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**A VICTIMS' FAMILY MEMBER ON JUVENILE LIFE
WITHOUT PAROLE SENTENCES:
"BRUTAL FINALITY" AND UNFINISHED SOULS**

Jeanne Bishop*

A juvenile killed three of my family members in 1990. He broke into their home on the North Shore of Chicago on a Saturday night and waited for them to return home. Upon arrival, he forced them into their basement at gunpoint and shot them to death. He was one month short of his 17th birthday. He kept a notebook with press clippings about the murders. He went to my loved ones' funeral. He even bragged to friends about killing them. One of his friends eventually turned him in to police, six months after the murders.

The killer was tried, convicted and given two different types of life without parole sentences: a mandatory life without parole sentence for the multiple homicide of Nancy and Richard, and a discretionary life without parole sentence for the intentional killing of their unborn child. Following his sentencing, the sheriffs took him away. As he disappeared through the door that led to the lockup, my mother turned to me and said, "We'll never have to see him again." I was glad I never had to see him again. I wanted that. It felt like another door closing, one that would separate me from him, and from the evil and heartbreak he represented. I thought the sentence meant that I could move forward, thinking not of him, but of my sister and how to honor her memory with the rest of my life. For decades, that is how I lived my life. I relied on what many people say victims' survivors need: finality. What we need, it is said, is the sure knowledge that we will never have to engage with the killer again in the legal system. The need for finality has been used to justify opposition to any reform to juvenile life without parole sentences, even allowing a single opportunity for meaningful review of the sentence at a later time for offenders who have demonstrated rehabilitation and remorse.

The finality argument is now part of the debate over juvenile life sentences post-*Miller v. Alabama*,¹ the United States Supreme Court case that struck down mandatory juvenile life sentences like the one my sister's killer is serving. The main argument in the debate considers whether the *Miller* decision should apply retroactively to the thousands of offenders given that sentence when they were convicted of murders they committed as juveniles (that issue is expected to be decided by an upcoming U.S. Supreme Court decision in a case pending at the time of this writing,

¹ 132 S. Ct 2455 (2012).

Montgomery v. Louisiana).² Some survivors of victims support retroactivity; others argue that it would violate the needs of survivors for legal finality.

“Legal finality” is not a new idea; it long has been cited as a reason for foreclosing avenues for prisoners to have their convictions or sentences looked at anew. For instance, in *Herrera v. Collins*,³ Chief Justice Rehnquist cited “the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases” to reject the habeas petition of Leonel Torres Herrera, which challenged his capital murder conviction and death sentence on grounds of innocence.⁴

Professor Paul M. Bator’s 1963 article “Finality in Criminal Law and Federal Habeas Corpus for State Prisoners”⁵ sets out four arguments of those in the criminal justice system who insist on finality as a virtue. First, re-litigating the same issues wastes resources.⁶ Second, judges’ sense of responsibility will be eroded if they feel nothing they do is final.⁷ Third, endless inquiry into the same legal issues undermines two important goals of criminal law: deterrence and rehabilitation (the idea that criminals will not be either deterred or rehabilitated unless there is a certain, just punishment).⁸ Fourth, as Professor Sigmund G. Popko stated, “repose is a psychological necessity....We cannot justify endless litigation....”⁹

In an issue of the Wake Forest Law Journal, Ryan W. Scott argues for the finality of sentences on a number of grounds, including that looking backward at certain factual determinations, such as the severity of the crime, the hurt suffered by victims and the culpability of the offender, may be hard to determine years after the offense.¹⁰ However, Professor Mark Osler of the University of St. Thomas School of Law criticizes that view, stating, “I’ve never understood why finality should be a moral value. Our criminal justice system is supposed to be a truth-

² *State v. Montgomery*, 141 So. 3d 264 (La. 2014); *cert. granted, Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015).

³ 506 U.S. 390 (1993).

⁴ *Id.* at 417.

⁵ Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Sigmund G. Popko, *Putting Finality in Perspective: Collateral Review of Criminal Judgments in the DNA Era*, 1.1 L.J. FOR SOC. JUST. 75, 77 (2011).

¹⁰ Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4:1 WAKE FOREST J.L. & POL. 179 (2014).

seeking exercise. If you're saying the process of getting to the truth has ended, you're committing an immoral act."¹¹

Further, sentencing expert Douglas A. Berman frames the finality issue as it applies to juvenile life sentences as follows: In 2012, the Supreme Court in *Miller v. Alabama* declared that statutes mandating juvenile offenders serve life in prison without the possibility of parole ("LWOP") violate the Eighth Amendment. "This new ruling has led to much state litigation over whether juvenile murderers previously sentenced under a mandatory LWOP scheme can now be resentenced....(A) fundamental issue undergirds all this litigation: after a criminal defendant has been deemed final, when can and should that defendant be able to have his sentence reviewed and reconsidered based on subsequent legal developments?"¹² Berman argues that judges, government officials and policymakers should be less concerned about sentence finality, and more concerned about the appropriateness of lengthy prison sentences where new developments in the law raise doubts about the fitness or fairness of those sentences.¹³ Berman also notes that the finality of criminal *sentences* is a very different matter than the finality of criminal *convictions*.¹⁴ He contends that the reasons for limiting review and reconsideration of convictions are not nearly as compelling when applied to sentences only,¹⁵ that sentence finality concerns should take a back seat to concerns about punishment fitness and fairness, particularly when new legal developments call lengthy prison sentences into question.¹⁶

One reason underlying Berman's call for change is the modern phenomenon of mass incarceration. After citing the seemingly familiar, yet, still shocking, statistic that the United States has more than two million people in prisons and jails,¹⁷ Berman highlights even more startling statistics, such as the historic rise in

¹¹ Interview with Mark Osler, March 29, 2015.

¹² Douglas A. Berman, *Re-Balancing Fitness, Fairness and Finality for Sentences*, 4:1 WAKE FOREST J.L. & POL. 151 (2014).

¹³ *Id.*, See also Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the 'Interests of Finality*, 2 UTAH L. REV. 561 (2013).

¹⁴ "It is curious and problematic that modern finality doctrines and debates rarely distinguish between final convictions and final sentences: curious because courts and commentators have long recognized that the determination of guilt and the imposition of punishment involve distinct stages of criminal adjudication calling for different rules and procedures; problematic because the strongest justifications for limiting reconsideration of final convictions are less compelling with respect to final sentences." Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*," *supra* note 10, at 152.

¹⁵ *Id.* at 153.

¹⁶ *Id.* at 166.

¹⁷ *Id.* at 163.

the number of people serving life sentences in the United States. According to a 2013 Sentencing Project report,¹⁸ by 2012, the population of prisoners serving life sentences had quadrupled since 1984 to 159,520, and life sentences without the possibility of parole reached 49,081 (30.8%). Another large portion of the prison population was serving long sentences that would likely outlast the inmate's natural life. The contrast with the past is startling, as there may now be more individuals who can expect to die in America's prisons based on their final sentences than the *total* prison population in the 1960s.¹⁹

Berman sounds the alarm on what these statistics mean: the majority of the more than two million prisoners in the U.S. must "cope with the now-prevailing reality that their prison sentences are fixed and final and not subject to any regularized means of review or reconsideration for any purposes."²⁰ Berman cites Professor Kevin Reitz's warning against locking in our worst sentencing mistakes: "It is unsound to freeze criminal punishments of extraordinary duration into the knowledge base of the past."²¹ Finally, Berman warns against assuming the victims' interests always support rigid finality of sentences, citing restorative justice practices under which victims' concerns "could be well served by a dynamic sentence review and reconsideration process which effectively incorporates victims' interests and empowers victims' voices."²²

For those opposing any opportunity for juveniles to be resentenced to less than life,²³ "finality" means that the only way to ensure certainty about the sentence the offender is serving is for him or her to be locked up forever. This ignores a second, equally plausible finality: the finality that comes when an offender is rehabilitated and no longer a threat, when a sentence is served and over and the offender is set free. There are no more court dates or hearings, no more wrangling in legal proceedings. The case is done; the offender and victims' survivors no longer need to engage with one another, unless that is what they both wish.

¹⁸ Ashley Nellis, *Life Goes On: The Historic Rise in Life Sentences in America*, The Sentencing Project, (2013), http://www.sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf

¹⁹ Berman, *supra* note 10, at 164.

²⁰ *Id.* at 165.

²¹ Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 706 (2009).

²² Berman, *supra* note 10, at 175.

²³ See, e.g., Heritage Foundation report, *Adult Crime for Adult Time: Life Without Parole for Juvenile Killers* (Aug. 17, 2009).

Seeking the kind of finality that restores an offender to society, rather than condemns him to imprisonment until the day he dies, does not dishonor victims. To the contrary, it can do the opposite. I came to that conclusion when I had a change of heart about the sentence my sister's killer is serving. I tell the story in my book, *Change of Heart: Justice, Mercy and Making Peace with My Sister's Killer*,²⁴ about my epiphany, my "aha" moment about juveniles who kill, the idea of justice and finality. It was a Sunday morning in summer, and I was attending a "church on the beach" service held by a church in the village where I live:

It's a pleasant change from the Gothic formality of my Presbyterian church in downtown Chicago. You spread out a blanket on the grass on a bluff overlooking the beach, kick off your flip-flops, bring your dog to loll beside you. I arrived late, just in time to hear the priest, a man in a black shirt and white collar, cargo shorts and Birkenstocks, begin his homily.

He was talking about how the Sunday after the Episcopal church's national convention is like its own liturgical season: the season of complaints. Every year, he said, on the Sunday after the convention he feels like a human dartboard. Members of his congregation call or email him, demanding to know: Why did the church vote in favor of that? How could the church decide this?

The priest's response: When you get a thousand Episcopalians in a room, you get a thousand different opinions. "It's a mess!" the priest observed, half-ruefully, half-cheerfully. He threw up his hands. "A mess!"

He went on, tying the messiness of the human condition to stories from Scripture. One was about King David, taking a woman who was the wife of another man, then arranging that man's death in battle. Another was the awful story of the beheading of John the Baptist because of Herod's moment of misbegotten pride.

²⁴ JEANNE BISHOP, *CHANGE OF HEART: JUSTICE, MERCY AND MAKING PEACE WITH MY SISTER'S KILLER* (1d ed. 2015).

“We are all a mess, all of us. And how does God respond to that messiness? Mercy...mercy...mercy,” the priest concluded, pausing between each word, his voice dropping to a whisper at the last.

That word hung in the still, sunlit air. We sat silent, no sound but the distant crash of waves on the beach, the song of birds overhead. The word lodged in my heart.

Mercy.

We, the congregation, said that word a short time later, just before we lined up under the shade of a spreading tree to take the bread and wine. “Lamb of God, you take away the sins of the world: have mercy upon us.”

You take away the sins of the world, I pondered. What does that mean? Whatever it meant, I knew it couldn’t mean saying to any human being: We are taking the sin you committed and freezing it in time forever. No matter what you do, how much you repent and show remorse, you are forever only one thing—killer—and we will punish you endlessly for it.

I knew in my heart: I could no longer support this merciless sentence of life without parole for juveniles.

And in the very next moment, like daylight breaking into darkness, I knew something else. I’d always thought that the only thing big enough to pay for the life of my sister was a life sentence for her killer. Now I understood: the only thing big enough to equal the loss of her life was for him to be found.²⁵

That there are some survivors of murder victims who want their loved ones’ killers locked up forever is true. However, it is equally true that there are survivors of murder victims who do not.

Many survivors of murder victims share a common belief that the lives and legacies of our murdered loved ones are not honored

²⁵ *Id.* at 95-97.

by the merciless sentence of juvenile life without parole. Rather, we believe that a sentence of life without parole dishonors our loved ones by holding human life cheap, the lives of young people convicted of crimes at an early age. The sentence preaches to young people that no matter how remorseful you are, how rehabilitated you become, how amply you demonstrate your worthiness to reenter society, as a productive citizen, we are throwing your life away into the maw of prison until you die. We are ignoring your deep regret for your crime, your efforts to become a better person, the working of your conscience, your potential as a human being, and locking you away forever. In doing so, we will be as merciless as you were when you took the lives of our loved ones.

Many family members of murder victims, like me, reject embracing the kind of mercilessness that took the lives of our loved ones. Sentences of life without parole for juveniles represent retribution, not redemption. The only way to truly honor the lost lives of our loved ones is for their killers to have an opportunity to be redeemed and restored, to contribute to this world all the good our loved ones could have done. Our argument is this: We have lost family members dear to us, precious and irreplaceable, we know we will never get them back. The young people responsible for their murder will never restore the lives of our loved ones. The only way to redeem the loss is for those same young people to grasp the enormity of what they took, to take full responsibility for the crimes they committed and to set themselves on a path toward a life worthy of the gift they have been given: the gift they stole from their victims, another day on this earth. The chance to do good, to contribute to society, to help others around them, to send out ripples of goodness rather than evil. Then, and then only, we believe, can the balances be righted and true justice be done.

Commenting on a report by the Sentencing Project, "The Lives of Juvenile Lifers,"²⁶ Professor Mark Osler made this statement:

Forty years ago, the case of *Furman v. Georgia* generated a dramatic focus on the racial and class dynamics of the death penalty, and the Supreme Court looked to those injustices in changing the course of American law. This report provides a haunting echo to that era in revealing the similarly disproportionate use of juvenile life without parole sentences against defendants who are black and

²⁶ Ashley Nellis, Ph.D., *The Lives of Juvenile Lifers: Findings from a National Survey*, THE SENTENCING PROJECT (Mar. 2012), http://sentencingproject.org/doc/publications/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

defendants who are poor. These sad facts underscore the need to once again recognize the simple truth that children are different than adults, and that such brutal finality does not sit well on unfinished souls.²⁷

The truth is, every human soul is “unfinished.” Each of us is endowed with the capacity to grow and change. No one, my faith tells me, is beyond the possibility of redemption. The “brutal finality” of juvenile life without parole sentences—of that word *Never* it says to young offenders—denies those facts. It gives up on people with enormous human potential, including people who are remorseful and rehabilitated and who no longer pose a threat to others.

An alternative type of “finality” exists; it is humane, hopeful, restorative and healing for the offender, the victim and society. It happens when the work of punishment, penitence, remorse and rehabilitation is complete, and a young offender can re-enter society. It happens the moment when he or she walks through the prison gate, into the world where he or she can do good, honoring the lost lives of victims and the value of all human life.

²⁷ Jorge Rivas, *Black Youth Disproportionately Sentenced to Life Without Parole (Report)*, COLORLINES, <http://www.colorlines.com/articles/black-youth-disproportionately-sentenced-life-without-parole-report>.