ARTICLES

The Illusion of Parole

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After serving 12 years and 11 months of a life sentence, I became eligible for parole consideration in 1992. However, 26 years and ten parole hearings later, I still do not know what I must do to obtain parole, and will they ever release me nor when or if I will ever be released. I am among a growing segment of men and women likely to die in prison because Maryland's parole scheme lacks discretionary standards and guidelines affording meaningful release consideration.

Maryland courts impose three distinct terms of life: (1) life with parole eligibility after serving 15 years less earned diminution credit; (2) life with parole eligibility after serving 25 years less earned diminution credit; and (3) life without the possibility of parole.[1] Prior to the birth of Maryland's notorious "life means life" standard, lifers were recommended and approved for release regularly. According to the Maryland Justice Policy, Inc., 92 of 155 lifers recommended for parole were released between 1970 and 1978; 65 of 88 lifers recommended for parole were released between 1979 and 1986; and 36 of 91 lifers recommended for parole were released between 1987 and 1994.[2] However, only one prisoner serving a life sentence has been paroled outright since 1994.

Parole is a conditional early release from a prison sentence.[3] For prisoners other than lifers, parole is viewed as an integral component of penal policy as it incentivizes good behaviour, serving as a reward for rehabilitation, a management tool to limit overcrowding, and to cut the costs of incarceration. Traditionally, Maryland Courts have held that the mere existence of a parole system does not create a constitutionally protected liberty interest.[4] As early release from a prison sentence is a privilege, prisoners do not have a constitutional right to be paroled. However, do parole eligible lifers have a legal right to meaningful parole consideration? In 1999, the MD Court of Special Appeals answered:

> Under the Maryland statutory scheme, until the Governor approves a parole recommendation for a lifer, and the court serves the inmate with an Order for Parole, the inmate has no due process right to parole or a parole hearing, and thus, has no liberty interest in meaningful parole consideration. Because appellant does not have a liberty interest in

> meaningful parole consideration, the Governor's pronouncement does not offend any procedural due process concerns.[5]

Thus, no prisoner had a liberty interest in meaningful parole consideration in Maryland until a ruling in August 2018 by the Court of Appeals. Reviewing a trilogy of recent US Supreme Court opinions distinguishing juvenile from adult offenders, and mandating states to develop schemes for compliance, Maryland's highest court opined that a juvenile cannot be sentenced to life without a realistic and meaningful opportunity for release based on demonstrated maturity and rehabilitation.[6] As the vast majority of offenders are adults, 90 percent of Maryland's 2,300 lifer population is sadly not legally entitled to meaningful parole consideration. Without public interest, political advocacy, legislated standards, guidelines, and mandates to look beyond the original offenses of lifers, life sentences will continue to mean the rest of a prisoner's natural life behind bars regardless of their circumstances. The lack of standards and guidelines for the exercise of discretion in statutory and regulatory provision enables Maryland's dysfunctional system of parole. The failings of the parole scheme become apparent when examining the parole process in light of the Maryland Annotated Code Correctional Services Articles, the state's Code of Regulations (COMAR), and Division of Correction policy.

The Maryland Annotated Code is the official codification of statutory laws of the State, which is divided into 36 named articles. This Annotated Code is amended through the Maryland General Assembly, which is the legislative process where a 47-member elected Senate and a 141-member elected House of Delegates convene to introduce and vote on bills proposing change, repeal, or additions to existing state law. COMAR is the official compilation of all administrative regulations issued by state agencies governing the execution of duties authorized by the Annotated Code.

The Maryland Parole Commission (MPC) and general statutes governing the parole process were created by the General Assembly. Pursuant to this legislative authority, the MPC enacted regulations governing its policies. However, the legislature only authorized the MPC to recommend parole for prisoners serving sentences of life, while the Governor retains exclusive power to grant parole in such cases.[7]

The MPC consists of ten commissioners appointed by the Secretary of the Department of Public Safety and Correctional Services (DPSCS) and

approved by the Governor and the Senate.[8] A two-commissioner panel is required to conduct a so-called parole hearing in the case of an eligible lifer. The in-person or video conference interview can hardly be described as an actual parole hearing because the panel lacks the authority to grant parole or even recommend it.

The interviewing panel is authorized to: 1) refuse parole, 2) schedule a future rehearing, or 3) refer a case for *en banc* proceedings where the full commission votes to make a recommendation to the Governor.[9] As there is no appeal from a decision by the two-commissioner panel, the interview is not electronically or stenographically recorded. The lack of a record makes judicial review of a decision impractical.

Attendance is restricted to parole personnel, an institutional case management representative, and the victim and/or victim representative(s). Upon request up to 30 days prior to the hearing, three advocates, whether legal representatives, relatives, or friends, may schedule a meeting on behalf of the prisoner. A single commissioner meets with the advocate(s) and not necessarily either one assigned to the hearing.[10]

In determining whether a prisoner is suitable for parole, Correctional Services Articles and COMAR require commissioners to consider and examine specific factors and information during the hearing.[11] Six youth related factors for juveniles were added to COMAR in 2016 in response to civil litigation over Maryland failing to provide them with meaningful parole consideration.[12]

Yet, statutes and regulations do not establish a standard for how these factors, criteria, information, and determinants should be assessed regarding parole consideration. After considering the identified factors, the MPC is free to accord more, less, or no weight to any of the factors. Whether factors should support or go against parole or should be considered aggravating or mitigating are not specified. Thus, the absence of any standards for the exercise of discretion enables decisions to be made on any basis.

For instance, the nature of the crime, the severity of the crime, and the person's prior criminal history are explicit factors to be considered. These factors can never change and often overshadow what has changed in a prisoner's life. Sentencing courts have considered these same factors when determining the length of a sentence imposed and when a criminalized person will become eligible for parole. Statutory law even permits

sentencing judges to make recommendations to the MPC. Yet, the MPC is allowed to render judgment that a case warrants stiffer penalty.

My initial appearance before the MPC in 1999 illustrates the danger of discretionary autonomy and how parole hearings have been reduced to meaningless formalities. My five prior parole appearances were before Patuxent Institution's Board of Review (IBR). The IBR is an independent authority, which conducts annual progress reviews of prisoners in Patuxent's voluntary treatment programs. The IBR can grant, deny, as well as revoke eligibility and conditional release statuses. The IBR can also recommend early release from sentences after three years of participation in treatment programs.

Noting that I was seven years beyond my parole eligibility date, my last disciplinary infraction was in 1986, and my outstanding record of achievements, the MPC panel scheduled my case for a rehearing in 2009. According to one commissioner, the norm was to issue ten-year set-offs at a lifer's initial hearing. Adding insult to injury, another commented that I would have been better off having killed someone. I do not know what disturbed me the most – the implication that rape is a more egregious offense than murder deserving of greater punishment or that I would have to serve twice as much time than the law required to be considered for parole.

The lack of discretionary constraint is more alarming in the case of a refusal which every lifer dreads. As stated previously, one of the three options available to the panel is to refuse future parole consideration for any reason. Depriving future parole consideration to a prisoner sentenced to a parole eligible life term forecloses any possibility of release. Though perfectly legal according to statute, such decisions are contrary to legislative and judicial intent. Why should commissioners be permitted to effectively transform a sentence into life without parole without due process?

An anomaly surfaced in 1994, which the legislature has yet to redress. When parole eligibility was amended requiring people convicted of violent offences and sentenced to determinate terms to serve half of their sentences before qualifying for parole, parole eligibility for lifers remained the same. Parole Commissioners therefore cannot reasonably consider a lifer for parole upon eligibility in 15 or 25 years less earned diminution credit, when someone serving a lesser term of 50 years has to serve 25 years day for day before being considered for parole. Subsequently, lifers, even those sentenced in the 1960s, 1970s, and 1980s are expected to serve

significantly longer periods behind bars before parole becomes even the slightest possibility.

Though not mandated by statute or regulation, Parole Commissioners now require a lifer to undergo a risk assessment before referral for *en banc* proceedings. While the use of risk assessment tools have become more prevalent nationwide, the MPC relies upon two openly biased indicators. The Violence Risk Appraisal guide (VRAG) and the Lifestyle Criminality Screening Form-Revised (LCSF-R) are static actuarial based risk assessment instruments. The individual's score is based on unchanging historical variables. No adjustments are made for a prisoner's current circumstances, the setting into which he will be released, their participation in treatment, education and vocational programming, nor developmental experiences occurring during incarceration.[13] Obviously, the static nature of these particular instruments is problematic for they do not take into account maturity and rehabilitation.

In addition, the nature of the convicted offense, multitude of convictions, and the age of the person at the time of the offenses elevate the assessment of recidivism and reduce the probability of being recommended for parole. These tests penalize criminalized people for committing crimes as children who have no adult experience in the outside community because they require greater supervision. There is even criticism regarding the applicability of these instruments in the cases of lifers. What pool of former prisoners can serve as the basis to predict recidivism for prisoners incarcerated for 30, 40, and 50 years? The attempt becomes more complex when considering the rare cases of lifers enduring long-term confinement for crimes committed as mid-teens. Research compiled on short-term prisoners is an inadequate barometer for the behaviour of lifers. Yet, those assessed to pose high risk of recidivism are not recommended to the Governor.

If the two-commissioner panel chooses to refer a lifer for the risk assessment, the parole decision is placed on hold pending the results. Unfortunately, the assessment is conducted by a lone MPC psychologist. The referral waiting list is 18 months long to this date. Typically, if a prisoner is assessed to be a moderate to low risk for recidivism, the case is referred for *en banc* proceedings.

As the risk assessments are conducted on behalf of the MPC and the Governor, the results are considered privileged and not provided to prisoners. I did not learn that I had been assessed at moderate to high risk for recidivism

in 2012 until my 2015 rehearing. I was then told that I would not qualify for another risk assessment referral until five years had elapsed. Though grateful for the 2017 referral, I remain clueless about what I need to do to improve my assessment. In all actuality, seven years will have passed between opportunities for my case to possibly be considered for *en banc* proceedings.

Statutory law merely authorizes *en banc* proceedings before the MPC and that a majority vote is required before a recommendation is forwarded to the Governor. No criteria or factors have been established to guide the MPC's discretion during the proceedings. Neither do statutory and regulatory provisions specify what constitutes a quorum for voting purposes. Prisoners are not even notified of their cases being referred for these proceedings. More importantly, they do not have any input in this critical stage of the decision-making process. The MPC is shrouded in secrecy not bound by open records and disclosure laws.

Recommendations for the release of lifers have steadily decreased. Despite the MPC being authorized to make recommendations of parole to the Governor, rare recommendations for sentence commutation have become the norm. Statute does allow for the MPC to make recommendations for sentence commutation in the cases of lifers when warranted by special circumstances.[14] Apparently, all cases of lifers warrant such special consideration. A commutation to a determinate number of years allows for the gradual release of a former lifer. A recommendation for a delayed parole release would accomplish the same. The sad reality is that the MPC has rarely made parole recommendations for lifers over the past 20 odd years. No recommendations were made at all during some of those years.

Division of Correction policy has contributed to the shift in recommendations. In 1993, public outcry eschewed when a lifer in a work release program murdered his estranged girlfriend and committed suicide. The Commissioner of Corrections removed all prisoners serving life sentences from minimum security and pre-release facilities. The following year, a Division of Correction Directive (DCD) was promulgated excluding lifers from progressing below medium security institutions unless within three years of release.[15] This DCD has effectively barred lifers from participation in re-entry programming, which is only available in lower security facilities. Naturally, the MPC is reluctant to recommend the release of prisoners serving long-term confinement without a gauge of suitability for release.

Clearly, MPC recommendations are influenced by the reluctance of Governors to grant approval. Even the cases posing the lowest risk of recidivism could have huge political risks. Who can forget the derailment of former Massachusetts' Governor Dukakis' 1988 presidential campaign? The media sensationalized how Willie Horton, a prisoner Dukakis approved for work release, escaped, and raped a woman in Maryland. Commuting the sentence of a lifer to a determinate term of years therefore allows the MPC to assume the responsibility for the release and insulates the Governor.

In 1995, the politicization of the parole process for lifers became clear when former Governor Parris Glendening, suffering in the popularity polls, pronounced his "life means life" standard. He publicly rejected the parole recommendations of seven lifers, announced that he would not parole any lifer unless elderly or terminally ill, and also instructed the Parole Commission not to send any recommendations for lifers to his office.[16] Successive governors followed the same standard not wanting to appear soft on violent crime. Two decades later, former Governor Glendening would admit his standard created a dysfunctional system.[17]

Nonetheless, Maryland's parole scheme has always been subject to dysfunction. The lack of standards and guidelines enables the discriminatory practice which has lasted for over two decades. Maryland is one of three states which require gubernatorial approval for prisoners serving life to be paroled. Unlike Oklahoma and California, Maryland statutory law establishes no criteria for the Governor's exercise of parole discretion. Until 2011, the Governor was free to approve, disapprove, or ignore recommendations by the Parole Commission without providing any justification.

In the wake of recommendations stagnating in the Governor's Office for years, legislators amended the statute to allow the recommendation of the Parole Commission to take effect if the Governor does not disapprove it within 180 days. The reaction of sitting Governor Martin O'Malley was to disapprove recommendations in 57 cases before the deadline.[18] This amendment applies to recommendations for parole, not recommendations for commutation. Though the legislature established a timeframe for the Governor's decision, he may continue to deny parole for any reason, without any standards, explanation, or opportunity for review.

Following in the wake of Supreme Court's decision to prohibit the imposition of a life without parole sentence on a juvenile, because

the sentence does not provide an opportunity for meaningful parole consideration based on demonstrated maturity and rehabilitation, I was one of the juvenile lifers who challenged the legality of parole eligible life sentences in Maryland.[19] The argument was simply that Maryland's parole scheme operates as a system of *ad hoc* executive clemency, which does not comply with the Supreme Court's mandate for states to develop mechanisms for compliance. To my dismay, a 3/4 majority the Court of Appeals ruled that Maryland's life sentences imposed on juveniles were made legal by the 2016 amended regulations, requiring consideration of six youth related factors by the MPC, and a controversial Executive Order issued by Governor Paul Hogan in 2018, binding himself and successive Governors to consider the same factors as the MPC.[20]

Mere consideration of youth related factors cannot bring Maryland's dysfunctional system into compliance. The parole scheme operates as a system of executive clemency in which opportunities for release are extremely rare, unpredictable, and shrouded in secrecy. Virtually no one is ever paroled. The remote possibility of release is insufficient. Thus, consideration is not enough! Without standards guiding the exercise of discretion by the decision makers, the possibility of parole is an empty promise. Any system that does not allow for a juvenile sentenced to life to be released upon demonstration of maturity and rehabilitation violates the Eighth Amendment. If the Maryland sentence is cruel and unusual punishment for children, how can the identical sentence be fair for adults? The possibility of parole must be more than an illusion.

Advocates have been trying to persuade the General Assembly to remove the gubernatorial requirement since 1998 to no avail. If the legislature insists that the Governor should have the final say in the release of lifers, it must enact criteria, standards, and guidelines for the exercise of discretion, and an avenue for review. Did the Governor have the authority to bind himself and future governors with the 2018 Executive Order or does the authority to fetter the Governor's discretion rest squarely upon the shoulders of the General Assembly? More importantly, when considering the Executive Order can be rescinded at anytime, cannot be enforced, does not apply to recommendations of commutation, does not instruct the MPC to resume making recommendations for parole, and provides no standards for gubernatorial discretion, one wonders if the objective was simply to

usurp the judgment of the Court. The Order was issued three days after oral arguments on the legality of life sentences imposed upon juvenile offenders appeared to go against the state.

While reform efforts have focused on the Governor's role in the parole process, attention should be directed to the statutory and regulatory provisions related to the MPC. The legislature and the judiciary should insist that the MPC resumes making recommendations for parole, rather than for commutation in the case of lifers as authorized by statute. Commutation of sentence is a standard-less act of clemency by which the Governor substitutes a lesser penalty than imposed by the Court.[21] It does not enable prisoners to predict when they may be released. This rarity should not be the normal expectation because statutory and regulatory provisions specify when one becomes eligible for parole, as well as detail a procedure and standards for parole.

The promulgation of standards and guidelines for the exercise of parole discretion by the MPC and the Governor are critical to providing meaningful release opportunities. Provisions could instruct how to assess rehabilitation, how to give weight to certain factors, how to gauge risk assessment instruments, and other quantitative guides, to require rendering specific findings of fact to support decisions, as well as provide prisoners with specific objectives to obtain a MPC recommendation and parole.

Lifers should be recommended for parole upon or shortly after reaching eligibility as intended by the legislature and judiciary. As the sentencing judges are aware of parole eligibility affixed to particular sentences, prisoners are expected to be paroled as specified unless noted otherwise. The severity of the underlying offense was also considered before the imposition of a sentence.

The presumption of rehabilitation should be the norm unless a delay is warranted by a prisoner's misbehaviour or an unambiguous threat posed to public safety. The anomaly that exists in parole eligibility for determinate and indeterminate sentences needs to be redressed. If public sentiment is for lifers to serve longer terms of confinement, then the parole eligibility requirement must be raised from 15 and 25 years less earned diminution credit. This amendment should not be applied retroactively.

A mandatory release date could be enacted for the two parole eligible life terms. For instance, a sentence could require a minimum of 15 years and a maximum of 25 years or a minimum of 25 years and a maximum of 40 years subject to life for parole violation. Would a mandatory release date

of 60 years applicable to diminution credit really depreciate the weight of a criminal offense?

The Commissioner of Correction's rationale for restricting lifers to medium and above security facilities is that prisoners with no hope for release pose a significant threat to public safety. It is shameful that every lifer is being penalized for actions of one lifer 25 years ago. Hope could be restored by the MPC recommending delayed parole releases and the Governor approving these releases. The re-entry programming available in lesser security facilities is critical for those who serve long-term incarceration.

In response to civil litigation in the Federal District by the ACLU for Maryland juvenile lifers, a Division of Correction Directive was promulgated allowing the security level of juvenile lifers to be decreased if approved by the Commissioner.[22] Thus far, the only juvenile lifers transferred to minimum security facilities were two of the three principle complainants represented in the lawsuit who happen to have recommendations for commutation pending in the Governor's Office.

At the very least, statutory and regulatory provisions should distinguish juveniles from adults. Juveniles are less culpable and more likely to change than adults. The juvenile is also subject to spend a disproportionate number of years behind bars than the adult simply because of their youth. While legislatures in states across the country have taken significant measures to amend parole statutes and regulations to comply with the Supreme Court mandate for juveniles, the Maryland legislature has done nothing.

Perhaps, this is a reflection of public sentiment. No one cares whether the parole system is just. Society is fed up with violent crime and lifers are the scapegoats. Most believe that life should mean life and those who commit capital offenses cannot be rehabilitated. However, ignoring the law and mistreating others is a crime, even when it relates to criminals.

The ending of the Court of Appeals' Chief Judge Mary Ellen Barbera's dissenting opinion in the recent juvenile lifer cases is befitting:

And it is not justice to have on the books the "possibility of parole" yet provide a protocol for granting or denying parole that is without standards to guide those who are the decision makers: the Parole Commission and the Governor. Under the United States Constitution, a meaningful opportunity for release cannot exist in name only, as it now does in Maryland.[23]

Since the initial August 2019 submission of this article for publication, there have been two relevant changes to Maryland's parole scheme. Firstly, the static risk assessment instruments relied upon by the MPC and the

Governor were replaced by another instrument in August of 2020. This new tool is reportedly dynamic in nature, which allows the clinical psychologists who administer the assessment to include post-crime factors rendering lower risk ratings.

Secondly, in December 2021, the General Assembly, with a two-thirds majority vote in the Senate and the House of Delegates, overrode Governor Hogan's veto of a bill removing the gubernatorial requirement for a release lifer on parole. Although this amendment significantly reduces the politicization of MD's parole process related to lifers, the General Assembly has yet to create any standards for the MPC's exercise of discretion. The MPC thus remains free to deny or grant the release of prisoners for any reason and without explanation.

ENDNOTES

1 MD Code Ann., Criminal Law Article§ 2 and MD Code Ann., Corr. Servs. Article § 7.
2 *Lifers Paroles in Maryland* (1970- 2008) by Frank Dunbaugh, J.D., Maryland Justice Policy, Inc., 2008.
3 MD Code Ann., Corr. Servs. Article§ 7-lOl(c).
4 Mclaughlin-Cox v. MD Parole Commission, 200 Md. App. 115 (2011).
5 Lomax v. Warden, 120 Md. App. 314, 329-30 (1999).
6 Carter v. State, MD Court of Appeals, No. 54, September Term, 2017 and Bowie v. State, MD Court of Appeals, No. 55, September Term, 2017.
7 COMAR 12.08.0l.17.A(7)(e).
8 MD Code Ann., Corr. Servs. Article§ 7-202.
9 COMAR 12.08.01.17.A (7)(f) and (g).
10 COMAR 12.08.0l.18©(l).
11 MD Code Ann., Corr. Servs. Article§ 7-305 and COMAR 12.08.01.17.
12 COMAR 12.08 .01.17 (2016).
13 Brief of Amici Curiae by the University of Baltimore Juvenile Justice Project in Bowie v. State, MD Court of Appeals, September Term (2017).
14 COMAR 12.08.01.15 (B).
15 DCD 100.5.
16 "Glendening to reject parole in life sentences" by Charles Babington, *The Washington Post*, September 22, 1995.
17 "Md. Lawsuit over juvenile lifers part of nationwide trend" by Juliet Linderman, *The Daily Record*, August 3, 2017.
18 "Assembly seat highlights O' Malley's views on crime" by Aaron Davis, *The Washington Post*, December 2, 2012.
19 Graham v. Florida, 560 US 48 (2010); Miller v. Alabama, 132, S.Ct. 2455 (2012); and Montgomery v. Louisiana, 136 S.Ct. 718 (2016).
20 James Bowie v. State of Maryland, Court of Appeals, # 55, September Term, 2017.

[21] MD Code Ann., Corr. Servs. Article§ 7-101 (d).
[22] Executive Directive Number OPS.100.4.
[23] Concurring and Dissenting Opinion in Bowie v. State, Court of Appeals, No# 55, September Term, 2017.

ABOUT THE AUTHOR

Gordon Pack is serving an aggregate sentence of life with the possibility of parole for rape, kidnapping, and armed robbery offenses committed as a 15-year-old. A 2020 parole decision in Gordon's case remains on hold pending another risk assessment and possible *en banc* proceedings. He has been incarcerated in the Maryland Division of Correction since 1980. Though his first five years of imprisonment were plagued with adjustment issues, he managed to turn his life around, becoming a model prisoner. He engages in various cognitive behaviour therapy, conflict resolution, alternatives to violence, juvenile counselling, and community service programs. He is a long-standing member of the Lifers' Groups advocating for prison reform, rehabilitative and reentry services, victim awareness, and peer mentoring. He credits his reformation to remedial programs at Patuxent Institution, conversion to Orthodox Islam, and the loyal support of family, friends, and advocates. He can be contacted at:

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