UNIVERSITÀ DEGLI STUDI DI MILANO

DIPARTIMENTO DI STUDI INTERNAZIONALI, GIURIDICI E STORICO-POLITICI

‘REOPEN THE QUESTION’. DEATH PENALTY AND CONSTITUTIONALISM

prof. Davide Galliani, University of Milan, Italy

mail: davide.galliani@unimi.it

web site: www.lifeimprisonment.eu

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Taking (Universal) Constitutionalism Seriously: The (Worldwide) Repudiation of Death Penalty *and* Life Imprisonment

A QUANTATIVE APPROACH

Execution Update

As of April 1, 2015

Total number of executions since the 1976 reinstatement of capital punishment:

1404

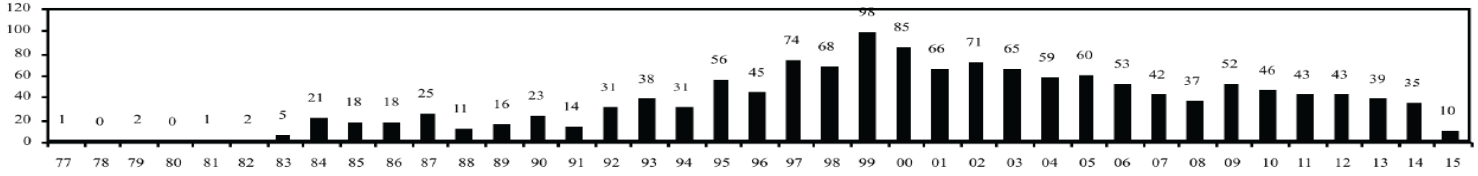


Figure 3. Expansion of Life Sentences, 1984-2012

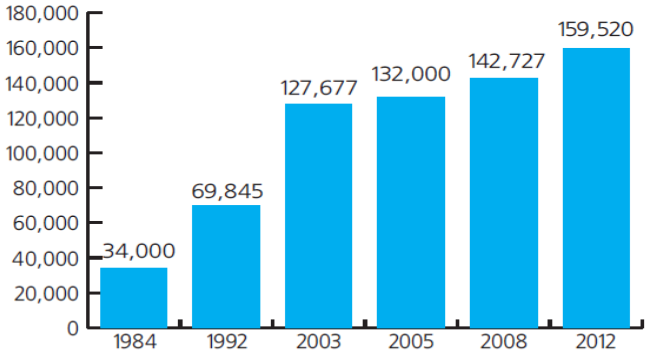
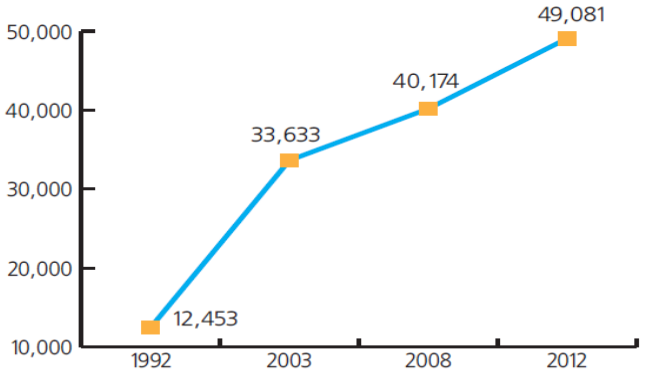


Figure 4. The Rise in Life without Parole Sentences



STARTING POINT

"La storia del penale può essere pensata come la storia di una lunga fuoriuscita dalla VENDETTA"* *('The History of Criminal Law is the History of the Escape from Revenge')*

"La lotta contro la teologia della VENDETTA è assolutamente contemporanea al diritto"**

('The Fight Against Revenge is Absolutely Contemporary in the Law Field')

*** M. SBRICCOLI**, *Giustizia criminale*, in *Lo Stato moderno in Europa. Istituzioni e diritto*, a cura di M. Fioravanti, Laterza, Roma-Bari, 2002, p. 164, ora in Id., *Storia del diritto penale e della giustizia*. Scritti editi e inediti (1972-2007), Tomo I, Giuffrè, Milano, 2009, pp. 3 ss.
**** P. RICOEUR**, *Il diritto di punire* (1958), in Id., *Il diritto di punire*. Testi di Paul Ricoeur, ed. L. Alici, Morcelliana, Brescia, 2012, p. 45.

A QUESTION OF ‘MENTALITY’ (1) (AURORA, COLO., U.S.)

“Please, no more death.

He will be punished.

He will be punished severely and he will be punished for the rest of his life”.

Tamara Brady, defense lawyer

A QUESTION OF ‘MENTALITY’ (2) (BOSTON, MASS., U.S.)

"Nothing is ever going to make those
who were injured whole.
My heart goes out to the families here,
but **I don't support the death penalty.**
I think he should spend his life in jail,
no possibility of parole.
He should die in prison”.

Elizabeth Warren, D-Mass.

Supermax Federal Prison, Florence, Colorado, US

This picture was shown to the Jurors. Why? To support Life Imprisonment Without Parole!

A Law Question (U.S. Supreme Court)

- *Six "Easy" Pieces*. Does the Death Penalty can be:

1) completely **DISCRETIONARY**? **NO** (5 vs 4)
Furman v. Georgia, 408 U.S. 238 (1972)

2) completely **MANDATORY**? **NO** (5 vs 4)
Robert v. Louisiana, 428 U.S. 326 (1976)

JURORS / PARLIAMENT

3) provided for, as only penalty, the offence of **RAPE** (stupro)? **NO**
Coker v. Georgia, 433 U.S. 584 (1977) (6 vs 3, versus adults) and
Kennedy v. Lousiana, 554 U.S. 407 (2008) (5 vs 4, versus minors of 12)

4) provided for, as only penalty, the offence of **ROBBER** (rapina)? **NO** (5 vs 4)
Enmund v. Florida, 458 U.S. 782 (1982)

OFFENCES

5) provided for **MINORS**? **NO** (5 vs 4)
Thompson v. Oklahoma, 487 U.S. 815 (1998) (16 years old) and
Roper v. Simmons, 543 U.S. 551 (2005) (18 years old)

6) provided for **LIMITED MENTAL CAPACITY** Human Beings (ritardati mentali)? **NO** (5 vs 4)
Atkins v. Virginia, 536 U.S. 304 (2002)

OFFENDERS

About the Execution Method: Firing Squad, Electrocution

- The **Execution Method**. The first two historical cases. Are not unconstitutional:

1) The **FIRING SQUAD**: **(unanimity)**
Wilkerson v. Utah, 99 U.S. 130 (1878): VIII am. protects from **unnecessary cruel punishment** (terror, pain, disgrace; VIII am. was inspired by 'Commentary on the Laws of England' by Blackstone (1765): emboweled alive, beheaded, and quartered).

2) The **ELECTROCUTION**: **(unanimity)**
In Re Kemmler, 136 U.S. 436 (1890): Wilkerson Standard (valid for National Government, only in 1962 the Supreme Court extends it to States thanks to Robinson v. California, 370 U.S. (1962) (lingering death, something inhuman and barbarous, more than the extinguishing of life) + Due Process Clause (XIV am.): no violation

IMPORTANT REMARKS:

1) If you start from quartering, It is obvious that firing squad is not cruel! The VIII am. is identical to Bill of Rights but … !!!

2) The Electrocution, in 1890, was an 'innovative' execution method itself and with respect of (the most frequent) hanging. Indeed, the Electrocution has been used, for the first time, by the State of New York (August 6, 1980) precisely versus Kemmler, after the Supreme Court decision. This new method was presented by the Governor as more human than hanging. Not only. The Electrocution, with the exception of the Philippines, was a method used, worldwide, by only one States: United States of America (one of the first *Old Sparkling* was created by Thomas Edison).

About the Execution Method: An Unbelievable Case

- The **execution method**. The unbelievable third case:

3) Lousiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947): **(5 vs 4)**

- Louisiana. A black guy of 17, Francis, was sentenced to death for homicide committed when he was 15.
- May 3, 1947. The execution was interrupted. The Old Sparkling, due to mechanical failure, did not work (Francis was already seated and bounded). The execution team dropped the lever but the electric current did not pass.
- May 9, 1947: the new execution date. Francis appealed to Supreme Court.
- Three complaints: VIII am., V am. (Double Jeopardy Clause, ne bis in idem), XIV am. (Due Process Clause, equal protection)
- Defense (original) strategy. The application to the States of VIII am. (and V am.) through the XIV am.
- The Supreme Court reasoning. First: "*Accidents happen for which no man is to blame*" (not a good start!). Second: keep separate the amendments (not a good start!). Third:

- V am: no new process, no new penalty, no violation
- VIII am.: reaffirmation of standard Wilkerson-Kemmler: *unnecessary pain*, *wanton infliction of pain*
- XIV am.: 'Laws cannot prevent accidents, nor can a law equally protect all against them'

- The Four Dissenting Judges. If two attempts are not unconstitutional, what we will say with respect to three, four, five?

About the Execution Method: Lethal Injection

- The last case before Glossip

4) The **LETHAL INJECTION**: (7 vs 2)

Baze v. Rees 553 U.S. 35 (2008):

The Supreme Court (substantially) reaffirms Wilkerson and Kemmler:

"*To constitute cruel and unusual punishment, an execution method must present a "substantial" or "objectively intolerable" risk of serious harm. A State's refusal to adopt proffered alternative procedures may violate the Eighth Amendment only where the alternative procedure is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain*".

"*Because some risk of pain is inherent in even the most humane execution method, if only from the prospect of error in following the required procedure, the Constitution does not demand the avoidance of all risk of pain*".

Supreme Court refers to Francis. In the past, an 'isolated mishap alone' (!) was not sufficient to find a violation of VIII am. "*because such an event, while regrettable, does not suggest cruelty or a substantial risk of serious harm*".

About the Execution Method: Lethal Injection

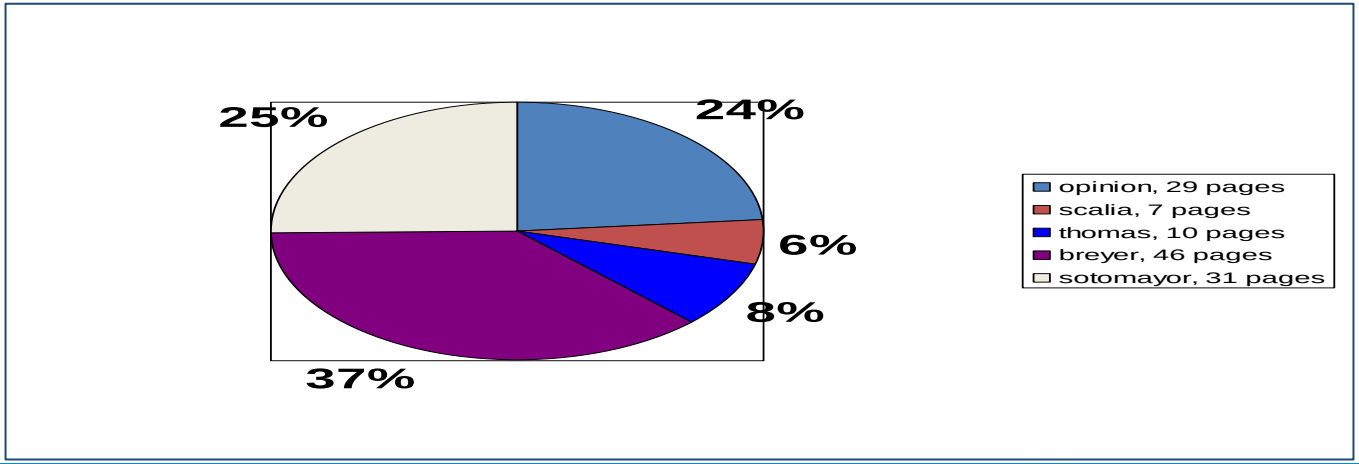
- Glossip v. Gross case.

5) The **LETHAL INJECTION and 'reopen the question'**:

Glossip v. Gross, 576 U.S. _ (2015) (5 vs 4)

After Clayton Lockett case (43 minutes from the first sedative to the declaration of death!), Oklahoma changes the quantitative of Mizadolam, from 100 mg to 500 mg.
Without considering the Glossip (probable) innocence, he disputes the 'ceiling effect'.

(5 vs 4, 123 pages total): US Supreme Court rules against Glossip (now, at Dec. 3, 2015, his execution is suspended).



About Scalia vs Breyer Dispute

An **Epic Dispute**: Scalia vs Breyer. Who win? No one! Who lost? The Constitutionalism!

JUSTICE BREYER:

'I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution (…). The circumstances and evidence of the death penalty's application have changed radically since then (since Gregg and others cases of 1976 after Furman). Given those changes, I believe that it is now time to **reopen the question**".

Yes, of course! The point is: HOW?

'Classic arguments':

- CRUEL: LACK OF RELIABILITY: innocent people executed, death penalty wrongly imposed, exonerated
- CRUEL: ARBITRARINESS: as being struck by lightning (Potter Stewart, *Furman*)

'New arguments':

- CRUEL: **EXCESSIVE DELAYS** (in 2014: 35 executions, on average 18 years after initially sentence; in 1969, the average was 2 years; now: 3,000 inmates on death row: 50% more than 15 years):
  - **DEHUMANIZING CONDITION** (solitary confinement: 22/24 hours; Breyer quotes **ECHR, *Soering* 1989**)
  - **UNDERMINES PENOLOGICAL RATIONALE** (in any case, for Breyer, **also LIWP incapacitates**, **also LIWP means dying behind bars**, **also LIWP serves retribution**)
- UNUSUAL: decline in use of Death Penalty, **public opinion is against Death Penalty when exists LIWP**

About Scalia vs Breyer Dispute

JUSTICE SCALIA:

- CRUEL as UNRELIABLE? Pressure on police, prosecutors and jurors increase the risk of wrongful convictions not only in the capital cases. Why?

  'The same pressure would exist, and the same risk of wrongful convictions, if horrendous death-penalty cases were converted into equally horrendous life-without-parole cases. The reality is that any innocent defendant is infinitely better off appealing a death sentence than a sentence of life imprisonment (…). The capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges), **while the lifer languishes unnoticed behind bars**'.

- CRUEL: long period on death row and undermining penological justifications?

  The first issue is a *nonsense*, for Scalia:

  "Life Without Parole is an even ***lengthier period*** than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing death penalty".

  About the second issue, If Breyer insists that the major alternative to death penalty, names life in prison without parole, also incapacitates, for Scalia this argument "apparently forget that one of the plaintiffs in this very case was **already in prison** when he committed the murder that landed on death row".

  On retribution, Scalia says:

  "My goodness. If he (Breyer) thinks the death penalty not much more harsh (and hence not much more retributive), why is he so keen to get rid of it? With all due respect, whether the death penalty and life imprisonment constitute more or less equivalent retribution is a **question far above the judiciary's pay grade** (…). I would not presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough".

U.S. Supreme Court and Life Imprisonment

In reference to VIII am., U.S. Supreme Court has always used **two different standards**, one for Death Penalty, and one for other penalties (cause '**Death is different**'), even if the starting point was the same, namely **principle of proportionality** between offences and sentences (opened due to *Weems v. United States*, 217 U.S. 349(1910): 15 years of 'cadena temporal'-hard labors, offence was fake of public registers).

Starting from principle of proportionality, two different standards :

1) **CAPITAL CASES**: the Supreme Court uses "**EVOLVING STANDARD OF DECENCY**" to limit (in some cases) Death Penalty; however, evolving standard of decency was born in two non-capital cases (*Weems* and especially *Trop v. Dulles*, 365 U.S. 86(1958): expatriation was cruel and unusual).

   First fundamental passage in *Trop*: "**The basic concept underlying the Eight Amendment (…) is nothing less than the dignity of man**" (356 U.S. at 100).

   Second fundamental passage in *Trop*: Supreme Court judges expatriation cruel and unusual without considering the seriousness of the crime: 'An expatriate is deprived of his 'right to have rights''.

   (*) Some Authors underline the strong link between evolving standard of decency and XIV am. (Due Process Clause): for instance, "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" (Snyder v. Mass., 291 U.S. 97 (1934, Cardozo).

U.S. Supreme Court and Life Imprisonment

The 'evolving standards of decency that mark the progress of a maturing society' was used by Supreme Court through two inquires:

- '**objective indicia**': number and trend of State Laws and Jury decisions (where, number) to evaluate the existence of a contrary 'national consensus';
- **scope of penalties**, taking into account previous case law and interpretation of VIII am. (text, history, meaning, scope).

By this way, the standard has been used to restrict the use of Death Penalty, in articular (see previous list 'easy six pieces'):

- **with respect to offence**: *Gregg* (Death Penalty was GROSSLY DISPROPORTIONATE AND EXECESSIVE), *Enmund* (principle of equality), and *Kennedy* (Death Penalty only for 'worse crimes')
- **with respect to offender**: *Atkins* (but the problem remains for mental retardation; IQ under 70 is an index, even if the choice is of State legislatures), *Roper* (Supreme Court counts the States, underlines the trend, refer to international opinion, and then judges; minors, as limited mental capacity persons, have lower criminal guiltiness-culpability; adds, the problem of error due to false admissions and the hypothetical problematic relation with lawyer).

U.S. Supreme Court and Life Imprisonment

2) **NON-CAPITAL CASES**: Supreme Court uses **NARROW INTERPRETATION** of the principle of proportionality; Supreme Court does not use the evolving standard of decency.

- ✓ The question was born due to *Rummel v. Estelle*, 445 U.S. 263 (1980):
  Texas: Mandatory Life Imprisonment (with Parole) thanks to *three strike law* for minor felonies (first: theft of 120 USD; second: fraudulent use of credit card for 80 USD; third: uncovered check of 28 USD).
  In the view of the Supreme Court, this law does not violate the principle of proportionality (the choice belongs to the States).

- ✓ The same thing in *Hutto v. Davis*, 454 U.S. 370 (1982): 40 years for possession of marijuana with the intention to distribute it and actual distribution.

- ✓ The **ONLY NON-CAPITAL CASE** in which the Supreme Court declared a violation of the VIII am. was *Solem v. Helm*,463 U.S. 277 (1983): Life Imprisonment Without Parole for seven non-violent offences (all uncovered check) contrasts with the principle of proportionality. The length of the sentence is not proportional to the offences. The Supreme Court uses three criteria:
  - proportionality between (the gravity of the) offence and (the hardness of the) penalty
  - comparative 'internal' approach-other offences in the same State
  - comparative 'external' approach-other States

U.S. Supreme Court and Life Imprisonment

In any case, Solem was an **exception**. The rule was: 8 am. does not work with respect to non-capital cases. Some examples:

- *Harmelin v. Michigan*, 501 U.S. 957 (1991) : mandatory LIWP for possession of 672 kg cocaine (Scalia, Renquist: proportionality only for capital cases; Kennedy, O'Connor, narrow interpretation, means grossly disproportionate)

- *Lockyer v. Andrade*, 538 U.S. 63 (2003) : 25 years to life: three previous convictions plus theft of videotape (150 USD)

- *Ewing v. California*, 538 U.S. 11 (2003) : 4 previous convictions plus theft for of 1200 USD: 25 years to life (defer to State legislature)

U.S. LIFE IMPRISONMENT: A NEW ERA!

- A **NEW ERA**: GRAHAM V. FLORIDA, 560 U.S. _ (2010): (6 vs 3)

  Graham (his parents were cocaine addicted) at 9 smoke and drink, at 13 smoke marijuana. At 16 he was an accomplice of rubbery. Plea agreement: probation without judge on culpability. After six months, another rubbery cause the revocation of probation. Penalty: Life Imprisonment (for the first rubbery).

  Judge says: '**there is nothing that we can do for you**'.

  Note: Florida has abolished Parole, the only chance is executive clemency!

  In reference to Grahman, there are three connected questions:

✓ non-capital cases, as Harmelin, Ewing, etc.
✓ nature of the offence, non-homicide, as Kennedy
✓ class of the offender, minors, as Roper

- **Revolutionary decisions**: (6 vs 3)

  EVOLVING STANDARDS OF DECENCY prohibit Life Imprisonment Without Parole for juvenile non-homicide crimes!

  So: *Death is different and Died in Prison, in some cases, is different!*

U.S. LIFE IMPRISONMENT: A NEW ERA!

1. **Objective indicia of society's standard**: 6 States NO LIWP for minors, 7 States YES LIWP for minors but only in homicide cases; 37 States, and District of Colombia, YES LIWP for minors in any cases. This first step is not sufficient, so:

   sentencing practice: consensus against: only 129 minors with LIWP for non-homicide crimes (of which 77 in Florida and 52 in other 10 States); therefore, 26 States do not impose, even if it is allow, LIWP for minors in non-homicide cases.

2. **Scope of the penalties**, **8 am**.: as Roper: minors have lesser-lower culpability

3. ADDITIONAL SUPPORT:

"Additional support for the Court's conclusion lies in the fact that the sentencing practices at issue has been rejected the **world over**: **the United States is the only Nation that impose this type of sentence**. While the judgments of other nations and the international community are not dispositive as to the meaning of the 8 am., the Court has looked abroad to support its *independent* conclusion that a particular punishment is cruel and unusual".

Note: Convention on the Rights of the Child, 1989, prohibits LIWP for minors: worldwide, only two States have not ratify the Convention: Somalia and United States of America.

U.S. LIFE IMPRISONMENT: A NEW ERA!

Some passages of Graham:

- "The 8 am. does not foreclose the possibility that persons convicted of no homicide crimes committed before adulthood will remain behind bars for life. It does forbid State from making the judgment at the **outset** that those offenders never will be fit to reenter society" (Opinion of the Court, B, p. 24)

  (the word 'outset' is fundamental and is previous Vinter of the ECHR)

- "The State's Amici stress that no international legal agreement that is binding on the US prohibits life without parole for juvenile offenders and thus urge us to ignore the international consensus (…). These arguments miss the mark. **The question before us is not whether international law prohibits the US from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual** (…). The debate between petitioner's and respondent's Amici over whether there is a binding jus cogens norm against this sentencing practice is likewise of no importance (…). The Court has treated the laws and practices of other nations and international agreements as relevant to the 8 am. Not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with **basic principles of decency** demonstrates that the Court's rationale has respected reasoning to support it" (Op. of the Court, D, p. 31)

U.S. LIFE IMPRISONMENT: A NEW ERA!

- The second case: Miller v. Alabama, 576 U.S. _ (2012): (5 vs. 4)

✓ two minors (14 years old), convicted of murder, mandatory LIWP

✓ the case is very different compared to Graham, but "its (of Graham) reasoning implicates any life without parole sentence for a juvenile, even as its categorical bar relates only to no homicide offenses".

✓ Why? LIWP "**share some characteristics with death sentences that are shared by no other sentences**" (the same in Graham, p. 19)

- Note:

"The State does not execute the offender sentenced to life without parole, but **the sentence alters the offender's life by a forfeiture that is irrevocable**. It deprives the convict of the most basic liberties without giving **hope** except perhaps by executive clemency – the remote possibility of which does not mitigate the harshness of the sentence".

- The Opinion quotes a 'famous' case from Nevada:

"this sentence (LIWP for juvenile) means **denial of hope**; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of (the convict), he will remain in prison for the rest of his days" Naovarath v. State, 779 P.2d 944 (1989)

- The conclusion of the Opinion:

'Graham, Roper, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this **principle of proportionality**, and so the Eighth Amendment's ban on cruel and unusual punishment'

THE 'STRANGE' CASE OF NEBRASKA

- Nebraska, a Republican State, has been the last State to abolish Death Penalty (May 27, 2015).

- Peter Ricketts, Governor, used the veto power. In the message:

  "Please consider that life imprisonment is not thoughtful compromise of some sort. Life Imprisonment does not always mean that a convicted murdered ***will spend the rest of his life behind bars***. The case of Laddie Dittrich is evidence of that. Dittrich, a convicted murdered, was sentenced to life imprisonment. After serving forty years in prison, his sentence was commuted by the Pardons Board. He was the paroled. Shortly after parole, he was arrested for molesting a young girl in Otoe County. He now faces a trial on that charge".

- The Nebraska Parliament overrides the veto (thanks only one vote). This time the winner is the Parliament and not the Governor, as in the past. BUT: Who really win? The Pardons Board, in the previous 23 years, has paroled only three lifers. Now?

A COURAGEOUS JUDGE SPEAKING CLEARLY

- *Jones vs. Chappell*, U.S. District Court, Central District of California, July 16, 2014:

✓ April 7, 1995: Mr. Jones was condemned to death
✓ Now, Dec. 3, 2015: Mr. Jones remains on California Death Row
✓ Mr. Jones is not alone: since 1978, over 900 people have been sentenced to death, of them 'only' 13 have been executed (40% are in prisons since 20 years)

The Judge speaks clearly:

'**Systemic delay** has made their execution so unlikely that the death penalty sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: **life in prison, with the remote possibility of death**'

- Unfortunately, US Court of Appeals, Ninth Circuit, *Jones v. Davis*, Nov. 12, 2015 reversed the District Court decision, but thanks to a 'procedural' question (a new constitutional theory, in federal cases, can't be exposed in habeas review cases-as stated in *Teague v. Lane*, 1989: the scope of the federal habeas 'is to ensure that state convictions comply with the federal law in existence at the time the convictions became final, and not to provide mechanism for the continuing re-examination of final judgments based upon later emerging legal doctrine').

CHALLANGES FOR THE FUTURE

- **European Court of Human Rights**: After Soering 1989 (Death Penalty), After Vinter 2013 (whole life sentence), After Trabelsi 2014 (LIWP), what else?

- One of the most important point: more substantial (not formal) **judicial review**, less **mandatory penalties**

- **Restorative Justice** as New Form of Justice? The role of the **Victims** in an European Constitutional Criminal Law Perspective

- **Solitary Confinement**

- **Critical Ill Detainees**

- The crucial point will be: lead resocialization principle from the prisons to the Parliaments; why the penalties should be aimed to resocialization if the penalties have no end? From the 'outset' means from the 'outset'.

- And: In a constitutionalism perspective, does it is possible to fight against Death Penalty and not against Life Imprisonment (without Parole and without substantial judicial review)? No chances: No.

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- Catherine Appleton, *Life after Life Imprisonment*, Oxford, 2010

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- *La perpétuité perpétuelle. Réflexion sur la réclusion criminelle à perpétuité*, Sous la direction de Y. LÉCUYER, Préface de K. Vasak, Rennes, 2012
- *Long-Term Imprisonment. Policy, Science, and Correctional Practice*, Editor T.J. FLANAGAN, Thousand Oaks (California), 1995
- *Life Without Parole. America's New Death Penalty*, Edited bt C. J. OGLETREE JR., and A. SARAT, New York and London, 2012.

In www.lifeimprisonment.eu, you can find (among others):

- **Inhuman Sentencing**, CRIN (Child Rights International Network), March 2015
- **Life Sentences in the Federal System**, US Sentencing Commission, February 2015
- **A Living Death. Life Without Parole for Nonviolent Offenses**, American Civil Liberties Union, 2013
- **Life Goes On: The Historical Rise in Life Sentences in America**, The Sentencing Project, 2013
- **Cruel and Unusual. US Sentencing Practices in a Global Context**, Center for Law and Global Justice, Univ. of San Francisco, School of Law, May 2012
- **No Exit. The Expanding Use of Life Sentences in America**, The Sentencing Project, July 2009
- **The Truth About Life Without Parole: Condemned to Die in Prison**, American Civil Liberties Union (ACLU) of Northern California
- **Life Imprisonment**, Penal Reform International

The Author

Davide Galliani (davide.galliani@unimi.it) is a Jean Monnet Professor of Fundamental Rights, University of Milan, Department of International, Legal, Historical and Political Studies (DILPHS).

He is a Scientific Coordinator of the Project "The Right to Hope. Life Imprisonment in the European Context", co-funded by the European Union (2014-2017). The official website of the Project is: www.lifeimprisonment.eu

Some Author's works in these subjects:

- DAVIDE GALLIANI, *The Reducible Life Imprisonment Standard from a Worldwide and European Perspective*, in *Global Jurist* (forthcoming, 2015-2016)
- DAVIDE GALLIANI, Riflessioni costituzionalistiche sull'ergastolo entro le maglie dello Statuto della Corte penale internazionale, in Rivista AIC, 2/2015
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Thanks.