

# Life Imprisonment Without Possibility of Parole is Cruel and Unusual

## *Introduction*

Today, more prisoners are serving life terms than ever before. A whopping 230%<sup>1</sup> are serving life without parole (LWOP): in 1984 the number of life sentences was 34,000, when 2009 rolled around, it increased to 140,610 with the number of LWOP's at 41,095, out of a prison population of about 2.3 million. Automatic appeals are for capitol cases, paid for by the federal government. Specialized non-profit organizations such as the Innocence Project focus on DNA evidence, or those on DR (death row). Advocating for LWOP, the sentence permanently removes the serious offender, saving society, and providing a perceived milder alternative to the brutality of killing someone. But in reality it is a stage for the politician to appear as a knight in shining armor; being tough on crime, and a manipulating tool for the prosecutor who can offer LWOP instead of the death penalty in a plea offer<sup>2</sup>. Either choice is a guarantee to the man, woman or child that freedom will never be available.

## *Background*

Life without parole (LWOP) is most often a mandatory punishment which juries have no say and most likely, no knowledge of. This is in contrast to capital punishment which has methods and procedures in place to circumvent extinguishing a person. By the end of the progressive era<sup>3</sup> mandatory punishment was almost unheard of, as of 1970 state and federal sentencing was indeterminate<sup>4</sup> for all but a few crimes. By 1996 states and the federal government had some kind of determinate<sup>5</sup> sentencing laws "a sentencing process that has been drained of its humanity."<sup>6</sup> Ten states tried to pass mandatory capital punishment in response to *Furman v. Georgia*<sup>7</sup> but the Court said this violated the Eighth Amendment "[Mandatory capital punishment] treats all people convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."<sup>8</sup> Enters LWOP, that would not raise an Eight Amendment challenge, and could be applied to a wide variety of violent and non-violent offenses.

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<sup>1</sup> 1992-2008

<sup>2</sup> 96% of defendants accept a plea. U.S. Sentencing Commission Sourcebook of Federal Sentencing Statistics

<sup>3</sup> 1890-1913

<sup>4</sup> Indeterminate sentence: A sentence range imposed by a judge with the actual sentence to be served to be determined at a later time by an administrative body, e.g., a parole board.

<sup>5</sup> Determinate sentence: A sentence consisting of a specific number of months or years the offender must serve in prison before being released.

<sup>6</sup> (Life Without Parole; America's New Death Penalty, 2012)

<sup>7</sup> (*Furman v. Georgia*, 1972)

<sup>8</sup> (Life Without Parole; America's New Death Penalty, 2012)

*Life imprisonment without possibility of parole is cruel and unusual: The United States must give a person the chance for rehabilitation by reopening the sentencing portion of a conviction.*

The person who finds themselves sentenced to LWOP, is forever without a light at the end of the tunnel; no incentive for self-rehabilitation, no institutional offering of rehabilitation, educational classes are not made available to LWOP's, and children lose parents<sup>9</sup>. Human beings are forever banished from society, dying alone in prison, and making LWOP the new death penalty.

Public opinion still appears to support capital punishment for first-degree murder but the trend is softening as the alternative of LWOP widens its exposure to the public. People fear the hypothetical future dangerousness of the perp/person and forgo forgiveness for retribution "an eye for an eye." But LWOP is not just imposed for a murder sentence. For example, Three-Strike Laws require mandatory sentences of LWOP and those crimes can be arson, armed robbery, kidnapping, burglary, carjacking, drug trafficking, embezzlement, bribery, leading organized crime and others.

A life sentence is cruel in itself, but when imposed without similar safeguard procedures such as those in a capital sentencing it is inhumane. A second look at the sentence of LWOP, and giving opportunity for parole would be a meaningful change in the American system of punishment.

#### *Life in prison without the possibility of parole (LWOP)*

The American Law Institute called for the elimination of life without parole except as an alternative to the death penalty.<sup>10</sup> Canada is a country where persons with a life sentence may be considered for parole after serving 10 to 25 years, but the United States remains a minority in the sentencing practice of LWOP, in addition the U.S. has the largest prison population<sup>11</sup> "American prison stays are on average much longer than in the rest of the world"<sup>12</sup> No person should spend their natural life in prison; no denial of release should be final, human compassion and logic demand that we all are capable of rehabilitation. Except for the most heinous of crimes, we should all have the chance of not being deprived of the hope of a future.

Retribution, incapacitation and deterrence was the goal of twenty-four states and Federal government when habitual offender laws were enacted, AKA Three-Strikes laws. The public was lead to believe harsh sentences would protect them. But now at an alarming monetary cost

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<sup>9</sup> In 2010, 2.7 million children had a parent incarcerated

<sup>10</sup> The American Law Institute (2009). *Model Penal Code: Sentencing Discussion Draft 2 No. 2*. Philadelphia: The American Law Institute.

<sup>11</sup> Bureau of Justice Statistics, Correctional Population in the United States, 2010 (Dec. 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>;

<sup>12</sup> *Life Without Parole; America's New Death Penalty*. (2012). New York: New York University Press.  
Soo-Ryun Kwon, A. S. (2012, May). *Cruel and Unusual*. Retrieved October 06, 2012, from University of San Francisco: [http://www.usfca.edu/law/clgj/criminalsentencing\\_pr/](http://www.usfca.edu/law/clgj/criminalsentencing_pr/)

of more than \$60 billion dollars a year (an average of \$45,000 per inmate), and the estimated costs of approximately \$1 million to house a prisoner from age forty to age seventy<sup>13</sup>, more studies are coming forward that criticize sentencing practices (among other prison related practices<sup>14</sup>) Recidivism has been shown to decline with advanced age such as those over 50 had a 9.5% rate of recidivism<sup>15</sup>. As an example “Michigan, 175 persons convicted of murder were paroled between 1937 and 1961; none committed another homicide and only four were returned to prison for other offense”<sup>16</sup> compellation from various sources including statistics from the U.S. Dept. of Justice (1994 re-arrests) conclude that lifers who were given parole were no more likely to be rearrested for a violent offence. This is important information to provide to the public in hopes of reducing fear and enlisting support towards eliminating life without parole.

### *Cruel and Unusual*

The United Nations Human Rights, issued the International Covenant on Civil and Political Rights<sup>17</sup>. The United States did sign in agreement though included may reservations: articles that would not be adopted. One of the articles that was agreed to but not practiced “shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation” making the U.S. in violation of international law. The practice of LWOP is retribution<sup>18</sup> not rehabilitation, and even Mexico’s Supreme Court ruled LWOP is unconstitutional because it amounted to cruel and unusual punishment.

Harmeline v. Michigan<sup>19</sup> said that mandatory penalties may be cruel but are not unusual in the constitutional sense “having been employed in various forms throughout our Nation’s history.” I respond with common sense that because something has been repeated does not make it an acceptable response and thereby should not lose the meaning unusual. LWOP is unusual when compared to the requirements and safeguards of the death penalty in place before someone can

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<sup>13</sup> Mauer Marc, K. S. (2004, May). *The Meaning of "Life": Long Prison Sentences in Context*. Retrieved Nov 2012, from The Sentencing Project: [http://www.sentencingproject.org/doc/publications/inc\\_meaningoflife.pdf](http://www.sentencingproject.org/doc/publications/inc_meaningoflife.pdf)

<sup>14</sup> It is not the scope of this paper to discuss other major influences towards lengthy sentences, but for informational consideration; three major private prison companies spent \$45 million on campaign donations and lobbyists to push legislation at the state and federal level; CCPOA, California correctional officers union in 2008 contributed one million dollars to defeat proposition 5.

<sup>15</sup> (U.S. Sentencing Commission, 2004)

<sup>16</sup> (Mauer Marc, 2004)

<sup>17</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. “Article 15 of the treaty declares the right of an offender to benefit when a change of law will lighten his or her sentence. The United States is the only one of 167 signatories to the treaty to place a reservation stating that this article would not be applied.” The U.S. also reserved the right to treat a juvenile as an adult and apply LWOP. Over half of the countries’ maximum sentence for a juvenile is 25 years or less, the United States remains the only country to sentence children under 18 to life without parole.

<sup>18</sup> Punishment that is considered to be morally right and fully deserved.

<sup>19</sup> (Harmelin v. Michigan, 1991)

be put to death for a crime, and unusual when the U.S. is compared to the world as being a minority in sentencing practices.

The Court in *Furman v. Georgia*<sup>20</sup> wrote of the death penalty “It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally in its absolute renunciation of all that is embodied in our concept of humanity.” I see little difference in this train of thought, handing down a sentence of LWOP also rejects rehabilitation. LWOP for juveniles<sup>21</sup> involved in nonhomicide crimes violated the proportionality principle of the Eighth Amendment according to *Graham v. Florida*<sup>22</sup>. Justice Kennedy’s majority opinion said LWOP was cruel, taking away all hope “It deprived the convict of the most basic liberties without giving hope of resoration. Except perhaps by executive clemency-the remote possibility of which doesnot mitigate the harshness of the sentence.”

#### *Examples of re-opening the sentencing portion of a conviction*

##### The Senior Convict

None too often are jurisdictions issuing release to the geriatric population though 15 states and the District of Columbia have provisions for their release. The Human Rights Watch obtained information that in 2006, only 17.4 percent of those released at age 55 returned to prison<sup>23</sup> there is no justification, except in the case of extremely serious crimes, that as prisoners grow old and/or infirmed, that imprisonment should continue. An option to the continued incarceration of the elderly and/or infirmed could be monitored parole supervision.

##### Violating Constitutional Rights

Violating the Due Process Clause (the Fifth and Fourteen Amendments contain a Due Process Clause) can be issue to seek resentencing. Lashawn Wilson<sup>24</sup> was able to have her sentence vacated and remanded for resentencing. The Supreme Court held that making assumptions about a defendant’s criminal record during sentencing also violated the Due Process Clause.<sup>25</sup> Both these cases reaffirmed *Townsend v. Burke*<sup>26</sup> which held that “defendants have “a due process right to be sentenced upon information which is not false...”

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<sup>20</sup> (*Furman v. Georgia*, 1972)

<sup>21</sup> It would still be OK for a jury to sentence juvenile to life in prison without the possibility of parole, as long as the jury has the option not to issue that sentence.

<sup>22</sup> (*Graham v. Florida*, 2010)

<sup>23</sup> Freedom of Information Act, New York Dept. of Correction. 31.2% of offenders released in 2006 returned to prison within three years for parole violations.

<sup>24</sup> (*United States of America v. Wilson*, 2010)

<sup>25</sup> (*United States v. Tucker*, 1972).

<sup>26</sup> (*Townsend v. Burke*, 1948)

### New Evidence of Innocence

15 years after sentencing, doubt was cast on the trial of *Henley v. State*<sup>27</sup> with new evidence. Forensic evidence emerged and Henley's conviction for attempted murder and the sentence was vacated. A showing of clear error that gives firm conviction that a mistake has been made.

### Change in Procedural Law

A change in procedural law can permit resentencing of a defendant. United States Code §3582(c) (2) "permits a court to resentence a defendant who was originally sentenced on the basis of a guideline which has subsequently been lowered and made retroactive by the Sentencing Commission." In 1993, A. Hicks<sup>28</sup> was sentenced to 420 months for crack and drug trafficking. Under the new amendment, Hicks was able to apply and did receive a lesser sentence. Though Hicks original sentence was not LWOP, others with similar charges and convictions have received LWOP.

### Illegal Sentence

Timothy Ragland<sup>29</sup> was sentenced in 1986 to LWOP for first degree murder. The crime was committed at the age of 17 years old. In 2012, Ragland sought post conviction release and the court remanded the case for further proceeding on the "illegal sentence issue." There is a three year limitation period for bringing a post conviction relief action, but was not prohibited because it was a challenge to an illegal sentence.

### *California*

The results from California's election of November 2012, may give relief to about 3,000 people serving life sentences. At the discretion of a judge, determination will be to whether the offender is a risk to public safety. The Lifer is eligible to petition for reduced sentence if their 3<sup>rd</sup> strike<sup>30</sup> was classified as "non-violent"

California does have a parole board, whom are supposed to determine release but in 1988, voters passed a Proposition that required the Governor to personally approve each and every parole decision. Due to a variety of reasons such as politics, law enforcement unions and victim's rights advocate, only about five a year, out of 30,000 lifers, gets parole.

### *Concluding*

Reopening the sentencing portion of a conviction for those with LWOP and giving opportunity for future parole would address indiscriminate punishment and motivate offenders to seek

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<sup>27</sup> (*Henley v. State*, 2008)

<sup>28</sup> (*United States v. Hicks*, 2007)

<sup>29</sup> (*State of Iowa v. Ragland*, 2012)

<sup>30</sup> In 1994, California passed the Three Strikes Law. it was one of the harshest sentencing schemes in the country and a law that would send people convicted of even nonviolent offenses to prison for life.

successful rehabilitation, along with reducing the use of our tax<sup>31</sup> money towards housing inmates. Hass & Fillion<sup>32</sup> opt for parole after serving 25 years. Citing a practical approach that embraces public safety and possible relief to a prisoner, whereby granting parole through the means of a parole board would demonstrate that no-one is indispensable. The Massachusetts Parole Board at the request of the Criminal Justice Policy Coalition<sup>33</sup> reported that from 2000 through 2006, 161 second-degree lifers were released under supervision.

- 97 not returned to prison for any reason 60.2%
- 19 returned to prison but re-released without a parole revocation 11.8%
- 23 returned to formal custody for technical reasons 14.3%
- 6 returned to formal custody for new convictions 3.7%
- 16 returned to formal custody for new arrests 16 9.9%

Another interesting statistic was that while there was an increase in LWOP sentences from 1977 to 2009, the murder rate remained relatively consistent.<sup>34</sup>

Serving de facto<sup>35</sup> life no longer seems extreme thereby no longer unusual. In 1995 Leandro Andrade<sup>36</sup> stole five video tapes from K-Mart. Prosecution charged Andrade with two counts petty theft with prior conviction thereby sentencing him to a mandatory 25 years to life. Again, an extreme response to a minor act is now interpreted as being the norm. We have to ask ourselves, what is not cruel and unusual about allowing life sentences, about incapacitating 41,000 (and growing) people. "...the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance."<sup>37</sup>

Because of the infrequent use of LWOP around the world, and that LWOP in the United States is really only a modern sentence method (in frequency) with disparities in sentence response, and

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<sup>31</sup> In a report published by The Pew Center on the States in March 2009, corrections "was the fastest expanding segment of state budgets, and over the past two decades its growth as a share of state expenditures has been second only to Medicaid. State corrections costs now top \$50 billion annually and consume one in every 15 discretionary dollars."

<sup>32</sup> (Haas & Fillion, 2010)

<sup>33</sup> *A Study of Parole Board Decisions for Lifers – 2009*. Lifers' Group, Inc., April 2010, p.4. A copy may be obtained from the Lifers' Group Inc., P.O. Box 269, No. Quincy, MA 02171.

<sup>34</sup> The over five-fold increase in the number of prisoners serving LWOP in Massachusetts from 1977 to 2009 cannot be accounted for by a concomitant increase in the murder rate. Rather, the murder rate in Massachusetts decreased slightly from 1977 (.003% of the population of 5,782,000) to 2008 (.002% of the population of 6,449,755). In addition, the murder rate per population remained relatively consistent (.002%) from 1999 to 2008. Yet, the number of lifers serving LWOP increased 37% (683 to 938) in that period, while the rate of lifers serving second-degree sentences, i.e. with a parole possibility after fifteen years, hardly increased at all (850 to 868). What does appear to be occurring is that, without an opportunity for parole, the number of lifers serving LWOP entering the prison system is greatly outpacing the number dying in prison." (Haas & Fillion, 2010)

<sup>35</sup> In law, it often means "in practice but not necessarily ordained by law" or "in practice or actuality, but not officially established." Wikipedia

<sup>36</sup> (Lockyer v. Andrade, 2003)

<sup>37</sup> (In re Estrada, 1965)

that LWOP is issued without the similar safeguards as the death penalty, and the inhumanity of banishing any woman, man or child from society: forever, and the unspoken collateral damage to loved-one's and the children of these mothers, fathers, sons and daughters. For is not the criminal, inmate, con, or offender another whom someone at night is praying for, hoping they may return home someday. Reopening the sentencing portion of a conviction and giving opportunity for parole, will unite families and give hope, renew life and evolve humanitarianism.

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