JUDICIAL SENTENCING ERROR AND THE CONSTITUTION

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Much recent scholarship has sharply criticized the pervasive phenomenon of wrongful convictions, but the literature has overlooked an important related injustice: inaccuracy in criminal sentencing. This Article provides the first comprehensive scholarly treatment of judicial sentencing error, which has become widespread in the modern era of both ad hoc revision to criminal codes and increasingly complex criminal sentencing systems that often lack internal coherence or sensible statutory organization. Although nearly always the product of human error, the problem of judicial sentencing error is more aptly characterized as systemic because sentencing judges often face ever-changing, overlapping statutory requirements contained in separate parts of the criminal code. We identify both the source and harmful consequences of judicial sentencing error, and then examine constitutional principles implicated by the untimely correction of an erroneous sentence. Focusing particularly on a defendant's interest in finality, we argue that the constitutional guarantees of substantive due process and protection against double jeopardy under the Fifth Amendment should be construed to limit the time to correct an erroneously lenient sentence, with the Double Jeopardy Clause supplying the more potent limiting principle and objective legal standard. We conclude that—by according respect for principles of finality in criminal sentencing—the law could create an effective institutional incentive for the State to ascertain the correctness of sentencing orders at or near the

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time of punishment, thereby preventing the harm and injustice that occur when the defendant's reasonable expectation of finality has been frustrated for the legitimate but not indomitable sake of accuracy.

INTRODUCTION

Imagine you plead guilty to murder without an agreement on punishment, and the judge sentences you to sixty years in an Alabama prison.[1] Your lawyer moves for sentencing reconsideration and the judge reduces the prison term to forty years. You might think you have saved yourself twenty years in prison, but not so fast. After serving seventeen of the forty years, you tempt fate in seeking further reduction of your sentence and file a pro se postconviction petition claiming that the forty-year sentence is invalid because you were not physically present at the original sentencing hearing. But unfortunately, as you will soon discover, the law governing your sentence is far more complex than was apparent to your untrained eye. In response to your petition, the State asserts its *own* new challenge to your sentence: a state rule of criminal procedure required the trial judge to rule on your initial reconsideration motion within sixty days and it failed to do so (the court took an additional forty-five days to rule after the sixty-day period). And although, at the time, the State had consented to the continuance beyond sixty days, the State's consent was not made part of the record as required by the procedural rule. Thus, technically speaking, the State's challenge to the reconsideration motion, however late in coming, is correct under state law, meaning that the sentencing judge committed procedural error when he reduced your sentence from sixty to forty years. The State now argues that, because of this sentencing error from seventeen years ago, the original sixty-year sentence should be reinstated. The postconviction court agrees in a decision later affirmed on appeal. Welcome to twenty more years in an Alabama prison.

The postconviction review petition you filed was an unforced error of major proportions, but can this resentencing be just? Why would the law allow the State to wait seventeen years before withdrawing its consent to the sentencing judge's forty-five-day continuance? How could the State fault the trial judge for his untimely delay of forty-five days when the State's own delay in asserting an objection lasted seventeen years? What metric should courts use to judge whether a sentencing error can be corrected so many years after it was made?

Historically, questions about sentencing accuracy were of no moment because felony sentencing in William Blackstone's day was straightforward. The "sentence" for many felonies was benefit of clergy, effectively giving first-time offenders a second chance; the judge would order the hand of the offender branded so he could not claim benefit of clergy again.[2] For more

[1] *See, e.g.*, Bryant v. State, 29 So. 3d 928, 937 (Ala. Crim. App. 2009).

[2] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *358-67. A pardon, of course, made the branding unnecessary. *See id.* at *367.

serious felonies, the sentence was typically either transportation to America or death.[3] Today, however, sentencing is far more complex. As legislatures have responded to political pressure to reduce crime and constrain judicial discretion, there has been a vast increase in criminal sentencing rules, regulations, and guidelines over the last half century. It is now often the case that the judge, prosecutor, and defense counsel are unaware of relevant rules that affect criminal sentences.

This Article represents the first comprehensive treatment of judicial sentencing error, an increasingly widespread human-error problem largely attributable to the formidable complexity of modern criminal codes and sentencing regimes. In examining patterns of sentencing error, we have discovered that not all judicial mistakes are alike in type or consequence. Some sentencing errors result in illegally lenient punishment, while other errors result in illegally severe punishment. Our study of sentencing error has revealed two distinct categorical patterns of error: (1) "application error," where the court accurately identifies the relevant law but applies that law incorrectly; and (2) "omission error," where the court fails to include a mandatory penalty or sentencing factor. We predict that omission error should yield a disproportionately high frequency of leniency error cases because the majority of omitted mandates have the effect of increasing, rather than decreasing, the severity of punishment. We further predict that omission error is more likely than application error to remain undetected for long periods of time because it is inherently more difficult to identify an omission than a misapplication.

In Part I, we will describe our prediction that these error biases should tend to exhibit a compounding effect: leniency error should account for a disproportionately high frequency of omission error cases, and instances of omission error are most likely to undergo long periods of latency. This compounding effect is problematic because the correction of an erroneously lenient sentence requires imposition of a harsher penalty, which in turn frustrates the defendant's expectation of finality in ways that are uniquely exacerbated by the passage of time and the defendant's increased reliance on being released on a date certain. This Article will therefore emphasize the problems implicated by delayed correction in leniency error cases, not only because of the error biases noted above, but also because the law has yet to develop a coherent framework for determining whether a dormant leniency error can be corrected long, or even shortly, after the original erroneous sentence.

We will focus on two provisions of the Constitution that provide potential limiting principles to constrain the untimely correction of sentencing error: the

[3] *See id.* at *368-72. To be sure, there were other penalties—typically for misdemeanors but perhaps for less serious felonies—such as flogging, the stocks, or imprisonment. *Id.* at *370.

guarantee of substantive due process and the protection against double jeopardy—both of which arise under the Fifth Amendment.

Under the doctrine of substantive due process, as we will discuss in Part II, courts have held that the defendant must meet a high standard in showing that the State's upward correction of an erroneous sentence—and the court's approval of the correction—is so arbitrary in a constitutional sense as to shock the conscience. In many substantive due process challenges to the untimely correction of a leniency error, courts have observed that, in theory, there exists some temporal limit on the power of courts to correct an erroneously lenient sentence; but in case after case, courts have denied the defendant relief because that undefined temporal limit had not been reached. In a recent Third Circuit Court of Appeals opinion, for example, the court held that the defendant's expectation of finality had not sufficiently crystallized eleven years after sentencing, so the constitutional protection of substantive due process did not prevent his resentencing to an additional five years' imprisonment.[4] Determination of whether the State's conduct meets the legal standard of conscience-shocking behavior, however, is inherently subjective, as one judge's conscience may be more easily shocked than the next. If substantive due process is to impose a temporal limit on resentencing—although we are not entirely convinced by dicta that it does—then the duration of that temporal limit should be subject to a more objective legal standard than the current conscience-shocking test. We recommend that courts borrow the statute of limitations for the convicted offense as a presumptive temporal limit after which a leniency error would become ineligible for upward adjustment.

In contrast to the comparatively weak protections of substantive due process, as we will discuss in Part III, courts have imposed far more stringent limitations on resentencing under the Double Jeopardy Clause. For double jeopardy purposes, the legal standard is not whether the State's conduct shocks the conscience, but whether the defendant acquired a reasonable expectation of finality as of the time of resentencing. Where, for example, the State invokes its statutory right to appeal a sentence and the defendant receives a harsher penalty on remand, there is no violation of double jeopardy because the defendant cannot acquire a reasonable expectation of finality so long as the State still has the right to appeal the sentence. However, the State's discovery of a leniency error after all appellate rights have expired would implicate the defendant's expectation of finality because—with the passage of time—he has grown to rely on the sentence originally imposed without any reason to believe the release date was subject to change. In our view, correction of the sentence in this latter scenario presents a compelling violation of double jeopardy protection. Unlike the subjective nature of the conscience-shocking test under substantive due process doctrine, the double jeopardy standard looks to objective indications of reasonable reliance on the sentence: Does the State still have the right to appeal? Has the defendant challenged his sentence on direct

[4] *See* Evans v. Sec'y Pa. Dep't of Corr., 645 F.3d 650, 652 (3d Cir. 2011).

appeal or in a collateral proceeding? Was the defendant actually aware of the error at the time of sentencing?

We are sympathetic to the need for accurate sentencing to maintain an orderly criminal justice system, but the need for accuracy in sentencing is not an indomitable one. Public perceptions of justice and the maintenance of an orderly system of criminal justice inevitably also take into account the fairness of procedures for imposing punishment. A criminal justice system in which the official record of punishment is perpetually subject to change undermines the reliability and predictability of criminal law. We will propose a constitutional framework in this Article that can advance the goals of both sentencing accuracy and fairness to the defendant in cases of sentencing error. In particular, we will argue that an objective constitutional limitation on resentencing in categories of cases of leniency error would not only serve the laudable goals of justice and fairness of process but would also create a powerful incentive for the State to ensure the accuracy of sentencing orders at, or near, the time of imposition, rather than long after the defendant has begun to serve the sentence.

I. JUDICIAL ERROR IN CRIMINAL SENTENCING

This Part introduces the problem of judicial sentencing error by examining its broader context: a constantly evolving and increasingly complex web of criminal statutes and sentencing rules that are difficult to apply accurately. We will then articulate the harm associated with sentencing error and consider whether the distribution of various types of error suggests a particular need for sentencing law reform. We conclude that the sentencing error landscape contains systemic bias that produces more leniency error—i.e., sentences meting out less punishment than required by law—and that leniency error tends to be harmful to defendants because it commonly goes undetected until the defendant has served a substantial portion of the erroneously light sentence. The harm is the defeat of the defendant's expectation that the sentence would not be increased; whether this expectation creates a constitutional right to the lenient sentence is the focus of this Article.

A. *Legal Complexity and the Layered Accumulation of Crime Legislation*

The problem of judicial sentencing error is largely traceable to a decades-long trend toward legal complexity in criminal law.[5] Although the solemn act of imposing criminal punishment ranks among the most serious and profound judicial duties borne by trial court judges,[6] the deep solemnity immersing the

[5] For commentary on the increased complexity of modern American law and a general theory of law reform to prevent legal error, see generally Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129 (2015).

[6] As described by Judge Weinstein: "A sentence is significant not only for the individual before the court, but for his family and friends, the victims of his crime, potential future victims, and society as a whole. For those charged with sentencing[,] the moral, legal, and

sentencing process has become increasingly overshadowed—and frequently compromised—by the intricate complexity of criminal statutes and sentencing rules that have accumulated in layer upon layer of crime legislation enacted over the last half century.[7] By way of a perhaps over-simplified comparison, in the eighteenth-century world of William Blackstone, the available felony sentencing options posed a mostly binary choice of exile or death.[8] Today, by contrast, criminal sentencing often requires judges to identify and interpret arcane tomes of sentencing statutes, rules, mandates, and factors—many of which involve complex fact- and law-intensive considerations.

We take for granted that trial courts are responsible for comprehending and applying the pervasive convolution of modern criminal law; but, in defense of judges, the judicial branch is not responsible for creating this undesirable state of complexity.[9] Rather, this phenomenon is the product of a national legislative trend constraining judicial discretion in criminal sentencing by which states have pursued a range of sometimes-conflicting policy objectives such as crime deterrence (reflected in the general trend toward increasing the severity of criminal penalties and mandatory minimum sentences), relief of prison overcrowding (reflected in the selective but not uniformly coherent reduction of penalties for certain non-violent crimes), and the elimination of sentencing disparities for similar offenses (reflected in the selective recalibration of penalties for certain comparably serious offenses).[10] The efficacy of statute-

psychological burdens are enormous." Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 179 (2008).

[7] *See* Paul H. Robinson, *The Rise and Fall and Resurrection of American Criminal Codes*, 53 U. LOUISVILLE L. REV. 173, 177-78 (2015).

[8] *See* BLACKSTONE, *supra* note 2, at *370 (mentioning other punishments that could also be imposed).

[9] Paul Robinson, for example, argues that the recodification of criminal law in the 1960s and 1970s has been significantly undermined by "a continuing and accelerating flood of criminal law legislation":

> There was a mere trickle of criminal law legislation after enactment [of criminal codes in the 1960s and 1970s], but it typically has grown each year since. And the new legislation is not tweaking one offense or another to make it clear or to keep it current with the advances of human activity. More often than not, existing statutes are ignored, and entirely new offenses are being created that overlap and often conflict with existing offenses. In many states, forty years of accumulated criminal law legislation, accelerating in rate each year, have left the original code unrecognizable—lost under a mountain of often unnecessary, often contradictory, often overlapping, and often unprincipled additions to the original, comprehensive code. Further, many of the new offenses are added to statutory titles outside of the criminal code.

Robinson, *supra* note 7, at 177-78.

[10] *See* State v. Bonnell, 16 N.E.3d 659, 664 (Ohio 2014) (noting that the purpose of prison reform legislation is "to reduce the state's prison population and to save the associated costs of incarceration by diverting certain offenders from prison and by shortening the terms of other offenders sentenced to prison"); MICHAEL TONRY, SENTENCING

based sentencing rules and their corresponding constraints on judicial discretion remain a matter of ongoing debate among scholars;[11] but, for our purposes, it is sufficient to observe that an unintended effect of this legislative trend has been an unprecedented level of legal complexity now confronting the court systems responsible for applying these statutory sentencing systems.[12]

To illustrate the unwieldiness of the modern regime, consider the plight of a trial court judge who, upon a defendant's conviction, must first ascertain the legal landscape of sentencing law applicable to the convicted offenses. This landscape might include statutory minimum requirements for incarceration or probation,[13] mandatory sentencing enhancements,[14] mandatory supervised

MATTERS 3-4 (1996); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 258, 261 (1993).

[11] *See* Debate, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279, 1282-83 (1999) (Congressman Hutchinson arguing for retributive justifications for mandatory minimums as an expression of public outrage). *Compare* Robinson, *supra* note 7, at 180 ("With the development of sentencing guidelines, mandatory minimum sentences are now archaic and destructive. They essentially guarantee a stream of injustices, as some offenders in some cases really will have the kind of important mitigations that demand a sentence in the lower end of the range forbidden by the mandatory minimum."), *with* Robert S. Mueller, III, *Mandatory Minimum Sentencing*, 4 FED. SENT'G REP. 230, 231 (1992) (arguing that mandatory minimums deter specific crimes and ensure adequacy of punishment according to severity of the crime).

[12] *See, e.g.*, Gilbert v. United States, 640 F.3d 1293, 1309 (11th Cir. 2011) (en banc) ("Sentencing guidelines provisions are many and complex, the English language and those who use it are imperfect, and the case law about what various and sundry guidelines mean and whether they apply in different factual situations is in a constant state of flux."); United States v. Mills, 485 F.3d 219, 223 (4th Cir. 2007) ("The Sentencing Guidelines are a veritable maze of interlocking sections and statutory cross-references."); United States v. Williams, 431 F.3d 767, 773 (11th Cir. 2005) (Carnes, J., concurring) (describing "some provisions" of the federal sentencing guidelines as "mind-numbingly complex"); *see also* R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 762 (2001); Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617, 619-22 (1992).

[13] For a random assortment of criminal offenses with mandatory minimum sentencing, see, for example, 21 U.S.C. § 847(b) (2012) (life imprisonment for "the principal administrator, organizer, or leader" of a criminal enterprise); ALASKA STAT. § 12.55.125 (2014) (mandatory sentencing provisions for various crimes); CONN. GEN. STAT. § 53a-94 (2015) (mandatory sentencing for kidnapping); N.J. STAT. ANN. § 2C:43-6(c) (West 2015) (mandatory minimum sentencing for firearm-related offenses); 42 PA. CONS. STAT. § 9718.2 (2014) (mandatory sentencing for sexual offenders); *id.* at § 9719 (mandatory sentencing for offenses committed while impersonating a law enforcement officer).

[14] For a random assortment of sentencing enhancement statutes, see, for example, 18 U.S.C. § 1028A(a)(1) (2012) (additional sentencing for aggravated identity theft); CONN. GEN. STAT. § 53-202b(a)(2) (heightened penalty for sale of firearms to minors); *id.* at § 53a-

release requirements,[15] mandatory postrelease restrictions on the possession of firearms,[16] or one of many special sentencing and diversion programs, such as early-release incentives for certain eligible defendants.[17] Having identified the universe of potentially applicable mandates and rules, the judge must then synthesize the law by resolving internal inconsistencies and ambiguities created by the layering and ad hoc accumulation of crime legislation often codified in disparate or uncoordinated locations within state and federal codes.[18] The judge may then be required to consider an ever-evolving sentencing guidelines regime, which, at the federal level, is notoriously subject to change.[19] After applying the sentencing guidelines, the judge may then be required to conduct a discretionary evaluation of potentially dozens of statutorily enumerated aggravating and mitigating factors to determine whether to grant an upward or downward departure from the guideline sentence.[20] The judge might then be required to navigate a series of intricate rules governing the concurrent or consecutive service of sentences for multiple offenses—an inquiry often further complicated by convictions in multiple jurisdictions triggering yet additional rules governing the service of sentences in foreign jurisdictions.[21] Finally, the judge might have to apply special rules for calculating a minimum term for concurrently served sentences of different

70(b)(2) (heightened sentencing for aggravated sexual assault when victim is under sixteen); FLA. STAT. § 775.084 (2015) (enhanced penalties for habitual offenders).

[15] *See, e.g.*, ALASKA STAT. § 12.63.100 (mandatory registration upon release for sexual assault); N.Y. PENAL LAW § 70.45 (McKinney 2015) (mandatory supervision upon release for felony sex offenses); N.C. GEN. STAT. § 15A-1368.2 (2014) (postrelease supervision eligibility and requirements); OHIO REV. CODE ANN. § 2967.28 (West 2014) (postrelease requirements).

[16] *See, e.g.*, 18 U.S.C. § 931 (2012) (limiting violent felons' possession of firearms); CAL. PENAL CODE § 29800 (West 2015) (same); GA. CODE ANN. § 16-11-131 (2015) (same).

[17] *See, e.g.*, 61 PA. CONS. STAT. § 4505 (2014) (sentencing requirements under the Pennsylvania Recidivism Risk Reduction Incentive program).

[18] *See, e.g.*, Robinson, *supra* note 7, at 178 ("Another problem comes from the conflicts between statutes and the resulting ambiguities. What is a court to do when statutory terms are defined differently in different places? Or if the same conduct is graded differently in different statutes?").

[19] Indeed, according to one count, the Federal Sentencing Guidelines were amended 631 times between 1987 and 2001. *See* Ruback & Wroblewski, *supra* note 12, at 764.

[20] Consider, for example, an Alaska statute enumerating thirty-five aggravating factors and twenty-one mitigating factors, for a total of fifty-six aggravating and mitigating factors generally applicable in criminal sentencing. *See* ALASKA STAT. § 12.55.155.

[21] *See, e.g.*, Huddleston v. Ricketts, 210 S.E.2d 319, 320 (Ga. 1974); Calloway v. Pa. Bd. of Prob. & Parole, 857 A.2d 218, 222 (Pa. Commw. Ct. 2004) (holding that the Pennsylvania Sentencing Code does not allow "periods of incarceration in other jurisdictions . . . [to] be credited towards Pennsylvania sentences if those foreign sentences are later vacated or reduced").

duration.[22] This account—perhaps exhausting for the reader but not necessarily exhaustive of the modern sentencing regime—illustrates the extraordinary complexity now commonplace in the postconviction adjudicatory process for a large portion of the criminal docket.

While the benefits of the ever-expanding complexity of criminal sentencing law may be subject to continuing debate, it seems beyond dispute that the complicated nature of our modern sentencing regime has not come without cost. Trial court judges—no matter how knowledgeable, experienced, diligent, or well intentioned—are human and, as such, inevitably prone to error. The formidable complexity of the criminal sentencing system increases the likelihood of judicial mistake because error tends to be correlated positively with task complexity.[23] Psychological research confirms what most lay observers naturally intuit about mental processes and decision-making: complex decisions are more challenging and require a greater level of cognitive effort than simple decisions.[24] As a consequence of complexity in the criminal justice context, judges faced with the task of applying complex sentencing rules tend to economize cognitive exertion by resorting to mental shortcuts that reduce the amount of information processing into manageable data points.[25] Sometimes mental shortcuts facilitate good analysis and produce accurate results, but sometimes they lead to error. Other social science research suggests that human error is often attributable to the failure of highly complex structures to account for the possibility that human decision makers respond to complexity in ways that can be both counterintuitive and counterproductive. For example, by presuming the futility of attempting mastery of the complexity, the decision maker loses motivation to expend any cognitive effort on the task; or, by expending so much effort in attempting to master the complexity, the decision maker becomes too distracted by the details to accurately evaluate the resulting decision in light of the complex process's broader underlying purpose.[26] These social science insights confirm what we believe should already be an uncontroversial assertion: trial court judges are

[22] *See, e.g.*, 42 PA. CONS. STAT. § 9761(a) (2014) ("If a minimum sentence imposed by the court which is to run concurrently with one which has been previously imposed would expire later than the minimum of such a previously imposed sentence, or if the previously imposed sentence is terminated before the expiration of the minimum sentence of the last imposed sentence, the defendant shall be imprisoned at least until the last imposed minimum sentence has been served.").

[23] *Cf.* Ruback & Wroblewski, *supra* note 12, at 767 (noting that research from organizational psychology and organizational sociology confirm that "complex structures reduce performance on complex tasks").

[24] *See id.* at 753.

[25] *Id.*

[26] *Id.* at 768-69 ("In the context of the federal sentencing guidelines, these problems are virtually self-evident. Judges dislike their supervisors (i.e., Congress and the Sentencing Commission) specifying procedures for them as if they were hourly workers, not professionals.").

more likely to err in imposing punishment when sentencing rules are complicated and abstruse. Thus, because our sentencing regime is complex and often tests the limits of human cognition, sentencing error has become an increasingly common feature of the criminal justice system.[27]

B. *Sentencing Error Harm*

Sentencing error inflicts harm on individual defendants and imposes significant costs on society and the State. The problem of sentencing error, however, remains largely undeveloped in the scholarly literature,[28] which has focused primarily on error in the wrongful conviction context, itself an intolerable problem that we agree warrants focused attention from judges and legislatures.[29] Wrongful conviction is intolerable because its harm implicates the most extreme form of miscarriage of justice: punishment of the innocent, the fundamental moral failure rhetorically excoriated in Blackstone's maxim that it is "better that ten guilty persons escape, than that one innocent suffer."[30] Like wrongful conviction, judicial sentencing error can also inflict serious harm on defendants because an erroneously severe sentence imposes a severity of punishment reserved by the law for only more serious crimes for which the defendant has not been convicted. At the other end of the error spectrum, in the case of leniency error exacerbated by delayed correction, a court's untimely review and upward correction undermines the finality of criminal sentencing and frustrates the defendant's expectations regarding the date of release.

[27] *Cf.* Hawkins v. Freeman, 195 F.3d 732, 742 (4th Cir. 1999) ("[E]rroneous release (and delayed incarceration) of prisoners is a surprisingly widespread and recurring phenomenon in both state and federal penal systems. A raw indication of its extent and persistence is conveyed by a recent academic comment that identifies over one hundred such cases running back to 1895, a figure that surely must represent only a fraction of a much larger number of such occurrences not all of which result in litigated and reported cases." (citing Gabriel J. Chin, *Getting Out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 CATH. U. L. REV. 403 (1996))).

[28] For a notable exception to the dearth of scholarship on judicial sentencing error, see Brandon L. Garrett, *Accuracy in Sentencing*, 87 S. CAL. L. REV. 499 (2014), in which the author addresses the extent to which errors of severity may be corrected and proposes a legal standard for adjudicating claims that a sentence is erroneously harsh. For scholarship on *administrative*, as distinguished from *judicial*, sentencing error, see Chin, *supra* note 27, at 403.

[29] *See generally* GEORGE C. THOMAS, III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS (2008); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 131 (2008) (summarizing an empirical study of wrongful conviction and advancing a normative claim that our criminal justice system too often misjudges innocence).

[30] BLACKSTONE, *supra* note 2, at *359. For a discussion of the "Blackstone Principle," see generally Daniel Epps, *Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015).

We acknowledge at the outset that the harm associated with sentencing error differs qualitatively from the harm associated with wrongful conviction because a rightfully convicted person deserving of criminal punishment is, in fact, guilty of a crime and not innocent. Thus, the problem of sentencing error does not implicate the need to protect innocent persons. But the fact that a guilty person is deserving of *some* punishment does not itself legitimize the State's enforcement of an unlawfully severe sentence or a system of perpetual uncertainty in which an erroneously lenient sentence may be corrected upward at any time before the defendant's death. We acknowledge, too, that concepts of desert are inherently imprecise and subject to competing political and philosophical views about exactly what punishment a convicted offender should receive.[31] Thus, there may never be a unanimously agreeable "correct" sentence for a given offense. But we contend that, regardless of what punishment a judge determines appropriate in a given case, the sentence ultimately carried out should never exceed the maximum legal punishment and, in cases where the sentence is erroneously lenient, upward correction should only be permissible when adjudicated in a timely fashion.

To enumerate with greater specificity the particular types of harm caused by sentencing error, we consider the effects of judicial mistake from two perspectives: the defendant's and the State's. From the defendant's perspective, there are two scenarios of potential harm: (1) when an erroneously *severe* sentence goes uncorrected, thereby infringing the defendant's liberty by imposing more than the legal amount of punishment; and (2) when an erroneously *lenient* sentence is corrected upward long after entry of the original sentence, thereby undermining the finality of the sentence and frustrating expectations regarding release. Likewise, from the State's perspective, there are also two scenarios of potential harm: (1) when a sentence is erroneously lenient or erroneously severe, thereby preventing the State from imposing the punishment intended by the legislature;[32] and (2) when sentencing error degrades public perceptions about the fairness of the criminal justice system, thereby diminishing the community's respect for and voluntary compliance with the criminal law.

In Parts II and III, we will examine in detail the harmful effects of sentencing error from the defendant's perspective because the individual right

[31] *See* Richard S. Frase, *Norval Morris's Contributions to Sentencing Structures, Theory, and Practice*, 21 FED. SENT'G R. 254, 255 (2009) (describing Norval Morris's influential theory that "in any given case there will be widespread agreement that certain penalties are clearly undeserved (either excessively severe or excessively lenient), but there may be little political and philosophical consensus on the offender's precise deserts").

[32] *Cf.* Berger v. United States, 295 U.S. 78, 88 (1935) (observing that the prosecution's "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done"). On this latter point regarding the State's interest in correcting erroneously severe sentences, the State's interest is at least putatively aligned with the defendant's interest. Although in practice prosecutors do not often accede to motions for sentence reduction.

to liberty and a fair criminal adjudicatory process is expressly protected by the Constitution under the Bill of Rights. By contrast, the State's interest in sentencing accuracy and achieving justice in criminal matters is not protected by the Constitution. But before we examine the constitutional dimensions of sentencing error on the defendant's liberty and due process rights, we will examine the systemic costs of sentencing error implicated by the degradation of public perceptions of fairness in the criminal justice system.

In this latter regard, Josh Bowers and Paul Robinson have argued that, when the criminal justice system achieves the "shared aims of legitimacy and moral credibility," it promotes public perceptions of fairness regarding the criminal law, which in turn facilitates the development of social norms of deference to—and obedience of—the law.[33] Bowers and Robinson define "legitimacy" in this context as a "belief that legal authorities are entitled to be obeyed and that the individual ought to defer to their judgments."[34] They argue that this form of legitimacy is normatively valuable because voluntary deference to legal authority is essential for the functioning of our criminal justice system.[35] Deference to substantive legal rules, in turn, is facilitated by perceptions of procedural fairness in applying and enforcing those substantive rules because social norms of obedience tend to develop around processes that the community perceives as fair.[36] Communities tend to view legal procedures as legitimate when they are "accurate, consistent, trustworthy, and fair," and "when they provide opportunities for error correction"; communities tend to perceive the exercise of law enforcement authority as legitimate when the State acts "impartially, honestly, transparently, respectfully, ethically, and equitably."[37]

Judicial sentencing error can undermine perceptions of legitimacy in at least two ways. First, in response to an erroneously severe sentence, the community would rightly perceive such a mistake as unfair because it imposes more punishment than allowed by law. A criminal justice system that, on the books, purports to impose a pre-established maximum penalty, but, in practice, metes out even harsher punishment, would be rightly criticized as unreliable, misleading, or a punitive game of chance. We would expect such negative perceptions of the law to be incompatible with, or at least unlikely to induce, voluntary deference to the criminal code. By arbitrarily exceeding the

[33] Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 213 (2012).

[34] *Id.* (quoting TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW, at xiv (2002)).

[35] *See id.* at 212-13 ("Particularly, we anticipate significant crime-control advantages for a system that enjoys perceptions of both moral credibility and legitimacy . . . .").

[36] *See id.* at 213-14 ("Citizens of a procedurally just state comport their behavior to the substantive dictates of the law not because the state exercises coercive power (or, at least, not exclusively because of it), but because they feel a normative commitment to the state.").

[37] *See id.* at 215-16.

maximum sentence, errors of severity would tend to undermine the reliability of law as a source of guidance for individuals who seek to conform their behavior within the legal limits established ex ante by statute. If the statutes purport to articulate those limits but do not actually impose a limiting principle, where else should the public turn for guidance? Errors of severity, therefore, should tend to degrade the general deterrence effect of criminal sanctions by promoting the perception that penalties are applied unpredictably and without regard for the ex ante statutory prohibitions governing criminal conduct. This degradation, in turn, may compromise legal legitimacy and invite the community to question its incentives for voluntary compliance.

Second, the State's untimely objection to an erroneously lenient sentence could delegitimize the criminal law by creating a perception that the State's failure to act promptly represents an inequitable exercise of legal authority. The State's gross delay in seeking correction of a leniency error may create a public perception of procedural unfairness because the passage of time often frustrates the defendant's understandable need to rely on the punishment imposed and release date pronounced at the time of sentencing. When the State does not respect the original sentencing instrument for its intended purpose—to provide an authoritative record of the defendant's punishment—the resulting appearance of arbitrariness could be perceived by the community as more unfair than the erroneously lenient sentence itself.

Bowers and Robinson describe moral credibility—legitimacy's counterpart in promoting norms of voluntary compliance—as a set of shared intuitions about justice and blameworthy conduct as determined by empirical study of views within the relevant community.[38] They argue that, when criminal law embodies the community's shared intuition, the law facilitates voluntary compliance by influencing social norms that stigmatize blameworthy conduct, by reducing resistance to systems when they are perceived as just, and by promoting unquestioned respect for punishment of criminalized conduct that causes harm that may not be readily apparent to lay observers.[39] But when individuals perceive the criminal justice system as unjust, they are more likely to resist and subvert the law.[40] For example, in proposing her theory on the "Flouting Thesis," Janice Nadler demonstrated empirical support for the proposition that individuals who are exposed to instances of perceived injustice are, in unrelated contexts, more likely to disobey the law and, if given the opportunity, to engage in juror nullification (a legal form of protest against the State's prosecution of the case).[41] Like other forms of perceived injustice, sentencing errors of severity and leniency both potentially undermine the moral credibility of the law.

[38] *See id.* at 216-18.

[39] *See id.* at 217-18.

[40] *See id.* at 256.

[41] *See* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1403 (2005).

C. *Patterns and Typology of Sentencing Error*

Having accounted for some of the harms and costs attributable to sentencing error, we will now qualitatively examine the various types of error claims asserted by defendants in postconviction proceedings and petitions for writs of habeas corpus. In our review of sentencing error claims, we have identified the two general types of error discussed above: (1) severity error, which imposes a harsher penalty than the proper legal punishment; and (2) leniency error, which imposes a lighter penalty than the proper legal punishment. We have also identified two common patterns of error: (1) application error, which we define as the accurate identification of relevant law and facts but an erroneous application of sentencing law to those facts; and (2) omission error, which we define as the failure to invoke or consider law or facts that, by statute, must be applied to determine the proper sentence.

These typological distinctions provide a useful framework for analyzing the sentencing error landscape and lead us to propose two hypotheses about the distribution and detection of sentencing error: First, application error is likely to exhibit an even distribution of leniency and severity error, but omission error is likely to exhibit strong bias favoring leniency error. Second, omission error is less likely than application error to be detected timely. We elaborate on both hypotheses below, but observe for now that if both hypotheses are true, then they suggest a previously undetected systemic bias favoring leniency error and show the need for a principled legal standard to address untimely objection by the State when it belatedly seeks upward correction of an erroneously lenient sentence.

Brandon Garrett—one of the very few scholars to have published scholarship on judicial sentencing error—proposes an alternative taxonomy of sentencing error claims: (1) factual error, in which the court bases the sentence on incorrect predicate facts or incorrect predicate crimes; (2) computational error, in which the court misapplies the relevant sentencing rules in computing the final sentence; and (3) legal error, in which the court misinterprets or misapplies the law governing the defendant's sentence.[42] This taxonomy is useful, but Garrett limited his inquiry to errors of severity (or "innocence of sentence claims," as he describes them).[43] We propose the additional typological distinctions noted above because we predict—admittedly, in the absence of existing empirical proof—that application error and omission error will exhibit different distributions of leniency versus severity error. This, in turn, may suggest the need to respond to errors of severity and leniency with different proposals for law reform. We also believe that the problem of gross delay in correcting leniency error may, in fact, be more common than the failure to correct severity error before the defendant begins serving the erroneously severe portion of the sentence. Our typology includes the universe

[42] *See* Garrett, *supra* note 28, at 505-15.

[43] *Id.* at 505.

of errors identified by Garrett, but categorizes them along the lines of application and omission error.

Application error occurs when a court correctly identifies the relevant (or potentially relevant) body of sentencing law but applies that law incorrectly. Examples of application error include, but are not limited to, the erroneous imposition of a potentially relevant, but not actually applicable, sentence enhancement provision;[44] application of a sentence enhancement provision for which the defendant is properly eligible on one count but erroneously imposed by the court on another count for which sentencing enhancement is ineligible;[45] inconsistency between the sentence pronounced orally by the judge in open court and the written sentence imposed on the posthearing sentencing order;[46] and application of sentencing guidelines with an erroneous assignment of criminal offense history or offense level.[47] These examples have in common the court's identification, but misapplication, of potentially relevant law. So long as the court has identified the relevant body of sentencing law, an application error may come in the form of a factual error, computational error, or legal error. In the absence of empirical research suggesting otherwise, the defining attribute of application error—correct identification but misapplication of potentially relevant law—standing alone, would seem no more likely to produce leniency error than severity error. Indeed, it would seem equally probable that a computation error could produce an erroneously lenient sentence as it could an erroneously severe sentence. Likewise, it would seem equally probable that a judge's oral misstatement of a sentence in open court could be overly light or harsh. Therefore, holding all else constant, we expect application error to exhibit an even distribution of leniency and severity error.

Omission error, by contrast, occurs when a court fails to identify the body of relevant sentencing law and therefore entirely omits a required component or consideration of the defendant's legal punishment from the sentence.[48] Unlike application error, omission error occurs when the court is unaware of the

[44] *See, e.g.*, Williams v. State, 494 N.E.2d 1001, 1005 (Ind. Ct. App. 1986) (finding that the sentencing judge erroneously imposed forty-year sentencing enhancement provision).

[45] *See, e.g.*, Delemos v. State, 969 So. 2d 544, 551 (Fla. Dist. Ct. App. 2007) (finding that resentencing violated double jeopardy prohibition where the trial court imposed a statutory mandatory minimum fifteen-year term on the wrong count and, upon resentencing, imposed a fifteen-year mandatory term on the correct count).

[46] *See, e.g.*, Marunich v. State, 151 P.3d 510, 522 (Alaska Ct. App. 2006) (finding a violation of procedural due process where written sentencing commitment order imposed general conditions of probation more severe than those imposed at oral pronouncement of the sentence). *But cf.* Nelson v. Commonwealth, 407 S.E.2d 326, 328-29 (Va. Ct. App. 1991) (denying any error or constitutional violation where the sentencing court initially announced the wrong sentence).

[47] *See, e.g.*, State v. Walsh, 456 N.W.2d 442, 444 (Minn. Ct. App. 1990).

[48] A further subcategory of omission error would involve the failure to identify facts that the law requires to be considered in determining the sentence.

omitted legal provision. In many, if not most, cases of omission error, the prosecution and defense are as unaware as the judge of the omitted statutory mandate's existence.[49] With the proliferation of ad hoc sentencing mandates and requirements, the problem of omission error has become more common because the large and growing volume of mandates and requirements increases the likelihood that one may be overlooked.

Our first hypothesis is that omission error is likely to generate a higher frequency of leniency error than severity error because the majority of ad hoc statutory mandates and requirements susceptible to omission tend to enhance rather than reduce the severity of punishment.[50] Therefore, when a court erroneously issues a sentence unaware of an applicable statutory requirement or mandate, it is more likely that the omitted requirement would have increased the severity of punishment had the court properly considered or applied the requirement.

Our second hypothesis is that omission error is more likely than application error to remain undetected for prolonged periods after the original sentencing proceeding. Omission error is, by nature, more difficult to detect because application error is foreseeable, occurring when the court and parties are in

[49] In some cases of factual omission error, the facts necessary to apply the sentencing law may (or should) be known to the defendant, but the defendant lacks an incentive to produce the information because volunteering the omitted fact—such as a prior offense—would result in a more severe sentence. In some such instances, courts have upheld correction of the error on grounds that the defendant was culpable in procuring it. *See* Goene v. State, 577 So. 2d 1306, 1309 (Fla. 1991) (holding that the double jeopardy prohibition does not bar resentencing to harsher punishment where initial sentence was based on the more favorable criminal history of the defendant's assumed alias); State v. Hardesty, 915 P.2d 1080, 1087 (Wash. 1996) (increasing punishment upon resentencing upheld where defendant procured initial sentence by fraudulently concealing criminal history); *cf.* Sampson v. State, 569 A.2d 95, 96 (Del. 1990) (imposing an erroneously lenient sentence based on mistaken information about the juvenile defendant's age and the date on which the defendant would reach the age of majority). In other instances, courts have found that correction of the error constituted violations of due process and double jeopardy. *See* Brown v. State, 376 So. 2d 1382, 1391 (Ala. Crim. App. 1979) (finding violations of due process and double jeopardy where, within four hours of the court's pronouncement of a sentence of ten years' imprisonment, prosecution informed judge of additional criminal history not taken into account, and defendant was resentenced to fifteen years' imprisonment).

[50] *See, e.g.*, Dunbar v. State, 89 So. 3d 901, 902-03 (Fla. 2012) (describing how at sentencing hearing, court imposed sentence of life imprisonment but failed to include a mandatory minimum sentence of fifteen years, and the mandatory minimum was later added to the sentence in the written sentencing commitment order); Strickland v. State, 687 S.E.2d 221, 222 (Ga. App. 2009) (affirming sentence of only ten years' imprisonment where statute mandated ten-year imprisonment plus $200,000 fine); State v. Houston, No. 09-1623, 2010 Iowa App. LEXIS 1546, at *5 (Iowa Ct. App. Dec. 8, 2010) (finding a double jeopardy violation where defendant, initially sentenced to one year of probation was, after serving entire sentence, resentenced to ten years' probation pursuant to a statutory mandatory minimum probation period inadvertently omitted from the original sentence).

actual possession of all information necessary to detect the error, whereas omission error is typically unforeseeable, occurring when the court and parties are collectively unaware of the missing fact or statutory mandate. In the case of omission error, where no one involved in the proceeding knows that a statutory mandate or consideration has been omitted, no one has reason to question the errant sentence as erroneous. This unawareness dilemma implicates a dichotomy between "known unknowns," which refer to foreseeable but as-of-yet unknown risks, and "unknown unknowns," which refer to risks that are both unforeseeable and currently unknown.[51] The unforeseeability of "unknown unknowns" renders omission error inherently more difficult to detect and therefore more likely than application error to remain hidden in plain sight.

Our two hypotheses, taken together, suggest that the problem of omission error bias (which disproportionately produces erroneously lenient sentencing outcomes) may be compounded by the disproportionate incidence of latency and delayed detection. Such a compounding effect would be significant because problems of latency and delayed detection often affect errors of leniency differently than errors of severity. In the case of leniency error, the prejudice suffered by the defendant upon upward correction of a sentence increases with the passage of time because, as a defendant progresses toward completion of the sentence, he places ever more reliance on expectations of being released on a date certain. By contrast, errors of severity (in particular, sentencing mistakes that erroneously increase the length of incarceration or supervised release) often have a natural grace period during which the error can be corrected harmlessly: a severity error that is detected after sentencing but corrected before the defendant begins serving the erroneously severe portion of the sentence is legally harmless because the error will not have wrongfully deprived the defendant of liberty.

The criminal justice system contains at least two built-in procedural safeguards that tend to mitigate the overall incidence of sentencing error, but both safeguards appear to be systematically more effective at preventing severity error than leniency error. The first procedural safeguard is a requirement in some jurisdictions that an administrative agency with expertise in criminal sentencing, such as a department of corrections or bureau of prisons, furnish the court with a presentence report setting forth all law and facts relevant to the sentencing determination.[52] Holding all else equal, a

[51] Former Defense Secretary Donald Rumsfeld was known for distinguishing "known unknowns" from "unknown unknowns." *See DoD News Briefing - Secretary Rumsfeld and Gen. Myers*, U.S. DEP'T OF DEFENSE (Feb. 12, 2002, 11:30 AM), http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636 [https://perma.cc/UWZ2-P2BP].

[52] *See, e.g.*, 18 U.S.C. § 3552(a) (2012) ("A United States probation officer shall make a presentence investigation of a defendant that is required pursuant to the provisions of Rule 32(c) of the Federal Rules of Criminal Procedure, and shall, before the imposition of sentence, report the results of the investigation to the court.").

presentence report prepared by personnel with specialized knowledge and experience in sentencing systems should reduce the incidence of judicial sentencing error. In practice, however, although administrative agencies often possess institutional competence in applying complex sentencing rules, they, like courts, are also error-prone and susceptible (although perhaps slightly less so) to omission error, which, itself, strongly favors leniency error.[53]

The second procedural safeguard is the adversarial system itself, through which both the State and defendant are represented by professional counsel, each of whom have incentives to detect and prevent error in the sentencing process. The adversarial system's built-in incentives, however, favor detection and timely correction of severity error over leniency error. This is largely because the defendant has, by far, the strongest personal incentive of any participant in the criminal proceeding to detect sentencing error, but the defendant's incentive is limited exclusively to the detection of severity error which, upon correction, would reduce the defendant's sentence. By contrast, when presented with leniency error, the defendant's interest lies in the court *not* detecting the mistake because, if it remains forever undiscovered, the leniency error would result in less punishment than would otherwise be required by law. The State, on the other hand, is the only party with an incentive to detect leniency error, and although the State has legal and moral obligations to carry out justice by seeking accurate sentencing, as a practical matter, those obligations are largely atmospheric and not legally enforceable against individual prosecutors.[54] Chief prosecutors, installed by either direct election or political appointment, have political motives to avoid public blame for sentencing error that might paint them as incompetent or "soft on crime."[55]

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[53] *See, e.g.*, Forbes v. Pa. Dep't of Corr., 931 A.2d 88 (Pa. Commw. Ct. 2007), *aff'd*, 946 A.2d 103 (Pa. 2008); Chin, *supra* note 27, at 403.

[54] For a modeling of prosecutorial incentives, including crime deterrence, efficient case-processing, career advancement, personal desire to win in litigation, political aspiration, and justice, see Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1524-31 (2009).

The incentive for prosecutors to obtain accurate sentences on the first try is especially salient with regard to errors of leniency because, as we will explain below, many courts have interpreted the Double Jeopardy Clause to forbid resentencing on motion by the State even for blatant errors of leniency once the appeal process is finished and the defendant begins to rely on the erroneous sentence. By contrast, errors of severity are more amenable to correction. *See, e.g.*, People v. Karaman, 842 P.2d 100, 110 (Cal. 1992).

[55] But, in the rare case that a sentencing error generates public controversy, the sentencing judge who committed the error is more likely to be the target of criticism than the prosecutor. Consider, for example, the tragic 2015 murder of New York City Police Office Randolph Holder, who was shot by a defendant with many prior offenses and who had been released on bail following a judge's prior decision to order the defendant into a drug diversion program rather than prison. Far more so than the prosecutor, the judge who entered the diversion order was subjected to severe criticism in the media for imposing too light a sentence. *See* Andrew Keshner, *Criticism of Judge Draws Strong Defense of*

Thus, in the absence of empirical research suggesting otherwise, we would expect the adversarial system to exhibit error bias favoring disproportionately lenient sentencing because defendants have stronger incentives to detect severity error than prosecutors have to detect leniency error.

In sum, our hypotheses posit that errors of leniency and severity are not evenly distributed because omission error is far more likely to generate errors of leniency than severity. We posit further that this systemic bias favoring leniency error is compounded by the inherent difficulty in detecting omission error. Taken together, these hypotheses suggest that leniency error may represent a disproportionate share of sentencing error cases, which are, in turn, rendered more difficult to adjudicate fairly because the delay in detecting such errors may be prejudicial to the defendant.

D. *The Problem of Delay in Error Correction*

When procedural safeguards fail, a sentencing error occurs and the defendant begins to carry out the erroneously ordered punishment, in most cases, without knowledge of the mistake. But at what point after a sentence becomes final may a court correct an error? Most courts hold that a sentence is not final for res judicata purposes while the case is pending appeal, so an appeal that results in resentencing on remand is permissible and the court may impose a more severe sentence than the vacated sentence in the remand proceeding.[56] But what about the correction of an error after the time for appeal has expired?

There is statutory and common law authority for the proposition that an illegal sentence may be corrected long after the original sentencing order;[57] indeed, some statutes provide for the correction of an erroneous sentence "at any time"[58] or regardless of whether the sentence is "otherwise final."[59] Rules of criminal procedure typically provide that errors must be preserved to be challenged on appeal,[60] but under the plain error doctrine, certain errors "that

Diversion Process, N.Y. L.J. (Oct. 23, 2015), http://www.newyorklawjournal.com/id=1202740529049/Criticism-of-Judge-Draws-Strong-Defense-of-Diversion-Process?slreturn=20150929200405 [https://perma.cc/SMJ7-PW6W].

[56] *See, e.g.*, United States v. Welch, 928 F.2d 915, 917 (10th Cir. 1991) (collecting cases).

[57] *See, e.g.*, OHIO REV. CODE ANN. § 2929.191 (West 2014) (authorizing the correction of sentences omitting mandatory supervised release "at any time before the offender is released from imprisonment under that term").

[58] *See, e.g.*, MD. CODE ANN., MD. RULES § 4-345(a) (LexisNexis 2016) ("The court may correct an illegal sentence at any time.").

[59] *See, e.g.*, 18 U.S.C. § 3742 (2012) (providing for review of "an otherwise final sentence" by a defendant or the Government under certain circumstances, such as where the sentence "was imposed in violation of law").

[60] *See, e.g.*, FED. R. CRIM. P. 51(b) ("A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that

affect[] substantial rights" are reviewable even if unpreserved.[61] As a sentencing error grows stale with the passage of time, two competing principles in the criminal justice system begin to pull in opposite directions. Tugging in one direction, the need for justice suggests that accuracy in sentencing should be paramount and that error should be corrected upon discovery, regardless of the time elapsed since the original sentence became final and without regard to whether the corrected sentence would increase or decrease the punishment imposed. Pulling in the other direction, concern for judicial efficiency, settled expectations, and the finality principles of res judicata suggests that, after a certain time, sentencing errors should not be subject to further litigation or dispute. In balancing these competing interests, we again find it helpful to distinguish between leniency and severity sentencing error.

In the context of severity error, the State, whose interest in criminal adjudication resides in obtaining justice rather than maximal sentencing, would seem to lack a cognizable interest in opposing error correction because the infliction of more punishment than the amount intended by the legislature would represent an unfair result or a miscarriage of justice. We contend as a normative proposition that neither the passage of time nor the defendant's failure to timely object should vest an erroneously harsh punishment with legal legitimacy. So long as the defendant has yet to serve the erroneously severe portion of the sentence, the potential miscarriage of justice is entirely preventable and therefore should be reviewable; the availability of judicial review becomes especially salient once the defendant begins to serve the erroneously severe portion of the sentence. If the State had no legal right to seek an erroneously severe punishment in the initial sentencing proceeding following conviction, then why should it be entitled to enforcement of a mistakenly harsh sentence after the errant sentence has become final?

The law regarding untimely correction of an erroneously harsh sentence after the exhaustion of the defendant's appellate rights is in a state of disarray. As Garrett observes, "[f]ederal courts have developed an intricate jurisprudence—drawing on postconviction miscarriage of justice exception standards, constitutional retroactivity standards, changes in sentencing standards on appeal, and policy interests in finality—to permit some postappeal sentencing challenges and not others."[62] This disarray of legal

objection."); 42 PA. CONS. STAT. § 9543 (2014) (requiring that a petitioner prove by a preponderance of the evidence that issues for postconviction relief have not been waived); *see also* PA. R. CRIM. P. 720 (prescribing time for filing postsentence motions and direct appeal).

[61] FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."); *see also* Johnson v. United States, 520 U.S. 461, 467 (1997) (requiring a showing that the error would "seriously affect the fairness, integrity, or public reputation of judicial proceedings").

[62] Garrett, *supra* note 28, at 536 (providing a comprehensive survey of federal law on the correction of erroneously harsh sentences).

standards extends to the state level, where some courts have held that it would be fundamentally unfair to preclude a defendant sentenced to an illegally severe sentence from challenging the error at any time,[63] while other state courts have held that objections to a sentence that, although erroneously severe, is nevertheless authorized by law, must be preserved and challenged by a timely appeal or else waived.[64]

Garrett argues persuasively that, for errors in which the defendant received an erroneously severe sentence, "[a]ll . . . claims should be cognizable, under a single miscarriage of justice standard across each type of sentencing error claim and each procedural context in which they may arise, creating a single miscarriage of justice gateway permitting sentencing error claims to be litigated."[65] Garrett's proposal draws on the Supreme Court's standard of review for habeas claims in *Schlup v. Delo*.[66] Under this standard, to establish actual innocence as the gateway through which a petitioner may challenge a constitutional violation, the petitioner must show that it is "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[67] Applying the *Schlup* miscarriage of justice standard to the sentencing error context, Garrett concludes that "the question is whether a reasonable judge, not factfinder, would more likely than not reach a different sentence."[68] We endorse this sensible proposal for resolving otherwise untimely claims of erroneously severe sentencing because it seeks to ascertain whether the sentencing error was, in fact, harmful to the defendant and, where the error was harmful, it permits review to prevent a miscarriage of justice.

Principles of waiver and res judicata, however, have not been applied as consistently to the State's failure to preserve objections to an erroneously *lenient* sentence, which will be the primary focus of the balance of this Article. When permitted by statute, the State may appeal an erroneously lenient

[63] *See, e.g.*, People v. Harper, 802 N.E.2d 362, 370 (Ill. App. Ct. 2003) ("Sentencing a defendant to a prison term longer than that which the Unified Code allows would be fundamentally unfair; therefore, res judicata would not bar the defendant from challenging the void sentence."); Weaver v. State, 725 N.E.2d 945, 948 (Ind. Ct. App. 2000) ("We conclude that *any* time a defendant whose liberty has been restricted through imprisonment or confinement requests a trial court to reconsider its previous award of jail time credit, and the defendant's motion in this regard identifies a sufficient factual basis for his eligibility, the court must address the merits of such motion.").

[64] *See, e.g.*, Moody v. State, 160 S.W.3d 512, 516 (Tenn. 2005) ("As a general rule, a trial judge may correct an illegal, as opposed to a merely erroneous, sentence at any time, even if it has become final.")

[65] Garrett, *supra* note 28, at 533.

[66] 513 U.S. 298, 327 (1995) (holding that a death row habeas petitioner could assert a procedurally barred claim only upon showing that "a constitutional violation has probably resulted in the conviction of one who is actually innocent" (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986))).

[67] *Id.*

[68] Garrett, *supra* note 28, at 533.

sentence,[69] and sentencing courts themselves are often authorized to correct errors of a technical nature within a relatively short period of time following issuance of the sentence.[70] But what about leniency errors that remain latent for the duration of the criminal adjudication and postconviction process, detected only after the defendant has served some or all of the erroneously light punishment? On the one hand, does the State not have an interest in correcting the error and imposing a more severe sentence because the erroneously lenient sentence fails to achieve justice for defendant's offense? Are illegally lenient sentences implicitly void or voidable when they violate a mandatory sentencing minimum, as some courts have held?[71] On the other hand, to what extent does the law recognize the defendant's expectation of finality with regard to the sentence imposed, notwithstanding a legal requirement of a more severe punishment?[72] At what point, if ever, does the defendant acquire a right to enforce an erroneously lenient punishment?

As a leniency error grows increasingly stale with the passage of time, the defendant comes to rely on the sentence term actually imposed, regardless of its legality, and begins to acquire an expectation of finality with respect to the erroneously recorded release date. For a defendant who has come to rely on his expected (albeit erroneous) release date, a nunc pro tunc correction would likely be perceived not only as fundamentally unfair to the defendant but also potentially disruptive to the defendant's family who may also have come to rely on the erroneously early release date. In addition to serious questions about the fairness of error correction following gross delay, resentencing a defendant long after the original proceeding raises a host of adjudicatory and practical problems: The sentencing judge who presided over the guilt phase of the trial may be deceased, retired, or, if still on the bench, may lack sufficient recollection of the trial evidence or witness testimony to apply fact-dependent factors or discretionary considerations of the sentence. And, if the omitted sentencing component requires factual findings not tried before a jury in the original proceeding, the Sixth Amendment right to trial by jury may require

[69] *See, e.g.*, FED. R. APP. P. 4(b).

[70] *See, e.g.*, FED. R. CRIM. P. 35(a) ("Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error."); N.Y. CRIM. PROC. LAW § 440.40(1) (McKinney 2016) ("At any time not more than one year after the entry of a judgment, the court in which it was entered may, upon motion of the people, set aside the sentence upon the ground that it was invalid as a matter of law.").

[71] *See, e.g.*, United States v. Allen, 588 F.2d 183, 184 (5th Cir. 1979); Dunbar v. State, 89 So. 3d 901, 907 (Fla. 2012) (finding that the defendant "had no legitimate expectation of finality in the initial sentence as orally pronounced because it did not include the nondiscretionary mandatory minimum term"); State v. Simpkins, 884 N.E.2d 568, 576 (Ohio 2008); Cardwell v. Commonwealth, 12 S.W.3d 672, 674 (Ky. 2000) (affirming a more severe punishment imposed by sentence correction entered "over eight months after the original judgment and sentence had become final"); State v. Owens, 748 P.2d 473, 474 (Mont. 1988).

[72] *See* State v. Fletcher, 965 A.2d 1000, 1004 (N.H. 2009).

empaneling a new jury to adjudicate those facts.[73] If the case is reassigned to a different judge for resentencing, the new judge may be forced to conduct a sentencing hearing without firsthand recollection of the evidence presented at trial. And to the extent the resentencing hearing requires additional witness testimony, the witnesses may not be alive, available, or capable of being found.

Untimely correction of a leniency error also raises special concerns of fairness and due process in cases where the erroneous sentence is negotiated as part of a guilty plea agreement accepted by the court upon entry of the non-trial conviction. Under federal law, and in many states, when a defendant pleads guilty, the plea is expressly conditioned on the imposition of the sentence or sentencing range set forth in the plea agreement.[74] Under this system, if the court accepts the plea agreement and enters a conviction pursuant to that agreement, the negotiated sentence generally becomes binding and the court cannot impose punishment inconsistent with the agreement.[75] In most plea agreements, defendants waive review of their sentence, both on direct appeal and in postconviction relief proceedings.[76] Thus, to challenge an erroneously severe sentence notwithstanding express waiver in a plea agreement, the defendant must generally show a miscarriage of justice, an amorphous legal standard subject to competing interpretations among different courts, some of which excuse waiver only when the challenged sentence exceeds the maximum legal sentence.[77] But plea agreements are often not reciprocal with regard to waiver of sentencing review because the State is not required to waive its appellate rights and, in many cases, the State does not include a reciprocal waiver provision regarding its own appellate rights.[78] The

[73] *Cf.* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

[74] *See* FED. R. CRIM. P. 11(c) (stating that a plea agreement may specify that the Government agrees to recommend or not oppose a particular sentence); ILL. SUP. CT. R. 402 (stating that a prosecutor and defendant may reach a specified sentencing agreement which must be honored by the trial judge at sentencing or the defendant must be given the opportunity to withdraw the plea).

[75] *See* United States v. Kling, 516 F.3d 702, 704 (8th Cir. 2008) ("A plea agreement under Rule 11(c)(1)(C), like all plea agreements, is binding on both the government and the defendant, but Rule 11(c)(1)(C) plea agreements are unique in that they are also binding on the court *after* the court accepts the agreement. If the court does not accept the agreement, the court is not bound to sentence the defendant by its terms.").

[76] *See* Garrett, *supra* note 28, at 522.

[77] *Id.*

[78] *See, e.g.*, U.S. DEP'T OF JUST., U.S. ATTORNEYS' CRIMINAL RESOURCE MANUAL § 626.3 (1997), http://www.justice.gov/usam/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law [https://perma.cc/QWV7-884G] ("The use of a sentencing appeal waiver in a plea agreement to bar an appeal by the defendant does not require the government to waive its right to appeal an adverse sentencing ruling."). Courts are split on whether the Government's reservation of appellate rights must be explicit in the agreement. *Compare* United States v. Guevara, 941 F.2d 1299, 1299-1300 (4th Cir. 1991) ("[A] provision against appeals [by the defendant] must also be enforced

typical plea agreement, therefore, precludes the defendant from challenging an erroneously severe sentence but does not preclude the State from challenging an erroneously lenient sentence. This is problematic because subsequent modification of an erroneously lenient sentence to increase its severity would undermine the voluntariness of the plea. Thus, some courts have required that a defendant be permitted to withdraw the plea before resentencing in cases involving severity errors.[79]

The balance of this Article addresses the law governing untimely correction of leniency error, which is more likely than severity error to remain undiscovered for long periods and, at present, is governed by a veritable mess of conflicting legal standards. In the next Part, we begin our analysis of whether the Due Process Clauses of the Fifth and Fourteenth Amendments permit the postappeal correction of leniency error and, if so, whether the Constitution imposes a temporal limit constraining the time for correcting such errors.

II. SUBSTANTIVE DUE PROCESS

This Part examines the claim by defendants that prolonged delay in correcting a leniency error constitutes prejudicial deprivation of substantive due process under the Fifth and Fourteenth Amendments. We consider what circumstances render the untimely upward correction of a leniency error so inherently unfair that, regardless of the fairness of procedures applied in resentencing the defendant, the untimeliness of the correction itself violates a fundamental right or liberty.

Derived from the "law of the land" provisions of the Magna Carta,[80] the Fifth and Fourteenth Amendment substantive due process protections subject state action, both legislative and executive, to heightened scrutiny when it infringes fundamental rights and liberties.[81] In the context of executive action,

against the government, which must be held to have implicitly cast its lot with the district court, as the defendant explicitly did."), *with* United States v. Hare, 269 F.3d 859, 862 (7th Cir. 2001) (criticizing *Guevara* and rejecting "the idea that each of defendant's promises in a plea agreement must be supported by some *particular* (and 'similar') promise by the prosecutor").

[79] *See* People v. Catu, 825 N.E.2d 1081, 1081 (N.Y. 2005) (permitting a defendant to withdraw a guilty plea where original sentence did not include mandatory postrelease supervision and defendant had no knowledge of the mandatory sentencing provision).

[80] *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986) (referring to the Magna Carta as the "forebear" of the Due Process Clause).

[81] U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); *see* Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (holding that strict scrutiny review applies to legislative action infringing upon those rights and liberties "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed'" (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937))).

substantive due process "bar[s] certain government actions regardless of the fairness of the procedures used to implement them."[82] But substantive due process protection is limited because the range of prohibited state action includes only the most egregious forms of governmental abuse. The Supreme Court has established an exceedingly high standard for executive state action violations of substantive due process: the state's conduct must "shock[] the conscience" or be "arbitrary in the constitutional sense."[83] Because the upward correction of leniency error is typically requested by the State is rarely a sua sponte act of the judge, and is never an act of the legislature, we will focus our substantive due process discussion on the latter standard for unconstitutional executive action.

Substantive due process protection from abusive governmental conduct is so uncommonly recognized by courts that, to appreciate the narrow contours of the conscience-shocking standard, one must consider the exceptional facts of the case in which the Supreme Court first found that state action shocked the conscience, *Rochin v. California*.[84] In *Rochin*, the police visited the house of a suspected narcotics dealer and, in violation of the Fourth Amendment, forcibly entered his bedroom.[85] The police observed the defendant, in bed with his wife, in close proximity to two suspicious capsules on the nightstand.[86] A struggle ensued and the defendant put both capsules in his mouth.[87] After unsuccessfully attempting to extricate the capsules from the defendant's mouth, the police took him to a hospital, where his stomach was intubated and pumped without consent, thereby causing the defendant's regurgitation of the illicit morphine capsules.[88] The Supreme Court found the conduct of the police conscience-shocking for purposes of substantive due process:

> Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[89]

Although *Rochin* does not require a literal "rack and screw" standard for substantive due process claims, the conscience-shocking test comes quite close. In *County of Sacramento v. Lewis*,[90] for example, the Supreme Court

[82] Cty. of Sacramento v. Lewis, 523 U.S. 833, 840 (1998) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986))).

[83] *Id.* at 846-47 (quoting Collins v. Parker Heights, 503 U.S. 115, 129 (1992)).

[84] 342 U.S. 165, 165 (1952).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 172.

[90] 523 U.S. 833 (1998).

held that a motorcycle passenger killed during a high-speed police chase was not deprived of a substantive due process right to life under the *Rochin* standard because "only the most egregious official conduct" is actionable and "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not" implicate the level of purposefulness necessary to establish the requisite degree of egregiousness.[91] Under this standard, substantive due process prevents the government from abusing its power as "an instrument of oppression,"[92] but it does not impose upon the government an "affirmative obligation . . . to ensure that those interests [of life, liberty, or property] do not come to harm through other means."[93] The Supreme Court has emphasized that substantive due process review is, at bottom, an inquiry into whether the conduct was "arbitrary in the constitutional sense."[94]

The invocation of substantive due process principles in the leniency error context surfaced briefly as dictum in *Breest v. Helgemoe*.[95] The defendant, convicted of first degree murder, was sentenced to life imprisonment subject to parole eligibility after eighteen years. Five days after sentencing, however, the prosecution filed an objection because the judge failed to comply with a then-recently-enacted statute requiring certification "at the time of sentencing, whether or not such murder was psycho-sexual in nature."[96] Upon court certification of a murder as "psycho-sexual," the statute imposed a mandatory forty-year period of parole ineligibility.[97] Approximately two weeks after issuing the initial sentence, the court held a hearing in which it certified the defendant's crime as "psycho-sexual" and imposed a sentence of life imprisonment with parole ineligibility of forty years. Upon considering the defendant's federal habeas petition challenging the additional twenty-two years of parole ineligibility, the First Circuit Court of Appeals rejected the defendant's claim of double jeopardy—an issue to which we will turn in Part III—but, in dictum, expressed concern for the due process implications of correcting, post hoc, an illegally lenient sentence:

> After a substantial period of time, therefore, it might be fundamentally unfair, and thus violative of due process for a court to alter even an illegal sentence in a way which frustrates a prisoner's expectations by postponing his parole eligibility or release date far beyond that originally set. We need not decide, however, how long or under what circumstances the state or a sentencing court constitutionally can wait to enhance an

[91] *See id.* at 846, 854.

[92] Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992).

[93] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

[94] City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 198 (2003).

[95] 579 F.2d 95, 101 (1st Cir. 1978), *cert. denied*, 439 U.S. 933 (1978).

[96] *Id.* at 98 (quoting N.H. REV. STAT. ANN. § 607:41-c (Supp. 1972)).

[97] *Id.* at 97 (citing N.H. REV. STAT. ANN. § 607:41-b to d).

> invalid sentence. The short period of time involved here clearly was permissible.[98]

We find appealing the notion that substantive due process should, at some point, entitle a prisoner to rely on the original sentencing instrument in setting expectations concerning the release date, even when those expectations are predicated on an illegally lenient sentence. For persons subject to a punishment of incarceration, the release date is not a mere feature or component of the sentencing order; rather, the release date is the prisoner's entire raison d'être so long as he remains incarcerated. To extend the maximum term of incarceration known to the prisoner at the outset could, at some later time, be such an extreme frustration of the prisoner's expectations as to shock the conscience.

Courts, however, have not embraced these concerns as a matter of substantive due process. For example, in *Littlefield v. Caton*,[99] the First Circuit clarified its *Breest* dictum: standing alone, a defendant's frustrated expectations do not constitute a violation of his substantive due process rights.[100] In *Littlefield*, the defendant was sentenced to a lengthy prison term and, pursuant to statute, the state department of corrections prospectively granted good time credit and computed a release date based on that credit.[101] Five months after the court entered the defendant's sentence, the state legislature increased the statutory rate at which prisoners earned good time credit; the department of corrections applied the new more favorable rate both retroactively and prospectively in computing a new earlier release date.[102] Seven years after the defendant's sentencing, the state legislature further increased the statutory rate for earning good time credit; again, the department of corrections applied the more favorable new rate both retroactively and prospectively in computing a new release date.[103] Nine years after the defendant's sentencing, however, the state supreme court held that both statutory amendments increasing the earned good time credit rate violated the state constitution.[104] The department then recalculated the defendant's release date, this time computing a later release date based on the less favorable good time credit system under the statute effective on the date of his original sentencing.[105] In *Littlefield*, therefore, the defendant's challenge was not based on a correction of error in the original sentence, but rather, the reversal of subsequently granted and revoked good time credit added by legislation. The defendant later filed a federal habeas petition and the district court held that the defendant had a due process liberty interest in statutorily granted good time

[98] *Id.* at 101.

[99] 856 F.2d 344 (1st Cir. 1988).

[100] *Id.* at 346.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

credit, but that his interest was not violated because the defendant suffered no tangible prejudice from the reversal and "[h]is good time has now been calculated using the same statute under which it was initially calculated when he was sentenced."[106] On appeal, the First Circuit clarified its *Breest* dicta and held that frustrated expectations arising from the correction of an erroneously early release date are understandable but not cognizable:

> While we do not minimize the strain which accompanies a prisoner's dashed expectations in circumstances like these, particularly when the string is played out over a long period of years, we have made clear that misdirection of this sort must "involve[] prejudice and harm beyond frustrated expectations" to be constitutionally redressable. The mere passage of time—even, as here, the passage of many years—does not per se import the existence of such prejudice and harm. Something more—something specific, some concrete injury—must be shown. And petitioner, whose counsel conceded at oral argument that no other, more tangible detriment was present, cannot surmount this barrier.[107]

The Third Circuit has also applied a high standard for establishing a substantive due process violation for the untimely correction of a leniency error. In *Evans v. Beard*,[108] a case that exemplifies both the complexity of criminal sentencing and the problems implicated by prolonged delay in correcting a leniency error, Evans was arrested in 1986 on rape and incest charges arising from separate offenses in Northampton County and Lehigh County, both in Pennsylvania.[109] Convicted in both counties and incarcerated since his 1986 arrest, Evans received his Northampton sentence in 1990 and his Lehigh sentence in 1991; his combined sentences included more than 700 years' imprisonment.[110] In 1992, both convictions were vacated on appeal due to procedural error, but Evans later entered guilty pleas on both indictments.[111] In January 1994, he was sentenced in Northampton to ten to twenty years' imprisonment; in June 1994, he was sentenced in Lehigh to ten to twenty years' imprisonment, with service of the Lehigh sentence to run concurrently with the Northampton sentence.[112] Upon resentencing, Evans was entitled to credit for time served subject to limitations imposed by statute.[113] On the court commitment form, the Lehigh court entered the effective date of Evans's sentence as November 6, 1986, the date of his extradition to and incarceration

[106] Littlefield v. Caton, 679 F. Supp. 90, 93 (D. Me.), *rev'd*, 856 F.2d 344 (1st Cir. 1988).

[107] *Littlefield*, 856 F.2d at 348 (footnote omitted) (quoting Lerner v. Gill, 751 F.2d 450, 459 (1st Cir. 1985)).

[108] 639 F. Supp. 2d 497 (E.D. Pa. 2009), *rev'd sub nom.* Evans v. Sec'y Pa. Dep't of Corr., 645 F.3d 650, 652 (3d Cir. 2011).

[109] *Evans*, 645 F.3d at 652.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 653.

[113] *Id*.

in Pennsylvania, for purposes of granting credit for time served.[114] By Pennsylvania statute, however, Evans could not receive credit on the Lehigh sentence for time served between his 1986 extradition and his 1990 Northampton sentencing date because credit for presentence time served could not be applied to more than one sentence, even if the defendant's sentences are later ordered to be served concurrently.[115] In December 1994, the state department of corrections wrote to the Lehigh court to inform it of the error, but the Lehigh court neither responded nor amended the court commitment order.[116]

For the next decade, Evans received periodic correspondence from the Pennsylvania Board of Probation and Parole notifying him of his date of release: "You will serve your unexpired maximum sentence, 11/13/2006."[117] In April 2005, however, the state department of corrections issued a "Sentence Status Summary" in which it deducted more than four years of erroneously granted credit for time served: ''[C]redit for that time period is not available toward the Lehigh County sentence. With this DC16E report, the apparently inadvertent duplicate credit is now removed from the computation @Lehigh CP125, in accordance with current directives under Policy 11.5.1."[118] When Evans filed a pro se petition challenging the loss of time credit, the Lehigh court amended the court commitment order by changing the sentence effective date from November 6, 1986 to December 6, 1990 without a hearing.[119] A letter from the Lehigh court clerk to Evans explained: "For your information your sentence was not amended, only a correction of the court commitment order was amended."[120] Evans later filed a federal habeas petition challenging the amendment to the sentence and, in the alternative, the voluntariness of his guilty plea.[121]

Citing the "unfairness of gross delay" by the state, which waited eleven years, until the eve of release, before seeking correction of the sentence, the federal district court found that the Lehigh court's untimely resentencing proceeding was a violation of substantive due process[122]:

> The Department's prolonged delay in seeking correction of Form DC–300B is shocking to the conscience; so was the court's decision to grant the amendment. If the Fourteenth Amendment Due Process Clause

[114] *Id.*

[115] *Id.*; *see also* Doria v. Pa. Dep't Corr., 630 A.2d 980, 982 (Pa. Commw. Ct. 1993).

[116] *See Evans*, 645 F.3d at 654; Evans v. Beard, 639 F. Supp. 2d 497, 501 (E.D. Pa. 2009) ("Nothing in the record suggests Judge Brenner responded to Ms. Grissinger or the Department of Corrections.").

[117] *Evans*, 639 F. Supp. 2d at 501.

[118] *Id.*

[119] *Id.* at 502.

[120] *Id.*

[121] *Id.* at 503.

[122] *Id.* at 506.

> imposes a temporal limit on the power of a sentencing court to correct an illegal sentence, an eleven year delay by the Lehigh County Court of Common Pleas certainly exceeded that limit.[123]

After the district court granted Evans's habeas petition, the State filed an emergency motion to stay his release from prison pending appeal, which was denied by a two-judge motions panel of the Third Circuit, and Evans was released.[124]

The Third Circuit merits panel, however, reached a staunchly different conclusion. Characterizing Evans's petition as asserting a claimed "fundamental right to be released from prison on or about a date certain,"[125] the appeals court interpreted the conscience-shocking standard to require a showing of "governmental conduct intended to injure," reserving as a "closer call" the question of whether deliberate indifference by a state actor is sufficient to establish a violation of substantive due process; the court noted further that negligently inflicted harm "'is categorically beneath the threshold of constitutional due process' and will never be conscience shocking."[126] The court explained that Evans's deep disappointment in belatedly learning of the upward correction "is certainly regrettable, but that does not make the correction conscience-shocking."[127] Although the court declined to "utterly reject" the possibility of a temporal limit on correcting a leniency error, it found that an eleven-year delay did not reach that potential limit.[128] According to the local press, the Lehigh prosecutor announced his intent to seek reincarceration for the balance of Evans's unexpired term.[129] It appears that Evans was, in fact, subsequently reincarcerated.[130]

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[123] *Id.* at 508-09.

[124] Order at 1, Evans v. Beard, No. 09-2657 (3d Cir. June 26, 2009) ("The forgoing motion for a stay is denied.").

[125] *Evans*, 645 F.3d at 659.

[126] *Id.* at 660 (citing Daniels v. Williams, 474 U.S. 327, 328 (1986)).

[127] *Id.* at 661.

[128] *Id.* at 661-62.

[129] Kevin Amerman, *Freed Allentown Child Rapist Could Be Headed Back to Prison*, THE MORNING CALL (May 23, 2011), http://articles.mcall.com/2011-05-23/news/mc-child-rapist-free-20110521_1_appeals-judges-william-h-evans-child-rapist [https://perma.cc/DZG4-6F9A] ("[District Attorney] Martin said he then will petition a Lehigh County judge to place Evans back in prison for the 20-month balance left on his sentence.").

[130] On October 7, 2014, Mr. Evans was registered as a sex offender under Pennsylvania's Megan's Law for an offense dated August 1, 1994, which appears to correspond roughly with the date of his resentencing in Lehigh County. The registration form indicates his status as "incarcerated" and provides a state prison as his residential address. Entry for Robert Arthur Evans, MEGAN'S LAW WEBSITE, https://www.pameganslaw.state.pa.us/OffenderDetail.aspx?OffenderId=36480 [https://perma.cc/9B7C-538K] (last visited Aug. 8, 2016).

The Third Circuit's high threshold for satisfying the conscience-shocking standard is consistent with a broader trend among federal courts of appeals addressing similar types of substantive due process claims. For example, in a related line of cases dating back to the 1960s, federal courts developed a principle of jurisdictional waiver applicable in cases of long delay between issuance of a sentence and actual incarceration of the defendant. In *Shields v. Beto*,[131] the leading case on waiver of jurisdiction, the defendant was sentenced to forty years on state convictions in Texas but, after serving one year, he received a sixty-day furlough, whereupon he was extradited to Louisiana to serve another sentence there.[132] The defendant was released early on parole from the Louisiana sentence, but later convicted in Tennessee for other federal offenses.[133] The defendant was, again, released early on parole from the federal sentence in Tennessee, whereupon he was transferred back to the Texas county in which he had been convicted twenty-eight years earlier but had served only one year of his forty-year sentence.[134] Once returned to Texas, the defendant was reincarcerated for the outstanding balance of his 40-year sentence.[135] Invoking "fundamental principles of liberty and justice," the Fifth Circuit Court of Appeals held that the State's "lack of interest in [seeking completion of the sentence following] a lapse of more than 28 years, was equivalent to a pardon or commutation of his sentence and a waiver of jurisdiction."[136] As the Eighth Circuit Court of Appeals later explained: "The waiver theory—that the state's conduct may result in the waiver of its jurisdiction over a criminal defendant—is premised on the fourteenth amendment's [sic] protection against arbitrary and capricious state action."[137] Under this theory, one might have questioned whether, if the State could altogether waive its interest in enforcing a sentence through prolonged inaction in acquiring custody of the defendant, then could the State also waive its interest in correcting an illegally lenient sentence through prolonged inaction in seeking resentencing? In both contexts, the State's prolonged inaction subjects the defendant to uncertainty, if not arbitrariness, in the enforcement of the court's sentence. More recently, however, federal courts of appeals have come to reject the waiver theory as inconsistent with the Supreme Court's conscience-shocking standard.[138] To

[131] 370 F.2d 1003 (5th Cir. 1967).

[132] *Id.* at 1003-04.

[133] *Id.* at 1004.

[134] *Id.*

[135] *Id.*; *see also Update: Mike Anderson Released*, THIS AM. LIFE (May 6, 2014), http://www.thisamericanlife.org/blog/2014/05/update-mike-anderson-released [https://perma.cc/KS6J-JMZY].

[136] *Shields*, 370 F.2d at 1006.

[137] Camper v. Norris, 36 F.3d 782, 784 (8th Cir. 1994).

[138] *See* Hughes v. Oliver, 596 F. App'x 597, 599 (10th Cir. 2014) (holding that a mistaken release and reincarceration does not violate due process); Bonebrake v. Norris, 417 F.3d 938, 943 (8th Cir. 2005) (same); Hawkins v. Freeman, 195 F.3d 732, 743-44 (4th Cir.

rise to the level of arbitrary conduct in the constitutional sense, the State's inaction in pursuing custody must be "infected or driven by something much worse—more blameworthy—than mere negligence, or lack of proper compassion, or sense of fairness, or than might invoke common law principles of estoppel or fair criminal procedure to hold the State to its error."[139]

State appellate courts have also applied the principle that frustrated expectations, absent tangible prejudice or intent to harm, do not violate due process. In *Beliles v. State*,[140] for example, the defendant was convicted for cocaine distribution pursuant to a written, negotiated plea agreement.[141] Under the plea agreement, the defendant would receive a twenty-year sentence of incarceration with six years suspended.[142] The judge, however, erroneously transposed the numbers on the sentencing order and imposed a twenty-year sentence, of which six years would be executed and fourteen years suspended.[143] Approximately one month later, the court corrected the sentence to conform to the negotiated plea agreement but did not inform the defendant, his attorney, or the state department of corrections.[144] After applying good time credit, the defendant was only required to serve three years of the six-year sentence, but shortly before completion of the defendant's third year, the court finally transmitted the amended sentence to the department of corrections, whereupon the defendant "was picked up at the work release center, handcuffed, shackled, and taken to the State Farm to serve the rest of his fourteen year sentence."[145] The appellate court affirmed dismissal of the defendant's postconviction relief petition and noted that "a prisoner's due process rights are not violated merely by the dashed hopes attendant in the correction of a sentence which delays the prisoner's expected release date."[146]

By limiting substantive due process claims to cases where state actors engage in intentionally harmful conduct, the modern conscience-shocking standard tends to facilitate the untimely correction of leniency errors. Under this standard, the State, the sole party with an incentive to correct leniency errors, will almost never be estopped from seeking resentencing because the

1999) (describing the waiver theory as "the fictive notion that by prolonged failure to incarcerate a convict who 'owes it time' (either original or 'interrupted') a government may 'waive its jurisdiction' to do so, thereby making any later incarceration one effected without jurisdiction and so a violation of due process"); *cf.* United States v. Sanders, 452 F.3d 572, 574 (6th Cir. 2006) (holding that a long delay in sentencing during appeal does not violate due process).

[139] *Hawkins*, 195 F.3d at 746.

[140] 663 N.E.2d 1168 (Ind. Ct. App. 1996).

[141] *Id.* at 1170.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* at 1171.

[146] *Id.* at 1172.

failure to detect such errors is almost always caused by negligence rather than a calculated intent to harm the defendant. It seems highly implausible, if not illogical, that a prosecutor who is aware of a leniency error upon initial pronouncement of the sentence would, for the intentional purpose of frustrating the defendant's expectations regarding release, wait several years or decades before objecting to the error. Why would a prosecutor seeking to obtain an upward correction risk that a court might deny resentencing on substantive due process grounds attributable to prolonged delay? Because prosecutors know that, under this high threshold for substantive due process claims, leniency errors can be corrected practically without regard to delay, prosecutors have no real incentive to establish practices, procedures, or systems that would prevent them from acting negligently in detecting sentencing error.

Drawing on the Third Circuit's refusal, however muted, to "utterly reject that there might be a 'temporal limit' on a court's ability to correct a sentencing problem,"[147] we propose an alternative substantive due process standard for determining when the State's petition to correct a leniency error should be denied as untimely. Rather than leaving to courts the task of ascertaining a temporal limit without guidance,[148] we recommend that courts apply the statute of limitations for the convicted offense as a presumptive temporal limit after which a leniency error would become ineligible for upward adjustment. The statute of limitations, like such statutes generally, would begin to run on the date of a defendant's offense. Such a standard would be consistent with the Supreme Court's liberal construction of criminal statutes of limitation more generally:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose.'"[149]

Statutes of limitation "represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice,"[150] so they

[147] Evans v. Sec'y Pa. Dep't of Corr., 645 F.3d 650, 661 (3d Cir. 2011).

[148] *Cf.* Baker v. Barbo, 177 F.3d 149, 158 (3d Cir. 1999) (observing without deciding, in a leniency error case, that the defendant's "reasonable expectations [regarding sentencing finality] could not have reached that 'temporal limit' wherever it may be").

[149] Toussie v. United States, 397 U.S. 112, 114-15 (1970) (quoting United States v. Habig, 390 U.S. 222, 227 (1968)).

[150] United States v. Marion, 404 U.S. 307, 322 (1971).

provide the most accurate guidance with regard to ascertaining the temporal limit that should constrain the State's ability to seek upward adjustment of an erroneously lenient sentence.

The convention of borrowing statutes of limitations is not novel as a concept. Indeed, federal courts have long engaged in the practice of borrowing statutes of limitation from state law when determining the appropriate limitations period for federal offenses without an express statutory limitations period.[151] In borrowing statutes of limitation, courts perform a qualitative comparison between the action lacking a limitations period and the action from which the appropriate limitations period should be borrowed.[152] Courts tend to borrow statutes of limitation rather than invent their own because legislatures have greater institutional competence in setting precise temporal limits and the application of an analogous (even if not controlling) statutory limitations period avoids problems of inconsistency and arbitrariness.[153] Judge Posner explains:

> Courts are comfortable making judgments of reasonableness, but they are not comfortable fixing arbitrary time periods, so when they need a fixed time period for an action at law they borrow a period fixed by a legislature, albeit fixed by it for a different purpose. Of course, in deciding which statute of limitations to borrow, the court is choosing among arbitrary periods set by a legislature; but the choice itself is not arbitrary.[154]

Our use of statutes of limitations as a time limitation on correcting leniency errors is, however, novel. We think it is a good idea because it would prevent

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[151] *See, e.g.*, Reed v. United Transp. Union, 488 U.S. 319, 323 (1989) ("When [Congress fails to supply an express statute of limitations for a federal cause of action], '[w]e have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.'" (quoting DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158 (1983))).

[152] *See, e.g.*, *id.* at 324 ("We decline to borrow a state statute of limitations only 'when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.'" (quoting *DelCostello*, 462 U.S. at 172)).

[153] *See* Ellen E. Kaulbach, Comment, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes*, 77 CALIF. L. REV. 133, 158 (1989) ("The analogy process is a method of turning this quasi-legislative task into a task more suited to judicial reasoning. It narrows the field of choice of appropriate limitations periods, and transforms the issue into a comparison rather than a bald assertion. In addition, the analogy process ideally eliminates much of the arbitrariness of the decision. The court extracts legislative policy judgments from analogous actions expressly governed by a statute of limitations and compares those judgments to the timeliness policies implicated by the case at bar." (footnotes omitted)).

[154] Hemmings v. Barian, 822 F.2d 688, 690 (7th Cir. 1987) (borrowing a state RICO statute of limitations for purposes of the federal RICO statute, which lacked its own statute of limitations).

arbitrary outcomes by establishing a precise and achievable standard for adjudicating substantive due process claims which, at present, almost always turn on the implausible possibility that a defendant can prove the State acted intentionally in prolonging delay. Few defendants, if any, will be able to prove intentional delay by the State,[155] so the current standard effectively nullifies substantive due process protection for the untimely correction of leniency errors. Moreover, as a substantive matter, why should the State be given a longer time to correct a leniency error that the legislature has given the State to prosecute the offense?

Our proposal of borrowing statutes of limitation to ascertain the temporal limit on correcting leniency errors would further the broader policy goals of (1) avoiding the unfairness of litigating stale claims; (2) penalizing dilatoriness or, phrased more positively, creating incentives for diligence; and (3) providing grace and repose for defendants who reasonably place reliance on what they understand to be their expected release date.[156]

To be sure, while our proposal achieves clarity, it will not provide relief to some prisoners who face increased penalties years after the original sentencing. As far as we know, no state has a statute of limitation for murder. Rhode Island has no statute of limitation for robbery.[157] Fred DeWitt, convicted of robbery in Rhode Island,[158] was resentenced to a harsher sentence six years after his sentence was modified.[159] He won his claim that the new sentence was unconstitutional under the vague substantive due process approach used by the First Circuit,[160] but could never benefit from our statute of limitations due process approach. And then there is the problem of defendants who are resentenced quickly after the error is discovered. For example, Carl Fogel was sentenced to a form of probation for receiving embezzled property.[161] His resentencing was a mere nine days after his original sentencing, meaning that he would get no relief under our due process proposal; no statute of limitations is counted in days. Evans, however, benefits from our due process proposal. The statute of limitations for rape in Pennsylvania in 1985 was five years,[162]

[155] In our research, we uncovered no case in which a court found the State acted intentionally in prolonging its delay in correcting a leniency error.

[156] *Cf.* Ochs v. Fed. Ins. Co., 447 A.2d 163, 165-66 (N.J. 1982) ("A statute of limitations has two purposes. The first is to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims. The second function is to penalize dilatoriness and serve as a measure of repose." (citations omitted)).

[157] R.I. GEN. LAWS § 12-17 (2015).

[158] DeWitt v. Ventetoulo, 6 F.3d 32, 32 (1st Cir. 1993).

[159] *Id.* at 33.

[160] *Id.* at 37.

[161] United States v. Fogel, 829 F.2d 77, 80 (D.C. Cir. 1987).

[162] Act of Dec. 19, 1984, No. 218, 1984 Pa. Laws 1089, 1091 (codified at 42 PA. CONS. STAT. § 5552(b) (2014)).

and he was resentenced eleven years after his original sentencing. To be sure, courts could still apply the vague "shock the conscience" test to rebut the presumption that DeWitt, for example, has no valid substantive due process claim. Is there a better approach that provides clarity and offers relief to defendants like DeWitt and Fogel, as well as an alternative argument for Evans? We think double jeopardy is the answer.

III. DOUBLE JEOPARDY

We saw in Part II the rather amorphous substantive due process tests used by the courts, which we sought to supplement with a rebuttable presumption drawn from the statute of limitations for the offense of conviction. The set of Fifth Amendment double jeopardy principles that can be teased out of the Supreme Court's doctrine is, by contrast, quite precise.[163] This is not to say that courts have applied double jeopardy principles with uniform consistency or accuracy. They have not, as we will demonstrate. But we believe that the policy rationale underlying the constitutional prohibition on double jeopardy offers a more principled and transparent basis for addressing the problem of delayed resentencing to correct judicial error.

The story begins in 1873. Edward Lange was convicted of stealing mail bags, which had a value of less than twenty-five dollars, an offense that carried either a fine *or* imprisonment for up to one year.[164] The judge, however, sentenced him to a fine *and* to a one-year prison term. He began to serve his sentence the day it was imposed—those were different times—and the next day paid his fine in full.[165] His first writ of habeas corpus pointed out the judge's sentencing error; the judge's response was to vacate both penalties imposed under the first sentence and resentence Lange to one year in prison but no fine.[166] The Court held that the resentencing violated the Double Jeopardy Clause because, even though it was not a second jeopardy, it was a second punishment for the same offense. The Court reasoned:

> For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and

[163] The Fifth Amendment prohibits a criminal defendant's exposure to double jeopardy: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

[164] *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 164 (1873).

[165] *Id.*

[166] *Id.*

> different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?[167]

Because Lange had fully executed one of the permissible statutory penalties—payment of the fine—vacating the original sentence entirely and imposing a new one-year term of imprisonment represented a second punishment for the same offense in violation of the Double Jeopardy Clause. The Court therefore vacated the second sentence of imprisonment and Lange was "discharged accordingly."[168]

Lange is the beginning of what the Court has come to call the multiple punishment prong of double jeopardy protection.[169] The Court's opinion in *Lange* is unclear as to whether the complete execution of one of the sentences was critical to its holding, but that of course would be the narrow holding. So construed, *Lange* does not provide much protection against resentencing. It would be the rare judge who would make the mistake in Lange's case; a sentencing provision of a fine *or* a jail sentence would be easy enough for the attentive judge to follow.[170]

In *United States v. Benz*,[171] the defendant was convicted of violating the National Prohibition Act.[172] After the court had sentenced Benz to ten months' imprisonment, a lawful penalty, and after Benz had begun serving time, Benz requested that the court reconsider his sentence.[173] Perhaps cognizant of the

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[167] *Id.* at 173.

[168] *Id.* at 178.

[169] *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711, 717 (1969) ("[The Double Jeopardy Clause] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (footnotes omitted)).

[170] Likewise, were the double jeopardy protection against resentencing to require full execution of at least one lawful penalty in the defendant's sentencing package, invocation of double jeopardy protection would be limited largely to the lucky circumstances presented in *Lange*, where one of the lawful penalties was a modest fine and the defendant had the financial resources to pay the fine immediately before challenging the new sentence. Suppose, however, that rather than sentencing Lange to a fine and one-year imprisonment, the court had erroneously sentenced Lange to six months' imprisonment and six months' probation under the same penalty statute (authorizing a fine or imprisonment). In this hypothetical, the six-month prison term would have constituted a lawful penalty but the six-month probation term would not. The narrow reading of *Lange* would imply that, had the court corrected its error days later by vacating the original erroneous sentence entirely and imposing a new lawful sentence of one year's imprisonment, Lange could not challenge the resentencing order until he had fully executed the original lawful penalty of six months' imprisonment.

[171] 282 U.S. 304 (1931).

[172] *Id.* at 306.

[173] *Id.* at 305.

then-growing movement to repeal the prohibition laws,[174] the trial court granted reconsideration and reduced the sentence to six months' imprisonment. The Supreme Court affirmed the resentencing and held that the federal judicial power includes a judge's authority to modify a sentence after it has been imposed.[175] In dictum, the Court explained that the judicial power to modify a sentence was limited to reducing, not increasing, the defendant's punishment.[176] Distinguishing *Lange*, the Court wrote:

> The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment . . . .[177]

The *Benz* Court then quoted with approval *Lange*'s dictum that the Double Jeopardy Clause would not have precluded a court from reducing an erroneous two-year term of imprisonment to a lawful punishment of one year.[178]

While the distinction between reducing and increasing a sentence after it has been imposed was a precise, easy to apply rule, it did not last. The next step in the doctrinal development of the Court's double jeopardy case law was *Bozza v. United States*,[179] which was the mirror image of the facts of *Lange*.[180] In *Bozza*, the defendant was convicted of tax evasion in connection with operating a distillery, an offense subject to a mandatory punishment of a term of imprisonment *and* a fine.[181] The judge sentenced Bozza to imprisonment but neglected initially to impose a fine, thus issuing a sentence that was unlawfully lenient.[182] About five hours later, the judge corrected his mistake by resentencing to include a fine and imprisonment.[183] The Court narrowly construed *Lange* as inapplicable,[184] and held that Bozza's resentencing did not

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[174] Prohibition would last only another four years. In 1928, the year before Benz was sentenced, the Democratic Party nominated a candidate for president, Al Smith, who endorsed repeal of Prohibition. While Smith lost the election decisively to Herbert Hoover, the idea of repeal was firmly planted in the nation's consciousness.

[175] *Benz*, 282 U.S. at 311.

[176] *Id.* at 307.

[177] *Id*.

[178] *Id.* at 310 (citing *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 175 (1873)).

[179] 330 U.S. 160 (1947).

[180] *Compare id.* at 165-66 (reciting the procedural history of sentencing), *with Lange*, 85 U.S. (18 Wall.) at 164-65 (same).

[181] *See Bozza*, 330 U.S. at 165-66 (stating that a one-hundred dollar fine and an imprisonment term were required by law). Recall, by contrast, that in *Lange*, the statutory penalty provided for imprisonment *or* a fine. *Lange*, 85 U.S. (18 Wall.) at 164.

[182] *Bozza*, 330 U.S. at 165.

[183] *Id.*

[184] *Id.* at 167 n.2.

violate the Double Jeopardy Clause because the judge corrected the mistake within hours and, in any event, the double jeopardy ban does not imply a "doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing the sentence."[185] The Court stated that *Lange* was distinguishable because "[Lange] had paid his fine and therefore suffered punishment under a valid sentence . . . ."[186] Bozza, by contrast, "had not suffered any lawful punishment until the court had announced the full mandatory sentence of imprisonment *and* fine."[187] Thus, at least in the view of the *Bozza* Court, the trial court's pronouncement and the defendant's full execution of at least one lawful penalty was the key to finding that Lange could not be resentenced. But what of the dictum in *Benz* purporting to limit a court's power to resentence a defendant to a more severe punishment?[188] The *Bozza* Court dismissed *Benz* with a "*cf.*" citation and did not discuss its dictum.[189] The holding in *Bozza* can be squared with the *Benz* dictum only if one understands *Benz* to prohibit increasing a sentence that was legal when imposed.

So after *Bozza*, the double jeopardy/multiple punishment principle was that an unlawful sentence could be corrected as allowed under the procedural rules of the jurisdiction unless the original sentencing package included a lawful penalty and the defendant had fully executed the lawful penalty. Under *Benz*, a lawful sentence could be adjusted downward but not upward.

Next was *United States v. DiFrancesco*.[190] The Court had long made clear that the Government could not appeal from a judgment favorable to a defendant in the absence of congressional authorization.[191] The Organized Crime Control Act of 1970, however, authorized Government appeal of sentences for "dangerous special offenders."[192] That provision required the Government's appeal to be filed no later than five days before expiration of the period allowed the defendant to file an appeal; thus, in all cases, the Government appeal would be filed before the defendant's conviction could become final.[193] In DiFrancesco's case, the Government appealed his sentence, claiming that the district judge abused his discretion by sentencing DiFrancesco to an erroneously lenient term of imprisonment under the Act's enhanced sentencing provision for "dangerous special offenders."[194]

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[185] *Id*. at 166.

[186] *Id.* at 167 n.2.

[187] *Id.*

[188] *See supra* note 176 and accompanying text.

[189] *Bozza*, 330 U.S. at 166.

[190] 449 U.S. 117, 134-35 (1980).

[191] United States v. Sanges, 144 U.S. 310, 318 (1892).

[192] *DiFrancesco*, 449 U.S. at 118-21, 120 n.2 (citing Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (codified at 18 U.S.C. §§ 3575-3576 (1970))).

[193] *Id.*

[194] *Id.* at 125.

The *Benz* dictum, which implied a limitation on a court's power to modify a sentence to increase the severity of punishment, had to be resolved because DiFrancesco's sentence, unlike Bozza's, was a legal one. And the *DiFrancesco* Court resolved it this way: "The holding in *Lange*, and thus the dictum in *Benz*, are not susceptible of general application. We confine the dictum in *Benz* to *Lange*'s specific context."[195] The narrow holding of *DiFrancesco* is thus that an authorized government appeal of a sentence does not constitute double jeopardy or multiple punishments.[196] Implicit in *DiFrancesco*'s narrow holding is that an upward resentencing would not violate the Double Jeopardy Clause if the Government won on direct appeal. But what about the more typical situation when it is the defendant who seeks review of a sentence after the appellate process has fully run its course? Or what about the increasingly common situation in which the Government seeks resentencing to correct an illegally lenient sentence after all appellate rights have expired? What would be the governing principle to control the more general case once the *Benz* dictum is limited to its facts and the narrow holding in *Lange*—i.e., where the resentencing reduced the punishment or the defendant had already fully executed a lawful sentence?

In its analysis of double jeopardy limitations on sentence modification, the *DiFrancesco* Court observed that the degree of finality required by the Double Jeopardy Clause depends on the type of judgment in question. The Court stressed that an acquittal is different from an appeal of a sentence because "a sentence does not have the qualities of constitutional finality that attend an acquittal."[197] But this is different, of course, from saying that a sentence does not have *any* qualities of constitutional finality. Indeed, consider the examples the Court gave where the Double Jeopardy Clause permits a later sentencing order to increase the severity of the original punishment. The Court cited with approval lower court cases holding that revoking probation to impose imprisonment instead did not violate double jeopardy.[198] The Court has held that a state may authorize appeal of a master's decision in a juvenile case to a juvenile judge for the purpose of obtaining a more severe adjudication.[199] Likewise, there is no jeopardy bar to imposing a more severe sentence after a defendant secures a reversal of his conviction on appeal and is again convicted

[195] *Id.* at 139.

[196] *Id.* (stating that because the appeal was authorized under §§ 3575 and 3576 it did not invoke problems of multiple punishment).

[197] *Id.* at 134.

[198] *Id.* at 137 (citing United States v. Walden, 578 F.2d 966, 972 (3d Cir. 1978), *cert. denied*, 444 U.S. 849 (1979); United States v. Kuck, 573 F.2d 25 (10th Cir. 1978); Dunn v. United States, 561 F.2d 259 (D.C. Cir. 1977); United States v. Jones, 540 F.2d 465 (10th Cir. 1976), *cert. denied*, 429 U.S. 1101 (1977); Thomas v. United States, 327 F.2d 795 (10th Cir. 1964), *cert. denied*, 377 U.S. 1000 (1964)).

[199] Swisher v. Brady, 438 U.S. 204, 219 (1978) (holding that revoking probation to impose imprisonment in a juvenile case did not violate the Double Jeopardy Clause).

of the offense.[200] What ties these doctrines together is that, in each category, the defendant is on notice that the sentence is not final.

These precedents teach that the principal value served by double jeopardy is finality. Why has English law for almost 1000 years forbidden a second trial after conviction or acquittal for the same offense?[201] The answer is elegant and explains why double jeopardy principles appear in the writings of ancient Greek philosophers.[202] A defendant who has been acquitted or convicted deserves to live the rest of his life without being burdened by the threat of a new trial or new punishment for the same offense. It is the same principle of finality that underlies the prohibition of ex post facto laws, statutes of limitations, and the civil doctrine of res judicata. It also explains *Lange*—having fully executed one of the alternative penalties for his offense, he could rely on being quit with the law for that conduct. Finality inheres in a sentence that the defendant understands to be final but not in one that is subject to change, either by the defendant or the Government. Furthermore, the Supreme Court understands its *DiFrancesco* holding to be about finality, as it explained in a later case: "In *DiFrancesco* a federal statute clearly allowed the appellate review of the sentences at issue. The Court noted that, in light of that statute, the defendant could not claim any expectation of finality in his original sentencing."[203]

Defendants who are appealing their conviction, defendants who know that their probation comes with conditions that can result in imprisonment, and defendants who know the Government is appealing their sentence can have no legitimate expectation of finality in the initial sentence. Contrast those defendants with a defendant who has begun serving his sentence and is thus, in effect, relying on it. Such a defendant was Carl Fogel, who pleaded guilty to embezzlement in 1986.[204] Fogel received an unusual (but not void) sentence from the trial court, which imposed a punishment including house arrest subject to a series of narrowly tailored travel restrictions.[205] After Fogel had complied with certain aspects of his sentence, including an order to contact the probation office and pay a fine, the judge announced that he had "made a mistake" and resentenced Fogel to a more traditional form of probation that triggered a three-to-five-year prison term for violating the probation conditions.[206]

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[200] North Carolina v. Pearce, 395 U.S. 711, 711 (1969).

[201] *See* GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 76-79 (1998) (describing the history of double jeopardy in twelfth-century England).

[202] In 355 B.C., Demosthenes wrote that the "laws forbid the same man to be tried twice on the same issue . . . ." DEMOSTHENES, 1 ORATIONS 20.147 (J.H. Vince trans., 1930).

[203] Pennsylvania v. Goldhammer, 474 U.S. 28, 30 (1985).

[204] United States v. Fogel, 829 F.2d 77, 79 (D.C. Cir. 1987).

[205] *Id.* at 80.

[206] *Id.*

Only ten days had passed between the court's entry of the original sentence and the new sentence, and Fogel had yet to fully execute his sentence in the way Lange did his.[207] But the D.C. Circuit, in an opinion by Judge Bork, drew principles from *DiFrancesco* that supported finding a double jeopardy violation in the resentencing. Bork derived from the *DiFrancesco* opinion that:

> [T]he application of the double jeopardy clause to an increase in a sentence turns on the extent and legitimacy of a defendant's expectation of finality in that sentence. If a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited by the double jeopardy clause. If, however, there is some circumstance which undermines the legitimacy of that expectation, then a court may permissibly increase the sentence.[208]

Applying that principle to *Fogel*, the court held that double jeopardy prohibited the second sentencing. It began by noting that the increase in the sentence was not required, as in *Bozza*, to bring the sentence in compliance with a statute.[209] The court noted that the "statutes relevant to appellant's sentence" did not permit the sentence to "be increased by the court."[210] Then it continued:

> The increase in the original sentence is also not predicated on any action taken by the appellant. The appellant did not appeal his conviction. Nor did he challenge the original sentence. To the contrary, the appellant proceeded to serve the sentence as if it were final in all respects. The appellant paid the fine in full, reported to a probation officer, and executed the terms and conditions of his probation. Appellant had no reason to believe that the district court could, on its own motion and without explanation, increase the length of his sentence.[211]

A parochial reading of *DiFrancesco*, as is too often evident from many of the thousands of subsequent opinions that cite or discuss it, might support a narrow proposition that double jeopardy simply does not apply to resentencing, even if the new sentence imposes a harsher punishment. In stark contrast to that narrow reading of *DiFrancesco*, however, the *Fogel* court understood the broader constitutional principles that explain why the Court's limitation of double jeopardy protection in *DiFrancesco*, under the specific facts presented

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[207] *See id.*

[208] *Id.* at 87.

[209] *Id.* at 82 ("Though the original sentence may have been ambiguous, there is no support for the proposition that it was void.").

[210] *Id.* at 88. Indeed, the D.C. Code of Procedure in effect at the time permitted trial courts to correct sentences only if they were "illegal" or "imposed in an illegal manner." D.C. CT. R. ANN. 35(a) (1986). Judge Bork concluded that the original sentence was "partly illegal" and could have been corrected by noting that the court was suspending execution of the sentence. *Fogel*, 829 F.2d at 82. What the court could not do under Rule 35 was impose a more severe sentence.

[211] *Fogel*, 829 F.2d at 89.

in that case, must also imply a more expansive scope of double jeopardy protection in other resentencing contexts. *Fogel* teaches that, implicit in nearly every facet of *DiFrancesco*'s detailed articulation of limitations constraining double jeopardy protection when the Government has a right to appeal a sentence, is a more fundamental requirement that protects a defendant's legitimate expectation of finality in criminal sentencing. The brilliance of *Fogel*'s analysis is that, although at first glance *DiFrancesco* appears to permit Fogel's resentencing, a nuanced understanding of *why* DiFrancesco lost his case—i.e., because he had no reasonable basis for relying on the finality of his sentence so long as the Government possessed statutory authority to challenge it—reveals a powerful source of protection against resentencing under double jeopardy in other contexts where the defendant has acquired a legitimate expectation of finality.[212]

At least one state supreme court has followed this approach to prohibit correction of an uncompleted sentence of probation. In *Commonwealth v. Selavka*,[213] the defendant was convicted of a sexual offense for which there was a statutory requirement of probation accompanied by mandatory GPS monitoring.[214] The original sentence of seven years' probation did not contain the required GPS monitoring provision, and the Massachusetts Supreme Judicial Court held that it would violate double jeopardy to correct the sentence to add the GPS monitoring condition after the defendant had served one year of the seven-year probation sentence.[215] The court explained that the State sought to correct the error only after the sixty-day period for error correction under the court's procedural rules had expired, by which time the defendant's expectation of finality had "crystallized," so double jeopardy prohibited resentencing a year later to impose a harsher penalty (i.e., more severe restriction on probationary release).[216]

We are now armed with principles that will allow us to explain, and critique, the universe of lower court resentencing cases arising from judicial error that turned up in our research. First, if a lawful sentence has been fully executed, double jeopardy prohibits a new sentencing (*Lange*). Second, a sentence can be reduced at any time without violating double jeopardy (*Benz*). Third, and this is the new principle that can be inferred from *DiFrancesco*, a defendant who has done nothing to upset a sentence acquires a legitimate expectation of finality after the time for any government appeal or motion to correct a sentence has passed. A fourth principle is implied by the first three: if there is

[212] *Id.* at 87 ("If the Court in *DiFrancesco* had meant to hold that a defendant has no interest in the finality of his sentence, under any circumstances, then the Court's discussion of the defendant's awareness of the potential increase in the sentence would have been unnecessary.").

[213] 14 N.E.3d 933 (Mass. 2014).

[214] *Id.* at 936.

[215] *Id.* at 945.

[216] *Id.* at 944.

no judicial resentencing, and if an error made by the parole commission or other administrative agency, for example, is simply corrected, there are no double jeopardy implications; there can be no double jeopardy without a second judicial sentencing. Fifth, an illegal sentence may be corrected during the statutory period for sentence correction, or as long as appeals are still permitted. Some lower courts read *Bozza* to permit an illegal sentence to be corrected at any time, but we will seek to show that this not only reads *Bozza* too broadly but also is flatly inconsistent with the *DiFrancesco* analytical structure that stresses the importance of finality when a sentence is no longer subject to review. A sixth principle is necessary for those courts who read *Bozza* broadly: A defendant who has been released from prison cannot be resentenced even if his original sentence was illegal, as long as appeal is no longer possible. A defendant's release from prison reflects significant indicia of finality on which one should be entitled to rely.

These principles explain most of the cases in our research universe; the ones that the principles do not explain, we will argue, are wrongly decided. We begin by showing that the double jeopardy analysis is both more straight forward and more precise than the due process analysis. Consider, for example, *DeWitt v. Ventetoulo*.[217] In 1978, following convictions for assault with intent to murder, robbery, and arson, DeWitt was sentenced to life in prison.[218] In 1981, while serving his term in prison, the trial court issued a new sentence that suspended all but fifteen years of DeWitt's original life sentence and accelerated parole eligibility by sixteen months as a reward for aiding a prison guard who was being attacked and then testifying against the attacker.[219] DeWitt was eventually paroled early under the new sentence, but soon after release, he was involved in a violent fight with his former landlord.[220] Rather than seek revocation of DeWitt's parole, the State moved to vacate the 1981 sentencing order in its entirety and reimpose the original life sentence.[221] The state court judge granted the prosecution's motion, but DeWitt then asserted a successful federal habeas claim in district court.[222] The State appealed the grant of habeas relief to the First Circuit, which analyzed DeWitt's challenge as a due process violation.[223] In its attempt to apply and constrain the highly malleable doctrine of substantive due process, the court conjured up a rough enumeration of factors and principles to frame its analysis:

> In our view, there is no single touchstone for making this judgment, nor any multi-part formula. Rather, drawing on considerations mentioned by cases like *Breest* and suggested by common sense, we think that

[217] 6 F.3d 32 (1st Cir. 1993).

[218] *Id.* at 33.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.* at 34.

[223] *Id.*

> attention must be given—our list is not exclusive—to the lapse of time between the mistake and the attempted increase in sentence, to whether or not the defendant contributed to the mistake and the reasonableness of his intervening expectations, to the prejudice worked by a later change, and to the diligence exercised by the state in seeking the change. To be sure, doctrine should evolve *toward* yardsticks and formulas, making law more predictable and reducing the need for *ad hoc* decisions by judges. But that is the end point of the journey, and we are at the beginning.[224]

As we saw in Part II, the First Circuit ultimately concluded that the state court's resentencing violated due process, but we believe the question could have been resolved much more simply under the Double Jeopardy Clause: DeWitt's original punishment was reduced pursuant to a lawful resentencing order and the State did not challenge the new sentence.[225] That 1981 resentencing order therefore became DeWitt's new and final sentence, so he should have been permitted to rely on his expectation of finality in the sentence as modified. By subsequently vacating the 1981 sentence and, in its place, imposing a harsher punishment (another life sentence), the state court violated the constitutional ban on double jeopardy.

In *United States v. Campbell*,[226] the defendant was convicted on federal charges relating to the distribution of crack cocaine.[227] The then-applicable Sentencing Guidelines required a sentence of not less than twenty years for a defendant in Campbell's situation.[228] The trial court departed downward from the statutory minimum sentence on grounds that such a severe punishment would be cruel and unusual when applied to Campbell, who was an addict.[229] The district court imposed a sentence of thirty-three months, but on appeal, the D.C. Circuit vacated the illegally lenient sentence, rejected the district court's Eighth Amendment argument, and remanded for sentencing in accordance with the twenty-year statutory minimum.[230] However, by the time the case had been remanded to the district court for resentencing, Campbell had served the entire original sentence of thirty-three months and remained in federal custody on a "post-conviction/pre-sentencing status."[231] On remand, Campbell argued that correction of the original sentencing error and imposition of the twenty-year mandatory minimum punishment would violate due process.[232] In rejecting Campbell's due process claim on remand, the district court searched (in vain,

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[224] *Id.* at 35.

[225] *See id.* at 32.

[226] 985 F. Supp. 158 (D.D.C. 1997), *aff'd*, 172 F.3d 921 (D.C. Cir. 1998).

[227] *Id.* at 158 ("[The] jury convicted [the defendant] of one count of conspiracy to distribute 50 grams or more of cocaine base.").

[228] *See id.* at 158-59.

[229] *Id.* at 159.

[230] *Id.*

[231] *Id.*

[232] *Id.*

in our view) for an articulable legal standard to apply substantive due process: "While the courts agree that this limitation ['on the power of the trial court to enhance punishment by resentencing after the defendant's commencement of service'] is grounded in notions of due process, they have not defined its contours with precision."[233]

The district court held that Campbell could not have formed "crystallized" expectations of finality because he "was aware from the very moment of sentencing that the Court's decision to depart downward so radically from the statutory mandatory minimum sentence was considered by government counsel to be most unusual and would be immediately challenged by the United States."[234] Though replacing thirty-three months with twenty years seems unfair to us, our perception of unfairness most likely reflects an objection to the extreme harshness of a twenty-year punishment for this type of drug offense. We have no quarrel with the court's view that there was no legitimate expectation of finality in the original sentence because Campbell was aware of the Government appeal from the outset. But had the court evaluated Campbell's challenge under double jeopardy principles, it would have found a simpler, more direct path to the same result: under *DiFrancesco*, Campbell lacked a valid double jeopardy claim because he had no expectation of finality as to the erroneously lenient sentence pending the Government's appeal.

In *Beliles v. State*,[235] the defendant was convicted of dealing cocaine after entering a negotiated written plea agreement that included the statutory maximum sentence of twenty years' imprisonment with six years suspended, fourteen years executed.[236] The court, however, incorrectly entered a sentence of twenty years with fourteen years suspended, six years executed.[237] Less than a month later, and outside the presence of the parties, the judge corrected the sentence to reflect the terms of the plea agreement, but the court did not notify Beliles or the Department of Correction of its resentencing order.[238] Unaware of the modification, Beliles then served three years in prison, after which he became eligible for early release under the state's "2 for 1 good time credit" formula.[239] Shortly before his official release date, Beliles was placed in a work release center outside the prison in anticipation of the completion of his sentence; this placement enabled him to secure employment and begin

[233] *Id.* at 160 (quoting United States v. Lundien, 769 F.2d 981, 986 (4th Cir. 1985)) (first citing DeWitt v. Ventetoulo, 6 F.3d 32, 34-35 (1st Cir. 1993); then citing Lundien, 769 F.2d at 986).

[234] *Id.*

[235] 663 N.E.2d 1168 (Ind. Ct. App. 1996).

[236] *Id.* at 1170.

[237] *Id.*

[238] *Id.*

[239] *Id.*

arranging for housing and the purchase of a car for after his release.[240] But at around the same time, the presiding trial judge entered a new abstract of judgment imposing an executed imprisonment term of fourteen years in accordance with the original written plea agreement.[241] Beliles received notice of the court's resentencing when he was arrested at the work release center and returned to prison.[242]

As we saw in Part II, the court analyzed Beliles's challenge to the validity of his resentencing under principles of due process and sought to balance what it considered the equitable factors favoring or disfavoring release. The court concluded that the equities did not favor Beliles's claim for release because he bargained for the longer sentence that he ultimately received and therefore could not demonstrate "prejudice beyond frustrated expectations."[243] This is perhaps the correct result, but the court's analysis depends entirely on its subjective identification and balancing of equitable factors unconstrained by an objective legal standard. By contrast, the finality principles underlying double jeopardy would have provided a more objective and transparent basis for adjudicating Beliles's challenge. For double jeopardy, the analysis is indeed simple. The defendant was on notice of the intended sentence because of the written plea deal. He simply could not have a legitimate expectation of finality in the erroneous sentence because he was aware of the leniency error from the outset.

In contrast to the problems of subjectivity and unpredictability of judicial tests applying substantive due process in this context, the simplicity of the double jeopardy finality principle has proven an effective counter to the simple (but, in our view, flawed) argument of prosecutors that an illegal sentence failing to conform to a statutory requirement is void ab initio and can be corrected at almost any time subsequent. For example, in *Stewart v. Scully*,[244] Stewart was convicted of attempted murder in a New York state court and bargained for a sentence of ten to twenty years, which the court accepted and entered.[245] Three years later, Stewart discovered that the minimum term of ten years was illegally severe because, under New York law, the minimum term could not exceed a third of the maximum (here, the proper minimum term could not exceed six and two-thirds years).[246] Stewart filed a motion to set aside his sentence, which the judge granted, but the judge then resentenced him

[240] *Id.*

[241] *Id.* at 1170-71.

[242] *Id.* at 1171.

[243] *Id.* at 1173 ("[I]n the present case, the 'sword' which hung over Beliles' head while he was in prison properly serving his sentence consisted of the chance that the error in the sentencing order would be corrected depriving him of the windfall of a shorter executed sentence than the one he had bargained for under his plea agreement.").

[244] 925 F.2d 58 (2d Cir. 1991).

[245] *Id.* at 59.

[246] *Id.* at 59-60.

to a statutorily compliant but more severe punishment of eight to twenty-four years.[247] The New York Appellate Division upheld the longer sentence on the theory that Stewart's only option was to withdraw his guilty plea, vacate the conviction with the illegal sentence, and proceed to trial anew. In Stewart's federal habeas proceeding, however, the Second Circuit Court of Appeals held that the Double Jeopardy Clause forbade a resentencing to a maximum sentence of more than twenty years.[248] In effect, the Second Circuit subdivided Stewart's attack on his sentence and held that he could challenge the erroneously severe minimum term without disturbing the protected expectation of finality in the originally imposed maximum term. The court remanded with instructions that the writ of habeas corpus be granted unless Stewart was sentenced to a maximum that did not exceed twenty years.[249]

Warner v. United States[250] presented a similar issue, although outside the context of judicial sentencing error.[251] Warner was sentenced to concurrent prison terms of seventy-eight months for two drug crimes and to a consecutive five-year term for the offense of using a firearm in the commission of those crimes.[252] Six years later, the Supreme Court decided in *Bailey v. United States*[253] that the "use of a firearm" statutory sentencing enhancer required that the firearm be actually used, not just be available for use.[254] Warner filed a federal habeas corpus petition asking that the conviction for the firearm use offense be vacated.[255] The Government conceded that Warner did not use a firearm and that the use conviction must be vacated.[256] It asked the district court, however, to resentence Warner to longer terms for the drug crimes.[257] The district court refused.[258]

Even though Warner challenged his conviction for using a firearm, he did not appeal his sentences for the drug crimes and thus, like Stewart, retained his expectation of finality in those sentences. In the words of the district court: "[W]hile it is true that a defendant cannot be said to have a legitimate expectation of finality in his sentence when he directly challenges either his sentence or the conviction from which it derives, it must be remembered that

[247] *Id.* at 60-61.

[248] *Id.* at 65.

[249] *Id.*

[250] 926 F. Supp. 1387 (E.D. Ark. 1996).

[251] *Id.* at 1390.

[252] *Id*.

[253] 516 U.S. 137 (1995).

[254] *Id.* at 150.

[255] *Warner*, 926 F. Supp. at 1390 ("In his present . . . motion, defendant argues that his conviction . . . cannot stand in light of the Supreme Court's recent decision in *Bailey v. United States*." (citation omitted)).

[256] *Id.* at 1391.

[257] *Id.*

[258] *Id.* at 1392.

defendant has not, in the present motion, mounted any attack upon his Drug-Related Convictions or sentences."[259] As an additional ground for finding that Warner had a legitimate expectation of finality in his sentences for the drug offenses, the court noted that he had already completed those sentences and was serving the sentence for the use of firearm conviction at the time of his habeas petition.[260]

Lower courts, however, do not always follow *Fogel*'s interpretation of *DiFrancesco*. *Baker v. Barbo*,[261] for example, illustrates a narrower conception of the limiting principle derived from *DiFrancesco* and *Bozza*.[262] After conviction in state court of two serious felonies, Baker was sentenced to twenty-seven years' imprisonment with eleven years of parole ineligibility.[263] None of the parties at the time of sentencing knew that state law had been recently amended to require a twenty-five-year term of parole ineligibility for one of Baker's offenses.[264] Baker appealed his conviction, and the State, having discovered the amended sentencing provision, cross-appealed raising the sentencing error.[265] The trial judge resentenced to twenty-five years with twenty-five years of parole ineligibility.[266] In denying Baker's federal habeas petition, the Third Circuit held that the constitutional expectation of finality did not apply because Baker's appeals were still ongoing.[267] The holding is correct, but the court muddied the waters when it cited with approval language from its own earlier opinion in *United States v. Busic*[268]: "Nothing in the history or policy of the [Double Jeopardy Clause] suggests that its purposes included protecting the finality of a sentence and thereby barring resentencing to correct a sentence entered illegally or erroneously."[269]

The Third Circuit's dictum suggests that a defendant could never win a double jeopardy claim based on a resentencing. This dictum is squarely at odds with the D.C. Circuit's opinion in *Fogel* that reads *DiFrancesco* to permit defendants who have a legitimate expectation of finality in the original sentence to win double jeopardy claims.

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[259] *Id.* at 1393 (citation omitted).

[260] *Id.* at 1394 ("[D]efendant has . . . completed the (assumedly) lawful sentence imposed upon him for his Drug-Related Convictions, and it cannot . . . be gainsaid that a defendant enjoys a legitimate expectation of finality in a term of incarceration which was lawfully imposed upon him at the time of sentencing . . . ." (footnote omitted)).

[261] 177 F.3d 149 (3d Cir. 1999).

[262] *Id.* at 157.

[263] *Id.* at 152.

[264] *Id.* at 151-52.

[265] *Id.* at 152.

[266] *Id.* at 153.

[267] *Id.* at 158.

[268] 639 F.2d 940, 948 (3d Cir. 1981).

[269] *Baker*, 177 F.3d at 157 (quoting *Busic*, 639 F.2d at 948).

Other courts apply a narrow construction of double jeopardy that does not extend constitutional protection to the finality of criminal sentencing. For example, compare *Fogel* to the Ohio Supreme Court's approach in *State v. Simpkins*,[270] in which the defendant pled guilty in exchange for an agreed upon term of eight years.[271] The sentence included no mention of postrelease control even though the statute required it.[272] Seven years later, when Simpkins was near the eve of his release from prison, the court issued a newly corrected sentence including the mandated penalty of postrelease control.[273] The Ohio Supreme Court held that there was no violation of double jeopardy:

> We hold that in cases in which a defendant is convicted of, or pleads guilty to, an offense for which postrelease control is required but not properly included in the sentence, the sentence is void, and the state is entitled to a new sentencing hearing to have postrelease control imposed on the defendant unless the defendant has completed his sentence.[274]

The state court read *DiFrancesco* narrowly and contended: "Where, as here, the sentence imposed was unlawful and thus void, there can be no reasonable, legitimate expectation of finality in it."[275] The underlying assumption is that the defendant is somehow on notice that his sentence was illegal even though the judge and the prosecutor were unaware of the defect, an assumption that takes formalism too far in our view. We think Justice Lanzinger's dissent in *Simpkins* offers a better approach. Justice Lanzinger argued that Ohio law has drawn a distinction between a void judgment, one that is without the jurisdiction of the court, and a voidable judgment that gives the State an automatic right of appeal.[276] But in a case where the State fails to appeal, she concluded, a defendant has a right to rely on the judgment.[277] We think this approach is compelled by *DiFrancesco*. If a defendant who has served seven years of an eight-year term is not entitled to rely on that sentence, it is hard to imagine who would be.

The Minnesota Supreme Court made the same mistake in *State v. Humes*.[278] Humes was sentenced in 1994 to a thirty-four-month prison sentence, which was subsequently stayed, and he was put on probation.[279] Humes violated the conditions of his probation, however, and in 1996 the trial court revoked his

[270] 884 N.E.2d 568 (Ohio 2008).

[271] *Id.* at 571.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 572.

[275] *Id.* at 577.

[276] *Id.* at 578 (Lanzinger, J., dissenting).

[277] *Id.* at 579-80.

[278] 581 N.W.2d 317 (Minn. 1998).

[279] *Id.* at 318.

probation and executed his sentence.[280] About six months later, a prison administrator wrote the court asking whether it had intended to impose a conditional release term in defendant's sentence, as required by statute.[281] The court wrote back saying "that it was the court's intention to include a five-year conditional release term in Humes' sentence and requesting computations to Humes's sentence on this basis."[282] The prison administrator recomputed the sentence to include a conditional release term and the judge imposed the new sentence.[283] Neither Humes nor the State appealed his sentence. Assuming the time for appeal had passed, *Humes* is an example of a court reading *Bozza* too broadly. The court cited *Bozza* for the principle that "double jeopardy guarantees are generally not violated when a district court corrects an unauthorized sentence, even if the sentence is increased."[284] But that is not the narrow holding in *Bozza* because the sentence there was corrected five hours after it was entered, not months or years later. It seems to us, as we argued in connection with *Simpkins*, that a defendant has a legitimate expectation of finality in a sentence on which he is relying, even an illegal one, once the time for the State to appeal has expired.

Compare *Humes* and *Simpkins* with *State v. Redhouse*,[285] where the issue was whether the convicted driving while intoxicated ("DWI") defendant should be sentenced as a habitual offender.[286] On December 3, the trial judge held that two prior DWI convictions could not be used in the habitual offender calculation because the defendant had not been represented by counsel in those cases.[287] Before sentencing Redhouse as a nonhabitual offender, the judge asked the State if it wanted to contest that finding of law, and the prosecutor declined.[288] To the extent the judge was relying on the Sixth Amendment, his judgment was incorrect; *Nichols v. United States*[289] permits uncounseled convictions to be used to enhance sentences.[290] Six days later, evidently having discovered *Nichols*, the prosecutor changed his mind and moved for reconsideration, arguing that "the district court made a mistake of law when it

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.* at 320.

[285] 269 P.3d 8 (N.M. Ct. App. 2011).

[286] *Id.* at 10.

[287] *Id.*

[288] *Id.*

[289] 511 U.S. 738 (1994).

[290] *Id.* ("[A] sentencing court may consider a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense so long as the previous uncounseled misdemeanor conviction did not result in a sentence of imprisonment.").

concluded that the DWI convictions from 1972 and 1973 could not be used for enhancement purposes."[291]

The trial judge ultimately agreed and resentenced Redhouse to a term that was seventy-one days longer than her original sentence.[292] She appealed, arguing "that she had an expectation of finality in the sentence imposed on December 3, 2009, prior to any reconsideration and subsequent amendment by the district court resulting in a double jeopardy violation."[293] Without mentioning *Bozza* or *DiFrancesco*, the New Mexico Court of Appeals held that sentences can be adjusted upward if they are "illegal or improper" and that Redhouse's sentence was illegal since the earlier convictions could, as a matter of law, be used to enhance her latest sentence.[294] The court concluded that the State had the right to appeal the original sentence and, if it could appeal, it could move for reconsideration.[295] That destroyed the defendant's expectation of finality in her original sentence. "Because the State expeditiously sought to have the district court correct its legal determination that the 1972 DWI conviction could not be used to enhance the current DWI, Defendant had no reasonable expectation of finality in the sentence entered on December 3, 2009."[296] This is consistent with our statement of the *Bozza* principle and our understanding of the *DiFrancesco* framework.

There is a category of cases that rejects our reading of *Bozza* as limiting the time for error correction to the expiration of the State's right to appeal or move for correction, and instead, posits an alternative double jeopardy principle—that defendants have a legitimate expectation of finality even in an erroneous sentence once they are released from prison. We already saw the Ohio approach to *Bozza* in *State v. Simpkins*, holding that a failure to order a term of postrelease control, required by statute, could be corrected by resentencing to a harsher penalty even though the defendant had served seven years of his eight-year term. New York courts have taken the same approach to *Bozza*, holding that courts can correct illegal sentences by resentencing defendants at any time during the term of imprisonment, even if this is long after the time for appeal has expired.[297]

But Ohio and New York courts could not face the full consequences of their approach. In *State v. Holdcroft*,[298] the Ohio Supreme Court noted: "This court has consistently and repeatedly held that a trial court loses jurisdiction to resentence a defendant for the purpose of imposing postrelease control once

[291] *Redhouse*, 269 P.3d at 10.

[292] *Id.*

[293] *Id.*

[294] *Id.* at 11.

[295] *Id.* at 12 ("Thus, Defendant's constitutional guarantee against double jeopardy was not violated when the State expeditiously filed a motion for reconsideration . . . .").

[296] *Id.*

[297] People v. Sparber, 889 N.E.2d 459, 466 (N.Y. 2008).

[298] 1 N.E.3d 382 (Ohio 2013).

the defendant has served his entire sentence of incarceration."[299] Similarly, the New York Court of Appeals, after reaffirming its view that illegal sentences can be corrected even after the period for the State to appeal has expired, went on to "conclude that, after release from prison, a legitimate expectation in the finality of a sentence arises and the Double Jeopardy Clause prevents reformation to attach a PRS component to the original completed sentence."[300] Other states are in accord with the general principle that, once a defendant has fully executed service of an illegally lenient sentence, the protection against double jeopardy forbids resentencing to a harsher punishment.[301]

The New Jersey Supreme Court, in approving New York's double jeopardy prohibition of resentencing a defendant after his release from prison, evaluated the reasonableness of the defendant's expectation of finality by examining the defendant's conduct in the underlying criminal litigation, which revealed no culpability on the defendant's part for the court's failure to impose the omitted penalty.[302] New Jersey's elaboration inquiring into the defendant's knowledge of and culpability for the court's failure to include an omitted penalty would narrow the double jeopardy protection but appears consistent with our reading of *DiFrancesco*, which measured the reasonableness of the defendant's expectation of finality in relation to the defendant's knowledge (or presumed knowledge) of the law allowing the State to appeal the sentence. If the defendant's knowledge of the law is a factor in determining whether he has acquired a reasonable expectation of finality, a defendant who possesses actual knowledge that his sentence is illegally lenient and does not inform the court of the error at the time of sentencing would seem to have a weaker basis for asserting a legitimate interest in finality.

We have no quarrel with the proposition that a defendant who has been released from prison, perhaps years ago, and who has re-established roots in the community has a greater expectation of finality in his sentence than a defendant who is still serving his sentence. But we would argue that a defendant like Simpkins, who has served seven years of his eight-year term of imprisonment, also has a compelling argument for an expectation of finality in his original sentence on which he was relying. Thus, we prefer the narrow holding in *Bozza*—that, assuming the defendant is not still appealing his conviction or sentence, an illegally lenient sentence can be corrected only until

[299] *Id.* at 385.

[300] People v. Williams, 925 N.E.2d 878, 889 (N.Y. 2010).

[301] *See, e.g.*, Sneed v. State, 749 So. 2d 545, 546 (Fla. Dist. Ct. App. 2000); State v. Houston, No. 09-1623, 2010 Iowa App. LEXIS 1546, at *5 (Iowa Ct. App. Dec. 8, 2010).

[302] State v. Schubert, 53 A.3d 1210, 1220 (N.J. 2012) ("We fail to see how it could be said that defendant, at least by the time he was discharged from probation, did not have a legitimate expectation of finality in his sentence. If there was some indication in this record that either defendant or his attorney had engaged in some effort to mislead the court with respect to omitting community supervision for life from defendant's sentence, we would agree that any expectation of finality defendant might have achieved would not be a legitimate one. The record before us contains not a hint, however, of such a devious plot.").

the State's right to appeal the sentence has expired. That is a bright line and one that fits nicely with the Supreme Court's approach to *DiFrancesco*; the key fact in that case, after all, was the Government's right to appeal. Take that away, as happened in *Fogel*, and the argument for correcting even an illegal sentence is considerably weakened.

One category of mistakes about sentencing has nothing to do with judicial sentencing—mistakes by parole boards in calculating release time. A notable case in that category is *Hawkins v. Freeman*,[303] where twenty months after Hawkins was released on parole, the North Carolina Parole Commission discovered that it had miscalculated his release date.[304] He was not eligible for release at the time he was discharged from prison or even at the time the mistake was discovered.[305] The commission revoked his parole and ordered his reincarceration.[306] Hawkins challenged the order on the grounds that it violated his due process liberty interest.[307] After losing in state court, a divided panel in the Fourth Circuit Court of Appeals granted his habeas corpus petition.[308] But an en banc Fourth Circuit rejected his claim, with only one dissenting judge.[309] Whatever the right outcome under due process theory, there can be no successful double jeopardy claim because there was but one sentencing. The decision of the parole commission is not a judicial act.

And what about our friend, the Alabama defendant who turned a forty-year sentence into a sixty-year sentence by seeking further postconviction review seventeen years after the court imposed his forty-year sentence? According to the Alabama Court of Appeals, he challenged the reduced sentence on the ground "that the trial court lacked jurisdiction to reduce his sentence and that his reduced sentence was therefore illegal because, he said, he was not present at the hearing . . . when his sentence was reduced."[310] The opinion offers no explanation for why Bryant would seek to invalidate his reduced sentence (the perils of self-representation and "jailhouse" lawyering); perhaps he thought if he got that sentence vacated, he could walk out of the courthouse a free man. Instead, as we saw earlier, the State agreed that the reduced sentence was illegal because it was entered after the period for moving for a change in sentencing had expired. For his efforts, Bryant wound up with his original sixty-year sentence. Whatever the right outcome under the malleable due process test (he had, after all, served seventeen years of the forty year sentence), Bryant loses under our interpretation of *DiFrancesco*. Rather than rely on his reduced sentence, he brought it into play by challenging it. He can

[303] 195 F.3d 732 (4th Cir. 1999) (en banc).

[304] *Id.* at 737.

[305] *Id.*

[306] *Id.*

[307] *Id.*

[308] *Id.* at 737-38.

[309] *Id.* at 750.

[310] Bryant v. State, 29 So. 3d 928, 931 (Ala. Crim. App. 2009).

have no legitimate expectation of finality in a sentence he challenged in court as illegal.

All of this naturally leads to the case that initially piqued our interest in sentence finality, *Evans v. Beard*, with which one of us became personally familiar while clerking in the federal district court where the petitioner filed his petition for writ of habeas corpus. As we saw in Part II, Evans's original sentence double-credited time served while awaiting sentencing, thus making him eligible for parole earlier than he should have been. That mistake was corrected, at the instigation of the Department of Corrections, eleven years after sentencing. Although the Third Circuit's opinion is not clear that the sentencing judge resentenced, it does state that the Department of Corrections lacks the authority to change sentences, including any change in crediting time served.[311] The judge at some point must have signed the new Commitment Sheet, which is in effect a resentencing. This, we think, is qualitatively different from a parole board correcting a mistake it made in granting release. Evans did nothing to challenge his original sentence; he was thus entitled to rely on its finality. We think that Evans had a compelling double jeopardy claim that was not pursued by the petitioner or addressed by either the district court or court of appeals.

CONCLUSION

With complexity comes human error. This Article developed a classification system for judicial errors in sentencing. Our system predicts that errors reflecting failure to include a mandatory sentencing factor (omission error) will yield a disproportionately high frequency of leniency error cases as compared to severity error cases because the majority of omitted mandates have the effect of increasing, not decreasing, the severity of punishment. We further predict that omission error is more likely than application error to remain undetected for long periods of time because it is inherently more difficult to identify an omission (akin to an "unknown unknown") than a misapplication (akin to a "known unknown").

These error biases will tend to exhibit a compounding effect: leniency error should account for a disproportionately high frequency of omission error cases, and instances of omission error are most likely to undergo long periods of latency. This compounded effect is, of course, what leads courts to attempt to find a way to decide when it is too late to impose a penalty that should have been imposed initially. Though courts seem attracted to substantive due process as a way of analyzing lenient sentencing errors, we have shown that no principle has emerged to date to guide such an analysis. We suggested a statute of limitations as the outside period for correction consistent with due process.

But because statutes of limitation tend to be very long, and in the case of murder do not exist at all, substantive due process is a weak protection of defendants' legitimate expectations of finality in a sentence. Far better, we

[311] Evans v. Sec'y Pa. Dep't of Corr., 645 F.3d 650, 654 n.5 (3d Cir. 2011).

believe, is a double jeopardy principle that emerges from a case in which the court ruled against a defendant's claim that resentencing violated double jeopardy. As Judge Bork first realized, implicit in the rationale of *United States v. DiFrancesco*, is a simple yet powerful double jeopardy principle. If the time for appeal has passed and the defendant is relying on the finality of his sentence, the State is barred from imposing the harsher penalty that should have been imposed initially. That principle, once articulated, seems obvious. When appeals are over, and a defendant is serving his sentence, free-standing notions of finality cut strongly in favor of not permitting the sentence to be increased. When appeals are over, the case is over. Both parties should treat the judgment as final.

Public perceptions of justice and the maintenance of an orderly system of criminal justice inevitably take into account the fairness of procedures for imposing punishment. A criminal justice system in which the official record of punishment is perpetually subject to change undermines the reliability and predictability of criminal law. We believe the constitutional framework set forth in this Article can advance the goals of both sentencing accuracy and fairness to the defendant in cases of sentencing error: a constitutional limitation on resentencing in cases of leniency error would not only serve the laudable goals of justice and fairness of process, but it would also create a powerful incentive for the State to ensure the accuracy of sentencing orders at or near the time of imposition rather than long after the defendant has begun service of the sentence.