled in 1958 after 33 years of imprisonment.¹⁰⁶

Parole figured explicitly in the decision of Herbert Wechsler to propose an abandonment of degrees of murder in the influential Model Penal Code.¹⁰⁷ In place of degrees of murder, Wechsler and the MPC offered a single crime of murder with three possible mental state elements (purpose, knowledge and extreme recklessness).¹⁰⁸ While eliminating degrees of murder, the MPC retained the distinction between murder and manslaughter, making the level of cognitive awareness of the risk of death, and the reasons for taking the risk, as well as the presence of extreme emotional disturbance (a variation on the provocation theme of common law), the major criteria.¹⁰⁹ The Code’s sentencing system allowed judges to establish the minimum amount of imprisonment along a ladder principle with higher possible minima for murder than manslaughter. Murder was a felony of the “first-degree” which meant a maximum of life imprisonment (although for murder, death was also a possibility governed by a different process), with judges free to set a minimum of up to ten years.¹¹⁰ On the other hand, manslaughter was a felony of the second-degree with a potential maximum prison sentence of ten years, permitting a judge to set a minimum of up to three years.¹¹¹ Between the minimum and the maximum, parole authorities could determine the timing of release.¹¹² In

105. Loeb was blamed for provoking his own killing by making a sexual proposition or assault on his killer. Historians think it more likely he was the victim of predatory sexual violence and extortion. See generally HAL HIGDON, *THE CRIME OF THE CENTURY—THE LEOPOLD AND LOEB CASE* (1999).

106. See *id.* at 312, 315, 321. Both were prodigies, the youngest graduates at that time ever of the University of Chicago and the University of Michigan respectively. *Id.* at 16–17.

107. Franklin E. Zimring & Gordon Hawkins, *Murder, the Model Code, and the Multiple Agendas of Reform*, 19 RUTGERS L.J. 773, 780 (1988).

108. MODEL PENAL CODE § 210.2 (1980).

109. *Id.* § 210.3.

110. *Id.*

111. Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 475 (1961).

112. Zimring & Hawkins, *supra* note 107, at 780.

the context of the mid-20th century, this process was a compromise between the traditional commitment to a ladder principle of punishment graded to the nature of the offense, and the modern correctionalist ideal of complete flexibility tied to rehabilitative considerations.¹¹³

Wechsler argued that this mixed system of grading punishment permitting both offense based considerations and individualizing considerations was a way of optimizing the epistemological advantages of both court and parole system.

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 of the term. . . .

[T]he 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. The organs of correction . . . [e.g., parole boards] are 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.¹¹⁴

The capital sentencing function of degrees of murder would be refined by the MPC's guided discretion system to consider many more factors, both aggravating and mitigating, than those involved in the premeditated and deliberate or felony murder bases for first-degree murder. These will be discussed below, but it is important to note that the abandonment of degrees of murder and its replacement by a multi-factor, guided discretion approach to capital sentencing, shares an essential premise with the parole system. Both move away from doctrinally structured grading of punishment toward the individual characteristics of the offender. Both also prioritize incapacitation, reformability, and to some extent deterrence or reflection of public concern as primary considerations rather than retribution.¹¹⁵

113. *Id.* (citing PAUL TAPPAN, CRIME, JUSTICE AND CORRECTION 431 (1960)).

114. Wechsler, *supra* note 111, at 476.

115. On Wechsler's commitment to individualization and the priority of incapacitation

Entering the last quarter of the 20th century, most states retained the common law degrees of murder, but they also allowed parole release, and administrative processes that permitted other mitigating and aggravating circumstances of the crime or the prisoner to be taken into account in determining the actual length of time in prison under a nominal life sentence. California, for instance, retained the degrees of murder but between the 1940s and the 1980s, the California Supreme Court revisited the elements of first degree murder repeatedly in an effort to restore more doctrinal coherence to the meaning of premeditation and deliberation, to reduce the scope of the felony murder rule, and to expand the cases in which individual features of the defendant could be considered in mitigating what would otherwise be murder to manslaughter.¹¹⁶ The California court argued that the distinction between murder and manslaughter and the degrees of murder represented efforts at individualizing the law.

Dividing intentional homicides into murder and voluntary 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 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.¹¹⁷

Since California had adopted a broad indeterminate sentence law in 1944, the operation of the system would have functioned much like that recommended by the Model Penal Code but with even more flexibility. Some grading would occur at the point of conviction for one of the degrees of murder, or manslaughter, but this would have established only a minimum sentence (seven years for first-degree murder, three years for second-degree murder, and no minimum for manslaughter), while the indeterminate sentence meant the maximum for each was life in prison with the release decision in the hands of the administrative parole board.

and reform as against retribution, see Russell Dean Covey, *Exorcising Wechsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HAST. CONST. L.Q. 189, 193–95 (2004).

116. Suzanne Mounts, *Premeditation and Deliberation in California: Returning to a Distinction without a Difference*, 36 U.S.F. L. REV 261, 289–305 (2002).

117. *People v. Holt*, 153 P.2d 21, 37 (Cal. 1944).

At its height, in the years following World War II, parole appended to the system of degrees of murder was a formidable “radiator” of penal heat. Confronted with a killer, the system had a wide range of choices to reaffirm social priorities. They could charge him with first-degree murder and seek to execute those killers whose crime and or character inspired the greatest public outrage, or accept a guilty plea to second-degree murder. Those killers whose motivations won public sympathy could obtain mitigation to manslaughter and the promise of an especially early opportunity for release. These aspects were highly tuned to local sentiment through the jury and through the locally elected public prosecutor. At the same time, parole meant that the jury’s decision could be effectively neutralized after the fact, with a person convicted of manslaughter being held long after their parole eligibility date while, second or even first-degree murderers might be released at the first opportunity if the board was so inclined.

This radiator allowed killing to be separated into a set of legally distinct categories in ways that corresponded to broadly recognized social types if not a satisfying analytic or morally coherent system. Those who might generate the most “heat” could be sentenced to death and actually executed in little more than a year from the time of conviction. Other cases could “age” in the penitentiary, under the apparent awful burden of life sentence, but with the promise of parole in the not too distant future if they played their cards right. The victim’s family and media might never even learn of the parole,¹¹⁸ and even if they did, it was virtually certain that the public heat about the crime would have dissipated considerably. Indeed, the media would most likely catch wind of it only if the parolee had been arrested for a new and serious crime.

2. Abolition

The second great movement shaping reform of the structure of murder in the 20th century was the post-war movement to abolish the death penalty. Parole and its positive story of rehabilitation helped to provide part of the narrative for completing the abolition of the death penalty by removing it from the last “normal” crime where it remained as a regular penal option, murder. The presumed capacity of prisons to rehabilitate serious criminals and incapacitate those who posed an

118. Contemporary laws give victims far more rights to notice and participation in the process, but this was a development of the late 20th century, one that has gone a long way toward removing the heat dissipating value of parole.

ongoing threat suggested that execution was no longer necessary as a means of public safety and at the very least warranted limiting the death penalty to some rational consideration of who should die, rather than either the mandatory death penalty of England (mitigated by pardons) or the jury lottery of first-degree murder in the United States (which Darrow had famously avoided with his guilty plea for Loeb and Leopold).¹¹⁹ Perhaps of even greater importance were the industrial scale uses of state killing of non-combatants by the Germans in World War II. Following the war, after a brief period in which capital punishment was widely used by the victorious countries to execute Nazi leaders and many of their collaborators, the international movement to abolish the death penalty for ordinary crimes was revitalized. While first generation of Human Rights charters signed after the war accepted the death penalty,¹²⁰ by the 1950s abolition was being embraced by many European countries (beginning with the defeated Axis powers).¹²¹ In England, considerable interest in Parliament in abolishing capital punishment produced an initial compromise of legislation that was, in its own right, the most substantial intervention by Parliament in the law of murder in history—the Homicide Act of 1957. The Act ended the mandatory penalty of death for murder and limited capital punishment to defined set of aggravated murders, mostly based on threats to public order and the operation of the justice system itself (but including theft).¹²²

119. During the Parliamentary debate on the Murder (Abolition of the Death Penalty) Act of 1965, the Lord Chancellor assured the House that “[W]here there is any possibility of a danger to society, my Right Honourable and Learned Friend, the Home Secretary [who held parole like powers over prisoners on a life sentence] does not, and will not release a murderer from prison, even if that means detaining him for a very long period indeed; if necessary for life.” BLOM-COOPER & MORRIS, *supra* note 2, at 116.

120. For example, the International Covenant of Civil and Political Rights, acknowledged the acceptability of the death penalty. So long as certain conditions were met, “the sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.” International Covenant of Civil and Political Rights art. 6, cl. 2, Mar. 23, 1976, 999 U.N.T.S. 171, 174–75.

121. FRANKLIN ZIMRING, *CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 19 (2003).

122. The set of aggravated murders was as follows: (a) any murder done in the course or furtherance of theft; (b) any murder by shooting or by causing an explosion; (c) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody; (d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting; (e)

In addition, those convicted of more than one murder, or who had been previously convicted of murder were also subjected to the mandatory death penalty.¹²³ All other murders were punishable by a life sentence. Thus, seeking to limit the death penalty, the Homicide Act had created a new tier of aggravated murder. For the first time England had a three tier structure of murder.

Less than a decade later the Murder (Abolition of the Death Penalty) Act of 1965 abolished the death penalty for murder and made life imprisonment the mandatory penalty for the crime of murder, rendering the aggravated murder provisions irrelevant. The Homicide Act of 1957 remained important for eliminating murder based on a felony murder theory (Section 2) and for creating a statutory manslaughter doctrine for both provocation (Section 3) and diminished responsibility (Section 4). Parliament also showed considerable support for narrowing the *mens rea* for murder, which included killing with the intent to do serious bodily injury, to include only those who intended to kill or at least recognized the great likelihood that they would kill and chose to carry on.¹²⁴

In the United States, the influential Model Penal Code,¹²⁵ set out a reform of the law of murder that included many of the same aspirations for reform that animated the English Homicide Act.¹²⁶ As noted above, the central reform of the MPC was eliminating degrees of murder in favor of single murder crime with multiple mental states. The MPC included (reluctantly) a capital sentencing approach to replace the first-degree murder trial that sought to narrow and channel the discretion to sentence to death through a set of aggravated murder elements similar to those in the Homicide Act.¹²⁷

in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting. Homicide Act, 5 & 6 Eliz. 2, c.11, § 5(1) (1957) (Eng.).

123. *Id.* §§ (6)(1)–(2).

124. Famously, Parliament was assured by then sitting Chancellor of the High court that courts always instructed the juries in intent to injure cases that they should not find guilt unless they were convinced the defendant was aware of the risk of death. However, within months of its adoption, the High Court affirmed a murder under circumstances that were incompatible with the promise. See MURDER, MANSLAUGHTER, AND INFANTICIDE, *supra* note 22, at 8.

125. MODEL PENAL CODE § 210.2 (1980).

126. Both were in fact political compromises. On Wechsler and the MPC, see generally Zimring & Hawkins, *supra* note 107.

127. The MPC's list of capital aggravators includes most of the same ones as the Homicide Act:

After the Supreme Court struck down all existing capital murder statutes in the 1972,¹²⁸ the Model Penal Code became the template for two of the most common features of the new statutes that eventually won approval.¹²⁹ One feature was a bifurcation of the trial into a guilt and, if convicted of a capital murder, a separate sentencing hearing. The

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- (a) The murder was committed by a convict under sentence of imprisonment.
 - (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
 - (c) At the time the murder was committed the defendant also committed another murder.
 - (d) The defendant knowingly created a great risk of death to many persons.
 - (e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
 - (f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
 - (g) The murder was committed for pecuniary gain.
 - (h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

MODEL PENAL CODE, § 210.6(3). The MPC also provided a list of mitigating factors designed to individualize the extenuating circumstances for each defendant and further recommended that the death penalty not be imposed, even when an aggravating factor was present, if there was “substantial mitigation”, leaving the decision maker, judge or jury, freedom to spare life even in a very aggravated case if defense introduced sufficient mitigation:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act.
- (d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
- (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
- (f) The defendant acted under duress or under the domination of another person.
- (g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
- (h) The youth of the defendant at the time of the crime.

Id. § 210.6(4).

128. *Furman v. Georgia*, 408 U.S. 238, 243 (1972).

129. *Gregg v. Georgia*, 428 U.S. 153, 191 (1976).

second feature was a narrowing based largely on aggravating factors, including a list of specific types of murders, which followed a conviction for a capital form of murder, intended to narrow the field of those exposed to the jury's discretion to sentence to death.¹³⁰

Thus in both cases, the initial efforts to restrict the death penalty within the categories of murder generated new structures of the law of murder which might have been expected to increase its capacity to manage and dissipate the penal heat of murder. However in both cases subsequent developments would nullify this prospect and produce quite the opposite. In England the abolition of the death penalty returned the law of murder to a two tiered structure with a mandatory life sentence. In the United States, the retrofitting of a law of aggravating factors onto the degrees of murder created a four tiered structure of murder. However, the appellate process also mandated by the Supreme Court's near abolition of capital punishment in the 1970s has ultimately resulted in a much reduced usage of the death penalty. While death sentences initially grew rapidly compared to the period before 1972 the actual number of executions has remained very small (peaking at about 100 executions in 1999) and even in the most aggressive death penalty states the portion of murderers subjected to death sentences is a tiny fraction of the pre-World War II norm.¹³¹

3. Summary

At the end of the 20th century, both in England and the U.S., the law of murder looked superficially much like it had at the beginning but with fundamental changes in the distribution of punishment. In England, two levels of intentional killing crime were recognized, murder and manslaughter. The mid-century effort to add an aggravated murder tier (a three level structure) was short lived. The most significant change was the abolition of capital punishment. In its place, a mandatory sentence of life was amenable to considerable individualization both by the judge, who had discretion until 2003 to set the minimum sentence before parole could be granted, and consideration by a parole process run by correctional professionals under the ultimate control of the Home Office (a government ministry). With the elimination of the

130. On the belated embrace of the MPC aggravating and mitigating factors see, Zimring & Hawkins, *supra* note 107, at 790. On the subsequent development of aggravating factors, see Givelber, *supra* note 91. See also Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in an Era of Deregulated Death Penalties*, in *THE KILLING STATE* 81, 81 (Austin Sarat ed., 1998).

131. ZIMRING, *supra* note 121, at 7.

death penalty in 1965, the combination of judicial discretion over minimums and parole allowed for a pretty effective channeling of penal heat. The judge could reflect the public concern aroused by the case (factors that we might think about primarily as deterrence or retributive concerns) in setting the minimum term of the life sentence, while still allowing correctional professionals and their concerns (both rehabilitation and penal prudence about managing people in prison) to govern the ultimate release of the prisoner to the community. So things would stand until the politicization of murder in the 1990s.

In the United States, capital punishment remains a sentencing option for first-degree murder where the elements defined by aggravating factors can be established. In principle this means there are in four tiers of murder crimes ranging from first-degree murder with aggravating factors (or special circumstances as some states denominate them) through first-degree murder, second-degree murder and manslaughter. In principle, the U.S. system, at least in those states that retained capital punishment, the four tier structure should have been even more effective in channeling the penal heat of murders. The death penalty remains available for the murders that most outrage or scare the public. Other killers can be incapacitated in prison for periods that follow the ladder principle in aligning sentences to the grading of the crimes (even if modified in part by parole). In fact, while the death penalty remains the law in 35 states and in the federal government and while executions still occur, the system is far better at producing litigation than it is at executing prisoners.¹³² The result is a system that, rather than dissipating heat by eliminating those the public is encouraged to fear the most, actually produces heat by defining condemned prisoners as the “worst of the worst” who pose an ongoing threat to public safety even while in prison, but subjecting victims and the public to decades of delay and litigation.¹³³

132. There remain many people sentenced to death, but the gap between sentences and executions has only grown over time, leading to large death rows and the prospects of prisoners serving life sentences in death row conditions. More recently there has been a drop off in both death sentences sought and in the number imposed by juries. This is thought to reflect growing public anxiety about wrongful convictions stirred by actual exonerations of some death row inmates, as well as the substantial decline in murders since the early 1990s. See THE DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2010: YEAR END REPORT 1, 3 (2010), available at <http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf> (noting death sentences in 2010 were the lowest in 34 years and 64% lower than in 1996.)

133. The average time between sentencing and execution for those executed in 2009 was 14 years. *Id.* at 3.

In both England and the United States, parole remains a release mechanism for many convicted of murder, but the interaction of the limitation of the death penalty in the U.S., and its abolition in England, has undermined parole. In the U.S., this is most obvious in the rapid growth of Life Without Parole (LWOP) sentences for murder. Virtually unknown in the middle of the 20th century LWOP has become the most typical alternative to the death penalty in retention states, and the mandatory punishment for the most serious grade of murders in those states that have eliminated the death penalty. Indeed, advocates of abolition have lobbied for LWOP in order to give juries more reason to not impose the death penalty. The existence of LWOP has also tended to increase the severity of even those murder sentences that permit parole after some number of years (typically fifteen or twenty five) by establishing a political norm that life should mean life—something that was never true before (indeed as noted above once murderers in California became eligible for parole in 1901, they could be paroled after seven years). In England, the removal of the option of restoring the death penalty through the adoption of European-wide prohibitions on state execution¹³⁴ means that the politics of penal populism has focused on extending life sentences.

The dynamics of abolition and parole since late 20th century have undermined that 20th century structure of murder creating a flatter, more severe penal sanction that while it rarely executes, increasingly foresees those convicted of murder dying in prison. The *de facto* collapse of the death penalty has not only eliminated the fourth tier of aggravated murder (while leaving it spectrally in place to frighten the public with the presumed dangerousness of those condemned) but through its undermining of parole has transformed first and second-degree murder into a flat sentence approaching life without parole. Only manslaughter remains a tier apart, generating ever greater litigation strain for defendants to obtain its prospect of a sentence with the promise of an end. Since manslaughter grounds typically require the defendant to blame the victim in large part for the fatal assault, these trials inevitably generate even more heat.

134. Optional protocol 6 of the European Charter of Human Rights requires member states not only to eliminate the death penalty in their own territory, but to seek its universal abolition. *Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 6*, in BLACKSTONE'S INTERNATIONAL HUMAN RIGHTS DOCUMENTS 204, 204 (P.R. Ghandhi ed., 5th ed. 2006).

III. HOT, FLAT, AND CROWDED: THE FLATTENING OF THE LAW OF MURDER

A. California

The U.S. contains fifty-two separate penal systems—counting the military as a separate one—and although difficult to generalize, there is good reason to fear that murder punishment is flattening these systems in both a qualitative and a quantitative sense. After rising in the 1990s, the percentage of persons sentenced to death has declined significantly.¹³⁵ Courts, to an increasing extent, are substituting life without parole for death in aggravated murder cases.¹³⁶ The median sentence for murder in a sample of large urban counties between 1990 and 2002 was 240 months or 20 years.¹³⁷

California is clearly at the extreme end of the distribution of states in this regard, with over 700 prisoners on death row and tens of thousands serving life sentences either for murder or pursuant to its three-strikes law.¹³⁸ When we look at California law, we find a full, late-20th-century structure (perhaps the most elaborate in history), with no fewer than four levels. These levels consist of one grade of voluntary manslaughter and three grades of murder, i.e., second-degree murder, first-degree murder, and first-degree murder with special circumstances, plus the possibility of parole for all but the last. Therefore, a person convicted of first-degree murder with special circumstances faces either the death penalty or life without parole.¹³⁹ A person convicted of first-degree murder faces a minimum of twenty-five years, plus an additional one to five years if the person used a gun, before he or she can be considered for parole.¹⁴⁰ And finally, a person convicted of second-degree murder must serve fifteen years, plus an additional one to five years if he or she

135. DEATH PENALTY INFORMATION CENTER, *supra* note 132, at 3.

136. In his introduction to a special issue of federal sentencing reporter devoted to LWOP, Dean Michael O'Hear notes that LWOP sentences, which hardly existed in the 1980s, have tripled since the middle 1990s. Michael O'Hear, *The Beginning of the End for Life Without Parole*, 23 FED. SENT. REP. 1, 1 (2010).

137. BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, VIOLENT FELONS IN LARGE URBAN COUNTIES 1 (2006) (including non-negligent manslaughter with murders).

138. As of January 2010, 697 prisoners were serving life sentences either for murder or pursuant to the three-strikes law. Furthermore, California had twenty-nine new death sentences during 2010 and zero executions. DEATH PENALTY INFORMATION CENTER, *supra* note 132, at 3.

139. CAL. PENAL CODE § 190.2(a) (West 2008).

140. *Id.* § 190(a).

used a gun, before the person can be considered for parole.¹⁴¹

Parole itself has become a legally complicated structure. Beyond the minimums set out in the statutes, administrative guidelines enacted in the 1980s establish ranges based on aggravating and mitigating factors of the crime or the offender's record.¹⁴² After the completion of the minimum sentence for the degree of murder, the weapon, and any additional months or years based on the guidelines, the statute states that the parole body—known in California as the Board of Parole Hearings—“shall normally set a parole release date,” unless the board finds that “considerations of public safety requires a more lengthy period of incarceration.”¹⁴³ Since the 1980s, members of the Board of Parole Hearings, who are appointed by the governor, have become increasingly reluctant to approve the parole of prisoners under life sentences for murder and routinely find that the vast majority of those eligible are unsuitable under the “unacceptable risk” formula.¹⁴⁴ A 1988 constitutional amendment gives the governor authority to review all release decisions made by the board in murder cases.¹⁴⁵ This amendment dramatically reduced the number of paroles approved to fewer than 100 per year (and in the single digits for some recent governors) out of thousands of eligible prisoners. In 2008 the voters adopted a constitutional amendment that establishes a number of rules unfavorable to the parole of prisoners.¹⁴⁶ These unfavorable rules include procedural rules giving victims' families practically unlimited speech rights during the proceedings and others delaying, after a parole hearing, the next parole hearing for a minimum of three years (and as many as ten), while previously the prisoner had been entitled to an annual hearing.¹⁴⁷ As the California Supreme Court has recognized, the near collapse of parole threatens to erase the distinction between first- and second-degree murder. The court has stated:

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

141. *Id.*

142. *Id.* § 3041(a). The factors are spelled out in CAL. CODE REGS. tit. 15, § 2282 (2008).

143. CAL. PENAL CODE § 3041(b); *see In re Lawrence*, 190 P.2d 535 (Cal. 2008).

144. JOHN IRWIN, *LIFERS: SEEKING REDEMPTION IN PRISON*, 10–11 (2009).

145. CAL. CONST. art. V, § 8(b).

146. CAL. CONST. art. V, § 28, *amended by Victims' Bill of Rights Act of 2008*.

147. *Id.*

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.¹⁴⁸

At the other end of the harshness spectrum, executions have ground to a near halt. Only thirteen prisoners have been executed since California's current death penalty law was put in place over thirty-five years ago and no execution has taken place in the past five years.¹⁴⁹

The twin collapse of parole, on the one hand, and capital punishment, on the other, has rendered California's elaborate four-tier structure of voluntary killing into a two level structure. If the partial defense of manslaughter is successfully invoked, the convicted killer is sentenced to a term of years,¹⁵⁰ which while much higher than it was previously, is fixed and subject to reduction for good behavior at a steady rate. If the killer is convicted of murder, whether of second-degree, first-degree, or first-degree special circumstances, the killer is sentenced to prison in all likelihood for the rest of his life. This fact has returned California to England's common law situation, where it had high fixed penalties for murder. At least England, in that era, was comfortable using executive pardons to reduce the punitive burden substantially, while recent California governors almost never issue pardons to current prisoners. This two-level structure has produced conditions that can be described as flat, hot, and crowded.

The death penalty, which arguably contributes to the dissipation of penal heat by focusing an especially severe sanction on a narrow group of offenders who are advertised to the public as the "worst of the

148. *In re Rosenkrantz*, 59 P.3d 174, 215 (Cal. 2002).

149. See Paul Elias, *Cal Case Spotlights Dysfunctional Death Penalty*, NEWSDAY.COM, Apr. 26, 2010, <http://www.newsday.com/news/nation/calif-case-spotlights-dysfunctional-death-penalty-1.1880491>. The current moratorium has been caused by extensive litigation over the lethal injection procedure, but even if this issue is resolved, there is little prospect of a speed up. *Id.* The main problem is the appointment of counsel, which takes a minimum of five years given the major shortage of lawyers qualified and willing to take capital appeals. Experts, including the former California Chief Justice, have described the system as dysfunctional. See Gerald F. Uelman, *The End of an Era*, CAL. LAW., Sept. 2010, at 32, 32.

150. The current terms consist of three, seven, or eleven years. CAL. PENAL CODE § 192(a) (West 2008).

worst,” has become a reactor because of the prolonged appellate process, which allows both victims and the media to recycle memories of the crime. Meanwhile, parole—which was designed to channel penal heat away from the political center and produce a cooler focus on the prisoner’s record in prison, progress toward rehabilitation, and prospects if released—has also become a reactor. The most common reasons cited by both the Board of Parole Hearings and the governors for finding the prisoner unsuitable for parole concern not the prison record, but the circumstances of the crime.¹⁵¹ Designed to distance punishment from the heat of the trial, the parole hearing has become a repeat trial.¹⁵² With manslaughter now as the only real hope (other than acquittal) for eventual release from prison, the criminal trial is likely to produce even more heat because the partial defense almost always requires the defendant to blame the victim for contributing to the lethal event.

*B. England: From Abolition to the Criminal Justice Act of 2003—
Extending Life Imprisonment*

Today, it seems intuitive to many citizens and even lawyers in both the U.S. and England that if the death penalty were to be abolished, the natural and inevitable replacement would be imprisonment for life (that is, until death). Historically, in fact, life without parole was almost never the alternative. Until 1957, death, in England, was the mandatory punishment for murder, but royal pardons were frequently issued and those reprieved could expect to leave prison within ten years.¹⁵³ Once the 1957 act created a new crime of aggravated murder, those murders that did not meet the capital elements resulted in a nominal life sentence. Nonetheless, the Home Secretary (at the time there was no parole board in England) held the discretion to release in the royal name. Most could expect, if they did not succumb to violence, pre-existing old age, or disease, that they would leave prison after serving a substantial but not an endless sentence.¹⁵⁴ According to Louis Blom-

151. Irwin, *supra* note 144, at 119–20.

152. Proposition 9, the 2008 constitutional amendment that gives the victims extensive participation rights in the parole hearing, intensified this situation. California Proposition 9 (2008), available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9>.

153. *Id.*; see also BLOM-COOPER & MORRIS, *supra* note 2, at 118 (quoting Viscount Dilhorne’s estimation that most life sentences last nine years).

154. As noted above, California permitted murderers to be paroled after seven years starting in 1901 until the length was extended in the 1980s. There was clearly variation among

Cooper and Terrence Morris, who as Queens Council and Professor, respectively, participated in the national debate on capital punishment on the side of abolition, this pattern continued under the nominal mandatory life sentence that became the general punishment for murder after the complete abolition of the death penalty in 1965.¹⁵⁵ Section 1(2) of the Murder (Abolition of the Death Penalty) Act of 1965 permitted judges to make a recommendation as to the minimum term before which release (on license as parole is known in English law) should be considered.

In England, this system of mandatory life sentences, with the likelihood of release after nine or ten years (or perhaps earlier if a judicial recommendation for leniency were acted on by the Home Secretary), was persevered until the early 1980s when the Thatcher government began to emphasize the severity of punishment as one of its goals (parallel to the emphasis on penal toughness that was also emanating from the Reagan Administration in the U.S.).¹⁵⁶ In 1983, Home Secretary Leon Brittan announced a new system by which the Home Secretary would fix “the tariff.” This tariff was meant to be a period of imprisonment that life sentenced prisoners should serve in the interests of retribution and deterrence before they would be considered for release by the government.¹⁵⁷ For the first time in English history, some life prisoners were deemed to be subject to a “whole life tariff”, the equivalent of “life without parole” (LWOP) in the U.S. (although subject to re-fixing by the government).

The increasingly punitive approach toward life sentences continued into the 1990s and when Labour came into government for the first time in more than a decade after the 1997 election. At that time, it firmly embraced the general politics of penal populism, including long sentences for murderers. In 1998 the House of Lords upheld the power of the Home Secretary to impose “while life tariff.” At this point, England was clearly moving from mid-20th century individualized model of grading, where a life sentence would mean release at the discretion of an agency focused on danger to the public toward the notion that life should mean death in prison to some murderers,

the states. H.L.A Hart noted in the late 1950s that US states held murderers in prison far longer than England did, citing terms as long as 28 years in Minnesota. *See* Hart, *supra* note 95, at 440.

155. Murder (Abolition of the Death Penalty) Act of 1965, officially this was a moratorium law; abolition became the law officially in 1969.

156. BLOM-COOPER & MORRIS, *supra* note 2, at 103.

157. *Id.* at 94.

regardless of the risk they pose to the public, based on the retributive and deterrence concerns of the crime.¹⁵⁸

In 2002, a pair of court decisions, one from the European Court of Human Rights, and a second, adopting the same approach from the House of Lords,¹⁵⁹ stripped the Home Secretary of his power to set the tariff, finding that such power violated the guarantees of Article 5.1 of the European Charter of Human Rights. If the law allowed discretion over the length of prison sentences, that discretion had to be exercised by a court or by another institution with similar autonomy from political pressure. Ironically, a generation earlier, at the time of the abolition of the death penalty, it was judges that were seen as more likely to reflect popular anger and anxieties about crime and government ministers who were seen as favoring shorter sentences.¹⁶⁰ By 2002, this had been reversed. Influenced by the European Court of Human Rights, British courts were increasingly seen as mistrustful of populist sentiments about punishment, and more committed to protecting the rights of prisoners. The New Labour government, which had pursued longer sentences for murder, and feared giving judges full discretion to set the minimum sentence for murderers serving life terms, established a new guidelines system for life sentences as part of a larger bill packed with “tough on crime” elements.¹⁶¹ This bill, the Criminal Justice Act of 2003, was designed expressly to “rebalance” the criminal justice system to be more in favor of victims.¹⁶²

The Act, which the Law Commission described as “one of the most important . . . in the history of criminal justice reform,”¹⁶³ was a large aggregation of specific amendments to existing criminal procedure, covering many aspects of criminal justice. Two of its most important components dealt with life sentences. For the first time in English history, the Criminal Justice Act of 2003 set specific tariffs within the life sentence.¹⁶⁴ Judges were required to apply a set of aggravating and

158. *Id.* at 125.

159. *Stafford v. UK* [2002] All E.R. 422; *R v. Secretary of State for the Home Department*, [2003] 1 A.C. 837 (H.L.) [837]; see ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 117–19 (5th ed. 2010).

160. BLOM-COOPER & MORRIS, *supra* note 2, at 119–20.

161. *Id.*

162. This is especially true in Schedule 21 of the Act. See BLOM-COOPER & MORRIS, *supra* note 2, at 128.

163. *A New Homicide Act*, *supra* note 24, at 23.

164. *Id.* at 19.

mitigating factors drawn mostly from the Homicide Act of 1957.¹⁶⁵ The Act required judges to fit each murder case into one of three categories that establish baseline minimum terms of “whole life,” thirty years, and fifteen years.¹⁶⁶ The Act then stated that judges should apply aggravating and mitigating factors to make adjustments.¹⁶⁷

The new scheme normalized the whole life tariff for the most serious murders and established fifteen years as the presumptive minimum (twelve for persons under eighteen at the time of the crime).¹⁶⁸

Despite the government’s enthusiasm for tougher sentences, an indicator of unease at least among legal elites with the resulting changes in the punishment for murder came to surface in 2005. At that time, the Law Commission, an independent organization tasked with advising the government and Parliament on matters of legal policy, was given a mandate to examine whether the law of murder should be revised in England.¹⁶⁹ The mandate of the Law Commission mentioned four considerations motivating a review of the law of homicide. These four considerations were to (a) take into account the continuing existence of the mandatory life sentence for murder, (b) provide coherent and clear offenses that protect individuals and society, (c) enable those convicted to be appropriately punished, and (d) be fair and non-discriminatory in accordance with the European Convention of Human Rights and the Human Rights Act 1998.¹⁷⁰

At least two, and perhaps all, of the factors point to excessive punishment as a problem driving the need to rework the law of homicide. The proper sentence for murder was not one of the subjects the Commission was mandated to consider; however, the tone of the consultation paper reflected a sense that the unprecedented nature of the highly punitive system under the 2003 Act required new consideration of the structure of murder, with an eye to allowing at least some cases that currently receive a mandatory life sentence and mandatory tariff to be sentenced under a different framework.

165. *Id.* at 18.

166. *Id.* at 19.

167. *Id.* at 19–20.

168. *Id.* at 19.

169. Although penal discourse in England (and the UK more generally, although Scotland and Northern Ireland have independent legal systems) is far more politicized now than it was a generation ago, there is still a role for criminal law expertise. *See* Newburn, *supra* note 26, at 454–60.

170. *A New Homicide Act*, *supra* note 24, at 1.

The sentencing guidelines that Parliament has recently issued for . . . murder cases presuppose that murder has a rational structure . . . that properly reflects degrees of fault and provides appropriate defences Unfortunately, the law does not have, and never has had, such a structure. Putting that right is an essential task for criminal law reform.¹⁷¹

Given this problem, the Commission recommended an entirely new structure of homicide law, replacing the old crimes of murder and manslaughter with a new three-tiered system of first-degree murder, second-degree murder, and manslaughter. At the heart of its proposals, the Commission identified what it called the “ladder principle.”

Individual offences of homicide, and partial defences to murder, should exist within a graduated system or hierarchy of offences. This system or hierarchy should reflect degrees of seriousness (of offence) and degrees of mitigation (in partial defences). Individual offences should not be so wide that they cover conduct varying very greatly in terms of its gravity. Individual partial defences should reduce the level of seriousness of a crime to the extent warranted by the degree of mitigation involved.¹⁷²

In its first draft, a consultation paper circulated in 2005, the Commission recommended a strict hierarchy of punishment tied to the specific homicide crime of conviction and proposed a radical revision of the *mens rea* elements of the crime. The mandatory life sentence and the structure of mandatory tariffs of the 2003 Act were to be reserved for the new crime of first-degree murder. Unlike the Homicide Act of 1957, which created its aggravated murder crime out of a panoply of quite different aggravating circumstances, the Commission initially proposed that first-degree murder assure a clear moral distinction to the crime attracting such a severe sentence by limiting it to intentional killings.¹⁷³ Such a limit resulted in a far narrower *mens rea* element than either the current English law of murder,¹⁷⁴ or than the historical

171. *Id.* at 3.

172. *Id.* at 6.

173. *Id.* at 7.

174. Under the existing English law, an unlawful killing is murder if it is done either with

American approach.¹⁷⁵

The consultation paper proposed a new crime of second-degree murder, defined as an unlawful killing carried out with one of three possible mental states. These mental states include an intent to “do serious harm,” or “recklessly indifferent killing, where the offender realized that his or her conduct involved an unjustified risk of killing, but pressed on with that conduct without caring whether or not death would result,” or, an intentional killing that would otherwise be first-degree murder but for which the defendant has presented a “partial defence” like provocation or diminished capacity.¹⁷⁶ Second-degree murder would be punished by a prison sentence chosen by the judge up to a maximum discretionary life sentence (i.e., one not subject to the mandatory minimums of the Criminal Justice Act of 2003). Finally, the Committee proposed defining manslaughter as a killing under one of two mental states, either “gross negligence” to the resulting death, or with intent “to cause injury or involving recklessness as to causing injury.”¹⁷⁷ Manslaughter would attract a fixed term of years with no life sentence option.

After considerable criticism of the consultation paper by prosecutors and judges,¹⁷⁸ however, the Commission issued a final report.¹⁷⁹ This report kept the three-tier structure but considerably reworked the *mens rea* requirements and the maximum penalties so as to greatly diminish the hierarchy of punishments and, thus, the ladder principle that it had earlier embraced. The new crime of first-degree murder would include intentional killings as well as killings where the defendant acted with an intention to do serious injury and was aware that “his or her conduct involved a serious risk of causing death.”¹⁸⁰ This new requirement had

an intent to kill or an intent to cause serious injury.

175. This approach mostly relies on the “willful, premeditated and deliberate” formula, along with killing in the course of one a list of serious felonies.

176. Thus, some killings that currently are considered manslaughter would be defined as second-degree murder. *Id.* at 7.

177. *Id.* at 7.

178. While no mention is made of specific criticisms from the then New Labour government, it seems likely that the government which had enacted the Criminal Justice Act of 2003 would have been supportive of changes that would have clearly diminished the punitiveness of the existing murder structure

179. See MURDER, MANSLAUGHTER, AND INFANTICIDE, *supra* note 22.

180. *Id.* at 28. The Commission reports that opposition to its original proposal for a narrower first-degree rule came from courts, law enforcement, and victims groups, including the Higher Court Judges Homicide Party, Justice for Women, the Police Superintendents Association, and the Association of Chief Police Officers.

the effect of keeping killings where the intent was to do serious injury in the top murder category, but with the added element that the person has an actual awareness of a serious risk of death. The new crime of second-degree murder would include killings where the defendant either “intended to cause serious injury” (without the additional element of the awareness of a serious risk of death) or where the defendant “intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death”, or where the killing meets the first-degree standard but the defendant “successfully pleads provocation, diminished responsibility or that he or she killed pursuant to a suicide pact.”¹⁸¹ First-degree murder would be punished by a mandatory life sentence and the mandatory structure of tariffs established in the Criminal Justice Act of 2003. Second-degree murder would be punished by a sentence of up to a discretionary life sentence (no mandatory minimum) set by the judge, but unlike in the consultation paper, the Commission in its final report recommended that Parliament create a structure of sentences or tariffs for second-degree murder.¹⁸² Manslaughter would include a killing where the defendant was “grossly negligent” with respect to the resulting death, a killing where the defendant was intending to cause a non-serious injury to the victim, or where the defendant was aware that there was a serious risk of causing injury, or where the defendant was participating in a joint criminal venture with another participant who commits first or second-degree murder under circumstances where it should have been obvious that first or second-degree murder might be committed.¹⁸³ Manslaughter would also be punished by up to a discretionary life sentence.¹⁸⁴

181. *Id.* at 32.

182. *Id.*

183. Joint criminal venture is a form of liability that under current English law makes someone an accomplice to murder if they are an accomplice to inflicting injury and the victim is killed by another with whom they are in the joint criminal venture.

184. In their earlier consultation paper, the Law Commission recommended that manslaughter not include the possibility of a discretionary life sentence in order to protect the “ladder principle,” linking real differences in the range of punishments to the hierarchy of murder crimes. The Commission cites strong resistance from judges as their reason for recommending that the discretionary life sentence remain an option. “However, most judges have indicated to us that they would be uncomfortable with anything less than a discretionary life sentence being available for manslaughter. The importance of reflecting their knowledge and experience has led us to depart from our provisional proposal.” *Id.* at 177. Perhaps more than any of its other compromises, this seriously undermines the goal of a coherent structure to homicide law. Whether or not it compromises the ability of the law of homicide to moderate the tendency toward escalating punishment is not clear, as judges could use their discretion to keep such life sentences very rare.

The Law Commission proposal would appear to follow the American innovation of degrees of murder; however, it defined these crimes in quite different ways. Despite those differences, there is a common purpose with the original formation of degrees of murder in the early American republic. That purpose is the aim of both limiting the reach of mandatory harsh sentences and assuring that the structure of substantive crimes defining those subjected to harsher mandatory sentences are morally substantial and socially meaningful.

The Commission can accurately claim to be both narrowing and widening the law of murder. Indeed, the law will expose to the mandatory life sentences of first-degree murder those killers who did not intend to do serious injury but who were aware of a serious risk of death—killers who can currently only be convicted of manslaughter. But a much larger class including those who intended to do serious injury, but were not aware of a serious risk of death, could be convicted only of a second-degree murder. By choosing to create a new crime of second-degree murder between the old crimes of murder and manslaughter, rather than creating a new crime of aggravated murder to cabin the mandatory life sentence, the Commission chose (although they do not defend the choice in these terms) what I would consider a moderating direction to the new structure.¹⁸⁵

The Law Commission recommendations as to the structure of murder were never brought to Parliament by the previous government and seem unlikely to at present. However the Report constitutes an early expression of concern with the law of murder and excess punishment that finds more recent echo in the current government where Justice Minister, Kenneth Clark, has issued a policy “green paper”¹⁸⁶ indicating that he wants to reconsider the mandatory minimum system of the Criminal Justice Act of 2003 and allow discretion to return to judges under the life sentence.¹⁸⁷ This change would take some of the pressure off of the law of murder, but not all of it, given the likelihood that some judges would take the guidelines as new norms as the federal judges in the U.S. have apparently done since the mandatory nature of the U.S. Sentencing Guidelines was found unconstitutional in *United*

185. The Report kicked off a considerable discussion among academics as well as judges and prosecutors. See Andrew Ashworth, *Principles, Pragmatism and the Law Commission's Recommendations on Homicide Law Reform*, 2007 CRIM. L. REV. 333; Victor Tadros, *The Homicide Ladder*, 69 MOD. L. REV. 601 (2006).

186. See *supra* note 117 and accompanying text.

187. *Id.* at 789.

States v. Booker.¹⁸⁸

From a penal heat perspective, the initial proposal in the Consultation paper offered a major reform aimed at restoring a ladder of punishment to the law of murder and creating a three tier structure of murder for the first time in English history—other than the short experiment of the Homicide Act of 1957. The Law Commission makes a good case for a three tiered structure of homicide as establishing a better balance of grading and moral salience than a two tiered structure with murder and manslaughter rearranged. Although they did not frame this in terms of the penal heat regulating function that this article advocates, their arguments fit well. Creating two distinct murder crimes, and limiting the flattened and severe life sentences to the more serious categories would have given English juries the chance to sort murders into two morally salient levels. The structure proposed in the final report continues to offer some of these advantages, although the modified distribution of *mens rea* elements, the invitation for parliament to produce a tariff structure for second-degree murder, and the discretionary life sentences for manslaughter go some way toward diminishing the integrity of the three tier structure. Indeed, the final report appears to be so anxious to avoid any association with the goal of moderating penal heat that it goes out of its way to suggest that the new structure might result in an overall increase in the punishment for murder in England.

III. REFORMING THE LAW OF HIGHLY CULPABLE KILLING

A. *How Many Crimes?*

From the birth of the common law, with Bracton in the 13th century, to Herbert Wechsler's and Jerome Michael's "rationale of the law of murder" to the Law Reform Commission proposals of 2006, there exists an essential question in the law of highly culpable killing. This question is whether we should have one, two, three, or more crimes covering killings that are especially serious because they are intentional or because they contain some other very culpable kind of mental state, like intent to injure, or recklessness, as to death.¹⁸⁹ As we've seen in our

188. 543 U.S. 220, 226–27 (2005).

189. Killing with a less culpable mental state, like ordinary negligence, may subject one to a crime like involuntary manslaughter. I am not counting involuntary manslaughter here because such crimes are commonly recognized as fundamentally less serious crimes and punished accordingly. One can argue whether there are sufficient moral differences to separate first and second-degree murder, or second-degree murder from manslaughter, but it

review of the history, the common law has gone from having essentially one such crime (indeed a potentially much more expansive category of killing or just felony) to two, with murder and manslaughter, to three, with the degrees of murder. In the late 20th century U.S., the near abolition and then “reform” of capital sentencing has produced a fourth-tier of murder, aggravated first-degree murder or first-degree murder with special circumstances as it is called in some states. At the same time, for much of the 20th century, and today, some reformers have called for a return to one.¹⁹⁰

I have asserted throughout this Article that one of the key jobs of the law of murder is to dissipate the penal heat created both by violent crime and by the law’s sometimes severe response to it; channeling heat away from the larger structures of law and governance before it distorts them, and helping the broader community heal from traumatic events. Here, I want to ask of what relevance, if any, is the number of crimes available, putting aside for a moment the question of how to define them in terms of the major variable of the culpable mental state or *mens rea*. In this regard, the English Law Commission’s report is particularly welcome as a conversation starter because it has explicitly raised the question of the structure of the law of murder, one, two, or three tiers; as well as many other questions of mental state and defenses more common to the genre of criminal law theory.¹⁹¹

1. Two is Better than One

My first proposition is, more than one crime of murder is better than just one. The argument often made for one murder crime is that judges can do a better job handling the various aggravating and mitigating factors that should grade the seriousness of highly culpable killing than any statutory or judicially articulated legal doctrine; whether malice aforethought, premeditation and deliberation, or a list of aggravating factors. The well-documented transition of these legal doctrines from having a strong normative foundation in the social understanding of killing to empty legal ciphers supports this position. Opponents of one crime generally reject the breadth (an inherent vagueness) of a single

is far harder to argue that negligent killing should be grouped with the others.

190. See BLOM-COOPER & MORRIS, *supra* note 2, at 175.

191. They are not alone. A significant review has also been undertaken in Western Australia which alone among the Australian provinces has a three tier structure with two grades of murder and manslaughter. See *generally* LAW REFORM COMMISSION OF WESTERN AUSTRALIA, REVIEW OF THE LAW OF HOMICIDE: FINAL REPORT (2007), available at <http://www.lrc.justice.wa.gov.au/2publications/reports/homicide/P97-Forepages.pdf>.

crime of unlawful killing, thus rejecting the huge discretion that would be given to judges in spanning the sentence range for such a crime. The English Law Commission rejected this approach on these grounds:

Sir Louis Blom-Cooper QC and Professor Morris' proposal would have the virtue of introducing simplicity into the law, and there would be few contested charges. However, the proposed offence is excessively broad. It is at odds with basic principles of fairness observed in the way that other serious offences against the person are defined in English law and in almost all other jurisdictions world-wide.¹⁹²

From the penal heat perspective, we can see the problem of one crime somewhat differently. In leaving the jury out of any role in grading homicide, this approach starts by rejecting the historic institution most associated with the public's view, the jury, which channels the heat of murder and punishment away from the central political institutions of the state. A one-crime model is most likely to lodge that power beyond the proxy of the public in some other institution, either the judge, a parole board, or the executive through clemency. This institution will inevitably be closer to the center of the state. Even if the jury received the task of deciding on the appropriate sentence, as they did between death and prison, in many U.S. states under the first-degree murder rule from the mid-19th century through 1972, the one-crime approach would lose the possibility of putting a public name on the level of seriousness represented by a particular crime.

Here, my objection to that argument is not constitutional but sociological. The one-crime model is abandoning any hope for using the law to produce a public account of seriousness in the grading of murder. I do not mean to idealize juries, or to assume that different kinds of legal narratives are not possible. If penal heat is going to be dissipated by the legal processing of a killing in the one crime model, it is going to be in the narrative created by the judge and its construction by the mass or news media. Media coverage of crime is of course a complex field of its own in criminology, and the way any case is communicated to the public can vary enormously. In a hypothetical one-murder crime model, perhaps the mass media and the blogosphere would focus on the specific

192. MURDER, MANSLAUGHTER, AND INFANTICIDE, *supra* note 22, at 22.

term of years or minimum part of a life sentence that the judge issued, and the reasoning behind that decision. But, in giving up on even trying to guide a jury in making part of this decision, the one crime model leaves the law as a moral narrative for society largely out of the equation altogether. Having even one distinction, between murder and manslaughter, for example, means asserting that sufficient moral clarity exists in the society to let ordinary people represented on the jury make a major decision reflected in the hierarchy of punishment.

Having at least two grades of highly culpable killing insists on a public hierarchy of moral seriousness and penal severity that we might think of as the rudimentary grammar of penal differentiation. Since the law of murder is not simply about murder, but about the calibrating the severity of the entire penal system, such a grammar is utterly indispensable to a penal culture that can set limits to its own outrage, at least in a democratic society.

2. Three is Better than Two

How many grades of murder do you need to effectively radiate penal heat? Here again, the English Law Commission has at least started our conversation. The Commission writes of the numbers problem with principles that seem to have relevance to the penal heat problem:

On the one hand, there is the need to ensure that the law is structured in a fair way which accords with common sense as well as legal principle. Important differences between kinds and degrees of fault in killing must be accommodated within any revised structure.

On the other hand, there is a need to ensure that the law does not become so complex that it cannot be applied by juries, especially when they are faced with a number of defendants running different defences (perhaps in the alternative). There must be clarity and simplicity in the distinctions drawn between offences. A lack of clarity, or excessive reliance on fine-grained distinctions, would mean that the prosecution might feel compelled in some cases to accept a plea of guilty to a lesser offence even when the evidence suggests that D is guilty of a more serious offence.

Having consulted widely with experienced legal practitioners, amongst others, we are confident that a three-tier structure strikes the right balance. Most significantly, prosecutors, defence advocates and judges

have not objected to the three-tier structure on the grounds that it would prove to be too complex. There is already a tiered structure in place for non-fatal offences that has for many years been understood in much the same way that we anticipate our scheme for fatal offences would be understood. Although the content of the non-fatal offences has been frequently criticised, the three-tier statutory structure in which they are situated has not been the subject of criticism.¹⁹³

If the goal, from a penal heat perspective, is to create crimes that meaningfully sort killings across significant spans of punishment, the question might become an empirical one. The Law Commission, for example, argued that a new crime between the most serious murders and manslaughter was better than a new aggravated form of murder, because most of the action in line-drawing had been on the manslaughter, murder line.¹⁹⁴ From a penal heat perspective, you want as many levels as the culture can sustain at a general level without making the process excessively complex. The early common law, for example, seems to have distinguished two modes of killing, the open conflict and the stealthy ambush or assassination. This attack model of murder, embodied by the common law,¹⁹⁵ was not so much concerned with specific intention of the attacker (whether to kill or inflict injury). The person who found himself or herself suddenly in armed conflict with another person, not a rare event in the Middle Ages, might be guilty of a felony, but not murder. The modern law has replaced the attack model with a risk of harm model,¹⁹⁶ making certain levels of risk taking a form of murder even if there is no intention to kill. This approach, which seems deeply anchored in the importance that contemporary society accords to risk is one that lends itself to three grades (first-degree, second-degree, or manslaughter, or murder plus capital sentencing v. manslaughter).

193. *Id.* at 22–23 (citations omitted).

194. But of course that is simply a product of the fact that it was the only relevant line. Had degrees of murder been part of the structure, presumably disappointed defendants would have attempted to press the distinction.

195. Wilson, *supra* note 28, at 163.

196. The Model Penal Code makes risk creation a central consideration. See Binder, *supra* note 43, at 755.

The invention of degrees of murder, and with it the three-tier structure of highly culpable homicides, speaks to another development: the emergence of the prison itself and the possibility of significant incapacitation and punishment without execution or permanent exile. Under the original common law murder and manslaughter two tier system, the two grades meant elimination at one end and virtually no punishment at the other (branding on the thumb and a short time in jail). Although contemporary society typically punishes even manslaughter with a prison sentence, the logic of having a substantial incapacitative sanction short of total elimination and more than symbolic punishment remains compelling. A non-capital sentence for murder and real time for manslaughter means the ends are not so extreme; the potential for prisons to sustain long term punishment with dignity points itself to the feasibility of a three tier structure.

If our problem is responding too flatly to highly culpable killing, let us revitalize what we have and determine what, if anything, we should add. The question of how to redefine first- and second-degree murder and manslaughter has understandably attracted the attention of criminal law scholars.¹⁹⁷ What *mens rea* should be required to make murder, first-degree? Another important question is whether something like the felony murder rule be an alternative to a very culpable *mens rea*.¹⁹⁸ On the manslaughter line, a good deal of scholarship takes on the important question of which partial defenses ought to mitigate murder to manslaughter. Here, I would assert that maintaining a three-tier structure is more likely to allow us to work through the serious arguments and moral distinctions that would inform those arguments. In the end, we need first-degree murder, second-degree murder, and manslaughter to make sense of modern killing and to deal with its penal heat, but how we define them—while not unimportant, especially to the durability of the distinctions—is less important from a penal heat perspective.

How we separate killings among three grades of highly culpable homicide crimes is open to considerable debate. Considerable scholarly debate exists over whether first-degree ought to be limited to intentional killing with some additional aggravating characteristics of target, motive, or method,¹⁹⁹ or whether it should include some forms of extreme

197. See generally MURDER, MANSLAUGHTER, AND INFANTICIDE, *supra* note 22; PILLSBURY, *supra* note 44.

198. See generally Binder, *supra* note 44.

199. See generally PILLSBURY, *supra* note 44.

recklessness that are similarly aggravated or a felony murder rule.²⁰⁰ Likewise, considerable scholarship urges the adoption of a limitation to the partial defense of manslaughter to only provocations consistent with pro-social values.²⁰¹ There may be an argument that reforming murder in one direction or another along these lines of dispute will increase its efficacy as a radiator of penal heat. However, it is also possible that the most important thing the law of murder can do is simply have three grades of serious homicide, which opens up a broader field of differentiation. How much the substantive law shapes the moral imagination of this field of differentiation remains unclear.

Would four be better than three? The fourth-tier has been associated with the U.S. experiment in reforming capital punishment. That experiment has been a failure in creating a more rational death penalty, it has also it seems been a failure in managing the penal heat of murder. Indeed by highlighting a series of especially monstrous crimes without providing a coherent way to differentiate them, the aggravated murder tier may have contributed to the breakdown of the law of murder as a radiator.²⁰²

B. *Mens Rea and Meaning*

Mens rea stands at the very heart of modern criminal law analysis. It is therefore not surprising that most academic and juristic debates about the law of murder concern the proper *mens rea* definition for the highest levels of murder and those that mark appropriate mitigation to a reduced level of murder (typically denominated manslaughter to differentiate it). The major concerns, understandably, have been with the justness and efficiency of any particular set of *mens rea* requirements. Do they separate morally distinct mental states associated with killing? Do they make the job of proof too difficult?

England has associated murder with two distinct mental states, intent to kill and intent to do serious or grievous bodily injury. Manslaughter has been marked by the addition of a state of provocation (one defined as likely to provoke a reasonable person) or a state of extreme emotional disturbance to one of the murder *mens rea*. Most

200. See generally Binder, *supra* note 44.

201. See generally LEE, *supra* note 44; Nourse, *supra* note 88.

202. It is interesting in this regard that the English Law Commission, in proposing a three tier structure, considered and rejected a proposal to make the top tier an aggravated murder tier and chose the generic first-degree label instead. See MURDER, MANSLAUGHTER, AND INFANTICIDE, *supra* note 22, at 24.

U.S. states have associated murder with three distinct mental states, intent to kill, extreme recklessness with respect to the death of the victim, or, in a case where the defendant is engaged in a felony inherently dangerous to life, no specific mental state is required. In most states with a separation between first and second-degree murder, first-degree murder is defined by one of these mental states with the additional finding that the defendant was “willful, premeditated and deliberate” with respect to the death of the victim, or, the fact that the defendant was engaged in one of a specific set of felonies (e.g., rape, robbery, or kidnapping) with no specific mental state respecting the victims death. Manslaughter is defined similarly in England, which requires a *mens rea* appropriate for murder but with the addition of provocation or extreme emotional disturbance.

Contemporary scholars have argued for several possible reforms. One persistent theme is the failure of the first-degree formulae to do justice to distinctions among murders. Despite evidence that the first statutory effort to frame the first-degree standard in Pennsylvania was intended to require juries to find actual deliberation and planning, courts quickly moved toward instructions that blurred the line between such deliberated killing and intended killing generally.²⁰³ As has been noted, the Model Penal Code recommended eliminating degrees of murder and defining the single grade of murder with a *mens rea* of purpose, knowledge or extreme recklessness with respect to the death of the victim.²⁰⁴ A more recent proposal by Samuel Pillsbury is to keep degrees of murder with first-degree murder having a *mens rea* requirement of either intent to kill or intent to inflict great violence on the victim. Furthermore, Pillsbury suggests that first-degree murder should be linked to a set of aggravating motives, i.e., for profit, to further another crime, to influence the legal process, out of hatred for a group, or to exercise “cruel power” over the victim.²⁰⁵ Pillsbury defines second-degree murder as either intentional killing without the aggravating motive, or a form of reckless killing defined around an attitude of indifference to human life rather than awareness of risk: “The death of a human being by the disregard of an obvious, extreme and unjustifiable risk of death, thus demonstrating extreme indifference to the value of human life.”²⁰⁶

203. Keedy, *supra* note 11, at 773.

204. MODEL PENAL CODE § 210.1 (1980).

205. PILLSBURY, *supra* note 44, at 183.

206. *Id.* at 184.

The English Law Commission has recommended introducing degrees of murder to England.²⁰⁷ In its consultation paper, the Commission suggested that the most serious grade of murder ought to be uniquely linked to clear intention to kill.²⁰⁸ The Commission argued that framing first-degree murder in terms of intentional killing would give it a moral coherence in line with contemporary values. In its Final Report, however, the Commission modified this proposal, adding in a new *mens rea*, intent to do serious injury along with an awareness of a substantial risk of death. Critics of the consultation paper had argued that killers who may not intend to kill, but who intend to do serious injury to others with an awareness of the significant risk of death, especially terrorists, were morally the equivalent of intentional killers.

Another persistent theme focuses on the over extension of mitigation to manslaughter under modern doctrine operative in most U.S. states, influenced by the Model Penal Codes “extreme, emotional disturbance” standard. Many contemporary scholars argue that this more subjective test makes it too easy for juries to find manslaughter even when the reasons that have led to the defendant’s lethal violence against the victim do not partake of even the partial justificatory logic of traditional “provocation” doctrine.²⁰⁹ This more subjective, more excuse oriented standard is said to be particularly problematic for men who kill women for attempting to leave even abusive relationships.²¹⁰ A number of academic critics have argued for returning a justification element to manslaughter so that the reasons leading to lethal violence would correspond to socially and legally wrong behavior by the victim (albeit not behavior sufficient to fully justify the killing as in self defense or defense of others).²¹¹

Proponents of reform along the lines of new first-degree murder standards and new manslaughter standards share a desire to reframe the law to reflect contemporary social and legal values, especially equality in terms of gender, race, and nationality. What implications do such reforms have for the ability of the law of murder to conduct and channel penal heat?

207. See MURDER, MANSLAUGHTER, AND INFANTICIDE, *supra* note 22, at 19.

208. *A New Homicide Act*, *supra* note 24, at 7.

209. See generally Nourse, *supra* note 88.

210. Under the traditional provocation standard, the victim would have had to at least commit adultery, originally in sight of the perpetrator. *Id.*

211. See generally LEE, *supra* note 44; PILLSBURY, *supra* note 44, at 83; Nourse, *supra* note 88.

We start with the proposition developed in the previous section that differentiation is more important than the particular doctrinal logics or cultural meanings assigned to differentiation. The terms “malice aforethought” and “premeditation” have long lost much of their doctrinal and cultural meaning, but in so far as they invite decision makers and litigants to distinguish among the emotionally charged field of murders, they create the potential for dissipating penal heat and constructing a grammar of penal moderation, which is left untapped by a single category of murder. When legal reforms introduce new *mens rea* requirements they offer an opportunity to realign this grammar of moderation with cultural meanings that have contemporary currency.

The relationship between such general meanings, and the more specific reasoning that decision makers (jurors or judges) will use to differentiate specific instances of culpable killing are difficult to know in advance and must ultimately be explored with experimental and other empirical methods, but some broad hypotheses can be offered here. It is important to remember, however, that the work the law of murder does with penal heat is not limited or even primarily constituted by the language of the law, but in the performative opportunities that such meanings create for the trial process, which is where public responses to the law’s handling of specific cases are most likely to be produced through the extensive media attention generally given to murder (and often only to murder). Here, I want to consider three reform possibilities: (1) defining first-degree murder as intentional killing; (2) defining first-degree murder with particularly heinous motives for killing, and correlatively, limiting the mitigation of murder to manslaughter with socially acceptable motivations; (3) eliminating the traditional U.S. “felony murder” doctrine making a killing committed during the commission of a statutorily limited set of violent felonies.

In its initial proposal to create a new crime of “first-degree murder” and to limit that crime to intentional killings, the English Law Commission cited both cultural meanings and moral concerns with the sanctity of life. Relying on an opinion survey conducted on behalf of the Commission by Professor Barry Mitchell,²¹² the Commission noted that:

[C]onfining “first degree murder” (and the mandatory life sentence) to intentional killing will bring the law of murder more into line with public opinion. The public opinion survey carried out by Professor Barry Mitchell

212. *A New Homicide Act*, *supra* note 24, at 259.

shows a very high level of agreement that an intent to kill is (subject to considerations of excusable motive) an indication that the crime was especially serious.²¹³

The Commission also noted the perceived linguistic association of murder with intentional killing, citing the views of an earlier commission studying revision of the criminal law: “In modern English usage the word ‘murderer’ expresses the revulsion which ordinary people feel for anyone who deliberately kills another human being.”²¹⁴

Closely related to this linguistic association is the moral judgment. Moral judgment is associated with the “sanctity of life”, that is, the view, grounded in both religious and secular moral thought that:

Life is sacrosanct, there is something that amounts to or is close to an absolute prohibition on the intentional taking of (innocent) life. On this view, as it is near absolute, respect for the prohibition cannot legitimately be a matter of degree. Consequently, an individual instance of, and still less a practice of, deliberate killing cannot be ‘traded off’ against the value of achieving a supposedly higher purpose, except perhaps in the most exceptional of circumstances not relevant here.²¹⁵

However in the Commission’s Final Report, as noted above, it backed off of the proposal to limit first-degree murder to intentional killing, citing primarily opposition from judges, victim groups, and police organizations. Their final proposal, discussed above, which includes in first-degree murder killings that while not intentional, were carried out with an intent to do serious bodily injury, and an awareness of a significant risk of death, was justified primarily on the view that for many, these killings are morally indistinguishable from intentional killing. They stated:

[W]e accept the arguments that some kinds of killings that were not intended are so especially heinous that they should be regarded as, morally speaking, virtually indistinguishable from intentional killings (putting aside

213. *Id.* at 29.

214. *Id.* at 30 (*quoting* CRIMINAL LAW REVISION COMMITTEE, REPORT 14, OFFENCES AGAINST THE PERSON, 1976, Cm. 7844, at para. 15).

215. *Id.* at 31.

questions of justification and excuse). Consultees such as Professor Wilson, for example, argued that, ‘some reckless killings attract far more revulsion and indignation than some intentional killings’. The degree of emotional agitation a killing generates may not in itself be a good or reliable measure of how serious that killing really is but we have tried to accommodate this ‘moral equivalence’ argument in the revised structure. We have sought to do this by including within first degree murder, alongside intentional killing, killing through an intention do serious harm aware that one’s conduct poses a serious risk of causing death.²¹⁶

It is noteworthy that the commission cites “emotional agitation” as a consideration, something quite close to our conception of penal heat. If the Commission is correct, that a good deal of the public (in England but also presumably the U.S.) holds as particularly heinous either the deliberate taking of life, or the deliberate infliction of both serious injury and a substantial risk of life, defining these mental states as elements of the law of first-degree murder should make the overall structure of murder better at conducting penal heat than alternative formulas that would either further narrow the category (as the initial proposal in the consultation paper did) or further broaden it. Consider that these elements will require the prosecution to present evidence that demonstrates either an intention to kill, or an intention to do serious injury and an awareness of a substantial risk of death. This evidence, whether in the form of statements taken from the defendant, the testimony of accomplices, or inferences from the means carried out (for example, setting off a bomb on a crowded bus) will give specificity to the claim that a particular murder is of a higher degree of seriousness. Likewise, while the defense does not have a burden to disprove an element, the practical value for the defendant of presenting evidence that contradicts these elements will create an incentive for the defense to present evidence that they were not intending to kill and were ignorant of the risk that their activity produced. In short, these *mens rea* elements invite the production of a narrative through the trial that links the killing to popularly held emotional responses that render a killing more or less productive of penal heat (a process intensified through media coverage and elaboration of these narratives).

216. MURDER, MANSLAUGHTER, AND INFANTICIDE, *supra* note 22, at 30.

Proposals to require additional elements going to the motive for the killing should in principle make the law of murder even more efficient at regulating penal heat. Assuming that the motives assigned to first-degree murder, or, in the other direction, required of the defense to mitigate murder to manslaughter, actually align with public emotional responses, the resulting trial narratives should provide a richer field of differentiations than a simpler *mens rea* approach. Or to put it in the negative, a law of murder that limits differentiation in murder to mere cognitive distinctions (intent, knowledge, awareness of risk, etc.) leaves much of the emotion generating meaning of killing outside the trial narrative.²¹⁷ This statement may be even truer with proposals to limit manslaughter to provocations or extreme emotional responses that accord with socially and legally accepted values. If a defendant who acknowledges intentionally killing the victim wins a reduction to manslaughter by proof of a provocation or extreme emotional response that is unrecognized as aligned with social and legal values, we may anticipate a failure of differentiation in terms of penal heat. In short, the law will draw a difference that does not reflect a meaningful distinction, leaving the penal heat of the killing without a narrative of moderation.

Attention to the performative opportunities to create trial narratives that are conducive to channeling penal heat also provides insight into the doctrine of felony murder from a penal heat perspective. The problem is not that such killings are not as morally heinous as intentional killings,²¹⁸ but rather that they remove the incentive for the prosecution to introduce evidence of this motive other than the fact of the independent felony, which may require only the demonstration of technical elements without accompanying narratives regarding the defendant's intentions with respect to the life of the victim. The result may not be as denuded of emotionally productive meanings as the "strict liability" crime some critics assert that felony murder

217. Of course the prosecution may seek to introduce evidence of such motives in order to support the cognitive *mens rea* element, but making particularly heinous motives an express element of the crime of first-degree murder both gives these meanings greater public salience and mandates their inclusion in the trial process.

218. Guyora Binder has argued that a properly defined felony murder rule is a way of evaluating and expressively sanctioning killing in the course of heinous motive. "Felony murder rules appropriately impose liability for negligently causing death for a very depraved motive, as long as the predicate felony involves coercion or destruction, and a felonious purpose independent of the fatal injury." Binder, *supra* note 44, at 1060.

represents,²¹⁹ but in easing the prosecutions narrative burdens, the rule results in a law of murder that has less penal heat channeling capacity.²²⁰

C. How Should we Punish Murder?

The key question here, as the title suggests, is how we approach the most serious category of murder, generally “first-degree murder” under the three-tier murder manslaughter structure endorsed in subsection IIIA above. How we deal with these worst of the worst crimes is a critical anchor for our whole scale of punishment. Too high an anchor will permit or even encourage demands for harsh punishment along the whole penal ladder; too low an anchor will eliminate the ladder all together, bunching punishments together in a way that may build penal heat in the centers of democratic politics where it is likely to produce a backlash of penal populism.

As a historical matter, we are at a moment when capital punishment is, or will soon be, off the table as an anchor punishment for even the most severe murders. From a dissipating penal heat approach, this is probably a bad thing. Historically, limiting the volume of capital punishments was one of the major drivers of reform of the criminal law, and later the law of murder. Too many executions, or too many executive pardons, contributed to the build up of penal heat. Creating a narrower band of capital punishment allowed for a substantial moderation of punishments down the ladder. But, removing completely capital punishment (or reducing it so far that its operation become by definition freakish and arbitrary) creates a problem by producing political demands for longer prison sentences for murder that ultimately reset the penal ladder upwards. The persistence of capital punishment as an option for a narrow band of murder cases where the conduct or disposition of the defendant was most alarming to the public probably contributed to the stability of punishment for much of the 20th century. Since its elimination in Europe in the 1970s and its reduction in the U.S., the death penalty strikingly has become a minor feature that has gone along with a significant expansion in the overall level of punishment. Ironically, removing or greatly reducing the availability of capital punishment for murder has escalated political demands to increase dramatically the overall level of punishment for murder and the overall

219. *Id.* at 1088.

220. This result will be more true the more states have elaborated felony murder to include crimes that do not speak in their own facility to the existence of morally heinous motives.

scale of penal sanctions. However, as a practical matter, capital punishment is not an option in England, and, unless current trends change dramatically, it is now such a minor a practice in all but a handful of U.S. states that it cannot meaningfully contribute to helping the law of murder manage penal heat.

Traditionally, the major alternative to capital punishment for murder has been a theoretical life sentence, but in practice, this term has varied greatly in its meaning. The elimination and reduction of capital punishment has promoted “Life Without Parole” as the punishment for the most serious first-degree murders. I would argue that despite the political popularity of this solution, we move past it for three reasons. First, as a practical matter it sets the scale of punishment too high. Most punishment is prison, and if the worst crimes are punished with spending the rest of your natural life in prison, this provides virtually no constraint on the overall severity of punishment. Second, as a penological matter, operating a prison system with a large number of LWOP prisoners is a grave challenge. I suspect prisons can develop dignity and decency enhancing ways to implement natural life sentences, but it represents a significant cost.

To give meaning to a life imprisonment sentence for first-degree murder, and to restore the capacity of the law of murder to channel penal heat and promote a sense of self restraint in the scale of punishments overall, I propose that the U.S. should borrow an idea from England and embrace multi phase life sentences that have explicitly different penal rationales. The first phase of any life sentence would be a fixed term of years, set either by judges or through a statutory guidelines framework with jury involvement, which assures that that strong retributive and deterrent concerns associated with the most culpable and damaging murders is highly visible.²²¹ We need a better word than minimum, which suggests that anyone being released after that is getting a very sweet deal. This phase, which the English call a tariff, ought to be called the “penalty phase,” because this is expiation, punishment, justice as loss of big portions of one’s life.

The setting of this penalty phase should be closely associated with the criminal trial itself and with the participation of victims. The harm

221. Indeed, I recognize that many would set these initial terms far higher than I would to possibly include a “whole life” sentence for the most extreme crimes which might attract the death penalty were it to continue to operate in the U.S.. While I oppose this for the reasons cited above, I acknowledge that from a penal heat perspective, a whole life term for a limited set of first-degree murders would suit the penal heat regulating role of the law of murder.

to the victims and their community is righty part of this sentence, and it should be delivered by courts following consideration of evidence that speaks to that harm as well as the defendant's culpability in producing it. But after that penalty phase of imprisonment, whether it be ten, twenty, or forty years, the continued incarceration of the prisoner should be based on, and only on, public protection considerations, or incapacitation for short. When it comes to this incapacitation phase, the trial is not an ideal time to make the decision about length; some kind of review in progress of the sentence is needed. Wechsler believed this was the ideal place for correctional expertise to weigh in on their views.²²² In the 20th century, these concerns were generally reflected through an expert administrative process like a parole board. Today, however, correctional authorities are dominated by a politicized populist punitiveness that makes them suspect decision makers. In some places that practice has been abolished and in others, like California, it operates under conditions that render it all but a nullity. Clearly, without parole, the modern law of murder has seriously flattened toward the high end of severity.

The European Court of Human Rights has held that where the indeterminate part of the sentence is based on incapacitative objectives, a court or court-like-body, rather than a political agency, potentially focused on popular sentiment, is a requirement of due process and that this body should periodically review the risk of release with a presumption that release should take place unless the authorities can demonstrate a substantial ongoing risk.²²³ The U.S. ought to follow the European lead in this practice as well. This incapacitation function and the risk analysis that goes with it could take the form of a parole board, or perhaps a trial court sitting as a release court; but in either course, it should be institutionally separated and protected from populist political institutions, and it should periodically review the prisoners status with the burden on the government to demonstrate unreasonable risk.²²⁴ Likewise, victims whose voices ought to play a significant role in the setting of the penalty phase ought to be excluded altogether from the incapacitative phase. Here, after all, the question is not what harm the

222. Wechsler, *supra* note 111, at 476.

223. DIRK VAN ZYL SMIT & SONJA SNACKEN, PRINCIPLES OF EUROPEAN PRISON LAW AND POLICY 332 (2009).

224. There is always some theoretical risk, but given that research has shown remarkably low levels of recidivism for prisoners released after murder sentences, there should be a requirement that the government prove the existence of unreasonable risk factors at the "clear and convincing evidence" level.

murder caused, but what chance there is that the defendant would cause such harm again. As noted above, the victim perspective is one of the forces arguably flattening the penal grading of homicide. If the law of highly culpable killing is to help us sustain a penal culture that can make distinctions and set limits on punishment, it must itself set limits on the participation of victims, while not ignoring or dishonoring them. Victim statements should be focused on the initial penalty period of imprisonment. Surviving family members and other victims should be able to provide evidence to the judge who is setting the penalty sentence, and to any further legal proceeding at which that minimum is revisited. But once the penalty phase has been completed and the question is whether or not the prisoner is an acceptable risk to release into the community, the victim's testimony or participation can no longer provide factually relevant evidence—no light but only heat.²²⁵

For lesser murders, those defined as “second-degree” under the structure endorsed in section IIIA above, the possibility of a life sentence should be eliminated altogether in favor of a determinate sentence. There is a strong political pressure today to apply life sentencing, at least as a maximum, to second-degree murder as well. This was the choice the English Law Commission made (as well as calling for Parliament to establish guidelines). The experience of California suggests that parole,²²⁶ even if it can be better insulated from populist penal pressures, is no reliable basis for actual penal separation of first and second-degree murders. To protect the ladder principle essential to the penal heat managing functions of the law of murder, we need a significant determinate sentence that can communicate severity and establish a meaningful anchor for sentence severity in other crimes.

What should the scale of determinate sentences for second-degree murder look like? I fear that there is no poetically or morally satisfying

225. It would also provide a benefit to victims to set limits to their participation in the later phases of the sentencing, victim advocates have often argued that repeated parole hearings are a great strain on victims who understandably feel that fidelity to their loved one means presenting the maximum opposition possible at any time parole is a possibility. Once removed as a category however, and on grounds that respect the rightful space of victim input, victims would be able to experience a sense of closure as to the pursuit of penal justice that closes with the finalization of the minimum sentence. Excluding victims sounds insensitive, but it would actually promote closure by preventing victims from having to relive their trauma during periodic reviews of the incapacitative sentence.

226. Once an innovative way to channel the dangerous penal heat of violent crimes away from the centers of government and to create a law of murder as individual as particular crimes and criminals, parole has limped into this century deeply mistrusted by the public, prone to political control and attack.

number once we have abandoned the metaphoric satisfactions of death or life. I would recommend ten years, as a minimum sentence for second-degree murder (less than the current, but far more than it was set even thirty years ago) with a maximum of twenty or twenty-five years. This scale is appealing on a number of grounds.

First, ten years is a fit synecdoche for life. Decades are the conventional metric for narrating our lives. While there is, to my knowledge, little if any empirical research on this question, from a deterrence perspective, I would suspect that there is a diminishing return impact of severe sentences beyond ten years. Ten describes a horizon that most of us can imagine easily (my twenties, my thirties, my forties). For second-degree murder, the presumption should be that the retributive and deterrent value of the sanction would also suffice to achieve incapacitative goals. From an incapacitation perspective, ten years will take most killers, except for the youngest, beyond the prime years for violent crime (generally 15 to 30). I would recommend judicial discretion with a range that went as high as twenty years. This would bring the punishment for second-degree murder up to and perhaps beyond the penalty phase for first-degree, blurring the ladder principle but not too much. This sentence should, on grounds similar to the ones discussed above for the penalty phase of a life sentence for first-degree murder, be set by a judge, in proximity to the criminal trial, and with participation by the victims.

Some might be concerned that at 10 years, my idea that murder provides an anchor for the top end of penal treatment might be constraining us too much in the punishment of other very serious crimes like rape, kidnapping, armed robbery, aggravated assault, etc. But it depends how we conceive of the ladder principle. One might well argue that second-degree murder could share its high rung on the ladder with the most life-damaging violent crimes including forcible rape, violent kidnapping, and aggravated assault with serious injuries.²²⁷

This discussion brings us finally to the penalty for manslaughter. In one of its least satisfying choices, the English Law Commission decided to leave discretionary life as a the maximum sentence for manslaughter, thereby destroying the ladder principle with respect to second-degree

227. Since it is the middle tier of killing it may overlap in punishment with other crimes that are less serious in consequences but more culpable in the mental state (someone kidnaps, rapes and tortures another, but does not kill them may be as heinous as someone else who kills recklessly in the midst of a crime).

murder and manslaughter.²²⁸ Having chosen a lengthy but determinate sentence for second-degree murder, it is only sensible to have as a maximum, a less severe determinate sentence for manslaughter. Here I would say, if we are truly interested in cultivating penal moderation, we might experiment with the common law's version of benefit of clergy; that is, a relatively modest punishment, something perhaps close to the overall average for all non-homicide felonies to establish that some killing while unquestionably wrong and unlawful, can be sanctioned without life diminishing punishment. This would be especially true if current reform proposals, to limit manslaughter to provocations or extreme emotional responses that were consistent in their origins (although not their results) with contemporary social and legal values, were to be adopted. The woman who responds to a non-lethal but repetitive cycle of violence from a domestic partner with lethal force that goes beyond reasonable self-defense may require punishment, but not life diminishing punishment. She should not lose her twenties, or thirties, etc. If properly delimited there should be little need for a substantial sentence for incapacitation. This may argue for limiting manslaughter to narrower more justification-oriented provocations as some scholars have urged.

The greatest problem with recreating the moral tension and grammar that murder and manslaughter had their time, and first and second-degree murder in theirs, is that with the exit of the death penalty, there is only prison, prison, and prison to mark the dimensions of penal severity. Placing first-degree prisoners under a mandatory life sentence may retain some power to differentiate (especially if we carefully limit second-degree to a term of years) but we ought to consider more innovative ways to mark off the most serious murders. Perhaps persons convicted of murder ought to go to distinct prisons with distinctive penal regimes designed to reflect both a greater degree of opprobrium and sense of a deeper need for penitence. It is hard for now to say what that regime ought to look like in detail, but it must protect the dignity of the prisoners and the prison officers that will maintain their custody.²²⁹ One way to establish such a differentiation in penal regimes without risking cruel or degrading punishments would be to

228. MURDER, MANSLAUGHTER, AND INFANTICIDE, *supra* note 22, at 177–78.

229. It could, but should not necessarily be a supermax style prison, that is a prison with isolation, lockdown conditions, limited or no educational and therapeutic programming. *See* SHARON SHALEV, SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT 3–7 (2009). I would imagine something more like a secular monastery with an emphasis on reflection and penitence rather than programming and an austere but nutritious diet.

improve the reality of rehabilitative programming, education, and community connection in our ordinary prisons, which have degenerated into “warehouse” like prisons with little rehabilitation or education. Second-degree murder prisoners might spend a portion of their sentence in the murder prison, while first-degree murder prisoners should stay there until the end of the penalty phase of their punishment.

Another way to re-establish a differentiation in penalty in a system with no death penalty and no life without parole sentences might be to return to the pre-modern practice of a murder debt (or *wergelt*) as a supplement to the reduced imprisonment for murder that this article advocates. This sum, which would be fixed for all murders (we would not want to distinguish among victims in their economic value), would begin in prison if remunerative labor was available for prisoners and continue after release, although limited in the level of repayment to permit some economic margin for the released prisoner’s own needs. Given that murder victims are disproportionately poor, such an economic supplement, even if paid at a modest rate, would not be meaningless. Moreover, a supplement might go some way to providing a sense of justice to victims who might question the elimination of the harsher punishments.²³⁰

IV. CONCLUSION: TURNING DOWN THE HEAT

Ian Loader and Richard Sparks have observed that criminologists now work in an environment undergoing what they call the “‘heating’ of crime and crime control.”²³¹ Loader and Sparks go on to elaborate the challenges this poses to criminology:

[C]ontemporary criminology is shaped by, and seeks to shape a world in which security questions have become paramount; a world where crime and punishment tend—albeit unevenly—to assume more prominent and contentious places in the political cultures and social relations of contemporary societies; a world dominated and reconfigured by dizzying technological change and a ‘24/7’ media culture, a world in which the ‘local’ and the ‘global’ interact in ways that have potentially profound

230. Imagine the different attitude a victim might feel toward learning that the killer of a loved one had been, himself, killed in prison, if she were otherwise to receive a continuing stream of revenue.

231. Loader & Sparks, *supra* note 4, at 2.

ramifications for crime and its control.²³²

Loader and Sparks call upon criminologists to consider what role they can play in such a world in turning down the heat, a project they call “public criminology?”. I want to conclude with a similar call to criminal law scholars and lawyers. In such a world it is critical not to be naive about what the substantive law of murder, or any other law, can do to reduce this heat. We can be sure that terrible crimes will occur, that when the right victims are involved media coverage will be intense, and that powerful penal interests groups and politicians will have a strong toolkit of ways to use those to turn up the heat. But law is not irrelevant. The law of murder establishes a template upon which these many other forces will play out.

The law of murder is a proper place for that public criminal law work to begin. In taking up this challenge, if you decide to, I want to leave you with features of our criminal law present that should shape this challenge. The first is mass incarceration. The last time the law of murder was on the table, overall sentences were very low and the U.S. incarceration rate was nearing a century long low. Today our prisons are becoming dangerously overcrowded in many states, and the health costs that they are generating threaten to eat up all our badly needed capital for public investment. The overall penalty structure in the U.S. is simply too high, and we should be unembarrassed to assert that reforming the law of murder is about reducing it.²³³

Second, we must recognize that an extreme logic of incapacitation has now replaced not only rehabilitation but also retribution and deterrence. The bad news is that in this extreme form it has degraded both prisoners and our laws in the pursuit of an elusive kind of total security. Keeping people convicted of murder in prison forever as a way of protecting against future murders is a foolish and futile project that ignores the fact that that all but a tiny percentage of murders every year are committed by people who have not been convicted of murder and imprisoned. It is the equivalent of the drunk who looks under the lamppost for his keys because it is light there. It is the killers we do not know yet against whom the most meaningful preventive measures can

232. *Id.* at 17.

233. This point is where my high admiration for the work of the English Law Commission gets weaker. In their final report, the Law Commission was anxious to show that it was not keen to reduce sentences and goes out of its way to suggest that its overall change proposal might increase overall punishment for murder.

be taken and while some of them are in prison, (for other crimes than murder) many are on the streets. The good news is that we have more reason to be confident that we have effective police strategies that to help make people safer than we had in the past.²³⁴ The law of murder can help reintroduce retribution and deterrence to the process of punishment. It can also help us acknowledge and meet the demand for incapacitation. If we can use more innovative policing strategies to continue the remarkable reduction in homicides that we have seen since the early 1990s, the public will be less committed to life exhausting prison sentences for murder as the source of security.

Third, the law of murder should hold near its heart the obligation to both victims and defendants to uphold their dignity. Dignity, which can be understood as a fundamental right to being recognized as a person “having a story of one’s own,”²³⁵ is perhaps the one right that a murder victim still has at stake even after death. To be killed by someone, unlawfully and with a highly culpable mental state, is to be denied your humanity as well as your life. The successful prosecution for murder and an appropriate punishment for the culpable killer is, in fact, a way to restore that dignity, something that will be quite real to the murder victim’s survivors and, thus, about which the victim cares. As moral philosophers have long appreciated, the killer has also lost their dignity, by putting their own humanity into doubt. The point of punishment should also be to restore that dignity to the convicted person who is willing to seek it. A hot, flat law of murder is less capable of assuring the dignity of either victims or their killers than one with a morally meaningful set of substantive murder crimes attached to a proper ladder of punishment.

234. FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 76–81 (2007).

235. DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 70 (2007).