

THE PROS AND CONS OF LIFE WITHOUT PAROLE

CATHERINE APPLETON and BENT GRØVER*

The question of how societies should respond to their most serious crimes if not with the death penalty is 'perhaps the oldest of all the issues raised by the two-century struggle in western civilization to end the death penalty' (Bedau, 1990: 481). In this article we draw attention to the rapid and extraordinary increase in the use of 'life imprisonment without parole' in the United States. We aim to critically assess the main arguments put forward by supporters of whole life imprisonment as a punishment provided by law to replace the death penalty and argue against life-long detention as the ultimate sanction.

Introduction

What is it that makes for the singularity of the death penalty? It is irreversible, but so is mutilation; it is a severe punishment, but so is torture or a life sentence. It involves the denial of dignity, but so, for all intents and purposes, does a life sentence: a human life involves not just existence and survival, but the unique development of a personality, creativity, liberty, unfettered social intercourse. When these are denied, can those who, in the name of civil rights, are in the forefront of the struggle against the death penalty ignore the ultimate implications of a life sentence? (Sheleff 1987: 138).

The rapid abolition of the death penalty throughout much of the western world during the latter half of the twentieth century was undoubtedly 'one of the signal achievements of liberal idealism' (van Zyl Smit 2001: 299). However, as the Israeli criminologist Leon Sheleff (1987) has recognized, few abolitionists have confronted themselves with the total implications of life imprisonment as an alternative punishment to the death penalty. Rather, death penalty supporters and opponents alike have often assumed that the alternative to execution should be to put murderers behind bars for the rest of their lives. In recent decades in the United States, there has been a rapid proliferation of life imprisonment without parole sentences for both adult and juvenile offenders, and also mandatory life sentences for recidivists and for drug offences. Recent trends in the United Kingdom appear equally unpromising. Although England and Wales has long since ceased the execution of offenders, it has surpassed all of Western Europe in its use of life imprisonment (Creighton 2004). Moreover, the recently enacted Criminal Justice Act 2003 has extended the scope of life imprisonment to include whole-life imprisonment as the maximum penalty. The resultant picture is of life imprisonment imposed more often and enforced for longer periods.

Despite the abandonment of capital punishment, as well as the fact that only a small proportion of homicides in the United States result in execution (Hood 2002), the rise in the use of life imprisonment without the possibility of release has received very little

*Correspondence to Catherine Appleton, Centre for Criminology, University of Oxford, Manor Road Building, Manor Road, Oxford OX1 3UQ, UK; catherine.appleton@crim.ox.ac.uk. Bent Grøver, sF, Nordslettveien 4B, 7038 Trondheim, Norway; bent@s-f.cc.

scholarly or public attention. The aim of this article is to focus on the dramatic increase of life imprisonment without parole sentences in the United States and to critically assess the main arguments put forward by supporters of whole-life sentences. It also considers a number of key inter-national developments that have placed important restrictions on the use of life without parole as an alternative to the death penalty. In conclusion, we argue against life-long imprisonment as the ultimate sanction, on the grounds that it faces many of the same objections as the death sentence.

A Brief Overview of LWOP

Life imprisonment without the possibility of parole (or life without parole, LWOP) has been described as the ‘penultimate penalty’ (Wright 1991: 339). Second to the death penalty, it is often regarded as the severest sanction a court can pass. Although the terminology varies across jurisdictions—such as ‘natural life’, ‘whole-life tariff’ or ‘life without the possibility of release’—LWOP is the most commonly used and most coherent description of such a sentence. While, in a few instances, the possibility of release before death is not completely foreclosed,¹ in practice, LWOP usually means what it says. For the purpose of this analysis, ‘LWOP’ has been defined in line with the language of Article 37(a) of the 1989 United Nations (UN) Convention on the Rights of the Child² as *life imprisonment without possibility of release*.

Although LWOP sentences previously existed, little attention appears to have been paid to whole-life imprisonment prior to the 1970s. In the United States, LWOP laws first became prominent following the decision of the Supreme Court in 1972 in *Furman v. Georgia*,³ which appeared, at the time, to have abolished the death penalty. Soon afterwards, the case of *Schick v. Reed*⁴ led to the endorsement by the US Supreme Court of LWOP as an acceptable sentence (see Wright 1990). Since then, LWOP laws have been introduced widely. Recent figures from the Death Penalty Information Center⁵ reveal that there are now, at the time of writing, only two of the 50 US states—New Mexico and Alaska—that do not offer LWOP as a sentencing option.⁶ A survey by Mauer *et al.* (2004) found that one in every four life-sentence prisoners in the United States (33,633) was serving a sentence of LWOP.

Statutes in the United States

The vast majority of US states that retain the death penalty mandate that anyone not sentenced to death for capital or first-degree murder—the crimes that normally carry the death penalty in the United States—shall serve a sentence of LWOP. Also, several of

¹ In the United States, for example, various states retain some release mechanisms for LWOP inmates, such as executive commutation.

² Article 37(a) of the Convention on the Rights of the Child states that ‘No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age’.

³ 408 U.S. 238 (1972).

⁴ 419 U.S. 256, 267 (1974) (‘The no-parole condition attached to the commutation of his death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole; it does not offend the Constitution’).

⁵ www.deathpenaltyinfo.org (November 2006).

⁶ New Mexico, however, has the death penalty. Alaska has neither LWOP nor the death penalty.

those that have abolished the death penalty have replaced it completely in cases of first-degree murder by LWOP. Hawaii's statute, for example, clearly provides that persons convicted of first-degree murder or first-degree attempted murder shall receive LWOP.⁷ Similarly, Iowa punishes first-degree murder as a 'Class A' offence with imprisonment 'for the rest of the defendant's life'.⁸ The Massachusetts statute provides that no person shall be eligible for parole while serving a life sentence for first-degree murder⁹ and Michigan also exempts from parole eligibility prisoners convicted of first-degree murder.¹⁰ These states require convicted murderers to spend the rest of their natural lives behind bars. The statute of the state of Washington is particularly detailed in its description of what an LWOP sentence actually means:

A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred or commuted by any judicial officer and the board of prison terms and paroles or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program. (Washington 1986; cited by Cheatwood 1988: 49)

In addition, a growing number of states have introduced LWOP statutes for other offences, such as those committed by drug 'kingpins' and persons trafficking in large amounts of narcotics.¹¹ The federal government also provides for LWOP in its drug enforcement laws.¹² Van Zyl Smit (2001: 299) suggests that since the US Supreme Court decision in *Harmelin v. Michigan* (1991),¹³ which ruled that a mandatory sentence of LWOP on a first offender for possession of a large quantity of drugs was not constitutionally disproportionate, the Court seems to have 'washed its hands' of interfering with this sanction, and the subsequent growth of LWOP has been rapid.

Furthermore, recently enacted 'three strikes and you're out' sentencing laws targeting habitual offenders have resulted in a growing number of prisoners being sentenced to spend the whole of their lives in prison. Several states, including California, Louisiana, Washington and Virginia, impose LWOP upon a third conviction of certain specified felony offences. The actual terms of the states' 'three strikes' laws may vary considerably. Washington, for example (the first 'three strikes' state), established that a strike must involve offences of violence. In California, the strikes may be for relatively minor offences, but may result in a lengthy prison sentence of either 25 years' imprisonment or LWOP (see Shichor and Sechrest 1996; Austin *et al.* 1999; Jones and Newburn 2006).

US trends

Over the last three decades, the US incarceration rate has quadrupled. At the time of writing, almost one in every 200 US citizens is incarcerated in prison.¹⁴ However, the

⁷ Haw. Rev. Stat. § 706–656(1) (1980).

⁸ Iowa Code Ann. § 902.1 (West 1979).

⁹ Mass. Gen. Laws Ann. ch. 265, § 2 (West Supp. 1989).

¹⁰ Mich. Comp. Laws Ann. § 791.234(4) (West 1979).

¹¹ See, e.g. Ala. Code 1975, § 13A-12–231 (Supp. 1989).

¹² See, e.g. 21 USC § 848 (1982). Specifically, the statute calls for 'continuing criminal enterprise' in narcotics to be punished with a term of imprisonment up to life and that 'probation shall not be granted' and parole laws shall not be applied.

¹³ 501 U.S. 957.

¹⁴ See Bureau of Justice Statistics (www.ojp.usdoj.gov/bjs).

LWOP population in the United States has increased at an even greater rate than the overall prison population (see Figure 1). The ratio of the LWOP population to the US prison population has increased to such an extent that it is currently a hundred times greater than it was 30 years ago. Analysis of the data suggests that one in every 35 people in prison in the United States in 2006 had been sentenced to LWOP. In absolute terms, the recent growth of the total US life-sentence prison population is mainly due to an increase in the LWOP population (see Figure 2).¹⁵ LWOP accounts for more than 60 per cent of the increase in life-sentence prisoners since 2000.

It appears that the availability of a stringent life sentence which ‘says what it means’ has either partially or completely eliminated the pressure to apply the death penalty in certain US states. In Maryland, for example, the state added LWOP as an alternative sentencing option for jurors in capital cases in 1987 and, over the following five years, only eight new defendants were added to the state’s death-row population (Dieter 1997).¹⁶ Some opponents of the death penalty have welcomed this development. According to a report in *The New York Times*, James Liebman, Professor of Law at Columbia University, recently stated: ‘Life without parole has been absolutely crucial to whatever progress has been made against the death penalty. The drop in death sentences [from 320 in 1996 to 125 in 2004] would not have happened without LWOP’ (Liptak 2005b).

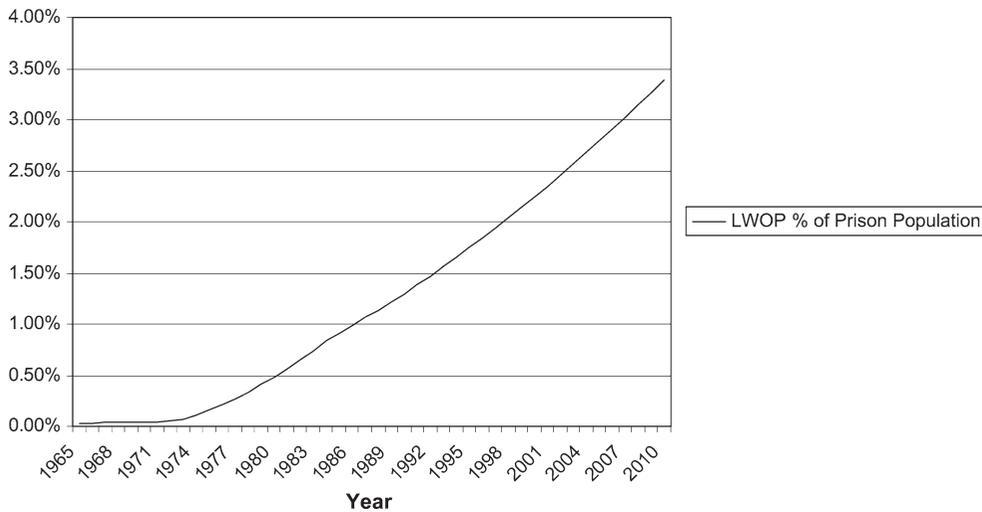


Fig. 1 LWOP growth in relation to the US prison population (actual and estimated US data). Sources: Bureau of Justice; Mauer *et al.* (2004). Estimated data and future predictions have been derived from actual growth rates.

¹⁵ Though life imprisonment has continued to grow steadily in the United States, the difference between the life-sentence prison population and the LWOP population has only increased by approximately 1 per cent each year since 2000.

¹⁶ See also *The Daily Oklahoman*, ‘Death Verdicts Slips as No-Parole Grows’, 10 November 1992.

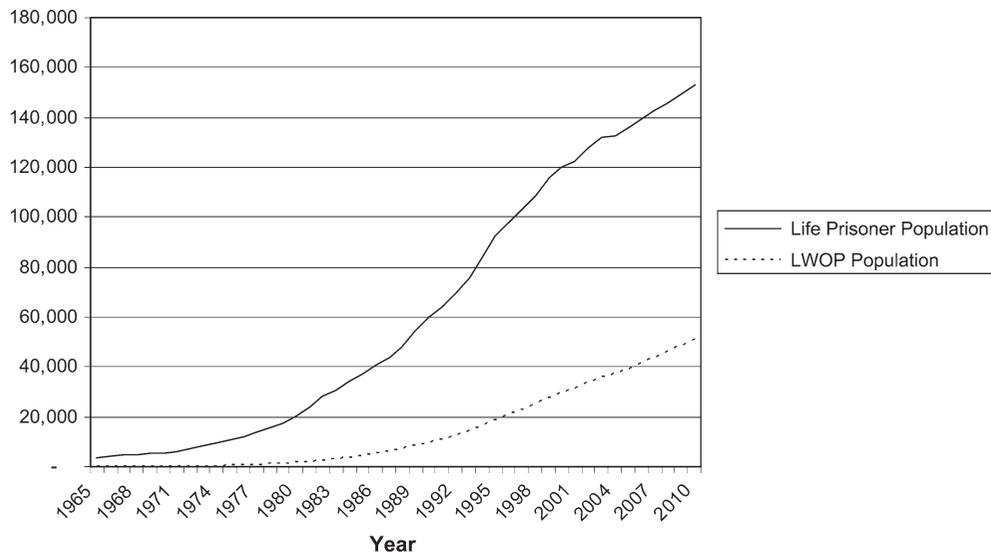


FIG. 2 Life prisoner vs LWOP growth (actual and estimated US data).

Beyond the United States

In stark contrast to the United States, five European countries—Croatia, Norway, Portugal, Slovenia and Spain—make no legislative provision for life imprisonment at all.¹⁷ Recent data from the Council of Europe suggest that most of its Member States prescribe some form of life imprisonment as the alternative to the death penalty, but few anticipate that those sentenced will remain in prison for the rest of their lives. Sweden and Bulgaria utilize LWOP, although, in both countries, it is possible to petition to the government for a pardon. While LWOP is an option in Ukraine, prisoners are also able to petition for presidential clemency after 15 years. And, in Georgia, the intention was apparently to provide for LWOP at the time of abolition of the death penalty in order to appease the public but to reduce this to a reviewable life sentence, ‘once the heat had gone out of the debate’ (Hodgkinson 2004: 160).

In preparation of the seventh (2005) UN quinquennial report on capital punishment, countries were asked for the first time for details about the maximum punishment that had been substituted for the crimes that had previously been sanctioned by the death penalty. The replies varied greatly; however, none of the responding countries had substituted LWOP as a mandatory penalty to replace capital punishment. In seven countries, the mandatory penalty for murder was life imprisonment. In all of these countries, there were mechanisms for releasing prisoners, but the period to be served in prison varied significantly. For example, in Finland, presidential clemency is required for release and is usually obtained after an average of 13 years; in Romania, the prisoner must serve 20 years (15 years if a male is older than 60 or a female over the age of 55);

¹⁷ Prisoners in these countries, however, may spend as long or longer incarcerated in prison as those sentenced to life imprisonment elsewhere (Newcomen 2005).

and, in Canada, offenders convicted of first-degree murder must serve 25 years in prison before becoming eligible to apply for parole, although a provision in the Code permits many of these inmates to apply for a jury review of this parole eligibility date after having served 15 years.

Seventeen countries had replaced the death penalty with a discretionary maximum sentence of life imprisonment. All of these countries had a policy whereby the prisoner could obtain release after a period of time, which varied from 12 years in Denmark and 15 years in Austria, Liechtenstein, Monaco and Switzerland to 26 years in Italy. Nine countries had replaced the death penalty by a determinate period of imprisonment and in three of them—Costa Rica, Ireland and Mozambique—the period to be served in prison¹⁸ was mandatory.¹⁹

The United Kingdom recently joined those countries that impose LWOP. In July 1990, the Home Secretary David Waddington (an elected politician) decided to impose a ‘whole-life tariff’ (or LWOP) on Myra Hindley—one of the so-called ‘Moors murderers’²⁰—and his decision was confirmed by successive Home Secretaries. In the case of *Hindley*,²¹ the House of Lords (the court of final instance in England and Wales) held unanimously that there was no reason in principle why a crime, if sufficiently heinous, should not be regarded as deserving of life-long incarceration for the purposes of pure punishment. From this basis of ‘principle’, the Court ruled that a whole-life tariff would not be illegal (see van Zyl Smit 2002).

Further to this, in the wake of *Anderson*²²—the House of Lords ruling that it was incompatible with Article 6 of the Human Rights Act 1998 for the Home Secretary to set the minimum term in murder cases—new legislation was proposed by David Blunkett, the then Home Secretary, who ‘reacted angrily to this decision, inevitable though it was, and vowed to neutralize its effect through legislation’ (Ashworth 2005: 116). Thus, s. 269 of the Criminal Justice Act 2003 requires judges, when setting the minimum term to be served by a convicted murderer, to have regard to the principles set out in Schedule 21 to the Act, which provides three starting points, including (for the first time in legislation) whole-life imprisonment as the maximum penalty. When sentencing someone to life imprisonment, a court must now consider:

- (i) a whole-life minimum term for exceptionally serious cases, such as premeditated killings of two or more people, sexual or sadistic child murders, or political murders;
- (ii) 30 years for particularly serious cases, such as murders of police or prison officers, murders involving firearms, sexual or sadistic killings, or murders aggravated by racial or sexual orientation;
- (iii) 15 years for other murders not falling within either of the higher categories. (Ashworth 2005: 117)

However, in *Sullivan*,²³ the Lord Chief Justice emphasized that so long as the judge bore in mind the principles set out in Schedule 21, ‘he is not bound to follow them’, although

¹⁸ This ranged from 12 to 35 years in Costa Rica, depending on the seriousness of the homicide; not less than 40 years in Ireland and 28 years in Mozambique.

¹⁹ Personal communication with Roger Hood, 27 October 2005 (see also United Nations 2005).

²⁰ For an account of the ‘Moors murderers’, see Harrison (1987).

²¹ *R v. Secretary of State for the Home Department, ex Parte Hindley* [2000] All E.R. 385 (HL).

²² *R v. Secretary of State for the Home Department, ex Parte Anderson* [2002] 4 All E.R. 1089.

²³ (2005) 1 Cr.App.R. (S) 308.

reasons for departing from them should be provided (Ashworth 2005: 117). In practice, there are only a small number of ‘whole-life’ prisoners in England and Wales. The Deputy Chief Inspector of Prisons recently revealed that there are 22 prisoners in the United Kingdom serving sentences which amount to LWOP, most of whom have been convicted of multiple murders (Newcomen 2005). Nonetheless, the recent case of Antony Rice—a life-sentence offender who committed a violent murder following release—has prompted criticism of the arrangement of releasing life-sentence prisoners (HMIP 2006) and has led to fewer lifers’ being granted early release (see Parole Board 2006).²⁴

The Rationale for LWOP

Public protection, retribution and deterrence have been commonly identified among abolitionists of the death penalty as the foremost benefits of LWOP. This section critically evaluates the main arguments put forward for sentencing offenders to whole-life imprisonment.

Protecting the public

Without doubt, the principal argument for LWOP is the protection that it offers to society from dangerous offenders. Its main appeal is that it guarantees that offenders will be permanently incapacitated, but—unlike the death penalty—eliminates the risk of wrongful executions. Many proponents of LWOP point towards failing parole systems, resulting from an inability of parole boards to make infallible predictions about future offending behaviour. Blair (1994: 198), for example, argued that:

Parole ineligibility for certain offenders operates to protect against [parole] inefficiency by recognizing that some offenders are so dangerous that we cannot leave the question of their release to the vagaries of the parole system.

Across the United States, a general attitude of frustration towards a ‘revolving door’ parole system prompted certain states to legislate for LWOP. In Alabama, for example, LWOP originated as an option in capital cases in the early 1970s due to a ‘general public dissatisfaction with murderers serving “life” terms and leaving prison early on parole’ (Wright 1990: 54). Empirical evidence from the United States also suggests that the possibility of parole from a life sentence has operated as a ‘silent aggravating circumstance’ in many capital cases and often may have been the decisive factor underlying a jury’s decision to sentence a defendant to death (Lane 1993). Furthermore, a 1992 survey of nearly 800 jurors revealed that only 41 per cent supported the death penalty if LWOP was offered as an alternative (Dieter 1997). LWOP, it is argued, readily accomplishes its goal of preventing further crime by the prisoner and consequently restores public faith in the efficacy of the system. Indeed, except in the very unusual instance of an executive commutation (or of an escape), a criminal justice system can guarantee that LWOP will protect society for the rest of that murderer’s life—a much surer sanction, in fact, than

²⁴ The punishment of LWOP also exists in Western Australia. Under the provisions of the Criminal Law Amendment Act No. 70 of 1988, a court that imposes a sentence of ‘strict security life imprisonment’ can order that the person is ‘never to be released’ (see Potas 1989).

sentencing a person to death, given the high rate of successful appeals (see Liebman *et al.* 2000; 2002).

However, other commentators in the United States (see Cunningham and Reidy 1998; Marquart and Sorensen 1997) point towards the difficulties in predicting future ‘dangerousness’ on the basis of a past murder. In their follow-up study of the *Furman*-commuted inmates, Marquart and Sorensen (1997: 174) revealed that the offenders ‘did not represent a significant threat to society ... We cannot conclude from these data that their execution would have protected or benefited society’. In the United Kingdom, Hood and Shute (2000) have provided a detailed examination of the decision-making processes of the parole board. They found that there has been a ‘dramatic decline in the use of parole’ (p. 81) and that parole board members tended to ‘overestimate the degree of risk posed by many prisoners’ (p. xvii). Indeed, contrary to the arguments of LWOP advocates, there is a growing body of evidence that suggests the reviewable life sentence is a very effective penal measure, with lower reconviction rates for lifers released under supervision in the community than any other sanction (Home Office 1997*a*; 1997*b*).

The debate about the need to incapacitate some prisoners until they die also needs to consider the implications of an ageing prison population. As a result of an increase in LWOP sentences, the United States now houses a large number of elderly and infirm prisoners. Indeed, a few states have so many elderly prisoners that they have created special facilities to cater for medical and geriatric care.²⁵ Supporters of LWOP tend to overlook this issue with a passing reference to the possibility of executive clemency (see Blair 1994) or suggest the need to start thinking in terms of ‘maximum security convalescent homes’ (Cheatwood 1988: 55). However, prisons that are essentially geriatric wards for aged convicts who pose a minimal risk to the public can serve no public safety objective and are very costly for criminal justice systems (see Mauer *et al.* 2004).

Other commentators have pointed towards distinct difficulties in controlling LWOP prisoners during the early stage of their sentence. It has been suggested that imposing LWOP sentences on violent offenders could result in a new class of ‘superinmates’ (Blair 1994: 213), uncontrollable in prison because they have nothing else to lose. Prison officials are inevitably concerned about how to provide a regime that is both constructive and safe for both prisoners and staff. Others disagree, suggesting that LWOP inmates pose fewer disciplinary problems because they become the most institutionalized (Wright 1991). However, as Coyle (2004) argues, the LWOP sentence is difficult to reconcile with the system in England and Wales for dealing with most life-sentence prisoners, which involves gradual progression to less secure conditions in preparation for eventual release (see also Padfield 2002). In the case of LWOP prisoners, the ‘carrot’ of parole cannot be used as an incentive to ensure the compliance and cooperation of those who have neither hope of release nor anything to lose.²⁶

²⁵ Alabama’s Hamilton Correctional Facility, for example, provides 24-hour nursing care and Louisiana’s State prison in Angola has its own funeral industry (Coyle 2004). See also Crawley and Sparks (2005) on the issues raised by the growing number of elderly and infirm prisoners in the United Kingdom.

²⁶ There is also some evidence to suggest that since ‘three strikes’ laws came into effect in the United States, potential third-striker suspects have become more violent in resisting arrest, knowing that if convicted, they will be sentenced to LWOP and therefore have nothing to lose (see, e.g. American Civil Liberties Union ‘10 Reasons to Oppose “3 Strikes, You’re Out”’, 17 March 2002, www.aclu.org).

Retributive punishment

For those in favour of LWOP, another key benefit is its retributive power. It is argued that murderers deserve to be so punished because of the heinous nature of their crimes.²⁷ If the death penalty is to be abolished, a replacement sanction of sufficient gravity needs to be provided by law. Proponents in the United States have emphasized that ‘life without parole is certainly not a lenient sentence’ (Blair 1994: 198). Sometimes referred to as ‘death by incarceration’,²⁸ such sentences are undeniably tough, pleasing both politicians and prosecutors, but also satisfying some opponents of the death penalty. Julian Wright—a lawyer in North Carolina, who has carried out empirical research on LWOP—recently stated in *The New York Times* that:

[LWOP] has the advantage of achieving a harsh penalty and keeping violent offenders off the streets. And you don’t take a human life in the process. Indeed, if you mess up and do it wrong, you haven’t taken someone’s life. (Liptak 2005a)

For some abolitionists, LWOP offers a persuasively harsh alternative to a broadly pro-death penalty public, while, at the same time, neutralizing claims that abolitionists are ‘soft on crime’ (see Haines 1996). A key research finding is that support for the death penalty drops dramatically if its proponents are offered LWOP as an alternative. This was first publicized in May 1990 in *The New York Times* by William Bowers—a leading researcher on the death penalty (see Bowers 1993). He reported that in California, for example, where 82 per cent of the public favoured the death penalty, only 26 per cent continued to support it if offered the alternative of LWOP plus a requirement of restitution to the murder victims’ families (see also Lane 1993; Wardle and Gans-Boriskin 2004).²⁹ Many US abolitionists have subsequently adopted a conscious strategy of supporting LWOP and other harsh measures in order to gain credibility and undermine support for the death penalty.³⁰ As Haines (1996: 136) suggests:

The negative stereotype of death penalty opponents as rehabilitation-minded liberals who are excessively sympathetic to criminals undoubtedly prevents their case from receiving a full and fair hearing. Many of them find they are taken far more seriously when their condemnation of execution is accompanied by an insistence that killers pay a high price for their misdeeds.

There are other abolitionists, however, who have been more cautious about LWOP. Hugo Bedau (1997), for example, points out that for many who oppose the death penalty, the alternative of LWOP is also unreasonably severe (see also Sheleff 1987). For Bedau, the dilemma for opponents of the death penalty in the United States is that the public is prepared to accept the abolition of the death penalty ‘only if the alternative to it is itself a morally unacceptable deprivation of liberty’ (Bedau 1997: 87). LWOP, as a meaningful retributive punishment, has been resisted on the grounds that it is virtually

²⁷ For critical discussion on the retributive sentencing philosophy, see Ashworth (2000).

²⁸ See Blair (1994 at fn. 69), quoting former New York Governor Mario Cuomo.

²⁹ A more recent Gallup Poll (May 2006) examining public opinion across the United States found that when offered a choice between LWOP and the death penalty, only 47 per cent of respondents favoured the death penalty—‘the lowest percentage in two decades’ (www.deathpenaltyinfo.org, November 2006).

³⁰ See Robert Johnson, ‘An Open Letter to the Governors of States with the Death Penalty’ (1990), who argued, when making the case in favour of LWOP as an alternative to the death penalty, that LWOP sentences were ‘in fact a “civil” death penalty’ (quoted in Haines 1996: 137).

as severe a punishment as the death penalty itself: to lock up a prisoner and take away all hope of release is to resort to another form of death sentence (Haines 1996).

A further challenge to the retributive appeal of LWOP is whether such a sentence satisfies the principles of proportionality.³¹ Although there seems to have been a relative rejection of proportionality testing in American life-imprisonment cases since *Harmelin*,³² it has not been ignored by other jurisdictions. In the case of *S. v. Dodo*,³³ for example, Judge Ackerman stated in the South African Constitutional Court:

To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. (Cited by van Zyl Smit 2005: 23)

Proportionality concerns have also shaped the evolution of life sentences in the United Kingdom. The system in England and Wales attempts to adjust the sentence of life imprisonment according to the seriousness of the offence. In its current form, it is a two-stage process in which the court that imposes a life sentence must also set what is now known as a minimum term (formally, the tariff period) for the purposes of retribution and deterrence. This portion of the sentence is intended to reflect the relative gravity and seriousness of the particular offence.³⁴ However, once that period has been served, the release of the offender must be considered by a judicial body that meets the requirements of due process similar to those of a full trial but considers only the danger that the offender may still present to the public. A murderer who is thought still to present a danger to the public may be detained for many years longer. Such requirements make explicit the relative roles of proportionality and dangerousness in the life sentence (see Cullen and Newell 1999; van Zyl Smit 2002). Furthermore, the German Constitutional Court has ruled that life imprisonment must include the possibility of release.³⁵ And in Eastern European countries, rather than implementing LWOP as the deserved punishment for heinous crimes, ‘a range of 15 to 25 years’ imprisonment seems to be considered sufficient and proportional for the most serious offences’ (Albrecht 2001: 304).

One of the key issues in the debate on LWOP as an alternative to the death penalty in the United States is the fact that LWOP has already been widely adopted in the form of ‘three strikes and you’re out’ sentencing laws for offences less serious than murder. If one believes in the principle of proportionality—that the most severe punishment ought

³¹ For detailed analysis of proportionate sentencing, see von Hirsch and Ashworth (2005).

³² As mentioned above, in 1991, the US Supreme Court was called upon to decide whether a LWOP sentence imposed on a first offender for possession of a large quantity of drugs was constitutional. Split by five votes to four, the Court decided that the sentence was not cruel and unusual in terms of the Eighth Amendment. The majority not only found that *Harmelin*’s sentence did not violate the Eighth Amendment, but also argued for reduced judicial scrutiny of the proportionality of prison sentences (van Zyl Smit 2005).

³³ *S. v. Dodo* 2001 (3) S.A. 382 (CC) at 404, para. 38.

³⁴ As discussed above, the Criminal Justice Act 2003 has brought into play new minimum terms in England and Wales which judges must refer to when sentencing someone to life imprisonment. The three starting points include, for the first time, whole-life imprisonment as the maximum penalty—‘a move which has attracted criticism not only from human rights groups but also from the judiciary and prison administrators’ (Browne and Kandelina 2005: 1).

³⁵ BverfGE 45 187.

to be reserved for the most serious offences, and that first-degree murder is more serious than three burglaries, for example—‘then these “three strikes” laws make it impossible to act on that principle and still abolish the death penalty in favour of LWOP’ (Bedau 2004: 203).

Detering those who might kill

Deterrence is seen to be another major strength of LWOP. Some abolitionists have put forward the argument that while reviewable life sentences offer little in the way of deterring those who might kill, LWOP is undeniably harsh and its deterrent effect should not be underestimated. Based on rational choice theory,³⁶ general deterrence strategies focus on preventing individuals from engaging in crime or deviant behaviour by affecting their rational decision-making process.³⁷ For abolitionists who promote the deterrent value of LWOP, the severity of the sentence is crucial. According to Wright (1991: 346), LWOP prisoners ‘vehemently disapprove of their sentences’ and would prefer to be executed rather than kept alive behind bars for the rest of their lives. A survey carried out by Wright among death-row inmates found that LWOP was perceived by the majority of prisoners to be a harsher punishment than death. He therefore argued:

[I]f most death row inmates surveyed, who obviously were not deterred from committing murder by the threat of capital punishment, maintain that LWOP is a worse sanction than death, does it not stand to reason that the penalty that is perceived as being the harshest will have been the greatest deterrent effect, whatever that effect might be? (Wright 1991: 353)

For Wright, the LWOP sentence meets the criteria of most of the traditional objectives of punishment: ‘To critics that claim capital punishment is necessary to deter murderers, protect society and provide retribution, LWOP offers an alternative that accomplishes these tasks without the moral cost of taking more lives’ (Wright 1990: 558). However, any deterrent effect of LWOP tends to be dismissed by other advocates of the sentence on the basis that ‘there is little evidence that punishments imposed on convicted offenders have any impact on the behaviour of potential offenders’ (Blair 1994: 202). In general, intuition would suggest that the policy of deterrence is only likely to have any effect ‘if it is enforced with a sufficient degree of certainty on persons who, in the course of their conduct, calculate the probable penal consequences’ (Hood 2002: 212).

Human Rights and Human Dignity

Over recent years, a number of international developments have placed important limitations on the introduction and use of LWOP as an alternative to the death penalty. We now turn to consider these developments and argue against LWOP on the grounds that it pays little regard to human rights and human dignity.

³⁶ See Cornish and Clarke (1986).

³⁷ For discussion on deterrence theory, see von Hirsch and Ashworth (1998).

International standards and practice

LWOP is prohibited for offences committed by persons below the age of 18 under Article 37 of the UN Convention on the Rights of the Child. The fact that this Convention has been ratified by all but two countries of the world indicates a near-universal consensus that LWOP should not be imposed on child offenders. Although far from worldwide, there is a growing trend that the same should apply to adults. Article 110(3) of the Rome Statute of the International Criminal Court provides that a sentence of life imprisonment—the maximum sentence available to the Court under Article 77 of the Statute—must be reviewed after 25 years. Thus, under the Rome Statute, which has now been ratified by 100 states, LWOP is not available as a punishment for the gravest crimes: war crimes, crimes against humanity and genocide.

In addition, LWOP is legally proscribed in certain parts of the world. For example, in Mexico, life imprisonment means any long or indeterminate sentence ranging from 20 years up to a maximum of 40 years. In October 2001, the Mexican Supreme Court ruled that a LWOP sentence was unconstitutional because it was cruel and unusual punishment (see Labardini 2004; Hodgkinson 2004; 2005).³⁸ Life imprisonment as such is also prohibited under a number of national constitutions.³⁹ In considering whether to support a policy of LWOP, a country has to consider whether its existence will hinder the prospects of obtaining the extradition of persons who are alleged to have committed serious crimes in the host country but have subsequently fled abroad. Thus, in accordance with its own prohibition of LWOP, Mexico will not extradite people to the United States should they face whole-life imprisonment.⁴⁰

In Europe, ongoing discussions with the US Attorney General's office suggest that the European Union is currently debating whether it should extend its policy of not extraditing anyone facing the death penalty without a guarantee that it will not be imposed to include a similar guarantee as regards the imposition of LWOP (Hodgkinson 2004). The issue was raised in 2001 by the European Court of Human Rights in the case of *Einhorn v. France*, when the Court stated that it 'does not rule out the possibility that the imposition of an irreducible life sentence may raise an issue under Article 3 of the [European] Convention [on Human Rights]'⁴¹ and continued 'it is likewise not to be excluded that the extradition of an individual to a State in which he runs the risk of being sentenced to life imprisonment without any possibility of early release may raise an issue under Article 3 of the Convention'.⁴² However, the European Court of Human Rights has not yet ruled that LWOP would constitute inhuman or degrading punishment under Article 3 of the European Convention on Human Rights.⁴³

³⁸ Suprema Corte de Justicia de la Nación, Contradicción de Tesis 11/2001-Pl, de entre las sustentadas por el Primer y Cuarto Tribunales Colegiados en Materia Penal del Primer Circuito, Mexico City, October 2, 2001.

³⁹ A survey conducted by Amnesty International in 2004 revealed prohibitions of life imprisonment in the constitutions of Brazil (Article 5(XLVII)), Colombia (Article 34), El Salvador (Article 27), Nicaragua (Article 37), Portugal (Article 30(1)) and Venezuela (Article 44(3)).

⁴⁰ Life imprisonment itself may also be an impediment to extradition. Uruguay, for example, only agreed to extradite an Egyptian man suspected of links to Al Qaeda and involvement in the 1997 massacre of 58 foreign tourists after receiving guarantees from Egypt that he would not receive the death penalty or a life sentence if found guilty of any charges (reported in *Gulf News*, 12 July 2003).

⁴¹ Article 3 of the European Convention on Human Rights states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

⁴² Appl. No. 71555/01, decision of 16 October 2001 (cited by Hodgkinson 2004: 186).

⁴³ The Court held in *Weeks v. United Kingdom* ((1982) 4 E.H.R.R. 252), however, that discretionary life sentences must include a mechanism to examine release from prison and that the release process must meet the requirements of Article 5(4) (see also *Thynne, Wilson and Gunnell v. United Kingdom* (1990) 13 E.H.R.R. 666).

As long ago as 1977, the Council of Europe's Committee on Crime Problems was of the opinion that 'it is inhuman to imprison a person for life without any hope of release' and that a crime-prevention policy which keeps prisoners detained for life even when they represent no danger to society 'would be compatible neither with modern principles on the treatment of prisoners ... nor with the idea of the reintegration of offenders into society' (Council of Europe 1977: 22). At its 49th plenary session in June 2000, the Committee on Crime Problems established a Committee of Experts to re-examine the management of long-term prisoners and set out common principles for the enforcement of life and long-term custodial sentences in Council of Europe Member States (Newcomen 2005). In April 2003, the Committee of Experts produced a document for Member States, building on previous recommendations published by the Council of Europe, the European Union and the United Nations.⁴⁴ According to Hodgkinson (2004: 186), the report recommends certain principles that reflect an appropriate balance between the needs of society and its responsibilities to prisoners and prison staff within a framework of 'positive, proportionate, humane and effective measures for management in prison and upon release'.⁴⁵ There is a single concession to the possibility of LWOP. Referring to this, Hodgkinson (2004: 186) states:

One hopes that the phrase 'Special management care and attention should be given to the particular problems posed by prisoners who are likely to spend their natural life in prison' does not concede either the inevitability or acceptability of the whole of life sentence but simply relates to the remote possibility that because of the high-profile risk someone poses they may need to be detained for the whole of their life.

Human dignity and a life without hope

Article 10(1) of the International Covenant on Civil and Political Rights (ICCPR) states that 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. Article 10(3) states that 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. One of the main arguments against LWOP is a concern for the inherent human dignity of the offender. Van Zyl Smit argues that there are two aspects of life imprisonment—its indeterminacy and the differences in the regimes to which life-sentence prisoners are subject—that make it 'particularly destructive to human dignity' (van Zyl Smit 2001: 301).

⁴⁴ An earlier UN study on life imprisonment recommended, among other things, that states should consider providing life-sentence prisoners with educational training programmes, aimed at helping them 'to preserve or revive their personal abilities', as well as 'opportunities for work with remuneration, study, and religious, cultural and sports and other leisure activities' (United Nations Crime Prevention and Criminal Justice Branch 1994: 17).

⁴⁵ These principles were:

- *Individualization*—'Consideration should be given to the diversity of personal characteristics to be found among life sentence and long term prisoners and account taken of them to make individual plans for the implementation of the sentence'.
- *Normalization*—'Prison life should be arranged so as to approximate as closely as possible to the realities of life in the community'.
- *Responsibility*—'Prisoners should be given opportunities to exercise personal responsibility in daily prison life'.
- *Security and safety*—'A clear distinction should be made between any risks posed by life sentence and other long-term prisoners to the external community, to themselves, to other prisoners or to those working in or visiting the prison'.
- *Non-segregation*—'Consideration should be given to not segregating life sentence and other long-term prisoners on the sole ground of their sentence'.
- *Progression*—'Individual planning for the management of the prisoner's life or long-term sentence should aim at securing progressive movement through the prison system' (Council of Europe, 2003, <https://wcd.coe.int>; see also Newcomen 2005).

In a landmark decision in 1977, the German Federal Constitutional Court recognized that a whole-life sentence invariably entails the loss of personal dignity and the related denial of the right to rehabilitation.⁴⁶ As the Court expressed it:

The threat of life imprisonment is complemented, as is constitutionally required, by meaningful treatment of the prisoner. The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes that go with it. The task that is involved here is based on the constitution and can be deduced from the guarantee of the inviolability of human dignity contained in article 1(1) of the *Grundgesetz* [Basic Law]. (Cited by van Zyl Smit 2005: 19)

Put simply, the German Court accepted that the principle of human dignity is compromised if the prisoner must abandon all hope of ever being released.⁴⁷ In German law, there could be no life imprisonment without the prospect of release.

Constitutional courts in other countries such as France,⁴⁸ Italy⁴⁹ and Namibia⁵⁰ have also recognized that those subject to life sentences have ‘a fundamental right to be considered for release’ (van Zyl Smit 2002: 213). Arguing that life imprisonment was cruel, inhuman and degrading punishment and therefore contrary to the Namibian Constitution, Judge Levy explained:

[Life imprisonment] removes from a prisoner all hope of his or her release. When a term of years is imposed, the prisoner looks forward to the expiry of that term when he shall walk out of gaol a free person, one who has repaid his debt to society. Life imprisonment robs the prisoner of this hope. Take away his hope and you take away his dignity and all desire he may have to continue living. Article 8 of the [Namibian] Constitution entrenches the right of all people to dignity. This includes prisoners. The concept of life imprisonment destroys human dignity reducing a prisoner to a number behind the walls of a jail waiting only for death to set him free. (Cited by van Zyl Smit 2005: 28)

Most legal systems have responded to this concern by setting a fixed period for the purposes of retribution and deterrence, after which the prisoner must be considered for release, although the terms of imprisonment vary across different jurisdictions. Edward Fitzgerald, Q.C. (a leading UK human rights lawyer) recently highlighted a growing trend in Europe of the need to recognize the capacity for redemption and rehabilitation, and that ‘any sentence that effectively closed the door forever would be contrary to Article 3 of the European Convention on Human Rights prohibiting cruel and inhuman treatment or punishment’ (Fitzgerald 2005: 53).

By contrast, such discussion has been markedly absent in the United States since the mid-1970s, when the argument based directly on human dignity failed to persuade a majority of the Supreme Court to abolish the death penalty (van Zyl Smit 2002). Abolitionists who support LWOP laws tend to dismiss the possibility of rehabilitation as ‘unrealistic’ (Blair 1994: 202). While many studies point towards the potential psychological and physical harm that long-term incarceration can cause (see Cohen and Taylor

⁴⁶ BVerfGE 45 187.

⁴⁷ For a detailed discussion of this decision, see van Zyl Smit (1992).

⁴⁸ Decision no. 93–334 DC 20 January 1994 of the Conseil Constitutionnel.

⁴⁹ Corte cost. sentenza, 27 September 1987, nr 274 *Foro Italia*. 1, 2333.

⁵⁰ S. v. *Tcoib* 1996 (1) S.A.C.R. 390 (NmS).

1972; Christie 1981; Bottoms and Light 1987; Flanagan 1995),⁵¹ research on the effects of indeterminable imprisonment has not been sufficiently conclusive to persuade the judiciary or the public in the United States that such sentences are incompatible with the norms of human dignity. Rather, the debate has focused on ‘get tough’ policies as the primary focus of crime control, and thus, in many states, parole eligibility for a life-sentenced prisoner has since become a rare commodity. It has been argued elsewhere, however, that laws that extinguish all hope of release abandon the principles of rehabilitation and ignore the essence of humanity. As Rod Morgan⁵² recently stated:

In my view the essential core of humanity is that everyone is redeemable. LWOP removes any prospect of reward for change and is therefore fundamentally inhumane. If society is going to announce baldly that we don’t care what you do, we don’t care what programmes you engage in, you’re never going to be released, it’s the equivalent of providing a death sentence. In my eyes, LWOP is therefore cruel and unusual punishment.⁵³

Economics

While the fiscal cost of providing punishment should not be the main factor determining penal policy, it is an important issue to consider. Housing people for life is not cheap. Assuming that a typical life-sentence offender is sentenced at the age of 30 and lives until 70, conservative estimates in the United States suggest that the total cost for such a prisoner would be at least one million dollars (Mauer *et al.* 2004).

In the United States, however, death-penalty cases cost even more than life imprisonment. In a review of the costs of life and death sentences in Tennessee, Morgan (2004: i) revealed that ‘[O]verall, first degree murder in which the prosecution has filed a notice to seek the death penalty cost more than life without parole and life with the possibility of parole cases’. This is mainly due to the number of agencies and people involved in a death-penalty case, the time spent in preparation by the prosecution and defence, and the lengthy appeal system. Furthermore, in Kansas, it was estimated that ‘cases in which the death penalty was sought and imposed could cost about 70 per cent more than cases in which the death penalty wasn’t sought’ (Hinton 2003: ii).

Though abolitionists commonly refer to the cost benefits of LWOP as an alternative to the death penalty, prisoners who are released will obviously cost less than those who are never released. Moreover, as mentioned above, LWOP sentences create a geriatric prison population with far greater costs for health care and other social services (see Mauer *et al.* 2004; Coyle 2004). The United States now houses the world’s largest prison population, accounting for 25 per cent of the world’s prison population (686 per 100,000 of the national population), whilst only representing 4 per cent of the world’s population. The financial burden of this vast imprisonment industry has caused some states to investigate alternative strategies.⁵⁴ However, any policy responses are

⁵¹ For first-hand accounts of long-term imprisonment, see Boyle (1984), Hassine (1999), James (2003) and Villaume (2005).

⁵² Rod Morgan is Emeritus Professor of Criminal Justice, University of Bristol, United Kingdom, and former Chair of the Youth Justice Board of England and Wales.

⁵³ Personal communication, 4 October 2005.

⁵⁴ For example, faced with the need to build new prisons after introducing ‘tough on crime’ measures in 1994, the Commonwealth of Virginia has recently introduced a statistical risk assessment tool which predicts the likelihood of reoffending as an aid for judges to reduce incarceration rates (see Bazelon 2005).

constrained by laws such as LWOP that clearly prevent the release of certain types of offenders.

Conclusion

In reviewing the main arguments put forward by supporters of LWOP as an alternative to the death penalty, we can see that there are a number of reasons for its grass-roots popularity. Its appeal is based on the idea that LWOP provides certitude of punishment, incapacitates violent murderers, and eliminates the risk of wrongful executions—allowing for mistakes to be corrected at a cost of years lost rather than lives. Further, LWOP has been embraced by advocates across the political spectrum by offering a persuasively harsh alternative and reducing public support for the death penalty.

As this article has documented, the use of LWOP has increased dramatically in the United States in recent decades, resulting in one of every 35 persons in prison now serving prison sentences for the remainder of their natural lives. In the United Kingdom, the government also seems inclined towards a greater use of life imprisonment and has recently introduced LWOP as the ultimate sanction. Yet, little is known about the real impact of the increased adoption of life imprisonment on offenders, correctional services or societies as a whole. Much more research is needed to probe the full import and efficacy of such sentences, from both a humanitarian and a fiscal perspective. The discussion in this paper raises serious questions about the justifications and fairness of the imposition of whole-life imprisonment and contests the belief that LWOP sentences are effective or necessary in advancing public safety.

We would argue that LWOP faces many, if not all, of the objections of the death sentence, and therefore is equally untenable in civilized society. To lock up a prisoner and remove all his or her hope of release compromises principles of human rights and human dignity, ignores the capacity for redemption and rehabilitation, and denies individuals of any right to be considered for release. Furthermore, opponents of capital punishment should not champion LWOP as a necessary step towards the abolition of the death penalty without undertaking a thoughtful analysis of life imprisonment itself.

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