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Finality and Rehabilitation

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FINALITY AND REHABILITATION

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I. INTRODUCTION

The doctrine of finality has recently been under steady attack. It has erected a high hurdle for individuals to overcome before their convictions can be overturned or their sentences modified, even if those individuals may be innocent, have been improperly sentenced, or are serving substantively disproportionate sentences. New science and changing societal views, though, have impelled commentators to take another look at the age-old doctrine of finality. In their reassessments, commentators have often disregarded or given little weight to the interests long thought to buttress the doctrine. And they have been quick to argue that the doctrine of finality must be abandoned, or at least relaxed, to provide courts with the opportunity to remedy injustices such as wrongful convictions and unjust sentences.

Commentators' rush to embrace new ideas and set aside obstacles like the finality doctrine is reminiscent of commentators' adoption of similar new ideas during the middle of the last century.[1] This was the era during which the penological theory of rehabilitation proliferated as policymakers acted on new science

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1. *See* Meghan J. Ryan, Science and the New Rehabilitation 7–10 (May 13, 2013) (unpublished manuscript), *available at* http://www.ssrn.com/abstract=2019368 [hereinafter Ryan, Science and Rehabilitation].

and seemingly enlightened views about sentencing.[2] This same sense of enlightenment is now, again, beginning to spread through the policymaking arena.

Today, rehabilitation and the discard of finality are often thought of as complementary; they are both avenues—and perhaps the same avenue—to more enlightened approaches to punishment. But the relationship between finality and rehabilitation is actually more complicated. Finality has historically been understood as promoting rehabilitation.[3] More recently, however, finality has been said to undercut rehabilitative efforts. This seeming inconsistency stems from changing understandings of rehabilitation over the years, therefore examining divergent conceptions of rehabilitation is necessary to deciphering its relationship with finality.

Rehabilitation focuses on offender change—on whether an offender is a final product or, rather, whether he is capable of transformation. This capacity for change might actually be thought of in terms of a third class of finality: the finality of the offender himself. If the offender is not final, meaning that he is capable of change, then the type of possible change is important. Is it character change—the type of rehabilitation referred to during an earlier era?[4] Or is it behavioral change—the conception of rehabilitation frequently referenced today?[5] While often overlooked, examining the nature of the rehabilitation at issue is critical to determining whether finality of conviction and sentencing may promote or undercut an offender's rehabilitation.

II. THE DOCTRINE OF FINALITY

The doctrine of finality is somewhat difficult to circumscribe. *Black's Law Dictionary* does not contain an entry for the concept,[6] and the *Oxford English Dictionary* fails to provide a

2. *See id.* at 8–10, 30.

3. *See* Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986) (Powell, J., concurring) ("[F]inality serves the State's goal of rehabilitating those who commit crimes . . . .").

4. *See* Ryan, Science and Rehabilitation, *supra* note 1, at 44–46.

5. *Id.* at 44–48.

6. *See* BLACK'S LAW DICTIONARY 705 (9th ed. 2009) (defining the "finality doctrine" only as "[t]he rule that a court will not judicially review an administrative agency's action until it is final," which is a somewhat different concept).

legal definition.[7] Not even Judge Friendly's or Paul Bator's seminal articles on the doctrine of finality clearly define the concept.[8] But the doctrine of finality is in some ways quite simple. Most often, it refers to the notion that a legal judgment—whether that be a judgment of conviction or of sentencing—should be considered the last word on a matter once the courts have completed direct review of the case, and the judgment then should not be revisited by a court at any future time. The doctrine frequently comes into play in determining whether a criminal defendant's attempt to collaterally attack his conviction and sentence is appropriate.[9]

Perhaps the most well-known face of finality is the finality of convictions—the idea that judges ordinarily ought not to question offenders' convictions that have completed the stages of direct review. For example, in the infamous *Herrera v. Collins*[10] case, a petitioner who had been convicted of capital murder sought federal habeas corpus relief, alleging that he was factually

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7. *See generally* OXFORD ENGLISH DICTIONARY (3d ed. 2009) (neglecting to provide a legal definition).

8. *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (neglecting to clearly define the doctrine of finality); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (same). It is important to note, though, that some courts and scholars seem to have adopted broader and narrower understandings of "finality" than used here.

9. It is important to note that procedures for collaterally attacking convictions and sentences in federal court have changed dramatically since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Under the Act, many federal defendants' claims that would previously have been styled as petitions for writs of habeas corpus now take the form of a motion to "vacate, set aside or correct [the defendant's] sentence" under 28 U.S.C. § 2255. *See* Janice L. Bergmann, *Section 2255 Motions and Other Federal Postconviction Remedies* § 1.01, *in* SUPPLEMENT TO DEFENDING A CRIMINAL CASE (2010), *available at* http://www.rashkind.com/appellatedocs.htm. The Supreme Court has explained that "§ 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus." Davis v. United States, 417 U.S. 333, 343 (1974). This similarity between the two avenues for relief has caused commentators to refer to § 2255 motions as petitions for habeas corpus. *See, e.g.*, Dustin B. Benham, *Beyond Congress's Reach: Constitutional Aspects of Inherent Power*, 43 SETON HALL L. REV. 75, 122 n.287 (2013) (equating applications for habeas corpus and § 2255 motions); Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1229 n.43 (2012) (noting AEDPA restrictions on "federal inmates seeking habeas relief under 28 U.S.C. § 2255"). For a good summary on the interaction between habeas petitions and § 2255 motions, see generally Bergmann, *supra*.

10. Herrera v. Collins, 506 U.S. 390 (1993).

innocent of the crime for which he had been convicted.[11] In support of his innocence, the petitioner presented several individuals' affidavits that claimed the petitioner's deceased brother was actually the guilty party.[12] Affirming the lower courts' decisions, the U.S. Supreme Court denied relief, stating:

> [B]ecause of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.[13]

Moreover, the Court explained that, even if the petitioner had made out "a truly persuasive demonstration of 'actual innocence,'"[14] the petitioner's claim still would have been denied[15]: Although federal habeas courts take into account claims of actual innocence in determining whether a petitioner may be excepted from procedural limitations on the writ for habeas corpus,[16] finality concerns compel federal habeas courts to refuse to entertain freestanding actual innocence claims—innocence claims that do not stand alongside claims of constitutional error.[17]

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11. *See id.* at 393.

12. *See id.* at 396–97 & n.2. At the time petitioner filed his second federal habeas petition, his brother was deceased. *See id.* at 396.

13. *Id.* at 417.

14. *Id.*

15. *See id.* at 399–417. The *Herrera* Court made it very clear that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* at 400. Precedent indicates that such evidence "is not a ground for relief on federal habeas corpus." *Id.* (quoting Townsend v. Sain, 372 U.S. 293, 317 (1963) (overruled on other grounds)) (emphasis omitted). "[O]ur habeas jurisprudence makes clear," the Court stated, "that a claim of 'actual innocence' is not itself a constitutional claim." *Id.* at 404.

16. *See id.* at 404.

17. *See id.* at 400, 404–05. Despite the majority's reasoning, six Justices in *Herrera* suggested that executing an innocent individual would be unconstitutional. *See id.* at 419 (O'Connor, J., concurring) (stating that it is a "fundamental legal principle that executing the innocent is inconsistent with the Constitution"); *id.* at 429 (White, J., concurring) ("I assume that a persuasive showing of 'actual innocence' made after trial,

This powerful doctrine of finality that could potentially allow the government to execute an innocent person[18] is said to serve many interests. First, the principle of finality serves the government's "punitive interests."[19] If a court revisits and vacates a defendant's conviction, it might be difficult for the government to retry the defendant.[20] This is not necessarily because the defendant is innocent, but the deck will likely be stacked against the government because evidence may have disappeared between the time of the first trial and the time that the government needs to retry the defendant.[21] During this period, witnesses' memories may have faded and physical evidence may have degraded, or been misplaced or destroyed.[22] The principle of finality is also useful in supporting the deterrence value of criminal statutes.[23] If courts readily revisit offenders' convictions on collateral attack, then would-be offenders may be less certain that they will be swiftly

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even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."); *id.* at 430 (Blackmun, J., dissenting) ("Nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." (internal citations omitted)). Further, Justices O'Connor and Kennedy contended that "[n]owhere does the [majority] state that the Constitution permits the execution of an actually innocent person." *Id.* at 427 (O'Connor, J., concurring).

18. *See supra* text accompanying notes 10–17. Several commentators have alleged instances of such wrongful executions. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 72 (1987) (alleging twenty-three cases of wrongful execution); *see also* Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 264–73 & nn.85–86 (2012) [hereinafter Ryan, *Wrongful Execution*] (describing a case of possible wrongful execution that took place in Texas in 2004 and also explaining that "no individual executed in the United States has been formally legally exonerated").

19. Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986) (Powell, J., concurring).

20. *See id.*; Ryan, *Wrongful Execution*, *supra* note 18, at 277; William A. Schroeder, *Federal Habeas Review of State Prisoner Claims Based on Alleged Violations of Prophylactic Rules of Constitutional Criminal Procedure: Reviving and Extending* Stone v. Powell, 60 U. KAN. L. REV. 231, 276 (2011).

21. *See Herrera*, 506 U.S. at 403 ("[T]he passage of time only diminishes the reliability of criminal adjudications."); McCleskey v. Zant, 499 U.S. 467, 491 (1991) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication." (internal quotations and citations omitted)); *Kuhlmann*, 477 U.S. at 453 (Powell, J., concurring).

22. *See Kuhlmann*, 477 U.S. at 453 (Powell, J., concurring).

23. *See* Calderon v. Thompson, 523 U.S. 538, 555 (1998) ("Finality is essential to both the retributive and the deterrent functions of criminal law."); Teague v. Lane, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect."); *Kuhlmann*, 477 U.S. at 452 (Powell, J., concurring).

convicted, sentenced, and punished for the crimes they commit.[24] Finality has also been said to further offender rehabilitation.[25] By remaining firm on the matter of the offender's conviction, it allows the offender to turn inward and begin working on himself rather than continuing to focus on the fight to have his conviction overturned.[26] Finality also conserves governmental resources.[27] Retrying a defendant requires the government to expend significant capital, taxing the government both monetarily and in terms of the time that prosecutors and judges must spend on the case.[28] Additionally, finality is said to provide victims with closure.[29] If courts revisit convictions that are supposedly final, and especially if offenders must be retried, victims must, once again,

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24. *See Kuhlmann*, 477 U.S. at 452–53 (Powell, J., concurring); *see also* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 58–59, 93–99 (Henry Paolucci trans., 1963) (1794) (explaining that effective deterrence rides on the certainty of punishment, the speed with which it is imposed, and its severity).

25. *See Kuhlmann*, 477 U.S. at 453 (Powell, J., concurring) ("[F]inality serves the State's goal of rehabilitating those who commit crimes because rehabilitation demands that the convicted defendant realize that he is justly subject to sanction, that he stands in need of rehabilitation." (internal quotations and alterations omitted)); Engle v. Isaac, 456 U.S. 107, 126–27 nn.31–32 (1982) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring)); *Schneckloth*, 412 U.S. at 262 (Powell, J., concurring) ("At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen."); Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting) ("Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.").

26. *See Kuhlmann*, 477 U.S. at 453 (Powell, J., concurring); *see also Engle*, 456 U.S. at 127 (1982) (referencing Justice Harlan's statement that "both the . . . defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community").

27. *See Kuhlmann*, 477 U.S. at 453 n.16 (Powell, J., concurring).

28. *See id.* Moreover, disregarding the finality doctrine could open the floodgates to voluminous meritless, as well as costly, claims. *See* Margaret A. Berger, *Lessons from DNA: Restriking the Balance Between Finality and Justice*, *in* DNA & THE CRIMINAL JUSTICE SYSTEM: THE TECHNOLOGY OF JUSTICE 109, 111 (David Lazer ed., 2004) [hereinafter DNA & THE CRIMINAL JUSTICE SYSTEM] ("Finality conserved scarce judicial time by not opening the floodgates to meritless and costly claims.").

29. *See* Berger, *supra* note 28, at 111 (explaining finality's historical value in promoting "needed closure for victims and their families and for participants in the legal proceedings: witnesses, judicial officers, prosecutors, victims' rights advocates, and law enforcement personnel").

relive the crimes that were perpetrated against them.[30] Lastly, finality is said to preserve comity and federalism in certain circumstances.[31] States ought to retain their authority over state criminal law, and any federal review of a state conviction creates friction between the two sovereign entities that ought to be avoided.[32]

The finality doctrine, and the interests finality is said to serve, has been questioned in recent years, though.[33] Much of this questioning stems from flagging confidence in the certainty of

30. *See id.*

31. *See* Calderon v. Thompson, 523 U.S. 538, 555 (1998) ("Finality serves as well to preserve the federal balance."). Often, the Supreme Court states that the interests buttressing courts' conservative approaches to entertaining defendants' collateral attacks are "comity, finality, and federalism." Woodford v. Garceau, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" (internal citation omitted)); Williams v. Taylor, 529 U.S. 420, 436 (2000) (noting that the purpose of AEDPA was to further the doctrines of "comity, finality, and federalism" (internal citations omitted)). This suggests that perhaps finality is not supporting federalism and comity but instead that federalism and comity are additional interests to be taken into account alongside finality. Historically, though, as well as practically, finality does seem to support the federalism and comity interests.

32. *See Kuhlmann*, 477 U.S. at 453 n.16 (Powell, J., concurring) ("Federal habeas review creates friction between our state and federal courts. . . . Moreover, under our federal system the States 'possess primary authority for defining and enforcing the criminal law,' and 'hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'"). There are a few additional interests that some scholars suggest have historically supported the finality doctrine, including a presumption of correctness of the directly reviewed (or final) verdict, *see* Berger, *supra* note 28, at 110, "encourag[ing] counsel to try their case correctly the first time," David Lazer & Michelle N. Meyer, *DNA and the Criminal Justice System: Consensus and Debate*, *in* DNA & THE CRIMINAL JUSTICE SYSTEM, *supra* note 28, at 357, 358, and improving the quality of judging, *see Calderon*, 523 U.S. at 555 ("Finality also enhances the quality of judging."); Bator, *supra* note 8, at 451 ("I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."). Moreover, there may be a psychological benefit to society inherent in preserving finality—the notion that justice has been done. *See* Bator, *supra* note 8, at 452–53; Friendly, *supra* note 8, at 149. It should be noted, however, that some scholars distinguish between the finality interests relevant in the capital and non-capital contexts. *See, e.g.*, Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 82 (2012) (excepting capital cases from her finality analysis).

33. *See* Berger, *supra* note 28, at 109 (asserting that vacated convictions require a reassessment of our criminal justice system and "the value of finality in criminal proceedings").

convictions that is fostered by cases like *Herrera*.[34] Since 1989, there have been at least 1,326 wrongful convictions.[35] And the number of people who have been exonerated and released from death row since 1973 is 143.[36] With this large number of wrongfully convicted individuals, there is considerable concern that even more individuals are being unjustifiably incarcerated, or even executed.

A number of these troubling exonerations have sprung from scientific advances—especially developments related to DNA technology.[37] Scientific knowledge in this area has grown tremendously since the 1980s and has allowed for more certain evidence regarding innocence and guilt.[38] Accordingly, much of this advanced DNA technology was unavailable to some defendants when they were convicted and was still unavailable

34. *See id.* at 112 ("Undoubtedly, the demonstration that numerous defendants were wrongfully convicted has made the most dramatic inroad into the case for finality, especially as a significant percentage of the convictions that have been vacated related to inmates who were on death row."); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1631, 1636 (2008) ("DNA technology has eroded the twin pillars [of] . . . reliability and finality."); Lazer & Meyer, *supra* note 32, at 358 ("Few individuals disagree with the principle that unambiguous evidence of innocence should be grounds for exoneration."); *see also supra* text accompanying notes 10–17 (briefly outlining the *Herrera* case). One can also see the Court cutting back on finality in its recent postconviction cases, such as its 2013 opinion of *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), in which the Court suggested that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." *Id.* at 1928. (The Court actually phrased this statement as its holding, see *id.*, but the Court ultimately found that "the District Court's appraisal of [Defendant's] petition as insufficient to meet [the] actual-innocence standard should be dispositive, absent cause, which we do not currently see, for the Sixth Circuit to upset that evaluation," *id.* at 1936. This suggests that the Court's alleged holding that actual innocence is a path around AEDPA's statute of limitations is actually dictum.).

35. *See* NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited June 23, 2013).

36. *See The Innocence List*, DEATH PENALTY INFO. CTR, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited June 23, 2013).

37. *See* Garrett, *supra* note 34, at 1630–33.

38. *See id.* at 1658–59 (explaining that scientific advancements in the 1990s—such as polymerase chain reaction ("PCR") testing, short tandem repeat ("STR") testing, and mitochondrial DNA testing—contributed to an increase in the rate of DNA exonerations); *see also* Lisa Calandro et al., *Evolution of DNA Evidence for Crime Solving - A Judicial and Legislative History*, FORENSIC MAGAZINE (Jan. 6, 2005), *available at* http://www.forensicmag.com/articles/2005/01/evolution-dna-evidence-crime-solving-judicial-and-legislative-history ("Even though DNA testing would grow more ubiquitous in the criminal justice system over its first fifteen years in use, another wave of cases came with advancements in DNA testing technology.").

when they initially challenged their convictions on collateral review. Several scholars argue that the greater certainty that DNA evidence and other scientific advancements can provide suggests that the age-old doctrine of finality, which could prevent these defendants from making use of such evidence, has little relevance anymore.[39] Their primary argument attacks the government's punitive interest in finality[40]: Whereas eyewitness identifications are often mistaken,[41] defendants' confessions are frequently false,[42] and certain physical evidence can lead to erroneous conclusions,[43] DNA evidence is generally thought to be the most reliable evidence available in a criminal case[44]—and this evidence

39. *See, e.g.*, Garrett, *supra* note 34, at 1636 ("DNA technology has eroded the twin pillars supporting the Court's ruling in *Herrera*: reliability and finality."); Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1266 (2005) ("While the government's interest in finality of judgments is strong enough to block some post-conviction petitions for review, that interest should be significantly weaker when asserted in the context of petitions for post-conviction DNA testing."); Lazer & Meyer, *supra* note 32, at 359 ("Most would now agree that DNA constitutes an exception to the principle of finality.").

40. *See* Lazer & Meyer, *supra* note 32, at 359; *supra* text accompanying notes 19–22.

41. *See* United States v. Wade, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 411 (5th ed. 2009) ("[I]t is well known that eyewitness evidence is inherently suspect . . . ."); Elizabeth F. Loftus, *Make-Believe Memories*, 58 AM. PSYCHOL. 867, 867–73 (2003) (summarizing some of the research related to mistaken eyewitness identifications); *Eyewitness Misidentification*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Mar. 3, 2014) ("Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in nearly 75% of convictions overturned through DNA testing.").

42. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920–21 (2004) (stating that "[false] confessions occur with alarming frequency" and that "interrogation-induced false confession may be a bigger problem for the American criminal justice system than ever before"); *False Confessions*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Oct. 24, 2013) (attributing approximately 25% of wrongfully convicted individuals who were exonerated by DNA evidence to false confessions).

43. *See generally* NATIONAL RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) (highlighting troubling deficiencies in many forensic science disciplines and techniques); Jonathan J. Koehler, *Fingerprint Error Rates and Proficiency Tests: What They Are and Why They Matter*, 59 HASTINGS L.J. 1077 (2008) (casting doubt on the reliability of fingerprint evidence); Ryan, *Wrongful Execution*, *supra* note 18, at 264–72 (explaining how the questionable application of arson science may have led to Cameron Todd Willingham's wrongful execution in Texas).

44. *See* Tonja Jacobi & Gwendolyn Carroll, *Acknowledging Guilt: Forcing Self-Identification in Post-Conviction DNA Testing*, 102 NW. U. L. REV. 263, 270–71 (2008) ("DNA testing is viewed as some of the most concretely verifiable evidence of identification

is even said to improve with time as science and technology improve.[45] Accordingly, they argue, if DNA evidence was not available in a defendant's original case, the passage of time has actually made it easier, rather than more difficult, to determine the guilt or innocence of the defendant.[46]

In addition to discounting the government's punitive interests that would weigh against revisiting a defendant's conviction, scholars have argued that other finality interests are similarly irrelevant in this context. For example, it has been argued that there is no role for deterrence if the defendant can make a showing of his innocence, because continuing to punish an innocent man and allowing the guilty one to go free actually undermines the value of deterrence.[47] Also, scholars have responded to the argument that cutting back on the finality doctrine and opening the courts to claims based on, for example, later-analyzed DNA evidence, will result in a flood of otherwise unjusticiable claims.[48] While acknowledging that some financial costs would be involved with such a change in the finality doctrine, scholars contend that the concern is largely overblown.[49]

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available to the courts . . . ."); Ryan, *Wrongful Execution*, *supra* note 18, at 274 ("Perhaps the only way to persuasively establish innocence is through DNA evidence."). *But cf.* Ryan, *Wrongful Execution*, *supra* note 18, at 274 n.89 ("[W]hile DNA evidence can be 'uniquely probative' of a defendant's innocence, it is not conclusive. For example, the defendant may not have left behind any of his DNA, and the trace DNA evidence examined could belong to his partner or an innocent individual." (internal citations omitted)).

45. *See* Berger, *supra* note 28, at 111 ("One assumption on which the belief in finality rests—that the passage of time will undermine the accuracy of a criminal adjudication—is completely refuted by DNA testing."); *id.* at 113 ("Unlike the memory of witnesses, DNA does not fade away."); *see also* NAT'L INST. OF JUSTICE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 15 (2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/183697. pdf ("DNA is remarkably stable, as is evidenced by its being identified long after death, for example, in Egyptian mummies or even extinct mammoths."). Several scholars base their arguments for the lesser need for finality in the age of DNA evidence on this notion that the evidence improves with time because technology improves with time. Many of them fail to address the related issue of the degradation of DNA evidence over time. *See* Richard A. Nakashima, *DNA Evidence in Criminal Trials: A Defense Attorney's Primer*, 74 NEB. L. REV. 444, 468 (1995) ("Degradation of DNA can occur spontaneously over time."); Ryan, *Wrongful Execution*, *supra* note 18, at 274.

46. *See* Berger, *supra* note 28, at 113.

47. *See* Garrett, *supra* note 34, at 1704 ("One concern not discussed by the Court in *Herrera* is deterrence. This omission is unsurprising, however, for deterrence itself is undermined when the innocent continue to be punished while the guilty go free.").

48. *See* Berger, *supra* note 28, at 115; Lazer & Meyer, *supra* note 32, at 359.

49. *See* Berger, *supra* note 28, at 115; Lazer & Meyer, *supra* note 32, at 359 ("[T]here is little evidence that increased access to postconviction testing would drain resources

Moreover, the exonerations that would likely result from a relaxed or nonexistent finality doctrine, it is argued, would actually save money, as the government would no longer have to house, feed, clothe, and medicate those who do not belong in prison.[50] Scholars have also argued that the finality doctrine actually does not provide the same closure to victims as it once did.[51] Instead, DNA testing made available even after a significant amount of time has passed is said to provide victims with greater closure because it provides confirmation that the real offender has been convicted and punished, and it will also supposedly put an end to the defendant's legal challenges.[52] Further, scholars have suggested that comity and federalism concerns are similarly weakened in this context because states, themselves, have abandoned finality by adopting post-conviction DNA testing statutes.[53] Notably, however, scholars have largely neglected to examine the continued relevance of finality in promoting offender rehabilitation in the conviction context. Perhaps this should not be surprising, because scholars have generally discounted the significance of rehabilitation since the theory faded from the penal landscape in the mid-1970s.[54]

III. FINALITY IN SENTENCING

In recent years, courts and scholars have been considering how the doctrine of finality applies to sentencing.[55] There are at

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from the criminal justice system."); *cf.* Garrett, *supra* note 34, at 1704 ("[T]he number of meritorious innocence claims will not be high.").

50. *See* Lazer & Meyer, *supra* note 32, at 359 (noting that "housing an inmate costs anywhere from $16,000 to $25,000 annually, while [DNA] testing costs from $50 to $5,000 per case, including materials and personnel expenses").

51. *See* Berger, *supra* note 28, at 113–14.

52. *See id.* at 114. In some circumstances, though, DNA analysis may provide inconclusive results, and thus not provide this desired closure. *See* Garrett, *supra* note 34, at 1650 ("DNA test results can be inconclusive if insufficient biological material remained, or if what remained was degraded."); *see also supra* note 45 (noting that DNA samples may degrade with time).

53. *See, e.g.*, Garrett, *supra* note 34, at 1702–03 (suggesting that federalism concerns are not a valid finality interest in the context of actual innocence claims because most states have abandoned the finality interest by providing for postconviction DNA testing).

54. *See* Ryan, Science and Rehabilitation, *supra* note 1, at 11–16; *see also infra* text accompanying note 115.

55. *See supra* text accompanying notes 18–32; *see also, e.g.*, Gilbert v. United States, 640 F.3d 1293, 1295 (11th Cir. 2011) (en banc) ("The principles of policy that limit the right to be resentenced in accord with the latest guidelines decisions are those regarding

least two situations in which the question of whether to reexamine offenders' sentences arise. The first is in determining whether courts should collaterally review sentences for legal errors, and the second is whether courts should resentence offenders based on changed views of disproportionate punishment.[56] In examining these situations, courts and scholars have focused on some of the same interests underlying the finality doctrine as in the conviction context: the government's punitive interests, deterrence, offender rehabilitation,[57] conservation of governmental resources, victim closure, and comity and federalism.[58] Even beyond looking at these particular interests supporting the finality doctrine, scholars seem to be influenced by other, broader, considerations. Examining the issue through a lens of perceived enlightenment and compassion for the criminal offender, they seem to suggest that weakening the finality doctrine will further offender rehabilitation and allow for criminal sentences to better comport with our evolved understandings of just punishment.

A. Legal Errors in Sentencing

The question of legal errors in sentencing has recently kindled a movement to revisit offender sentences. This comes in the wake of a series of cases in which it was discovered that some lower courts had inappropriately enhanced offenders' sentences based on their misreading of the Federal Sentencing Guidelines' "Career Offender" provision.[59] This provision states that an offender's sentence should be enhanced if, among other requirements, the offender had previously committed a "crime of violence."[60] In 2008, though, the Supreme Court decided the

finality of judgment and the important interests that finality promotes."); Russell, *supra* note 32, at 139–62 (analyzing the applicability of finality interests in the context of sentencing).

56. These categories are not necessarily mutually exclusive.

57. But, as explained above, rehabilitation is regularly ignored in recent analyses of how strong the finality doctrine should apply to convictions.

58. *See* Russell, *supra* note 32, at 145–55.

59. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2013); *see also, e.g.*, *Gilbert*, 640 F.3d 1293 (en banc) (acknowledging that a legal error was involved in sentencing the defendant but refusing to overturn the resulting erroneous sentence).

60. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2013). The Career Offender provision states that an offender may be sentenced more harshly—by raising his offense level and his criminal history category—if he "was at least eighteen years old at the time [he] committed the . . . offense," the offense "is a felony that is either a crime of violence

Begay v. United States[61] case, in which the Court determined that an analogous phrase[62] in the Armed Career Criminal Act should be interpreted more narrowly than several lower courts had been doing.[63] Accordingly, it has become apparent that several offenders have been erroneously considered career offenders under the Guidelines, leaving them serving longer sentences than they actually should have received.[64] For example, in 1996, Ezell Gilbert pled guilty to one count of possession of crack cocaine with intent to distribute and one count of possession of marijuana with intent to distribute.[65] Based on his prior convictions of a controlled substance offense and carrying a concealed firearm, Gilbert was deemed a career offender and was thus sentenced under the relevant Guidelines' enhancement.[66] Based on this enhancement, Gilbert was sentenced to 292 months' (twenty-four and one-third years') imprisonment.[67] Gilbert's initial attempts to

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or a controlled substance offense," and the offender "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." *Id.*

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

62. *See* United States v. Wise, 597 F.3d 1141, 1145 (10th Cir. 2010) ("[I]n interpreting 'crime of violence' under § 4B1.2, we may look for guidance to cases construing the [Armed Career Criminal Act's] parallel provision."); United States v. Tyler, 580 F.3d 722, 724 n.3 (8th Cir. 2009) (stating that the Eighth Circuit "employ[s] the same test to [determine whether an offense constitutes a 'violent felony' as it does to] decide whether an offense constitutes a 'crime of violence' under the Sentencing Guidelines because the definitions of 'violent felony' and 'crime of violence' are virtually identical"); United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (stating that "the definition of a 'violent felony' under . . . the Armed Career Criminal Act as 'virtually identical' to the definition of a 'crime of violence' under U.S.S.G. § 4B1.2" and that *Begay* "clearly set forth a new standard to evaluate which crimes constitute 'violent felonies' and 'crimes of violence'").

63. *Begay*, 553 U.S. at 148 (holding that the New Mexico crime of driving under the influence is not a "violent felony" under the Armed Career Criminal Act); *see also, e.g.*, United States v. McCall, 439 F.3d 967, 972 (8th Cir. 2006) (concluding that a "felony conviction for driving while intoxicated" constitutes a violent felony under the Armed Career Criminal Act (emphasis omitted)), *overruled by Begay*, 553 U.S. 137; United States v. Sperberg, 432 F.3d 706, 708–09 (7th Cir. 2005) (noting that "circuits are divided on the question whether . . . felony drunk driving is a 'violent felony' under [the Armed Career Criminal Act]," and concluding that it is), *overruled by Begay*, 553 U.S. 137.

64. *See* Russell, *supra* note 32, at 81; *see also, e.g.*, *Gilbert*, 640 F.3d at 1324 (stating that, "[a]fter a case has passed the stage of a first [28 U.S.C.] § 2255 proceeding, the right to error correction is narrowly limited by principles of policy that reside in the finality of judgment neighborhood of the law" and thus concluding that the defendant must serve the erroneously-determined sentence).

65. *Gilbert*, 640 F.3d at 1298.

66. *See id.* at 1299.

67. *See id.* at 1300. "The district court sentenced Gilbert to 292 months[']imprisonment on the intent to distribute crack cocaine count . . . . The court also

appeal and collaterally attack his conviction and sentence were unsuccessful.[68] After the Supreme Court decided *Begay* in 2008, Gilbert sought to "reopen and amend" his collateral attack on his sentence because it had been determined that a critical basis of his career offender enhancement—carrying a concealed firearm—was actually not a "crime of violence."[69] And had this enhancement not been employed, the applicable Guidelines range would have been just 151 to 188 months' (approximately twelve and one-half to fifteen and one-half years') imprisonment, rather than 292 months' (twenty-four and one-third years') imprisonment.[70] However, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") places significant restrictions on filing second and successive motions for collateral relief.[71] Because Gilbert had already collaterally attacked his sentence prior to the *Begay* decision, the Eleventh Circuit held that he was not entitled to relief for his improperly imposed sentence.[72] The court's concern for the doctrine of finality clinched its decision.[73] The court stated that finality interests are "critically important" and are safeguarded by the limitations set forth in AEDPA.[74] Allowing Gilbert to proceed, the court explained, "would wreak havoc on the finality interests that Congress worked so hard to protect with

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sentenced Gilbert to 120 months[']imprisonment on the intent to distribute marijuana count, to run concurrently." *Id.*

68. *See id.* at 1300–01. Gilbert filed a 28 U.S.C. § 2255 motion in the district court, which was denied. *See id.* at 1301.

69. *See id.* at 1301–02.

70. *Id.* at 1300.

71. *See* 28 U.S.C. § 2255(h) (2006). Section 2255(h) provides:

> A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Id.

72. *See Gilbert*, 640 F.3d at 1295. The Eleventh Circuit concluded that the text of the statute precluded it from entertaining Gilbert's claim. *See id.* at 1307–09.

73. *See id.* at 1309–12 ("The critically important nature of the finality interests safeguarded by [AEDPA] also weighs heavily against an interpretation of the [statute] that would lower the second or successive motions bar and permit guidelines-based attacks years after the denial of an initial § 2255 motion.").

74. *Id.* at 1309.

the AEDPA provisions"[75]: "If second and successive motions are not 'greatly restricted,' there will be no end to collateral attacks on convictions and sentences, and there will be no finality of judgment."[76] Emphasizing this point, the court referenced some of the same interests that courts have cited in the conviction context—confidence in the criminal justice system, deterrence, rehabilitation, and comity and federalism.[77] It concluded that, "for claims of sentence error, at least where the statutory maximum was not exceeded, the point where finality holds its own against error correction is reached not later than the end of the first round of collateral review."[78]

Despite the Eleventh Circuit's reasoning, scholars have suggested that the traditional interests underlying the finality doctrine have significantly less relevance in the sentencing context.[79] For example, the government's punitive interests may not be at stake in the same way as in the conviction context because the offender's punishment, rather than his underlying conviction, is at issue; "records of convictions do not go 'stale' in the way that witnesses and some types of physical evidence may,"[80] and the passage of time can actually improve the amount of information available about the offender—by, for example, providing evidence of rehabilitation—allowing judges to better determine an appropriate sentence after more time has passed.[81] Additionally, one scholar has argued that there is no real interest in deterrence here.[82] Because swiftness and certainty of punishment have a greater deterrent effect than the severity of punishment,[83] revisiting an offender's sentence with an eye towards shortening it will have no appreciable detrimental effect

75. *Id.* at 1310.

76. *Id.* at 1311.

77. *See id.* at 1310–11.

78. *Id.* at 1312.

79. Russell, *supra* note 32, at 145.

80. *Id.* at 153. This is similar to the argument that DNA evidence renders the finality doctrine significantly less important in the conviction context. *See supra* text accompanying notes 39–54.

81. *See* Russell, *supra* note 32, at 153 ("[T]he passage of time could actually enhance the court's ability to determine an appropriate sentence . . . [because] the court can consider the defendant's conduct in prison . . . [including] the [defendant's] extraordinary efforts at rehabilitation . . . .").

82. *See id.* at 154.

83. *See* Bator, *supra* note 8, at 452 n.21; Russell, *supra* note 32, at 154.

on deterrence goals.[84] Moreover, fewer governmental resources are expended in resentencing an offender than in retrying him, and governmental resources are actually saved if an offender is released from governmental custody early.[85] Also, resentencing an offender has less of an impact on victims' senses of closure than retrying an offender, because, when resentencing, the conviction still stands.[86] Further, at least when federal sentences are at issue, such as is the case with Guidelines cases like *Gilbert*, concerns of comity and federalism are irrelevant because only federal courts are involved.[87] Finally, the rehabilitative basis for finality may be absent here. In fact, scholars have suggested that the finality doctrine undercuts the rehabilitative enterprise—that the long prison sentences that finality protects may actually "be counter-productive to rehabilitation."[88] Offenders subject to these unjust punishments may have difficulty accepting their punishments and therefore be unmotivated to work on their own personal growth.

B. Just Punishment in an Age of Enlightenment and Rehabilitation

Beyond the concern for legal errors in sentencing, commentators also seem to be troubled by a sense that punishments imposed during earlier times are disproportionate to the crimes for which they were imposed. Historically, legislatures' and judges' determinations of appropriate sentences generally have been afforded significant respect.[89] But commentators are

84. Russell, *supra* note 32, at 154. Despite this argument, the severity of punishment is still an accepted factor in deterrence, so the statement that there is no real interest in deterrence in this context is likely hyperbole.

85. *See id.* at 146–52.

86. *See id.* at 155. Sarah French Russell has argued that the interest of victim closure is less important in the resentencing context also because, upon resentencing, it is unlikely that the offender will be released in the near future. *See id.* Moreover, many of the offenses for which such sentencing may occur—such as drug crimes—lack a clear victim anyway. *See id.*

87. *See id.* at 146.

88. *Id.* at 154–55. Moreover, one scholar has argued, federal law provides that a term of imprisonment cannot be lengthened to serve rehabilitative goals. *See id.*

89. Outside of the capital context—and, more recently, the juvenile life-without-parole context—courts have been extremely reluctant to strike down legislatively sanctioned punishments. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding a defendant's sentence of life imprisonment without the possibility of parole, which was imposed under a recidivist statute, for the crime of possessing more than 650 grams of cocaine); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding a defendant's sentence of

now suggesting that society has evolved and therefore the punishments that have been legally imposed upon certain offenders during a previous era are too stringent—that the sentiments that led to these sentences are outdated and stale.[90] Since the time these punishments were imposed, they argue, society's views have become more enlightened and perhaps more understanding of the criminal offender's tribulations.[91]

One of the primary targets of commentators' interest in relaxing finality is the long sentences that many scholars view as draconian.[92] This especially seems to be the case in the context of drug crimes. In 1982, President Reagan announced this country's

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life imprisonment, which was imposed under a recidivist statute, for the crime of obtaining $120.75 by false pretenses); *cf.* Miller v. Alabama, 132 S. Ct. 2455 (2012) (striking down a mandatory sentence of life without the possibility of parole for a juvenile offender who committed a homicide offense); Graham v. Florida, 130 S. Ct. 2011 (2010) (striking down a sentence of life without the possibility of parole for juvenile offenders who committed non-homicide offenses). The historical pedigree of judicial discretion has narrowed in recent years. *See generally, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2004) (setting advisory sentences for offenders with particular criminal histories who have committed particular offenses).

90. *See generally* MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2012) (proposing second-look sentencing); Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194 (2009) (concluding that second-look sentencing provisions are essential); Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859 (2011) (explaining and supporting second-look sentencing).

91. *See generally* MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2012); Frase, *supra* note 90; Love & Klingele, *supra* note 90.

92. *See, e.g.*, Frank O. Bowman, III, *Playing "21" With Narcotics Enforcement: A Response to Professor Carrington*, 52 WASH. & LEE. L. REV. 937, 981 (1995) ("Even if one believes as I do in the deterrent power of serious punishment, many drug sentences under the guidelines are of lengths far longer than necessary to achieve maximum deterrence."); Steven G. Calabresi, *"A Shining City on a Hill": American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1385 (2006) (describing this nation's drug laws as "extremely draconian," at least by global standards, and explaining that "[n]o other western democracy imprisons people so long for narcotics offenses"); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 515 (2010) ("Against this backdrop of race, drugs, crime, and welfare, Congress waged a 'war on drugs,' which resulted in harsh sentencing schemes that have fallen overwhelmingly on African Americans and Latinos."); *see also* Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1881, 1884–88 (1999) (stating that a common criticism of the American criminal justice system is that "[s]entences for drug crimes are too severe" and arguing that such harsh punishments are not proportionate to the drug offenders' deserts).

"War on Drugs."[93] Congress then passed several statutes that sharply increased penalties for drug-related crimes—most notably new mandatory minimum sentences.[94] Many commentators find these sentences unjustifiable.[95] For example, one professor has lamented that these laws "are indefensibly rigid, often unfair and unjustly harsh."[96] These long sentences for drug offenders have led many commentators to blame the War on Drugs for prison overcrowding and the resulting suffocating costs of increasing

93. *See* Robert G. Lawson, *Drug Law Reform—Retreating from an Incarceration Addiction*, 98 KY. L.J. 201, 201 (2010) ("The so-called 'war on drugs' was officially declared by President Reagan in 1982, although it had started earlier under the pressure of public concerns about drug abuse."); David M. Zlotnick, *The Future of Federal Sentencing Policy: Learning Lessons from Republican Judicial Appointees in the Guidelines Era*, 79 U. COLO. L. REV. 1, 9–10 (2008) ("At the start of the Sentencing Guidelines Era, the Reagan Administration declared a federal 'War on Drugs' and stressed the importance of increasing drug and gun prosecutions and issued tougher plea policies that called for more severe sentences."); *see also* Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 799 (2004) (explaining that Reagan's declaration was a "renewed 'war on drugs'").

94. *See* Richard C. Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and the United Kingdom*, 62 S.C. L. REV. 261, 287–88 (2010) (describing the growth of the "war on drugs"); *cf.* Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally about Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1439–40 (2012) ("The racial dimensions of the war, particularly the crack-powder cocaine distinctions and the draconian mandatory minimums, have been well documented.").

95. *See* Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1132 (2001) ("There are doubtless a good number of judges, probation officers, and lawyers who feel strongly that the Guidelines, strictly applied, produce drug sentences so long as to be unjust, either generally or at least frequently."); Gabrielle S. Friedman et al., *Challenging the Guidelines' Loss Table*, 20 FED. SENT'G REP. 3, 174 (2008) (noting district court judges' concern "that unmediated application of the Guidelines drug table may lead to unjustly long sentences for some nonviolent narcotics offenders"); *see also, e.g.*, George W. Dent, Jr., *Race, Trust, Altruism, and Reciprocity*, 39 U. RICH. L. REV. 1001, 1061 (2005) ("Long sentences for mere possession or small sales of drugs diminish respect for law among the many people who consider these sentences unjust."); David C. Leven, *Our Drug Laws Have Failed—So Where Is the Desperately Needed Meaningful Reform?*, 28 FORDHAM URB. L.J. 293, 293 (2000) ("Our current drug laws often impose harsh sentences on low level offenders—many of whom are serving draconian sentences for non-violent crimes—while drug trafficking and use have continued virtually unabated."); Jonathan T. Menitove, *The Problematic Presidential Pardon: A Proposal for Reforming Federal Clemency*, 3 HARV. L. & POL'Y REV. 447, 454 (2009) (referring to the "unjustly long prison sentences" than many federal offenders must serve); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 98 (2003) ("[W]hatever the systemic impact, federal narcotics sentences simply are too long.").

96. Weinstein, *supra* note 95, at 126.

incarceration.[97] While other legal scholars refute this relationship between drug enforcement and prison overcrowding,[98] the focus on this connection has likely contributed to scholars' discontent with long prison sentences.

More radical than commentators simply scoffing at draconian drug laws, drafters of a new tentative revision of the Model Penal Code ("MPC") have suggested several changes to undermine the historical finality in sentencing. They have proposed allowing judges to decrease imposed sentences by up to 30% based on offenders' accumulation of good time and earned time credits.[99] They have suggested that judges adjust sentences to accommodate compassionate releases—those based on an offender's disability, illness, or significant change in family circumstances.[100] And perhaps most revolutionarily, the drafters have proposed judicial reconsideration of sentences based upon social change—"second look" sentencing.[101] The reasoning behind this proposal is that, as society changes and evolves,

97. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 59 (2010) ("Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States."); MARC MAUER, RACE TO INCARCERATE 34–37 (1999) (concluding that, in the federal system, "drug offenses alone account[ed] for three fourths (74 pe[r]cent) of the rise in the inmate population between 1985 and 1995").

98. *See, e.g.*, John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547, 559 (2008) ("[T]he effect of the war on drugs on overall prison populations is often overstated. Despite large numbers of arrests, relatively few drug offenders are sent to prison."); Franklin E. Zimring, *The Scale of Imprisonment in the United States: Twentieth Century Patterns and Twenty-First Century Prospects*, 100 J. CRIM. L. & CRIMINOLOGY 1225, 1237–38 (2010) ("To the extent . . . that the relatively constant growth of imprisonment before and after the peak emphasis on the war on drugs indicates that drug offenders simply crowded out marginal property offenders or restrained longer prison sentences for street criminals when they took priority in the late 1980s, the drug panic was not itself a primary cause of change in the growth rate of imprisonment."); *cf.* Jesse J. Norris, *The Earned Release Revolution: Early Assessments and State-Level Strategies*, 95 MARQ. L. REV. 1551, 1624 (2012) ("Studies demonstrate that increases in prison admissions, not the length of sentences, were overwhelmingly the main cause behind the growing incarceration rates of the 1990s.").

99. *See* MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2012).

100. *See id.* § 305.7.

101. *See id.* § 305.6. This proposal suggests that legislatures "authorize a judicial panel or other judicial decisionmaker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment." *Id.* "Sentence modification under this provision should be viewed as analogous to a resentencing in light of present circumstances. The inquiry shall be whether the purposes of sentencing . . . would better be served by a modified sentence than the prisoner's completion of the original sentence." *Id.*

perhaps it makes sense to reexamine criminal sentences imposed during earlier harsher times and allow offenders to benefit from our now enlightened views.[102] The drafters' commentary to this new proposal provides:

> The passage of many years can call forward every dimension of a criminal sentence for possible reevaluation. On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods. In recent decades, for example, there has been flux in community attitudes toward many drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide, such as when a battered spouse kills an abusive husband, or cases of euthanasia and assisted suicide. . . . It would be an error of arrogance and ahistoricism to believe that the criminal codes and sentencing laws of our era have been perfected to reflect only timeless values. The prospect of evolving norms, which might render a proportionate prison sentence of one time period disproportionate in the next, is a small worry for prison terms of two, three, or five years, but is of great concern when much longer confinement sentences are at issue.[103]

While differences in opinion about the moral disapprobation to be placed on various transgressions have long been recognized in criminal law,[104] and while opinions on the sentence that an offense

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102. *See id.*

103. *Id.* § 305.6 cmt b.

104. *See* Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1064–65 (2012) ("While numerous empirical studies demonstrate that individuals across cultures generally agree on the relative, or ordinal, ranking of standard criminal offenses, there seems to be little agreement as to the cardinal ranking—or the weighted sequencing—of these offenses."). *See also generally* Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1847 (2007) (explaining that individuals' judgments about the severity of crimes can measurably vary, although concluding that the differences in opinion on this issue have been overstated).

merits may change over time,[105] the notion that judges should alter sentences based on only society's change in opinion about what type of sentence is appropriate for a particular crime is a radical departure from prior approaches to sentencing in this country.[106] It challenges the important role that finality has long played in sentencing decisions by allowing reconsideration of an offender's sentence after he has served only part of it.[107]

This significant change from prior approaches to finality and sentencing seems to grow from our generation's perceived enlightenment. As the drafters of the proposed MPC provision explained, "societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation."[108] As a result, the drafters suggest that sentences ought to be examined in light of these new, evolved, societal assessments.[109] Along with our confidence in the power of DNA evidence that has revealed the wrongfulness of hundreds of convictions,[110] we seem to be confident that we are not as blinded by fear and vengeance as our predecessors and can instead make better determinations of proportionate and just punishment.

IV. FINALITY AND REHABILITATION

What has set the stage for this fresh confidence of our generation? Of course it is difficult to know, but it seems to be the

105. *See* MODEL PENAL CODE: SENTENCING § 305.6 cmt b (Tentative Draft No. 2, 2012) ("On proportionality grounds, societal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods. In recent decades, for example, there has been flux in community attitudes toward . . . drug offenses, homosexual acts as criminal offenses, and even crime categories as grave as homicide . . . .").

106. *See* Love & Klingele, *supra* note 90, at 861 (explaining that this proposal "offers a new model" of sentencing); Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 704 (2009) (explaining that a recent draft of the MPC "addresses . . . a novel mechanism for a judicial 'second look'—a power of sentence modification—deep into the execution of long-term prison sentences (which would have been a wholly new proposal not based on prior state or federal law)").

107. *See* MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2012). The proposal suggests that offenders' sentences may be revisited after the offender has served at least fifteen years of his sentence of imprisonment. *Id.*

108. *Id.* § 305.6 cmt b; *see also supra* text accompanying notes 90–91.

109. *See generally* MODEL PENAL CODE: SENTENCING § 305.6 (Tentative Draft No. 2, 2012).

110. *See supra* text accompanying notes 33–46.

same sentiment held by the policymakers and commentators of the mid-1900s who enthusiastically embraced rehabilitation.[111] Rehabilitation came of age in America in the late eighteenth century when, spurred on by the Quakers, the government sought to reform offenders' characters through segregation from corrupt influences, hard labor, and religious instruction.[112] In the 1950s and 1960s, rehabilitation proliferated as great strides were made in psychiatry and related fields.[113] One might consider recent advances in pharmacology, genetics, and neuroscience to mirror these mid-century developments.[114] Indeed, the same recent DNA technology that has led to the unearthing of hundreds of wrongful convictions is a prime example of such scientific progress. It is also an example of how new scientific knowledge can breed the confidence that our generation is currently exhibiting in the criminal justice realm. Just as with those now questioning the finality of convictions and sentencing, policymakers at the time that rehabilitation was proliferating were convinced that they knew better than their predecessors, who had not seen the full potential of offender rehabilitation.

The rehabilitative movement of the 1900s abruptly fizzled out in the mid-1970s.[115] This was due primarily to the concern that rehabilitation simply did not work,[116] but the theory also abated because it was thought that it caused similar offenders to be treated unequally, implemented race and class biases, bred

111. *See* Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. & CRIMINOLOGY 226, 227 (1959) ("[I]n no other period has the rehabilitative ideal so completely dominated theoretical and scholarly inquiry . . . ."); Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 136 (2010) ("By the mid-1960s, retributive justifications for punishment had fallen from favor and rehabilitation was widely embraced as a respectable if not urgent penological goal."). Rehabilitation was later reviled by policymakers and scholars who instead overwhelmingly embraced retribution as the primary theory of punishment. *See* Ryan, Science and Rehabilitation, *supra* note 1, at 8 n.25; *infra* text accompanying notes 115–17.

112. *See* Ryan, Science and Rehabilitation, *supra* note 1, at 7–8.

113. *See* Allen, *supra* note 111, at 226; Ryan, Science and Rehabilitation, *supra* note 1, at 9–10.

114. *See* Ryan, Science and Rehabilitation, *supra* note 1, at 30–31.

115. *See id.* at 11–13.

116. *See id.* at 10–11; *cf.* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) (concluding that, "[w]ith few and isolated exceptions, the rehabilitative efforts [reportedly used in prisons] have had no appreciable effect on recidivism").

judicial arbitrariness, and was too coercive.[117] Along with the recent questioning of finality, though, rehabilitation has recently been making a comeback.[118] Evidencing this trend, several legislatures have created specialty courts to support offender treatment in the areas of mental illness and substance abuse, and legislatures have also devoted resources to aiding in offender reentry.[119] Further, the U.S. Supreme Court has emphasized the importance of rehabilitation in some of its recent Eighth Amendment cases.[120] For example, in its 2010 *Graham v. Florida*[121] opinion, the Court held that a life-without-parole sentence for a juvenile offender committing a non-homicide offense was unconstitutionally cruel and unusual.[122] It explained that the sentence of life without parole is inconsistent with the goal of rehabilitation because it "forswears altogether the rehabilitative ideal."[123] "By denying the defendant the right to reenter the community," the Court explained, "the State makes an irrevocable judgment about that person's value and place in society."[124] Similarly, in its 2012 *Miller v. Alabama*[125] case, the Court held that mandatory juvenile life-without-parole in homicide cases is unconstitutional.[126] Again, the Court focused on the virtues and importance of rehabilitation, stating that the "mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."[127] In both of these cases, ignoring juveniles' potential for rehabilitation rendered the

117. *See* Ryan, Science and Rehabilitation, *supra* note 1, at 13–15.

118. *See id.* at 19–29. This comeback has been fueled, at least in part, by scientific innovations in the fields of pharmaceuticals, genetics, and neuroscience. *See id.* at 19–44.

119. *See id.* at 27–29; *see also, e.g.*, 730 ILL. COMP. STAT. 168/5, 15 (2007) (recognizing that mental illness and substance abuse are significant contributors to crime, finding a "critical need" to address these issues, and stating intent "to create specialized mental health courts with the necessary flexibility to meet the problems of criminal defendants with mental illnesses and co-occurring mental illness and substance abuse problems"); IND. CODE § 33-23-16-20 (2010) (setting forth the services that a problem-solving court may provide, including education, case management, supervision, and rehabilitative services).

120. *See* Ryan, Science and Rehabilitation, *supra* note 1, at 23–26.

121. Graham v. Florida, 560 U.S. 48 (2010).

122. *See id.* at 82.

123. *Id.* at 74.

124. *Id.*

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

126. *See id.* at 2469.

127. *Id.* at 2468.

punishments unconstitutional.[128] Considering this recent reemergence of rehabilitation—and our accompanying thoughts that, perhaps with the aid of science, we have greater knowledge about how to better treat offenders—it is not surprising that commentators are questioning the wisdom of sentences premised on older ideas and, along with this, questioning the role of finality in sentencing.

Rehabilitation's relationship to the doctrine of finality is perplexing, though. Scholars have largely neglected exploring the relationship between the two concepts,[129] just as scholars have generally overlooked the theory of rehabilitation since it waned in the mid-1970s.[130] Finality has historically been thought to promote offender rehabilitation.[131] It allows an offender the chance to set aside his battle with the criminal justice system and instead focus inward, on his own potential for change.[132] Paradoxically, though, this movement away from finality is now often considered to *further* rehabilitative goals.[133] Indeed, rehabilitation is now commonly thought to be at complete odds with the doctrine of finality: If there is no hope that a court will revisit an offender's conviction or sentence, and thus no hope of escaping the offender's reality of possibly long-term imprisonment or even death, what incentive does the offender have to work on rehabilitating himself? It may seem more likely that an offender will fall into despondency and be unable to work on changing himself for the better.[134] Moreover, one might argue that revisiting an offender's sentence can lead to a more just punishment because the government, at this later point in time, has greater information about whether the offender has been working toward

128. *See id.* at 2469; *Graham*, 560 U.S. at 73–74.

129. Russell, *supra* note 32, at 149.

130. *See, e.g.*, *id.* at 150 ("[T]he argument that the availability of collateral review of sentencing errors delays a prisoner's rehabilitation is far from compelling."); Ryan, Science and Rehabilitation, *supra* note 1, at 10–11.

131. *See* Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986) (Powell, J., concurring); *supra* text accompanying notes 25–26.

132. *See supra* text accompanying notes 25–26.

133. *See* Russell, *supra* note 32, at 156.

134. *See* Russell, *supra* note 32, at 161 ("[T]reating the sentence as final hardly fosters the prisoner's rehabilitation. Rather, the failure of the court to correct [an erroneously enhanced] sentence may cause the prisoner to feel angry and disrespected by society.").

rehabilitation and whether he has been successful in that respect.[135]

V. REHABILITATION AND FINALITY OF THE OFFENDER

To better understand the relationship between rehabilitation and finality, one must look more deeply at rehabilitation and realize that rehabilitation is really about offender change. Is the offender who has been convicted and sentenced capable of transformation—of metamorphosing into an individual viewed as virtuous, law-abiding, or a productive member of society—or is the offender a final product incapable of change and remaining a threat to either himself or society? In a sense, this could be considered as a third class of finality—the finality of the offender himself. If there is no finality here, meaning that the offender is capable of change, what sort of change is possible, and what type of change does society desire? Only by understanding the contours of rehabilitation can we negotiate its relationship to the various classes of finality.

Teasing out the different goals of what we refer to as "rehabilitation" is essential. Historically, rehabilitation focused on changing an offender's character.[136] In the early days, for example, it was thought that removing an offender from his corrupt surroundings and providing him with religious education could aid in this enterprise.[137] Emerging science and attendant confidence in our abilities has brought changes in how we view rehabilitation, though.[138] Today, rehabilitation is most often viewed as transforming an offender's behavior.[139] This could be achieved by enticing the offender to behave with good-time credits and the like, or through biochemical interventions such as the administration of antipsychotic medication or chemical castration.[140]

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135. *See id.* at 152–53.

136. *See* Ryan, Science and Rehabilitation, *supra* note 1, at 7–8, 44–45.

137. *See id.*

138. *See generally id.* (arguing that rehabilitation is reemerging, that increased faith in science is contributing to rehabilitation's reprise, and that the rehabilitation reemerging differs from the rehabilitation that preceded it).

139. *See id.* at 44–46.

140. *See id.* at 31–32; Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J. L. & PUB. POL'Y 1, 11 (2013). In practice, it

Perhaps the clearest example of this development in our understanding of rehabilitation can be seen in the capital context.[141] Capital punishment was imposed in early America in part because it was thought to promote rehabilitation.[142] It was thought to encourage the offender to reflect upon his actions and prepare himself for death in an attempt to secure salvation.[143] Today, in contrast, the Supreme Court has stated time and time again—with virtually no disagreement from legal commentators[144]—that capital punishment is completely irrelevant to rehabilitation.[145] Any suggested connection has been said to be obviously wrong,[146] a "sad joke."[147] After all, how can an offender be rehabilitated if he does not have the opportunity to reintegrate

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may be difficult to disentangle character and behavioral change. After all, behavioral change may sometimes be deemed the best measure of character change.

141. Capital punishment could be considered the primary example of a fourth type of finality: finality of the punishment itself. *See, e.g.*, Monge v. California, 524 U.S. 721, 732 (1998) ("[T]he death penalty is unique 'in both its severity and its finality.'" (internal citation omitted)); Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring) ("Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.").

142. *See* Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. DAVIS L. REV. 1231, 1246 (2013) [hereinafter Ryan, *Death and Rehabilitation*] ("[D]eath was imposed in the seventeenth and eighteenth centuries to encourage an offender to repent and rehabilitate himself."); *cf.* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 16–17 (2002) ("Capital punishment was . . . understood in the seventeenth and eighteenth centuries to facilitate the criminal's repentance.").

143. *See* BANNER, *supra* note 142, at 16; Ryan, *Death and Rehabilitation*, *supra* note 142, at 1247.

144. *See, e.g.*, MARK TUSHNET, THE DEATH PENALTY 2 (1994) (suggesting that rehabilitation is "irrelevant . . . in the death penalty debate"); Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 47 (1980) ("Rehabilitation is obviously inapplicable [in the death penalty context]."). *But see generally* Ryan, *Death and Rehabilitation*, *supra* note 142 (arguing that death is relevant to rehabilitation).

145. *See* Ryan, *Death and Rehabilitation*, *supra* note 142, at 1243–45; *see also, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 995 (1991) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. . . . It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice." (quoting *Furman*, 408 U.S. at 306 (Stewart, J., concurring))); Rummel v. Estelle, 445 U.S. 263, 272 (1980) (same).

146. *See* TUSHNET, *supra* note 144, at 2 (suggesting that rehabilitation is "irrelevant . . . in the death penalty debate"); Gillers, *supra* note 144, at 47 ("Rehabilitation is obviously inapplicable [in the capital context].").

147. Lupe S. Salinas, *Is It Time to Kill the Death Penalty?: A View from the Bench and the Bar*, 34 AM. J. CRIM. L. 39, 57 (2006) ("It would be a sad joke to say the death penalty rehabilitates because the person that needs reformation receives no benefit.").

into society but is instead being put to death?[148] The change in our view of rehabilitation has thus migrated from character change in early America to today's focus on behavioral change—ensuring that an offender can reintegrate into society after he has served his sentence.[149]

This shift in our understanding of rehabilitation likely contributes to the confusing relationship between rehabilitation and finality. When rehabilitation was first counted as one of the interests served by finality of conviction,[150] it was likely the rehabilitation of character that was contemplated.[151] This would explain the view that finality is necessary to achieve rehabilitation, because an offender cannot begin working on himself until he has understood his wrongdoing and decided to change himself for the better. In contrast, the more modern view that finality actually undercuts the goal of rehabilitation[152] is more consistent with the behavioral understanding of the penological theory.[153] Perhaps we can coax an offender into changing his behavior by offering him incentives such as the possibility of parole or "second look" sentencing.[154]

The move from viewing finality as bolstering rehabilitation[155] to viewing finality as undermining rehabilitation[156] does not seem to be rooted in new or differing evidence about the effectiveness of rehabilitation. The effectiveness of rehabilitation and the ideal conditions for

148. *See* Ryan, *Death and Rehabilitation*, *supra* note 142, at 1245 ("At first blush, courts' and scholars' conclusion that capital punishment is irrelevant to rehabilitation seems to make sense: How can an offender be rehabilitated if he is being put to death?").

149. *See* Ryan, Science and Rehabilitation, *supra* note 1, at 44–46. Indicative of this modern understanding of rehabilitation is the now well-accepted view that the effectiveness of rehabilitation is best measured by recidivism—whether offenders commit additional criminal offenses upon release. *See* Marguerite A. Driessen, *Challenging the Irrelevant Acquittal*, 11 GEO. MASON L. REV. 331, 334 (2002) ("Recidivism is believed to be an objective measure of whether an offender has truly been rehabilitated."); E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. 519, 577 (2012) ("Rates of recidivism are often considered the most tangible and suitable outcome measures of rehabilitative treatment . . . .").

150. *See supra* text accompanying notes 136–37.

151. *See supra* text accompanying notes 136–37.

152. *See supra* text accompanying notes 138–40.

153. *See supra* text accompanying notes 138–40.

154. *Cf. supra* text accompanying note 140.

155. *See supra* text accompanying notes 137–38.

156. *See supra* text accompanying notes 139–41.

achieving it have been debated throughout the ages.[157] Today, there continues to be a lack of consensus as to the effectiveness of rehabilitation, and there is a lack of empirical evidence as to whether finality of conviction and sentencing actually contributes to offender rehabilitation, or whether jettisoning the doctrine will further offender rehabilitation. New, reliable data on rehabilitation and its relationship to finality would be welcome here. Existing evidence regarding rehabilitation generally does not distinguish between character and behavioral reform. Of course, such a distinction is often difficult to make in practice.[158] But, again, this distinction is essential to understanding whether finality in conviction and sentencing supports rehabilitation, or, rather, whether it undercuts it.

VI. CONCLUSION

Sorting out these various aspects of finality and rehabilitation is key to understanding the relationship between these intersecting legal precepts. In addition to the traditional finality of conviction, scholars have recently been exploring the doctrine of finality in the context of sentencing. Finality has been historically understood to serve rehabilitative goals, but with the recent faith in improved science, and attendant enlightened views about offender treatment, finality has recently been said to undercut rehabilitative goals. While this may seem paradoxical, better understanding a third type of finality—the finality of the offender—helps clarify these relationships. An offender can potentially change in different ways. He may be able to reform his character, and he may be able to alter his behavior. Providing an offender with the opportunity to reflect on what he has done by maintaining a strong finality doctrine of conviction and sentencing may further an offender's character reform. But relaxing or obliterating the doctrine of finality in the sentencing context may promote behavioral change by providing the offender

157. There are some broad principles, though, as to what can effectively reduce recidivism. It is thought that effective rehabilitation programs should "target the known predictors of crime and recidivism for change," "should be behavioral in nature," and "should be used primarily with higher-risk offenders, targeting their criminogenic needs . . . for change." FRANCIS T. CULLEN & CHERYL LERO JONSON, CORRECTIONAL THEORY: CONTEXT AND CONSEQUENCES 165–69 (2012).

158. Indeed, behavioral change may sometimes be deemed the best measure of character change. *See supra* note 140.

with incentives and basic hope. Regardless of the breed of rehabilitation at issue, and aside from the class of finality involved, focus on the offender is essential as we attempt to negotiate the best path forward in offender convictions, sentencing, and rehabilitation.