The Abolition and Retention of Life Without Parole in Europe: A Comparative and Historical Perspective

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Abstract

Life without parole is increasingly recognised as another death penalty in dooming prisoners to die behind bars. On the tenth anniversary of the ECtHR's landmark Vinter decision, abolitionism and retentionism characterise its state in Europe. In abolishing irreducible life sentences, Vinter crystallised a long-term evolution in prisoners' rights since the Enlightenment. Meanwhile, enduring animosity towards prisoners has led to their rights repeatedly becoming the stage for wider debates concerning the legitimacy of European institutions. The United Kingdom's threats to leave the ECtHR notably enabled it to exempt itself from Vinter. Still, the European project retains numerous supporters, which helps explain why the abolition of life without parole is making progress in continental Europe, as compared to the United States, Canada, Australia, and New Zealand. Ultimately, the article demonstrates that prisoners' rights are both a microcosm of broader questions regarding European integration and a benchmark of human dignity's historical evolution.

Keywords

1 Introduction

This article analyses the intersection of two contrary currents: the development of prisoners’ rights and the rise of Euroscepticism. As prisoners' rights have made strides in Europe, they have simultaneously become a nexus of anti-European sentiment. Because prisoners are among the most vilified, feared, and vulnerable members of any society, their rights have repeatedly been the stage for debates concerning the legitimacy of the European Court of Human Rights (ECtHR or Court) and European institutions writ large. This dynamic has especially materialised in the United Kingdom, where ‘tough-on-crime’ attitudes tend to converge with anti-ECtHR and anti-European attitudes. Major developments in prisoners’ rights are therefore increasingly intertwined with shifts in the European sociopolitical landscape, from ‘Brexit’ to the rise of nationalistic, sovereigntist, populist, xenophobic, illiberal, and authoritarian movements hostile to human rights in general and prisoners’ rights in particular.

This societal context surrounds one of the most significant decisions in the history of criminal law, *Vinter and Others v the United Kingdom*, where the ECtHR abolished life without parole, otherwise known as ‘irreducible life sentences.’ On the eve of *Vinter*’s tenth anniversary, this article uses it as a stepping stone to explore the interrelationship between the historical evolution of prisoners’ rights and Europe’s sociopolitical landscape. As life without parole is analogous to the death penalty, in that it dooms prisoners to die behind bars, *Vinter* suggested that Europe was turning its back on lifelong imprisonment after gradually abolishing capital punishment in prior generations. After all, it was a quasi-unanimous, 16-1 decision. *Vinter* attracted attention and invited comparisons with the United States, which has experienced a contrary trend since the 1980s with the normalisation of life without parole and other merciless punishments under its peculiar mass incarceration phenomenon. *Vinter* seemed to embody the promise of penal
reform in an age where prisoners’ rights advocates have grown increasingly pessimistic given ‘the decline of the rehabilitative ideal.’

Yet a dramatic volte-face soon occurred in *Hutchinson v the United Kingdom*, as the ECtHR licensed the same ‘whole-life-order’ scheme that was under challenge in *Vinter*. This unexpected turnaround buoyed leaders of Britain’s Conservative Party, which had threatened to withdraw from the ECtHR following *Vinter*. Judge Paulo Pinto de Albuquerque of Portugal, a dissenter in *Hutchinson*, later accused his colleagues of falling prey to regressive forces: ‘Illiberal times call for a strong, counter-majoritarian Court, not an illiberal Court.’ Complicating the picture, *Hutchinson* also reaffirmed *Vinter*’s fundamental holding that life without parole is abolished, and that ‘human dignity requires prison authorities to strive towards a life sentenced prisoner’s rehabilitation.’

One of the last major ECtHR decisions on the matter again reaffirmed *Vinter*. ‘The Court would emphasise that the prohibition of Article 3 ill-treatment remains absolute,’ it stated, when prohibiting extraditions posing a genuine risk of life without parole if the defendant were convicted in a foreign country, in that case the United States. That Grand Chamber decision did not discuss *Hutchinson*, plausibly because it lies in tension with *Vinter*.

The thesis of this article is that abolitionism and retentionism both characterise the current state of life without parole in Europe. That paradox is the latest stage in a long-term movement to expand prisoners’ rights and

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6 *Hutchinson v the United Kingdom* [GC] 57592/08 (ECtHR, 17 January 2017).
8 *Illescher v Germany* [GC] 10211/12 and 27505/14 (ECtHR, 4 December 2018) Dissenting Opinion of Judge Pinto de Albuquerque, para 74.
9 *Hutchinson* (n 6) para 43.
10 *Sanchez-Sanchez v the United Kingdom* [GC] 22854/20 (ECtHR, 3 November 2022) para 99.
11 As the Grand Chamber found that the defendant in that case was not genuinely at risk of receiving life without parole in the United States, it allowed his extradition. See also n 226 and the accompanying paragraphs.
bar inhuman punishments. This historical evolution evokes ambivalence – a concept that has garnered insufficient scholarly attention. Ambivalence may be defined as holding conflicted feelings, ideas, or beliefs, as wanting something and its opposite, as recognising an idea and simultaneously rejecting it. This mindset captures how Europe has regularly approached the protection of prisoners’ rights.

Furthermore, this article analyses how the ambivalence towards prisoners’ rights is intertwined with ambivalence towards European institutions such as the ECtHR. Even though powerful movements are increasingly calling into question European integration, it retains numerous supporters. Both the opposition to and support for ECtHR standards on prisoners’ rights thus warrant attention.

While scholars have instructively discussed the tension between Vinter and Hutchinson, this article broadens our historical, comparative, and theoretical perspective. Much of the scholarly debate begins with ECtHR jurisprudence, but I will describe how Vinter was the fruit of a longstanding evolution in sentencing norms since the Enlightenment. It initially led to the gradual abolition of corporal punishment and the death penalty, before restricting lifelong imprisonment. By 2013, when the ECtHR decided Vinter, life without parole was already a rare or unlawful sentence in Europe. Ever since Hutchinson, the ECtHR has continued to apply Vinter to more and more European countries, thereby strengthening European integration in the area of criminal justice and human rights. Moreover, reformers are increasingly calling into question life without parole elsewhere in the Western world, namely in the United States, Canada, Australia, and New Zealand. I will explore how this movement has faced far more resistance in American society, where life without parole remains pervasive. Strikingly, a comprehensive study found ‘almost 25 times as many prisoners serving [life without parole] sentences in the United States [as] in Europe, even though the population of Europe was

14 Different definitions of the ‘Western world’ exist, yet it is typically understood to include the United States, Canada, Australia, New Zealand, and European nations, excluding Russia and states in its sphere of influence. See, for example, G Hellman and B Herbroth (eds), Uses of the West (Cambridge University Press 2017).
more than double that of the United States.\textsuperscript{15} American reformers have only succeeded in limiting the application of life without parole to juveniles.\textsuperscript{16} By contrast, life without parole does not exist in the Canadian Criminal Code. In 2022, the Supreme Court of Canada’s unanimous decision in \textit{R v Bissonnette} also drew upon \textit{Vinter} when striking a legislative scheme allowing de facto life without parole.\textsuperscript{17} This seminal Canadian ruling reinforced the position of the United Kingdom and United States as outliers in the West.

Citing \textit{Vinter} approvingly,\textsuperscript{18} the Supreme Court of Canada described how life imprisonment with no possibility of release can be understood as ‘the other death penalty’, if not as ‘death by incarceration’, a ‘virtual death sentence’, ‘living death sentence’, or ‘delayed death penalty’.\textsuperscript{19} Assuming that life without parole is the functional equivalent of the death penalty, this has major implications for human rights in Europe. The abolition of the death penalty has been a constitutive element of European human rights policy and foreign policy for decades. Both national European governments and transnational bodies, the Council of Europe (COE or Council) and European Union in particular, have emphatically advocated the abolition of capital punishment.\textsuperscript{20}

As this abolition has become categorical under European law,\textsuperscript{21} the retention of life without parole is an intertwined, critical human rights issue insofar as it constitutes the death penalty through time.

\textsuperscript{17} \textit{R v Bissonnette}, [2022] SCC 23, para 104 (Can). For a more detailed discussion of this case, see n 280 and the accompanying paragraphs.
\textsuperscript{18} \textit{Bissonnette} (n 17) para 104.
\textsuperscript{19} Ibid para 82.
\textsuperscript{21} In \textit{Al-Saadoon and Mufhdi v the United Kingdom}, the Court concluded that capital punishment categorically violates the Convention, thereby going beyond optional protocols on the death penalty’s abolition (\textit{Al-Saadoon and Mufhdi v the United Kingdom} 61498/08 (ECtHR, 2 March 2010)). See also n 126 and the accompanying paragraph.
Whereas a wide-ranging literature has focused on the historical decline and abolition of the death penalty, the analogous trend for life without parole has garnered less attention. Indeed, insofar as life without parole has been an object of attention, scholars have disproportionately focused on its normalisation in the United States and on the similarly atypical situation of the United Kingdom, including its resistance to the ECtHR’s abolition of life without parole in Vinter. These circumstances have not only overshadowed the abandonment of life without parole in continental Europe, but also in Canada.

While the United Kingdom’s refusal to comply with Vinter has been described as ‘UK exceptionalism’, the United States is far more of an outlier among modern Western democracies, both in terms of its general isolationism and the harshness of its penal system. Still, within Europe, ‘[t]he UK is quite alone in its more fundamental and widespread antagonism towards the Strasbourg Court’ as the authors of a comparative study conclude. Hostility towards the ECtHR in parts of British society has encompassed claims that it is overly protective of prisoners’ rights. However, this article will likewise consider how the United Kingdom has simultaneously converged with the historical evolution of prisoners’ rights. This is not simply captured in the United Kingdom’s gradual abolition of capital punishment in the 1950s, which preceded various European nations. Whole life orders also remain relatively rare in the United Kingdom despite their persistence.

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23 See generally Ogletree and Sarat (n 4).

24 See generally Celiksoy (n 12); Graham (n 12); Pettigrew (2017) (n 12).

25 Bissonnette (n 17).

26 Celiksoy (n 12) 1594–1615.


30 Hammel (n 22) 110–113.

Several factors help explain why the historical evolution of life without parole has often been analysed through the lens of enduring punitiveness. Scholars commonly seek to analyse social problems in order to better understand them and suggest solutions. In the United States, punitiveness is the main theme in the academic literature, which has notably sought to explain the rise of mass incarceration, retention of the death penalty, and persistent systemic racism. But even in societies that are comparatively less punitive, such as Canada and France, criminal justice scholarship also focuses significantly on punitiveness. After all, punitiveness is a salient dimension of penality in these Western nations and many others, from abusive police practices to ruthless sentences, not forgetting racist or xenophobic treatment. Another explanation for the disproportionate focus on enduring punitiveness is found in social science revealing that the media and public debate disproportionately emphasise troubling content or developments. The disproportionate attention devoted


to negative events is actually a longstanding area of psychological research.  

In the end, this article suggests that enduring forms of punitiveness should not eclipse progress towards abolishing lifelong incarceration in Europe.

Alongside a socio-historical perspective, this article will present a survey of recent cases revealing that the ECtHR has found irreducible life sentences unlawful in multiple countries, from authoritarian-leaning Hungary and Turkey to Belgium, Bulgaria, Italy, Lithuania, Ukraine, and the Netherlands. The inconsistency with Hutchinson suggests that it may be less a case about criminal sentencing than one about accommodating the resistance to the Court’s authority in British society.

The article proceeds as follows. First, it describes why an interdisciplinary methodology can help us better understand key developments regarding irreducible life sentences. Second, it situates Vinter in the long-term historical evolution of prisoners’ rights since the Enlightenment. Third, it considers how a shifting sociopolitical landscape has tied prisoners’ rights to broader clashes over European integration that led to Hutchinson. Notwithstanding that decision, my survey of recent jurisprudence finds that the ECtHR has actually upheld Vinter against many European governments. Fourth, the article widens the perspective on the evolution of life imprisonment in the West with a comparison between continental Europe, the United Kingdom, the United States, Canada, Australia, and New Zealand. Despite the scholarly focus on enduring punitiveness, these findings show that the abolition of life without parole and the development of prisoners’ rights have made progress, especially in continental Europe and Canada. Fifth, the article’s final section discusses insidious ways in which lifelong imprisonment may persist in Europe even if Vinter were generally followed. Abolition may thus ultimately coexist with retentionism by another name due to the ambivalence that has historically hindered the movement for prisoners’ rights.

2 A Multidisciplinary Methodology to Explore Key Developments

To thoroughly analyse irreducible life sentences in Europe, one must understand them as a question of ECtHR jurisprudence and as a question of criminal justice. This article therefore aspires to conciliate research into both of these fields, which typically operate on separate planes. Scholarship on ECtHR
jurisprudence regarding irreducible life sentences tends to focus on doctrinal
questions about case law under the European Convention on Human Rights
(ECHR). By the same token, influential and otherwise insightful scholarship
on criminal punishment has often devoted limited to no attention to ECtHR
jurisprudence, as it has instead focused on criminal justice at the national
level. Relatively few works bring these fields into dialogue, thereby offering
insight into both the nature of criminal justice and European human rights
norms.

Moreover, scholarship on the ECtHR’s jurisprudence regarding irreducible
life sentences has generally lacked a historical and comparative perspective.
Thoughtful research has examined present trends but has not connected them
to historical developments, including the long-term evolution of prisoners’
rights. Scholarship on irreducible life sentences has additionally tended to
focus on Europe’s approach towards this penalty, although a comparative
perspective could help us determine whether Europe’s evolution in this area is
significant. In particular, how do European nations compare to other Western
democracies in allowing or prohibiting irreducible life sentences?

This article tackles all of these questions through an interdisciplinary
methodology. First, it analyses ECtHR jurisprudence on irreducible life
sentences as a question of criminal justice, thereby drawing upon several areas
of research. Second, it employs historical and comparative analysis to situate the
evolution of ECtHR jurisprudence in a wider context. This historical approach
not only considers the evolution of prisoners’ rights since the Enlightenment,
but also historical context regarding the evolution of European integration in
the aftermath of World War Two. That is because the development of human
rights has been a fundamental dimension of European integration, just as
the development of prisoners’ rights has been a fundamental component
of human rights. It would follow that prisoners’ rights would become a key
target for those who resent or oppose European integration. By considering
this question, the article seeks to complement incisive works on the ECtHR’s
history that do not delve into Vinter or focus on prisoners’ rights.

39 See, for example, Graham (n 12).
40 See, for example, D Garland, The Culture of Control (University of Chicago Press 2002); C
Seeds, Death by Prison: The Emergence of Life Without Parole and Perpetual Confinement
(University of California Press 2022); Whitman (n 32).
41 See, for example, K Drenkhahn, M Dudeck, and F Dünkel (eds), Long-Term Imprisonment
and Human Rights, (Routledge 2014); Van Zyl Smit and Appleton (n 15).
42 M Rask Madsen, ‘La fabrique des traités européens: Une analyse de la genèse et évolution
43 See, for example, Burgorgue-Larsen (n 29).
The article ultimately argues that prisoners’ rights have made significant headway in continental Europe if one addresses the issue from a historical and comparative angle. This would not be palpable by focusing narrowly on salient events, such as the successful resistance to Vinter in the United Kingdom or pushback against European integration in much of the continent, which could lead to the false conclusion that European norms regarding prisoners’ rights now lack meaningful influence.

Last but not least, by ‘life without parole’ the article means ‘life without the possibility of parole.’ Naturally, a prisoner serving a regular life sentence with the possibility of parole is not guaranteed release and may die behind bars. Life without parole goes one step further in barring the possibility of regaining one’s freedom. If ‘life without parole’ or ‘LWOP’ is the name used in America nowadays, in Europe the terminology focuses on whether a life sentence is ‘irreducible’, meaning that it will last until death regardless of rehabilitation. The article therefore uses the synonymous terms ‘life without parole’ and ‘irreducible life sentences’ interchangeably.

3 The Historical Roots of a Paradigm Shift

The ECtHR did not create the fundamental norms against life without parole. By the time of Vinter, it was already a relatively rare sentence throughout Europe, as many countries had previously decided not to inflict this punishment. This is because longstanding reforms at the national level precipitated shifts in international law. A history of this evolution must begin somewhere, and one of the earliest authorities that the ECtHR cites in Vinter is a 1977 decision by the German Federal Constitutional Court in the Life Imprisonment case, which prohibited irreducible life sentences as a violation of human dignity. However, the normative and penological principles restricting or barring permanent imprisonment were not born a few decades ago in West Germany, just as they did not emerge with Vinter in 2013.

While a thorough history of imprisonment and penal reform in Western societies is beyond this article’s scope, an overview is instructive. Despite various precursors, such as the Dutch rasphuis (workhouse) that gained traction in the 17th century, the modern prison is generally understood to
have emerged in the late 18th century and early 19th century, primarily in the United States. Penal institutions advocating rehabilitation made progress in Pennsylvania and New York, inspiring European and Canadian reformers. These social transformations reflected age-old debates about humane penalties that, before the rise of the prison, revolved around corporal punishment, torture, and executions. During the Renaissance, diverse figures like Thomas More, Erasmus, and Montaigne suggested that all too many wrongdoers received cruel and ineffective sentences. The social debate intensified during the Enlightenment, as the Milanese philosopher Cesare Beccaria profoundly influenced thinkers on both sides of the Atlantic, from Voltaire to the Founding Fathers of the United States. In *On Crimes and Punishments* (1764), Beccaria argued that sentencing should be humane and no harsher than necessary to deter crime. Innumerable other figures, such as Jeremy Bentham, Elizabeth Fry, and John Howard in Britain, advocated more humane and useful forms of imprisonment.

By the second half of the 20th century, an abundance of literature focused on prisons, prisoners’ rights, and prospects for reform. Scepticism of state discourse on the benevolence of rehabilitation behind bars simultaneously became an abiding theme of scholarship. These social shifts buoyed challenges to lifelong incarceration in numerous European countries at the national level. Accordingly, when the ECtHR declared in *Vinter* that ‘the emphasis in European penal policy is now on the rehabilitative aim of imprisonment’, it was building upon a long-term evolution that began well before the starting point that it identified in the post-World-War-Two era.

Interestingly, *Vinter* did not discuss the anti-death-penalty movement that laid the groundwork for the movement against life without parole. Since the

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54 Vinter and Others (n 1) para 115.
Enlightenment, European countries gradually restricted and abolished the death penalty until international treaties\textsuperscript{56} and ECtHR decisions cemented this shift on the continent.\textsuperscript{57} This transformation has not been limited to Europe, as capital punishment has been formally abolished in Canada, Australia, New Zealand, 23 states within the United States, and nearly all of Latin America. Overall, more than two-thirds of all countries have abolished it in law or practice.\textsuperscript{58} Unlike the ECtHR, the Supreme Court of Canada has explicitly compared irreducible life sentences to the death penalty.\textsuperscript{59}

Certain scholars nonetheless argue that the development of human rights generally,\textsuperscript{60} and in European criminal justice in particular,\textsuperscript{61} is a recent shift traceable to the final decades of the 20th century. The notion that the death penalty's abolition in the United Kingdom in the 1960s had nothing to do with human rights illustrates this perspective,\textsuperscript{62} which is difficult to reconcile with British social and legislative debates expressing humanistic concerns about state-killing, alongside utilitarian objections to capital punishment.\textsuperscript{63} Meanwhile, other accounts focused on France,\textsuperscript{64} for example, or the evolution of the Western world\textsuperscript{65} describe a long-term normative evolution that influenced modern human rights norms.

Irrespective of how one traces their genealogy, the movements against the death penalty and life without parole became intertwined. Some call life without parole ‘the other death penalty’, as both punishments are analogous in condemning prisoners to perish behind bars.\textsuperscript{66} Both sentences likewise make

\textsuperscript{56} See generally Protocol No 6 to the ECHR; Protocol No 13 to the ECHR.

\textsuperscript{57} See, for example, Soering v the United Kingdom 14038/88 (ECtHR, 7 July 1989); Al-Saadoon and Mufhdi (n 21).


\textsuperscript{59} Bissonnette (n 17) para 82. See also quotations at n 19 and the accompanying paragraph.

\textsuperscript{60} S Moyn, The Last Utopia: Human Rights in History (Belknap 2010).

\textsuperscript{61} Zimring (n 20) Chapter 2.

\textsuperscript{62} Ibid 20–22.


\textsuperscript{64} R Badinter, Contre la peine de mort (Fayard 2006); Le Naour (n 22).

\textsuperscript{65} Jouet (n 2).

\textsuperscript{66} See generally Bissonnette (n 17) para 82; E Girling, ‘Sites of Crossing and Death in Punishment: The Parallel Lives, Trade-Offs and Equivalencies of the Death Penalty and
rehabilitation irrelevant. Prisoners will never be allowed to re-enter society, regardless of whether they have demonstrated heartfelt remorse, are no longer dangerous, or have reformed themselves.

Hence, Vinter may be interpreted as the culmination of a gradual historical evolution that emerged centuries earlier. That does not mean that it was inevitable. One year before Vinter, the ECtHR rejected a challenge to extraditions leading to life without parole in the United States, reasoning that the lawfulness of such sentences was not settled in Europe.67 Based on more auspicious precedents,68 some experts anticipated an ECtHR decision against life without parole.69 Vinter ultimately held that irreducible life sentences violate Article 3 of the European Convention on Human Rights, which proclaims: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’

4 Europe’s Abolition and Retention of Lifelong Imprisonment

This section surveys the ECtHR’s evolving jurisprudence on irreducible life sentences. After briefly summarising Vinter, it examines the societal context surrounding the Hutchinson decision that reached an opposite result on similar facts, namely authorising Britain’s ‘whole-life-order’ scheme after the Conservative Party threatened to have the United Kingdom leave the ECtHR in protest against Vinter. Subsequent cases complicate the picture, as the ECtHR proved far more inclined to find lifelong incarceration schemes unlawful in other countries.

4.1 Vinter: A Landmark Moment

In 2013, a resounding majority of the ECtHR Grand Chamber held that life without parole violates the ECHR. By a 16-1 margin, the Judges found that, ‘for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review.’70 Vinter had recognised ‘a
right to hope’ behind bars, as Judge Ann Power-Forde of Ireland stated in a concurrence.\textsuperscript{71} A permanent finding of irredeemability would be unlawful in precluding release based on rehabilitation. The Court thus seemingly rejected the logic of predictive judgments rooted in a purported ability to foretell the future, which have been a recurrent topic of academic criticism in the field of criminal justice.\textsuperscript{72}

Notwithstanding the extensive literature on ‘the decline of the rehabilitative ideal’,\textsuperscript{73} the ECtHR relied on the German Federal Constitutional Court’s 1977 Life Imprisonment case to underline that ‘rehabilitation was constitutionally required in any community that established human dignity as its centerpiece.’\textsuperscript{74} West Germany was a trailblazer in barring irreducible life sentences and the ECtHR drew upon its jurisprudence to specify that no one is beyond rehabilitation.\textsuperscript{75} In doing so, German and European law adopted a principle that has animated diverse philosophers and reformers since the Renaissance and Enlightenement – the distinction between the crime and the criminal, who should not be reduced to their worst act or even dehumanised as solely a criminal.\textsuperscript{76}

The ECtHR’s rationale was consistent with the evolution of human dignity. Whereas scholars have offered competing perspectives on dignity, many define it as a norm rooted in the inherent worth of human beings at an abstract level.\textsuperscript{77} This very inherence means that dignity is universal and not forfeitable by committing a crime.\textsuperscript{78}


\textsuperscript{72} See generally J de Keijser, J Roberts, and J Ryberg (eds), Predictive Sentencing: Normative and Empirical Perspectives (Bloomsbury 2019).

\textsuperscript{73} Allen (n 5). See also generally Garland (n 40).

\textsuperscript{74} Vinter and Others (n 1) paras 69–71 and 113 (citing: Life Imprisonment (lebenslange Freiheitsstrafe) (n 46)).

\textsuperscript{75} Ibid.

\textsuperscript{76} Jouet (n 2).


\textsuperscript{78} Jouet (n 2).
The Court supported its holding not only by surveying international law, such as the European Prison Rules and other European instruments,\(^7\) but also the laws of individual European countries.\(^8\) As the ECtHR is an institution of the COE, which presently comprises 46 member states and nearly every country on the continent, it was relevant that at the time of Vinter ‘a large majority of Contracting States either [did] not impose life sentences at all or, if they [did], provide[d] some dedicated [review] mechanism, [...] usually after twenty-five years’ imprisonment.’\(^9\)

What would become the crux of the issue in Hutchinson a few years later is how the Court applied these principles to the facts in Vinter, as both cases concerned England and Wales’ whole-life-order scheme.\(^8\) Vinter, unlike Hutchinson, deemed it an irreducible sentence. In a nutshell, England and Wales permitted release only in ‘exhaustively listed, and not merely illustrative, circumstances, namely if a prisoner is terminally ill or physically incapacitated and other additional criteria can be met,’\(^3\) including that ‘the risk of re-offending is minimal.’\(^4\) ‘These are highly restrictive conditions,’\(^5\) the ECtHR stressed. ‘Even assuming that they could be met by a prisoner serving a whole life order,’ it would be ‘correct to doubt whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather behind prison walls.’\(^6\) To boot, the scheme’s vagueness violated the principle of ‘legal certainty,’ as ‘[a] whole life prisoner is entitled to know [...] what he must do to be considered for release and under what conditions, including when a review of his sentence will take place.’\(^7\) The ultimate finding of an Article 3 violation seemed unequivocal.

\(^7\) See COE, European Prison Rules (Council of Europe Publishing 2006).

\(^8\) Vinter and Others (n 1) paras 68–72 and 117.

\(^9\) Ibid para 117.


\(^4\) Ibid para 126.

\(^5\) Ibid.

\(^6\) Ibid para 127.

\(^7\) Ibid.
Yet the Court of Appeal of England and Wales considered that the ECtHR had gone too far. Heeding the position of the United Kingdom Government in a subsequent legal challenge to a whole life order, the Court of Appeal held that *Vinter* did not mean what it meant: ‘Although there may be debate in a democratic society as to whether a judge should have the power to make a whole life order, in our view, it is evident’ that some crimes ‘are so heinous that Parliament was entitled to proscribe, compatibly with the [European] Convention, that the requirements of just punishment encompass passing a sentence which includes a whole life order.’\(^{88}\) Whereas *Vinter* had held that an opportunity for release based on rehabilitation was a universal right for all prisoners, irrespective of their past crimes, the Court of Appeal of England and Wales thus declared that this right was a matter of ‘debate’ and that Parliament had chosen a lifelong incarceration scheme for heinous crimes.\(^{89}\)

The Court of Appeal further rejected *Vinter*’s conclusion that life-sentenced prisoners should generally have an opportunity for release within 25 years.\(^{90}\) Despite finding that this time frame remained within the margin of appreciation,\(^{91}\) the *Vinter* Court stated that it was ‘not persuaded by the reasons adduced by the Government for the decision not to include a twenty-five year review in the current legislation on life sentences in England and Wales.’\(^{92}\) Underscoring its disagreement with the ECtHR, the Court of Appeal later found that a minimum term of 40 years before parole eligibility was ‘unduly lenient’ for Ian McLoughlin – a recidivist murderer with a substantial criminal record. The Court of Appeal consequently quashed his sentence and replaced it with a whole life order.\(^{93}\) Its interpretation of *Vinter* set the stage for *Hutchinson*.

### 4.2 *Hutchinson*: A Tension Over More Than Life Without Parole

On substantially similar facts to *Vinter*, only four years later, the ECtHR Grand Chamber reached a different result in *Hutchinson*: ‘The Court concludes that the whole life sentence can now be regarded as reducible, in keeping with Article 3 of the Convention.’\(^{94}\) At times, its tone when referring to the

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88 *R v McLoughlin* (n 82) [15].  
89 Ibid.  
90 *Vinter and Others* (n 1) paras 117, 120, and 124.  
91 Ibid paras 123–121.  
92 Ibid para 124.  
94 *Hutchinson* (n 6) para 72. Before the case’s referral to the Grand Chamber, a panel of ECtHR Judges had oddly decided in a 6-1 vote that the whole-life-order scheme was not
British authorities verged on complimentary: ‘[T]he Court of Appeal drew the necessary conclusions from the Vinter judgment, as it ‘dispelled the lack of clarity identified in Vinter arising out of the discrepancy within the domestic system between the applicable law and the published official policy’ that allowed the United Kingdom Secretary of State to release an ill or incapacitated prisoner on ‘compassionate grounds.’’

To an incredulous Judge Pinto de Albuquerque, a dissenter, no such thing had occurred. Between Vinter and Hutchinson, the Court of Appeal had not ‘budge[d] an inch from its previous position.’ Vinter had entailed broad judicial review of the penological justifications for keeping a life-sentenced prisoner indefinitely behind bars. Instead, Hutchinson upheld a practice out of step with ECtHR jurisprudence in finding sufficient an executive discretion to exceptionally release a prisoner on ‘compassionate grounds.’ For instance, in a later decision against Hungary, the ECtHR emphasised that ‘a possibility of being granted a pardon or release on compassionate grounds for reasons related to ill health, physical incapacity or old age does not correspond to the notion of “prospect of release.”’

Judge Pinto de Albuquerque made the prior remarks in a subsequent case on preventive detention, where he deplored an increasingly ‘illiberal’ trend: ‘It is sad to see the beacon of human rights and of criminal law reform in Europe failing to uphold the basic principle of the rule of law and abandoning the most fundamental principles of modern criminal law.’ The turnaround in Hutchinson followed the Conservative Party’s explicit threats to have the United Kingdom withdraw from the ECtHR due to Vinter, an increasingly plausible threat following Brexit. From this angle, Hutchinson may be more a case about the legitimacy of the ECtHR and other European institutions than about life imprisonment per se.
4.2.1 An Intriguing Historical Parallel

_Hutchinson_ was not merely a case about irreducible life sentences, as it can be understood as the dénouement of wider events with implications beyond the field of criminal justice. Before analysing the rise of tensions surrounding the ECtHR's protection of prisoners' rights, this section discusses a root cause of these developments. The clash over prisoners' rights should be understood in the context of a historical parallel. The past circumstances that led to the ECtHR's creation are analogous to the modern circumstances that threaten its destruction. The Court was once created as a rampart to nationalistic, authoritarian, and illiberal forces. Now, such forces seek to undermine or end its mission. In other words, the Court's turnaround in _Hutchinson_ reflected a wider turnaround in the perception of European institutions.

The ECtHR stems from the coe, founded on 5 May 1949. In addition to the United Kingdom, its ten original members comprised Belgium, Denmark, France, Ireland, Italy, Luxemburg, the Netherlands, Norway, and Sweden. Greece and Turkey joined a few months later, whereas West Germany and Iceland did so in 1950. The Council's creation reflected a Cold War strategy of standing against the Soviet bloc by promoting democratic and human rights principles, alongside market economies and international trade. In particular, the adoption of the Convention in 1953 aspired to preclude the kinds of totalitarian trends witnessed in Nazi Germany, Stalinist Russia, and elsewhere. The establishment of the European Commission of Human Rights (European Commission) and subsequently the ECtHR proved a remarkable achievement considering the opposition or wariness of many founding member states towards the creation of such oversight bodies. Since its creation in 1959, the ECtHR has indeed come to play a growing role in protecting human rights, the rule of law, and democratic principles.

Some countries were initially reticent to recognise the Court's jurisdiction, such as France, which did not ratify the Convention until 3 May 1974 – a paradox, given that the Court is based in Strasbourg. General Charles de Gaulle's rise to power in 1958 had reinforced this sovereigntist trend. The French Judge René Cassin threatened to resign from his position as President of the ECtHR, lest
France fully accept the Court’s authority. The efforts of Cassin, who earned the 1968 Nobel Peace Prize for his contributions to the modern international human rights system, fell on deaf ears for years.\(^{106}\)

Conversely, the United Kingdom was the first country to ratify the Convention, doing so on 8 March 1951.\(^{107}\) But Britain did not recognise the right of individual petition before the European Commission and individual recourse before the ECtHR until 1966, namely after the decolonisation process saw it lose most of its overseas empire. Britain still preceded France in that process, as its southern neighbour only accepted this right in 1981.\(^{108}\) These examples demonstrate that the United Kingdom was not a staunch outlier at the outset. Rather, France then was the primary outlier in Western Europe. A role reversal would thereafter occur, as modern France has generally converged with the ECtHR, despite its own ambivalence, whereas Britain has largely diverged.

By 1998, the ECtHR’s jurisdiction became mandatory for all COE member states with the entry into force of Protocol No 11 to the Convention. Its caseload also grew substantially over time.\(^{109}\) Most European governments usually accepted the Court’s legitimacy, recognising its contribution to strengthening human rights throughout the continent. Both the COE and the European Union, a separate entity often confused with the Council, made human rights cornerstones of modern European law, norms, and identity.\(^{110}\)

The Court still had its critics, which were not limited to far-right political parties sceptical or hostile towards human rights per se. Certain governments ruled by mainstream political parties also resented what they perceived as the ECtHR’s meddling and micro-management of national legal matters. Even though the United Kingdom contributed to the creation of the Court and the European human rights system, it veered towards defiance.\(^{111}\) Its Government led diplomatic attempts to curtail the Court’s mission and jurisdiction at the

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107 Burgorgue-Larsen (n 29) 81.
110 Rask Madsen (n 42).
111 See n 173, n 182, and n 186 and the accompanying paragraphs.
Brighton conference of 2012, which faced pushback from European states keen on preserving the Court’s mandate.112

It must be underlined that certain member states went much further in challenging the European human rights system, especially Russia and Turkey given their rulers’ authoritarian proclivities. Following its invasion of Ukraine in 2022, Russia was ultimately expelled from the COE.113 The Court equally faced a major cyberattack114 following a decision ordering the Turkish Government to release a detained political opponent and member of parliament.115 While those responsible for the cyberattack have apparently not been identified, the incident forebodes potentially sharper challenges to the ECtHR.

Within Western Europe, the United Kingdom has been the democracy most inclined to challenge the ECtHR’s legitimacy.116 Its stance towards the ECtHR echoes facets of what has been termed ‘American exceptionalism.’ The United States has been among the leading architects of international courts and instruments in the post-World-War-Two era, although it has recurrently exempted itself from their jurisdiction.117 The status of creator-outsider can be understood as a form of realpolitik where states seek the benefits of international arrangements without accepting their costs. Insofar as a parallel ‘UK exceptionalism’ exists in this area,118 exemplified by defiance towards the ECtHR - an institution that the United Kingdom helped create - it remains relative compared to the definite exceptionalism of the United States in the modern Western world.119

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112 Burgorgue-Larsen (n 29) 124–127. See also Popelier, Lambrecht, and Lemmens (n 28) 7 (finding that the United Kingdom Government had mostly failed in its efforts to lead a rollback of the ECtHR’s power at the Brighton conference).
115 Demirtas v Turkey [GC] 14305/17 (ECtHR, 22 December 2020).
116 See n 173, n 182, and n 186 and the accompanying paragraphs.
118 Celiksoy (n 12) 1594–1615.
119 Jouet (n 27) Chapter 8.
4.2.2 Prisoners’ Rights as a Nexus of Anti-European Sentiment

What deserves closer attention is how prisoners’ rights have been at the forefront of British debates about European integration, as well as how this compares to the experience of other nations. Because prisoners are among the most unsympathetic persons who may appeal to the ECtHR, their cases became a stage for wider battles about the Court’s authority. In fact, several key ECtHR precedents on prisoners’ rights stem from the United Kingdom. Well before Vinter and Hutchinson, the ECtHR and the United Kingdom Government had clashed over prisoners’ voting rights. British authorities refused to comply with ECtHR decisions that found it unlawful to categorically deprive prisoners of their right to vote – a measure embodying their exclusion from society.120

In 2018, the CoE accepted that these cases were closed after the British Government finally passed reforms allowing highly restrictive voting rights for a tiny segment of prisoners, mainly those eligible on temporary licence (i.e., authorised to leave prison during the daytime for work or other reasons). Various experts observed that this amounted to noncompliance and the status quo.121 These circumstances epitomise a disagreement over whether the United Kingdom is ignoring or complying with European rules on prisoners’ rights, from their right to vote to their freedom from irreducible life sentences. The Court of Appeal of England and Wales’ McLoughlin decision, concluding that the whole-life-order scheme complied with Vinter, was not merely contested by several ECtHR Judges122 or within the British academy123 – it reflected a wider pattern. While McLoughlin has been the object of doctrinal analysis,124 an in-context, comparative perspective can capture additional dynamics. At the very least, disagreements over actual compliance or noncompliance suggest that a comparatively narrow interpretation of prisoners’ rights often prevails in modern British law.

Defiance towards the ECtHR was likewise at the heart of one of the Court’s most significant death-penalty decisions: Al-Saadoon v the United Kingdom. After the 2003 invasion of Iraq led by the United States, occupying British forces handed suspects over to Iraqi authorities without requiring assurances that they would not face the death penalty. The ECtHR had ordered the British Government not to transfer the detainees until the case’s resolution, yet

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120 Hirst v the United Kingdom (No 2) [GC] 74025/01 (ECtHR, 6 October 2005); Greens and mt v the United Kingdom 60041/08 and 60054/08 (ECtHR, 23 November 2010).
122 See n 96 and the accompanying text.
123 See, for example, Graham (n 12) 262–264; Pettigrew (2017) (n 12) 267.
124 See generally ibid.
‘the Government took the view that, exceptionally, it could not comply with the measure indicated by the Court.’125 The ECtHR went on to hold that the death penalty is an inherent violation of the ECHR, thereby going beyond the optional protocols regarding the abolition of the death penalty. The ECtHR simultaneously found that an extradition or transfer without assurances against execution would inherently violate the Convention.126 Another landmark case, Soering v the United Kingdom, had previously shaped norms barring extraditions that may result in the death penalty.127

In yet another revealing incident, the United Kingdom Government disregarded British and European law when, without seeking assurances against the death penalty, it assisted US authorities seeking to prosecute two suspected terrorists. The Home Secretary, Sajid Javid, wrote to Jeff Sessions, Donald Trump’s Attorney General, to explain that such assurances were unnecessary. Once leaked, Javid’s letter sparked a public outcry and led to a parliamentary hearing.128 As Bharat Malkani recounts, Members of Parliament pressed the Minister of State for Security to ‘reconcile Javid’s letter with the UK’s stated opposition to the death penalty in all circumstances, regardless of nationality, jurisdiction, or severity of crime.’129

ECtHR decisions have also tended to attract more political and media attention in the United Kingdom than in other Western European nations. Besides mainstream politicians’ threats to leave the Court,130 the British social debate has been influenced by a tabloid press running stories hostile to the ECtHR and human rights law, such as casting them as a ‘criminals’ charter’.131

The mere suggestion that sex offenders, murderers and terrorists enjoy basic rights in spite of their criminality is sufficient to create a tabloid frenzy [...] The most punitive media commentaries will readily imply that offenders should be regarded as having forfeited their rights as a form of retribution or just deserts.132

125 Al-Saadoon and Mufhdi (n 21) para 81 (emphasis added).
126 Ibid paras 115–125 and 143.
127 Soering (n 57).
129 Ibid 93.
130 See n 101, n 182, and the accompanying paragraphs.
Such media coverage fuses ‘tough-on-crime’ and anti-ECtHR attitudes in rejecting the principle that human rights are inalienable.

Keeping matters in perspective, Britain is hardly the nation that has garnered the most violations of the Convention. Turkey and Russia dramatically stand out in this area with 3,309 and 2,724 judgments, respectively, finding at least one violation between their respective adhesions to the Convention and 2020.\textsuperscript{133} Italy, Poland, Romania, and Ukraine also tallied over a thousand violations since their own adhesions, with Greece nearly reaching that threshold. As for the United Kingdom, it had 322 such violations, compared to 759 for France. One must be mindful that these aggregate statistics comprise disparate cases and areas of law, meaning that each judgment may be best analysed individually and qualitatively. Nevertheless, quantitative data warn against the assumption that the United Kingdom is a systemic violator or outlier.

That said, the advent of ‘tough-on-crime’ policies in the United Kingdom sheds additional light into its defiance towards the ECtHR. Over the past two decades, imprisonment levels in Britain have been high by Western European standards. As of July 2023, the incarceration rate was 143 prisoners per 100,000 residents in England and Wales, whereas Scotland’s rate was virtually identical at 141 and Northern Ireland’s rate was 99. The corresponding figures were lower for, say, Belgium (97), France (107), Germany (67), Ireland (91), Italy (97), the Netherlands (66), and Spain (116).\textsuperscript{134} Even though harsh practices exist throughout Europe, British society has been on the punitive end of the spectrum for decades.\textsuperscript{135} Tellingly, ‘[a]s a proportion of the national population, there were 18 times more life-sentenced prisoners in the United Kingdom than in France’\textsuperscript{136} based on 2014 data.

In the United Kingdom, whole life orders primarily concern England and Wales, which had 66 whole-life prisoners as of March 2023.\textsuperscript{137} Whereas Scottish law does not authorise whole life orders, in some cases a substantial mandatory minimum before parole eligibility may amount to de facto life without parole.\textsuperscript{138} Certain legislators have called for instituting whole life orders in Scotland.\textsuperscript{139} 

\textsuperscript{133} On Russia’s expulsion from the coe in 2022, see ECtHR (n 113).
\textsuperscript{135} See generally D Downes, Contrasts in Tolerance: Post-War Penal Policy in the Netherlands and England and Wales (Oxford University Press 1988); Garland (n 40).
\textsuperscript{136} Van Zyl Smit and Appleton (n 15) 92.
\textsuperscript{137} United Kingdom Ministry of Justice (n 31).
\textsuperscript{138} Vinter and Others (n 1) paras 68 and 99; Van Zyl Smit and Appleton (n 15) 121 and 161.
whose practices are harsher than it may seem at first glance given that
Scotland advocates a model of penal welfarism. Scotland had more people
serving life sentences as a proportion of its national population than any other
country in Europe as of 2020. Northern Ireland’s situation has garnered
far less scholarly attention, perhaps because it avoids meting out whole life
orders, consistent with its lower incarceration rate. Even so, the Court of
Appeal in Northern Ireland recently suggested that whole life orders remain
possible in the jurisdiction. It made no reference to Vinter, Hutchinson, or
the ECtHR. Following a public consultation, the Minister of Justice of Northern
Ireland also vowed to introduce legislation ensuring that ‘the whole life tariff
will be available for “rare and exceptionally serious murders.”’ The Northern
Ireland Department of Justice’s 2021 report on the matter flatly ignored ECtHR
standards, too. While virtually all of the prisoners facing irreducible life
sentences are in England and Wales, the situation in Scotland and Northern
Ireland further illustrates how the United Kingdom has resisted the abolition
of life without parole that has prevailed in much of continental Europe.

The ECtHR cannot singlehandedly resolve these fundamental divides over
prisoners’ rights. A court’s authority is not merely a reflection of positive law,
as it also rests on sociopolitical norms that will lead actors to comply even
with decisions that they disagree with. These difficulties are exacerbated for
international courts facing national governments that are sceptical about their
legitimacy. Vinter and Hutchinson exemplify the catch-22 that an international
court may face when dealing with a defiant government, as with the United
Kingdom refusing to budge on the whole life order. An evident option for an

140 Ibid 77 and 96–97.
141 Ibid 80–81.
142 A government report underscores that the whole life order ‘has been used rarely in
this jurisdiction.’ See Northern Ireland Department of Justice, ‘Summary of Responses:
.nidirect.gov.uk/doj/sentencing-review-northern-ireland> para 86. An earlier draft
featured a detail missing in the final version: ‘Only one has ever been imposed by a
Crown Court Judge in Northern Ireland and, on appeal, this was changed to a 35 year
tariff.’ See Northern Ireland Department of Justice, ‘Draft of ‘Sentencing Policy Review
Consultation’ (22 October 2019): <https://consultations.nidirect.gov.uk/doj/sentencing
-review-northern-ireland/user_uploads/chapter-4-----tariff-setting-for-murder-22.10.19
.pdf> Chapter 4 (‘Tariff Sentencing for Murder’), para 4.26 (citing R v Hamilton [2008]
NICA 27).
143 ICPR (n 134).
144 R v Haggarty [2020] NICA 22 [9]–[18] (imposing tariff of ten years for multiple terrorist
offenses after considering possibility of whole life order).
145 Northern Ireland Department of Justice (2019) (n 142) para 115.
146 See ibid.
international court in this situation is reasserting its prior ruling, but doing so risks undermining the authority of the international court, which may appear as a paper tiger incapable of enforcing its rulings. The ECtHR previously faced this quandary with the United Kingdom’s noncompliance with its ruling invalidating a blanket ban on prisoners’ voting rights.147

The ECtHR is not simply mindful of sociopolitical context in the abstract, as it engages in diplomacy with member states. This includes periodic conferences aiming to foster dialogue and understanding between ECtHR Judges, diplomats, and academics.148 The ECtHR pragmatically avoids confining itself to an ‘ivory tower’ wholly ‘disconnected from national realities.’149 This context sheds light on Hutchinson, as well as on the Court’s diverse manoeuvres in response to the wider movement to weaken the European human rights system.150

The United Kingdom’s position is particularly critical since it might be the Western European nation most at risk of withdrawing from the ECtHR,151 which could conceivably have a domino effect in encouraging other countries to leave the Court or undermine it from within. While such a domino effect remains speculative, if not doubtful,152 scholars have described how British leaders opposed to the ECtHR have sought to lead European allies towards their goal of weakening the Court.153

France offers an instructive comparison, as the dynamics that have undermined the ECtHR in the United Kingdom have also emerged in French society to an extent. Jean-Éric Schoettl, former Secretary General of the French Constitutional Court, notably proposed reforming France’s Constitution to ‘unilaterally suspend some of our European engagements in the name of the superior interest of the country’,154 especially fighting jihadism, Islamism, and illegal immigration. Schoettl argued that France should revert back to the pre-1981 situation where it did not recognise the right to recourse before the

147 Greens and MT (n 120) para 120. On the relative status quo on British prisoners’ voting rights since this 2010 decision, see Johnston and Brown (n 121).
148 Burgorgue-Larsen (n 29) 426–432.
149 Ibid 367 and 435 (author’s translation).
150 Ibid 485–488.
151 See n 173, n 182, and n 186 and the accompanying paragraphs.
152 By way of analogy, the Brexit referendum vote in 2016 has not so far led other countries to leave the European Union.
153 Burgorgue-Larsen (n 29) 124–127; Popelier, Lambrecht, and Lemmens (n 28) 7.

https://creativecommons.org/licenses/by-nc-nd/4.0/
ECtHR. Analogously, Michel Barnier, a French citizen who faced criticism in the United Kingdom for his role in representing the European Union in the acrimonious Brexit negotiations, sparked outrage with his subsequent bid for the French presidency resting on a Eurosceptic platform. France should obtain greater independence from the European Union and other European institutions, including the ECtHR, Barnier claimed. Such voices spurred a vigorous reply from Laurence Burgorgue-Larsen, a prominent French human rights scholar, who deplored the rise of illiberalism and populism bent on scapegoating European institutions for modern France’s problems. The ECtHR is ‘a last rampart against authoritarianism (wherever it comes from) and fanaticism (whatever it may be), Burgorgue-Larsen warned. ‘If terrorism manages to divide French society to the point where some of its thinkers renounce the principles stemming from the postwar democratic project, then the terrorists will have won.’

Scapegoating European institutions is therefore a common dynamic in debates about prisoners’ rights, just as with terrorism, undocumented migrants, and beyond. Much like national courts, the ECtHR can be unfairly blamed for matters like crime rates, immigration levels, or terrorist attacks on which its decisions have limited influence, if any at all.

Nevertheless, the ECtHR or its decisions on prisoners’ rights do not occupy a significant place in the modern French political and media debate, as France is far more concerned about the European Union and European integration in general. For example, Marine Le Pen, the leader of the French far right, said that France did not need to be part of the ECtHR, but her political focus has been on the European Union. Another comparative study describes how modest French public debates on Convention rights have been. On the whole, these

155 Ibid.
158 Ibid.
160 Ibid 278.
debates gained only the attention of specialists.\textsuperscript{161} Although criticism of the ECtHR in France rose at the time of the 2012 Brighton conference, the French Government distanced itself from the efforts of the British Government to significantly curtail the ECtHR’s authority. While ‘[t]he British Prime Minister questioned the very existence of the European Court,’\textsuperscript{162} Katarzyna Blay-Grabarczyk and Christophe Maubernard note, ‘neither the [French] president of the Republic, nor the Prime Minister and the members of the government criticised the power of the European Court.’\textsuperscript{163}

Further demonstrating how the debate over the ECtHR’s legitimacy in contemporary France has not gone as far as in Britain, President Emmanuel Macron praised the ECtHR during an official visit to Strasbourg intended to defend Europeanism at a time of crisis. ‘France consistently reiterates its commitment to the binding nature of the judgments of the [ECtHR],’\textsuperscript{164} Macron stressed in a prominent speech, later adding: ‘I want to reaffirm the importance that France attaches to the unconditional obligation to execute the Court’s judgments.’\textsuperscript{165} The intense media coverage and social debates about Euro-scepticism tend to overshadow how European integration retains support.

The comparison with France is also insightful because its penal system has been the object of critical ECtHR decisions for years, although this has not led to the same situation as in British society, where anti-European attitudes are closely associated with ECtHR decisions protecting prisoners’ rights. France made significant reforms to procedures concerning the detention of criminal suspects to bring them in line with ECtHR jurisprudence on the right to counsel and right to remain silent during police interrogations.\textsuperscript{166} In addition, degrading conditions of confinement in French prisons have been a matter of concern for at least two decades. French prisons are notoriously overcrowded, dilapidated, and unsanitary, which has led the ECtHR to condemn France.\textsuperscript{167}

\textsuperscript{162} Blay-Grabarczyk and Maubernard (n 159) 282.
\textsuperscript{163} Ibid.
\textsuperscript{164} E Macron, ‘Speech by Emmanuel Macron, President of the French Republic, at the European Court of Human Rights on 31 October 2017’ (ECtHR, 31 October 2017): \texttt{<https://www.echr.coe.int/documents/d/echr/Speech_20171031_Macron_ENG>}.\textsuperscript{165} Ibid.
\textsuperscript{166} Grewe (n 161) 350–351.
Macron could therefore have assumed a defiant posture towards the ECtHR during his visit to Strasbourg, warning it not to meddle in French criminal justice by needlessly expanding the rights of criminal suspects and prisoners. To the contrary, Macron praised the Court for its contributions to the development of human rights in Europe, and acknowledged that France needed to improve its prisons to meet human rights norms. Nonetheless, the ECtHR again condemned France for its prisons in the aftermath of Macron’s visit, and questions persist about France’s willingness or capacity to resolve this matter, despite many social actors’ recognition of the problem. This example still illustrates how France has diverged from the United Kingdom in its reaction to ECtHR jurisprudence expanding prisoners’ rights.

In fact, this example is consistent with research documenting how ECtHR decisions enjoy more legitimacy than it may seem at first glance. While the ECtHR has ‘stumbled into a legitimacy crisis with regard to certain countries,’ a comprehensive comparative study found that ‘[t]he most severe criticism has been voiced in the UK.’ This finding is corroborated by a vast literature suggesting that the tensions between the United Kingdom and the ECtHR have been greater than those between the Court and other Western European nations. Despite criticism of the ECtHR in diverse countries, such as France, the Netherlands, Norway, and Switzerland, ‘[a] surge of criticism is most visible and strongest in the United Kingdom.’ Whereas most countries’ contestation of the ECtHR tends to be episodic or situation-specific, defiance has become a constitutive element of British policy. Besides, in most countries, criticism of

168 Macron (n 164).
169 [m8 and Others v France 9671/15 and others (ECtHR, 30 January 2020).
171 Popelier, Lambrecht, and Lemmens (n 28) 3.
172 Ibid.
175 Popelier, Lambrecht, and Lemmens (n 28) 10. For instance, a critical debate about the ECtHR emerged in the Netherlands in 2010 but subsided in subsequent years as critics
European integration focuses on the European Union and scarcely addresses the ECtHR, which remains little known and out of the public eye.\textsuperscript{176}

These circumstances have led criticism of the ECtHR to occupy a comparatively significant place in the British political debate and news media,\textsuperscript{177} which has encompassed the spread of misinformation about the ECtHR and its decisions.\textsuperscript{178} Much of the backlash against the ECtHR in British politics and media focuses on the Court’s allegedly misguided decisions on prisoners’ rights.\textsuperscript{179}

The \textit{Vinter} decision was rendered the year after the Brighton conference and it was met with fierce criticism in the United Kingdom, primarily from the ruling Conservative Party. Prime Minister David Cameron’s vigorous disagreement with \textit{Vinter} was matched by cabinet ministers Theresa May and Chris Grayling, who then were the Home Secretary and Justice Secretary. David Blunkett, the former Labour Home Secretary, concurred and defended his 2003 decision to eliminate the right to review after 25 years for life-sentenced prisoners. Most importantly, the Prime Minister’s office announced that Cameron would not rule out abandoning the ECtHR given these developments. ‘[The Prime Minister] is very, very, very, very disappointed. He profoundly disagrees with the court’s ruling. He is a strong supporter of whole-life tariffs’,\textsuperscript{180} a spokesperson explained. In 2014, the media equally reported that ‘[t]he right wing of the Conservative party, including Chris Grayling, justice minister, has previously described the court as having “lost legitimacy”’ and that the United Kingdom ‘should be able to overrule Strasbourg decisions.’\textsuperscript{181} Grayling later reiterated this warning to the ECtHR: ‘If we cannot reach agreement that our courts and our parliament will have the final say over these matters, then we will have to withdraw.’\textsuperscript{182}
Two years after *Vinter*, the Conservative Party’s manifesto maintained the same theme: ‘We will [...] toughen sentencing and reform the prison system, so dangerous criminals are kept off your streets.’\(^{183}\) It is revealing that criminal justice and the ECtHR are addressed in the same section of the Party’s official platform – titled ‘Fighting crime and standing up for victims’ – that cast the ECtHR as an obstacle to public safety and tough sentencing.\(^{184}\) To this end, the platform vowed to ‘scrap the Human Rights Act’ and ‘break the formal link between British courts and the [ECtHR].’\(^{185}\) Such proposals remain a matter of debate in the United Kingdom to this day.\(^{186}\)

In sum, questions of criminal justice and questions regarding the ECtHR’s legitimacy have become increasingly intertwined in the United Kingdom, whereas these dynamics are not as common in other Western European nations. Although the United Kingdom’s defiance towards the ECtHR may be a better starting point to understand *Hutchinson* than substantive issues regarding life without parole, *Hutchinson* also offers insight into the evolution of prisoners’ rights. Indeed, *Hutchinson* did not overrule *Vinter*. Nor was *Hutchinson* decided under the ‘margin of appreciation’ doctrine, which has been the primary ECtHR rule for accommodating or tolerating national or cultural differences.\(^{187}\) COE member states do not have a margin of appreciation to inflict irreducible life sentences, which categorically violate human dignity and Article 3. Rather, *Hutchinson* is more insidious in finding that the United Kingdom had resolved the lack of clarity surrounding its whole-life-order scheme when it essentially had not budged following *Vinter*.\(^{188}\) This outcome is less incongruous if one considers that the Judges in the majority were just as aware as Judge Paulo Pinto de Albuquerque, one of the dissenter, of the United Kingdom’s discontentment with the ECtHR and the risk of its future withdrawal. In a recent case unrelated to prisoners’ rights, a panel of ECtHR Judges further cited *Hutchinson* approvingly for the proposition that a member state can resolve a

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184 Ibid 58–60.
185 Ibid 60.
188 See n 96 and the accompanying paragraph.
violation. Again, this is striking in that the United Kingdom had not changed position between Vinter and Hutchinson – the Court had.

4.3 Vinter’s Progeny: Trying the Right to Hope

Given the turnaround in Hutchinson, some may be tempted to interpret Vinter as a symbolic decision that has offered little relief to prisoners. That interpretation would be false. This section presents a survey of recent ECtHR cases demonstrating how Vinter has served as a precedent to prohibit irreducible sentences in countries less powerful than the United Kingdom – a double standard that warrants closer scrutiny.

Turkey has been among the countries most inclined to ignore or defy the ECtHR due to an authoritarian trend. In a succinct 2019 decision that was not translated into English, the Court unanimously reiterated that Turkey’s irreducible ‘aggravated-life-sentence’ scheme violated Vinter. The Court maintained its position despite Turkey’s refusal to reform its law following prior violations. All prisoners were allegedly members of the PKK (Workers’ Party of Kurdistan), an illegal armed organisation. The ECtHR did not show the same deference towards Turkey as towards the United Kingdom.

Hungary, another country whose Government has gravitated towards an authoritarian, anti-European ideology, was also soon found in violation of Vinter. Hungary thereafter passed legislation to introduce the automatic review of whole life sentences after a ‘retribution phase’ of 40 years. Finding this scheme unlawful, the ECtHR refused to grant Hungary leeway under the margin of appreciation doctrine because the international standard was to review life sentences no later than 25 years. The ECtHR recently reasserted that Hungary’s immobilism was unacceptable because it rested on claims

189 Valaitis v Lithuania 39375/19 (ECtHR, 17 January 2023) paras 113–114.
190 See generally E Celiksoy, ‘Ongoing Problem of Irreducible Life Sentences in Turkey’ (2019) 4 European Journal of Crime, Criminal Law, and Criminal Justice 320, 334–335 (‘Despite the ECtHR’s rulings against Turkey, both Turkish legislature and judiciary have remained indifferent to these developments in the ECtHR’s jurisprudence.’); Lambrecht (n 174) 10 (‘Although human rights training programs for the Turkish judiciary have advanced their knowledge, the current political atmosphere in Turkey creates reticence within the judiciary to apply the [European Convention on Human Rights]’).
191 Boltan v Turkey 33056/16 (ECtHR, 12 February 2019) para 42 (citing: Öcalan v Turkey (No 2) 24069/03 and others (ECtHR, 18 March 2014); Kaytan v Turkey 27422/05 (ECtHR, 15 September 2015); Gurban v Turkey 4947/04 (ECtHR, 15 December 2015)).
192 Ibid.
193 László Magyar v Hungary 73593/10 (ECtHR, 20 May 2014).
194 TP and AT v Hungary 37871/14 and 73986/14 (ECtHR, 4 October 2016) para 43.
195 Ibid paras 41 and 50.
‘similar to those already examined and rejected’ in persistently defending its irreducible-life-sentencing scheme. Whereas the United Kingdom Government had successfully employed this strategy in *Hutchinson*, the ECtHR was apparently not prepared to allow Viktor Orbán’s Hungary to do so.

The ECtHR’s 2017 *Matiošaitis* decision also invalidated Lithuania’s life-sentencing scheme because it lacked a parole system. Neither a potential amnesty, an executive pardon, nor the compassionate release of ill prisoners matched the standard for release based on rehabilitation. Hence, the same year that the Grand Chamber of 17 Judges decided *Hutchinson*, a smaller ECtHR Chamber of seven Judges reached an opposite result in *Matiošaitis* based on analogous facts.

Following a 2019 legislative reform, Lithuania finally allowed life-sentenced prisoners to seek the reduction of their penalty after 20 years. That being noted, Lithuania’s situation underscores how the Court must tread carefully. A concurrence by Judge Egidijus Kūris of Lithuania deplored that, after *Vinter*, ‘the Lithuanian authorities chose to tarry until the Court delivered its judgment [in *Matiošaitis*].’ To Kūris, this ‘was due to a lack of political will’ and ‘subservience to public opinion’ ostensibly ‘very much against the introduction of even a formal possibility of periodic review of life prison sentences.’

Furthermore, in the 2019 *Petukhov* decision, the ECtHR unanimously invalidated Ukraine’s lifelong imprisonment system as irreducible. Ukraine segregated life prisoners up to 23 hours per day in cells of double or triple occupancy with scant organised activities. Data indicated that merely one life prisoner under this regime had ever been released, via clemency. The Court consequently ordered Ukraine to ‘put in place a reform of the system of review of whole-life sentences.’

The ECtHR reaffirmed its position in a recent judgment against Ukraine in November 2022. The applicant, a Ukrainian citizen, had been convicted in Hungary of a double murder in 1999 and sentenced to life imprisonment with the possibility of parole after serving 20 years. The applicant was

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196 *Sándor Varga and Others v Hungary* 39734/15 (ECtHR, 17 June 2021) para 49. The ECtHR reaffirmed this point a few months later in *Bancsók and László Magyar (No 2)* (n 99).
197 *Matiošaitis and Others v Lithuania* 22662/13 and others (ECtHR, 23 May 2017).
199 *Matiošaitis and Others* (n 197) Concurring Opinion of Judge Kūris, para 8.
200 Ibid.
201 *Petukhov v Ukraine* (No 2) 41216/13 (ECtHR, 12 March 2019) para 194.
202 Ibid.
203 *Kupinskyy v Ukraine* 5084/18 (ECtHR, 10 November 2022) paras 5–6.
subsequently transferred to Ukraine, which converted his punishment to an irreducible life sentence on the ground that Ukraine does not allow parole for life-sentenced prisoners. This assuredly violated Article 3, Petukhov, and Vinter. 204 Ukraine’s actions likewise violated Article 7 of the Convention, which especially protects people from suffering ‘a heavier penalty […] than the one that was applicable at the time the criminal offence was committed,’ 205 in that case under Hungarian law. The decision, which concerned events before Russia’s invasion of Ukraine, is part of a wider body of law where the ECtHR has tackled the development of human rights in Ukrainian society. 206 Inaction on irreducible life sentences is one of various areas where the Ukrainian Government had not executed ECtHR decisions. 207

Bulgaria presents a more incongruous picture. The ECtHR found Bulgaria in violation of Article 3 for its state of affairs up until a 2012 reform established a clemency commission. 208 Despite another decision approving the new Bulgarian system, 209 it still appears to run afoul of Vinter insofar as it is not a genuine review process but one resting on arbitrary, discretionary executive decisions. The last report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to address this issue deplored that Bulgaria had not reformed its legislation on ‘life imprisonment without the right of substitution.’ 210 The Bulgarian Helsinki Committee concurred. 211 At the end of 2020, 59 Bulgarian prisoners had life

204 Ibid paras 42 and 43.
205 Ibid paras 44 and 64.
208 Harakchiev and Tolmou v Bulgaria 15018/11 and 61199/12 (ECtHR, 8 July 2014); Manolov v Bulgaria 23810/05 (ECtHR, 4 November 2014).
209 Sabev v Bulgaria 57004/14 (ECtHR, 4 June 2015).
without parole and another 124 had life with the possibility of parole. At the time of writing, Bulgaria still had to reform its legislation.

The ECtHR has equally tackled cases where governments deemed prisoners too dangerous to release due to mental disorders. Murray v the Netherlands remarkably held that a life sentence was de facto irreducible where the Dutch Government offered no genuine treatment for the prisoner's psychiatric and psychological condition, even though the condition served to justify his permanent incarceration in the Dutch Caribbean. The ECtHR insisted that '[t]he obligation to offer a possibility of rehabilitation is to be seen as an obligation of means, not one of result.'

A recent decision reaffirmed that prisoners must have a genuine means of release. Horion v Belgium concerned the type of recidivist murder case with the capacity to inflame public opinion. After being released from prison following a murder conviction, the applicant was imprisoned again in 1981 for murdering five more people in a robbery. He managed to escape from prison in 1982 and 1987, before being caught. The applicant had been eligible for the equivalent of parole since the early 1990s, but, despite repeated requests over ensuing decades, had never been released due to expert opinions about his high risk of recidivism and dangerousness. In 2017, however, experts concluded that, instead of imprisonment or release, an intermediary solution was suitable: placing the aging man in a psychiatric facility in order to facilitate his social reinsertion. This solution proved impossible because no psychiatric facility would accept him on the ground that he lacked a psychiatric problem or the proper status to be committed to their unit. The case finally headed to the ECtHR, which found that the sentence was de facto irreducible because the prisoner could not fulfil a condition for release, as he was stuck in a dead end for five years in requesting admission to a psychiatric ward. Belgium had consequently violated Article 3.

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213 The author communicated with the Bulgarian Helsinki Committee on this matter.
214 Murray v the Netherlands [GC] 10511/10 (ECtHR, 26 April 2016) para 104.
215 Ibid.
216 Horion v Belgium 37928/20 (ECtHR, 9 May 2023) paras 5–6.
217 Ibid.
218 Ibid paras 7–39.
219 Ibid para 27.
220 Ibid paras 28–30 and 40.
221 Ibid paras 72–76.
seventies,²²² Horion confirmed that the ECtHR was willing to uphold Vinter even for a prisoner with an aggravated criminal record.

Besides the predicament of prisoners with grave mental conditions, the ECtHR has grappled with claims that certain circumstances made ostensibly ordinary life sentences irreducible due to the impossibility of fulfilling the relevant conditions for release. In an extraordinary 2019 case, Viola v Italy (No 2), a prisoner deemed to be a mafia boss alleged that his life imprisonment since the 1990s was effectively irreducible because Italian law predicated his release on his cooperation with criminal investigations.²²³ The appellant contended that he could not cooperate, partly due to fear of reprisals. The Italian authorities essentially imputed his refusal to the mafia code of silence, finding it proof of non-rehabilitation. However, the ECtHR declined to defer to the Italian Government and found a violation of Article 3 by a 6-1 margin. The condition of collaboration with criminal investigations had improperly trumped all other considerations. The prisoner had apparently maintained good conduct in prison, yet was excluded from social reintegration programs available to other inmates, such as furloughs or temporary work-release programs. The ECtHR stressed that Italian law could not permanently classify him as dangerous and categorically unfit for release. Nor would an executive pardon or release for medical reasons satisfy the Vinter standard. Judge Krzysztof Wojtyczek of Poland, the lone dissenter, accused his colleagues of ‘tacitly reversing’ Hutchinson.²²⁴

Last but not least, European law forbids extraditions that may result in life without parole in a foreign country, which would make ECtHR member states complicit in the infliction of a degrading punishment abroad. This development tracks the bar on extraditions that may lead to the death penalty.²²⁵ In Sanchez-Sanchez v the United Kingdom, a recent major decision, the Grand Chamber clarified the legal standard in such cases. First, the defendant must present evidence establishing that, if extradited and convicted, ‘there is a real risk that, a sentence of life imprisonment without parole would be imposed on him.’²²⁶ Second, the country of extradition must have ‘a review mechanism in place allowing the domestic authorities to consider the prisoner’s progress towards

²²² Ibid para 2.
²²³ Viola v Italy (No 2) 77633/16 (ECtHR, 13 June 2019).
²²⁴ Ibid Dissenting Opinion of Judge Wojtyczek, para 11.
²²⁵ Soering (n 57); Al-Saadoon and Mufhidi (n 21). See n 126 and the accompanying paragraph.
²²⁶ Sanchez-Sanchez (n 10) para 97. Sanchez-Sanchez also reaffirmed Vinter’s holding (ibid paras 78 and 99), but did not address Hutchinson, perhaps to avoid discussing its contradictions with Vinter.
rehabilitation or any other ground for release based on his or her behaviour or other relevant personal circumstances.\textsuperscript{227}

Thus, the remote possibility of life without parole does not automatically prohibit extradition. \textit{Sanchez-Sanchez} permitted an extradition to the United States after reasoning that, under the facts of the defendant’s case, he did not face a material risk of receiving life without parole for drug-trafficking offenses.\textsuperscript{228} The ECtHR reached the same conclusion in another case, regarding the US sentencing guidelines for drug crimes and the sentences of 72, 14, and 12 months already meted out to alleged co-conspirators.\textsuperscript{229}

Germany was again among the trailblazers in this evolution. After abolishing life without parole in 1977, as discussed above, the German Federal Constitutional Court barred an extradition that would have led to this penalty in Turkey.\textsuperscript{230} The decision diverged from British jurisprudence maintaining extradition under such circumstances.\textsuperscript{231} Although the ‘right to hope’ is commonly traced to \textit{Vinter}, similar language is found in this little-known German precedent:

> The expected punishment and the restricted conditions for pardoning [in Turkey] deprive a convicted person of any hope he or she may have of leading an independent life in freedom one day. With a view to human dignity, however, such hopes are what make a life sentence bearable in the first place.\textsuperscript{232}

In sum, numerous recent ECtHR cases have addressed irreducible life sentences and \textit{Hutchinson} is the one that interpreted prisoners’ rights the most narrowly, further suggesting that its incongruous outcome reflected the United Kingdom’s greater willingness and ability to exempt itself from international standards. Simply put, life without parole is still largely abolished in Europe.

\textsuperscript{227} Ibid.
\textsuperscript{228} Ibid paras 100–110.
\textsuperscript{229} Lópe\'z Elorza v Spain 3664/15 (ECtHR, 12 December 2017).
\textsuperscript{230} \textit{K} (‘Constitutional Complaint of the Turkish National K …’) of 16 January 2010, 2 BvR 2299/09 (English Abstract).
\textsuperscript{231} Hafeez v US [2020] EWHC 155 (Admin), [2020] 1 WLR 1296; \textit{Harkins and Edwards} (n 67). See also Van Zyl Smit (n 13) 44–45.
\textsuperscript{232} \textit{K} (n 230) section 11.
Europe in Comparative Light

Those who know only one penal system know no system, to paraphrase Seymour Martin Lipset, the renowned sociologist and political scientist.\(^{233}\) A comparative perspective can therefore shed light on the evolution of life imprisonment. Dirk Van Zyl Smit and Catherine Appleton’s global survey, published in 2019, found only a few countries worldwide with effectively irreducible life without parole, in particular Haiti, Honduras, Israel, Mexico, Turkey, the United Kingdom, and the United States. They also identified life without parole in the legislation of Bulgaria, Hungary, Lithuania, Malta, the Netherlands, and Slovakia, but specified that the situation in several of these nations was evolving.\(^{234}\) The recent jurisprudence discussed in the last section supports this finding. These circumstances confirm the trend against permanent incarceration in Europe and beyond, notwithstanding Hutchinson and the lingering issues surrounding whole life orders in the United Kingdom. By deepening the comparison to other Western democracies – the United States, Canada, Australia, and New Zealand – I will now demonstrate that the development of prisoners’ rights in continental Europe should not be dismissed as irrelevant or illusory.

The United States has nearly the highest incarceration rate internationally\(^{235}\) and over 80 percent of all prisoners serving life without parole worldwide.\(^{236}\) These circumstances commonly eclipse how it once was among the pioneers in instituting principles of rehabilitation and humane punishment. Recall that modern prisons aspiring to reform wrongdoers, at least in principle, emerged in the United States in the late 18th and early 19th centuries.\(^{237}\) Until approximately the 1970s and 1980s, the level of harshness of its penal system was relatively comparable to other Western democracies. Scholars have offered a multitude of perspectives on the subsequent rise of mass incarceration in American society, such as institutionalised racism, penal populism, peculiar institutions, and political culture.\(^{238}\) While a comprehensive theorisation of mass incarceration lies beyond these pages, the United States’ exceptional regression demonstrates that the development of prisoners’ rights in Europe is hardly meaningless.

\(^{234}\) Van Zyl Smit and Appleton (n 15) 49 and 53.
\(^{235}\) As of 2023, the United States had the world’s sixth highest incarceration rate, behind El Salvador, Cuba, Rwanda, Turkmenistan, and American Samoa. ICPR (n 134).
\(^{236}\) Van Zyl Smit and Appleton (n 15) 94.
\(^{237}\) Rubin (n 47).
\(^{238}\) See generally Barkow (n 32); Reitz (n 32); M Tonry, ‘Explanations of American Punishment Policies’ (2009) 11 Punishment & Society 377; Vannier (n 4); Whitman (n 32).
The ECtHR’s willingness to engage in judicial review of lifelong imprisonment is manifest in contrast to the US Supreme Court’s immobilism in the face of draconian sentencing schemes. Its Justices declined to find that a single prison term amounted to ‘cruel and unusual punishment’ under the Eighth Amendment of the US Constitution between 1983 and 2010. Since then, the Court has not found any adult prison sentence excessive, although it has limited the scope of life without parole for juveniles without abolishing it altogether. Its decisions on juvenile justice have spurred a wave of state legislative reforms and state court rulings. At present, 28 states have fully abolished life without parole for juveniles. These ongoing reforms are impressive by modern US standards but narrow by international ones. Virtually all other countries worldwide bar juvenile life without parole, consistent with the United Nations (UN) Convention on the Rights of the Child, which the United States is essentially alone in refusing to ratify.

The sentencing principles of rehabilitation, proportionality, and dignity are still making headway in modern America, slowly buoying legislative and judicial reforms to improve conditions of incarceration and shorten sentences. As penal reform tends to occur incrementally, the American legal landscape might slowly converge with Europe and the rest of the West within a few generations. In 2023, a groundbreaking report documented the successful social re-entry of over one hundred juveniles and adults who had life without parole in California. Their sentences were modified in recent years in order to allow parole, which they obtained, either after a resentencing hearing or a sentence commutation by the Governor of California. At the

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242 Jouet (n 16).
244 Graham (n 240) 81.
246 Jouet (n 239).
national level, however, the ethos of American justice is presently captured by a 2021 US Supreme Court decision ratifying state practices under which certain juveniles are labelled irredeemable and fit for life without parole.248

Contrariwise, Vinter reasoned that sentencing authorities cannot make permanent judgments about defendants’ dangerousness or incapacity for rehabilitation. This rule is universal, as it is not individual- or crime-specific. Besides protecting juveniles and adults alike, the ECtHR rejects a dichotomy between violent and nonviolent offenders. The article previously described how the ECtHR did not singlehandedly institute these humanistic sentencing norms that reflect a longstanding historical evolution and prior reforms in diverse European countries. In comparison, modern US sentencing reform lacks universalism by focusing heavily on freeing sympathetic, nonviolent offenders, such as those convicted of petty infractions under the ‘War on Drugs.’ Contemporary American reformers often create a strict dichotomy between nonviolent and violent criminals, arguing that the former should be released whereas the latter are the ones who belong in prison.249 The lengthy or permanent incarceration of violent offenders commonly serves as a foil or bargaining chip to justify the liberation of nonviolent offenders. Similarly, juvenile sentencing reform has regularly pit sympathetic children against ‘irredeemable’ adults in the United States. This approach is unlikely to end mass incarceration, as approximately 58 percent of offenders in American state prisons are incarcerated for violent offenses.250 Absent a paradigm shift towards more universal prisoners’ rights, the abolition of irreducible life sentences in the United States may remain elusive.

Modern America’s exceptional punitiveness transcends its regional divides between ‘blue states’ and ‘red states.’251 The erosion of prisoners’ rights stretches far beyond Southern states like Louisiana, which had the nation’s highest incarceration rate at approximately 1,094 prisoners per 100,000 residents as of 2021. This is around four times the rate of Massachusetts, the state with the

248 Jones v Mississippi, 141 SCt 1307 (2021) (US).
lowest incarceration rate. But Massachusetts’ own incarceration rate is roughly twice as high as the rate of England and Wales, which is the highest in Western Europe.252

Whereas scores of US prisoners face irreducible life sentences, the number of British prisoners serving a whole life order was reportedly 66 in March 2023.253 This figure has increased from 41 in 2011, but has remained rather steady in recent years.254 In 2017, the year that Hutchinson was decided, 59 prisoners were serving whole life orders.255 These figures suggest that neither Vinter nor Hutchinson drastically changed a situation where irreducible life sentences were relatively rare both in the United Kingdom and other European nations.

The question of irreducible life sentences in the United Kingdom should not overshadow other punitive trends, especially how life sentences with the possibility of release are drastically more common there than in most European nations. For instance, 11 percent of United Kingdom prisoners are lifers, compared to 0.8 and 3.6 percent of French and German prisoners, respectively.256

Punitive trends in British society have attracted scholarly attention for decades. In a 1988 study, David Downes insightfully contrasted the soaring incarceration rate in post-war England and Wales with its sharp decline in the Netherlands.257 Since then Britain’s incarceration rate has surged even higher, whereas the Dutch rate has generally stayed low.258 Drawing upon Émile Durkheim, Downes suggested that the Netherlands had a ‘restitutive’ social model where ‘justice is designed to minimize disruption and restore the status quo ante with the least possible sanctions to ensure future compliance.’259 Conversely, Britain had a ‘repressive’ model where ‘the offence is defined as a threat to the social order which warrants the stigmatization and punishment of the offender, not only to ensure future compliance but also to reaffirm the inviolability of the rule transgressed.’260 Punitive trends in the United Kingdom nowadays often appear to be variations on this theme. Yet this article has captured another development. Under today’s repressive model, the

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253 United Kingdom Ministry of Justice (n 31).
254 Ibid.
255 Ibid.
256 Van Zyl Smit and Appleton (n 15) 93.
257 Downes (n 135).
258 ICPR (n 134).
259 Downes (n 135) 193.
260 Ibid.
perceived threat to British society is not simply the criminal who should be cast away from society, if need be with a whole life order. The threat to British society is also the ECtHR, because it purportedly protects the criminal preying on society.

There is no inherent reason why the expansion of prisoners’ rights came to be a major target of opposition to the ECtHR in British society, unlike in other Western European societies. On the one hand, scholars have observed that the negative perception of the ECtHR in a country can bear little relationship to its jurisprudence. Comparative research indicates that the United Kingdom has a much tenser relationship with the ECtHR than several countries that have been found in violation of the Convention at a far higher rate, such as Italy. In brief, ‘no correlation is visible between Strasbourg-friendly or hostile countries and the percentage of judgments in which the Court found at least one violation.’ On the other hand, this outcome seems consistent with the greater punitiveness of British criminal justice in comparison with Western European nations, which may facilitate a synergy between ‘tough-on-crime’ attitudes and anti-European or anti-ECtHR attitudes. Similar dynamics might gain traction in more European nations in the future if social actors choose to foment animosity towards the ECtHR by pointing to its protection of prisoners, who can easily be vilified if there is the political will to do so. This scenario is conceivable, as punitiveness is a wider trend in COE states, which experienced a 66 percent increase in life-sentenced prisoners from 2004 to 2014.

However, a historical and comparative perspective points to a gradual movement away from lifelong imprisonment in Europe. The prior comparison with the United States has underscored how Europe has made significant headway in this direction. Expanding the comparative analysis enables us to gauge the wider evolution of irreducible life sentences in the modern Western world.

New Zealand is another Western democracy that has gravitated towards punitiveness without normalising lifelong imprisonment. Its incarceration rate of 162 per 100,000 residents is high among Western democracies, such as 91 and 142 percent higher than Canada and Germany, respectively. Still, New Zealand stands nearly four times below the US incarceration rate. In 2020, New

261 Popelier, Lambrecht, and Lemmens (n 28) 16–17.
262 See generally Claire Hamilton, ‘Radical Right Populism and the Sociology of Punishment: Towards a Research Agenda’ (2022) 0(0) Punishment & Society 1.
264 ICPR (n 134).
Zealand meted out what was reportedly the first life without parole sentence in its history\(^{265}\) in the tragic attacks on Christchurch mosques, where the perpetrator was convicted of 51 murders and 40 attempted murders.\(^{266}\) ‘While life imprisonment without parole has only been imposed in one case, the use of life imprisonment more generally has remained consistent’ in New Zealand, whereas ‘the scope of other indefinite sentences and measures has expanded over time.’\(^{267}\) From 2010 until its repeal in 2022,\(^{268}\) New Zealand also had three-strikes legislation for habitual offenders, but it was drastically more moderate than US sentencing schemes bearing the same name.\(^{269}\) New Zealand has thus been converging more with Europe than with the United States.

Punitiveness has further led Australia’s incarceration rate to nearly match neighbouring New Zealand at 158 prisoners per 100,000 residents.\(^{270}\) Most Australian states and territories have life without parole and legal challenges there have encountered diverse obstacles, including defiance towards the UN Human Rights Committee’s calls to reform several indefinite detention schemes.\(^{271}\) But unlike in the United States, irreducible life sentences or extremely long periods of parole ineligibility are relatively uncommon in Australia,\(^{272}\) thereby evoking the situation in the United Kingdom.\(^{273}\) Moreover,

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\(^{266}\) R v Tarrant [2020] 3 NZLR 15 (NZ).

\(^{267}\) Anderson (n 265).


\(^{270}\) ICPR (n 134).


\(^{273}\) See n 253 and the accompanying text.
both *Vinter* and Britain’s whole-life-order scheme have attracted attention in Australia, where judges, litigators, and scholars have been debating whether to forbid irreducible life sentences.\(^{274}\) Recent reform efforts have faced setbacks in Australia, yet again demonstrating that the legitimacy of lifelong incarceration has become a chronic issue throughout the West.\(^{275}\)

As for Canada, it has converged far more with Europe than Australia, New Zealand, or, its neighbour, the United States.\(^{276}\) Canada’s incarceration rate – presently 85 prisoners per 100,000 residents – has hovered around those of European nations like France and Italy.\(^{277}\) Canadian courts have resisted political and legislative attempts to make sentencing significantly harsher, especially during the rule of Conservative Prime Minister Stephen Harper (2006–2015), who adopted a ‘tough-on-crime’ platform.\(^{278}\) Life without parole also does not exist under the Canadian Criminal Code, under which the longest sentence is life with a 25-year period of parole ineligibility for first-degree murder.\(^{279}\)

In 2022, the Supreme Court of Canada rendered a historic decision effectively barring irreducible life sentences as ‘cruel and unusual treatment or punishment’ under Section 12 of the Canadian Charter of Rights and Freedoms.\(^ {280}\) *R v Bissonnette* addressed a 2011 legislative scheme authorising *de facto* life without parole through consecutive periods of parole ineligibility for multiple homicides – a term of years that could exceed human life expectancy.\(^ {281}\) In a unanimous voice, Canada’s Justices found this punishment unconstitutional – a conclusion bolstered by their survey of international and comparative law, which cited *Vinter* among other authorities.\(^ {282}\) ‘A sentence of imprisonment for life without a realistic possibility of parole is intrinsically incompatible with human dignity’,\(^ {283}\) the Justices recognised. ‘Such a sentence

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\(^{275}\) See generally ibid; *Minogue v Victoria* [2018] HCA 27 (Aus); *Minogue v Victoria* [2019] HCA 31 (Aus).


\(^{277}\) ICPR (n 134).


\(^{279}\) Criminal Code (rsc, 1985, c C-46) § 745(a) (Can).

\(^ {280}\) *Bissonnette* (n 17) para 4.

\(^ {281}\) Ibid para 3.

\(^ {282}\) Ibid paras 98–108.

\(^ {283}\) Ibid para 8.
is degrading insofar as it negates, in advance and irreversibly, the penological objective of rehabilitation. This objective is intimately linked to human dignity in that it conveys the conviction that every individual is capable of repenting and re-entering society. The Supreme Court of Canada adopted a definition of dignity consistent with my analysis of the principle’s historical evolution: ‘Generally speaking, the concept of dignity evokes the idea that every person has intrinsic worth and is therefore entitled to respect [...]. This respect is owed to every individual, irrespective of their actions.’

Canada’s Justices rejected a zero-sum conception of justice when emphasising that protecting the dignity of prisoners is not tantamount to devaluing the lives of their victims. Several paragraphs of their ruling condemn the atrocities perpetrated by the defendant, Alexandre Bissonnette, a nativist who callously killed six people in a Quebec mosque.

Canadian criminal justice has at times proven more ambivalent towards global human rights norms. Diverging from Europe, the Supreme Court of Canada’s extradition rulings previously declined to approach the death penalty as an inherent human rights violation. Conditions of incarceration in Canada can equally resemble the violence and mismanagement oft-associated with US prisons and diverge from leading international standards, such as the European Prison Rules. However, Canada has now joined the ECtHR in rejecting lifelong incarceration schemes.

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284 Ibid.
285 See n 77 and the accompanying paragraph.
286 Bissonnette (n 17) para 59.
287 Ibid paras 1, 10–12, and 142–145.
290 Ricciardelli (n 33).
291 COE (n 79).
292 A turnaround in Canada cannot be excluded, as leading Conservative politicians have called for legislation limiting the Court’s authority in this area. See M Horwood, ‘Conservative MPs Call for Invoking of Notwithstanding Clause After Supreme Court Rules on Quebec City Shooter’ (Western Standard, 27 May 2022): <https://www.westernstandard.news/news/conservative-mps-call-for-invoking-of-notwithstanding-clause-after-supreme-court-rules-on-quebec-city/article_def3ef12-ddff-11ec-baef-f727b5f7b5b.html>.
Overall, the abolition of life without parole has made significant progress in the West. This finding reflects the wider restraint in the use of imprisonment in much of continental Europe and Canada, notably compared to the United States and, to a lesser extent, the United Kingdom, Australia, and New Zealand. The ECtHR has played a leading role in this trend, whereas the US Supreme Court seems to have lost credibility in the eyes of many Western jurists by eviscerating the American constitutional protection against ‘cruel and unusual punishment’ in an age of unparalleled mass incarceration. The Supreme Court of Canada was particularly explicit in stating that it would not follow its neighbour. The ECtHR has proven more influential, vindicating its understanding that ‘the [European] Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective.’

6 Retentionism by Another Name

This article has described how a key question regarding irreducible imprisonment in Europe is the willingness and capacity to resist the ECtHR. Yet, even if Vinter were implemented throughout Europe, it would not resolve a host of questions regarding long-term incarceration. This final section therefore raises several pressing issues that may lead retentionism to continue in the shadow of abolitionism.

In particular, how can one know that a life sentence is de facto irreducible? This is an intricate question in the field of criminal justice that is now intertwined with human rights jurisprudence. The Horion and Murray cases discussed above speak to this matter, but the problem appears wider than these decisions let on. That is because presumably only a fraction of prisoners will have their day in court before the ECtHR. Even a favourable decision can be fact-specific, as in these cases or many others, for that matter, meaning that its impact might be limited to the individual applicant and of little benefit to others facing de facto irreducible sentences.

In addition, diverse countries have explicitly sought to institute lifelong imprisonment through other names, especially the indefinite detention of

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293 ‘[T]he American approach differs from the one that exists under Canadian law, since that country applies the death penalty and has a narrower interpretation of the concept of cruel and unusual punishment’ (Bissonnette (n 17) para 107).

294 Murray (n 214) para 104.

295 See n 214, n 216, and the accompanying paragraphs.
persons deemed too dangerous for release after serving prison sentences for violent or sex crimes. This includes France’s divisive loi de rétention de sûreté (2008), which both the French Constitutional Court and ECtHR authorised on the ground that this was a ‘civil’ measure and not a ‘criminal’ punishment. The ECtHR had struck comparable German legislation in an earlier case, revealing its ambivalence towards these practices. At this stage, the trend suggests that the ECtHR may defer to the national trend enabling criminal courts to impose these allegedly non-punitive measures on persons labelled dangerously insane. A global survey of life imprisonment found that such indefinite detention schemes are ‘a difficult category to pin down’ and ‘hard to quantify.’

Scholarship has further neglected the unnerving predicament of lifers eligible for parole who decline to apply for it, primarily due to various forms of institutionalisation. Loïc Lechon documented multiple cases in France where lifers refused to cooperate with prospective release procedures because they could not envision life outside prison or because they suffered from mental disorders, if not both. Similarly, a group of researchers depicted a long-term French prisoner who begged the warden not to release him: ‘Madame la directrice, I do not want to leave [...] I have nothing left outside, nobody’s left to wait for me [...] here is where I have my bearings [...] you are my family.’

As the ECtHR lacks the capacity to oversee all aspects of criminal sentencing, more insidious or veiled practices may persist in the face of the Vinter jurisprudence. For irreducible life sentences to disappear altogether, including on the edges of the penal system that face less scrutiny, governments will need to muster the political will to do so.

296 Jouet (n 54) 81.
297 Conseil constitutionnel, 2008-562 DC, 21 February 2008 (Fr).
298 Berland v France 42875/10 (ECtHR, 3 September 2015) paras 40–47.
299 M v Germany 19359/04 (ECtHR, 17 December 2009) paras 124–137.
300 Jouet (n 54) 81; Van Zyl Smit and Appleton (n 15) 81.
301 Van Zyl Smit and Appleton (n 15) 84.
Conclusion

This article has dissected the intersection of two contrary historical movements. *Vinter* should be understood as a major step in the incremental evolution of prisoners’ rights since the Enlightenment. In contrast, *Hutchinson* should be understood as a concession to the rise of Euroscepticism and efforts to undermine the ECtHR.

The clash of these two historical movements has led the state of life without parole in modern Europe to paradoxically be abolitionism and retentionism. Crystallising a long-term evolution, the ECtHR abolished irreducible life sentences in its 2013 *Vinter* decision. Barely four years later, in *Hutchinson*, the Court incongruously authorised the same whole-life-order scheme that it had found unlawful in *Vinter*. The tension between both decisions is manifest. But *Hutchinson* did not overrule *Vinter*. Nor has the Court’s subsequent jurisprudence interpreted *Vinter* so narrowly as to make it a dead letter. To the contrary, it reaffirmed *Vinter’s* principles and barred irreducible life sentences in multiple countries. The key difference between these cases is that the respondent was not the United Kingdom – a country where ‘tough-on-crime’ and anti-ECtHR or anti-European attitudes have become intertwined. At a time when beleaguered European institutions face a host of nationalistic, sovereigntist, and illiberal movements, ECtHR Judges appeared prepared to make pragmatic concessions to the United Kingdom given its power and capacity to withdraw from the Court on the heels of Brexit. Short of this step, the United Kingdom has demonstrated the capacity to undermine the Court’s authority while remaining a member state.

Continental Europe is nonetheless the region where prisoners have acquired the most rights against endless incarceration. A comparison with other Western democracies – the United States, Canada, Australia, and New Zealand – demonstrated how European norms against life without parole and other draconian sentences are more than symbolic.

Whereas imprisonment may be an inherently harsh condition, the degree of harshness varies considerably across penal systems in ways that are relevant to prisoners. Indeed, dismissing all prison systems as harsh overshadows how some offer shorter and more humane sentences. This article corroborates prior findings suggesting that, to this day, ‘the human rights of prisoners are much more contested in the Anglo-American world than in Continental Europe.’

The same body of research suggests that, ‘[a]mong the European prison systems, the English and Welsh is unique in its total and obsessive adoption of the risk-management perspective [...] and a lack of solid prisoners’ rights.’

Prospects for penal reform are equally intertwined with the enduring question of discrimination, which exacerbates many people’s inability to identify with prisoners at a human level. Irrespective of incarceration rates or the abolition of life without parole, discrimination on the basis of race, ethnicity, and social class persists in innumerable Western democracies. This longstanding issue is compounded by the re-legitimation of far-right, nativist, and xenophobic political ideologies aiming to normalise discrimination. However, insofar as poor people and minorities tend to be disproportionately incarcerated in any society, they will continue to benefit from efforts to abolish the harshest punishments and develop humane, rehabilitative sentencing practices.

Research on the pitfalls of prison can still foster scepticism about the capacity to rehabilitate or reintegrate people by locking them up for years. Just as prisons commonly fail their rehabilitation mandate, harshening prison terms does not make society safer. Nevertheless, Western democracies are unlikely to abolish prisons in the future. Incarceration will plausibly remain commonplace in the name of public safety, deterrence, incapacitation, and retribution, particularly for murder and other violent crimes. In societies where prisons are widely deemed indispensable, if not a necessary evil, the prospect of release based on rehabilitation can serve as a counter-principle against endless incarceration. To be sure, a rehabilitative model alone cannot eliminate the capacity for government overreach or abuse. Yet modern America offers a cautionary tale of how a penal system that discounts rehabilitation as irrelevant can gravitate towards mercilessness. At their best, the ECtHR and other institutions, such as the Supreme Court of Canada, have instead exemplified how protecting prisoners’ rights is a binding obligation on governments that would otherwise be inclined to lock people up and throw away the key.

306 See generally Arbel (n 33); Bosworth (n 35); Gardner (n 35); Stanley and Mihaere (n 35); Terrio (n 35).
The predicament of prisoners will remain a fundamental question for years to come. At a time when the United States has been mired in mass incarceration for decades, its penal system can foster profound pessimism. The persistence of penal populism and emergence of prisoners’ rights as a nexus of anti-European sentiment can likewise cast doubt on the principle that even people guilty of grave crimes have inalienable human rights rooted in dignity. In these times, it may be *Vinter* and its progeny that give us the right to hope.

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