

**SITES OF CROSSING AND DEATH IN PUNISHMENT:
THE PARALLEL LIVES, TRADE-OFFS AND EQUIVALENCIES OF
THE DEATH PENALTY AND LIFE WITHOUT PAROLE IN THE US**

EVI GIRLING

Senior Lecturer in Criminology, School of Social Science and Public Policy, Keele University

Abstract: This article explores continuities and discontinuities between two kinds of death in punishment: of death as punishment and of death as the specified detritus of punishment, life without parole (LWOP). It traces the parallel lives and equivalencies between life and death in penal policy and practice in the US, and attendant narratives of harshness/mildness, and compromises and covenants with pasts and futures. The discourse of death that has sustained the survival of the death penalty in the US has found a home in LWOP. It argues that spectacles and memorialisations of injustice, error and pain circumscribed in the judicial and popular discourse of death as different provide spaces for reflection on dignity and cruelty, spaces in which the loss of life and liberty can be grieved, a subversive politics of mourning (Butler 2004) for those whom punishment had deemed dispensable. As the death penalty is exchanged for LWOP, reform strategies need to reimagine and recapture these spaces for grieving, and understanding the death work of LWOP in US penal politics is crucial to this endeavour.

Keywords: death penalty; life without parole (LWOP); abolitionist politics; penal sensibilities

This article explores political and cultural sites of crossing in the US between two variants of death in punishment – of death as punishment and of death as the specified and sought-for

detritus of punishment – life without parole (LWOP). To paraphrase Strauss (1966): ‘Death is good to think punishment with’ – in law, administration, witnessing or experiencing the unnatural state of death in censure and captivity. The death penalty in the US has been explored, mapped out, and contested, as a ‘peculiar’ institution; a case of historical, penal and symbolic exceptionalism (Garland 2010; Zimring 2003), and scholars have sought to explore the parameters and contingencies of exceptionalism in historical and geographical terms (Whitman 2003; Garland 2002, 2010; Girling 2006; Sarat and Martchukat 2011; Zimring 2003). Reflections on death in the discourse and grammar of punishment remain an important and timely project for academics and penal reformers. The article explores the mythology of death in punishment and its place in two particular versions of life and death exchanges in the name of punishment in the US. The study of the ‘cultural life’ of capital punishment (Sarat and Boulanger 2005; Girling 2011; Seal 2014) is very much premised on the witnessing of its attendant judicial, political, administrative, and medicalised rituals (Sarat 2001b; Lynch 2000; Girling 2004; Kaufman-Osborn 2002). Yet such witnessing is absent in the attendant practices of LWOP and the very condition of invisibility or ‘thoughtlessness’ is built into the history of emergence and grammar of LWOP as an alternative to a death sentence. This article explores possibilities and impasses of witnessing (seeing and seeing through) a new scene of death in punishment in the context of the political and cultural condition of invisibility of death in ordinary, banal, normalised carceral punishment, for the worst of the worst.

The global demise of the death penalty has been well documented (Hood and Hoyle 2014), yet the life of death in punishment is anything but over; the diminishing number of death sentences and executions in the US belies the fact that a sentence of ‘death in punishment’ (LWOP) is now an increasingly prominent feature of American criminal justice.

The narrowing of the scope and scale of the application of the death penalty in the day-to-day repertoire of criminal justice in the US (Zimring 2003; Garland 2010) has exchanged death through execution to death as an exit from penal institutions. That one becomes the conduit of another is not contested – in the US, LWOP becomes an exit from death row as a policy trade-off (moratoria, state abolition of the death penalty, a compromise condition for extradition from abolitionist jurisdictions such as the European Union) and in terms of individual lives (plea bargaining, commutations from death row).

Narratives of the historical transformation of executions begin with the spectacle of the physical annihilation of the body (Foucault 1977) and seem to end with lethal injection, a private, ‘painless’ medicalised (Denno 2007), uneventful, ‘assisted’ crossing between life and death (Kaufman-Osborn 2002; Sarat 2001a; Denno 2007; Lynch 2000). There are emerging narratives reflecting on continuities with another scene of death in punishment (Gottschalk 2014; Ogletree and Sarat 2012; Adelsberg, Guenther and Zeman 2015), that of LWOP as a replacement for execution, where death is the expected, yet uninvited, guest at the scene of punishment. That attention must be shifted onto LWOP is a case that has been eloquently made (Gottschalk 2012, 2014; Adelsberg, Guenther and Zeman 2015; Dilts 2015). Yet the death penalty’s agility to survive challenges and adapt has enshrined it as both the ‘masthead symbol’ of penal harshness and ‘risk-averse retributivism’ (Garland 2010, p.244) and as the focus of abolitionist and reform strategies. By contrast, there is a comparatively deafening silence on the other lives of death in punishment and the challenge remains of ‘figuring out how to make the carceral state ... a leading political and public policy issue’ (Gottschalk 2014, p.2). It is argued here that old and new abolitionist, and ‘smart on crime’ strategies alike, have failed to produce ‘replacement discourses’ (Henry and Milonavonic 1996, p.204) and the discourse of death that supports and sustains the perseverance of the

death penalty in the US (Garland 2010), has found a home in the new penalties that have replaced executions. In the sections below I trace the parallel lives and equivalencies between life and death in penal policy and practice in the US, and their political and penal narratives of harshness and mildness, compromises and covenants with pasts and futures.

Clearing out the Roots of Death in Punishment: New Abolitionist Strategies

Understanding the legacy of death in the grammar of punishment in the US means apprehending the resonance of a particular long, contested, and very public, 'doing away' of the death penalty. Foucault (2000) warned that the manner of abolition is as important as abolition itself: 'The roots are deep. And many things will depend on how they are cleared out' (p.459). If there is no reimagining or challenging punishment for the incorrigible, if there is an easy-to-reach-for oubliette for those we cannot change then the 'trap door through which the "incorrigible" will disappear is ready' (Foucault 2000, pp.460–1; Dilts 2015).

The death penalty has been regulated in the US as an apt, but rare, sentence reserved for the worst of the worst. LWOP as a sanction in its own right had developed as a 'solution' to the problem of the habitual offender (Gottschalk 2012). Additionally, LWOP in retentionist states tends to be a statutory alternative to the death penalty for first degree murders depending either on the discretion of the prosecutor to pursue a capital charge or the failure to establish the presence/absence of aggravating/mitigating factors. The outright reluctant replacement of the death penalty by LWOP in abolitionist states in the face of costs and fallibility, has meant a cascading down of the 'worst of the worst' punitive rationality to stand alongside the harsh punishment for the habitual offender. The

confluence of the worst of the worst and habitual offender necessitates that we understand the cultural and political baggage of LWOP as an alternative to the death penalty.

There are two distinct phases and tropes of the abolitionist movement in the US since the 1960s – old abolitionism and new abolitionism (Sarat 1998). Old abolitionism sought to challenge the death penalty on the basis of the immorality and cruelty of killing another human being and triggered one of the most crippling moral and political impasses of identifying ‘whose side are you on’ in US penal politics (Sarat 2001a, 2002). New abolitionism gained ground as a strategy for political and judicial challenge of the death penalty after the stampede to reinvent and re-establish the constitutionality of state sentencing practices in a ‘mean spirited revisionism’ (Sarat 1998, p.6) in response to the effective judicial abolitionism after *Furman v. Georgia* (408 US 238 (1972)) between 1972 and 1976. New abolitionism placed fairness and fallibility, not the dignity of the offender, as the source and focus of concern. The offender is effaced and becomes a stand-in for the innocent accused, the poor accused, the juvenile accused, the intellectually disabled accused, the African American accused, and the hurdles in their search for justice in the American criminal justice system. Concerns about the dignity of the offender and the constitutionality of the death penalty itself were replaced with concerns about the efficiency and fallibility of the system.

Narratives about the inherent cruelty of executions and of the dignity of the offender are muted in the search for a pragmatic consensus on a morally-contested issue (Sarat 2001b; Simon 2014). Human rights/dignity concerns that animated European death penalty abolitionism (Girling 2006) and which led to successful challenges and recent ‘cascades’ of mildness towards life-limiting sentences in Europe (van Zyl Smit, Weatherby, and Creighton 2014; Simon 2014) have not been nurtured, nor have they found legal

comfort in Supreme Court decision making. Nevertheless, some discourses of cruelty and dignity persisted in the spectacle of contestation of death penalty practices, and the conditions and echoes of their emergence and survival are important. First, the cruelty and suffering of being unjustly selected to die and awaiting unjust punishment is central to late 20th/early 21st Century abolitionist strategies, where error in criminal justice is embodied in the *unjust* suffering of the *innocent* accused/condemned. However, the economy of cruelty and undeserved/deserved pain/dignity underpinning such strategies, echoes the appeal to the innocent victim, which resonates with the discourses of retribution and its victim service symbolism in US penal culture(s) (Zimring 2003). Second, the cruelty of experiencing, and the problem of witnessing, pain and its indignities during executions, have been key battlegrounds of legal and political challenges to the death penalty (see below). The fates and prospect of these discourses in LWOP has important implications.

The inheritance or ‘cascading’ of a moral economy of cruelty and suffering from the new abolitionist tradition of death penalty politics towards other ‘life’-limited sentences has become a point of reflection in abolitionist and academic writing (for example, Simon 2014). Simon (2014) argues for a politics of hope that embraces and acknowledges the historical cruelty of abolition; and hopes and works towards a ‘dignity cascade’ eliminating harsh punishments (p.489) after death penalty abolition. He suggests that the death penalty’s ‘metaphoric and discursive role’ anchors a structure of extreme punishment in a way that LWOP does not. Yet there are traces of the metaphoric and discursive role of the death penalty in LWOP which casts a shadow over LWOP for both incorrigible and the worst of the worst.

Derrida (2013) warns against complacency about the inevitability of ending death in punishment in an era of apparent global successes in abolition:

Even when the death penalty will have been abolished ... Other figures will be found for it; other figures will be invented for it, other turns in the condemnation to death ... (pp.282–3)

Both old and new abolitionism seek to divert the rule of law from resorting to the death penalty (Adelsberg, Guenther and Zeman 2015, p.87) – rationalising death out of punishment. They make no attempt to curtail the sovereign imagination of punishment of the power over life and death and, furthermore, as I will go on to show below, they nurture and draw on that imagination. For Simon (2014), the cost of rationalising death out of punishment could be set in a genealogy of punishment where ‘utilitarian gains, proper legal procedures and well-disciplined prisons, absorbed the cruelty of earlier rituals without fundamentally altering it’ (p.486). The rest of this article is concerned with this ‘absorption’ and its implication at this particular historical juncture.

Death Penalty Exceptionalism and LWOP: Parallel Lives and Deadly Symbiosis

New abolitionism and the propensity of American federalism to foster pockets of resistance to reform (Zimring 2003; Garland 2010) has fostered, over the last 50 years, a spectacle of executions in which pragmatic concerns about the ability of the US criminal justice system take centre stage alongside a spectacle of judicial eagerness to ‘tinker with the machinery of death’ (Justice Blackmun dissenting in Collins v. Collins (510 US 1141 (1994))), to provide sustainable and constitutional futures for the death penalty. This space of work and contest over death as punishment has shored up a clear judicial and popular distinction between death and life as punishment. Since the 1970s and the Furman decision there has been a popular, judicial, and political, articulation of the exceptionalism of the death penalty (in terms of its impact and meanings) and in terms of a special duty of care placed on the criminal justice system and its actors. Supreme Court death penalty jurisprudence

developed after *Furman* reiterated a persistent and 'enduring argument' (Abramson 2004, p.117) that the death penalty is so different from any other punishment that it requires extraordinary prudence and a maze of procedural protections for those finding themselves within its remit to avoid error (both in judgments of guilt and deadworthiness). The discourse of difference between life and death as punishment foregrounds death's severity and irrevocability.

At the same time, the death penalty was presumed to be amenable 'to meaningful judicial restriction' (Steiker and Steiker 2014, p.204), unlike LWOP in particular and mass incarceration in general (Gottschalk 2012), where there has been comparatively little and hard-won judicial oversight. Steiker and Steiker (2014) argue that the hive of judicial activity and Supreme Court interventions in death penalty cases 'fuels the (mis)perception that all areas of criminal justice worthy of regulation are in fact subject to regulation through the courts' (p.204). Furthermore, the Supreme Court has ensured that procedural protections allowed for capital cases do not 'bleed out' (Gottschalk 2012, pp.230–2) in non-capital sentences and processes. By fiercely protecting the idea that death is different, it seems that this spectacle of judicial intervention in capital cases may have left LWOP in a judicial wilderness of fettered discretion of individual states, juries and automatic sentencing. Capital cases and their journey through the courts, established a temporality and spatiality of work and challenge which mirrors the journey of the defendant/condemned towards the execution chamber. The progression towards an execution after sentencing both punctuates time and offers windows for challenge and intervention. This is a temporality/spatiality absent from LWOP sentences and this is of practical and symbolic significance for challenges, mobilisation, and intervention, in such cases.

During this time of work for the death penalty there was a silent, but inexorable, rise of the use of LWOP. Three factors are widely cited as contributing to its ascendance: the rise of penal populism since the 1980s, the war on drugs, and the ratcheting up of sentencing tariffs and sentences of which LWOP became the apex (for example, Gottschalk 2014; Nellis 2013; Travis 2014). The harshness in sentencing increasingly came to be marked by the withdrawal of discretion (mandatory sentencing), as well as by sentence length. The rise of the truth-in-sentencing movement (Nellis 2013) limited opportunities/eligibility for parole, and 'locked prisoners' into a covenant with their past, foreclosing possibly lenient parole decisions.

The 'historical thoughtlessness' of the adoption of LWOP since the 1980s (Berry 2015, pp.6–7) is in sharp contrast to the increased judicial and activist scrutiny of capital sentencing of the 'death is different' doctrine which drove executions to an effective standstill around the same time. This disparity provided both practical and symbolic incentives to individual states, criminal actors, and jurors, to consider and replace LWOP as alternatives to death sentences. New abolitionism's appeal to restraint and rationality contributed to the ascendance of LWOP as an alternative to the death penalty; LWOP provided a logical, practical, tested and, as I will illustrate below, satisfying, alternative to the death penalty for offenders convicted of capital crimes.

Consequently, whereas the death penalty in the US was marked as a space for judicial and popular reflection, LWOP was marked not only by historical thoughtlessness, but as a sentence without space for reflection, without any judicial and personal mirrors of recognition either for the judicial process or for 'the other' finding themselves within its scope. It developed as mandatory (in most cases), with little to no space for consideration of mitigating factors (except for juveniles), no automatic review process, no procedural

safeguards (regarding representation) and only a theoretical possibility of executive clemency (Henry 2012). There is no space for an 'express lever of mercy' fostered through due process on jury decision making and no 'reasonable deliberation over equitable blameworthiness' (Bowers 2012, p.25). Unlike the death penalty, opportunities for revision through political deliberation (executive clemency) even though available in theory, are, in practice, virtually non-existent, especially for cases involving murder (American Civil Liberties Union 2014).

The 'death is different' argument has been increasingly challenged by both academics (Berry 2010; Ogletree and Sarat 2012; Adelsberg, Guenther and Zeman 2015) and penal reformers, and for a specific category of offenders (juvenile offenders) and by the Supreme Court itself in *Graham v. Florida* (130 S.Ct. 2011 (2010)). It is variously described as 'Death by Incarceration' (CADBI 2015) 'worse than death' (Cockburn 2009), living death (American Civil Liberties Union 2014), a 'different death penalty' (Dow 2012), a 'death penalty in disguise' (Almenara and van Zyl Smit 2015). Ogletree and Sarat (2012), amongst others, point out that that death is not really all that different and there is a need 'to confront the possibility that LWOP may well be the new capital punishment, with all of its baggage – but none of its process' (p.21).

As Henry (2012) and Berry (2010) compellingly demonstrate, the legal doctrine of 'death is different' does not hold well under close scrutiny when considering the current practices of LWOP. The rejection of rehabilitation is part of a shared logic of feasibility and desirability of eternal exclusion removing the offender as a calculable, yet immutable, risk to the public. The 'special irrevocability' of death key in the 'death is different' doctrine bears more than a family resemblance to the lack of scrutiny and effective review of LWOP cases.

The denial of spaces for measured and equitable deliberation may mean that, in practice (if not in theory), a sentence is bulletproofed against revision and is effectively irrevocable.

Justice Kennedy, in *Graham v. Florida*, in considering the constitutionality of LWOP for juveniles, traces similarities between LWOP and the death sentence, and especially the issue of irrevocability. He acknowledges the possibility of clemency for LWOP but noted that the remoteness and likelihood of an individual making effective use of mechanisms for release are so slim as to have no mitigation on the harshness of the sentence (*Graham*, 130 S.Ct. 2027–2030 (2010)). This ‘irrevocable judgment about the person’s value and place in society’ (at p.2030) is a motif of the *Graham* decision that acknowledged that for juveniles, LWOP was sufficiently like a death sentence to merit protections reserved for the death sentence (that is, ensuring the due consideration of mitigating circumstances). This irrevocable judgment binds the hands of the decision makers, not only at some distant future execution, but from the very moment of judgment of those condemned to LWOP.

Revolutions and Revelations: The Decision not to Decide and the Reluctant Abolitionist

Concerns about innocence have played a key role in articulating the problem of the death penalty in the media and in the courts. The innocence frame, in particular, is one that has dominated reporting and brought about tangible changes in death penalty practice, resulting in an increase in the number of states adopting LWOP as an alternative (Baumgartner, De Boef and Boydston 2008). The innocence revolution (Marshall 2004; Steiker 2005) effectively challenged the ability of the system to distinguish the innocent from the guilty and to adequately and timely respond to their claims.

In the early 2000s, seemingly state after state, case after case, and issue after issue, raised concerns about the fallibility of the process (see Steiker 2005). The first decade of the 21st Century was marked by executions as the spectacle of error and the fallibility of

judgment. The innocence revolution appeared to convert a number of high-profile supporters of the death penalty and to turn strongholds of the death penalty, such as Illinois, into abolitionist states (Warden 2005). The foregrounding of innocence, and especially the prominence of actual innocence cases in public debates, precluded principled objections to the practice of the death penalty itself (see Steiker and Steiker 2005) and left debates about how we should punish the guilty, to the punitive imagination. Additionally, the discourse of innocence in a perverse way is not about the defendant at all; as I have argued elsewhere the displacement of death is very much driven by a decision not to decide death and evading the moral burden of a fallible and irrevocable penal decision (Girling 2011).

Concerns about fairness and disproportionate pursuance and application of the sentence of death based on race of the offender and victim, showed promise in terms of challenging death penalty practice and support. These challenges revealed a system that, in making use of politically and judicially much hard-fought-after equitable discretion, evoked and summoned the ghosts and the burdens of race and lynching (Kaufman-Osborn 2006; Ogletree 2002). These ghosts have been particularly resistant to reform, as the troubled history of the North Carolina Racial Justice Act 2009, and its repeal, show. The haunting of race in capital punishment continues in a number of high-profile cases (for example, Gary Graham – executed 2000; Troy Davis – executed 2011; George Stinney’s posthumous exoneration in 2014 for 1944 execution). LWOP as a penal exit strategy absolves decision makers (legislators, prosecutors, jurors, judges) of making inequitable decisions which may result in death. The displacement discourse is one of absolution, the moral washing of the hands in the decision to end life, a decision not to decide death. This displacement discourse of absolution is one that goes beyond a decision to avoid an error of judgment; it

is also a decision not to trust the state to take life. During the long, protracted, but recently successful, campaign to repeal the death penalty in Nebraska, those deciding were urged not to consider whether some people deserve to die but 'do they trust an error-prone government to fairly, efficiently and properly administer a program that metes out death to its citizens?' (Berman 2015). Yet at the same time, the state is entrusted unconditionally with the whole lives and deaths in penal institutions.

The wider 'smart on crime' rhetoric in American criminal justice is very much concerned with the social benefits of alternative sanctions (Steiker 2014, p.212) and appears to be making some, albeit slow, headway as a public rationale for recent repeals of death penalty legislation (for example, Maryland 2013; Nebraska 2015). As Steiker (2014) notes: 'the thrust of the contemporary movement is that our death penalty – the prevailing American practice – is simply too costly along several dimensions with insufficient benefits to justify retention' (p.212).

Yet not only has there been a failure to replace the moral discourse of retribution, deterrence and incapacitation of death in punishment but LWOP was measured against it and found not to be wanting. In *Baze v. Rees* (553 US 35 (2008)), Justice Stevens reflected on the erosion of justifications for the death penalty: the weakening of incapacitation arguments in light of the introduction of LWOP, the undermining of appeals to deterrence by the lack of consensus on its efficacy and the incompatibility between retributive justifications and the tide towards humanising executions.

The perceived requirements of swiftness, severity and certainty, that have beset common sense and some academic discourses as conditions for effective deterrence, find little comfort in the current practice of the death penalty in the US (Sunstein and Vermeulen 2005; Steiker 2005; Donohue and Wolvers 2005) and appear to be satisfied by LWOP. The

sentence is immediate with no delay, no 'second lifetime' on death row. It appears not to overpromise and under-deliver death, like the death penalty with its many exits, delays and judicial and political uncertainty. It does what it says on the tin – you die in prison, little possibility of review of the case, review of sentence, mercy. It, thus, appeases a greater range of retributive demands than the current 'peculiar form' of the institution of the death penalty in the US (Garland 2010).

LWOP could also be said to satisfy the victim service symbolism (Zimring 2003, pp.60–2) of American capital punishment. LWOP is a covenant with victims that can be kept, not at the moment of death, but in the finality and unconditionality of the sentence. LWOP has been argued to give 'a sense of personal control to the victims' (Barrile 2014, p.241) by not fostering a lingering 'involuntary relationship' between the offender and the survivor through the maze of appeals, process and ritual of capital cases.

The harshness of LWOP provides reassurance for reluctant converts, such as Governor Richardson of New Mexico. His support for abolishing the death penalty was reported as marking the abolition of the death penalty as a victory for keeping New Mexico safer:

We now have the option of sentencing the worst criminals to life in prison without the possibility of parole. They will never get out of prison. Faced with the reality that our system for imposing the death penalty can never be perfect, my conscience compels me to replace the death penalty with a solution that keeps society safe. (Death Penalty Information Centre 2009)

Prior to this announcement on 'smart penalties', Richardson visited maximum-security units for LWOP after which he announced that: 'Those cells are something that may be worse than death' ... 'I believe this is a just punishment' (Associated Press 2009). This has been

precisely the political sell of LWOP in light of the decision not to decide death in US criminal justice.

The state of California and the fates of recent proposals to replace the death penalty with LWOP encapsulate the political appeal of the harshness of 'smart on crime' reform. During the campaign for the SAFE California Act (Proposition 34) the conditions of LWOP took centre stage in the campaign alongside fiscal and utilitarian questions of its comparative efficacy and cost. The proposal, for all intents and purposes, recasts and reinforces the victim service symbolism of the death penalty into a new victim and community service symbolism for LWOP. Voters were promised that those convicted would have to 'work within a high security prison as many hours of faithful labour in each day and every day during his or her term of imprisonment' (California Legislative Information 2011), and their wages would be subject to deduction for victim restoration/restitution. It also offered to transfer projected savings from the changes (100 million over four years) to local law enforcement budgets in order to enhance the investigation of homicide and sex offences (California Legislative Information 2011). The campaign addressed concerns about fiscal costs and offered narratives of opportunity costs for both law enforcement and victims' families if the death penalty was not abolished (Dilts 2015, pp.109–12). However, it also proposed to suspend all litigation and appeals by existing death row prisoners. This disregard for abolitionist hard-won ground over the prevalence of error in capital cases was a cause for concern (Dilts 2015; Simon 2014). The opportunity costs establish and support a new victim service symbolism which promises certainty in both punishment and the severity of punishment, and appeals to the punitive reality and certainty of LWOP in the face of persistent and long-standing challenges to the fallibility of death sentences. As Dilts (2015) argues, it promises security, safety, AND harshness, in an age of austerity and limited

resources. This penal rhetoric is sustained by an unchallenged moral economy of harshness and exclusion (both physical and judicial silencing) in the punishment of the worst of the worst.

The Spectacle of Mercy and Museums of Rage

Legal strategies for challenging executions since *Furman* (1972) and the ensuing spectacle of mitigation, delay, mercy (and its denial) (Alfieri 1996; Girling 2011) are deeply embedded in the cultural lives of the death penalty in the US. This is a spectacle which is not afforded, finds no stage and no witnesses in LWOP.

States that recently repealed the death penalty from their statute replaced punishment for the worst of the worst with LWOP (Death Penalty Information Centre 2013) and in the process, injected different versions of mandatory sentencing. Mandatory sentencing meant that the harshest sentence was no longer the subject of equitable discretion and that opportunities for individualised sentencing during the sentencing process, and beyond it, were severely curtailed. This stands in sharp contrast to the complex jurisprudence developed after *Furman* to ensure consideration of mitigating factors in capital trials, with juries offered guided discretion and penalty phase trials for consideration of both aggravating and mitigating factors before deciding on deadworthiness. It seems that in most cases of recent repeals of death sentences, the role of mitigation for the most serious of cases has been eroded, and the legal and practical scope of narratives of mercy is all but absent in most states' process of meting out LWOP (Death Penalty Information Centre 2013). Clemency in capital cases can be seen as 'remembering the future, of memorialising miscarriages of justice, a way of ensuring the future remembers' (Sarat 2009, p.238) both as 'a kind of testimony, and a way of recording

a history of injustice' (p.238). The 'guided discretion' of capital sentencing schemes since the 1970s aiming to deliver equitable declarations of deadworthiness can also be said to have provided opportunities, first, for narratives of mercy and narratives of hope during the trial, but also for yet another testimony, another record of a denial of mercy which could be unpicked during the appeals and clemency process. Thus, LWOP as an exit and a declaration of lifeworthiness has been described as a 'conflicted' punishment (Lerner 2013) because those ending up in LWOP, with its covenants of denial of hope, have had to demonstrate that they are worthy of mercy and hope (Lerner 2013).

The case of juvenile defendants facing LWOP came into sharp relief in a number of recent decisions which appear to reintroduce the aspirations of mitigation and individualised sentencing in the mandatory frameworks of LWOP. In a series of decisions in *Graham v. Florida* (2010) and *Miller v. Alabama* (132 S.Ct. 2455 (2012)) the US Supreme Court asserted the importance of age as a mitigating factor and of individualised LWOP sentencing for juveniles (Fiorillo 2013). The special status of the juvenile LWOP defendant rested with the argument in *Graham v. Florida* that 'LWOP is different' for a juvenile defendant LWOP and more like a death sentence, because the juvenile offender will spend a larger proportion of their lifetime in prison (see Fiorillo 2013). It was this analogy between a LWOP and a death sentence for a juvenile offender that re-established the importance of individualised sentencing for juvenile offenders in LWOP cases.

LWOP generally remains insular and insulated from the processes of individualised sentencing and the memorialisation of judgment, mercy, and error, that have come to define the legal and cultural production of death sentences in the last 50 years. Blecker (2010), a proponent of the death penalty, makes a cutting point that those arguing for

LWOP as a replacement for the death penalty are supporting an equally retributivist 'irrationally preoccupied with the past' sanction:

When we sentence to LWOP, we irrevocably pledge at this moment forever: We will never let our rage and disgust disintegrate and deteriorate. LWOP creates a binding commitment now and forever never to think differently, or feel different – when the future becomes the present and the present is now past. (Blecker 2010, pp.12–13)

LWOP memorialises our rage without the contested and subversive memorialisations of injustice (historical and present), mercy, dignity and lifeworthiness that the very flawed death penalty system in the US has done over the last 25 years.

Mirrors of Recognition: Doing Death and the Politics of Mourning

Botched executions are subversive, unmasking the brutality of the violence of the law as commensurable to the criminal act (Sarat 2014). The effacing of pain (and to some extent death itself) at the point of execution has become the motif of this differentiation in the US.

The introduction of lethal injection in 1982 augured a medicalised aesthetics of execution preoccupied with the experience and control of pain and its expression and witnessing during executions (Sarat 2001a; Kaufman-Osborn 2002, 2011; Denno 2007). The drug protocols of lethal injection as a method of execution in the US since its adoption inscribed an aspiration for an unfeeling, unconscious body before the killing. This 'anaesthetisation logic' (Kaufman-Osborn 2011) of execution is concerned primarily, not with the experience of pain by the subject, but with the possibility of communication of pain during the execution ritual (Kaufman-Osborn 2011). Like the prisoner in the Panopticon, the anaesthetised condemned is 'seen, but he does not see; he is the object of information, never a subject in communication' (Foucault 1977, p.200). The death of the convicted is rendered a non-event (see Kaufman-Osborn 2002; Lynch 2000), the ending of life entombed

within the anaesthetised unmarked physical body of the condemned where there should be nothing for the witness to see. The death work of execution is shown by Kaufman Osborn (2002, 2011) to be 'haunted by the ideal of a death sentence the infliction of which is so imperceptible that it elides the act of killing' (Kaufman-Osborne 2011, p.235) where the dignity of the process means that the spectator sees nothing, no 'life excision' (p.235) without having to avert their gaze. The simulation of a medicalised natural good death on the body of the condemned permeates the rituals and processes of execution in the US. The performance of, and futile search for, painless uneventful death by lethal injection has highlighted a retributive gap between the humanising of executions and retributive force of condemnation for the worst of the worst. Lynch (2000) observed, even before the main judicial battle over methods of execution in the first decade of the 21st Century, that the transformation of the death penalty into a painless, uneventful disposal, with the introduction of lethal injection in the late 1970s, would eventually render the death penalty 'obsolete' and 'superfluous' because it would fail to appease the retributive call by supporters of the death penalty demanding a measure of pain for the pain those executed have inflicted on others (pp.25–6). Practical and legal challenges over botched executions, process, drug protocols and availability, have periodically curtailed executions in a number of states and have staged a judicial spectacle of a chimeric search for the modicum of pain that would not constitute 'cruel and unusual punishment'. Similar to clemency petitions, challenges to methods of execution can be said to serve as contested memorialisations of pain and the embodiment of the condemned; an embodiment which is elided and rendered meaningless at the final staging of modern executions.

The discourse of a search for dignified and painless death in recent political and cultural narratives around physician-assisted suicide in the US (Curran 1997; Weiss 2014),

has further problematised the witnessing of dying without pain in the execution chamber. This medicalised palliative staging in which the taking of life 'assume[s] the character of a depoliticized humanitarian (non)event, a painless matter of putting someone "to sleep"' (Kaufman-Osborn 2002, p.69) challenges notions of least eligibility. A good death, as the Supreme Court reminds us in two decisions, years apart, by Scalia in Callins v. Collins (1994) and more recently, in Glossip v. Gross, often eludes the law abiding. 'After all, while most humans wish to die a painless death, many do not have that good fortune' (Glossip v. Gross, 576 US 4 (2015)).

These discourses and conditions of dignity, pain and witnessing have 'sunk their teeth', to paraphrase Derrida, into the death work of LWOP. Both the death penalty and LWOP encounter death as a limit but in both, the taking of life is elided – in the death penalty through lethal injection and the anaesthetisation logic, in LWOP through the vagaries of a 'natural' unalleviated death. In the death penalty the witness need not avert their gaze as there should be nothing to see, in LWOP there is no event to see and no need for a witness. There are many expositions about the conditions of life and death and the privations suffered by those serving sentences of LWOP (for example, Gottschalk 2012; Dayan 2011). In both executions by lethal injection and 'natural' deaths in LWOP, the state simulates and redefines its limits as health and dignity provider. Moreover, unlike modern-day executions, LWOP seems to appease both the moral comfort procedures of a state and actors who have made a decision not to decide **and** never to look back on their original decision, extending to leaving indeterminate and to the vagaries of nature, the manner and time of death. At the same time, there are glimpses and imaginings of suffering in the 'hell holes and purgatories' (Jewkes 2014) of such detention, glimpses that the modern lethal injection process not only denies, but also reassures the witness that they are not part of

the bargain of punishment. It is sometimes claimed that medicine saved the death penalty (Denno 2007). It could be said that nature is keeping death alive in American penal politics in what may be its final transformation.

Garland (2010) suggested that the death penalty in the US is 'hypersignificant because it talks of killing and death and makes that talk pleasurable and empowering' (p.304). He goes on to argue that the capital punishment system today is 'primarily a communication system' (p.312), in which that which is performed is 'discourse and debate' (p.312). Yet this discourse and debate are more than just about death and vengeance and the popular sovereign imagination suggested by Garland. The spectacles and memorialisations of injustice, error and pain reflect on dignity and cruelty and create spaces in which the loss of life and liberty can be grieved, a subversive politics of mourning (Butler 2004) for those whom punishment had deemed dispensable. In the twilight of the death penalty and its coexistence and replacement with LWOP, it is important to work towards a politics of mourning for those (un)grievable (Butler 2004) lives within it. It may be that, as Simon (2014) suggested, the 'metaphoric and discursive role' of the death penalty is a scaffold supporting 'a larger structure of extreme punishment' (p.486) and that its dismantling may create cascades of dignity providing hope for a reform of other extreme punishments such as LWOP. Here I illustrated some of these metaphoric and discursive roles, but also demonstrated that new reform strategies would also need to reimagine and recapture the spaces for grieving that have come to define the political and cultural lives of the production of the death penalty in the US, and which have been designed out of LWOP.

LWOP entombs moral comforts in an era of uncertainty and becomes a museum of rage; it is a place both to forget and to imagine. It embodies places both beyond, and after, judgment, delimited by technocratic, neoliberal strategies; a 'room of requirement', to

paraphrase J.K. Rowling (2003), for moral comfort and horrible imaginings. Those serving LWOP are often said to be 'doing life' in prison. They are also 'doing death' for us.

References

- Abramson, J. (2004) 'Death-is-different jurisprudence and the role of the capital jury', *Ohio State Journal of Criminal Law*, *2*, 117–64.
- Adelsberg, G., Guenther, L. and Zeman, S. (Eds.) (2015) *Death and Other Penalties: Philosophy in a Time of Mass Incarceration*, Oxford: Oxford University Press.
- Alfieri, A.V. (1996) 'Mitigation, mercy, and delay: the moral politics of death penalty abolitionists', *Harvard Civil Rights-Civil Liberties Law Review*, *31*(2), 325–48.
- Almenara, M.A. and van Zyl Smit, D. (2015) 'Human dignity and life imprisonment: the Pope enters the debate', *Human Rights Law Review*, *15*(2), 369–76.
- American Civil Liberties Union (2014) *A Living Death*, New York, NY.: American Civil Liberties Union.
- Associated Press (2009) *New Mexico Repeals Death Penalty*. Available at: <http://articles.latimes.com/2009/mar/19/nation/na-newmexico-death19> (accessed 10 May 2015).
- Barrile, L.G. (2014) 'I forgive you, but you must die: murder victim family members, the death penalty, and restorative justice', *Victims & Offenders*, *10*(3), 239–69.
- Baumgartner, F., De Boef, S. and Boydston, A. (2008) *The Decline of the Death Penalty and the Discovery of Innocence*, Cambridge: Cambridge University Press.
- Berman, R. (2015) 'How Nebraska abolished the death penalty', *The Atlantic*, *27 May*.
- Berry, W. (2010) 'More different than life, less different than death', *Ohio State Law Journal*, *71*(6), 1109–47.
- Berry, W. (2015) 'LIFE-WITH-HOPE SENTENCING: the argument for replacing life-without-parole sentences with presumptive life sentences', *Ohio State Law Journal*. Available at: <http://ssrn.com/abstract=2567963> (accessed 28 October 2015).
- Blecker, R. (2010) 'Less than we might: meditations on life in prison without parole', *Federal Sentencing Reporter*, *23*(1), 10–20.
- Bowers, J. (2012) 'Mandatory life and the death of equitable discretion', in: C.J. Ogletree and A. Sarat (Eds.), *Life without Parole: America's New Death Penalty?*, New York, NY.: New York University Press.
- Butler, J. (2004) *Precarious Life: The Power of Mourning and Violence*, New York, NY.: Verso.
- CADBI (2015) *Coalition to Abolish Death by Incarceration (Pennsylvania)*. Available at: <http://decarceratepa.info/CADBI> (accessed 6 September 2015).
- California Legislative Information (2011) *SB-490 Death Penalty (2011–2012)*. Available at: http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB490 (accessed 2 May 2015).
- Cockburn, A. (2009) 'Worse than death', *The Nation*, *20 April*.

- Curran, P.M. (1997) 'Regulating death: Oregon's Death with Dignity Act and the legalization of physician-assisted suicide', *Georgetown Law Journal*, *86*, 725–49.
- Dayan, C. (2011) 'Did anyone die here? Legal personalities, the Supermax, and the politics of abolition', in: A. Sarat and J. Martchukat (Eds.), *Is the Death Penalty Dying? European and American Perspectives*, Cambridge: Cambridge University Press.
- Death Penalty Information Centre (2009) *Death Penalty Abolished in New Mexico*. Available at: <http://www.deathpenaltyinfo.org/death-penalty-abolished-new-mexico-governor-says-repeal-will-make-state-safer> (accessed 5 May 2015).
- Death Penalty Information Centre (2013) *LWOP Post Repeal*. Available at: <http://www.deathpenaltyinfo.org/lwop-post-repeal> (accessed 4 May 2015).
- Denno, D. (2007) 'The lethal injection quandary: how medicine has dismantled the death penalty', *Fordham Law Review*, *76*(1), 49–128.
- Derrida, J. (2013) *Jacques Derrida: The Death Penalty*, vol. I (translated by Peggy Kamuf), Chicago, IL.: University of Chicago Press.
- Dilts, A. (2015) 'Death penalty "abolition" in neoliberal times', in: G. Adelsberg, L. Guenther and S. Zeman (Eds.), *Death and Other Penalties: Philosophy in a Time of Mass Incarceration*, Oxford: Oxford University Press.
- Donohue, J. and Wolvers, J. (2005) 'Uses and abuses of empirical evidence in the death penalty debate', *Stanford Law Review*, *58*, 791–856.
- Dow, D.R. (2012) 'Life without parole: a different death penalty', *Daily Beast*, *27 April*.
- Fiorillo, S.E. (2013) 'Mitigating after Miller: legislative considerations and remedies for the future of juvenile sentencing', *Boston University Law Review*, *93*, 2095–129.
- Foucault, M. (1977) *Discipline and Punish: The Birth of the Prison*, Harmondsworth: Penguin.
- Foucault, M. (2000) 'Against replacement penalties', in: J. Faubion (Ed.), *The Essential Works of Michel Foucault, 1954–1984*, New York, NY.: The New Press.
- Garland, D. (2002) 'The cultural uses of capital punishment', *Punishment & Society*, *4*(4), 459–87.
- Garland, D. (2010) *Peculiar Institution*, Cambridge, MA.: Harvard University Press.
- Girling, E. (2004) "'Looking death in the face": the Benetton death penalty campaign', *Punishment & Society*, *6*(3), 271–87.
- Girling, E. (2006) 'European identity, penal sensibilities and communities of sentiment', in: S. Armstrong and L. McAra (Ed.), *Perspectives on Punishment: The Contours of Control*, Oxford: Oxford University Press.
- Girling, E. (2011) 'The witnessing of judgment: between error, mercy and vindictiveness', in: A. Sarat and J. Martchukat (Eds.), *Is the Death Penalty Dying? European and American Perspectives*, Cambridge: Cambridge University Press.
- Gottschalk, M. (2012) 'No way out? Life sentences and the politics of penal reform', in: C.J. Ogletree and A. Sarat (Eds.), *Life without Parole, America's New Death Penalty*, New York, NY.: New York University Press.

- Gottschalk, M. (2014) *Caught: The Prison State and the Lockdown of American Politics*, Princeton, NJ.: Princeton University Press.
- Henry, J.S. (2012) 'Death in prison sentences: overutilized and underscrutinized', in: C.J. Ogletree and A. Sarat (Eds.), *Life without Parole, America's New Death Penalty*, New York, NY.: New York University Press.
- Henry, S. and Milovanovic, D. (1996) *Constitutive Criminology: Beyond Postmodernism*, London: Sage.
- Hood, R. and Hoyle, C. (2014) *The Death Penalty: A Worldwide Perspective*, Oxford: Oxford University Press.
- Jewkes, Y. (2014) 'Punishment in black and white: penal "hell-holes", popular media, and mass incarceration', *Atlantic Journal of Communication*, 22(1), 42–60.
- Kaufman-Osborn, T. (2002) *From Noose to Needle: Capital Punishment and the Late Liberal State*, Ann Arbor, MI.: University of Michigan Press.
- Kaufman-Osborn, T. (2006) 'Capital punishment as legal lynching?', in: C. Ogletree and A. Sarat (Eds.), *From Lynch Mobs to the Killing State: Race and the Death Penalty in America*, New York, NY.: New York University Press.
- Kaufman-Osborn, T. (2011) 'The death of dignity', in: A Sarat and J. Martchukat (Eds.), *Is the Death Penalty Dying? European and American Perspectives*, Cambridge: Cambridge University Press.
- Lerner, C.S. (2013) 'Life without parole as a conflicted punishment', *Wake Forest Law Review*, 48(5), 1101–72.
- Lynch, M. (2000) 'The disposal of inmate #85271: notes on a routine execution', *Studies in Law, Politics and Society*, 20(3), 3–34.
- Marshall, L.C. (2004) 'The innocence revolution and the death penalty', *Ohio State Journal of Criminal Law*, 1(2), 573–84.
- Nellis, A. (2013) *Life Goes On: The Historic Rise in Life Sentences in America*, Washington, DC.: The Sentencing Project.
- Ogletree, C.J. (2002) 'Black man's burden: race and the death penalty in America', *Oregon Law Review*, 81, 15–38.
- Ogletree, C.J. and Sarat, A. (2012) *Life without Parole: America's New Death Penalty?*, New York, NY.: New York University Press.
- Rowling, J.K. (2003) *Harry Potter and the Order of the Phoenix*, London: Bloomsbury.
- Sarat, A. (1998) 'Recapturing the spirit of "Furman": the American Bar Association and the new abolitionist politics', *Law and Contemporary Problems*, 6(4), 5–28.
- Sarat, A. (2001a) 'Introduction: If Timothy McVeigh doesn't deserve to die, who does?', in: A. Sarat (Ed.), *When the State Kills: Capital Punishment and the American Condition*, Princeton, NJ.: Princeton University Press.

- Sarat, A. (2001b) 'Killing me softly: capital punishment and the technologies for taking life', in: A. Sarat (Ed.), *When the State Kills: Capital Punishment and the American Condition*, Princeton, NJ.: Princeton University Press.
- Sarat, A. (2002) 'New abolitionism and the possibilities of legislative action', *Ohio State Law Journal*, *63*, 343–69.
- Sarat, A. (2009) 'Memorializing miscarriages of justice: clemency petitions in the killing state', in: A. Sarat (Ed.), *When Law Fails: Making Sense of Miscarriages of Justice*, New York, NY.: New York University Press.
- Sarat, A. (2014) *Gruesome Spectacles: Botched Executions and America's Death Penalty*, Stanford, CA.: Stanford University Press.
- Sarat, A. and Boulanger, C. (2005) *The Cultural Lives of Capital Punishment: Comparative Perspectives*, Stanford, CA.: Stanford University Press.
- Sarat, A. and Martchukat, J. (2011) *Is the Death Penalty Dying? European and American Perspectives*, Cambridge: Cambridge University Press.
- Seal, L. (2014) *Capital Punishment in Twentieth-century Britain: Audience, Memory, Culture* (Routledge SOLON explorations in crime and criminal justice histories, 3), London: Routledge.
- Simon, J. (2014) 'The cruelty of the abolitionists', *Journal of Human Rights Practice*, *6*(3), 486–502.
- Steiker, C. (2005) 'No, capital punishment is not morally required', *Stanford Law Review*, *58*, 751–90.
- Steiker, C.S. and Steiker, J. (2005) 'The seduction of innocence: the attraction and limitations of the focus on innocence in capital punishment law and advocacy', *Journal of Criminal Law and Criminology*, *95*(2), 587–624.
- Steiker, C.S. and Steiker, J.M. (2014) 'The death penalty and mass incarceration: convergences and divergences', *American Journal of Criminal Law*, *41*(2), 189–207.
- Steiker, J. (2014) 'The American death penalty from a consequentialist perspective', *Texas Tech Law Review*, *47*, 211–21.
- Strauss, L. (1966) *The Savage Mind*, Chicago, IL.: University of Chicago Press.
- Sunstein, C.R. and Vermeule, A. (2005) 'Is capital punishment morally required – acts, omissions, and life-life tradeoffs', *Stanford Law Review*, *58*, 703–50.
- Travis, J. (2014) 'Assessing the state of mass incarceration: tipping point or the new normal', *Criminology & Public Policy*, *13*, 567–77.
- van Zyl Smit, D., Weatherby, P. and Creighton, S. (2014) 'Whole life sentences and the tide of European human rights jurisprudence: what is to be done?', *Human Rights Law Review*, *14*(1), 59–84.
- Warden, R. (2005) 'Illinois death penalty reform: how it happened, what it promises', *Journal of Criminal Law and Criminology*, *95*, 381–426 .
- Weiss, M. (2014) 'Illinois Death with Dignity Act', *Annual Health Law Advance Directive*, *23*, 13–198.

Whitman, J.Q. (2003) *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, Oxford: Oxford University Press.

Zimring, F.E. (2003) *The Contradictions of American Capital Punishment*, Oxford: Oxford University Press.