IN DEFENSE OF THE FINALITY OF CRIMINAL SENTENCES ON COLLATERAL REVIEW

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I. INTRODUCTION

The Supreme Court's decision in *Miller v. Alabama*[1] has touched off a flurry of public debate and legislative action around a seemingly dry and technical topic: the retroactivity of new rules of sentencing procedure.[2] In *Miller*, the Court held that sentencing a juvenile offender to life imprisonment without the possibility of parole violates the Eighth Amendment if that sentence is mandatory, rather than the product of a discretionary choice.[3] That rule prohibits mandatory life-without-parole sentences for juvenile offenders in all pending and future cases. But what about the more than two thousand juvenile murderers who received a mandatory sentence of life without parole years ago, before the *Miller* decision?[4] By filing a motion for collateral review of the judgment, many prisoners have already asked state or federal courts to apply *Miller* retroactively, vacating their sentences and ordering new sentencing proceedings. So far the results have been mixed. Many courts have declined to apply *Miller* to sentences that became final before the rule was announced, citing the government's interest in the finality of the judgment.

Although *Miller* has attracted considerable public attention, that result is commonplace in the collateral review of final criminal judgments. Congress and the courts have cited the government's interest in finality as a basis for many barriers to collateral relief, including statutes of limitations, harmless-error

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

2. *See* Editorial, *Injustices for Young Offenders*, N.Y. TIMES, Sept. 17, 2013, http://www.nytimes.com/2013/09/17/opinion/end-mandatory-life-sentences.html.

3. *Miller*, 132 S. Ct. at 2469–71.

4. *See id.* at 2477–78 (Roberts, C.J., dissenting) (discussing the number of prisoners affected by the mandatory sentence).

standards, and procedural default rules.[5] The non-retroactivity of "new constitutional rules" of criminal procedure,[6] in particular, is grounded principally in respect for the finality of criminal judgments. Once the process of direct review has concluded and a prisoner's conviction and sentence become final, a collateral attack on the judgment faces a steep uphill battle based, in part, on concerns about finality.

Recent scholarship, however, has challenged the strength of those finality interests in cases where a collateral attack seeks only to alter a criminal sentence without affecting the underlying conviction. Sarah French Russell and Douglas Berman have forcefully argued that interests in the finality of sentences on the whole are considerably weaker than interests in the finality of convictions.[7] Other judges and scholars have made more narrow claims about the finality interests that attend particular cases or particular claims of sentencing error.[8] Federal courts of appeals on occasion have drawn a similar distinction when calibrating standards of review or levels of scrutiny.[9] Their central claim is that the collateral review of sentences, as opposed to convictions, should be subject to different and less exacting rules. In particular, they urge a more generous approach to retroactivity, arguing that new rules of constitutional procedure that affect sentencing should more readily apply to prisoners whose criminal judgments have become final.[10]

5. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion).

6. *Id.* at 316.

7. *See* Douglas Berman, *Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 165–76 (2014) [hereinafter Berman, *Finality for Sentences*]; Douglas Berman, *Distinguishing Finality Interests Between Convictions and Sentences*, SENTENCING LAW AND POLICY (Dec. 15, 2006, 9:51 AM), http://www.sentencing.typepad.com/sentencing_law_and_policy/2006/12/distinguishing_.html [hereinafter Berman, *Distinguishing Finality*]; *see also* Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 88–89 (2012).

8. *See, e.g.*, Carrington v. United States, 503 F.3d 888, 901 (9th Cir. 2007) (Pregerson, J., dissenting) (discussing the sentences of two individual offenders with unique circumstances because of the sentencing judge's actions); Paul J. Heald, *Retroactivity, Capital Sentencing, and the Jurisdictional Contours of Habeas Corpus,* 42 ALA. L. REV. 1273, 1320–21 (1991) (discussing the narrow approach with respect to capital sentences); Russell, *supra* note 7, at 85–86 (discussing "'Begay-type' errors" in which courts erroneously classified prior convictions as "violent felon[ies]" that trigger sentence enhancements under the Armed Career Criminal Act).

9. *See infra* pp. 196–97 and notes 90–95.

10. *Id.*

The argument has obvious appeal in cases like *Miller*, in which a class of juvenile offenders stands to serve out especially severe sentences, despite the fact that they were imposed unconstitutionally. It also has some force in light of the traditional justifications for respecting finality. Resentencing is faster, less complex, and cheaper than a new trial. Although resentencing may take place years after the original proceedings, the relaxed evidentiary rules at resentencing make the risk of inaccuracy from unavailable or spoiled evidence less acute than at retrial. Indeed, the passage of time may provide better information about the offender's dangerousness and rehabilitation, enhancing accuracy. In addition, continuing litigation over a sentence may not pose the same threat to the reputation of the criminal justice system as continuing litigation over guilt or innocence. Sentences are already subject to modification and reduction through a host of procedures, and the finality of a sentence currently being served somehow "feels different" than a final conviction based on past criminal conduct.[11] Each of those distinctions, moreover, is especially sharp for certain types of sentences or claims of sentencing error, where resentencing would reap clear benefits with few costs.

Nonetheless, this essay argues in defense of the finality of criminal sentences on collateral review. It disentangles two versions of the argument against sentence finality: a "strong form," which insists that all sentences implicate diminished finality interests; and a "modest form," which singles out particular types of sentencing error and individual cases that pose a lesser threat to finality. Neither version is persuasive, however, as a basis for changing the rules for collateral review.

The strong form of the argument is premised on the low costs of resentencing relative to retrial. But the focus on average costs per procedure ignores a stark imbalance in the volume of procedures: roughly ninety-five percent of criminal convictions result from guilty pleas rather than trials,[12] and in those cases sentencing represents the major investment of judicial resources. New rules of sentencing procedure therefore threaten to disrupt far more cases than new rules of trial procedure. As to accuracy, sentencing, no less than trial, depends on a host of backward-

11. Berman, *Finality for Sentences*, *supra* note 7, at 167–69.

12. Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

looking factual determinations—such as the severity of the offense, the harm to victims, and the blameworthiness of the offender—that may be difficult to replicate many years later. Although new information may come to light that can benefit the sentencing process, that is an argument for discretionary sentence modification, and a *non sequitur* from a demand for resentencing based on a new procedural rule. Nor is the finality of sentences less important to the reputation of the criminal justice system. The "truth in sentencing" movement, which has led to the abolition of parole and other reforms in many jurisdictions, tapped into strong public appetite for predictability in sentences. Outrage over prisoners who commit crimes following early discharge also belies the suggestion that the public is indifferent to sentences so long as convictions remain intact.

The modest form of the argument focuses on particular sentences and errors that pose a lesser threat to finality interests. Violations of some sentencing rules, such as *Miller*'s ban on mandatory juvenile life-without-parole sentences, could be corrected at a lower cost and with fewer concerns about accuracy than others. By conducting a case-by-case balancing of finality and competing interests, the argument goes, courts could develop collateral review rules carefully calibrated to the particular challenge. Yet some claims of trial error likewise implicate lesser finality interests than others, and the same rules for collateral review apply. The same is true in analogous settings, such as qualified immunity for executive officials, where the Supreme Court has adopted a unified standard rather than one that is variable and context-specific.[13] The equivalence in finality between sentences and convictions under current law results not from courts' special hostility to sentencing claims—their "finality fixation," on Professor Berman's account[14]—but from a general commitment to striking a single reasonable balance across the board, rather than revisiting it in every new case. A case-by-case balancing approach to sentence finality would be challenging for collateral review courts because they rarely have complete

13. *See* Anderson v. Creighton, 483 U.S. 635 (1987); *see also* discussion *infra* Part IV.

14. *See* Douglas Berman, *Fascination and Frustration with "Finality Fixation" in en banc Sixth Circuit* Blewett *Arguments*, SENTENCING LAW AND POLICY (Oct. 15, 2013), http://www.sentencing.typepad.com/sentencing_law_and_policy/2013/10/fascination-and-frustration-mix-as-i-worry-sixth-circuit-may-blow-it-in-blewett.html.

information about what would happen at resentencing. Doctrinally, it would also prove exceedingly complex, layering standards upon standards and producing results that suffer from the appearance, and probably the reality, of arbitrariness. Widespread criticism of the rule-by-rule approach to retroactivity under *Linkletter v. Walker*,[15] long since abandoned by the Court, should serve as a cautionary tale. A complex and unpredictable sliding-scale approach to finality would also disserve the deterrent purpose of collateral review.

More promising than a two-tier system in which all sentencing challenges are subject to relaxed collateral review rules, or case-by-case balancing in which courts make precise doctrinal adjustments, is an approach that carves out broad categories of sentences for distinct treatment on collateral review. Capital sentences and federal sentences, for example, arguably should be subject to different rules because they implicate countervailing interests that justify a different balance against finality. A categorical approach would add some complexity, but would avoid the grave workability challenges of case-by-case balancing. Sentences of life without parole, at issue in *Miller*, would be a strong candidate under this approach.

Fixating on collateral review in debating the retroactivity of *Miller* would be unfortunate. Many states, in responding to *Miller,* have deliberately chosen to make their legislation retroactive.[16] Considering the range of possible *Miller* "fixes," each carrying different costs and producing different winners and losers, legislatures are better situated than courts to select the best option. In addition, because state courts can hardly be faulted for failing to anticipate the rule of *Miller*, automatic resentencing in cases where the government did not comply with the rule would serve no deterrent purpose. At the same time, for a host of reasons unrelated to retroactivity, collateral review is unreliable as a means of giving effect to new rules of sentencing procedure. Critics of finality in sentencing offer persuasive reasons to allow courts to modify sentences, and juvenile offenders serving sentences of life without parole deserve an opportunity for resentencing or parole

15. Linkletter v. Walker, 381 U.S. 618 (1965).

16. *See* Editorial, *supra* note 2 (noting that "[c]ourts in Michigan, Iowa, and Mississippi have ruled that the ban applies to previously sentenced juveniles").

eligibility. Given its purposes and limitations, however, collateral review is not an appropriate or effective mechanism.

The essay proceeds in three parts. Part II describes the current framework for finality on collateral review, setting out the traditional rationales for the government's interests in finality and explaining how current law operationalizes those interests in the collateral review of criminal judgments. Part III engages the strong form of the argument against sentence finality, discussing how each of the traditional rationales for finality maps onto challenges to sentences, as opposed to convictions, and whether those differences justify a two-tier retroactivity regime. Part IV turns to the modest form of the argument against sentence finality, considering whether the diminished interests in finality that attend particular sentences or types of sentences justify more targeted changes to retroactivity law.

II. FINALITY ON COLLATERAL REVIEW: THE CURRENT FRAMEWORK

Current law governing the collateral review of criminal judgments accords strong respect to the government's interest in finality. In this context, finality refers to several core concerns—costs, inaccuracy, and reputational damage—about the relitigation of criminal cases after a judgment becomes final. Those concerns animate various doctrinal hurdles to collateral relief, including the non-retroactivity of new rules of constitutional procedure. At present, federal law does not draw any distinction for finality purposes between convictions and sentences, as illustrated by federal and state courts' decisions on the retroactivity of the Supreme Court's decision in *Miller*.

A. Finality Interests on Collateral Review

In the context of collateral review,[17] finality refers to the interests of states and the federal government in preserving a

17. Finality may carry other meanings in criminal cases. For example, courts and scholars sometimes refer to the "finality" of the death penalty, meaning that it cannot be reversed. *See, e.g.*, Monge v. California, 524 U.S. 721, 732 (1998) (calling the death penalty "unique in both its severity and its finality"). Similarly, in double jeopardy cases, courts frequently emphasize the criminal defendant's interest in the "finality" of an acquittal. *See, e.g.*, Crist v. Bretz, 437 U.S. 28, 33 (1978). This essay focuses on a different kind of

criminal judgment. Once a criminal defendant has been convicted and sentenced by a trial court, and the process of direct review on appeal has concluded, the judgment is considered final.[18] According to the prevailing view, championed in influential opinions and articles by Justice John Marshall Harlan, Judge Henry Friendly, and scholars like Paul Bator, Anthony Amsterdam, and Paul Mishkin,[19] the government has a strong interest in preserving such a judgment, grounded primarily in three practical considerations: the costs of relitigation, the accuracy of new proceedings, and the damage to the reputation of the criminal justice system.

First, collateral review of a criminal judgment is costly, time consuming, and duplicative.[20] Criminal trials require a substantial investment of money and time, not only by the courts themselves, but by prosecutors, defendants and their counsel, investigators, witnesses, and jurors.[21] Almost all of those costs are borne by the public.[22] A collateral attack on a conviction, if successful, forces the adjudication process to start over from square one, necessitating another substantial investment of resources. Those costs may be particularly wasteful because, at least in theory, trial courts and the direct review process already afford every

finality: the government's interest in certainty and repose following a final conviction and sentence.

18. Barefoot v. Estelle, 463 U.S. 880, 886–87 (1983) (holding that "a presumption of finality and legality" attaches to a final criminal judgment).

19. *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, 262–64 (1969) (Harlan, J., dissenting); Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 383–84 (1963); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451–52 (1963); Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 146–51 (1970); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 77–86 (1965).

20. *See* Amsterdam, *supra* note 19, at 383–84 (describing "aspects of a 'finality' factor" that include "duplication of judicial effort" and "delay in setting the criminal proceeding at rest"); Bator, *supra* note 19, at 451 (discussing the costs of duplicative relitigation).

21. *See* Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 946–47 (1983) (estimating cost savings for courts, prosecutors, and defense counsel through guilty pleas rather than trials); Friendly, *supra* note 19, at 148–49.

22. *See* ELI BRAUN, OHIO JUST. & POL'Y CENTER, $42,000 FOR A COURTHOUSE HOUR: THE COST OF PROCESSING ADULT CRIMINAL CASES IN HAMILTON COUNTY, OHIO (Sept. 1, 2010), *available at* http://www.ohiojpc.org/text/publications/court%20cost.pdf (discussing "the burden of court functions on taxpayers").

defendant a full and fair opportunity to defend against the charges and to raise claims of error.[23] As a result, collateral review may be both expensive and duplicative. Respect for finality helps to conserve the scarce public resources available to the criminal justice system.[24]

Second, because collateral review may take place years after the original judgment became final, it may produce less accurate results.[25] The average time period between conviction and the *filing* of a federal habeas petition by a state court prisoner is 6.3 years.[26] It takes the federal courts another 9.4 months, on average, to resolve the petition,[27] and if relief is granted it takes still more time for the prosecution, defense, and the state courts to commence a new trial. That long time lag can jeopardize the reliability of the new proceedings. Over time, memories fade, evidence spoils, and witnesses die or otherwise become unavailable.[28] That poses challenges, in the first instance, for collateral-review courts themselves. Evidence of what transpired at trial may be stale, making it difficult to assess whether an error occurred or how it affected the trial. That risk is particularly acute when prisoners invoke "new rules" not yet announced at the time the conviction became final, since no one might have paid attention to the relevant facts during the original proceedings.[29] It

23. If the trial court failed to provide a full and fair opportunity to raise errors in the first instance, some procedural obstacles to collateral relief are cleared away. *See, e.g.*, 28 U.S.C. § 2254(b)(1) (2006) (waiving exhaustion requirements in cases where "there is an absence of available State corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant").

24. Friendly, *supra* note 19, at 148–49.

25. *See* McCleskey v. Zant, 499 U.S. 467, 491 (1991) (describing how a new trial "prejudice[s] the government and dimish[es] the chances of a reliable criminal adjudication"); Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part) (describing how witnesses' memories may be "dimmed" during a second trial); Amsterdam, *supra* note 19, at 384 (arguing that relitigation "will often be less reliable in reproducing the facts").

26. NANCY J. KING ET AL., NAT'L CENTER FOR ST. CTS., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 22 (2007), *available at* http://www.ncjrs.g ov /pdffiles1/nij/grants/219559.pdf. The median period between conviction and filing of a habeas petition is 5.7 years. *Id.*

27. *Id.* at 41.

28. Kirk J. Henderson, *Thanks But No Thanks: State Supreme Courts' Attempts to Remove Themselves from the Federal Habeas Exhaustion Requirement*, 51 CASE W. RES. L. REV. 201, 226 (2000).

29. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1815 (1991); Joseph Hoffmann, *Retroactivity and the Great Writ: How Congress Should Respond to* Teague v. Lane, 1990 BYU L.

also poses challenges for the trial court, if collateral review results in an order to conduct a new trial. The second time around, perhaps many years later, key evidence may be missing or less reliable, rendering the new trial less accurate or even impossible.[30] Similar concerns about accuracy, and in particular the risk of prejudice resulting from long delays between a crime and the ensuing trial, are central to the Sixth Amendment's guarantee of a speedy trial.[31]

Third, collateral review threatens the public reputation of the criminal justice system. Without some visible and conclusive resolution to cases, a system of criminal justice lacks legitimacy.[32] In Justice Harlan's memorable phrase: "No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved."[33] Scholars and judges who articulate this reputational concern typically focus on the public, warning that frequent relitigation of settled cases will undermine public confidence in the criminal justice system. Variations of that concern, however, focus on offenders and would-be offenders, maintaining that

REV. 183, 203 (1990) ("If successful on habeas, the petitioners who file such petitions are the most difficult ones for state officials to retry because their cases are the most stale.").

30. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 417 (1993) (noting "the enormous burden that having to retry cases based on often stale evidence would place on the States").

31. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 532 (1971) (calling "the possibility that the defense will be impaired," due to loss of witnesses or faded memories, "the most serious" interest that the Speedy Trial Clause was designed to protect because delays may "skew[] the fairness of the entire system").

32. Bator, *supra* note 19, at 452 ("A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands."); Friendly, *supra* note 19, at 149 (noting that "the human desire that things must sometime come to an end" is satisfied by finality).

33. Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).

finality is essential to the deterrent effect of the criminal law,[34] or to the effective rehabilitation of offenders.[35]

No one contends, of course, that finality interests outweigh all other considerations. Despite the fact that it unsettles final judgments, collateral review performs important functions, including the vindication of federal rights in a federal forum, the deterrence of constitutional errors, and the freeing of the innocent.[36] Nonetheless, based on concerns about cost, accuracy, and reputation, the Supreme Court and many scholars have concluded that finality interests are important enough to justify some limits on the availability of collateral review.

B. Finality and the Retroactive Application of New Rules

Many limits on the collateral review of criminal judgments derive from concerns about finality. Statutes of limitations, such as the one-year limitation period for habeas corpus petitions by state prisoners, obviously safeguard the repose of final criminal judgments.[37] Restrictions on the filing of successive or abusive habeas petitions likewise reflect concerns about finality.[38] So do rules excluding some constitutional claims altogether from collateral proceedings,[39] harmless-error standards,[40] and a variety of others.

Most relevant for present purposes, finality interests lie at the heart of the Supreme Court's approach to retroactivity in

34. *See* Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion) ("Without finality, the criminal law is deprived much of its deterrent effect.").

35. *See* Bator, *supra* note 19, at 452 ([W]e should at least tentatively inquire whether an endless reopening of convictions . . . [would] be consistent with the aim of rehabilitating offenders.").

36. *See* Fallon & Meltzer, *supra* note 29, at 1813–15 (discussing each of those functions).

37. *See* 28 U.S.C. § 2244(d)(1) (2006); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 453 (2007) ("The statute of limitations is AEDPA's clearest expression of a finality interest, placing a temporal constraint on the ability of prisoners to challenge convictions.").

38. *See* McCleskey v. Zant, 499 U.S. 467, 490–91 (1991); Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting).

39. Stone v. Powell, 428 U.S. 465, 491, n.31 (1976) (citing finality concerns in support of a rule excluding Fourth Amendment exclusionary rule claims from the scope of habeas corpus relief).

40. *See* Brecht v. Abrahamson, 507 U.S. 619, 635–36 (1993) (discussing finality concerns in announcing a harmless-error standard for habeas review).

habeas cases. In *Teague v. Lane*[41] in 1989, the Court inaugurated its current approach to cases in which a habeas petitioner seeks to benefit retroactively from a "new rule" of criminal procedure, announced after his conviction and sentence became final.[42] Earlier that decade the Court had concluded that when a new rule is announced, courts must give full retroactive application of the rule in any cases still pending on direct review.[43] But in *Teague* the Court held that, with limited exceptions, new rules should not have retroactive effect in cases on collateral review.[44] When a new rule calls into question the constitutionality of procedures used at trial, but at the time of trial the procedures were perfectly lawful, the Court insisted that "interests in comity and finality must also be considered" in determining the scope of review.[45] Stressing the value of finality in criminal cases, the Court concluded that the costs imposed by retroactive application of new rules on collateral review outweigh the benefits.[46] It therefore jettisoned its earlier approach, which evaluated new rules on a rule-by-rule basis in determining whether retroactive application was warranted.[47]

In addition, the Court relied on two other principles as a basis for its new approach to retroactivity. One was the deterrent purpose of habeas review. Habeas proceedings, the Court explained, are not designed to guarantee every defendant an error-free trial.[48] They serve, instead, to deter errors by judges and state officials.[49] The Court reasoned that federal courts could accomplish that goal by applying the constitutional standards that prevailed at the time of the original judgment, without reference

41. Teague v. Lane, 489 U.S. 288 (1989).

42. *Id.* at 310.

43. *Id.* at 304–05 (citing Griffith v. Kentucky, 479 U.S. 314, 322 (1987)).

44. *Id.* at 310.

45. *Id.* at 308.

46. *See id.* at 309 (concluding that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system"). The Court also cited the scholarship of Judge Friendly and Professors Bator and Mishkin. *Id.* at 309–10.

47. *Id.* at 301–02 (discussing the Court's earlier approach to evaluating new rules in *Linkletter v. Walker*, 381 U.S. 618 (1965)).

48. *Id.* at 305 (citing *Linkletter*, 381 U.S. 618).

49. *Id.* at 308 (quoting Kuhlmann v. Wilson, 477 U.S. 436 (1986) (plurality opinion)).

to new rules.[50] The other principle, mentioned only briefly in *Teague*, was comity or respect for the procedures of state courts.[51]

The Court also announced two exceptions to the principle that new rules should not apply retroactively to cases on collateral review. First, new substantive rules that place conduct beyond the power of the criminal law should be given retroactive effect.[52] In Justice Harlan's view, non-retroactivity was warranted for new procedural rules when the earlier procedure had accomplished "concededly valid" ends.[53] New substantive rules, by contrast, should not yield to concerns about finality because "there is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."[54] Second, the Court carved out an exception for rare "watershed rules of criminal procedure" linked to the defendant's innocence that implicate the fundamental fairness of the trial.[55]

Today, retroactivity rules on collateral review draw no distinction between challenges to convictions and challenges to sentences. The Supreme Court has announced that, once direct review has concluded, a presumption of finality attaches both "to the conviction and sentence."[56] Accordingly, it has consistently applied *Teague*'s non-retroactivity approach to collateral attacks on sentences.[57]

The equivalence, for finality purposes, between convictions and sentences has received only brief attention from the Court. In

50. *Id.* at 308 (agreeing with "Justice Harlan's description of the function of habeas corpus"); Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting).

51. *Teague*, 489 U.S. at 308 (citing Wainwright v. Sykes, 433 U.S. 72, 87–91 (1977)).

52. *Id.* at 311.

53. Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part).

54. *Id.* at 693 (noting that collateral review on substantive grounds also involves "none of the adverse collateral consequences of retrial"). Justice Harlan's opinion in *Mackey* referred specifically to "substantive due process" claims. *Id.* at 692. Since *Teague*, however, the Court has interpreted this exception to reach any new substantive rule, regardless of its source. *See, e.g.*, Bousley v. United States, 523 U.S. 614, 620 (1998) (explaining that *Teague* draws a "distinction between substance and procedure," and declining to apply it to a claim based on the Court's interpretation of a criminal statute).

55. *Teague*, 489 U.S. at 311. The Court acknowledged that it is "unlikely that many such components of basic due process have yet to emerge," offering examples such as mob violence at the courthouse and the brutal extortion of a confession. *Id.* at 313–14.

56. Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (quoting Barefoot v. Estelle, 463 U.S. 880, 887 (1983)).

57. *E.g.*, Beard v. Banks, 542 U.S. 406, 408 (2004); Lambrix v. Singletary, 520 U.S. 518, 527 (1997); Stringer v. Black, 503 U.S. 222, 227–28 (1992).

Teague itself, Justice Stevens suggested in a concurring opinion that the Court's new approach should not apply to challenges to capital sentences, contending that the new approach to retroactivity reflected only "the interest in making convictions final," which is "wholly inapplicable to the capital sentencing context."[58] In dictum, a plurality of Justices disagreed, maintaining that "collateral challenges to the sentence in a capital case, like collateral challenges to the sentence in a noncapital case, delay the enforcement of the judgment" and undermine certainty.[59] Later in the same Term, a majority of the Court formally adopted the latter view—apparently without the benefit of argument or briefing—and applied the *Teague* framework to a collateral attack on a capital sentence.[60] Thus, under current law, new rules of constitutional procedure for sentencing do not apply retroactively to sentences that have become final, unless one of *Teague*'s exceptions applies.

This essay does not undertake a systematic defense of current habeas law, or of *Teague* in particular. Nor could it, considering the voluminous body of scholarship criticizing the limits on habeas relief imposed by the Supreme Court and by Congress in the Antiterrorism and Effective Death Penalty Act ("AEDPA").[61] Many scholars and judges have criticized the *Teague* framework for over-emphasizing finality and, as a consequence, for failing to vindicate newly announced constitutional rights.[62] Congress and the courts may well have struck the wrong balance, in *Teague* and other settings, for collateral challenges in general.

58. *Teague*, 489 U.S. at 321 n.3 (Stevens, J., concurring in part and concurring in the judgment).

59. *Id.* at 314 n.2.

60. *See* Penry v. Lynaugh, 492 U.S. 302, 313–14 (1989) (echoing the plurality's view in *Teague* that non-retroactivity rules should apply in capital cases); *id.* at 349 (Stevens, J., concurring in part and dissenting in part) (refusing to support that aspect of the opinion "without benefit of argument or briefing on the issue").

61. *See, e.g.*, Ursula Bentele, *The Not So Great Writ: Trapped in the Narrow Holdings of Supreme Court Precedents*, 14 LEWIS & CLARK L. REV. 741, 742–44 (2010); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808, 1832–37 (2000); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 252–53, 271–73 (1988); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 581, 582, 602–03 (1982); Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2340–41 (2007); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2333 (1993).

62. *See, e.g.*, Fallon & Meltzer, *supra* note 29, at 1815–20.

Instead, this essay focuses on the proposed distinction for finality purposes between convictions and sentences. Scholars and judges who draw that distinction accept, for the sake of argument, that the Court has struck an appropriate balance in weighing finality interests for collateral challenges to convictions.[63] They urge, however, that a different approach is warranted for challenges to sentences. Testing the persuasiveness of that claim is possible, and valuable, whether or not one endorses other aspects of current law.

C. Retroactivity and Finality in Miller

As a recent and controversial example of the current retroactivity regime, in *Miller v. Alabama*[64] the Supreme Court held that the Eighth Amendment prohibits states from imposing a mandatory sentence of life imprisonment without the possibility of parole on a juvenile offender.[65] It explained that, although the Constitution does not categorically forbid life-without-parole sentences for juvenile murderers, a procedure that makes such a sentence mandatory impermissibly "preclude[s] a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[66] The rule of *Miller* clearly governs all future cases and all cases pending on direct review at the time of the decision. But the future is less certain for the more than two thousand juvenile murderers who received a mandatory sentence of life without parole that that became final before *Miller*.[67] A flurry of activity in legislatures and courts has followed.

Sixteen states were affected by the *Miller* decision,[68] and state legislatures enacting "*Miller* fix" legislation have deliberated over the retroactive application of new procedures to cases where

63. *See, e.g.*, Russell, *supra* note 7, at 82–83.

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

65. *Id.* at 2460, 2473, 2475.

66. *Id.* at 2467.

67. *See id.* at 2477 (Roberts, C.J., dissenting) (estimating the number of affected prisoners between 2,000 and 2,500).

68. *Cf.* Douglas Berman, *Effective Press Review of Some State Responses to SCOTUS* Miller *Ruling*, SENTENCING LAW & POLICY (Aug. 19, 2013, 12:58 PM), http://www.sentencing.typepad.com/sentencing_law_and_policy/2013/08/effective-press-review-of-some-state-responses-to-scotus-miller-ruling.html (noting that, as of August 2013, "at least 10 states have changed laws to comply with the ruling").

the sentence had become final. In five states (California, Delaware, Louisiana, North Carolina, and Wyoming), the legislature expressly made the new procedures retroactive.[69] Because of their high concentration of juvenile life-without-parole sentences, those states account for approximately twenty-five percent of the total.[70] Legislatures in two other states (Arkansas and Texas) specified that their *Miller* fix should not apply retroactively,[71] while legislation in another four states (Nebraska, Pennsylvania, South Dakota, and Utah) leaves the question unaddressed.[72]

For prisoners in the last group of states, and in states where no legislation responding to *Miller* has been enacted, the *Teague* framework governs whether the decision will apply retroactively. There is no question that *Miller* announced a "new rule," one not dictated by prior precedent. The Court had previously held that the Eighth Amendment categorically prohibits capital punishment for juvenile offenders,[73] as well as sentences of life without parole for juveniles convicted of non-homicide offenses.[74] But before *Miller* it had never extended the Eighth Amendment bar against life-without-parole sentences to juvenile murderers, and it certainly had not combined two "strands of precedent" to announce a bar on *mandatory* sentences of life without parole, while leaving open the possibility of discretionary sentences of that type.[75] Since *Miller*, every court to consider the question has

69. *See* CAL. PENAL CODE § 1170(d)(2)(A)(i)-(ii) (2013) (granting a right to petition for resentencing after fifteen years, but excluding offenders who killed certain law enforcement personnel or who tortured their victims); 11 DEL. CODE ANN. tit. 11, § 4204A, 4209A (2007) (granting a right to seek sentence modification after twenty-five or thirty-five years, depending on the degree of murder); LA. REV. STAT. ANN. § 15:574-4(E)(1) (2013) (granting juvenile murders who satisfy certain conditions a right to seek parole after thirty-five years); WYO. STAT. ANN. § 6-10-301(c) (2013) (granting a right to parole after serving twenty-five years of incarceration).

70. *See Juveniles Serving Life Sentences Without Parole in the U.S.*, PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html (last visited Nov. 14, 2013) (based on data from Human Rights Watch).

71. *See* 2013 Ark. Act 1490; 2013 Tex. Sess. Law Serv. 2d Called Sess. Ch. 2 (S.B. 2).

72. *See* Maggie Clark et al., *Life Without Parole for Juveniles: States and Courts Weigh In*, PEW CHARITABLE TR. STATELINE NEWS SERVICE (Aug. 26, 2013), http://www.pewstates.org/research/data-visualizations/life-without-parole-for-juveniles-states-and-courts-weigh-in-85899500114#.

73. Roper v. Simmons, 543 U.S. 551, 575 (2005).

74. *See* Graham v. Florida, 560 U.S. 48 (2010).

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

agreed that the decision announced a new rule within the meaning of *Teague*.[76]

Courts have divided, however, about whether *Miller* fits the first *Teague* exception for substantive rather than procedural rules. The Court took pains in *Miller* to explain that "our decision does not categorically bar a penalty for a class of offenders," but instead requires only "a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[77] Because a sentence of life without parole remains a "concededly valid" end in sentencing a juvenile murderer,[78] and *Miller* alters only the required process (discretionary rather than mandatory), most courts to consider the question have concluded that *Miller* does not apply retroactively to cases on collateral review. The Eleventh Circuit and Fifth Circuit, along with state courts in Minnesota, Louisiana, Michigan, and Florida have reached that conclusion, although some of the state court decisions remain pending on appeal.[79]

On the other hand, even if a life-without-parole sentence remains legally permissible, it is likely that most juvenile offenders would receive a different sentence today. As the Court noted in *Miller*, the lopsided percentage of juvenile life-without-parole sentences imposed in states where it is mandatory suggests that discretionary procedures "relatively rarely" produce the same result.[80] In addition, the Court granted relief in a companion case to *Miller* (*Jackson v. Hobbs*) that presented a collateral challenge.[81]

76. *See, e.g.*, *In re* Morgan, 713 F.3d 1365, 1366–67 (11th Cir. 2013); Craig v. Cain, 2013 WL 69128, at *1 (5th Cir. Jan. 4, 2013) (per curiam); Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *2 n.2 (E.D. Mich. Jan. 30, 2013).

77. *Miller*, 132 S. Ct. at 2471.

78. Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part).

79. *See In re Morgan*, 713 F.3d at 1367–68; *Craig*, 2013 WL 69128, at *1–2; Chambers v. State, 831 N.W.2d 311, 326–29 (Minn. 2013); State v. Huntley, 118 So. 3d 95, 98–101 (La. Ct. App. 2013); People v. Carp, 828 N.W.2d 685, 708 (Mich. Ct. App. 2012); Geter v. State, 115 So. 3d 375, 377–84 (Fla. Dist. Ct. App. 2012); *see also* Johnson v. United States, 720 F.3d 720, 721 (8th Cir. 2013) (Colloton, J., dissenting from order authorizing successive § 2255 motions).

80. *Miller*, 132 S. Ct. at 2471 n.10. A high likelihood of a different sentence does not establish, however, that "the law cannot impose" the original sentence. *See* Schriro v. Summerlin, 542 U.S. 348, 352 (2004). It would be strange to treat the *Teague* exception for substantive rules as, in essence, a second layer of harmless-error review.

81. Jackson v. Hobbs, 132 S. Ct. 548 (2011). Drawing any inference from the Court's treatment of *Jackson* is hazardous, however, because the case came to the Court on direct review of a state court's denial of relief under state postconviction procedures. The Court

Based on those considerations, state courts in Mississippi, Iowa, and Illinois have held that *Miller* applies retroactively because it announced a new substantive rule.[82] The U.S. Department of Justice apparently agrees,[83] as do a few federal judges and commentators,[84] and (in case you were wondering) the editorial board of the *New York Times*.[85] To date, however, that remains a minority view in the courts.

The upshot is that, for most juvenile murderers whose life-without-parole sentences became final before *Miller*, the strong interests in finality recognized by current law will prevent them from obtaining collateral relief. The fact that *Miller* involves a challenge to a criminal sentence, as opposed to a conviction, is irrelevant.

A number of scholars and courts seek to change that aspect of retroactivity law, advancing two lines of argument that zero in on the finality interests in criminal sentences. Some advance a strong form of the argument, contending that all sentences carry diminished finality interests. Others make more modest claims that focus on particular kinds of sentences or sentencing rules that implicate diminished finality interests. The remainder of this essay considers each form of the argument in turn.

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has squarely held that such procedures are not bound by *Teague*. Danforth v. Minnesota, 552 U.S. 264, 278–79 (2008).

82. *See* People v. Morfin, 981 N.E.2d 1010, 1021–22 (Ill. Ct. App. 2012); State v. Ragland, 836 N.W.2d 107, 113–16 (Iowa 2013); Jones v. State, 2013 WL 3756564, at *3 (Miss. July 18, 2013). Several federal circuits have issued tentative opinions permitting *Miller* challenges to go forward based on a "prima facie showing" that the decision applies retroactively, without squarely resolving the issue. *See In re* Pendleton, No. 12-3617, 2013 WL 5486170, at *2 (3d Cir. Oct. 3, 2013) (per curiam); Wang v. United States, No. 13–2426 (2d Cir. July 16, 2013); *In re* James, No. 12–287 (4th Cir. May 10, 2013); Johnson v. United States, 720 F.3d 720 (8th Cir. 2013) (per curiam).

83. *See* Government's Response to Petitioner's Application for Authorization to File a Second or Successive Motion Under 28 U.S.C. § 2255, at 6–7, Johnson v. United States, 720 F.3d 720 (8th Cir. Feb. 22, 2013) (No. 12–3744).

84. *See In re Morgan*, 717 F.3d at 1195–96 (Barkett, J., dissenting from denial of rehearing en banc); Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *2 n.2 (E.D. Mich. Jan. 30, 2013); Erwin Chemerinsky, *Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J. LAW NEWS NOW (Aug. 8, 2012), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-withoutparole_case_means_courts_must_look_at_sen.

85. Editorial, *supra* note 2.

III. THE STRONG FORM: DO ALL SENTENCES IMPLICATE DIMINISHED FINALITY INTERESTS?

In its strong form, the argument is that sentences implicate categorically different and diminished finality interests, justifying a two-tier retroactivity regime with relaxed rules for challenges to sentences. In her recent article *Reluctance to Resentence*, Professor Sarah French Russell faults courts for their unwillingness to order resentencing on collateral review, arguing that "concerns about finality are much less pressing when a court reconsiders the length of a sentence rather than the validity of a conviction."[86] She urges that the finality interests underlying sentences should be reconsidered, with corresponding changes to rules governing retroactivity and other subjects on collateral review.[87] Professor Douglas Berman similarly contends, in his essay as part of this symposium, that modern finality doctrine should distinguish between final convictions and final sentences.[88] Earlier scholarship presses similar, if more abbreviated, arguments about the diminished finality interests in sentences.[89]

Although to date it has escaped the attention of legal scholars, a surprising number of federal appellate courts have relied on the same distinction in crafting doctrine for cases on collateral and direct review. The Tenth Circuit has adopted a more exacting standard for attorney performance in ineffective assistance of counsel claims challenging a capital sentence, based in part on "the minimized state interest in finality when resentencing alone is the remedy."[90] The D.C. Circuit requires a lesser showing of "prejudice" sufficient to excuse procedural default on collateral review when a petitioner challenges a

86. Russell, *supra* note 7, at 82–83.

87. *See* Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1716–17 (2003).

88. Berman, *Finality for Sentences*, *supra* note 7, at 152–53.

89. *See* Heald, *supra* note 8, at 1320-21 (urging that lesser finality interests attend capital sentences, but for reasons that would apply to any sentence); Christopher S. Strauss, Comment, *Collateral Damage: How the Supreme Court's Retroactivity Doctrine Affects Federal Drug Prisoners'* Apprendi *Claims on Collateral Review*, 81 N.C. L. REV. 1220, 1265 (2003) ("Whatever legitimate interests the criminal process has in respecting the finality of an adjudication of guilt, that interest is not as strong when a new constitutional rule, such as *Apprendi*, only affects a sentencing determination.").

90. Littlejohn v. Trammell, 704 F.3d 817, 859 (10th Cir. 2013) (quoting Osborn v. Shillinger, 861 F.2d 612, 626 n. 12 (10th Cir. 1988)).

sentencing error, rather than a trial error.[91] It also sets a lower standard for remand based on clearly erroneous factual findings, citing "the lesser costs to the systemic interests in finality where resentencing, as opposed to retrial, is the appropriate remedy."[92] The Second Circuit has adopted a relaxed "plain error" standard for unpreserved errors when the error occurred at sentencing, rather than at trial.[93] In 2006, a panel of the Ninth Circuit seemed poised to adopt the strong form of the argument against sentencing finality, carving out an exception to ordinary retroactivity principles to accommodate new rules of sentencing procedure announced in *United States v. Booker*.[94] Although the panel ultimately reversed course, Judge Pregerson's dissenting opinion defended the initial result on the ground that "the interest in repose is lessened all the more because we deal not with finality of a *conviction*, but rather the finality of a *sentence*."[95]

The strong form of the argument touches on each of the major rationales for the finality of criminal judgments generally: the cost of resentencing, as opposed to retrial; the accuracy of new sentencing proceedings, as opposed to new trials; and the damage to the reputation of the criminal justice system when reopening sentences, but leaving the underlying conviction intact. Although the argument on each of those grounds has some appeal, it is ultimately unpersuasive.

A. The Costs of Relitigating Sentences

Initially, it should be uncontroversial that sentencing in felony cases is costly, both in time and resources, for various stakeholders in the criminal justice system. It is costly for the courts. Typically, probation officers or court staff must conduct a presentence investigation that includes interviews with the

91. United States v. Saro, 24 F.3d 283, 287–88 (D.C. Cir. 1994) ("In the special context of sentencing errors, moreover, we think that the required showing of 'prejudice' should be slightly less exacting than it is in the context of trial errors" because "resentencing is nowhere near as costly or chancy an event as a trial.").

92. United States v. Brockenborrugh, 575 F.3d 726, 743 (D.C. Cir. 2009) (citing *Saro*, 24 F.3d at 287–88).

93. United States v. Williams, 399 F.3d 450, 456 (2d Cir. 2005).

94. Carrington v. United States, 470 F.3d 920, 925 (9th Cir. 2006) (ordering recall of the mandate to permit resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005)).

95. Carrington v. United States, 503 F.3d 888, 901 (9th Cir. 2007) (Pregerson, J., dissenting) (emphasis in original).

offender, victims, and perhaps family members, witnesses, and others.[96] They must file a written report setting forth the findings of the investigation, often accompanied by recommended factual findings or even a recommended sentence.[97] The court must then convene a sentencing hearing, oversee the introduction of evidence and perhaps testimony, consider the arguments of counsel, and render judgment.[98] Sentencing is also costly for the parties. Prosecutors and defense counsel must engage in briefing and motion practice concerning the presentence report as well as the appropriate sentence.[99] They may also need to prepare witnesses for examination and cross-examination, or prepare the defendant to address the court.[100] Sentencing may impose further costs on third parties, including victims, witnesses, medical experts, and prison officials.[101] The widespread adoption of determinate sentencing reforms, and especially sentencing guidelines, has increased the complexity and cost of sentencing in time and resources.[102]

Sentencing tends to be particularly time and resource intensive in the kind of cases challenged on collateral review, which disproportionately involve lengthy terms of incarceration. Because the collateral review process takes years—as noted above, the average habeas petition is filed 6.3 years after conviction[103]—it is generally available only to offenders serving sentences of long-

96. *See* FED. R. CRIM. P. 32(d) (setting forth required contents of federal presentence reports); OFFICE OF PROBATION AND PRETRIAL SERVICES, THE PRESENTENCE INVESTIGATION REPORT ch. II-1–26 (2006), *available at* http://www.fd.org/docs/select-topics—sentencing/the-presentence-investigation-report.pdf?sfvrsn=4 (offering guidance to probation officers responsible for presentence investigations).

97. *See, e.g.*, FED. R. CRIM. P. 32(c)(1)(A) (requiring a presentence investigation and report, with a few narrow exceptions).

98. *See, e.g.*, 18 U.S.C. § 3553(c) (requiring a statement of reasons for the sentence "in open court").

99. *See, e.g.*, FED. R. CRIM. P. 32(f) (authorizing parties to file objections to the report and to be heard at the sentencing hearing).

100. *See, e.g.*, FED. R. CRIM. P. 32(i)(4)(A)(ii)) (giving the defendant a right to allocute at sentencing).

101. *See, e.g.*, FED. R. CRIM. P. 32(i)(4)(B) (granting victims a right "to be reasonably heard" at sentencing); FED. R. CRIM. P. 32(i)(2) (authorizing courts to permit parties to introduce evidence, including witness testimony, at sentencing).

102. *See* Symposium, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 316 (1996) (noting the remarks of Judge Sarah Evans Barker, objecting that under the U.S. Sentencing Guidelines "we have sentencing hearings that last two hours instead of twenty minutes because we have to go through this whole process").

103. *See* KING ET AL., *supra* note 26, at 22 and accompanying text.

term imprisonment. Among habeas petitioners in noncapital cases,[104] 27.7% are serving life sentences, and among the remainder the average sentence is twenty years of imprisonment.[105] Less than 12% of habeas petitioners are serving sentences of five years or less.[106] That profile of sentences is far more severe than the population as a whole. In state courts, around 60% of felony convictions result in a sentence of probation or a relatively short jail term.[107] Life sentences represent just 0.3% of all sentences imposed, and among offenders sentenced to a term of incarceration, the median sentence length is one year and five months.[108] It is true, as some critics of finality in sentencing have argued, that sentencing procedure sometimes lacks the costly features described above. Sentencing can even have an uncomfortable assembly-line feel, with little advance preparation, a succinct hearing, and a judgment entered swiftly and without fanfare. But the pool of cases that actually reaches the collateral review stage contains few quick-and-easy sentences. To the contrary, it consists disproportionately of the kind of severe sentences in which courts typically invest more time, resources, and attention.

Judges and scholars who urge that sentences implicate diminished finality interests do not deny that sentencing (and resentencing) imposes substantial costs. Instead, they emphasize the *relative* costs of resentencing and retrial. New sentencing procedures, the argument goes, require a substantially smaller commitment of judicial resources than new trials.[109] And because

104. *See* ADMINISTRATIVE OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, Mar. 31, 2012, tbl.C-4, *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2012/tables/C04Mar12.pdf (reporting that petitions in capital cases represent approximately 0.9% of all habeas petitions).

105. KING ET AL., *supra* note 26, at 20.

106. *See id.* at 20 (noting that 12% of petitioners serving a term of years, which excludes life sentences, were serving a sentence of five years or less).

107. BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES, tbl.1.2. (2009), *available at* http://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

108. *Id.* at tbls.1–3 & 1–4 (noting that the average term of incarceration is thirty-eight months and the median is seventeen months).

109. *See* United States v. Williams, 399 F.3d 450, 456 (2d Cir. 2005) (reasoning that "the cost of correcting a sentencing error is far less than the cost of a retrial" because "[a] resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel"); United States v. Saro, 24 F.3d 283,

the conservation of resources is a major rationale for interests in finality, that difference in costs justifies the loosening of restrictions on collateral relief for claims challenging the validity of a sentence.

To be sure, criminal trials on average are substantially longer, more complex, and more costly than sentencing proceedings. The average criminal trial in federal court lasts four or five days,[110] and in state courts the average jury trial lasts two to four days.[111] Sentencing hearings, by contrast, may take only a few minutes and usually do not last more than an hour.[112] Judges and court staff, prosecutors, and defendants and their counsel must invest far more time and resources on pretrial motions and preparation. Trials also impose significant direct and opportunity costs on third parties, such as jurors, victims, witnesses, and experts.[113] Sentencing, on the other hand, rarely involves the participation of a jury, and in-court testimony by witnesses and other experts is less common and less time consuming than at trial.

The claim that resentencing is less costly than retrial is misleading, however, because it compares only per-procedure costs while ignoring the enormous difference in volume between trials and sentences. In the United States, the overwhelming majority of people convicted of felonies plead guilty rather than contesting their guilt at trial.[114] In state courts, just 6% of felony convictions result from trial.[115] In federal court, the rate is even

287–88 (D.C. Cir. 1994) (adopting a lesser prejudice standard for sentencing challenges because "resentencing is nowhere near as costly or chancy an event as a trial"); Russell, *supra* note 7, at 146, 149 (discussing how a court can correct a sentence using significantly less resources than a new trial).

110. *See* Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 48 (1996); David L. Cook et al., *Criminal Caseload in U.S. District Courts: More Than Meets the Eye*, 44 AM. U. L. REV. 1579, 1597 (1995).

111. Nancy King, *The American Criminal Jury*, 62 LAW & CONTEMP. PROBS. 41, 60 (1999).

112. *See* Marc Mauer, *Alice in Wonderland Goes to Criminal Court, Or, How Do We Develop a More Effective Sentencing System?*, 14 ST. LOUIS U. PUB. L. REV. 259, 263 (1994).

113. *See, e.g.*, King, *supra* note 111, at 60 (noting the "hefty portion of its resources" that the justice system devotes to maintaining the criminal jury).

114. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 107, tbl.4.1 (showing that 94% of felony convictions result from guilty pleas).

115. *Id.*

lower: 3% of felony convictions result from trial.[116] By contrast, 100% of felony convictions result in a sentence. Thus, in state and federal criminal systems driven by guilty pleas, sentencing has displaced trial as the "main event" in the criminal process.[117] In the vast majority of cases, sentencing represents the most significant investment of judicial resources that might be duplicated following collateral review.[118] Only a small fraction of prisoners can possibly raise a claim of trial error, but every prisoner has the potential to raise a claim of sentencing error.

Accordingly, taking into account aggregate costs, government interests in the finality of sentences are just as strong as interests in convictions. Consider the federal system, where it is estimated that an average trial takes four days[119] and an average sentencing hearing takes one hour.[120] Measured by the length of court proceedings, that is a stark 32:1 difference in per-procedure costs.[121] But because almost 97% of convictions result from guilty pleas rather than trials,[122] sentencing hearings in federal court outnumber trials by a 33:1 ratio. On those assumptions, the overall investment of judicial resources for both procedures is roughly equivalent. In state systems the calculation is similar. Trials on average are slightly more frequent in state court, but also slightly

116. U.S. SENTENCING COMMISSION, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, fig.C (2013).

117. *See* Russell, *supra* note 7, at 160 (noting that sentencing hearings are now the "main event" for district judges in federal criminal cases); *see generally* Alan Dubois & Anne E. Blanchard, *Sentencing Due Process: How Courts Can Use Their Discretion to Make Sentencings More Accurate and Trustworthy*, 18 FED. SENT'G RPTR. 84 (2005) (calling the notion that sentencing is a "sideshow" to the trial an "artifact of an earlier time," and arguing that "[i]n an era of highly determinate sentencing systems where only a tiny percentage of cases go to trial, sentencing has become by far the most important stage of the criminal process for most defendants").

118. *See* Russell, *supra* note 7, at 146–48. To be sure, the investigative process—responding to crimes, questioning witnesses, and gathering and testing evidence to build a case—requires significant investment as well. For purposes of collateral review, however, those are sunk costs. A successful collateral attack on a conviction or sentence does not require duplication of the investigation that led to the initial charge. Instead, an order to conduct a new trial or new sentencing hearing requires a fresh investment of resources in the adjudicative process.

119. *See supra* note 110 and accompanying text.

120. *See* Hon. Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After* United States v. Booker, 41 U. RICH. L. REV. 625, 645 (2007) (reporting that for a "routine" sentencing hearing, the judge spends five to six hours to sentence six or seven defendants).

121. The calculation assumes an eight-hour work day for the courts.

122. *See* Russell, *supra* note 7, at 160.

shorter, meaning that trials and sentencing require a comparable aggregate investment of resources.

Both the large volume of sentences in general and the disproportionate severity of sentences challenged on collateral review directly implicate the cost concerns underlying non-retroactivity under *Teague*. Proponents of the strong-form argument against finality in sentencing accept, for the sake of argument, that new rules of *trial* procedure should not be retroactive in light of the high costs of new trials. Yet a trial-specific new rule can affect, at most, only 3–6% of final judgments. A new rule of *sentencing* procedure, by contrast, in theory could unsettle every final judgment because every offender, even those who plead guilty, receives a sentence. And as a practical matter, the kind of cases affected by a new rule of sentencing procedure made retroactive on collateral review will be particularly costly.

Sarah French Russell makes a slightly different cost-based argument against the finality of sentences, urging that resentencing actually conserves public resources because shortening a lengthy prison sentence conserves resources "that would otherwise be spent on incarceration."[123] Given the staggering costs of mass incarceration, both in human and economic terms, procedures to revise a sentence can indeed produce significant savings. But a successful collateral attack on a conviction secures even *greater* savings, requiring immediate release and vacating the sentence entirely. Resentencing, by contrast, may merely shorten the length of a long term of imprisonment. Yet the potential cost savings have not persuaded the courts to assign convictions a diminished interest in finality. Not all new trials result in acquittal, of course, but neither do all new sentencing hearings result in shorter sentences. Because all forms of collateral review promise to reduce those costs, they do not justify a distinction for finality purposes between convictions and sentences.

B. The Accuracy of Resentencing Proceedings

Sentencing also implicates finality interests in the accuracy of proceedings because it depends, in part, on backward-looking

123. *Id.* at 146; *see id.* at 150 (noting that the federal government spends $28,000 per year to incarcerate a single prisoner).

factual determinations. A sentencing court must consider, for example, the severity of the offense, the "harm to a victim, and the blameworthiness of the offender."[124] The factual issues a court must resolve at sentencing may include the offender's role in a larger criminal enterprise, his use or possession of a firearm, his mental state at the time of the crime, the quantity of drugs in a trafficking case, or the amount of loss in a fraud case. Each of those determinations requires a backward-looking assessment of what happened at the time of the offense.

Making those findings requires the participation of several key individuals. Typically the prosecutor and investigating case agent supply crucial information to the court about the offense conduct, as do the offender and defense counsel.[125] Victims of the crime, either individually or through a liaison such as a victim-witness coordinator, also provide information about the harm caused by the offense.[126] Yet the passage of time may degrade the reliability of that information. When a collateral challenge to a sentence succeeds, the new sentencing hearing and presentence investigation takes place, on average, more than seven years after the original judgment.[127] By that time the prosecutor, investigating agent, and defense counsel may no longer be available for a host of reasons, including a change of job, a move to another state, illness, or death.[128] And even if they remain accessible, their recollection of the details of a case many years earlier will have faded. As a consequence, courts are more likely to make errors at resentencing than at an initial sentencing.

Critics of finality in sentencing acknowledge that risk, but maintain that it is less serious for resentencing than for retrial. They offer two reasons, one based on the relaxed rules of evidence

124. *See, e.g.*, MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(1), at 5 (Tentative Draft No. 1, 2007) [hereinafter MODEL PENAL CODE: SENTENCING].

125. *See* OFFICE OF PROBATION AND PRETRIAL SERVICES, *supra* note 96, ch. II-22 (listing possible questions for the AUSA and case agent).

126. *Id.* at II-23–24.

127. *See supra* notes 26–27 and accompanying text.

128. *See* Henderson, *supra* note 28. Sarah French Russell reports, based on her experience as a federal public defender, that counsel for the defendant and government "may also be the same original players" following a successful *Begay*-type collateral attack on a federal sentence. Russell, *supra* note 7, at 149. That experience, however, likely is not typical of challenges to state-court judgments in habeas petitions, where the average period between sentencing, vacatur of the sentence, and resentencing is more than seven years. *See* KING, *supra* note 26.

at sentencing, and the other based on the accuracy of forward-looking determinations that also inform sentencing decisions.

First, they note, sentencing involves looser evidentiary rules compared to trial.[129] Hearsay is generally inadmissible at trial,[130] but is admissible and routinely introduced at sentencing.[131] Likewise, the Confrontation Clause grants defendants a constitutional right to cross-examine witnesses at trial,[132] but that right does not extend to sentencing hearings.[133] Those relaxed rules obviate the need for in-court testimony by witnesses, investigators, lawyers, and victims, making it possible at sentencing for someone else to recount their testimony secondhand. Indeed, Professor Russell suggests that threats to accuracy at resentencing can be avoided altogether. No new investigation is necessary because the court can simply reuse the original presentence investigation and report, perhaps with a few updates based on the offender's conduct in prison.[134] The threat to accuracy is therefore less acute at resentencing.[135]

That generalization may apply to some sentencing challenges, but it certainly does not hold for all of them. In the last fifteen years, for example, by far the richest source of "new rules" of sentencing procedure has been the Sixth Amendment's jury trial right, as applied in cases like *Apprendi v. New Jersey*,[136] *Blakely v. Washington*,[137] and *United States v. Booker*.[138] The whole

129. Berman, *Finality for Sentences*, *supra* note 7, at 166–67; Russell, *supra* note 7, at 152.

130. *See* FED. R. EVID. 802–804.

131. *See* FED. R. EVID. 1101(d)(3) (excepting from the Federal Rules of Evidence "miscellaneous proceedings" including sentencing); Williams v. New York, 337 U.S. 241, 249–50 (1949) (noting that probation officers reports have been given great weight in sentencing hearings); Jerome Deise & Raymond Paternoster, *More than a "Quick Glimpse of the Life": The Relationship Between Victim Impact Evidence and Death Sentencing*, 40 HASTINGS CONST. L.Q. 611, 626 (2013) ("[H]earsay evidence is routinely offered as substantive evidence.").

132. U.S. CONST. art. VI; Crawford v. Washington, 541 U.S. 36, 68 (2004).

133. *Williams*, 337 U.S. at 249–50.

134. Russell, *supra* note 7, at 149.

135. *See* United States v. Pollard, 959 F.2d 1011, 1038 (D.C. Cir. 1992) (Williams, J., dissenting) (urging a lower standard for "fundamental defects" in § 2255 cases on the ground that "in the ordinary habeas case" any remedy is "more costly for the system than it would have been" because "in a new trial, the government will be hobbled by the staleness of its evidence and the risk of an erroneous acquittal will be higher," whereas resentencing "is not markedly more burdensome" than a direct appeal).

136. Apprendi v. New Jersey, 530 U.S. 466 (2000).

137. Blakely v. Washington, 542 U.S. 296 (2004).

point of those claims is to demand more formal procedures—factfinding by a jury, a standard of proof beyond a reasonable doubt, etc.—for making backward-looking factual determinations.[139] Repeating that exercise with more demanding procedural requirements many years after the crime raises exactly the kind of accuracy concerns implicated by a new trial.

Moreover, virtually the same arguments downplaying the risk of inaccuracy could be advanced about challenges to convictions. When a court orders a new trial following a collateral challenge, the government does not need to reinvestigate the entire case from scratch. Except in rare instances where forensic evidence has spoiled without ever being tested, the same evidence, documents, expert reports, interviews, and witness statements remain available and admissible at the new trial. Nor is the unavailability of witnesses necessarily fatal. Although hearsay rules apply with full force at trial, the Federal Rules of Evidence and their state-law equivalents contain a hearsay exception for "former testimony" admitted at a previous proceeding.[140] Likewise, the Confrontation Clause permits the introduction of hearsay evidence at trial when a witness is unavailable and the defendant had a prior opportunity for cross-examination.[141] Those exceptions ordinarily should be available when a witness has become unavailable during the pendency of collateral review, since the defendant had an opportunity for cross-examination at the original trial.

Concerns about accuracy relate not only to the admissibility of evidence, but to its effectiveness. Even when witnesses remain available to testify at a new trial or for an interview during a presentence investigation, they may no longer remember—or may affirmatively misremember—important details about the crime, making accurate factfinding more difficult. When witnesses have become unavailable, the recitation of an eight-year-old trial transcript cannot compare with a witness's live testimony before a factfinder. The risk of inaccuracy at sentencing

138. United States v. Booker, 543 U.S. 220 (2005).

139. *See Booker*, 543 U.S. at 226 (considering a Sixth Amendment challenge to factual findings concerning the quantity of drugs involved in the offense); *Blakely*, 542 U.S. at 298 (considering a Sixth Amendment challenge to factual findings that the offender obstructed justice and acted with unusual cruelty).

140. FED. R. EVID. 804(b)(1).

141. Crawford v. Washington, 541 U.S. 36, 68 (2004).

is particularly acute when it comes to victims. Not only can victims become unavailable, depriving the court of an essential voice in the sentencing process,[142] but the passage of time may cloud the victim's sense of the full impact of the crime.[143] Because accuracy concerns are prevalent in both contexts, the same finality interests that justify limits on collateral review of trials also justify limits on collateral review of sentences.

In addition, concerns about accuracy are not confined to the new proceedings in the original trial court. In part, they reflect concerns about the ability of collateral review courts themselves, in the first instance, to make an accurate determination about whether an error has occurred. That is particularly true for claims that depend on "new rules" of procedure, because the original trial or sentencing proceeding, for obvious reasons, may not have focused on the issue.[144] Without a reliable record, courts, on collateral review, may be left to guess whether the original proceeding was infected with constitutional error. That kind of accuracy concern applies equally to trial challenges and sentencing challenges.

Second, and more provocatively, critics of finality in collateral challenges to sentences contend that conducting a new sentencing hearing, many years after the judgment becomes final, actually *enhances* accuracy.[145] That is because, in addition to backward-looking factual determinations about offense conduct, harm to victims, and culpability, sentencing also depends on forward-looking predictions about the offender's dangerousness and prospects for rehabilitation.[146] At resentencing, those findings of fact can benefit from new information about the offender's

142. *But see* Crime Victims' Rights Act of 2004, Pub. L. 108–405, tit. I, § 102(a), 118 Stat. 2261, *codified at* 18 U.S.C. § 3771(a) (granting crime victims the right to be "reasonably heard" at sentencing); Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims' Rights Amendment*, 1999 UTAH L. REV. 479, 487–97 (discussing criminal impact statements).

143. *Cf.* People v. Otto, 26 P.3d 1061, 1066 (Cal. 2001) (declining to require live testimony by victims at proceedings to designate sexually violent predators under state law based, in part, on concerns that the proceedings "may occur years after the predicate offense or offenses," raising "a concern that victims and other percipient witnesses would no longer be available").

144. *See supra* note 29 and accompanying text.

145. Berman, *Finality for Sentences*, *supra* note 7, at 171–73; Russell, *supra* note 7, at 152–53.

146. *See, e.g.*, MODEL PENAL CODE: SENTENCING, *supra* note 124, § 1.02(2)(a)(ii).

behavior in prison, track record of success or failure in treatment, and improved tools for predicting recidivism. In principle, resentencing could also improve the "accuracy" of a court's assessment of backward-looking factors like the seriousness of the offense or the harm to victims.[147] Far from spoiling, Professor Russell argues, evidence available at resentencing will have "ripened."[148]

The point is sound, but it is a peculiar *non sequitur* from the alleged error in the original sentencing that forms the basis for the collateral attack. To be sure, any time a court vacates a sentence and begins again from scratch, new and helpful information may be available to improve the accuracy of the court's predictions. But the proper way to take account of that new information is through sentence modification procedures designed for that purpose. The Model Penal Code: Sentencing revision's "second look" provisions, for example, call for the reconsideration of all lengthy terms of incarceration after a period of years.[149] A handful of states have similar discretionary procedures for sentence modification based, among other factors, on changed circumstances.[150] Sentence modification procedures have a sound basis in theory.[151] Equally important, as Cecilia Klingele has argued, they offer a measure of transparency and

147. *See* Berman, *Finality for Sentences*, *supra* note 7, at 171–73. Over time, for example, society may come to view some offenses as more serious (such as domestic abuse, child pornography, drunk driving, or animal cruelty) and others less serious (such as the possession of marijuana or crack cocaine, or certain consensual sex crimes). *See* MODEL PENAL CODE: SENTENCING § 305.6 cmt. b (Tentative Draft No. 2, 2011) [hereinafter ALI] ("On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods.").

148. Russell, *supra* note 7, at 153.

149. *See* ALI, *supra* note 147, § 305.6 (authorizing the judge or a judicial panel to revisit the sentence of any offender who has served more than fifteen years in prison and to decide whether, in light of current circumstances, a different sentence would better serve the purposes of sentencing).

150. 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, 506–09 (2010).

151. *See* ALI, *supra* note 147, § 305.6 cmts. a, b (discussing the rationale for the MPC: Sentencing draft's proposed sentence modification proceedings); Margaret Colgate Love & Cecilia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 873–76 (2011) (discussing the benefits of sentence modification).

public accountability not present in other back-end mechanisms for release.[152]

Collateral review, by contrast, is designed to deter or correct specific errors at sentencing, not as a covert method of obtaining sentencing modification. The non-retroactivity of new rules of procedure, in particular, reflects the Court's view that habeas review serves a deterrent purpose.[153] The strong-form argument against finality, on the other hand, proceeds from a different premise. All resentencing is good, the syllogism goes, and collateral review of sentences is therefore good to the extent it maximizes the amount of resentencing. There is considerable merit in "second look" and similar procedures, but collateral review should not be conscripted to perform the same function in a less transparent manner.

C. Resentencing and the Public Reputation of the Criminal Justice System

Among the most frequently advanced, but least developed, attacks on finality interests in sentences centers on the public reputation of the criminal justice system. Public attention and anxiety may run high, the argument goes, when collateral review unsettles a conviction that has become final, but a decision that merely sets aside a sentence poses a lesser reputational threat.[154] The unstated premise is that the public does not much care about sentences being reduced or prisoners being released, so long as the underlying conviction remains intact.

That premise is difficult to accept in light of the widespread adoption of "truth in sentencing" reforms in the last twenty-five years. Beginning in the 1980s, the truth in sentencing movement embraced determinate sentencing regimes as a way to close the gap between the sentences announced by judges and

152. Klingele, *supra* note 150, at 515–19.

153. *See supra* notes 48–49 and accompanying text.

154. *See, e.g.*, United States v. Brokenborrugh, 575 F.3d 726, 743 (D.C. Cir. 2009) (invoking, without elaboration, "the lesser costs to the systemic interests in finality where resentencing, as opposed to retrial, is the appropriate remedy"); Carrington v. United States, 503 F.3d 888, 901 (9th Cir. 2007) (Pregerson, J., dissenting) (arguing that interests in finality are lessoned "because we deal not with the finality of a *conviction*, but rather the finality of a *sentence*," and stressing that "[t]here is no suggestion that [the defendants] be set free" immediately).

sentences actually served by offenders.[155] Of particular concern were non-transparent sentencing decisions rendered outside the view of the public, such as the decisions of parole boards.[156] Congress embraced truth in sentencing as a central objective of the Sentencing Reform Act of 1984,[157] and by 2000 the federal system and sixteen states had abolished discretionary parole altogether.[158] In the 1990s, Congress "played a major role in the Truth-in-Sentencing movement" by giving more than $10 billion to states in incentive grants, designed to encourage the adoption of laws requiring that violent offenders serve at least eighty-five percent of their imposed sentences.[159] In many states, truth in sentencing has also been instrumental in "restricting or eliminating" early release procedures.[160] Whatever one's views of the efficacy of those reforms, there is no denying the public appetite for truth in sentencing or its transformative effect on American sentencing policy.[161] The suggestion that society's interests in finality are confined to convictions, rather than sentences, is simply implausible.[162]

Along those lines, the D.C. Circuit has explicitly considered, and rejected, the suggestion that collateral review of sentences poses a lesser threat to the reputation of the criminal justice system. In *United States v. Pollard*,[163] a case also noteworthy

155. Carole Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2550 (1996).

156. *See* Jeremy Travis et al., *Prisoner Reentry: Issues for Practice and Policy*, 17 CRIM. JUST. 12, 17 (2002) (discussing parole supervision).

157. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988) (discussing one of the "primary purposes" of the Sentencing Reform Act as "honesty in sentencing").

158. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REENTRY TRENDS IN THE U.S.: RELEASES FROM STATE PRISON (2003), *available at* http://www.bjs.ojp.usdoj.gov/content/reentry/releases.cfm.

159. Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y REV. 75, 75 (1999); *see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20102, 20103, 108 Stat. 1796.

160. Klingele, *supra* note 150, at 481.

161. For a wide-ranging statistical survey of truth-in-sentencing reforms at the state level, see BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS (1999), *available at* http://www.bjs.gov/content/pub/pdf/tssp.pdf.

162. *Cf.* MODEL PENAL CODE: SENTENCING, Discussion Draft No. 3, at 16 (Mar. 29, 2010) (acknowledging that proposed "second look" sentence modification proceedings are in tension with truth-in-sentencing principles).

163. United States v. Pollard, 959 F.2d 1011 (D.C. Cir. 1992).

for its discussion of "wired pleas,"[164] Judges Silberman and Ruth Bader Ginsburg considered whether to adopt a "bi-level standard" for collateral attacks that would distinguish between convictions and sentences.[165] The court declined to treat limits on collateral relief as "elastic terms that shift in meaning depending on the nature of the relief sought," citing doubts about judges' power to apply lesser standards whenever they believe the costs of the remedy to be particularly low.[166] But the court also stressed society's interest in "bringing criminal appeals to an end," and warned that a lesser standard for sentencing challenges "would disserve this interest by making it considerably more attractive for defendants to pursue collateral attacks on their sentences."[167] Creating, in essence, an incentive to challenge sentences on collateral review would prolong litigation and compromise the reputation of the criminal justice system, no less than an incentive to challenge convictions.

Professor Russell maintains that finality interests are diminished in this context because society already tolerates considerable uncertainty about sentences.[168] After all, discretionary parole, good-time credits, and early release procedures (for example, due to prison overcrowding) routinely hold open the possibility of a shortened sentence. Yet the availability of those procedures, which varies considerably between jurisdictions, hardly establishes that they pose no threat to the reputation of the criminal justice system. Parole and good-time credits, in particular, have eroded because of the truth in sentencing movement.[169] States' recent experiments with early release—more often at the direction of a federal court than by popular demand—have proven controversial as well.

Public outrage when violent criminals' sentences are cut short also belies the suggestion that concerns about finality are

164. *Id.* at 1020–22.

165. *Id.* at 1029. Specifically, the court declined to require a "lesser showing" under the miscarriage-of-justice exception when the remedy would be resentencing, rather than rescission of a guilty plea. *Id.*

166. *Id.* at 1028.

167. *Id.* at 1029. The court also cautioned that a bi-level standard might tempt appellate judges to second-guess trial judges' sentencing decisions. *Id.*

168. Russell, *supra* note 7, at 156.

169. *See* BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS (1999), *available at* http://www.bjs.gov/content/pub/pdf/tssp.pdf.

diminished in that context. One infamous example, Willie Horton's escape during a prison furlough and commission of a brutal rape, became a flashpoint in the 1988 Presidential election.[170] More recently, Arkansas Governor Mike Huckabee's run for President in 2007 was battered by criticism that he had granted clemency or supported parole for more than one thousand criminals, including a convicted rapist who committed another rape and murder within a year of his release.[171] As Professor Russell acknowledges, victims of crime may find the vacating of an offender's sentence particularly alarming, even if the conviction remains intact, because it disrupts their sense of closure and accelerates the date when the offender returns to the street, placing them in danger once again.[172] The intuition shared by some scholars and judges that the public cares intensely about the finality of convictions, but much less about the finality of sentences, does not stand up to scrutiny.

In summary, each of the major justifications for taking seriously the finality of criminal judgments—costs, accuracy, and reputation—apply with equivalent force to trial claims and sentencing claims. Resentencing requires a substantial investment of resources, and the enormous volume of sentencing proceedings in a system dominated by guilty pleas compensates for the high per-procedure cost of trials. Like trials, sentencing requires backward-looking factual determinations that may become less accurate when key witnesses have become unavailable during the pendency of a collateral attack. Uncertainty about the finality of sentences also threatens the public reputation of the criminal justice system, as evidenced by the truth-in-sentencing movement. Accordingly, if interests in finality justify limits on collateral review of criminal convictions, an across-the-board rule assigning lesser interests in finality for collateral review of sentences is unwarranted.

170. *See* David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 42–43 (2011) (acknowledging that failures of early release, probation, and alternatives to incarceration inevitably "will, in some instances, fail" and thereby "galvanize public support for even harsher criminal policies").

171. Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1146 & n.141 (2012).

172. *See* Russell, *supra* note 7, at 155.

IV. THE MODEST FORM: DO SOME SENTENCING CASES DESERVE DIFFERENT RULES ON COLLATERAL REVIEW?

Some courts and scholars make more modest claims about finality interests in sentencing, focused on particular kinds of sentences or particular claims of sentencing error. Those special sentencing cases, they contend, deserve different treatment on collateral review because they can be resolved at especially low cost, with little or no risk of inaccuracy, or with no meaningful reputational damage.

The premise is entirely correct. Not all collateral attacks on sentences pose the same threat to finality interests. Some new sentencing rules and some individual offenders' sentencing claims raise fewer finality concerns than others. But not all collateral attacks on *convictions* pose the same threat to finality interests either, and yet Congress and the courts have adopted a single set of rules for those collateral attacks regardless of the particular claim, context, or defendant.

There are good reasons for that uniform approach. A rule-by-rule or case-by-case weighing of finality interests would be unworkable for courts, layering standards upon standards and producing a scheme of review that suffers from the appearance, if not the reality, of arbitrariness. For those reasons, the Court has adopted a unitary standard in analogous contexts, such as qualified immunity and plain-error review. A fine-grained but unpredictable retroactivity regime would also put an unhealthy kind of pressure on courts, discouraging the identification of new rules in the first place, to the detriment of the development of constitutional law.

A more promising approach would focus on broad categories of sentences, such as capital sentences or federal sentences, rather than specific rules or offenders. Adding an additional tier of review for retroactivity and other issues would make collateral review doctrinally more complex, but not to the same extent as a sliding-scale standard that varies with every case. Identifying types of sentences that qualify for that treatment could also reflect countervailing considerations that apply generally to whole subsets of sentences. That approach, for example, would also be a more straightforward method of addressing juvenile life-without-parole sentences under *Miller*.

A. Some Collateral Challenges to Sentences Pose Lesser Threats to Finality Interests

Critics of finality in sentencing are correct that some kinds of collateral attack on sentences pose an especially minimal threat to finality interests. Some new rules implicate lesser finality interests than others, such as the requirement of discretion for juvenile life without parole sentences in *Miller v. Alabama*[173] and the narrowing of predicate offenses for career offender status in *Begay v. United States*.[174] In addition, some individual offenders' particular circumstances may alter the balance of finality interests, as the Ninth Circuit initially concluded in *Carrington v. United States*.[175]

Errors under *Miller* do not implicate the full range of finality interests cited by the Court as grounds for limits on collateral review. To be sure, resentencing a person who committed murder as a juvenile many years after the original sentence is costly and carries some risk of inaccuracy. But the narrowness of the *Miller* rule helps to reduce those costs. Because it applies only to juveniles who received a mandatory sentence of life imprisonment without parole, it affects fewer than 2,500 cases.[176] Those cases also involve few "sunk costs" because by definition the life without parole sentence was mandatory. Identifying *Miller* errors in the first instance is simple and in no way dependent on stale factfinding; either the governing statute made the sentence mandatory or it did not. Reputational concerns may be diminished in this context as well. The Court in *Miller* relied in part on a "national consensus" against mandatory life without parole sentences for juvenile murderers,[177] and the decisions of many state legislatures to make "*Miller* fix" legislation retroactive[178] suggests considerable public willingness to reconsider those sentences.

173. Miller v. Alabama, 132 S. Ct. 2455, 2469–71 (2012).

174. Begay v. United States, 553 U.S. 137 (2008).

175. Carrington v. United States, 470 F.3d 920 (9th Cir. 2006), *withdrawn, and superseded by* 503 F.3d 888, 901 (9th Cir. 2007).

176. *Miller*, 132 S. Ct. at 2477 (Roberts, C.J., dissenting).

177. *Id.* at 2470–71 (majority opinion).

178. *See* CAL. PENAL CODE § 1170(d)(2)(A)(i)-(ii) (West 2013) (granting a right to petition for resentencing after 15 years, but excluding offenders who killed certain law enforcement personnel or who tortured their victims); DEL. CODE ANN tit. 11, § 4217(f) (West 2013) (granting a right to seek sentence modification after at least one-half of the

Similarly, Professor Russell makes a convincing case that lesser finality interests are at stake in challenges to federal sentences under the Armed Career Criminal Act ("ACCA")[179] following the Supreme Court's decisions in *Begay* and related cases.[180] Like *Miller* errors, *Begay* errors can be resolved easily as a matter of law, based solely on the elements of a state law crime. When raised on a motion for collateral review under 28 U.S.C. § 2255, *Begay* claims almost always are litigated by the same prosecutor and defense counsel, and resolved by the same judge, who handled the original sentencing.[181] Their familiarity with the case helps to reduce resentencing costs and minimize the risk of inaccuracy.[182] Indeed, the judge frequently can impose a new sentence without a full hearing because correcting the error typically involves a straightforward reduction of the advisory sentencing range under the U.S. Sentencing Guidelines.[183] If a resentencing hearing is necessary, the absence of victims is less of a concern because many *Begay* errors involve offenders convicted of crimes with no identifiable victim, like drug trafficking and immigration offenses.[184]

In addition, individual offenders in some circumstances may raise collateral challenges to a sentence that implicate diminished finality concerns. In *Carrington*, for example, two prisoners brought postconviction motions seeking resentencing following the Supreme Court's decision in *United States v. Booker*,[185] which rendered the federal sentencing guidelines advisory rather than mandatory.[186] Every court of appeals had concluded that *Booker* did not apply retroactively to cases on collateral review,[187]

originally imposed sentence is served); LA. REV. STAT. ANN. § 15:574.4(E)(1) (2013) (granting juvenile murderers who satisfy certain conditions a right to seek parole after thirty-five years); WYO. STAT. ANN. § 6-10-301(c) (West 2013) (granting a right to parole after serving twenty-five years of incarceration).

179. 18 U.S.C § 924 (2006).

180. *See* Russell, *supra* note 7, at 84–86.

181. *Id.* at 147.

182. *Id.* at 147, 153–54.

183. *Id.* at 147–48.

184. *Id.* at 155.

185. Carrington v. United States, 503 F.3d 888, 889 (9th Cir. 2007).

186. United States v. Booker, 543 U.S. 220 (2005).

187. *See In re* Zambrano, 433 F.3d 886, 889 (D.C. Cir. 2006); Cirilo-Munoz v. United States, 404 F.3d 527, 533 (1st Cir. 2005); Guzman v. United States, 404 F.3d 139, 140 (2d Cir. 2005); Lloyd v. United States, 407 F.3d 608, 614 (3d Cir. 2005); United States v. Morris, 429 F.3d 65, 70 (4th Cir. 2005); Padilla v. United States, 416 F.3d 424, 427 (5th

and the costs of a contrary ruling would have been staggering because hundreds of thousands of prisoners had been sentenced under the mandatory guidelines. But a panel of the Ninth Circuit initially concluded that the two offenders in *Carrington* were entitled to resentencing because of special circumstances in their case.[188] At their original sentencing hearings years earlier, the judge had expressed his view that the Guidelines were unconstitutional and had made clear that he wished to impose less severe sentences.[189] After *Booker*, the judge took the extraordinary step of imploring the Ninth Circuit for an opportunity to resentence the men, writing that he was "sad and a little angry" at the manifest injustice that had been done to them.[190] Granting relief to offenders in that position, the panel reasoned, would "place only a limited burden" on the government because the sentencing judge's protests about the Guidelines and request for an opportunity to resentence made the cases unique.[191] At the same time, the judge's intimate familiarity with the case would reduce the cost of resentencing and reduce the risk of factfinding errors.

No doubt there are many other examples of specific rules of sentencing procedure or specific offenders whose collateral cases pose a lesser threat to finality interests. For some judges and scholars, the variability in the strength of finality interests at sentencing justifies selectively relaxing limits on collateral review, depending on the circumstances of the particular case.

B. Drawbacks to a Case-By-Case Approach to Finality in Sentencing

However appealing it may be in individual cases, a regime in which courts routinely calibrated limits on collateral review to

Cir. 2005); Humphress v. United States, 398 F.3d 855, 860 (6th Cir. 2005); Wilson v. United States, 414 F.3d 829, 831–32 (7th Cir. 2005); Never Misses a Shot v. United States, 413 F.3d 781, 783–84 (8th Cir. 2005); Schardt v. Payne, 414 F.3d 1025, 1036 (9th Cir. 2005); United States v. Bellamy, 411 F.3d 1182, 1188 (10th Cir. 2005); United States v. Moreno, 421 F.3d 1217, 1220 (11th Cir. 2005).

188. Carrington v. United States, 470 F.3d 920 (9th Cir. 2006), *withdrawn and superseded by* 503 F.3d 888, 901 (9th Cir. 2007).

189. *Id.* at 922.

190. Tillitz v. United States, No. C05-5411RJB, 2005 WL 2921957, at *14 (W.D. Wash. Nov. 3, 2005).

191. Carrington v. United States, 503 F.3d 888, 901–02 (9th Cir. 2007) (Pregerson, J., dissenting) (defending the panel's original decision).

case-specific finality concerns would carry serious drawbacks. Implementing that approach would require, in every case on collateral review, that the court weigh and balance the finality interests implicated by the particular claim and individual offender against competing objectives. Then the court would need to adjust the rules of collateral review on a sliding-scale basis to reflect that balance.

For collateral attacks on convictions, however, the Court and Congress have never required such a fine-grained assessment of finality interests, even though some collateral attacks on convictions implicate lesser finality interests than others. Nor has the Court adopted that approach in analogous contexts, such as qualified immunity for executive officials, instead announcing a single "across the board" standard.[192] A case-by-case approach to finality in sentencing would prove unworkable for courts, creating the appearance (and probably the reality) of arbitrariness. That indeterminacy would disserve the deterrent purpose of collateral review, a central justification for non-retroactivity rules. At the same time, it could distort the development of constitutional law at sentencing by discouraging courts from announcing new rules in the first place.

To begin, it is unclear why a case-by-case approach makes sense for challenges to sentences, but not convictions. Not all collateral attacks on convictions pose an identical threat to finality interests either. Some new rules of trial procedure impose fewer error-correction costs than others (e.g., narrow rules affecting a small number of cases),[193] or implicate diminished accuracy concerns (e.g., where trial is unlikely because the remedy relates to the terms of a guilty plea).[194] Likewise, many individual cases pose a lesser threat to finality because they will be resolved by guilty plea, or will involve a relatively inexpensive trial, or involve unspoiled evidence and readily available witnesses, or for case-

192. Harlow v. Fitzgerald, 457 U.S. 800, 821 (1982) (Brennan, J., concurring).

193. *See, e.g.*, Cooper v. Oklahoma, 517 U.S. 348, 360, 363–65 (1996) (invalidating a state statute that placed the burden on defendants to prove incompetence to stand trial by "clear and convincing evidence," a rule adopted in only four states and applicable only to cases in which competence is contested and where the quantum of proof of incompetence falls between a preponderance and clear and convincing evidence).

194. *See, e.g.*, Lafler v. Cooper, 132 S. Ct. 1376, 1390–91 (2012) (finding ineffective assistance of counsel during plea bargaining and ordering, as a remedy, that the State must offer a guilty plea to the defendant on the original terms).

specific reasons could enhance the public reputation of the criminal justice system through a new trial. Yet Congress and the courts have adopted a single set of rules for collateral attacks on convictions, regardless of the particular claim, context, or defendant.

The same is true in the analogous context of qualified immunity for government officials in actions under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[195] Qualified immunity shields government officials from personal liability in damages for constitutional violations, unless their conduct violated "clearly established . . . constitutional rights of which a reasonable person would have known."[196] As numerous scholars have observed, the "new rule" inquiry under *Teague* and the "clearly established" law inquiry for qualified immunity bear a strong conceptual connection.[197] Both require a determination of the state of the law at an earlier point in time, often based on inferences about the application of then-existing precedent to new circumstances. Both also reflect a policy-driven judgment by the Court that seeks to balance the vindication of federal rights against other interests.[198]

Yet in the qualified immunity context, the Court has expressly rejected a case-by-case interest balancing approach. In *Anderson v. Creighton*,[199] the plaintiffs urged that a more relaxed "clearly established law" standard should apply based on the type of claim (an unlawful search under the Fourth Amendment), the defendant (an FBI agent), and the particular circumstances (a search for a fugitive in an innocent third party's home).[200] The

195. *See generally* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

196. *Harlow*, 457 U.S. at 818.

197. *See, e.g.*, Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 763–64 & nn.79–80 (2005); James S. Liebman & William F. Ryan, *"Some Effectual Power:" The Quantity and Quality of Decisionmaking Required of Article III and the Supremacy Clause Demand of the Federal Courts*, 98 COLUM. L. REV. 696, 858–61 (1998); Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 925–27, 946–47 (1998); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 635–43 (1993).

198. *See, e.g.*, *Harlow*, 457 U.S. at 813–14 (explaining that "resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative").

199. Anderson v. Creighton, 483 U.S. 635 (1987).

200. *Id.* at 643–44.

Court refused, announcing that it was "unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated."[201] The Court cautioned against "an immunity that has as many variants as there are modes of official action and types of rights," and declined to "Balkanize the rule of qualified immunity by carving exceptions at the level of detail" proposed by the plaintiffs.[202] It concluded, instead, that "the doctrine of qualified immunity reflects a balance that has been struck 'across the board.'"[203] Although a few scholars and dissenting Justices have criticized that feature of qualified-immunity law,[204] the Court has retained a single unified standard.

It is therefore mistaken to fault collateral-review courts for their "reluctance to resentence" (Professor Russell's phrase) or their "'finality fixation' in the context of sentencing issues" (Professor Berman's phrase).[205] Courts' reluctance to individually consider the finality considerations raised by particular claims or cases is not the product of some special hostility toward sentencing challenges, but a general preference for crafting doctrine that strikes a single reasonable balance between competing interests, applicable across the board. There are good reasons for that approach, and nothing about the sentencing context justifies a departure from it.

For several reasons, a case-by-case approach to finality in sentencing on collateral review would prove complex and unworkable for courts, likely resulting in a hopelessly indeterminate standard. First, the initial fine-grain assessment of the finality interests implicated in a particular case would be difficult. To succeed, it would require a review of the totality of the circumstances relevant to finality, including the costs of resentencing the particular offender, the accuracy of further proceedings, and any case-specific reputational concerns. A court reviewing the case on collateral review, however, will rarely have

201. *Id.* at 643.

202. *Id.* at 643, 646.

203. *Id.* at 642 (quoting *Harlow*, 457 U.S. at 821 (Brennan, J., concurring)).

204. *See id.* at 647 (Stevens, J., dissenting); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 618–34 (1989) (discussing qualified immunity).

205. Berman, *Distinguishing Finality*, *supra* note 7; Russell, *supra* note 7.

complete information on those subjects, which depend heavily on the choices that the parties and the court ultimately make at resentencing. Usually it will not be clear to a habeas court, for example, whether a state-court judge will order a complete presentence investigation, or whether the original investigating officer and victims remain available and willing to participate, or whether there are new or contested facts to litigate. In theory the case-by-case approach allows a careful calibration of doctrine to the circumstances, but in practice it would force collateral review courts to make speculative guesses about the finality interests at stake.

Second, compounding the complexity for courts, resolving each challenge would require "stacking" a flexible standard for assessing finality interests on top of various limits on habeas review, which may themselves operate as a flexible standards rather than bright-line rules. Harmless-error requirements,[206] procedural-default doctrines,[207] and even limitation periods[208] on collateral review often require the application of standards. Retroactivity under *Teague* likewise may require the application of two standards: an evaluation of the state of the law at the time the judgment became final, and the underlying constitutional law, which may be expressed as a standard (e.g., whether a sentence is "grossly disproportionate" to the crime in violation of the Eighth Amendment).[209] Layering standard upon standard (perhaps upon another standard!) in that fashion is exceedingly complicated, and perhaps simply unrealistic. Lower courts, in particular, would have difficulty interpreting and applying the decisions of appellate courts in a consistent manner because, as Alan Chen has argued in the qualified immunity context, the stacking of standards upon standards can confuse and mask courts' reasons for their

206. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (holding that habeas relief must be denied if the error did not have "a substantial and injurious effect or influence" on the outcome, based on all of the evidence (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))).

207. *See* Schlup v. Delo, 513 U.S. 298, 327 (1995) (excusing procedural default upon a showing of "actual innocence," meaning that "it is more likely than not that no reasonable juror would have found [the] petitioner guilty beyond a reasonable doubt" in light of all of the evidence).

208. *See* McQuiggin v. Perkins, 133 S. Ct. 1924, 1932 (2013) (applying the "actual innocence" exception to AEDPA's one-year statute of limitations for federal habeas petitions).

209. *See* Ewing v. California, 538 U.S. 11 (2003).

decisions.[210] Over time, an approach that attempts to capture with precision the finality interests at stake in a particular claim or case, and to modulate limits on collateral review accordingly, will suffer from the appearance, and probably the reality, of unpredictability and arbitrariness.[211]

To illustrate the point, consider the retroactivity regime that preceded *Teague*. In *Linkletter v. Walker*,[212] the Court adopted a three-prong balancing test for retroactivity, taking into account the purpose of the new rule, the extent of reliance on former law, and the effects of retroactivity on the administration of justice.[213] The idea was to strike a careful balance of competing considerations, including finality interests, on a rule-by-rule basis. In practice, however, *Linkletter*'s balance of competing interests proved hopelessly indeterminate and unworkable, producing "doctrinal confusion" and inconsistency.[214] Different judges and circuits frequently disagreed about the retroactivity of new rules, leading to criticism that the fluidity of the standard made it easy to manipulate.[215] The perceived failure of *Linkletter*'s rule-by-rule approach became a driving force behind the new framework adopted in *Teague*.[216] There is no reason to believe a similar multifactor balancing test, this time oriented toward finality interests at stake at sentencing, would perform better.

210. *See* Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 316–18 (1995) (arguing that the stacking of qualified immunity standards on underlying substantive constitutional law standards may "completely eliminate the deliberative advantages of constitutional standards").

211. *Cf.* John Bernard Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35, 84–85 (1985) (arguing, in the context of retroactivity under *Linkletter*, that "[e]xcessively complex doctrines may be too difficult for courts and parties to understand, effectively precluding just application" and that the Court should strive for "as much complexity as necessary to make a doctrine theoretically just without making it either incomprehensible or too intricate for practical application").

212. Linkletter v. Walker, 381 U.S. 618 (1964).

213. *Id.* at 629.

214. *See* Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting); Corr, *supra* note 211, at 74 (noting that "[a]lmost every feature of the three-pronged approach has been a source of uncertainty and confusion" for lower courts).

215. *Cf.* Ann Althouse, *Saying What Rights Are—In and Out of Context*, 1991 WIS. L. REV. 929, 949 (1991) (acknowledging the "practical problems" created by *Linkletter*'s "nebulous" three-factor analysis).

216. Teague v. Lane, 489 U.S. 288, 305 (1989) (indicating that under the *Linkletter* standard, the court's "failure to treat retroactivity as a threshold question," and inability "to account for the nature and function of collateral review").

Because of its complexity and unpredictability, a case-by-case approach to finality interests at sentencing would also disserve the deterrent purpose of collateral review. Although the proposition is controversial among scholars, the Court increasingly has described the objective of collateral review as the deterrence, rather than the correction, of constitutional errors.[217] The Court's decision in *Teague* is a particularly clear example, and limits on habeas relief later imposed by Congress in AEDPA are consistent with that understanding.[218] Vacating sentences based on new rules of procedure, even if it occurs only selectively, would do nothing to advance a deterrent purpose because the original sentence was perfectly lawful under the "old rules" applicable at the time of the decision. A court imposing an initial sentence cannot possibly know what finality interests will remain salient in a particular case many years later, since those interests depend on the nature of the not-yet-announced new rule and the fate of witnesses and evidence in the years that follow. Thus, selectively vacating final sentences would introduce an element of randomness to collateral review that could undermine its deterrent effect. The same threat to deterrence would be present if the layering of a case-by-case finality balancing test on top of existing doctrine produces unpredictable or arbitrary results in practice.

Thus, whatever their superficial appeal, even more modest claims about finality in sentencing on collateral review are ultimately unpersuasive. Although there is no question that some sentencing claims and individual cases pose lesser threats to finality interests than others, it does not follow that collateral-review doctrine must be calibrated accordingly. Practical difficulties in implementing such a complex standard, and tension with the deterrent purpose of collateral review, militate against the kind of case-by-case approach that the Court has rejected for collateral review of convictions and in analogous contexts.

217. Joseph L. Hoffman, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165, 178 (1989).

218. *See* Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535, 607–08 (1999).

C. Finality Interests for Broad Categories of Sentences

This essay has challenged claims that all challenges to sentences implicate diminished finality interests, as well as claims that the lesser threat to finality posed by particular offenders or types of error justifies different rules for collateral review. A final set of arguments, however, is conceptually more plausible. Some scholars and judges have urged that broad categories of sentences deserve distinctive treatment on collateral review, based in part on the implications for finality. Two categories especially prominent in the literature are (1) challenges to capital sentences, and (2) challenges to federal sentences under 28 U.S.C. § 2255.

First, a number of scholars, echoing Justice Stevens's concurring opinion in *Teague*,[219] have urged that finality interests deserve less weight when a prisoner challenges a capital sentence on collateral review.[220] Paul Heald contends that accuracy concerns are lessened at capital sentencing hearings because the central issue is the defendant's character, which is "not so subject to the vicissitudes of time" as the evidence needed for retrial.[221] Other scholars have argued that reputational risks are minimal because, even if a death sentence is vacated, the defendant will receive a sentence of life imprisonment without the possibility of parole and will therefore remain off the streets permanently.[222] One could quibble with some aspects of those arguments.[223]

219. *Teauge*, 489 U.S. at 321 n.3 (Stevens, J., concurring in part and concurring in the judgment) (calling finality "an interest that is wholly inapplicable to the capital sentencing context"); *see supra* notes 58–60 and accompanying text.

220. *See* Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able To Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357, 396–400 (1991) (urging that states' interest in finality are outweighed in the capital sentencing context); Heald, *supra* note 8, at 1320–21 ("The state's interest in the finality of a petitioner's *conviction* for murder is greater than its interest in the capital *sentence* he has received."); Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160, 180–90 (1991) (urging that retroactivity doctrine should operate differently in capital sentencing cases); Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals*, 18 J.L. & POL. 773, 812 (2002) ("There is a place for finality in judicial decision-making, but in a capital case finality should give way to confidence in our system of justice.").

221. Heald, *supra* note 8, at 1320.

222. *Id.*; Goldstein, *supra* note 220, at 397.

223. As to accuracy, many aggravating and mitigating factors under capital sentencing statutes involve backward-looking factual determinations about the offender's actions and state of mind at the time of the offense, not just his present-day character and prospects for rehabilitation. In particular, victim impact evidence is critical, yet the long delays caused by collateral review may render that kind of testimony less effective or unavailable.

Conspicuously absent, for example, is any discussion of the costs of resentencing in time and resources. Capital sentencing is expensive and every bit as procedurally complex as trial, requiring the participation of a jury and extensive in-court witness testimony. Indeed, the extraordinary delays and costs of sentencing, collateral review, and resentencing in capital cases has become a major rallying cry for opponents of the death penalty.

But finality interests are only part of the story. The argument for relaxed collateral review standards in capital cases rests principally on the gravity, irreversibility, and unique nature of the death penalty.[224] It emphasizes the high stakes for prisoners for whom a collateral attack is a matter of life or death, and the correspondingly strong interests in avoiding errors in capital cases. Considering the myriad ways in which "death is different" for constitutional purposes, there are forceful grounds for striking a different balance between finality interests and competing considerations, regardless of whether challenges to death sentences truly raise fewer finality concerns than challenges to noncapital sentences or convictions. Indeed, as a practical matter, courts may already be treating capital sentencing claims differently. Although the Court has repeatedly stated that capital sentences should not receive a different standard of review on habeas review,[225] the success rate is far higher for capital cases (more than 12.4%) than for noncapital cases (less than 0.3%).[226] In part that gap reflects the fact that petitioners in capital cases are far more likely to be represented by counsel,[227] as well as heightened constitutional requirements for capital sentencing. Many observers have speculated, however, that federal judges follow an unstated practice of reviewing claims of error in capital cases more strictly, sometimes "bending" procedural limits to

As to reputation, whatever one thinks of AEDPA's specific provisions, it expressly sought to make the death penalty more "effective" by restricting collateral review, and it commanded broad bipartisan support before being signed into law by President Bill Clinton. It is difficult to accept the suggestion that the public is indifferent to the execution of legally authorized death sentences, provided the offender remains in prison.

224. *See* Goldstein, *supra* note 220, at 397; Metzler, *supra* note 220, at 180–82.

225. Herrera v. Collins, 506 U.S. 390, 405 (1993) (quoting Murray v. Giarratano, 492 U.S. 1, 9 (1989) (plurality opinion)).

226. KING ET AL., *supra* note 26, at 51–52.

227. Douglas A. Berman, *Making the Framers' Case, and a Modern Case, for Jury Involvement in Habeas Adjudication*, 71 OHIO ST. L.J. 887, 904 (2010).

permit consideration of a habeas petition on the merits.[228] Although transparency about that practice would be preferable, there are good reasons to single out capital sentences for categorically different treatment on collateral review.

Second, Professor Russell and others have urged that collateral challenges to federal sentences under 28 U.S.C. § 2255 implicate diminished finality interests.[229] From a resource standpoint, the duplication of effort is less acute in the federal system because a federal prisoner need not exhaust available state court remedies before pursuing postconviction relief.[230] For the same reason, federal postconviction claims can be resolved much faster than habeas claims by state prisoners, reducing the risk of inaccuracy at a new proceeding due to unavailable witnesses or faded memories.[231] In addition, as noted above in reference to *Begay* claims, in federal court the same judge and attorneys who handled the original sentencing typically handle the § 2255 motion, and their familiarity with the case should make resentencing more straightforward and efficient.[232]

Again, however, the argument that federal sentences should be treated differently is only partly grounded in finality. The principal contention is that limits on collateral review reflect federalism and comity concerns specific to habeas review of state court judgments, and that those concerns are absent in federal postconviction proceedings.[233] In the retroactivity context, at least, that claim is vulnerable to criticism: it overstates the importance of federalism reasoning to the *Teague* framework,[234] and it misunderstands how identical standards for collateral review of state and federal judgments can be seen as an expression of

228. *Cf.* Russell, *supra* note 7.

229. *Id.* at 162 n.506.

230. *Id.* at 147.

231. *See id.* at 152 (discussing stale evidence).

232. *See supra* notes 181–182 and accompanying text.

233. *See* United States v. Frady, 456 U.S. 152, 184 (1982) (Brennan, J., dissenting) (urging that the absence of comity concerns in § 2255 cases justifies a different "cause and prejudice" standard for collateral review); Russell, *supra* note 7, at 146 ("Courts and scholars often cite concerns about comity and federalism when emphasizing the importance of finality of criminal judgments."). *But see* Amsterdam, *supra* note 19, at 379–81 (urging the opposite distinction between state and federal prisoners, for purposes of collateral review, on the ground that federal prisoners receive a federal forum to resolve their constitutional claims "from the start").

234. *See supra* Part.II.B.

respect, rather than disrespect, for state court proceedings.[235] Consistent with Justice Harlan's view,[236] the lower courts uniformly have held that *Teague* applies with equal force to federal postconviction motions under § 2255, and in dictum the Supreme Court appears to have endorsed that practice.[237] Nonetheless, in principle, collateral review of federal judgments by federal courts (and, for that matter, postconviction review of state judgments by state courts) differs in important ways from habeas corpus review, making it appropriate to consider different limits on collateral review in that context.[238]

Carving out broad categories of sentences for distinct treatment would add some complexity to courts' tasks on collateral review, but it would avoid the grave workability challenges of a case-by-case balancing approach. Courts could establish a distinct set of rules for various limits on collateral review—in essence a lower "tier of scrutiny"—and could easily determine based on the type of sentence whether to apply it.

235. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 915 (1984) (explaining that the Court's decision "to conform its interpretation of section 2255 to its rules for habeas corpus petitions filed by state prisoners might be understood as embracing federalism," which "may simply oblige federal courts to accord equal deference to federal and state court judgments").

236. *See* Mackey v. United States, 401 U.S. 667, 681–82 n.1 (Harlan, J., dissenting) ("I do not propose to make any distinction, for retroactivity purposes, between state and federal prisoners seeking collateral relief. . . .").

237. *See, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 269 n.4, 281 n.16 (2008) (noting that lower courts have applied *Teague* to federal postconviction motions and that "[m]uch of the reasoning applicable to applications for writs of habeas corpus filed pursuant to § 2254 seems equally applicable in the context of § 2255 motions," but that the question was not present in the case); Duncan v. United States, 552 F.3d 442, 444 n.2 (6th Cir. 2009); *In re* Fashina, 486 F.3d 1300, 1303–04 (D.C. Cir. 2007); Ferrara v. United States, 456 F.3d 278, 288 (1st Cir. 2006); United States v. Gentry, 432 F.3d 600, 602–03 (5th Cir. 2005); Howard v. United States, 374 F.3d 1068, 1073–74 (11th Cir. 2004); United States v. Jenkins, 333 F.3d 151, 154–55 (3d Cir. 2003); United States v. Sanchez–Cervantes, 282 F.3d 664, 667–68 (9th Cir. 2002); Daniels v. United States, 254 F.3d 1180, 1194 (10th Cir. 2001) (en banc); Jarrett v. United States, 266 F.3d 789, 791 (8th Cir. 2001); United States v. Martinez, 139 F.3d 412, 416 (4th Cir. 1998); Van Daalwyk v. United States, 21 F.3d 179, 183 (7th Cir. 1994); Gilberti v. United States, 917 F.2d 92, 95 (2d Cir. 1990).

238. *See* Reina–Rodriguez v. United States, 655 F.3d 1182, 1189–90 (9th Cir. 2011) (expressing doubt, in light of *Danforth*, about whether *Teague* applies to collateral attacks under § 2255); *Duncan* 552 F.3d at 444 n.2 (applying *Teague* to a sentencing challenge under § 2255, but expressing reservations "because many of the comity and federalism concerns animating *Teague* are lacking"); Valentine v. United States, 488 F.3d 325, 341–42 & n.3 (6th Cir. 2007) (Martin, J., dissenting); Teague v. Lane, 489 U.S. 288, 328 (1989) (Brennan, J., dissenting) (contending that the Court's opinion had nothing to do with § 2255 petitions).

Within those categories, no further effort would be made to ascertain case specific finality interests and to make doctrinal adjustments accordingly. That would spare collateral review courts the need to speculate about the finality interests at stake in individual cases, while avoiding the complexity and indeterminacy of infinitely variable habeas standards.[239] Without attempting a complete catalogue of types of sentences that might warrant categorically different treatment, it is enough to note that a category-based approach shows more promise than either a separate set of rules for *all* sentences or a case-by-case balancing of finality interests.

Under an approach that carves out some categories of sentences for separate treatment, sentences of life without the possibility of parole, at issue in *Miller*, would be strong candidates. The Court already has drawn parallels between capital sentences and life without parole sentences for Eighth Amendment purposes, first in *Graham v. Florida*[240] and subsequently in *Miller*.[241] A raft of scholarship has emerged developing that comparison and urging that life without parole sentences implicate similar considerations.[242] Much of the public attention to the retroactivity *Miller* results not from strongly-held views about the finality interests at stake, but from a sense that it is unfair for any juvenile offender to serve a sentence so severe that they will die in prison.[243] Making that distinction explicit would be preferable to stretching existing *Teague* exceptions beyond recognition.

D. Finality and Miller

It may come as a surprise, in light of the above defense of finality, that I earnestly hope that *Miller* in some way affects all of the more than two thousand sentences imposed in violation of the rule but which became final before the decision. As a matter of justice, every juvenile offender serving a mandatory sentence of

239. *Cf.* Anderson v. Creighton, 483 U.S. 635, 644, 646 (1987) (declining to adopt a case-by-case approach in the qualified immunity context).

240. Graham v. Florida, 560 U.S. 48 (2009).

241. Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2012).

242. For an overview, see WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? (Charles J. Ogletree & Austin Sarat eds., 2012).

243. *See, e.g.*, Jody Kent Lavy, *Give Them Another Chance*, N.Y. TIMES, Sept. 19, 2013, http://www.nytimes.com/roomfordebate/2013/09/18/reconsidering-young-lifers-sentences.

life without parole deserves an opportunity to request resentencing or parole. But the public debate about the retroactivity of *Miller* powerfully illustrates the ineffectiveness of collateral review in achieving that end.[244]

As noted above, the legislatures of five states—California, Delaware, Louisiana, North Carolina, and Wyoming—already have enacted "*Miller* fix" legislation that expressly applies retroactively to cases that became final before the decision.[245] That achievement, wholly separate from the collateral review process, has granted parole or an opportunity for resentencing to more than six hundred juvenile offenders sentenced to life without parole.[246] At the same time, the variety of *Miller* "fixes" chosen by state legislatures highlights the advantages of legislative, rather than judicial, resolution of retroactivity questions. Many states have granted offenders a right to seek resentencing or parole, but they differ as to the timing (after fifteen years in California, after forty years in Texas),[247] the identity of the decisionmaker (a parole board in Louisiana, a sentencing court in Delaware),[248] the frequency of review (annually in Nebraska, discretionary in others),[249] and statutory exceptions (torturers in California,

244. *Cf.* William Baude, *The Problem with Retroactivity Rules*, N.Y. TIMES, Sept. 19, 2013, http://www.nytimes.com/roomfordebate/2013/09/18/reconsidering-young-lifers-sentences (encouraging juvenile justice advocates not to "place their faith in federal courts," and noting that state postconviction procedures and executive clemency remain available to address *Miller* issues).

245. *See supra* note 69 and accompanying text.

246. *See State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUMAN RIGHTS WATCH 1 (Oct. 2, 2009), *available at* http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09_final.pdf (reporting that 2,589 juvenile offenders are serving life without parole sentences, including 265 in California, 335 in Louisiana, and 44 in North Carolina).

247. *See, e.g.*, 2013-3 Cal. Adv. Legis. Serv. 1170, 1171 (LexisNexis) (to be codified at CAL. PENAL CODE § 1170(d)(2)(A)(i)-(ii)) (granting a right to petition for resentencing after fifteen years, but excluding offenders who killed certain law enforcement personnel or who tortured their victims); TEX. GOV'T CODE ANN. § 508.145(b) (West 2012 & Supp. 2013) (granting eligibility of parole after forty years to those serving life sentences under Section 12.31(a)(1) of the Penal Code); *id.* § 12.31(a)(1) (West 2012 & Supp. 2013) (granting life with the possibility of parole for individuals who committed capital offenses at younger than eighteen years of age).

248. *See, e.g.*, 2013-3 Del Code. Ann. Adv. Legis Serv. 177, 178–79 (LexisNexis) (to be codified at DEL. CODE ANN. tit. 11, § 4204A(d)(1)-(4)); 2013 La. Acts 239 (to be codified at LA. REV. STAT. § 15:574.4(E)(2)), *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=857374&n=HB152%20Act.

249. *See, e.g.*, 2013-3 Del Code. Ann. Adv. Legis Serv. 177, 178–79 (LexisNexis) (to be codified at DEL. CODE ANN. tit. 11, § 4204A and DEL. CODE ANN. tit. 11, § 4209A(d)(1)-

prisoners who commit certain infractions in Wyoming).[250] Other states, like South Dakota, afford only a one-time resentencing procedure at which the judge has discretion to impose any sentence, including life imprisonment.[251]

Each of those changes solves the *Miller* problem. But each fix also carries different costs, reflects different state commitments, and produces a different mix of winners and losers. Offenders with especially compelling cases, for example, might prefer a single immediate resentencing hearing, rather than a long wait for parole eligibility. Other offenders, however, likely would receive another life without parole sentence if the hearing took place immediately, and would benefit more from automatic parole eligibility in the future. Legislatures are better situated than courts—especially federal courts engaged in collateral review of state court judgments—to assess those costs and to select an appropriate *Miller* remedy.

Collateral review is also an inappropriate mechanism for securing resentencing under *Miller* because of its deterrent purpose.[252] Many prisoners now seeking the benefit of *Miller* were sentenced before *Roper v. Simmons*[253] in 2005, at a time when states were free to sentence juvenile offenders to death. Ironically, many offenders now challenging their sentences under *Miller* no doubt initially welcomed a sentence of life without parole as an act of mercy, even if it was a mandatory alternative to a capital sentence. In fact, the frequency with which state courts chose life without parole, rather than death, contributed to the "national consensus" that prompted the Court in *Roper* to strike down the death penalty

(3)) (discretionary) (granting discretion to the court to set differing amounts of time in between judicial review of a juvenile's life sentence); L.B. 44, 103d Leg. (Neb. 2013) (to be codified as NEB. REV. STAT. 83-1,110.04), *available at* http://www.leg.ne.gov/FloorDocs/Current/PDF/Slip/LB44.pdf.

250. 2013 Cal. Legis. Serv. 1170, 1171 (LexisNexis) (to be codified at CAL. PENAL CODE § 1170(d)(2)(A)(i)-(ii)) (granting a right to petition for resentencing after fifteen years, but excluding offenders who killed certain law enforcement personnel or who tortured their victims); WYO. STAT. ANN. § 6-10-301 (2013) (excepting offenders who commit violations of WYO. STAT. § 7-13-402(b) from parole eligibility); *id.* § 7-13-402(b) (2013) (stating that offenders who commit assault with a deadly weapon or escape are ineligible for parole).

251. *See* S.B. 39, 89th Leg. Sess. (S.D. 2013) (to be codified at S.D. CODIFIED LAWS § 22-6-1), *available at* http://www.legis.state.sd.us/sessions/2013/Bills/SB39ENR.pdf.

252. *See supra* notes 217–218 and accompanying text.

253. Roper v. Simmons, 543 U.S. 551 (2005).

for juvenile offenders.[254] It therefore seems strange, and more than a little dishonest, to fault state trial courts for imposing cruel and unusual punishment by violating procedural requirements they could not possibly have anticipated. Juvenile offenders serving sentences of life without parole deserve an opportunity for resentencing or parole eligibility, but we should not pretend that state courts require the discipline of collateral review to deter future errors.

At the same time, for reasons unrelated to retroactivity law, collateral review is simply unreliable as a means of effectuating new rules like in *Miller*. Filing a petition for state postconviction relief or federal habeas requires compliance with statutes of limitations, procedural default rules, exhaustion requirements, bars against successive petitions, and various other requirements. All of those limits serve legitimate purposes in their own right. Yet the prisoners seeking collateral review have no right to appointed counsel, and the vast majority represent themselves *pro se*. Even if collateral review courts were to relax all of those requirements somewhat in *Miller* cases, a nontrivial number of prisoners would see their collateral actions dismissed without review on the merits. Collateral review simply is not designed to extend the benefits of a new rule automatically to all prisoners affected.

V. CONCLUSION

Although this essay has undertaken a defense of finality in sentencing on collateral review, it would be misleading to divide the judges and scholars who address finality into "attackers" and "defenders." No defender considers finality interests so weighty as to foreclose collateral review of sentences altogether. No attacker considers finality interests so trivial that every offender should be entitled to, say, automatic resentencing every month. Where they disagree, it is only about the relative importance of finality and competing interests, and about the proper rules to operationalize that balance.

Some scholars propose a distinction, for finality purposes, between sentences and convictions. In its strong form, the argument is that all sentences implicate diminished finality interests, and therefore should be evaluated under relaxed

254. *Id.* at 567.

standards on collateral review. But each of the principal justifications for existing limits on collateral review—the costs of relitigation, the risk of inaccuracy at new proceedings, and the threat to the reputation of the criminal justice system—applies with equal force to collateral attacks on sentences. If the current regime strikes a sensible balance for attacks on convictions, it is appropriate for attacks on sentences as well.

In its modest form, the argument is that particular sentencing claims or cases implicate diminished finality interests, and the rules for collateral review should be calibrated accordingly on a case-by-case basis. Although the premise is sound, in practice that approach would prove complex and indeterminate, producing results that suffer from the appearance (and probably the reality) of arbitrariness. It would also be in tension with the deterrent purpose of collateral review. A more promising approach would be to carve out broad categories of sentences, such as capital sentences or federal sentences. That approach could respond to important differences in the balance of finality and other interests for certain kinds of sentences, while avoiding the workability challenges of a rule-by-rule or case-by-case inquiry.