

RE-BALANCING FITNESS, FAIRNESS, AND FINALITY FOR SENTENCES

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Two recent developments involving changes to severe sentencing laws have engendered new debates over whether old sentences should be reviewed and reconsidered. In 2010, Congress reduced the prison sentences mandated and recommended for federal crack offenses through the Fair Sentencing Act (“FSA”).¹ This new law has led to much federal litigation over whether crack defendants sentenced before the FSA can now benefit from its passage. In 2012, the Supreme Court in *Miller v. Alabama*² declared that statutes mandating juvenile offenders serve life in prison without any possibility of parole (“LWOP”) violate the Eighth Amendment.³ This new ruling has led to much state litigation over whether juvenile murderers previously sentenced under a mandatory LWOP scheme can now be resentenced. Though some distinct legal doctrines and different sets of offenders are involved, a fundamental issue undergirds all this litigation: after a criminal defendant’s sentence has been deemed final, when can and should that defendant be able to have his sentence reviewed and reconsidered based on subsequent legal developments?

This Essay examines the issue of “sentence finality” in the hope of encouraging more thorough and reflective consideration of the values and interests served—and not served—by doctrines, policies, and practices that may allow or preclude the review of sentences after they have been deemed final. Drawing on American legal history and modern penal realities, this Essay highlights reasons why sentence finality has only quite recently become an issue of considerable importance. This Essay also

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1. See Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

2. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

3. *Id.* at 2464.

suggests that this history combines with modern mass incarceration in the United States to call for policy-makers, executive officials, and judges now to be less concerned about sentence finality, and to be more concerned about punishment fitness and fairness, when new legal developments raise doubts or concerns about lengthy prison sentences.

The issue of sentence finality is necessarily connected, of course, to the status and treatment afforded final criminal judgments more generally. For more than a half-century, a robust jurisprudential debate has swirled in the Supreme Court and in academic circles concerning federal court authority to review final state criminal judgments using the historic writ of habeas corpus.⁴ But courts and scholars analyzing whether and how defendants should be able to attack final criminal judgments have too often failed to explore or even recognize that different conceptual, policy, and practical considerations are implicated when a defendant seeks only review and reconsideration of his final sentence and does not challenge his underlying conviction. 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.

4. The robust scholarly debate over the finality of criminal judgments that began in the 1960s was largely in response to the Supreme Court's expansion of doctrines allowing federal courts to review and reverse final state criminal judgments through habeas corpus collateral appeals. See Anthony Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Paul Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965). Concerns about the importance of finality interests expressed in these articles ultimately found expression in Supreme Court opinions: first in the separate opinions of Justice John Marshall Harlan, see *Mackey v. United States*, 401 U.S. 667, 688–89 (1971) (Harlan, J., concurring in part and dissenting in part); *Desist v. United States*, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting), and thereafter in the set of rulings that culminated with a plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989), which has come to define the modern terms and limits for the scope of collateral review of final convictions in federal courts.

Recently, a few academics have finally begun to dig more deeply into the distinct concerns raised by the issue of sentence finality,⁵ and Professor Scott's thoughtful article in this Symposium Issue is an important new contribution to this emerging scholarly discussion.⁶ This Essay seeks to further advance and enhance perspectives on sentence finality considerations by highlighting why sentence finality has only recently become a distinct and distinctly important issue for modern criminal justice systems and by suggesting why legislatures, sentencing commissions, and courts developing modern doctrines and practices need to consider and balance dynamically the interests served by sentence finality and by punishment fitness and fairness. Part I begins this project by canvassing legal and practical reasons why, until recently, there was relatively little need or opportunity to give much attention to the distinct issues raised by sentence finality. Part II, in turn, explores the conceptual, policy, and practical reasons why the strongest justifications for limiting review and reconsideration of final convictions are not nearly as compelling when only sentences are at issue. This Part concludes by acknowledging when finality may still be a weighty concern even in sentencing contexts, and it urges legislatures, sentencing commissions, and courts to begin the project of modernizing existing finality doctrines to rebalance interests in fitness, fairness, and finality for modern sentences.

5. See Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 UTAH L. REV. 561 (2013) (explaining how criminal justice goals can be better served if courts more frequently remedy "wrongful incarceration"); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79 (2012); see also Cecelia Klingele, *Changing the Sentence Without Hiding the Truth: Judicial Sentence Modification as a Promising Method of Early Release*, 52 WM. & MARY L. REV. 465 (2010) (documenting benefits of judicially supervised sentence modification schemes).

6. Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179 (2014). While Professor Scott's article is focused on the relatively narrow (though very consequential) issue of when and how courts should review final criminal sentences in traditional habeas corpus proceedings, this Essay is concerned more broadly with general approaches and attitudes toward the reconsideration of final sentences. Notably, Professor Frank Bowman's article in this issue, *Freeing Morgan Freeman: Expanding Back-End Release Authority in American Prisons*, 4 WAKE FOREST J.L. & POL'Y 9 (2014), spotlights the broader connections between modern mass incarceration and modern finality issues in the course of advocating for the reintroduction and reinvigoration of parole mechanisms as a means for reconsideration of some long terms of imprisonment.

I. HISTORICAL PERSPECTIVE ON SENTENCE FINALITY

Though detailed exploration of finality issues through American legal history is beyond the scope of this Essay,⁷ a brief review of American criminal justice doctrines and sentencing practices over the last quarter-millennium provides important historical perspectives for modern consideration of sentence finality issues. As detailed below, this review reveals some notable (and too often overlooked) historical realities concerning the impact and import of final criminal judgments in general and final sentences in particular.

A. *Distinctive Finality Realities in the Founding Era*

As Stephanos Bibas has chronicled effectively in a recent book,⁸ criminal adjudications in the Founding Era lacked many of the legal formalities and procedural particulars now familiar to modern lawyers: criminal trials, which were frequent and speedy, involved a “common-sense, public moral judgment” in which laymen were central players.⁹ Concern about how “final” to treat the outcome of criminal trials would likely have puzzled this era’s lawyers and laymen because they structured and conducted criminal trials to be “community searches for factual and moral truth” in response to a defendant’s alleged wrongdoing.¹⁰ Even direct appellate review of the outcomes of criminal trials likely would have been regarded as a novel idea (and an impractical luxury) during this period—in part because trial procedures sought to achieve accurate and fair results in the first instance, and in part because mechanisms ranging from the benefit of clergy to

7. As will be briefly suggested, the Constitution’s text and the Framers’ concerns about limiting government power and safeguarding individual rights suggest that Founding Era perspectives on criminal justice finality issues may have been quite different than some modern views. See *infra* Part I.A. Given the significant attention now paid to various theories of originalism in modern constitutional litigation and jurisprudence in recent years, see generally THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION (Grant Huscroft & Bradley W. Miller eds., 2013), modern criminal justice advocates and scholars might unearth interesting and consequential findings if they were now to engage in an in-depth historical exploration of criminal justice finality concerns and issues through U.S. legal history.

8. STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012).

9. *Id.* at Ch. 1 *passim*.

10. *Id.* at 3–6.

executive clemency provided ready means for defendants to obtain review and modification of criminal trial results.¹¹

Against this backdrop, the Constitution's text can be read to suggest the Framers were decidedly eager to provide or preserve opportunities for defendants to seek review and reconsideration of their treatment by government authorities. Article I, Section 9 instructs Congress that the "Privilege of the Writ of Habeas Corpus shall not be suspended,"¹² Article II, Section 2 provides that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States,"¹³ and Article III, Section 2 provides that the Supreme Court "shall have appellate Jurisdiction."¹⁴ These provisions codify in our nation's charter all the traditional mechanisms long used by individuals to challenge or seek modification of the exercise of government power through criminal justice systems. These provisions alone may not support a strong originalist claim that the Framers disfavored treating criminal judgments as final. Nevertheless, by precluding Congress from suspending habeas review, by empowering the President to grant clemency, and by authorizing the Supreme Court to hear appeals, the Constitution ensured that criminal defendants in a new America would have various means to seek review and reconsideration of the application of governmental power even after an initial criminal conviction and sentencing. More broadly, given the checks and balances built into our constitutional structure and the significant individual rights and criminal procedure protections enshrined in the Bill of Rights, one might readily conclude that the Framers were likely far more concerned with the fitness and fairness of criminal justice outcomes than with their finality.

The distinct nature of sentencing and punishment in the Founding Era adds additional dimensions to the finality story in early American criminal justice systems. At America's founding, differentiating between convictions and sentences was largely unknown because a defendant's conviction and sentence were

11. *Id.* Though grants of executive clemency are a rarity in modern times, "as recently as the first half of the twentieth century, clemency grants were a regular feature of our criminal justice system." Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1149 (2012).

12. U.S. CONST. art. I, § 9.

13. U.S. CONST. art. II, § 2.

14. U.S. CONST. art. III, § 2.

generally one and the same. As the Supreme Court has explained, during this period the “substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense [and a] judge was meant simply to impose that sentence.”¹⁵ This era’s “invariable linkage of punishment with crime” meant that there were generally no special sentencing doctrines or court proceedings distinct from the doctrines and procedures that attended traditional criminal trials.¹⁶ The early history of American law, in other words, did not generally distinguish between convictions and sentences for any purpose, let alone with respect to how these two components of a criminal judgment ought to be treated for finality purposes.

Last but certainly not least, until the development of penitentiaries in the mid-nineteenth century, the capital and corporal punishments typically employed in early America were completed upon imposition and thus beyond review or reconsideration once imposed.¹⁷ After a convicted criminal defendant was executed or banished or pilloried or whipped or placed in the public stocks, there were no practical means or opportunity to review or modify the imposed sanction. An executed or banished defendant was, obviously, no longer present in the community to seek reconsideration of either his conviction or sentence; a defendant who was whipped or subject to other public corporal punishment could not have reversed or modified the pain or shame he experienced after such a sanction was first imposed.¹⁸

15. *Apprendi v. New Jersey*, 530 U.S. 466, 479 (2000); *see also Alleyne v. United States*, 133 S. Ct. 2151, 2158–59 (2013) (highlighting the “intimate connection between crime and punishment” in early American laws and practices).

16. *Apprendi*, 530 U.S. at 478. This reality helps explain why the U.S. Constitution frequently mentions trials and expressly regulates criminal trial procedures, but does not mention sentencing procedures or practices. *See, e.g.*, U.S. CONST. art. I, § 3 (providing that an impeached official may still be subject to a traditional criminal trial); U.S. CONST. art. III, § 2 (setting forth procedures for criminal trials in all cases but impeachment); U.S. CONST. amend. VI (providing for accused defendants to have various trial rights).

17. *See generally* DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 48 (1971) (noting that criminal codes of the Founding Era “provided for fines, whippings, for mechanisms of shame like the stocks, pillor and public cage, for banishment, and for the gallows”); Note, *The Eighth Amendment, Proportionality, and the Changing Meaning Of “Punishments”*, 122 HARV. L. REV. 960, 961 (2009) (“The system of ‘punishments’ that existed at the time of the Founding was fundamentally different from that which exists today.”).

18. In this context, Thomas Jefferson’s 1779 proposed “Bill for Proportioning Crimes and Punishments” in Virginia provides a notable and informative perspective on

*B. A Century without Sentence Finality Due to the
Rehabilitative Ideal*

Through the latter half of the nineteenth century, progressive criminal justice reformers in the United States championed a move away from capital and corporal punishments toward the development of penitentiaries and the use of imprisonment as a primary punishment for all offenders.¹⁹ As new prisons were constructed from coast to coast, American criminal justice systems nationwide embraced rehabilitation as the central punishment concern, and a highly discretionary “medical” model came to dominate criminal sentencing procedures and practices.²⁰ As the rehabilitative ideal grew in prominence throughout the 1900s, trial judges in federal and state systems were afforded nearly unfettered discretion to impose upon criminal defendants just about any prison term selected from within wide statutory ranges,²¹ and parole officials exercised similar discretion concerning actual release dates.²² The grant of nearly unfettered

Framing Era punishment views and practices. Among other punishments suggested by Jefferson in this bill were death by hanging, forfeiting of all lands and goods to the state, physical castration, cutting a hole through the cartilage of the nose, maiming, putting in the pillory, ducking, and whipping. See THOMAS JEFFERSON, A BILL FOR PROPORTIONING CRIMES AND PUNISHMENTS IN CASES HERETOFORE CAPITAL (1778), available at <http://press-pubs.uchicago.edu/founders/documents/amendVIII10.html>. Obviously, once a convicted defendant had been physically castrated or had a hole cut in her nose, there would be no ready means to undo this punishment and thus no practical purpose could be served by review or reconsideration of a defendant’s conviction or sentence.

19. See generally David Rothman, *Perfecting the Prison: United States, 1789–1865*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 100, 111–29 (Norval Morris & David Rothman eds., 1995); Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in THE OXFORD HISTORY OF THE PRISON, *supra*, at 169.

20. See J.L. MILLER ET AL., SENTENCING REFORM: A REVIEW AND ANNOTATED BIBLIOGRAPHY (1981); SANDRA SHANE-DUBOW ET AL., SENTENCING REFORM IN THE UNITED STATES: HISTORY, CONTENT, AND EFFECT 3–6 (1985); see also *Williams v. New York*, 337 U.S. 241, 248 (1949) (explaining that “reformation and rehabilitation of offenders have become important goals of criminal jurisprudence”).

21. See, e.g., MICHAEL TONRY, SENTENCING MATTERS 6 (1995) (“Subject only to statutory maximums and occasional minimums, judges had authority to decide whether a convicted defendant was sentenced to probation (and with what conditions) or to jail or prison (and for what maximum term).”); see also *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (discussing the wide discretion given to federal judges in ascribing sentences during this time).

22. See, e.g., Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 568 (1994) (“Traditionally, a parole board’s unfettered discretion determined when an offender could leave prison. Within broad parameters set by the legislature, the authority of parole decision makers has been extensive and far-reaching.”).

discretion to sentencing judges and parole officials was designed to enable government officials to individualize punishments and thereby tailor sentences to the rehabilitative prospects and progress of each offender²³—in order to, as the Supreme Court put matters in 1949, effectuate the “prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.”²⁴

This rehabilitative model of punishment, which came to dominate criminal justice practices throughout the United States for over a century, transformed sentencing policies and practices in numerous ways. Most fundamentally, state and federal prison sentences imposed after a defendant’s conviction were indeterminate: a sentencing judge typically could and would impose imprisonment terms in broad ranges so that prison and parole officials would subsequently decide what period of time a defendant would actually remain incarcerated.²⁵ Through a system pioneered by penologist Zebulon Brockway, offenders sentenced to prison terms of whatever duration could, through continuous good behavior and other means of demonstrating that they were rehabilitated, earn early release on parole.²⁶ While on parole, offenders would then be closely supervised in the community and violations of the terms of parole could result in a return to prison.²⁷ This structure of indeterminate sentencing and parole spread rapidly through the United States; nearly every state and

23. See Andrew von Hirsch et al., *The Sentencing Commission’s Functions*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 3, 3 (1987) (“[W]ide discretion was ostensibly justified for rehabilitative ends: to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender’s need for treatment.”); see also FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 3–20 (1981) (discussing the “dominance” of the rehabilitative ideal through the late 1960s).

24. *Williams*, 337 U.S. at 247.

25. See generally JEREMY TRAVIS & SARAH LAWRENCE, BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA (2002), available at http://www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf; Joan Petersilia, *Community Corrections: Probation, Parole, and Prisoner Reentry*, in CRIME AND PUBLIC POLICY 499 (James Q. Wilson & Joan Petersilia eds., 2011).

26. See Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 980–83 (2013); Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 9, 20–40 (1925).

27. See TRAVIS & LAWRENCE, *supra* note 25; Petersilia, *supra* note 25; Doherty, *supra* note 26.

the federal government had embraced this model of sentencing and corrections by the 1920s.²⁸

This rehabilitative model of sentencing and corrections was avowedly disinterested and arguably disdainful of sentencing finality, at least with respect to the traditional sentences of prison and probation. After a sentencing judge had imposed a prison term, which sometimes would be set in a range as broad as one year to life, prison and parole officials were expected and instructed to consistently review offenders' behavior in prison to determine if and when they should be released to the community.²⁹ All imprisoned defendants would have regular parole hearings at which time their sentence terms were, formally and functionally, subject to review and reconsideration by corrections officials.³⁰ Even after officials decided to set free a prisoner on parole, or if a defendant was sentenced to probation rather than prison in the first instance, correctional supervisors still kept close watch on offenders to assess their behavior in the community again with an eye toward reviewing and modifying sanctions as needed to fit the needs of the offender and society.³¹ Release on parole or probation was never really a final sentencing disposition: government officials readily could and often would revoke parole or probation to remand those who misbehaved in the community back to prison.³²

Significantly, this rehabilitative model of sentencing and corrections with its fundamental disaffinity for treating any sentencing term as final was still dominant in the 1960s when courts and scholars began earnestly discussing the importance of

28. See Lindsey, *supra* note 26, at 65; see also Joan Petersilia, *Parole and Prisoner Reentry in The United States*, 26 CRIME & JUST. 479, 489 (1999) ("By 1927, only three states (Florida, Mississippi, and Virginia) were without a parole system, and by 1942, all states and the federal government had such systems.").

29. See, e.g., Alan Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 23 U. PA. L. REV. 297, 298 (1974) (noting that it was "extremely rare for a convicted criminal . . . to know, at the time judgment is formally imposed by the court, precisely how long he actually will be retained in confinement").

30. See TRAVIS & LAWRENCE, *supra* note 25; Petersilia, *supra* note 25.

31. See, e.g., MICHAEL TONRY, RECONSIDERING INDETERMINATE AND STRUCTURED SENTENCING 3 (1999) ("Individualization' was the fundamental idea behind indeterminate sentencing. At every stage officials needed broad authority to tailor dispositions to the treatment needs of individual offenders and the public safety risks they posed.").

32. See generally Petersilia, *supra* note 25.

treating criminal judgments as final.³³ This historical reality should inform consideration of this period's debate over the finality of criminal judgments in two critical ways: (1) because it was widely understood (and still well-accepted) that all sentences were indeterminate and subject to review and reconsideration by corrections officials, advocates stressing the importance of treating criminal judgments as final were necessarily focused only on the finality of criminal *convictions*; and (2) any problems or harms resulting from giving too much weight to the interests of finality for criminal *convictions* were necessarily mitigated by parole mechanisms which allowed reconsideration of any and all criminal *sentences* that might later be considered unfit or unfair based on subsequent legal or social developments.

In sum, from the middle of the nineteenth century until toward the end of the twentieth century, due to the rise of U.S. penitentiaries and incarceration as a principle mode of punishment coupled with the widespread dominance of the rehabilitative ideal and its commitment to indeterminate sentencing schemes and parole mechanisms, sentencing outcomes and practices throughout the United States exhibited a distinctive *lack* of finality. By definition and by design, the indeterminate sentences judges imposed during this period eschewed any commitment to or concern for finality interests and were instead driven by the "philosophy of penology that the punishment should fit the offender"³⁴ and should be reviewed and reconsidered for refitting as needed. Stated slightly differently, concerns about punishment fitness, not sentence finality, dominated American criminal justice philosophies and practices until quite recently.

33. See ALLEN, *supra* note 23, at 3-7 (1981) (discussing the "dominance" and "almost unchallenged sway of the rehabilitative ideal" through the late 1960s); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 163 (1967) (continuing to describe offenders as "patients" in a leading government report about sentencing and corrections); *supra* note 4 (discussing the start of robust scholarly debate over the finality of criminal judgments in the mid-1960s).

34. *Williams v. New York*, 337 U.S. 241, 247 (1949).

*C. Sentence Finality's Bite in the Modern Era of
Mandated Massive Incarceration*

In the last quarter of the twentieth century, U.S. sentencing philosophies, policies, and practices changed dramatically. Judges, politicians, academics, and advocates became increasingly suspect about the efficacy of efforts to rehabilitate offenders and increasingly concerned about discretionary sentencing procedures giving short shrift to defendants' individual rights and to the value of equal treatment across cases.³⁵ Researchers highlighted and criticized the unpredictable and disparate sentences that often resulted from discretionary sentencing systems focused only on offender rehabilitation; reform advocates urged the development of more structured sentencing regimes which would lead judges to impose sentences that were more fixed, certain, and consistent.³⁶ As one leading commentator explained, this period brought a "wide and precipitous decline of penal rehabilitationism" as a foundational theory for the sentencing systems and practices.³⁷

Because indeterminate prison sentences and parole review were the most tangible and consequential manifestation of the rehabilitative model of sentencing and corrections, these mechanisms quickly became casualties of new sentencing reform efforts. Maine became the first state to eliminate parole in 1976,³⁸ and California and Indiana soon thereafter enacted legislation calling for its judges to impose determinate prison sentences and abolishing discretionary parole release.³⁹ A number of other states in subsequent years followed suit by completely abolishing parole for all offenses and offenders,⁴⁰ as did the federal criminal justice

35. See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE (1971); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1971); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

36. See DAVID FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (1975); TWENTIETH CENTURY FUND TASK FORCE ON CRIM. SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); ERNEST VAN DEN HAAG, PUNISHING CRIMINALS (1975); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); JAMES Q. WILSON, THINKING ABOUT CRIME (1975).

37. See ALLEN, *supra* note 23, at 7–20.

38. See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 65 (2003).

39. *Id.*

40. See *id.* at 66–67 (providing a table with the status of state and federal parole provisions as of 2002); see also TRAVIS & LAWRENCE, *supra* note 25, at 4–7 (2002).

system through Congress's passage of the Sentencing Reform Act of 1984.⁴¹ Even those states that preserved some system of parole reformed their sentencing laws in various ways to limit or narrow the offenders eligible for parole consideration: nearly every U.S. jurisdiction adopted mandatory minimum sentencing provisions for certain crimes or repeat offenders which required prisoners to serve fixed terms before any parole consideration, and many states also adopted "truth-in-sentencing" laws that required offenders convicted of certain serious crimes to serve at least eighty-five percent of the prison sentence announced by the judge at sentencing.⁴²

During this same period, a new era of punishment punitiveness accompanied the move away from the rehabilitative ideal and the transformation of modern punishment practices throughout the United States. As criticisms of discretionary sentencing practices dovetailed with concerns about increasing crime rates, "tough on crime" policies and politics began to draw adherents to the view that only severe mandatory sentencing terms could help deter criminal offenses and that lengthening prison terms would at least help incapacitate criminal offenders to help protect and promote public safety.⁴³ Legislatures nationwide embraced determinate sentencing laws that called for prison sentences for most offenses and required very lengthy prison terms for all serious offenses and for all repeat offenders.⁴⁴

41. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

42. See DALE PARENT ET AL., KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: MANDATORY SENTENCING I (1997) ("By 1994 all 50 States had enacted one or more mandatory sentencing laws, and Congress had enacted numerous mandatory sentencing laws for Federal offenders.").

43. See generally Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61 (1993); Marc Mauer, *Why are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9 (1999).

44. See, e.g., Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 307 (2009) (noting that in the period from 1970 to 2000, "state and federal governments tripled the percentage of convicted felons sentenced to confinement and doubled the length of their sentences"). One of the most prominent and consequential of these reforms was California's enactment of its Three Strikes Law in the early 1990s, which provided for a mandatory minimum prison term of 25 years for a defendant's third felony conviction. See CAL. PENAL CODE ANN. § 667(b) (West 2012); see also John R. Sutton, *Symbol and Substance: Effects of California's Three Strikes Law on Felony Sentencing*, 47 LAW & SOC'Y REV. 37, 68 (2013) (documenting that in California: "Three Strikes made the system as a whole more punitive, increasing both the probability of imprisonment for the average felon and the length of the average prison sentence").

The impact of modern sentencing reforms and practices on the size and scope of the U.S. prison population has been profound and profoundly consequential:

Between 1970 and 2005, state and federal authorities increased prison populations by 628 percent. By 2005, more than 1.5 million persons were incarcerated in U.S. prisons on any given day, and an additional 750,000 were incarcerated in local jails. By the turn of the 21st century, more than 5.6 million living Americans had spent time in a state or federal prison—nearly 3 percent of the U.S. population.⁴⁵

The current fashionable term for the historically huge prison population in the United States is mass incarceration,⁴⁶ and the phenomenon of distinctly harsh prison sentences and huge numbers of incarcerated individuals now serves as the defining and most distinguishing characteristic of U.S. criminal justice systems at the start of the twenty-first century.⁴⁷

The raw data reporting that 2.25 million individuals are imprisoned in America's prisons and jails⁴⁸ documents just the most basic dimensions of mass incarceration in the United States, and drilling deeper into the numbers provides an even more disconcerting snapshot of modern America's affinity for extreme terms of imprisonment. A recent Sentencing Project report, for

45. DON STEMEN, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 1 (2007).

46. See generally, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); *Symposium on Mass Incarceration: Causes, Consequences, and Exit Strategies*, 9 OHIO ST. J. CRIM. L. 1 (2011).

47. See generally JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003). The extraordinary modern growth in prison and jail populations is stunning when placed in a global perspective: a higher proportion of the adult population in the United States is incarcerated than in any other country in the world, and our incarceration rate is now roughly five to ten times the rate of most other Western industrialized nations. See Nicola Lacey, *American Imprisonment in Comparative Perspective*, 139 DAEDALUS 114 (2010).

48. See LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, (Nov. 2012) available at <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

example, documents a “historic rise” in offenders serving life prison terms in the United States: “The lifer population has more than quadrupled in size since 1984 . . . [A]s of 2012, 159,520 people in prison were serving a life sentence and 49,081 (30.8%) of them have no possibility for parole.”⁴⁹ An earlier report by this same group indicated that “one of every four (27.5%) adult prisoners was serving a sentence of 20 years or more” and that hundreds of thousands of prisoners not formally serving life prison terms are “serving very long sentences, or consecutive sentences, that will often outlast the person’s natural life.”⁵⁰

These statistics suggest there may now be more individuals condemned to die in America’s prisons based on their current “final” sentences than the *total* prison population in the 1960s when courts and scholars began earnestly discussing the importance of finality for criminal judgments. As explained before, the then-prevailing practices of indeterminate sentencing and parole entailed that the vast majority of 300,000 persons incarcerated in 1970 could take comfort in the then-prevailing reality that the duration of and justification for their ongoing prison terms would be regularly reviewed and reconsidered by corrections officials. Today, in sharp contrast, the majority of the 2.25 million incarcerated individuals in the United States⁵¹ must

49. ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 2, 5 (2013), available at http://www.sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf. A recent report by the American Civil Liberties Union further documents that many thousands of persons are serving life without parole sentences in federal and state prisons for nonviolent offenses. See ACLU, *A Living Death: Life Without Parole for Nonviolent Offenses*, (Nov. 2013), <http://www.aclu.org/criminal-law-reform/living-death-life-without-parole-non-violent-offenses-0>.

50. MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF “LIFE”: LONG PRISON SENTENCES IN CONTEXT 11 (2004).

51. In addition, though not quite as dramatic and life-defining as incarceration, various forms of liberty deprivation in the United States are an aspect of daily life for millions more than just the nearly 2.25 million persons now confined in prison or jail cells. For example, roughly five million persons are now serving probation, parole, or some other form of post-release supervision. See GLAZE & PARKS, *supra* note 48. In addition, these remarkable data on state control do not incorporate the massive—but largely uncounted—number of former criminals subject to a range of punitive collateral consequences. Hundreds of thousands of sex offenders nationwide must deal with state and local residency restrictions and registration requirements. Millions of other former felons face a wide array of restrictions on their ability to work in certain fields and to receive certain government opportunities and benefits. See generally CECELIA KLINGELE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE (2012).

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.

In sum, the transformation of the sentencing enterprise and embrace of mandatory sentencing schemes throughout the United States over the past four decades has been remarkable and remarkably consequential for the considerable number of offenders sentenced to significant terms of imprisonment. The highly discretionary indeterminate sentencing systems that had been dominant for a century have been replaced by an array of sentencing structures that govern and control sentencing decisionmaking. Most pertinent to the topic of this Essay, prison sentences that had for more than a century been defined by a lack of finality are now fixed and final in the vast majority of all serious criminal cases at the moment they are announced by a sentencing judge.⁵² Consequently, two centuries of U.S. criminal justice experience in which sentence finality was not a distinct concern has given way, due to dramatic changes in sentencing laws, policies, and practices, to a modern era of mass and massive terms of incarceration that makes the treatment of final sentences arguably the most important issue for hundreds of thousands of current prisoners and for the tens of thousands more defendants being sentenced to lengthy prison terms each year throughout the United States. Sentence finality, in short, has gone from being a non-issue to being arguably one of the most important issues in modern American criminal justice systems.

II. REBALANCING SENTENCE FINALITY, FITNESS, AND FAIRNESS CONCERNS IN MODERN CRIMINAL JUSTICE SYSTEMS

Given the limited need or opportunity to give much attention to the distinct issues raised by sentence finality until

52. Different jurisdictions have a variety of laws and procedures governing direct appellate review of criminal justice outcomes which provide some sentenced defendants with some means for directly appealing an imposed sentence. But statistics from the federal criminal justice system, which may well now have the most robust form of direct appellate review of sentences among all U.S. jurisdictions, reveal that only a small percentage of defendants appeal their sentences and that only a small percentage of those who appeal get their initial sentences reversed and reconsidered. *See* U.S. SENTENCING COMM'N, 2012 ANNUAL REPORT 47–49 (2013) (reporting that less than 6000 of roughly 80,000 sentenced defendants pursued a direct appeal and that only about fifteen percent of that group had their sentences fully or partially reversed).

recently, it is understandable that lawmakers and commentators generally have not explored or even considered the different considerations implicated when a defendant seeks only review and reconsideration of his final sentence and does not challenge his underlying conviction. But, as stressed in Part I, sentencing laws and practices in our modern era of mass and massive incarceration have heightened the importance and impact of sentence finality. Consequently, it is now critically important for policy-makers, courts, and scholars to consider more thoughtfully and thoroughly the values and interests served—and not served—by doctrines, policies, and practices that may allow or preclude the review of sentences after they have been deemed final. This Part explores the distinct concerns raised by the distinct issue of sentence finality, and suggests that sentence finality concerns should more often take a back seat to concerns about punishment fitness and fairness, especially when legal developments raise new questions about lengthy prison sentences. This Part concludes, however, by acknowledging that finality is still a weighty concern even in sentencing contexts, especially in cases involving serious violent crimes with enduring victims, and it urges legislatures, sentencing commissions, and courts to refine existing doctrines and consider new legal mechanisms to seek to best balance fitness, fairness, and finality for modern criminal justice systems.

*A. Conceptual, Policy, and Practical Differences between
Convictions and Sentences for Finality Purposes*

As suggested at the outset of this Essay, it is curious that modern finality doctrines and debates rarely distinguish between final convictions and final sentences given that legislatures, courts, and commentators have long recognized that guilt determination and punishment imposition involve distinct stages of criminal adjudication calling for different rules and procedures.⁵³ Burdens

53. See generally 18 U.S.C. § 3661 (providing, in sharp contrast to the evidentiary rules that limit information presented during trials, that “[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence”); *Williams v. New York*, 337 U.S. 241, 248 (1949) (stressing that “the issue [at trial] is whether a defendant is guilty of having engaged in certain criminal conduct of which he has specifically been accused . . . [while sentencing] is to determine the type and extent of punishment after the issue of guilt has been determined”); Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771

of proof, evidentiary rules, courtroom procedures, the primary finders of fact, and the range of possible legal outcomes are all traditionally quite different for criminal trials that sometimes, but not always, result in convictions and for sentencing proceedings which always result in the imposition of punishment. Put simply, it is well accepted that there are fundamental and essential conceptual differences between criminal trial procedures, which are designed and seek only to determine the binary question of a defendant's legal guilt, and criminal sentencing proceedings, which are structured to assess and prescribe a convicted offender's future and fate.⁵⁴ This fundamental and essential conceptual difference between trials and sentencings not only entails that final convictions and final sentences are necessarily and inherently different legal creatures with different characteristics, but also should encourage suspicion concerning any claim that convictions and sentences necessarily must or generally should be given the same kind of treatment for finality purposes.

Criminal trials are inherently backward-looking, offense-oriented events, and convictions reflect and represent binary factual determinations about legal guilt. Typically, trial disputes center on particular issues of historical fact; trials are designed and intended to achieve an accurate and specific legal determination that resolves these factual disputes in order to establish formally, for all pertinent legal purposes, whether the defendant in fact committed a criminal offense that calls for society's condemnation and state punishment. At issue at trial may be whether the defendant was the person who committed a wrongful act, what the defendant's mental state was, or whether the defendant used a weapon or inflicted a particular injury. Whatever the specific factual issue in dispute, in every criminal trial the advocates and the adjudicators can and should be given all the resources needed—and should be committed to and able to invest all necessary time, energies, and efforts—to marshal and review whatever evidence and information exists concerning the past historical events that are at the heart of the government's

(2003) (detailing the many traditional constitutional and statutory rights generally afforded defendants at trial that typically do not apply at sentencing).

54. *See generally* NORA DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES AND GUIDELINES ch.6 (3d ed. 2013) (reviewing at length the unique legal rules and procedures that apply at sentencing).

accusations concerning a defendant's alleged misconduct and wrongdoing.⁵⁵ Every effort necessarily should be made to ensure—and every traditional constitutional and evidentiary rule is styled in order to ensure—that a criminal defendant is given a full and fair opportunity to raise a reasonable doubt about the government's allegations, and trial decision-makers are required to choose from a fixed and limited set of possible trial verdicts as they resolve factual questions concerning guilt or innocence. If the defendant prevails at a criminal trial through a not-guilty verdict, this trial outcome is truly final for all purposes: the prosecution is precluded from seeking any appeal or review of this trial determination and is further barred from pursuing a retrial on the same charges. Conversely, if the prosecution prevails at trial through a guilty verdict, this outcome of conviction justifiably merits a strong presumption of regularity and accuracy in light of all the time, energies, and efforts marshaled by the participants to get the fundamental guilt determination right initially.

Sentencings, in sharp contrast, involve assessing the future treatment and legal fate of only those offenders convicted after a trial or plea has resolved basic backward-looking factual disputes about guilt and degrees of criminality. No matter which modern punishment philosophies a jurisdiction principally embraces, sentencing determinations will necessarily always incorporate some offender-oriented considerations, many of which involve assessments of a defendant's personal history and characteristics to

55. Many traditional rules of evidence, all of which apply during criminal trials and very few of which are applicable in sentencing proceedings, are designed to ensure that trial fact-finders are focused exclusively on whether the defendant did in fact commit the crime with which he is charged. For example, a number of federal evidentiary rules significantly limit the introduction of a defendant's prior convictions or prior bad acts in order to ensure juries are not prejudicially distracted by a defendant's past when tasked with determining only whether the defendant committed the new crime charged. *See* FED. R. EVID. 404(b) (expressly providing that evidence of a defendant's past "crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character"); FED. R. EVID. 609 (carefully limiting when a past criminal conviction can be used to impeach a witness). These kinds of evidentiary rules have long been deemed inapplicable in any sentencing proceedings, *see* FED. R. EVID. 1101(d)(3), largely because of the widely embraced view that evidence concerning a defendant's criminal past or other bad prior conduct is essential for a judge or jury to consider when seeking to determine a fair and effective sentence following a trial conviction. *See, e.g.*, 19 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

make a forward-looking prediction of the offender's likelihood of committing future crimes. Though sentencing proceedings may often incorporate some backward-looking considerations concerning how and why a particular crime was committed, the focus of the advocates and the adjudicators is always broader, always more multifaceted and multi-dimensional, and always more granular and nuanced than the basic binary issues of historical fact that are resolved at trial and reflected in a criminal conviction. The legal issue at sentencing is no longer simply what happened and who was involved in alleged criminal conduct, but what to do with the convicted criminal in light of his, the victims', and society's needs. Sentencing decisionmakers, even within modern determinate sentencing schemes, are presented with a wide array of information about both the offense and the offender, and these decisionmakers are also typically given at least some (and often lots of) discretion to consider an array of possible punishments and sentencing dispositions.

Put most simply, a criminal trial involves the determination of discrete historical factual issues to be reflected in a binary verdict of conviction or acquittal; a sentencing proceeding involves the exercise of reasoned judgment balancing an array of diverse considerations in order to impose a just and effective punishment. This fundamental and essential conceptual difference necessarily must inform our traditional understanding of the importance of the finality of criminal judgments as we consider distinctions between conviction finality and sentence finality.

As Professor Scott effectively highlights in his contribution to this Symposium, there is a pervasive modern view that governments and society at large have a strong interest in preserving final criminal judgments because any re-litigation is costly and likely inefficient, may not be more accurate, and may damage the reputation of the criminal justice system.⁵⁶ These finality concerns are justifiably perceived to be at their apex when a defendant questions or assails the discrete backward-looking historical factual determinations at a trial that served as the basis for his conviction—a determination that can, and should be from the very outset, a subject of considerable procedure and

56. See Scott, *supra* note 6, at 185–88; see also Kim, *supra* note 5, at 566–71 (reviewing at length the traditional arguments in support of giving great weight to finality interests).

adversarial engagement in the trial courts (and through any available direct-review appellate process). But these concerns necessarily recede, at least somewhat and arguably a whole lot, when a defendant questions or assails only the legal rules and the discretionary forward-looking judgments that were central to the imposition of his punishment. As Professor Scott notes, merely the passage of time—when “memories fade, evidence spoils, and witnesses die or otherwise become unavailable”—provides reason to fear that any new review or reconsideration of backward-looking factual determinations of guilt made during a trial will be costly and inefficient, will be less accurate, and will raise questions about the accuracy and efficacy of criminal trials generally.⁵⁷ But the passage of time—when societal perspectives on just punishment necessarily evolve, when further evidence concerning an offender’s character emerges, and when new governmental and victim interests may enter the picture—can provide reason to *expect* that review or reconsideration of an initial sentence may be an efficient way to save long-term punishment costs, may result in a more accurate assessment of a fair and effective punishment, and may foster respect for a criminal justice system willing to reconsider and recalibrate the punishment harms that it imposes upon its citizens.⁵⁸

These conceptual and policy arguments for considering sentence finality “different in kind” from conviction finality may, in the end, return to a very practical reality that cuts to the heart of what it means in real terms to call a criminal judgment final: when a defendant is still serving time in prison or otherwise still having his freedom directly restricted by the state as part of the formal punishment imposed for his crime, arguably his sentence is not yet really even final because the state’s criminal justice power is still actively controlling the defendant’s life, liberty, and pursuit of happiness. A conviction is, in many formal and functional ways, essentially final the moment a trial verdict is reached, and any

57. Scott, *supra* note 6, at 186–87.

58. See generally Kim, *supra* note 5, at 579–91 (highlighting the considerable economic and social costs of “wrongful incarceration” and arguing, based on social psychological research showing the willingness of people to obey the law is influenced heavily by their perceptions of procedural fairness and system legitimacy, that undue restrictions on review of punishment that may appear “unfair” could end up increasing law-breaking by undermining the perceived legitimacy of the entire criminal justice system).

subsequent challenge by a defendant to that conviction is necessarily an effort to seek a do-over for a prior determination of guilt that we should hope and expect was made right initially. But a sentence arguably is not formally or functionally truly final until a defendant has completed serving the imposed punishment, and thus challenges by a defendant to a sentence he is still serving may be better understood and conceptualized not as an effort to review a prior legal determination but rather only as an effort to seek a new and fresh assessment of an on-going legal concern in light of changed legal or factual circumstances. Indeed, many if not most efforts by defendants to seek review and reconsideration of only a sentencing judgment often will not be a request to undo completely a prior decision, but instead typically will involve a claim that more recent changes in applicable laws or circumstances since the time of an initial sentencing decision provide reason to question now and anew whether the continued exercise of state power through continued punishment is still needed or justified.

Last, but certainly not least, traditional theories of punishment counsel that, especially for severe and continuing sanctions, significant limits on sentence review and reconsideration always risks, in the words of Professor Kevin Reitz, “lock[ing] in the worst of our sentencing mistakes”⁵⁹:

Both moral and consequentialist judgments become suspect when their effects are projected forward into a distant future.

On proportionality grounds, societal assessments of offense gravity and offender capability sometimes change over the course of a generation or comparable period. In recent history, for example, there has been flux in community attitudes toward some classes of drug offenders, and even in crime categories as serious as homicide, such as when a battered spouse kills an abusive husband or in cases of assisted suicide. The prospect of changing norms, which might render a

59. 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).

proportional prison sentence of one era disproportionate to the next, is of greatest concern for extremely long confinement terms.

On utilitarian premises, lengthy sentences may also fail to age gracefully. The accumulation of knowledge may reveal that sentences thought to be well founded in one era were in fact misconceived. An optimist might hope and expect this to be so. For example, research into risk assessment technologies has from time to time yielded significant improvements. A prediction of recidivism risk made today may not be consistent with the state of prediction science twenty years later. Similarly, with ongoing research, new and effective rehabilitative or re-integrative interventions may become available for long-term inmates who previously were thought resistant to change. It is unsound to freeze criminal punishments of extraordinary duration into the knowledge base of the past.⁶⁰

As stressed in Part I above, throughout most of American legal and social history, sentencing laws, policies, and practices evinced little or no concern for sentence finality and thus there were no real problems with, or need for concern about, lengthy prison sentences that failed to age gracefully. Especially while the rehabilitative ideal held sway, judicial and executive branch officials were principally and persistently concerned with calibrating and then often recalibrating sentences through parole and other mechanisms in order to effectuate the “philosophy of penology that the punishment should fit the offender.”⁶¹ Of course, modern concerns about unpredictable, disparate, unfair, and ineffective punishments that can and did result from rehabilitation-oriented sentencing systems of the past may justifiably discourage wholesale return to indeterminate sentencing systems which prioritize trying to fit punishments to

60. *Id.* (quoting MODEL PENAL CODE: SENTENCING § 6.10A cmt. b, at 59–60 (Council Draft No. 2, 2008)).

61. *Williams v. New York*, 337 U.S. 241, 247 (1949).

offenders over all other criminal justice values.⁶² But modern affinity for structured sentencing systems designed to ensure that punishments are more fixed, certain, and consistent need not and should not suffer and exacerbate the corollary problems that result from prioritizing sentence certainty and finality over all other criminal justice values. Instead, the goal and real challenge for fair and effective modern sentencing systems requires seeking a sound and sensible modern balance between the unique interests served (and not served) by sentence finality and the broader concerns of punishment fitness and fairness that surround all sentencing determinations.

B. Outlines for Rebalancing Sentence Finality, Fitness, and Fairness

At this point a reader should be convinced that “sentence finality” is a distinct concern raising distinct issues above and beyond the issues that surround the basic topic of finality. But even for those still drawn to traditional finality concerns, Professor Scott’s thoughtful contribution to this Symposium appropriately highlights and concedes that everyone recognizes, even in traditional finality debates, that finality concerns in the criminal justice system should never be deemed so critical that all possible means of review and reconsideration be forever foreclosed.⁶³ As he puts it, the fundamental issue here is really “about the relative importance of finality and competing interests, and about the proper rules to operationalize that balance.”⁶⁴ Thus, building on the prior parts of the Essay, the reader should contextualize the preceding account of why sentence finality is an issue of distinct concern raising distinct issues with Professor Scott’s important reminder that all discussions of finality doctrines ultimately concern how best to balance finality with other competing criminal justice interests.

62. *C.f. generally* Bowman, *supra* note 6, at 26–28 (providing an astute account in light of the problems created by modern mass incarceration of how parole review might be reinvigorated in modern U.S. criminal justice systems without creating the various problems with indeterminate sentencing that initially prompted modern structured sentencing reforms).

63. Scott, *supra* note 6, at 229.

64. *Id.*

To his great credit, Professor Scott's strong arguments for concluding that the "principal justifications for existing limits on collateral review—the costs of re-litigation, the risk of inaccuracy at new proceedings, and the threat to the reputation of the criminal justice system—apply with equal force to collateral attacks on sentences."⁶⁵ But tellingly, after making this argument fulsomely, Professor Scott ultimately concedes that "some sentencing claims and individual cases pose lesser threats to finality interests than others," and he specifically identifies how the severity of some penalties such as death or life imprisonment without parole provide "forceful grounds for striking a different balance between finality interests and competing considerations."⁶⁶ Professor Scott in this way effectively—and in my view appropriately—recognizes that when there are enormous stakes for the petitioner seeking review of his sentence, finality interest and concerns should more likely give way to other concerns.⁶⁷

Readers should not at this stage be surprised to learn that I concur with Professor Scott on this point. Moreover, I think his central insight can and should be embraced and further engaged by lawmakers and judges as they consider the application or possible modification of traditional finality doctrines and policies. In my view, the "stakes" for a defendant seeking review of his sentence are necessarily enormous not merely when he or she is facing the prospect of death, but also when he or she is facing an extended and on-going term of imprisonment. Indeed, given that the economic costs of long-term incarceration can be hundreds of thousands of taxpayer dollars, the "stakes" for society of any sentence involving decades of imprisonment are also quite significant. For these reasons, and in light of the conceptual ground covered above, I strongly believe that lawmakers and judges should be inclined to *reverse* the standard finality presumption a defendant is challenging only his extended and on-going prison sentence based on consequential new developments: i.e., a sound and sensible modern rebalanced finality presumption should be for, not against, sentence review or reconsideration when there has been a clear and significant new legal or social

65. *Id.* at 228.

66. *Id.* at 219, 221.

67. *Id.* at 221.

development that plainly undermines the apparent fitness or fairness of a defendant's still on-going and still extensive prison term. Put another way, I contend that finality concerns ought to presumptively recede when a defendant challenges an extended prison term, especially if and when the relief sought is not a reversal of past punishments already endured, but merely a new assessment of significant scheduled future punishments still in the offing.

At the risk of concluding this Essay with a refinement that demands a follow-up, I must now concede that it is beyond the scope of this Essay to work through the array of different and viable considerations one might reasonably incorporate in a new rebalanced finality jurisprudence (or even new types of sentence review mechanisms) that could and would seek in a nuanced way to accommodate dynamically the distinctive interests served (and not served) by sentence finality and the broader concerns of punishment fitness and fairness that surround all sentencing determinations. Indeed, I fear that this Essay, because it is primarily intended to raise new questions about old perspectives on finality issues, fails to give sufficient attention and consideration to all the varied reasons and distinct settings in which finality is still a weighty concern even in sentencing contexts. In particular, when offenders are sentenced for serious violent intentional crimes that result in lasting victims whose personal repose and psychic peace may only be well served by bestowing sentences with heightened certainty and predictability, the balance of personal and societal interests served by fitness, fairness, and finality may change dramatically. The traditional finality concerns stressed in Professor Scott's article are still legitimate (even if less weighty for sentences), especially for those cases in which not only society at large, but crime victims in particular have settled expectations that a defendant will serve the full term of the sentence imposed at initial sentencing.⁶⁸ Though

68. In this context, though, victim interests may not always run toward treating sentences as more final. One lesson often rightly preached by advocates of restorative justice concepts and practices is that victims' concerns could be well served by a dynamic sentence review and reconsideration process that effectively incorporates victims' interests and empowers victims' voices. See generally Janine Geske, *Achieving The Goals Of Criminal Justice: A Role For Restorative Justice*, 30 QUINNIPIAC L. REV. 527 (2012); Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15 (2003).

traditional finality concerns regarding the preservation of resources and the importance of repose and respect for judgments are weaker for sentencing judgments, they are hardly non-existent and their import and impact can wax and wane in a variety of criminal justice circumstances. Moreover, as highlighted by Frank Bowman's suggestion for creating a revised second-look, parole-type program for long-sentenced inmates,⁶⁹ and by Cecelia Klingele's suggestion that judicial sentence modification schemes could have considerable benefits for modern sentencing systems,⁷⁰ there can be a number of different structures and means to allow review and reconsideration of final sentences in order to give more modern attention to punishment fitness and fairness in various contexts.

This Essay does not and cannot seek to fully chart a precise course for legislatures, sentencing commissions, and courts to modernize existing laws and doctrines to better balance fitness, fairness, and finality for modern sentences. Rather, this Essay's chief goal was to unpack and deconstruct the under-examined and under-appreciated dynamics and concerns that surround the unique issue of sentence finality in modern criminal justice systems. Put most simply, sentence finality is a concern different in kind from conviction finality, and thus the finality balance struck for convictions, whatever its merits or flaws, should not, in modern times, be unthinkingly applied when a defendant only seeks review or reconsideration of an on-going sentence.

III. CONCLUSION

This Essay contends that modern mass incarceration in the United States now calls for policy-makers, executive officials, and judges to be less concerned about sentence finality, and more concerned about punishment fitness and fairness when new legal developments raise doubts or concerns about lengthy prison sentences. The conceptual, policy, and practical reasons that are used to justify limiting review and reconsideration of final convictions are not nearly as compelling when only sentences are at issue. Given that now the United States—a country which President Lincoln famously said was “conceived in Liberty” and

69. See Bowman, *supra* note 6.

70. See Klingele, *supra* note 5.

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which still pledges “liberty and justice for all”—confines more of its people in cages than any other nation in human history, the time has come to fundamentally review and reconsider our commitment to mass incarceration after decades in which our country, both legally and socially, turned long-terms of imprisonment into a first-resort punishment even though our national values suggest it should instead be a last-resort punishment. One means to that needed end may require new doctrines and practices that rebalance sentence finality with fitness and fairness in order to operationalize a new willingness to review and reconsider still on-going prison sentences one by one.