



# Is life without parole ‘the new death penalty’? Reformulating the identity critique

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## Introduction

The global demise of the death penalty<sup>1</sup> has led to the emergence of new issues, among the most notable of which is the rising prominence of life without parole (LWOP).<sup>2</sup> For many anti-capital punishment campaigners, life imprisonment<sup>3</sup> has often seemed the most natural alternative to executions, one that could reassure the general public and ease the burden for activists and reformers.<sup>4</sup> However, the approach that many scholars have adopted with regard to this great turn from capital punishment to LWOP has been a critical one: LWOP, it has been said, is nothing less than a death penalty in disguise—as problematic, inhumane, and at odds with human rights as capital punishment is. It is seen as a different label to describe the same concept: state-imposed death, be it by execution or incarceration.<sup>5</sup> This paper will

refer to this approach as the *identity critique*—meaning the identity relationship between capital punishment and LWOP that these critical voices aim to unveil.

That these concerns about LWOP deserve our full attention is beyond doubt; it is a matter of some gravity, speaking, as it does, to principles of human rights and dignity. However, it is the equation ‘LWOP=death penalty’ which can be sometimes problematic, presenting a number of crucial aspects that often surface in the most relevant literature. First, by stressing so strongly the importance of *death in prison*, these analyses run the risk of overlooking what comes before it: *life* in prison. While these approaches focus their gaze on this punishment’s final stage (even conceptualising death as immanent to the whole condition of lifers),<sup>6</sup> some of LWOP’s most notable and harshest

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features already appear in the here and now. On the other hand, empirical research has shown positive evolutions in lifers' behaviour and attitudes thanks to the (albeit limited) access to rehabilitation<sup>7</sup>—resocialization remaining however precluded for these convicts. All these elements might be overlooked if the identity critique were to be applied too strictly.

Second, and from an aggregate perspective, by equating LWOP to the death penalty these arguments risk leaving the anti-death penalty movement in an impasse: if the more pragmatic step-by-step approach—one that includes *de facto* abolition as well as LWOP—has been so far the most successful way to achieve the vital goal of getting rid of capital punishment and protecting the right to life,<sup>8</sup> one is left to wonder what would happen to the abolitionist movement if reformers were not in the position to offer death penalty's usual substitute (LWOP) as a more humane alternative to state-imposed death. This is, in other words, what has been called the moral dilemma (or even ambivalence)<sup>9</sup> behind the abolitionist position. This dilemma, given the undeniable harshness of life imprisonment, is of course well posed, however, it ends up accusing the abolitionist movement of hypocrisy, claiming that it would be calling for the replacement of the death penalty with... another death penalty. Dow<sup>10</sup> has even argued that “death penalty opponents who have embraced life without parole have surrendered the moral basis of their position”.

Third, and from a jurisprudential standpoint, so far the identity critique has received little favour from the courts: if recently we have seen some positive, but timid openings to the idea that life imprisonment and capital punishment might share something in common (at least when it comes to juveniles: see *Miller v Alabama* and *Graham v*

*Florida*)<sup>11</sup> with its traditional, well-established *death is different* approach<sup>12</sup> the U.S. Supreme Court—while granting more procedural safeguards to defendants facing death<sup>13</sup>—has over time entrenched the difference between the death penalty and other punishments.<sup>14</sup> This has been done by stressing the centrality of the *structural differences* between the former and imprisonment: per the judgment in *Woodson v North Carolina*,<sup>15</sup> “death in its finality differs more from life imprisonment than a 100-year prison term differs from one of only a year or two”, while in *Glossip v Gross*<sup>16</sup> the Court specified that capital punishment differs from all others in *quality* rather than in *quantity*. All in all (and awaiting possible positive developments in the future), today the claim that ‘LWOP=death penalty’ remains a something of an uphill argument in the courts of law.

So, should we be tempted to discard the identity critique completely, to say that death should have no part when criticizing LWOP? Indeed, one could, in theory, pursue a different path, deciding to apply the rehabilitation model,<sup>17</sup> which is meant to lead<sup>18</sup> to the gradual abolition of LWOP in Europe. This choice, however, would probably underestimate both the significance of retention of the death penalty in America and the great prominence of related discourses. Indeed, American exceptionalism<sup>19</sup> is still very much alive, and not only with regard to capital punishment, but to LWOP as well.<sup>20</sup> No other country in the Global North has ever witnessed a similar, sharp increase in the use of life imprisonment—in U.S. abolitionist States, even way beyond the former boundaries of capital punishment<sup>21</sup>—and European-like approaches centred around rehabilitation are quite rarely mobilised in favour of milder penal sanctions.

Also, and even though the rehabilitation model remains, at least ideally, a valuable resource for

reformers, the topic considered here demonstrates how a peculiarity of American discussions around criminal justice is the presence and pervasiveness of arguments based on death even *outside* the perimeter of capital punishment, influencing discussions around both LWOP and incarceration more generally (as some examples provided below will show). And precisely these arguments, when put forward via the identity critique, appear particularly powerful and impactful, both in theory and in practice: in theory, as there *must* be some aspects that LWOP shares with capital punishment, aspects that have, in fact, guaranteed LWOP's success in stepping into the shoes of death penalty as the punishment at the top of the penal scale (as Miao (2020) puts it, "an alternative must be equivalent to, but not merely identical with, that which it seeks to replace"<sup>22</sup>); on a more concrete level, as the constant presence of death<sup>23</sup> is vividly represented in the statements of those who are subject to LWOP, as the empirical works in the matter have shown (see *infra*).

Keeping the above considerations in mind, this article will propose a re-thinking of the identity critique, providing a few guidelines for an analysis that, while still valuing LWOP's crucial link to death, could be mindful of the issues it raises. Arguing that this will necessarily entail a theoretical re-organization of the whole *life imprisonment problem* which can be only sketched here, in the following paragraphs this paper will advance three proposals that could be useful in guiding this analysis: first (Section 1), relying on a Foucauldian/post-structuralist framework, I will start from the premise that we should see life imprisonment as a complex—or *composite*—punishment, and that equal attention should be devoted to its constituting elements, the biopolitical and the necropolitical elements; I will then (Section 2) propose to dig deeper into the

former, focusing on the *exclusion* LWOP creates as a thick concept capable of conveying the various hardships and punitive aspects of lifers' condition; third (Section 3) the paper will turn to the necropolitical element of LWOP, i.e., the role of death and the relationship with capital punishment.

## 1. One punishment, two problems

It has already been observed in the literature that life imprisonment represents a multidimensional, multilayered punishment, having variable forms, serving different functions, and being underpinned by different rationales: in Lerner's words, "a conflicted punishment, inspired by a congeries of penological goals."<sup>24</sup> Even though jurisprudential and scholarly attempts to define this punishment have led, over time, to complex definitional puzzles,<sup>25</sup> the value one can see in these analytical efforts lies in the question they pose: if life imprisonment is a multilayered punishment, what are these layers? Answers to this question might vary considerably, and be as numerous as interpretations of punishment (in general) are. LWOP can be seen as: the measure (among the carceral ones) *par excellence* devoted to incapacitation; the supreme expression of the necessity of deterrence, bearing a symbolic meaning very close to that of capital punishment; a purely retributivist/vindictive punishment, in which the interests of victims is deemed central; or all these things together, or variably combined.<sup>26</sup>

My proposal here will be to, at least momentarily, look beyond this penological lens, drawing from the identity theory itself to see this punishment which, although not entailing execution, does involve death, as a more complex phenomenon than just its penological/normative pillars. When death enters the realm of discussions around the carceral state, in other words, these assume an entirely different

character, and discussions around punishment justification or definition might seem already too narrow. Hence, here I will consider life imprisonment, first and foremost, as one instance of state power over life and death. As mentioned, in order to do this, I will resort to the two categories of bio- and necropower.

*Biopower* or *biopolitics of power* is a concept which helps us see sovereignty as the power to foster life, or, in the words of Foucault,<sup>27</sup> the power “to make live or let die.” According to this post-structuralist notion, the sovereign—either the king, the State, or any other equivalent entity—intervenes in order to maximise, optimise and foster life, by improving, prolonging and extending it. This is done, on a concrete level, through investments in science, security and welfare, and in any other way that can assure those material and social conditions necessary for a *life fully lived*.<sup>28</sup> This power does not, however, affect the whole citizenry evenly. Instead, in the modern *disciplinary*<sup>29</sup> state, it is exercised through what has been called a “micro-physics of power”, i.e., dividing (even physically)<sup>30</sup> those who are allowed to enjoy these guarantees and protections, and those who are not. This line of demarcation is drawn, most notably, by means of the criminal justice system and its mechanisms of criminalization and stigmatization. In this schema, punishment is not merely the consequence of wrongdoing, but a way to polarize society between good and evil, to divide people and distribute rewards and pains accordingly.<sup>31</sup>

If this notion could be potentially all-encompassing when defining the influence of the state’s actions on its citizen, the binary framework of *make live or let die* it promotes has been considered unsatisfactory by many. Mbembe,<sup>32</sup> in particular, has objected to the indifferent attitude towards death that this theory presupposes, and has

described a more precise politics of power—*necropower* or *necropolitics of power*—whose aim is the creation of *death-worlds* and *living dead* not just as a by-product or an unintended consequence of biopower, but as the “primary aim of its counterpart, necropower.”<sup>33</sup> While usually applied to contexts that are distant from those of everyday reality of normally functioning societies—i.e. Nazi concentration/extermination camps;<sup>34</sup> the annihilation of indigenous populations during colonization;<sup>35</sup> the occupation of enemies’ territories, through sieges, territorial fragmentation and destruction of strategic facilities or vital resources;<sup>36</sup> etc.—a great number of scholars have found the necropolitical concept applicable to penal systems as well, and in particular to the dysfunctionalities of the carceral system and their deadly effects on inmates’ bodies.<sup>37</sup>

Even though one can agree that the two categories of bio- and necropower, in conception and application, seem to speak directly of the carceral state and its problems, applications that are too automatic, if not uncritical, are a risk. It would be a hasty assumption to simply construe the dualism between LWOP and the death penalty as one would intuitively do following the summary above: as the opposition between two different forms of the state’s penal power, the former being the primary expression of a biopolitical use of criminal justice through irredeemable exclusion from society, and the latter being the most significant manifestation of penal systems’ necropolitical capabilities. This approach, seen from the angle of a study on life imprisonment, would present a very significant issue: it would unproblematically opt for the biopolitical label and negate the presence of any wilful imposition of death, being therefore in irreconcilable conflict with the critique of LWOP’s *real nature* described above—a critique which, as

this paper will further explore below, appears to have more than one convincing argument.

If this is the core of the problem—if life imprisonment is not exclusively about life *or* death—one cannot but conclude it has to be about *both* life and death: LWOP is, in other words, a measure about both exclusion and elimination, dictating how lifers will live and how lifers will die.

It is precisely from this composite nature of life imprisonment, then, that I think a study on this punishment should start. Considering LWOP as both a bio- and a necropolitical tool could be a useful way to make sense of all its aspects and features, to really appreciate all the elements that constitute its punitive character. The Janus-faced nature of life imprisonment will therefore require an approach that could distribute its analytical efforts *evenly* between the two co-existing, but distinct issues of i) life in prison, before, and ii) certainty of death, at the end. Part of the scholarship has already argued that the biopolitical and necropolitical aims are not necessarily mutually exclusive but can work together to achieve common objectives (according to Braidotti, they are “two sides of the same coin”).<sup>38</sup> In the next sections this paper will try to demonstrate exactly that, arguing that life imprisonment can be understood as a punitive tool of this kind, being underpinned simultaneously by (and, for its own existence, necessitating) both a logic of *exclusion*—intending its biopolitical feature—and a logic of *elimination*—the necropolitical one in common with the death penalty.

## 2. The *life* in life imprisonment

For its chronological collocation, it is probably from *lifers' life* that one should start, i.e. from analysing the regime of exclusion experienced by lifers. The element of exclusion will be understood here as a

thick concept bringing together and simultaneously representing three conditions.

The first is one of material deprivation. In his *Society of Captives* (1958),<sup>39</sup> Sykes famously observed a number of typical prison deprivations, which created consequent and related pains: deprivation of liberty, framed as the confinement *to* and *within* the institution and the limits to freedom of movement that this involves; deprivation of goods and services, which, while maybe not affecting basic inmates' material needs, exclude them from enjoying the wider number of pleasures and experiences of the outside world; deprivation of autonomy, as the prisoner will always be dependent on their captors' choices, losing most part of their agency and independence; and deprivation of security, as inmates will always be vulnerable to unpredictable acts of aggression from dangerous inmates. This model had significant influence over time, having fuelled the discussion on prison retention/abolition—the two critical approaches which Crewe and Liebling<sup>40</sup> divide into “radical pessimist”<sup>41</sup> and “conservative pragmatist”<sup>42</sup>—and still representing a foil against which to evaluate prison conditions or other aspects of the penal system that are akin to prison—like police custody, court cells or escort vehicles<sup>43</sup>.

The enduring validity of Sykes' arguments must be, however, valued against their limitations,<sup>44</sup> the most notable being perhaps their inability, focused as they are on the world *inside* the prison walls, to shed light on the wider, social and political dimension of prisons' pains, i.e., on the ways in which they are socially situated (hence the definition of *painscape* elaborated by Skinnis and Woof).<sup>45</sup> This means that in order to fully appreciate the condition suffered by lifers, one has to consider a second dimension of their exclusion: the one from the body politic.

In *Arresting Citizenship* (2014), Lerman and Weaver<sup>46</sup> describe the processes of democratic disengagement that follow contacts and negative experiences with the criminal justice system, especially when they are repeated and/or involve incarceration. These interactions, they argue, become totalizing: the state is seen by the *custodial citizenry* (an umbrella notion they coined to group together criminal suspects, arrestees and incarcerated offenders) through the lenses of their negative experience(s) in the orbit of criminal justice. This results in either a formally imposed or a self-imposed exclusion—a state the authors refer to as *custodial citizenship*. Indeed, on the one hand, many countries provide formal felony disenfranchisement as an accessory penalty for those who have been sentenced to long prison terms (they offer the specific example of the Voting Rights Act 1965 in the U.S.). On the other, their study shows how “punishment and surveillance themselves activate a process of withdrawal, alienation, and fear of government”<sup>47</sup> as products of the shame and stigma consequent to a criminal charge, but also as expressions of a new way of living *under the radar*, as proximity to government is now associated with potential danger and pain. Also, they observe, contact with the criminal justice system ends up shaping one’s democratic attitudes potentially forever, as the sense of exclusion and isolation might very well persist even after the *official* sentence term has expired.

Finally, the two conditions of material and socio-political exclusion described above can be said to have in common one element, their *exclusivity*: they are not shared by anybody else in society, but the excluded. In other words, the power to exclude people from society relies on the previous existence of two sets of rights: the first one, available to the general population; the second, instead, exclusive

to those who have been excluded. The former is richer and more complete; the latter is a condition of diminished and compressed rights.

What I have described above is but one of the *dimensions* of life imprisonment, only one of the lenses through which it could be viewed: its exclusionary features. A dimension that appears to be shared, albeit to different extents, with regular imprisonment. The distinctive element of this exclusion in the matter at hand is, of course, that it is meant to be *for life*. And this leads us to a twofold observation: first, the exclusionary features described above must be adapted to the peculiar condition of lifers. This does not only entail looking empirically at the conditions suffered by lifers,<sup>48</sup> but understanding what normative arguments sustain them. In other words, certainty that the effects contingently suffered will last forever, that the hardships that are experienced today will replicate themselves endlessly, are undeniable aggravating conditions in the lifer’s punitive treatment which call for justification, both in general terms and with regard to specific crimes.

But the life-long duration of life imprisonment (and this is the second observation) also introduces us to a further, connected aspect, that transcends criminal justice: life imprisonment is certainly not the only case where life-long measures can be imposed against individuals. Here is, in other words, where this punishment intersects with another area of State powers, the one that allows public (not necessarily judicial) authorities to impose limitations that negatively affect citizens’ lives forever. In this sense, life imprisonment equally belongs to both the wider world of imprisonment and to this latter realm of life-long measures: it represents a manifestation of the same biopolitical power which we can find, for example, in deprivation of citizenship. It is therefore no

coincidence that LWOP has been defined as the modern equivalent of banishment, tracing a common historical trajectory between this ancient practice and life-long incarceration.<sup>49</sup> This equivalence appears revitalised today in the era of terror and securitization of citizenship,<sup>50</sup> where citizenship status is revoked for those who are considered to pose risks to their national community,<sup>51</sup> and could help us shed light on the state's general level of ease in imposing life-long exclusionary measures by revealing common patterns: existing studies, while not explicitly linking the two phenomena, already denounce parallel increases in the use of both deprivation of citizenship<sup>52</sup> and life imprisonment (as already seen) in the last two decades. Also, given penal systems' well-known tendency—in the Global North, at least—to target specific ethnic, linguistic and religious minorities (hence, their overrepresentation in the criminal justice processes on both sides of the Atlantic),<sup>53</sup> this analogy could help to expose the extent to which these life-long measures target the same social groups and communities, and therefore similarly promote conditions of isolation and otherness through mechanisms that differ in form but are analogous in substance.

### 3. Life imprisonment and necropolitics of power

Having set out to demonstrate that LWOP's absolute peculiarity lies in the way it is sustained by both a logic of exclusion and of elimination, this paper now turns to a brief examination of the necropolitical element of the punishment.

As noted, according to Mbembe,<sup>54</sup> we should consider necropolitics to be the choice of pursuing death as the ultimate objective of states' actions. This paper also noted that this model has been

adapted by other scholarship to the penal system in order to highlight its inhumanness and harshness. Lamble,<sup>55</sup> for example, resorts to this concept when, describing the shift in the boundaries of criminalization from a queer perspective, she highlights how the LGBTQIA+ community have gone from being the object of a gendered penal repression, to investors and lobbyists promoting harsher penal action against those who discriminate, endanger and assault them. Lamble does not hesitate in framing these investments in the penal system as a form of a necropolitics of power, as they foster the “ongoing colonial legacies of the carceral state, [...] disproportionate number of people of colour in prison and [...] widespread abuses within carceral institutions.” Indeed, she continues, “These conditions, coupled with overcrowding, lack of adequate medical care and disconnection from family and friends, mean that prisoners experience high risks of self-harm, psychological abuse, trauma and suicide, both during imprisonment and post-release”.<sup>56</sup> Similarly, Le Marcis<sup>57</sup> uses a necropolitical framework for analysing prison practices that result in the neglect of physical health (especially for the cases of tuberculosis epidemics and HIV) or mental health of inmates.<sup>58</sup> Along these same lines, Jackson<sup>59</sup> describes prisons as sites of necropolitics, in the way they exclude people from the body politic, promote mass injury and death, and fail to provide adequate protection from fellow inmates' violence.

These approaches, while underscoring the undeniable brutality of the penal system in many of its forms and aspects, leave the door open to a possible question: where is the difference between death as a by-product of state action (in this case, the exclusion from state's positive, biopolitical action through incarceration) and death as the objective actively pursued by the state? Indeed, if the distinction between bio- and necropower lies in

the difference between letting die or purposefully (even though not immediately/directly) killing—what Le Marcis<sup>60</sup> refers to as the “*continuum* between ‘letting die’ and ‘making die’”—when it comes to the latter, the case of carceral state might be said to occupy a more nuanced position than war, armed repression, attempts to conquer or annihilation of an enemy (described by Mbembe<sup>61</sup> as the “state of exception”). One is left to wonder, in other words, whether the particular harshness and inhumanness of prison is enough to mobilise the necropolitical label, or whether we need something else, *something more*. Consideration of LWOP might reveal such an intent to seek death.

No doubts are left, of course, when considering the death penalty: here, the state is actively and directly pursuing the individual’s elimination. However, a similar necropolitical intent can be identified in LWOP, linking this measure, although essentially carceral, to capital punishment: indeed, with imprisonment imposed *for life*, death in prison is clearly a part of this punishment as life in prison was before.<sup>62</sup> The aim of this punishment is therefore to exclude *and* to eliminate. Here the use of the necropolitical category appears to be justified and to mark a difference between the cases where death in prison is instead the unintended consequence of prison harshness—i.e. the case of fixed-term sentences.

Recognition of death as a necessary part of the LWOP experience is therefore a factual observation even before a doctrinal one: LWOP convicts live and *die* in prison, and reasoning in terms of the biopolitical only would downgrade this death to a mere accident instead of an inherent requirement of this measure. Similarly, an extensive application of the necropolitical label to the carceral system as a whole would fail to capture the difference between an ordinary prisoner whose death is a

tragic (even though quite frequent) accident of his/her punitive treatment and the conditions suffered by lifers. In other words, the necropolitical label’s function here lies both in highlighting the uniquely peculiar sufferance of lifers, telling us how it differs from other prisoners’ experiences, and in enlightening its normative basis. Indeed, given that death is an intended component of the punishment, identifying this additional punitive element is essential to ask questions about its justification and legitimacy.

At this point, it can be observed that adopting the identity critique leads to an absolutization of death, transforming the necropolitical element into the only element, and life imprisonment into an equivalent of capital punishment. The arguments advanced by those who advocate this approach are powerful and impactful: it is the case made by Marion Vannier’s *Normalizing Extreme Imprisonment*,<sup>63</sup> where she elaborates and conceptualises the way in which LWOP inmates think of and come to terms with the idea of dying in prison. Her empirical work allowed her to conclude that death for the LWOP population is not a distant prospect at the end of their punishment, but a constant companion. The testimonies she has gathered include statements like: “I would be better off given the death penalty [...]. But instead I’m given *the slow death penalty*”. Other lifers equate LWOP to a terminal illness: “LWOP is a slow death, kind of like cancer just hanging on until the final breath”; “it’s a slow death, a slow cancer that makes you rot from the inside.” Some equate LWOP to a death penalty performed through a more inefficient and slower technology: “LWOP is like a very slow execution. A lethal injection of incarceration”.<sup>64</sup> The presence of death *behind the scenes* of LWOP is therefore evident. LWOP is, as another participant of Vannier’s study puts it, a *life in the limbo*: “it’s like



being stuck in limbo [...], not quite fully alive, not completely dead.”

Considering death as the only lens through which life imprisonment should be viewed presents potential risks and limitations, since the nature of this punishment seems hardly reducible to simple physical elimination. Death is an undeniably relevant component of this punishment, one that tells us something about both LWOP's final end and, as these statements seem to confirm, the everyday pains suffered by lifers. The above testimonies present, in other words, both bio- and necropolitical statements.

#### 4. Final remarks

With this work, I have tried to propose three guidelines for a reformulated critique against LWOP: LWOP should be seen as (i) a composite

punishment, and a thorough critique must address both (ii) its biopolitical and (iii) necropolitical aspects. My concluding observation is that LWOP, if appreciated in all its aspects, is not a new or more refined<sup>65</sup> version of the death penalty, but a uniquely peculiar punishment, that must be analysed and normatively assessed according to its composite structure. Isolating the two elements it comprises from one another could give us only a partial view of the LWOP phenomenon: LWOP is not only about exclusion or elimination, but about both. It is about a life of horrible deprivations and an imposed death in confinement. In the way that LWOP manages, at once, to both exclude and eliminate, we can see a rather telling example of collaboration between the bio- and necropolitics of power.

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- <sup>2</sup> Christopher Seeds, 'Life Without Parole, Capital Punishment, and Mass Incarceration in Florida, 1972-1995' (2018) 52(1) *Law & Society Review* 172; Girling, 'Sites of Crossing and Death in Punishment' (n 1); Marie Gottschalk, 'Sentenced to Life: Penal Reform and the Most Severe Sanctions' (2013) 9 *Annual Review of Law and Social Science* 353; Craig S. Lerner, 'Life without Parole as a Conflicted Punishment' (2013) 48 *Wake Forest L Rev* 1101.
- <sup>3</sup> The two notions of life without parole and life imprisonment will be here used interchangeably. In other words, with the latter I will be meaning the *real*/life imprisonment.
- <sup>4</sup> Marion Vannier, *Normalizing Extreme Imprisonment: the Case of Life Without Parole in California* (Clarendon 2021); Thomas Dichter, 'Worst of the Worst: Rehabilitationist Roots of Life without Parole' (2021) 17(3) *Law, culture and the humanities* 529; Miao, 'Replacing Death with Life?' (n 1); Jonathan Sorensen and Thomas Reidy, 'Incapacitation and Life Without Parole from' in Robert M Bohm and Gavin Lee (eds) *Routledge Handbook on Capital Punishment* (Routledge 2017); Lerner, 'Life without Parole as a Conflicted Punishment' (n 2).

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- <sup>8</sup> Hood and Hoyle, 'Towards the Global Elimination of the Death Penalty' (n 1); Marcel Ancel, *The Death Penalty in European Countries: Report* (Council of Europe 1962).
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- <sup>10</sup> David Dow, 'Life Without Parole: A Different Death Penalty' (*The Nation*, 26 October 2012) <<https://www.thenation.com/article/archive/life-without-parole-different-death-penalty/>> accessed 12 January 2023.
- <sup>11</sup> [2012] 567 U.S. 460 (U.S. Supreme Court) and [2010] 560 U.S. 48 (U.S. Supreme Court). These decisions concerned juvenile offenders: see *Graham*, according to which "life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable"; similarly, see also *Miller*.
- <sup>12</sup> See *Furman v Georgia* [1972] 408 U.S. 238 (U.S. Supreme Court) and *Gregg v Georgia* [1978] 428 U.S. 153 (U.S. Supreme Court).
- <sup>13</sup> Benjamin S Yost, *Against Capital Punishment* (Oxford Academic 2019); Frank Baumgartner, Marty Davidson, Kaneesha Johnson, Arvind Krishnamurthy and Colin Wilson, *Deadly Justice: A Statistical Portrait of the Death Penalty* (OUP 2017).
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- <sup>15</sup> [1976] 428 U.S. 280 (U.S. Supreme Court).
- <sup>16</sup> [2015] 576 U.S. 863 (U.S. Supreme Court).
- <sup>17</sup> Lerner, 'Life without Parole as a Conflicted Punishment' (n 2); Dirk Van Zyl Smit, 'Is life imprisonment constitutional? The German Experience' (1992) *Public Law* 263; Dirk van Zyl Smit, Catherine Appleton and Georgie Benford, 'Introduction' in Dirk van Zyl Smit and Catherine Appleton (eds) *Life Imprisonment and Human Rights* (OUP 2016).
- <sup>18</sup> As the legal practice shows, a process which is still ongoing: Davide Galliani, 'Il chiaro e lo scuro. Primo commento all'ordinanza 97/2021 della Corte costituzionale sull'ergastolo ostativo' (2021) <<https://air.unimi.it/bitstream/2434/845536/2/Il%20chiaro%20e%20lo%20scuro.pdf>> accessed 20 May 2023; Marion Vannier, 'In the shadow of death: the normalization of life without parole and death penalty abolitionism in California' (DPhil thesis, University of Oxford 2016); Francesco Viganò, 'Ergastolo senza speranza di liberazione condizionale e art. 3 CEDU: (poche) luci e (molte) ombre in due recenti sentenze della Corte di Strasburgo' (*Diritto Penale Contemporaneo*, 4 July 2012) <<https://archiviodpc.dirittopenaleuomo.org/d/1616-ergastolo-senza-speranza-di-liberazione-condizionale-e-art-3-cedu--poche-luci-e-molte-ombre-in-due>> accessed 21 December 2022.
- <sup>19</sup> David Garland, 'Capital Punishment and American Culture' (2005) 7 *Punishment & Society* 347; David Garland, *Peculiar Institution* (HUP 2010).
- <sup>20</sup> Dichter, 'Worst of the Worst' (n 4); Miao, 'Replacing Death with Life?' (n 1); Lerner, 'Life without Parole as a Conflicted Punishment' (n 2).
- <sup>21</sup> Vannier, *Normalizing Extreme Imprisonment* (n 4); Seeds, 'Life Without Parole' (n 2); Jeffrey Fagan, 'Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment' (2006) 4 *Ohio St J Crim L* 255.
- <sup>22</sup> Miao, 'Replacing Death with Life?' (n 1).
- <sup>23</sup> Vannier, *Normalizing Extreme Imprisonment* (n 4).
- <sup>24</sup> Lerner, 'Life without Parole as a Conflicted Punishment' (n 2).
- <sup>25</sup> Kenneth Zysk, *Taking Life Imprisonment Seriously – In National and International Law* (Kluwer 2002) 1. It would be impossible to cite them all here; however, the most relevant rationales underlying this punishment will be briefly mentioned below.
- <sup>26</sup> Scholarly discussions on this can be found, among others, in Girling, 'Sites of Crossing and Death in Punishment' (n 1); Lerner, 'Life without Parole as a Conflicted Punishment' (n 2); William Tallack, *Penological and Preventive Principles* (Wertheimer 1896); Cesare Beccaria, *Dei delitti e delle pene* (first published 1764, Mondadori 1991); in the caselaw, *Graham*, for example, based many of its observations on the *incorrigible offender* paradigm, and therefore on rehabilitation/incapacitation.
- <sup>27</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage 1978) 56; see also Didier Fassin, 'Another Politics of Life is Possible' (2009) 26(5) *Theory, Culture & Society* 44.
- <sup>28</sup> Frédéric Le Marcis, 'Life in a Space of Necropolitics: Toward an Economy of Value in Prisons' (2019) 84(1) *Ethnos* 74; Sarah Lamb, 'Queer Necropolitics and the Expanding Carceral State: Interrogating Sexual Investments in Punishment' (2013) 24(3) *Law and Critique* 229; Didier Fassin *The Will to Punish* (Berkeley Tanner Lectures 2018); Michel Foucault, 'Alternatives to the prison: Dissemination or decline of social control?' (2009) 26(6) *Theory, Culture & Society* 12.
- <sup>29</sup> Famously, Foucault elaborated three *general economies of power* (or governmentalities): sovereign power, disciplinary power and security. See: Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–78*

(Palgrave Macmillan 2007); Mark Brown, *Penal power and colonial rule* (Abingdon 2014). Here attention is devoted to the disciplinary form of power as the one that seems to better apply to the carceral state, and therefore to life imprisonment. Indeed, in *Discipline and Punish*, Foucault (n 27) defines the prison as the archetypal disciplinary institution.

<sup>30</sup> Foucault, *Discipline and punish* (n 27); Frantz Fanon, *The Wretched of the Earth* (Grove Weidenfeld 1991).

<sup>31</sup> Foucault, *Discipline and punish* (n 27).

<sup>32</sup> Achille Mbembe, 'Necropolitics' (2003) 15(1) *Public Culture* 11.

<sup>33</sup> Lambie, 'Queer Necropolitics and the Expanding Carceral State' (n 28) 243.

<sup>34</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Meridian 1998).

<sup>35</sup> Christopher Gevers, 'Africa and International Criminal Law' in Kevin J Heller, Frédéric Mégret, Sarah MH Nouwen, Jens DO Ohlin and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (OUP 2019); Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton University Press 2020).

<sup>36</sup> Mbembe, 'Necropolitics' (n 32); Fanon, *The Wretched of the Earth* (n 30).

<sup>37</sup> Lambie, 'Queer Necropolitics and the Expanding Carceral State' (n 28); Le Marcis, 'Life in a Space of Necropolitics' (n 28); Jessi L Jackson, 'Sexual Necropolitics and Prison Rape Elimination' (2013) 39(1) *Signs* 197. See also the research conducted by Peter Collins, 'The continuing horror story of *spiegelgrund*. Mental health, compassion, awareness and incarceration' (2008) 17(2) *Journal of Prisoners on Prisons* 6; Terry A Kupers, 'How to create madness in prison' in David Jones (ed) *Humane prisons* (Radcliffe 2006); M Taylor L Grayson, 'Prison psychosis' (2000) 27(3) *Social Justice* 50.

<sup>38</sup> Rosi Braidotti, 'Bio-power and necro-politics: Reflections on an ethics of sustainability' (2007)

<<https://rosibraidotti.com/publications/bio-power-and-necro-politics/>> accessed 11 May 2023. See again Lambie, 'Queer Necropolitics and the Expanding Carceral State' (n 28).

<sup>39</sup> Gresham Sykes, *The society of captives* (Princeton University Press 1958) 65. See also: Layla Skinns and Andrew Wooff 'Pain in police detention: a critical point in the "penal painscape"?' (2021) 31(3) *Policing & Society* 245.

<sup>40</sup> Ben Crewe and Alison Lieblich 'Reconfiguring penal power' in Alison Lieblich, Shadd Maruna and Lesley McAra (eds), *The Oxford Handbook of Criminology* (OUP 2017) 889.

<sup>41</sup> e.g. Mike Fitzgerald, 'The telephone rings: long time imprisonment' in Anthony E Bottoms and Roy Light (eds) *Problems of long-term imprisonment* (Gower 1987); Phil Scranton, Joe Sim and Paula Skidmore, *Prisons under protest* (Open University Press 1991).

<sup>42</sup> e.g. John J Dilulio, *Governing prisons: a comparative study of correctional management* (Free Press 1987).

<sup>43</sup> Skinns and Wooff, 'Pain in police detention' (n 39); Diarmaid Harkin 'The police and punishment: understanding the pains of policing' (2015) 19(1) *Theoretical Criminology* 43; Layla Skinns and Robert Reiner, 'Police custody: governance, legitimacy and reform in the criminal justice process' 12(5) *Criminology and Criminal Justice* 613; Helen Jones, 'The pains of custody: Young men's experiences of pre-prison custodial settings' (2011) 197 *Prison Service Journal* 20.

<sup>44</sup> Such as: a rather simplistic way of seeing power structures within the prison—in this model presented as a very hierarchical structure, whereas more recent studies have underscored a co-dependency bond between guards and inmates (Skinns and Wooff, 'Pain in police detention' (n 39); Crewe and Lieblich, 'Reconfiguring Penal Power' (n 40)); its lack of attention for diversity in inmates' population (Richard Sparks, Anthony E Bottoms and Will Hay, *Prisons and the problem of order* (OUP 1996)); its neglect for inmates' resilience and agency (Ashley T Rubin, 'Resistance as agency? Incorporating the structural determinants of prisoner behaviour' (2017) 57(3) *British Journal of Criminology* 644.

<sup>45</sup> Skinns and Wooff, 'Pain in police detention' (n 39); see also John Irwin and Donald R Cressey, 'Thieves, convicts and the inmate culture' (1962) 10 *Social Problems* 142.

<sup>46</sup> Amy E Lerman and Vesla M Weaver, *Arresting Citizenship. The Democratic Consequences of American Crime Control* (Chicago Studies in American Politics 2014).

<sup>47</sup> Lerman and Weaver, *Arresting Citizenship* (n 46) 256.

<sup>48</sup> There have been successful attempts to do so already. Among the most notable ones, one can cite Vannier, *Normalizing Extreme Imprisonment* (n 4); Ben Crewe, Susie Hulley and Serena Wright, *Life Imprisonment from Young Adulthood: Adaptation, Identity and Time* (Palgrave Macmillan 2021); Catherine Appleton, 'Life After Life Imprisonment' (2010) 15 (3) *The Edinburgh Law Review* 492.

<sup>49</sup> Lerner comes to define LWOP as "internal banishment", see: 'Life without Parole as a Conflicted Punishment' (n 2) 1127; similarly, see also Dichter, 'Worst of the Worst' (n 4).

<sup>50</sup> Mercedes Masters and Salvador S Regilme, 'Human rights and British citizenship: the case of Shamima Begum as citizen to *homo sacer*' (2020) 12(2) *Journal of Human Rights Practice* 341; Mary Bosworth, 'Can Immigration Detention Centres be Legitimate? Understanding Confinement in a Global World' in Katia F Aas and Mary Bosworth (eds) *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (OUP 2013).

<sup>51</sup> Devyani Prabhat, 'Political Context and Meaning of British Citizenship: Cancellation as a National Security Measure' (2020) 16(2) *Law, Culture and the Humanities* 294.

<sup>52</sup> Masters and Regilme, 'Human rights and British citizenship' (n 50); Ben Herzog, 'Revocation of citizenship in the United States' (2011) 52(11) *European Journal of Sociology* 77.

<sup>53</sup> Claire Valier, 'Foreigners, crime, and changing mobilities' (2003) 43(1) *British Journal of Criminology* 1; Loic Wacquant, 'Suitable enemies': Foreigners and immigrants in the prisons of Europe' (1999) 1(2) *Punishment & Society* 215; Coretta

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Phillips, Rod Earle, Alpa Parmar and Daniel Smith 'Dear British Criminology: Where Has All the Race and Racism Gone?' (2020) 24(3) *Theoretical Criminology* 427.

<sup>54</sup> Mbembe, 'Necropolitics' (n 32).

<sup>55</sup> Lamble, 'Queer Necropolitics and the Expanding Carceral State' (n 28).

<sup>56</sup> Lamble, 'Queer Necropolitics and the Expanding Carceral State' (n 28) 242.

<sup>57</sup> Le Marcis, 'Life in a Space of Necropolitics' (n 28).

<sup>58</sup> On this see also Collins, 'The continuing horror story of *spiegelgrund*.' (n 37); Kupers, 'How to create madness in prison' (n 36); Taylor 'Prison psychosis' (n 37).

<sup>59</sup> Jackson, 'Sexual Necropolitics and Prison Rape Elimination' (n 37).

<sup>60</sup> Le Marcis, 'Life in a Space of Necropolitics' (n 28).

<sup>61</sup> Mbembe, 'Necropolitics' (n 32).

<sup>62</sup> As rightfully observed by Demma, 'Sentenced to Life without Parole' (n 1) 644, "while those sentenced to LWOP are not being executed by the state, they are being sentenced to die in prison."

<sup>63</sup> Vannier, *Normalizing Extreme Imprisonment* (n 4).

<sup>64</sup> Vannier, *Normalizing Extreme Imprisonment* (n 4) 34.

<sup>65</sup> Girling, 'Sites of Crossing and Death in Punishment' (n 1); Timothy Kaufman-Osborn, *From Noose to Needle: Capital Punishment and the Late Liberal State* (University of Michigan Press 2002); Mona Lynch, 'The disposal of inmate #85271: notes on a routine execution' (2000) 20(3) *Studies in Law, Politics and Society* 3.