BEYOND FINALITY: HOW MAKING CRIMINAL JUDGMENTS *LESS* FINAL CAN FURTHER THE "INTERESTS OF FINALITY"

ANDREW CHONGSEH KIM*

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* Visiting Assistant Professor of Law, Washington University in St. Louis; B.A., University of Chicago (2000); J.D., Harvard Law School (2010). The author is grateful to William Stuntz for comments and inspiration. The author is additionally thankful to Laura Rosenbury, Francis X. Shen, and the members of the Washington University Junior Faculty Group for their valuable comments. The author is further indebted to Tod Stephens, Emily Danker-Feldman, Anastasia Kovalevskaya, and Marissa Ulman for invaluable research assistance.

INTRODUCTION

This Article seeks to challenge the common assumption that offering broader protections for defendants' rights in post-conviction review necessarily imposes costs on society. Courts and scholars often assume that granting convicted defendants more liberal rights to challenge their convictions and sentences necessarily inflicts significant harm to society's interests in "finality," the most prominent of which are resource conservation, efficient behavior by defense counsel, and the deterrence of crime. The extent to which convicted defendants should be allowed to challenge their judgments depends, according to the standard narrative, on how much society is willing to sacrifice those interests to validate defendants' rights. This Article argues that although expanding defendants' rights on post-conviction review makes criminal judgments less "final," it does not necessarily harm the interests "finality" presumably protects. Rather, when the financial costs of wrongful incarceration, the resource constraints on defense counsel, and the effects of legitimacy on compliance are considered, it becomes clear that granting more liberal review can often conserve state resources, is unlikely to affect the behavior of counsel, and may help reduce crime.

The assumption that defendants' post-conviction rights impose significant financial burdens on states and the federal government ignores the substantial costs of wrongful incarceration. As used in this Article, the term "wrongful incarceration" refers not only to the incarceration of innocent defendants, but also to the incarceration of guilty defendants who were convicted or given a lengthier sentence as a result of a violation of their rights. Such incarceration is in excess of that provided for by the legislature and so, this Article argues, must be considered a waste of resources. By reducing the costs of wrongful incarceration, post-conviction review can therefore help conserve state resources.

Incarceration in the United States costs an average of $30,000 per

prisoner per year. Although studies on innocence have demonstrated that *successful* post-conviction review can produce large incarceration savings, they offer little insight into how significant those savings are compared to the costs of providing the many appeals to defendants who ultimately fail to obtain relief. No study to date has attempted to compare the administrative costs of appeals to the costs of wrongful incarceration outside the capital context. An analysis of the limited data available on state direct appeals, however, suggests that the incarceration savings produced by direct appeals are quite significant compared to the administrative costs.

Roughly 20% of state defendants who appeal obtain any relief on direct appeal. By making a number of conservative assumptions, this Article estimates that successful appeals save states an average of 23 months of wrongful incarceration each. When these savings are averaged across all appeals, the average savings per appeal becomes 4.7 months. Thus, this Article concludes that the average direct appeal saves states around $11,800 in wrongful incarceration costs. This Article separately estimates that the average administrative costs of providing direct appeals, including subsequent resentencing hearings and new trials, is roughly $9,000 per appeal. Although these estimates are inherently imprecise, and so must be interpreted with caution, it suggests that the wrongful incarceration savings produced by direct appeals are quite substantial when compared to the costs of providing those appeals. Indeed, it cannot rule out the possibility that some states realize net cost *savings* by providing direct appeals. This Article argues that the failure of courts to appreciate and consider the costs of wrongful incarceration is partially the result of a problem of agency and cognitive bias in appellate decision making.

Advocates of finality argue that expanded review encourages inefficient behavior by giving defense counsel incentives to strategically "sandbag" errors and by reducing incentives on defense counsel to prevent mistakes at trial. With respect to strategic behavior, this Article argues that concerns about sandbagging are largely an illusion visible only in hindsight. Granting relief on appeal from trial errors defense counsel could have prevented appears, in hindsight, to reward and therefore encourage counsel to allow errors to occur. Granting such relief, however, can only incentivize such behavior if counsel knows, ex ante, that their client will be able to obtain relief on appeal. Because harmless error rules permit relief only from errors that had a reasonable chance of changing the outcome of a trial, the only errors that could give rise to relief on appeal are also those most likely to produce an acquittal if corrected at trial. Moreover, when an error is deemed not harmless on appeal, relief is generally limited to a new trial free from that error, which counsel could have obtained by preventing the error in the first instance. Sandbagging, therefore, would require defense counsel to

significantly increase a client's chances of conviction at trial in the hopes that after months or years of incarceration pending appeal, the sandbagged error will be deemed not harmless and give rise to a new trial. As a result, consciously allowing errors to occur at trial will rarely be a reasonable strategy.

Advocates of finality also argue that restricting relief after conviction increases incentives on defense counsel to prevent mistakes at trial, forcing them to take more care, thereby reducing trial errors. This argument, however, ignores the resource constraints that contribute to such mistakes. For defense counsel who represent their clients conscientiously, taking additional care to prevent mistakes requires spending additional time and resources on each representation. Because public defenders already are forced to ration the time and resources they spend on each client, however, it is unlikely that they would be capable of responding to restrictions on review by increasing the care they take.

Finally, this Article argues that the traditional finality deterrence arguments, which depend heavily on the assumption that prisons effectively rehabilitate offenders, have been severely undermined by social science literature. Liberalizing post-conviction review, however, could *increase* incentives to obey the law by reducing the risk of wrongful conviction. Although the effects of reduced wrongful convictions are unlikely to affect the behavior of most people, for whom the risk of wrongful conviction is already negligible, they may be significant for populations for whom the risks of profiling and false suspicion are more salient. Moreover, studies have demonstrated that the willingness of people to obey the law is influenced heavily by how "fair" or "legitimate" they perceive the legal system to be. Because many restrictions on post-conviction relief may be perceived as procedurally unfair by defendants, lifting these restrictions could actually encourage criminals and their associates to comply with the law. Although releasing more defendants on "technicalities" might have a delegitimizing effect on those with little personal contact with the justice system, this Article argues that the net effect of more liberal post-conviction review could be an overall reduction in serious crime.

This Article proceeds in three parts. Part I discusses the traditional arguments about finality and how concerns about finality and its component interests have justified a broad range of restrictions on post-conviction rights. Part II.A discusses existing critiques of finality. Part II.B offers a new conceptual critique of finality, explaining how expanding review, and thus making judgments less “final,” can sometimes further the interests *restrictions* on review are assumed to protect. Part III offers a framework for understanding and analyzing the actual effects expanded review might have on the interests of resource conservation, efficiency, and the reduction

of crime.

I. THE EVOLUTION OF "FINALITY" AS AN INTEREST TO JUSTIFY LIMITATIONS ON DEFENDANTS' POST-CONVICTION RIGHTS

Post-conviction review serves a number of important purposes in society.[1] Appellate review helps ensure that the law is applied uniformly by providing authoritative interpretations of the law and oversight of the decisions of trial courts.[2] It allows the judiciary to correct its mistakes, helping to ensure that the state does not deprive defendants of their liberty or expend valuable resources punishing the innocent, except in accordance with the law.[3] When new evidence arises that suggests a defendant was wrongfully convicted, a collateral attack on the conviction can help set an innocent person free.

Convicted defendants who seek relief from claimed errors, however, often encounter restrictions that prohibit relief from recognized errors or prevent their claims of error even from being considered on the merits. Some such restrictions are relatively non-controversial. Few would argue, for example, that a defendant who claims that a minor piece of evidence was improperly admitted should receive a new trial when the undisputed evidence, standing alone, was truly damning.[4] Reversing the conviction in such a case would waste valuable resources on a new trial, the result of which would likely be another conviction or, if the prosecutor chose not to pursue a new trial, a guilty defendant going free on a technicality. Similarly, if a defense attorney consciously decided not to present certain evidence at trial for sound strategic reasons, granting a new trial at which to present that evidence would give the defendant an unfair "second bite at the apple."[5]

Other restrictions, however, are more controversial. When a judge

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1. *See, e.g.*, David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1060-63 (2010) ("[T]he benefits [of post-conviction review] are more than the dollar value of releasing an innocent person from prison; there are also the benefits to the values of accuracy, systemic legitimacy, and professionalism."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451-54 (1963) ("[I]mportant functional and ethical purposes are served by allowing recourse to an appellate court in a unitary system, and to a federal supreme court in a federal system.").

2. Wolitz, *supra* note 1.

3. *See generally id.*

4. *See* Correll v. Thompson, 63 F.3d 1279, 1291-92 (4th Cir. 1995) (even if third confession was inadmissible, error was harmless).

5. Puckett v. United States, 556 U.S. 129, 140 (2009); s*ee* Strickland v. Washington, 466 U.S. 668, 699-700 (1984) (approving counsel's decision not to present evidence at trial concerning defendant's character and emotional state and not to present psychiatric evidence at sentencing).

calculates an improperly severe sentencing range and defense counsel fails to catch the error and object, contemporaneous objection rules often prohibit relief, even when the judge's mistake significantly lengthens the defendant's sentence.[6] Defendants who find new evidence that casts substantial doubt on their guilt are often denied a new trial if the new evidence is deemed "merely cumulative" or if there is still a 51% chance that the defendant would be found guilty again.[7] Moreover, although virtually all jurisdictions give defendants convicted at trial the right to raise claims of error on direct appeal,[8] many defendants who plead guilty are forced, either by law[9] or as a term of a plea agreement,[10] to waive their rights to appeal, even with regard to errors that may yet be undiscovered.[11]

Determining whether defendants' post-conviction rights should be expanded or restricted in a particular manner is often treated as a balancing of the importance of those rights against the "State's interest in finality."[12]

A. The Traditional "Finality" Arguments

The concept of finality as it exists in contemporary criminal law discourse grew out of a taxonomy developed in a highly influential article

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6. *See, e.g.*, United States v. Jasso, 587 F.3d 706, 708-10 (5th Cir. 2009) (no relief from trial court error that likely added five months to defendant's sentence, where the defendant failed to object during sentencing).

7. *See, e.g.*, In re Davis, 565 F.3d 810, 816-18 (11th Cir. 2009) (denying a new murder trial in spite of evidence that seven of nine eyewitnesses recanted their testimony, citing police pressure, and that the eighth witness was the actual alleged shooter).

8. Forty-seven states and the federal government provide for at least one direct appeal as of right for defendants convicted at trial in non-death penalty cases. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT ORGANIZATION 2004, at 133-36 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sco04.pdf. Although West Virginia provides only discretionary appeals, and New Hampshire and Virginia provide discretionary appeals in non-death penalty cases and as of right appeals in death penalty cases, these appeals are ensconced with "procedures that are tantamount to an appeal as of right." Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 513-14 (1992).

9. In Michigan, by state constitutional amendment, defendants who plead guilty are allowed to appeal only by leave of the court. MICH. CONST. art. 1, § 20. *See generally* Halbert v. Michigan, 545 U.S. 605, 609 (2005) (discussing the appellate rights of Michigan defendants who plead guilty).

10. *See infra* Part III.B.4.

11. *See generally* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (finding that two thirds of federal plea agreements require defendants to waive some or all of their rights to appeal including rights to appeal errors that occur at sentencing).

12 *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

by Paul Bator.[13] Although Bator's article specifically addressed the scope of federal habeas corpus for state prisoners, where issues of federalism and comity militate in favor of limited review, his arguments about the importance of finality have been applied to justify a wide range of restrictions of defendants' post-conviction rights.[14] Bator argued that allowing defendants to challenge their judgments after convictions causes several particular types of harm, the avoidance of which serves a state interest named "finality."[15] The most prominent and widely cited of these harms are the administrative costs of appeals, the incentives of defense counsel to act inefficiently, and the reduction of deterrence.[16]

The first and most often mentioned cost of offering post-conviction procedures is the administrative cost of actually providing those procedures.[17] Reviewing trial court judgments consumes the time of judges,

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13. Bator, *supra* note 1. *See* Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 509 (1996) ("Bator's article . . . has so profoundly influenced the habeas jurisprudence of the Rehnquist Court."); Erwin Chemerinsky, *The Individual Liberties within the Body of the Constitution: A Symposium: Thinking about Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 772-75 (1986-1987) (discussing the influence of finality and Bator's article on the Burger Court).

14. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 309-10 (1989) (citing finality and Bator's arguments to justify restrictions on retroactivity of new rules on habeas); Dist. Attorney's Office v. Osborne, 557 U.S. 52, 72-73 (2009) (citing "traditional notions of finality" to justify denying right to test potentially exculpatory DNA evidence); Puckett v. United States, 556 U.S. 129, 138-140 (2009) (contemporaneous objection rule necessary to avoid sandbagging and encourage efficiency); Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring) ("the burden on judicial and prosecutorial resources entailed in retrial" justifies rule of procedural default) (internal quotation and citations omitted); Lebron v. Comm'r of Corr., 876 A.2d 1178, 1191 (Conn. 2005) (citing Bator, *supra* note 1, to support argument that state habeas not available to challenge prior conviction that enhanced sentence for subsequent conviction); Cortellesso v. Commonwealth, 238 N.E.2d 516, 517-18 (Mass. 1968) (citing Bator as support for rule of procedural default on state collateral review); *Halbert*, 545 U.S. at 627 (2005) (Thomas, J., dissenting) (arguing that the state's preference for finality helps justify denial of appointed counsel to defendants who plead guilty and later petition for leave to appeal); United States v. John, 597 F.3d 263, 292 (5th Cir. 2010) (Smith, J., dissenting) (judicial efficiency can justify denial of relief from sentencing errors that increase a sentence).

15. *See generally* Bator, *supra* note 1, at 450-53.

16. Bator also argues that in addition to the primary interests of resource conservation, efficiency, and deterrence, finality serves a general role in offering societal "repose" and respect for the system. *See generally* Bator, *supra* note 1, at 450-53.

17. *See id.* at 451 (the interests of finality "run[], in the first place, in terms of conservation of resources"); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148 (1970-1971) ("Indeed, the most serious single evil with today's proliferation of collateral attack is its drain upon the resources of the community−judges, prosecutors, and attorneys appointed to aid the accused, and even of that oft overlooked necessity, courtrooms."); Chemerinsky, *supra* note 13, at 791 ("[T]he real basis for the concern over finality . . . is a desire to conserve

prosecutors, defense counsel, and support staff, as well as physical state resources like courtrooms and paper, all of which must be paid for by the state. Although defendants' rights are important, there are limits to how much the state is willing to pay to protect those rights.[18] Restrictions on post-conviction rights can often discourage defendants from appealing, reducing the total number of appeals, and can conserve judicial resources by allowing judges to dismiss many claims as procedurally barred without spending time considering the merits of the underlying claims.[19] Conversely, expanding defendants' post-conviction rights increases the number and complexity of appeals, increasing the workload of courts, prosecutors, and defense counsel.

Related to the direct costs of appeals is the concern that expanding opportunities for relief from errors after conviction reduces incentives on defense counsel to prevent and object to those errors at trial.[20] Many trial errors, such as the introduction of inadmissible evidence, violations of the terms of a plea bargain, or errors in sentencing calculations, if brought to the trial court's attention, can be easily corrected, ensuring the defendant receives a fair trial in the first instance and avoiding an unnecessary appeal.[21] Courts often argue that providing post-conviction relief reduces the incentives of defense counsel to identify and object to errors at trial, thereby increasing the number of harmful errors and avoidable appeals. Indeed, courts even argue that expanding post-conviction rights can give attorneys incentives to *intentionally* ignore errors when they occur, "sandbagging" the errors to establish grounds for an appeal in the event the

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judicial resources.") (citing Friendly, herein, and Bator, *supra* note 1); *Teague*, 489 U.S. at 310 (arguing that the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application") (quoting *Stumes*, 465 U.S. at 654 (Powell, J., concurring)); *Osborne*, 557 U.S. at 79-85 (Alito, J., concurring) (cataloging a number of costs associated with post-conviction DNA testing).

18. Bator argues that post-conviction review consumes not only economic resources but also intangible resources, such as the mental acuity of judges. Bator, *supra* note 1, at 451 ("Surely the answer runs, in the first place, in terms of conservation of resources−and I mean not only simple economic resources, but all of the intellectual, moral, and political resources involved in the legal system."). This issue is discussed further in Part III.A.2.

19. *But see* Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CALIF. L. REV. 485, 531 (1995) (arguing that many of the Supreme Court's substantive restrictions on habeas rights of state prisoners have not reduced habeas litigation but rather have increased litigation over procedural matters).

20. *See infra* Part II.B.2.

21. *See, e.g.*, *Puckett*, 556 U.S. at 140 (2009) ("[*S*]*ome* breaches may be curable upon timely objection . . . if the breach is established but cannot be cured, the district court can grant an immediate remedy (*e.g.*, withdrawal of the plea or resentencing before a different judge) and thus avoid the delay and expense of a full appeal.").

defendant is convicted.[22] As a result, it is broadly assumed that expanding post-conviction review will increase the number of avoidable trial errors and unnecessary appeals.

With respect to deterrence, Bator and others have identified three different ways in which post-conviction review can reduce the deterrent effect of criminal law.[23] First, by delaying the imposition of punishment on defendants, particularly the death penalty, appeals reduce the severity of the punishment and increase the likelihood that potential criminals will be able to avoid punishment entirely.[24] Second, by creating a possibility that a defendant's conviction will be overturned, appeals reduce the average punishment criminals can expect to receive for their crimes.[25] Third, Bator argues that, to the extent incarceration helps rehabilitate offenders, rehabilitation cannot occur until "the convict [accepts] that he is justly subject to sanction, that he stands in need of rehabilitation."[26] Bator argues that "an endless reopening of convictions . . . tells the convict that he may not be justly subject to reeducation and treatment in the first place," encouraging convicts to remain recalcitrant and preventing the rehabilitation that might otherwise occur.[27] Although courts and scholars rarely explain

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22. *Id.* ("For one thing, requiring the objection means the defendant cannot "game" the system, 'wait[ing] to see if the sentence later str[ikes] him as satisfactory,' and then seeking a second bite at the apple by raising the claim.") (quoting United States v. Vonn, 535 U.S. 55, 73 (2002)); Wainwright v. Sykes, 433 U.S. 72, 89 (1977). *See* United States v. Frady, 456 U.S. 152, 164-65 (1982) (citing the state's interest in finality in refusing to allow an appeal from a 15-year old judgment, where allegedly erroneous jury instructions were not objected to at trial). *Cf.* Engle v. Issac, 456 U.S. 107, 130-34 (1982) (defense counsel's claimed lack of knowledge of certain constitutional claims, when such claims were cited in numerous contemporary cases, did not excuse defendant from failing to timely raise the claims at trial).

23. *See* Bator, *supra* note 1, at 451-52; Friendly, *supra* note 17, at 146-47 (adopting Bator's deterrence argument); *Teague*, 489 U.S. at 309 ("Without finality, the criminal law is deprived of much of its deterrent effect."); Calderon v. Thompson, 523 U.S. 538, 555 (1998) (quoting *Teague*).

24. Bator, *supra* note 1, at 452 ("Surely it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment. Yet this threat may be undermined if at the same time we so define the processes leading to just punishment that it can really never be finally imposed at all."); Kuhlmann v. Wilson, 477 U.S. 436, 452-53 (1986) ("Availability of unlimited federal collateral review to guilty defendants frustrates the State's legitimate interest in deterring crime, since the deterrent force of penal laws is diminished to the extent that persons contemplating criminal activity believe there is a possibility that they will escape punishment through repetitive collateral attacks.").

25. Although Bator does not explicitly make this point, it is a natural extension of his arguments and has been attributed to him. *See, e.g.*, *Kuhlman*, 477 U.S. at 452-53; *Engle*, 456 U.S. at 128 n.32 (citing Bator, *supra* note 1, at 452).

26. Bator, *supra* note 1, at 452.

27. *Id. See* Friendly, *supra* note 17, at 146 (although convicted defendants generally

these arguments in detail, many have adopted his conclusion that expanding review harms deterrence.[28]

B. The Influence of "Finality"

> Few things have so plagued the administration of criminal justice, or contributed more to lowered public confidence in the courts, than the interminable appeals, the retrials, and the lack of finality.[29]

Bator's article and its arguments about the value of finality have had a tremendous influence on courts and scholars.[30] Bator's article and much of the Supreme Court's "finality" jurisprudence has focused on federal habeas, where issues of federalism militate in favor of reduced review of state court

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remain in prison pending appeal, appeals nonetheless affect rehabilitation); *Kuhlman*, 477 U.S. at 453 (quoting Bator and citing *Engle*, 456 U.S. at 128 n.32). *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) ("At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation.").

28. Friendly, *supra* note 17, at 146 (quoting Bator, *supra* note 26); Warren E. Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A.B.A. J. 290, 292 (1981) (stressing the societal detriment caused by delaying the finality of judgments); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (recognizing that most habeas appeals "result[] in serious intrusions on values important to our system of government," including finality of judgments); *Teague*, 489 U.S. at 309 ("Without finality, the criminal law is deprived of much of its deterrent effect."). *But see* Chemerinsky, *supra* note 13, at 789 ("[T]he Court and commentators continue to say that habeas is undesirable because it undermines the deterrent function of the criminal law. Yet, no evidence for this assertion is ever offered.") (citation omitted).

29. Evitts v. Lucey, 469 U.S. 387, 405-06 (1985) (Burger, C.J., dissenting).

30. A July 2012 search of the commercially available legal databases of LexisNexis revealed that Bator's article has been cited by name in 145 state and federal cases, including 22 times by the Supreme Court, and in 348 law review articles. An article by Judge Friendly, *supra* note 17, which built on Bator's arguments about finality, has been cited in 272 state and federal cases, including 25 times by the Supreme Court, and in 246 articles. *See, e.g.*, In re Davis, 557 U.S. 952, 956 (2009) (citing Bator); Danforth v. Minnesota, 552 U.S. 264, 272 n.6 (2008) (citing Bator); Dist. Attorney's Office v. Osborne, 557 U.S. 52, 72 (2009) (citing Friendly); House v. Bell, 547 U.S. 518, 538 (2006) (citing Friendly). *See generally* Wolitz, *supra* note 1, at 1037 n.57 (Bator's article and Friendly's article are "the two most influential articles decrying the mid-century expansion of habeas"), 1038 n.60 (citing Friendly); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 456 (1980) (describing Friendly's article as "seminal"). *Cf.* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 892 (observing that the Supreme Court's "dominant procedural concerns are finality and economy").

decisions and additional review is arguably most redundant.[31] Nonetheless, the assumption that post-conviction review necessarily imposes significant costs on society has attained great importance in non-habeas federal jurisprudence and in state court criminal jurisprudence.[32]

The idea that finality is crucial to the criminal justice system has become so enmeshed in legal discourse that courts and scholars often invoke "the state's interest in finality" to justify restrictions on defendants' post-conviction rights without explanation of how or to what extent the interests identified by Bator would actually be harmed by expanding those rights. Rather, the assumption that increased finality inherently conveys practical benefits to society is so pervasive that courts and scholars often discuss finality as if it were an interest in itself.[33] Indeed, even those who advocate for expansions of defendants' rights often concede, also without explanation, that finality would be significantly harmed. In turn, such advocates argue that the interests of finality must yield in favor of interests they find more compelling, such as the liberty interests of defendants.[34]

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31. *See generally* Williams v. Taylor, 529 U.S. 362 (2000) (discussing restrictions on federal habeas relief); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007) (discussing federalism and the challenges of interpreting habeas legislation).

32. *See, e.g.*, Lebron v. Comm'r of Corr., 876 A.2d 1178, 1191 (Conn. 2005) (citing Bator, *supra* note 1, to support argument that state habeas not available to challenge prior conviction that enhanced sentence for subsequent conviction); Cortellesso v. Commonwealth, 238 N.E.2d 516, 517-18 (Mass. 1968) (citing Bator as support for rule of procedural default on state collateral review); Puckett v. United States, 556 U.S. 129, 138-140 (2009) (contemporaneous objection rule for direct appeals in federal court necessary to avoid sandbagging and encourage efficiency).

33. In the words of Professor Friedman, "The Court believes finality is good for its own sake, for - as the Court often says - matters must eventually come to an end." Friedman, *supra* note 19, at 529. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 491 (1991) ("One of the law's very objects is the finality of its judgments."); Hill v. Lockhart, 474 U.S. 52, 58 (1985) ("Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and . . . impairs the orderly administration of justice.") (citing United States v. Timmreck, 441 U.S. 780, 784 (1979) (quoting United States v. Smith, 440 F.2d 521, 528 (7th Cir. 1971))); *Osborne*, 557 U.S. at 72 (noting without explanation that requiring DNA testing would disrupt "our traditional notions of finality"); People v. Bulger, 614 N.W.2d 103, 112 (Mich. 2000) (stating without explanation that the state has a "fundamental interest in the finality of guilty pleas") (citing *Hill*, 474 U.S. at 58).

34. *Osborne*, 557 U.S. at 98-100 (Stevens, J., dissenting) (accepting without discussion that finality is an important interest, but concluding that the interests of "justice" are more important in this case); George C. Thomas III et al., *Is It Ever too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 264 n.3 (2002-2003) ("[W]e concede the many virtues of the Court's 'finality' jurisprudence and argue only that those virtues do not extend to procedural bars on powerful claims of innocence."); Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 687-89

Even courts that directly cite a component interest of finality, such as sandbagging, rarely analyze the *extent* to which an expansion of review would actually cause the harm identified.[35] Rather, because all expansions of post-conviction review, by definition, make criminal judgments less "final," they are *presumed* to cause substantial harm to the interests of finality. As such, finality and its component interests are used as "trump cards"[36] to uncritically dismiss the benefits and importance of expanded review.[37]

Thus, for example, the Supreme Court in *Osborne* denied a man convicted of a violent sexual assault in state court the right to test DNA evidence, at his own expense, that he claimed would prove his innocence. The Court noted that granting such relief might disrupt "our traditional notions of finality" but made no attempt to explain what how that interest would be harmed or to what extent.[38]

Similarly, in *Puckett*, the Supreme Court considered whether a defendant should be granted relief after a prosecutor violated a plea agreement by asking for a lengthier sentence than originally agreed upon.[39] Although defendant's counsel objected to the increased sentence on legal grounds, the Court concluded that the defendant was not entitled to relief because he did not *specifically* object to the violation of the plea agreement. The Court acknowledged that the prosecutor's behavior was "undoubtedly a violation of the defendant's rights."[40] Nonetheless, the Court argued that granting the defendant relief from this error would encourage "the defendant [to] 'game' the system, 'wait[ing] to see if the sentence later str[ikes] him as satisfactory,' and then seeking a second bite at the apple by raising the claim."[41] In addition, the Court argued that denying relief would encourage

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(2005) (finality and judicial economy must be balanced against the importance of allowing innocent prisoners to present newly discovered evidence).

35. *See generally* Resnik, *supra* note 30, at 896-97 (the argument about sandbagging in federal habeas corpus cases "assumes a fantastically risk-prone pool of defendants and attorneys.").

36. *Osborne*, 557 U.S. at 98 (Stevens, J., dissenting) ("[F]inality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens."); Sigmund G. Popko, *Putting Finality in Perspective: Collateral Review of Criminal Judgments in the DNA Era*, 1 L.J. SOC. JUST. 75, 75 (2011), http://ljsj.files.wordpress.com/2011/08/ljsj-finished-vol-1-1-2011.pdf (in post-conviction criminal law, "the demands of finality [often] trump what were once viable legal issues").

37. *Cf.* Chemerinsky, *supra* note 13, at 759 (arguing that the Burger Court "viewed upholding the finality of convictions and encouraging presentation of all objections at trial as paramountly important").

38. *Osborne*, 557 U.S. at 72.

39. Puckett v. United States, 556 U.S. 129, 133 (2009).

40. *Id.* at 130.

41. *Id.* at 140 (quoting United States v. Vonn, 535 U.S. 55, 73 (2002)).

future defendants to take more care to object at trial, where the error might be corrected more efficiently.[42] Absent from both the majority and dissent analyses, however, was any explanation of how granting the defendant relief from an error to which counsel objected on different grounds could encourage strategic behavior or how likely it was that this rule would actually prevent future errors.

By invoking finality or its component interests as significant factors in favor of a particular restriction of review, courts implicitly assume that (i) the restriction in question would make criminal judgments *significantly* more "final," (ii) the restriction would increase finality in a way that actually benefits society, and (iii) the societal benefits of the marginal increase in finality are so important that they outweigh the other interests at stake, such as consistency in the law or the value of defendants' rights. As I explain in Part II, these three assumptions, rarely made explicit, are often false.

II. THE PROBLEMS OF USING FINALITY AS A JUSTIFICATION FOR LIMITATIONS ON REVIEW

A. Existing Responses to "Finality"

As Part I illustrates, advocates of restrictions on post-conviction review often assume that a particular expansion of defendants' post-conviction rights would do substantial harm to the state's interests in "finality" but rarely explain what those interests are or how significant the harm would be. Instead, they take it as given that any expansions of defendants' rights to challenge criminal judgments, by definition, make those judgments less final, and so necessarily inflict substantial harm to finality.[43] Advocates of expanded review have generally attempted to counter the "finality card" in one of three different ways.

First, and most commonly, advocates of defendants' rights simply concede, without analysis, that granting defendants the rights in question would inflict substantial harm on the state's interests in finality. They argue, nonetheless, that other values such as liberty or the integrity of the judicial process are *more* important.[44] For example, in *Osborne*, the state argued

42. *Puckett*, 556 U.S. at 131-41.

43. *See generally* Chemerinsky, *supra* note 13, at 759 ("[T]he Burger Court viewed upholding the finality of convictions and encouraging presentation of all objections at trial as paramountly important and thus consistently held that procedural defaults do prevent habeas review, except in . . . relatively rare circumstances . . . ."). *Cf. Osborne*, 557 U.S. at 98 (Stevens, J., dissenting) (accusing the majority of treating finality as a 'trump card' that necessarily outweighs the other interests at stake).

44. *See, e.g.*, *Puckett*, 556 U.S. at 146 (Souter, J., dissenting) ("Redressing such

that the defendant should be denied the right to test potentially exculpatory DNA. The only reason the state offered for denying a defendant-funded test that might prove his innocence was "a generalized interest in protecting the finality of the judgment of conviction from any possible future attacks."[45] The Supreme Court, noting that DNA technology poses intricate "challenges . . . to our criminal justice systems and our traditional notions of finality," agreed.[46] The Court's opinion, however, failed to explain how allowing such a test would actually harm those interests. In dissent, Justice Stevens conceded, also without analysis, that "States have an interest in securing the finality of their judgments" but argued that this interest was outweighed by the "State's overriding interest in ensuring that justice is done in its courts and secured to its citizens."[47] Because Justice Stevens made no attempt to explain *how* allowing the test would harm any particular state interests, or how significant that harm would be, he offered no real way to judge whether the interests he cited were more important than the interests of finality. Rather, he essentially countered the trump card of "finality" with the trump card of "justice."

Some scholars, in a second common approach, have attempted to counter the finality card by addressing the component interests and arguing that each is either not furthered by the restrictions in question or is insignificant in light of the other interests at stake. Susan Bandes, for instance, argues that the Supreme Court's jurisprudence on whether convicted capital defendants can present new evidence of innocence ultimately reduces to a balancing of the interests of finality against the rights of the defendant.[48] Using Bator's taxonomy as a guide, Bandes argues that concerns about deterrence and rehabilitation are unimportant in this context because the execution of innocent defendants serves no real deterrent or rehabilitative

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fundamentally unfair behavior by the Government . . . is worth the undoubted risk of allowing a defendant to game the system and the additional administrative burdens.") (citations omitted); Wolitz, *supra* note 1, at 1062 ("There is, of course, some real limit to the amount of resources that any society can or should allocate to providing post-conviction factual review. The question is whether the innocence commission approach demands too much . . . . [T]here is also the cost to the value of finality and the interests it serves."). *See also* Susan Bandes, *Taking Justice to Its Logical Extreme: A Comment on* Teague v. Lane, 66 S. CAL. L. REV. 2453, 2458 (1992-1993) (accusing the Court of "stack[ing] the deck in favor of finality [by] . . . focus[ing] on fairness and accuracy as the only counterbalancing values, willfully blinding itself to such basic tenets of habeas jurisdiction as the importance of the federal forum for constitutional claims, the concern for ensuring convictions free from constitutional error, and the desire to safeguard the integrity of the judicial process").

45. *Osborne*, 557 U.S. at 97 (Stevens, J., dissenting).

46. *Id.* at 72 (majority opinion).

47. *Id.* at 98 (Stevens, J., dissenting) (citations omitted).

48. See Bandes, *supra* note 13, at 507.

function. As a result, the state's interests in the finality are limited to conservation of resources and efficiency.[49] Conceding that these interests may be significant in general, Bandes argues that they necessarily must yield when the life of a potentially innocent defendant is at stake.[50]

Critiques like Bandes's pierce the veil of finality, exposing it as a collection of interests, each of which must be weighed against the countervailing interests at stake, primarily the fairness to the defendant. Although these critiques make significant strides in demystifying the importance of finality, they nonetheless continue to concede that expanded review would cause at least *some* net harm to the instrumental interests of society. As argued in Part II.B, because expanded review can reduce wasteful spending on wrongful incarceration and increase legitimacy in the eyes of defendants, it can often *benefit* the interests of resource conservation and crime reduction that finality presumably protects. As such, these critiques prematurely concede the benefits of finality.

A third approach argues that although restrictions on review may make it more difficult for defendants to obtain relief, they do not necessarily make judgments more "final" in the sense of ending litigation over a defendant's conviction. In *Teague v. Lane*, for example, the Supreme Court held that "new rules" issued by the Court could not be applied to habeas petitioners whose appeals became "final" on direct appeal before the rules were announced, subject to only two exceptions.[51] Justice O'Connor's plurality opinion argued that this broad prohibition on relief was necessary to protect the state's interests in finality as explained by Bator.[52] Barry Friedman argues that rather than ending litigation by defendants whose claims were ostensibly barred, *Teague* simply forced such defendants to litigate over whether those bars actually applied.[53] As a result, rather than conserving state resources, *Teague*'s blanket prohibition on relief merely "substitute[d] unending litigation on the merits with unending litigation on procedural issues."[54]

Friedman's response, to finality, like the others discussed, concedes, at

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49. *Id.* at 509-511 (arguing that innocent defendants obtain no psychological repose from the finality of their judgments and that finality serves no deterrent function).

50. *Id.*

51. Teague v. Lane, 489 U.S. 288, 310 (1989). Under *Teague v. Lane*, a "new rule" can still be applied retroactively to "final" convictions "if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or if it is a "watershed rule[] of criminal procedure," that "requires the observance of those procedures that . . . are implicit in the concept of ordered liberty." *Id.* at 311, 313 (internal quotations and citations omitted).

52. *Id*. at 309 (quoting Bator).

53. Friedman, *supra* note 19, at 530-34.

54. *Id.* at 531.

least, arguendo, that increasing the finality of judgments imparts significant benefits to society. As explained in the next subpart, a more conceptual critique of finality reveals that making judgments more final can sometimes *cause* the very harms that finality is thought to avoid.

B. A New Conceptual Critique of Finality Discourse

As discussed above, courts and scholars often treat finality as an interest in itself[55] that is "paramountly important."[56] By definition, anything that makes it easier for convicted defendants to seek relief from errors makes judgments less "final" and, so, presumptively causes significant harms to finality. Unpacking finality, however, reveals that it is actually a shorthand for the avoidance of several disparate harms, primarily the waste of state resources, inefficient behavior by defense counsel, and insufficient deterrence of crime. Making judgments more final by restricting defendants' rights therefore cannot confer significant benefits on society unless those restrictions *significantly* mitigate one or all of those harms. Shifting the analysis of post-conviction review from an assumption that all expansions of review "cause" the harms associated with less finality to an analysis of the *degree* to which review affects the interests of resource conservation, efficiency, and deterrence reveals that those interests are often unaffected by or *benefit from* expansions of review.

This Part introduces the concept of wrongful incarceration costs and explains that—when these costs, the causes of trial errors, and the effects of legitimacy on compliance with the law are considered—many restrictions on defendants' rights may waste resources, impede efficiency, and decrease compliance with the law.

This Part proceeds in three subparts. Subpart 1 introduces the concept of wrongful incarceration costs and explains how post-conviction review can help reduce these hidden costs. Subpart 2 explores the causes of avoidable trial error and argues that when resource constraints on defense counsel are considered, restrictions on review are unlikely to reduce such errors. Subpart 3 discusses how post-conviction review, by reducing wrongful convictions and improving "legitimacy," can actually help *reduce* crime. Part III builds on these insights to develop a more holistic framework for analyzing how particular expansions of post-conviction review might affect the conservation of resources, efficiency, and crime reduction.

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55. *See supra* note 33.

56. Chemerinsky, *supra* note 13, at 759 (applying this critique to the Burger Court's jurisprudence of procedural default).

1. Ignoring Wrongful Incarceration Can Impede Resource Conservation

a. The Concept of Wrongful Incarceration

Modern arguments about the value of finality in criminal cases were adapted from conceptions of finality in civil litigation.[57] In civil suits for damages, finality provides certainty that after a given amount of review, judgments will stand, right or wrong. Not knowing whether one party will eventually have to pay the other a significant sum of money can have a chilling effect on the parties' business decisions. Indeed, this uncertainty can infect the rest of society by deterring others from engaging in business with the litigants. Moreover, from an economic standpoint, civil lawsuits for damages are a zero sum game. An erroneous judgment may unfairly shift wealth from one party to another, but no wealth is directly destroyed.[58] In contrast, ongoing civil litigation continually consumes the resources of litigants and the state. Although civil appeals produce value for society by making judgments more accurate, at some point, additional appeals cost society more than they are worth.

Whereas erroneous civil judgments allow one party to benefit unfairly at the expense of the other, erroneous criminal judgments impose costs on *both* the defendant and the state. The defendant, of course, loses the freedom to which he would have been entitled but for the violation of his rights.[59] For the state, however, wrongful incarceration brings with it the substantial burden of paying for punishment not provided for by law. Whereas the finality of civil judgments grants "repose," allowing the parties and society to move on productively from an erroneous judgment, the finality of erroneous criminal judgments ensures that the defendant will continue to suffer excessive punishment for which the state will continue to pay.

Although many scholars have argued that the American criminal justice

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57. *See generally Teague*, 489 U.S. at 309 ("The fact that life and liberty are at stake in criminal prosecutions 'shows only that conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*.") (quoting Friendly, *supra* note 17, at 150) (internal quotations omitted).

58. *See generally* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 402-10 (1973) (recognizing that although erroneous civil judgments likely create a slight "social loss" over time, individual civil judgments simply trade wealth between and among parties and attorneys).

59. Indeed, the consequences of wrongful conviction for defendants can reach far beyond incarceration itself. *See generally* Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, J. GENDER RACE & JUST. 253 (2003) (cataloguing collateral consequences of wrongful conviction).

system is overly punitive, the concept of wrongful incarceration begins with the assumption that the incarceration of all factually guilty[60] defendants who were convicted and sentenced in accordance with the governing laws is a proper use of state resources. Legislatures in all jurisdictions have created highly nuanced criminal codes that define what conduct is punishable and what conduct is not, provide that particular forms of conduct deserve more punishment than others, and provide people with particular rights that should be protected even though those rights make it harder to inflict punishment on guilty defendants. By so providing, legislatures have implicitly concluded that punishment consistent with the codes is an appropriate and worthwhile use of state resources. Likewise implicit is the determination that punishment inconsistent with these codes or that violates constitutional rights is morally excessive, financially wasteful, or inappropriate in light of individual rights. This Article refers to all incarceration in excess of that provided for by legislative and constitutional schema as "wrongful incarceration."

The term "wrongful incarceration," as used in this Article, then refers to the punishment of: innocent defendants who are "wrongfully convicted,"[61] guilty defendants who were convicted only through a violation of important rights, and guilty defendants who receive longer sentences as the result of errors in sentencing. Wrongful incarceration, then, is the incarceration of defendants whom the legislature has determined should not be incarcerated. Resources spent on such punishment, therefore, are resources the state has

60. This Article uses the terms "factual guilt" and "factual innocence" in the sense used by William Laufer to refer to defendants who did not commit the crime they were convicted of, independent of whether and to what extent the state is able to demonstrate guilt. *See generally* William S. Laufer, *The Rhetoric of Innocence,* 70 WASH. L. REV. 329, 331 n.4 (1995) ("factual innocence is simply the state of being innocent in fact," as distinguished from the concepts of "legal innocence" or "actual innocence" which relate to burdens of proof).

61. In innocence literature, the term "wrongful conviction" often refers only to the conviction of factually innocent defendants, excluding defendants who were convicted in violation of their rights. *See, e.g.*, John Conroy & Rob Warden, *The High Costs of Wrongful Convictions*, BETTER GOV'T ASS'N & CTR. ON WRONGFUL CONVICTION, NORTHWESTERN UNIV. SCH. OF LAW (June 18, 2011), http://www.bettergov.org/investigations/wrongful_convictions_1.aspx (analyzing various costs associated with wrongful conviction). This study concluded that the wrongful convictions of 85 men and women cost the state of Illinois a total of $214 million in incarceration costs, compensation related to the wrongful convictions, and related litigation costs. The largest portion of this total, $156 million, was the direct cost of civil settlements and judgments paid to exonorees. Although compensation for victims of wrongful conviction imposes direct costs on state coffers, because legislatures often provide for compensation by statute and such payments do not destroy net societal wealth, this Article treats such payments as proper state expenditures and does not include them in weighing the costs and benefits of post-conviction review.

implicitly determined would be better spent elsewhere.[62] By reducing the amount of wrongful incarceration, post-conviction review allows states to conserve resources that otherwise would be wasted.[63]

b. The Costs of Wrongful Incarceration

It is difficult to gauge in absolute terms how much wrongful incarceration costs states because wrongful incarceration cannot be distinguished from "legitimate" incarceration until the errors that make the incarceration wrongful are identified. Nonetheless, it appears that the financial costs of wrongful incarceration and cost savings from successful post-conviction review can be quite substantial.

Recently, there has been more attention paid to the costs of wrongful incarceration, particularly with respect to the incarceration of factually innocent defendants. For example, a recent study by the Better Government Association and the Center on Wrongful Conviction at Northwestern University School of Law analyzed the costs associated with 85 defendants who were wrongfully convicted of crimes they did not commit.[64] These men and women served an average of 11 years in prison before being exonerated through post-conviction review, costing the state over $200,000 per defendant.[65] An analysis of the data collected in this study reveals that releasing these innocent defendants may have saved the State of Illinois an average of $400,000 in wrongful incarceration per person.[66] This study, of course, documents only the costs of wrongfully incarcerating defendants who ultimately were exonerated. No numbers exist documenting the costs of continuing to incarcerate innocent defendants who, for evidentiary or procedural reasons, are unable to demonstrate their innocence.

A small scale study by the Michigan State Appellate Defender Office (SADO) suggests that the savings from post-conviction sentencing corrections can also be significant. SADO compiled records of its success rates for a special unit of three attorneys that handles appeals from guilty pleas.[67] Because defendants who plead guilty have already conceded their

62. Although this Article addresses wrongful incarceration, similar arguments apply to other forms of wrongful punishment, such as supervised release or sex offender registries.

63. *Cf. id.*

64. *Id.*

65. Author's calculations.

66. Author's calculations (assuming that defendants sentenced to life in prison and those given sentences longer than forty years would have served only forty years).

67. APPELLATE DEFENDER COMM'N, STATE APPELLATE DEFENDER OFFICE, 2007 ANNUAL REPORT (2008), *available at* http://www.sado.org/content/commission/annual_report/2007.pdf [hereinafter SADO STUDY]. The Michigan Constitution was amended to

guilt in open court, most of the appeals handled by this unit relate to sentencing errors, in which defendants were sentenced to more serious punishments based on inaccurate information or on inaccurately calculated sentencing guidelines recommendations.[68] SADO calculated that the special unit obtained sentencing reductions in about a third of the plea cases they pursued. For successful cases, special unit attorneys reduced the recommended sentencing range by an average of 6.3 months for the minimum sentence and an average of 25.3 months for the maximum.[69] As the study explained, if the actual sentences of these defendants were reduced only by as much as the minimum sentence reductions, the state would realize an average minimum savings of $18,900 per successful case. SADO estimates that in 2007, the work of these three attorneys likely saved the state of Michigan at least $855,000 in incarceration costs.[70] Although the SADO study did not attempt to calculate the total cost to the state of providing this post-conviction relief (including support staff, prosecutorial, and judicial time), it notes that the salaries for these three lawyers totaled only approximately $200,000,[71] suggesting that the work of the special unit may have saved significant amounts of money for the state.[72]

Although existing studies have demonstrated that *successful* post-conviction review can produce large wrongful incarceration savings, they offer little insight into the significance of those savings when compared to the total administrative costs, including judicial, prosecutorial, and public defense resources, of providing the many unsuccessful appeals necessary to realize those savings.[73] From the standpoint of resource conservation,

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eliminate appeals as of right for defendants who plead guilty, and subsequent legislation denied appointed counsel to assist defendants in petitions for discretionary appeal. However, the Supreme Court in *Halbert* restored the right to appointed counsel for petitions for appeal. *Halbert* upheld the denial of appeals as of right as constitutional. *See generally* Halbert v. Michigan, 545 U.S. 605 (2005).

68. *See* DAWN VAN HOEK, MICHIGAN STATE APPELLATE DEFENDER OFFICE, PENNY-WISE AND POUND-FOOLISH: WASTE IN MICHIGAN PUBLIC DEFENSE SPENDING 3 (2009).

69. *See generally* SADO STUDY, *supra* note 67, at 5-6 (author's calculations).

70. *Id.* at 6.

71. *Cf.* OFFICE OF THE AUDITOR GENERAL, PERFORMANCE AUDIT OF THE APPELLATE DEFENDER COMMISSION 23 (2002), *available at* http://audgen.michigan.gov/~audgenmi/finalpdfs/01_02/r0515501.pdf.

72. *See* Van Hoek *supra* note 68, at 6.

73. Some scholars have argued that administrative costs of post-conviction DNA testing are small enough that the costs are likely outweighed by the monetized value of an innocent defendant's freedom. Such analyses, however, often ignore the cost savings of reduced wrongful incarceration and have rarely been extended to other forms of post-conviction review. *See, e.g.*, Thomas et al., *supra* note 34, at 296-97 (applying cost benefit analysis to DNA testing to demonstrate that allowing such tests could produce net social surplus if an innocent's freedom was valued at a minimum of $100,000 (this figure did not account for the value of reduced wrongful incarceration)).

however, the mere fact that expansions of defendants' rights have some effect on reducing corrections budgets is not a factor to be considered *unless* those effects are significant with respect to the financial impact of those expansions on the administration of justice. Part III demonstrates that wrongful incarceration savings can often be as or more substantial than the costs of providing those appeals.

2. Rethinking Efficiency

As discussed in Part I, courts and scholars commonly assume that granting defendants broader rights to seek relief from trial errors will reduce incentives of defense counsel to prevent and object to errors at trial, where they might be corrected without the expense of appeals. As a result, it is widely assumed that expanding defendants' post-conviction rights will cause significantly more uncorrected trial errors, producing an inefficiently large number of appeals. Although such disastrous effects would undoubtedly occur if defendants were given *unlimited* opportunities to seek relief from trial errors, this is unlikely to be the result with respect to the *marginal* expansions of defendants' rights that are debated today. Rather, this Article argues that when the causes of avoidable uncorrected trial errors are considered, it becomes clear that marginal expansions of post-conviction rights are generally unlikely to cause significantly more avoidable errors, and, indeed, could cause *inefficiently few* errors at trial. This subpart analyzes the efficiency argument in two parts, first with respect to errors caused by strategic behavior by defense counsel and second with respect to inadvertent errors by defense counsel.[74]

a. Strategic Behavior of Defense Counsel

Courts often cite the risk of strategic behavior or "sandbagging" to deny relief from errors defense counsel failed to object to at trial or with respect to arguments or evidence defense counsel failed to present.[75] Granting relief in such cases would perversely reward defendants whose attorneys failed to act diligently at trial by granting them a "second bite at the apple" in the form of a new trial or a new sentencing hearing.[76] Attorneys might then choose not to object to errors when they occur, hoping for a favorable outcome from the flawed proceeding and calling foul if displeased with the

74. *See generally* Chemerinsky, *supra* note 13, at 790-91 (emphasizing the importance of the difference between errors caused by strategic behavior and those that occur inadvertently).

75. *See supra* note 22.

76. *Id.*

result. Such strategic behavior would cause unnecessary appeals and new trials and could potentially reward defendants with unfair acquittals. In order to avoid such results, many argue, defendants should be denied relief from errors their attorneys could have objected to at trial.[77]

This analysis of defense counsel behavior, however, operates through the lens of hindsight. Granting relief to defendants from errors made without objection can only encourage strategic behavior by attorneys *if* attorneys know their clients will be able to obtain relief from such errors on appeal. In all jurisdictions, harmless error rules prohibit relief from almost any error unless the defendant establishes, in retrospect, a reasonable possibility that the defendant would not have been convicted or would have received a substantially shorter sentence if not for the error.[78] Indeed, for errors that defense counsel failed to object to at trial, those most commonly associated with sandbagging concerns, a defendant must normally demonstrate that the error was both "plain," an exacting standard, and, at least in federal court, that the error "affected substantial rights."[79] This standard often prohibits relief from trial decisions that may have appeared correct at the time, to which defense counsel would have had little reason to object, but in retrospect are clearly erroneous,[80] and errors that increased a defendant's sentence by "only" a few months or years.[81] In addition, rules of post-conviction review often *explicitly* prohibit relief from errors that were the result of strategic behavior by attorneys, as when defense counsel withholds potentially exculpatory evidence for strategic reasons.[82]

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77. *See id.*

78. *See, e.g.*, Chapman v. California, 386 U.S. 18, 23-24 (1967) (applying harmless error review to violation of defendant's Fifth Amendment rights). For some errors, such as the improper admission of a coerced confession, harm is presumed. *See, e.g.*, Payne v. Arkansas, 356 U.S. 560, 568 (1958).

79. *See, e.g.*, United States v. Mares, 402 F.3d 511, 520 (5th Cir. 2005) ("An appellate court may not correct an error the defendant failed to raise in the district court unless there is (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met an appellate court may then exercise its discretion to notice a forfeited error but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.") (internal quotations and citations omitted); United States v. Ellis, 564 F.3d 370, 371 (5th Cir. 2009) (no relief from failure to object to error that likely added several months to defendant's sentence).

80. *See, e.g.*, United States v. Henderson, 646 F.3d 223, 225 (5th Cir. 2011) (no relief when counsel failed to object at oral hearing to use of aggravating factor that was later ruled improper, even though no circuit precedent existed and other circuits offered mixed authority).

81. *See, e.g.*, United States v. Jasso, 587 F.3d 706, 708-10 (5th Cir. 2009) (no relief from trial court error that likely added five months to defendant's sentence, where the defendant failed to object during sentencing).

82. *See generally* United States v. Conzemius, 611 F.2d 695, 696 (8th Cir. 1979) (discussing the *Berry* standard for new trials based on newly discovered evidence, which

As a result, attorneys who identify errors at trial generally *cannot* know whether allowing an error to pass without objection will produce a second bite at the apple. At the same time, however, because of harmless error doctrine, the *only* errors that might give rise to relief after conviction are the most serious errors that, if caught at trial, might actually lead to an acquittal or a shorter sentence in the first instance. Thus, attorneys who wish to "game" the system must exchange the certainty that objecting to the error at trial may help the defendant go free for the chance that months or years later, during which time the defendant will most likely be incarcerated,[83] an appellate court will acknowledge the error, deem it not harmless, and order a new trial. Although eliminating *all* restrictions on relief from errors made at trial might provide rational incentives to sandbag, marginally relaxing default rules would still leave defense counsel in a position where intentional sandbagging would rarely makes sense.[84]

b. Inadvertent Errors

Related to concerns of strategic behavior are concerns that granting defendants broader post-conviction rights will increase the number of inadvertent trial errors by defense counsel.[85] Such errors, like the failure to object to mistakes by judges and prosecutors or to present a valid legal argument, are believed to be harmful because they degrade the representation defendants receive at trial and produce unnecessary errors.[86] Restricting review increases the incentives of counsel to prevent such errors, in theory reducing the number of errors that occur.

The argument that restricting post-conviction rights will *significantly* decrease inadvertent errors, however, implicitly assumes either that defense attorneys can easily bring additional resources to bear to catch and prevent errors or that they are careless in using the resources they currently have. If, on the other hand, defense attorneys generally represent their clients conscientiously but have limited time and resources to identify and investigate all potential errors, restricting post-conviction review would have little, if any, effect on the number of "inadvertent" trial errors.

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requires new evidence to "be such . . . as that, on a new trial, the newly discovered evidence would probably produce an acquittal.").

83. *See* Resnik, *supra* note 30, at 897 ("[B]ecause appeals and habeas decisions occur many months and often years after conviction, defendants must discount the odds of victory by the years of incarceration pending adjudication.").

84. *See generally* Chemerinsky, *supra* note 13, at 790-91 (making similar arguments with respect to the risk of sandbagging in federal habeas corpus); *supra* note 35.

85. *See, e.g.*, cases cited *supra* note 77.

86. *See supra* Part II.

Mistakes happen. Even the best criminal lawyers will sometimes make a mistake or inadvertently fail to object to a violation of their clients' rights.[87] Attorneys can, however, *reduce* the number of errors they allow to occur.

For irresponsible attorneys, those who fall asleep in court or goof off during billable time, reducing errors can be as simple as working more diligently. For such attorneys, increasing the consequence of errors for their clients *might* cause them to work more diligently. At the same time, however, one can seriously question whether attorneys who are already unmotivated by the seriousness of criminal charges would be spurred to perform better simply by the knowledge that their client, if convicted, would remain in prison.

Most attorneys, however, represent their clients in a relatively conscientious manner. They offer the best representation of which they are capable within the limits of their time and resources. For such attorneys, reducing trial errors can only be accomplished by increasing the amount of time and resources they devote to a client's representation. Unfortunately, however, defense counsel's resources are often severely limited.

Roughly 80% of criminal defendants in the United States are represented by a public defender or appointed counsel who operate under severe resource constraints.[88] Public defenders in many jurisdictions must *already* ration the time they spend on each case.[89] Indeed, several Missouri public defenders' offices have recently begun refusing to take additional cases on the grounds that they simply cannot handle any additional work without further degrading the representation they provide.[90] Increasing restrictions on post-conviction relief for defendants represented by public defenders therefore is unlikely to decrease the number of mistakes they make.

Moreover, even private attorneys do not operate with unlimited resources. For private attorneys, the costs of representation are passed on to

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87. "Indeed, some (maybe most) of the time, the failure to object [to plain errors at trail] is the product of inadvertence, ignorance, or lack of time to reflect." United States v. Escalante-Reyes, 2012 U.S. App. LEXIS 15385, at *14 (5th Cir. July 25, 2012).

88. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf.

89. *See generally* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 10-11 (1997). Although appointed counsel receive an hourly wage, most states place a cap on the number of hours for which they can be reimbursed per case. *Id.*

90. The decision of Missouri public defenders to decline assignments was recently upheld by the Missouri Supreme Court. *See* State ex rel. Mo. Pub. Defender Comm'n v. Waters, 2012 Mo. LEXIS 160, at *39-48 (Mo. July 31, 2012); *Court: Judge Wrongly Appointed Mo. Public Defender*, ST. LOUIS POST-DISPATCH (July 31, 2012, 5:59 PM), http://www.stltoday.com/news/state-and-regional/missouri/court-judge-wrongly-appointed-mo-public-defender/article_98da98ae-61e0-5fe1-bd3e-a23698a50917.html.

their clients. To the extent that restrictions on review might induce such attorneys to take more care on each case, it would simply drive up the price of representation, making it less affordable than it already is.

In sum, unless a significant proportion of defense attorneys can and will reduce trial errors by simply working more diligently, further restrictions of post-conviction review is unlikely to significantly reduce trial errors that occur through inadvertence. Conversely, marginal expansions of defendants' rights to post-conviction relief are unlikely to cause the inefficient behavior courts fear.[91]

Moreover, assuming arguendo that defense attorneys have *no* resource constraints, and so could devote unlimited resources to represent clients, many restrictions on review could be expected to incentivize inefficiently *high* levels of care. Consider, for instance, the question of whether a defendant should be granted relief from a trial court's decision to admit certain evidence or apply a particular aggravating factor at sentencing if the decision appeared reasonable at the time but became clearly erroneous when the applicable law was later clarified.[92] Although such decisions may be plainly erroneous in retrospect, rules of procedural default would often deny relief from such errors if defense counsel failed to object to the error at trial[93] or if the defendant's direct appeal was completed before new rights were acknowledged.[94] Such rules give defense counsel with unlimited resources strong incentives to investigate and present all conceivable legal arguments at trial in order to preserve the errors on review, to triple and quadruple check all judicial decisions in order to sniff out anything that could potentially be considered erroneous, and to drag out appeals for as long as possible in order to avoid the restrictions of *Teague* and the Antiterrorism and Effective Death Penalty Act (AEDPA).[95] Such arguments could conceivably include not only positions that the relevant appellate court had rejected, in hopes that the Supreme Court would later overrule, but also arguments already rejected by the Supreme Court, in hopes that the

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91. *Cf.* William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1978 (2008) (although the Warren Court's expansions of trial rights was ostensibly intended to offer defendants broader protections, because of plea bargaining and resource constraints, it has actually reduced the number of trials that occur).

92. *See generally* United States v. Olano, 507 U.S. 725, 734 (1993) (leaving open the question of whether defendants would be entitled to relief under such circumstances).

93. *See generally* Puckett v. United States, 556 U.S. 129, 134 (2009) (unpreserved errors are subject to more rigorous standards of plain error).

94. *See generally* Teague v. Lane, 489 U.S. 288, 310 (1989) (no relief based on "new rules" if defendant's conviction finalized on direct appeal before rule promulgated).

95. *Id.* Antiterrorism and Effective Death Penalty Act, 28 U.S.C. §§ 2241-2255 (2011) (codifying much of the *Teague* rule and imposing additional restrictions on habeas relief).

Court would later change its mind. Rather than reducing the amount of unnecessary litigation, such restrictions might *multiply* the number of unnecessary appeals and encourage wasteful use of defense counsel resources at trial. Such untenable results, of course, are only realistic for the very few defendants with extraordinary resources. Most defense counsel are unlikely to engage in such wastefully litigious behavior for the same reason that they are unlikely to respond to restrictions on review with increased diligence: because they are already doing the best they can with the resources they have.

3. How Post-Conviction Review Can Reduce Crime

Under the classic economic model of crime developed by Gary Becker, a rational person will commit a crime when the expected net value of committing the crime outweighs that of *not* committing it.[96] In other words, the more likely it is that criminals will be punished and the harsher the punishment they receive, the less likely they are to commit crimes in the first place. According to this theory, liberal post-conviction review incentivizes crime by reducing the average punishment defendants can expect to receive and increasing their chances of avoiding punishment altogether.[97]

More recent research, however, demonstrates that wrongful convictions and attendant perceptions of procedural unfairness can decrease the willingness of people to obey the law. This section examines in detail how wrongful convictions affect perceptions of system legitimacy and argues that, contrary to popular belief, liberalizing post-conviction review can actually encourage people to obey the law.

a. Effects of Wrongful Convictions on Deterrence

The most direct way that wrongful convictions can increase crime is by preventing police and courts from apprehending and incarcerating the true perpetrators of serious crimes.[98] An Illinois study of 85 exonerated men and women estimated that the true perpetrators of the crimes committed a total of 14 murders, 11 sexual assaults, 10 kidnappings, and at least 62 other

96. *See generally* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169; I. P. L. Png, *Optimal Subsidies and Damages in the Presence of Judicial Error*, INT'L REV. LAW & ECON. 101 (1986); Richard Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1484 (1999).

97. *See generally* Bator, *supra* note 1, at 452.

98. *See generally* Conroy & Warden, *supra* note 61.

felonies during the time the innocent defendants were incarcerated.[99]

In addition, wrongful convictions can contribute to crime by reducing incentives to obey the law. When wrongful convictions occur, there is a chance that a person who chooses not to reap the benefits of committing crimes will nonetheless be punished. As a result, higher wrongful conviction rates can undermine deterrence by decreasing the benefits of avoiding crime. Indeed, some scholars believe that changes in the odds of being wrongfully convicted can have a greater impact on deterrence than changes in the odds of apprehension.[100] Releasing innocent defendants through post-conviction review can therefore help increase incentives to obey the law by reducing the severity of punishment that innocent defendants receive. In addition, misconduct by police and prosecutors is often a significant contributing factor to wrongful convictions.[101] By discouraging such misconduct, post-conviction review can help prevent wrongful convictions in the first place. Although the risk of wrongful conviction likely has little effect on the behavior of most Americans, for whom the risk of wrongful conviction is negligible, as argued in Part III.D.2, it could have a significant impact on the behavior of those at greatest risk for committing crimes or being prosecuted.

b. Why Legitimacy and Procedural Fairness Matter

Much of the criminal justice system is designed to reduce crime through deterrence. Increasing the likelihood that people will be punished if they break the law and increasing the punishment they receive increases the

99. *Id.*

100. *See, e.g.*, Matteo Rizzolli & Luca Stanca, *Judicial Errors and Crime Deterrence: Theory and Experimental Evidence* 1 (2009) (Dep't of Econ., University of Milan – Bicocca Working Paper Ser. No. 170) (theorizing that "in the presence of risk aversion, loss aversion, or differential sensitivity to procedural fairness, [wrongful punishment errors] can have a larger effect on deterrence than [failures to punish]," and offering experimental evidence to support the claim).

101. In their study of Illinois, Conroy and Warden, *supra* note 61, found that the top three causes of wrongful convictions were (i) alleged police misconduct or error, (ii) erroneous eyewitness identification, and (iii) alleged prosecutorial misconduct or error. "One bad set of prosecutions can cost taxpayers dearly. The conviction of four men for a 1978 double murder in Ford Heights ultimately cost taxpayers $45.2 million. A woman, who started out as a witness in the case but later was wrongfully convicted as a participant, added another $5 million." *Id.* In addition, a report by Emily West of The Innocence Project shows that, of documented appeals based on prosecutorial misconduct among the first 255 DNA exoneration cases, courts found harmful error and reversed 18% of appealed verdicts. EMILY M. WEST, THE INNOCENCE PROJECT, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES 3 (2010), *available at* http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf.

"price" people can expect to pay for engaging in crime. Social science research shows, however, that fear of punishment is generally not the primary reason that people obey the law.[102] Rather, studies have shown that compliance with the law in everyday life is motivated primarily by an internalized sense that obeying the law is the right thing to do, even when it is inconvenient.[103] The degree to which people are willing to obey the law depends in large part on how "legitimate" or "fair" they believe the law and the legal system to be.[104]

People view the law as more legitimate not only when they agree with the substance of the law—for example, that certain conduct should be punished—but also when they believe the substance of the law is enforced in a procedurally fair manner.[105] Indeed, some researchers have argued that for litigants, including criminal defendants, procedure can have a *greater* effect on legitimacy than whether they receive a favorable outcome.[106] Factors that have been shown to increase litigants' perceptions of procedural fairness include (i) being treated with respect, (ii) being granted an opportunity to fully express their views and have them meaningfully considered, (iii) having unfavorable outcomes, such as sentencing, reached based on principled criterion,[107] and (iv) offering access to some further process to correct mistakes.[108] By granting defendants who believe they were unfairly convicted or sentenced a meaningful opportunity to present their views and seek relief, post-conviction review can increase the willingness of defendants to obey the law in the future. Conversely, imposing restrictions on review that appear arbitrary or unfair to defendants may significantly reduce the respect convicted defendants have for the law.

Studies suggest that perceptions of legitimacy can have a significant effect on willingness to obey the law in the future. One study by Raymond Paternoster of individuals arrested in domestic assault cases found that

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102. For example, one study by Robert MacCoun found that people's perceptions of their likelihood of being caught using marijuana and the severity of punishments they expected explained only five percent of the variance in their actual use. *See* Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, 113 PSYCHOL. BULL. 497, 501 (1993).

103. *See* Tom R. Tyler, *Obeying the Law in America: Procedural Justice and the Sense of Fairness*, 6 ISSUES OF DEMOCRACY 16, 17 (2001), *available at* http://www.4uth.gov.ua/usa/english/society/ijde0701/ijde0701.pdf.

104. *See generally* Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988).

105. *See, e.g.*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3-5, 106-07, 163-65 (2006).

106. *See* Casper et al., *supra* note 104, at 486-87 (citing studies reaching this conclusion).

107. *See generally* Casper et al., *supra* note 104.

108. *See generally id.* at 485-87, 493.

defendants who felt they had been treated in a more procedurally fair manner were significantly less likely to commit assaults again in the future.[109] Another study by Andrew Papachristos, Tracey Meares, and Jeffrey Fagan of violent offenders in Chicago suggests that increased perceptions of legitimacy may even *reduce* the criminal behavior of people who continue to break the law.[110] The study examined the perceptions and behavior of released prisoners from high-crime, predominantly African American neighborhoods convicted of a violent offense, including many gang members who had committed offenses with firearms. It found that although all individuals in the sample had very low opinions of the legitimacy of police and prosecutors, those who viewed the system as more legitimate were significantly less likely to carry a gun in violation of the law. This effect was significant even among those who were later returned to prison for committing new crimes.[111] Although small improvements in criminals' perceptions of legitimacy may not stop criminals from committing crimes completely, they may well help reduce criminal behavior.

Applying the concept of legitimacy to criminal appeals, if a defendant believes the processes used to convict and sentence him were procedurally unfair or that an error occurred, allowing his claims to be heard on the merits may well improve the defendant's perceptions of fairness, even if he does not ultimately receive relief. Conversely, dismissing claims as procedurally barred without considering the merits of a claim or denying relief from a conceded error may cause defendants to feel that the procedures used to convict and sentence them were not fair in the first place.[112]

The delegitimizing effects of overly strict post-conviction procedures may be especially acute when a defendant is denied relief from mistakes made by or the misconduct of criminal justice "insiders" like judges, prosecutors, or public defenders. As Stephanos Bibas has explained,

> [I]nsiders−the judges, prosecutors, police, and defense counsel who regularly handle criminal cases−are professional repeat players who dominate criminal justice. . . . [They] control the levers of power, deciding which cases to charge,

109. *See generally* Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 168 (1997).

110. Andrew V. Papachristos et al., *Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, J. CRIM. L. & CRIMINOLOGY (forthcoming), *available at* http://www.papachristos.org/Publications_2_files/JCCL_final draft_8jan2012.pdf.

111. *Id.* at 41-42.

112. *See* Tyler, *supra* note 105, at 109-112.

> which crimes and defendants should receive probation, and what prison sentences are appropriate. . . . Procedural fairness, process control, and trust in insiders' motives contribute greatly to the criminal justice system's legitimacy.[113]

When an appellate court refuses to offer relief from, or even consider the merits of, a defendant's claim that he was harmed by the mistakes or misconduct of criminal justice insiders, it may send a message: "Although defendants like you must obey the rules, *we* do not." Defendants who hear this message from those charged with enforcing the law may be less willing to obey the law in the future.

Although this research suggests that liberalizing post-conviction review would improve legitimacy in the eyes of criminals, releasing more criminals on "technicalities" may make courts appear *less* legitimate in the eyes of more law abiding citizens.[114] Part III offers a framework for analyzing and comparing how much the deterrence effects identified by Bator and the effects of legitimacy may affect these different populations.

III. BEYOND FINALITY

Given that a simplistic approach to finality at times impedes the interests it purports to further, the legal system needs a more nuanced approach that considers how those interests would actually be furthered or harmed by particular expansions of post-conviction review. This Part develops an approach that is designed to better align access to post-conviction review with the interests of resource conservation, efficiency, and deterrence. This Part argues that reducing procedural barriers to substantive review and relief can often save states money, would rarely impact the behavior of defense counsel, and may reduce serious crimes committed by those who have served time in prison and those of their associates who are influenced by their views.

A. Balancing Administrative Costs and Wrongful Incarceration Costs

Although court opinions often mention finality, "judicial efficiency," or the administrative burdens of review as reasons to restrict defendants'

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113. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912, 949 (citations omitted).

114. *See, e.g.*, Tyler, *supra* note 105, at 110 ("It may be that procedural irregularities, such as criminals being let free on 'technicalities' are particularly important in feeding public dissatisfaction with courts.")

rights, they rarely mention potential wrongful incarceration savings. If the expected wrongful incarceration savings are negligible compared to administrative costs, ignoring wrongful incarceration would be entirely proper from a pure resource conservation perspective. If, however, wrongful incarceration savings are substantial, ignoring those savings while emphasizing administrative costs could cause courts to inefficiently restrict review. Subpart 1 estimates the wrongful incarceration savings produced by direct appeals and the administrative costs necessary to produce them, concluding that the savings are generally quite substantial. Indeed, it is possible that direct appeals may produce net cost *savings* in some jurisdictions. Subpart 2 explores the implications of wrongful incarceration costs for several different forms of review. Subpart 3 argues that the failure of judges to acknowledge and appreciate these costs is related to problems of agency and cognitive bias.

1. Quantifying Administrative Costs and Wrongful Incarceration Savings

The average cost of incarcerating a single prisoner in the United States for one year is around $30,000, or $2,500 for one month.[115] As the studies in discussed in Part II.B.1 demonstrate, correcting a sentence that is improperly long by even a few months can save the state thousands of dollars in wrongful incarceration costs. The problem, of course, is that it is impossible to know whether a defendant's incarceration is wrongful until *after* an appeal has been drafted, responded to by a prosecutor, and reviewed by a judge or panel of judges, all at significant expense to the state. Although every appeal filed imposes a financial burden on the justice system regardless of its merits, appeals only generate incarceration savings *if* an appeal, or any subsequent hearings or retrials, are resolved in favor of the defendant. Although most observers assume that post-conviction review imposes significant financial burdens on the state, whether a particular form

115. These figures are an average cost across all states for defendants housed in jail and prison facilities. The costs of incarceration vary significantly by state and type of facility. PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 12 (2009), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf. *See also* JAMES J. STEPHAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES 2001, at 1 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spe01.pdf (approximately $30,000 in 2010 dollars); Mark Goodpaster, *Cost Comparison Between a Death Penalty Case and a Case Where the Charge and Conviction Is Life Without Parole, in* THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW: FINDINGS OF THE INDIANA CRIMINAL LAW STUDY COMMISSION 122A-122F (2002) (incarceration costs ~$30,000 per year in 2010 dollars) [the Commission's complete findings hereinafter INDIANA COMMISSION].

of review or expansion of review imposes a *net* financial burden depends on the relative magnitudes of the administrative costs of providing review and the wrongful incarceration savings realized.

No study to date has attempted to compare these costs and benefits outside the capital context, and, indeed, no one has collected sufficient data to do a precise comparison with regard to any particular form of post-conviction review.[116] An analysis of the limited available data, however, suggests that the incarceration savings from direct appeals are generally at least as significant as the administrative costs of providing direct appeals.

A study by the National Center for State Courts (NCSC) on direct appeals in state courts provides the basis for estimating these costs.[117] The vast majority of appeals in the study, 79.4%, were entirely unsuccessful for the defendant.[118] Only 20.6% of defendants received any form of relief. In 1.9% of cases, appellate courts reversed the conviction with prejudice and ordered the defendant released.[119] In 6.6% of cases, the conviction was vacated and the case remanded to the trial court.[120] In 12.1% of cases, the defendant was granted a new sentencing hearing or other relief, such as a reversal of only some charges and an affirmance of others.[121] Although the NCSC study is the most detailed study of state criminal appellate outcome to date, it provides little information on the sentences defendants received at trial or the length of incarceration saved by defendants who succeeded on appeal. To estimate the wrongful incarceration savings produced by state appeals, this Article must make assumptions about the average initial sentences of defendants who succeed on appeal, the proportion of those sentences such defendants would have actually served, the time such defendants spend incarcerated before being released, and the average

116. *Cf.* NANCY J. KING & JOSEPH L. HOFFMANN, HABEAS FOR THE 21ST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT (2011) (data on final dispositions of successful habeas petitions not available).

117. *See* JOY A. CHAPPER & ROGER A. HANSON, NATIONAL CENTER FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS 18-19 (1989), *available at* http://caught.net/caught/ReveErrCtApp.pdf (empirical analysis of criminal appeals) [hereinafter NCSC STUDY]. Five states were included in the study, and although the study is somewhat dated, it remains the best data available to date. *See generally* Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice* (2008) (Vanderbilt University Law School Pubic Law and Legal Theory Working Paper No. 08-43), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1277304 (relying on the study). The NCSC has commissioned an updated version of this study. However, the results will not be available for a few years.

118. Affirmance rates for the five courts included in the study ranged from 70.8% to 81.7%. NCSC STUDY, *supra* note 117, at 5.

119. *Id.* at 5.

120. *Id.*

121. *Id.* at 35.

sentence reductions for defendants who receive new sentence hearings or other relief.

The mean sentence for defendants in the NCSC study was approximately 100 months.[122] The vast majority of defendants who succeed on appeal do so only after serving a significant portion of their sentences. Good data on how long state appeals take to resolve is not readily available. An analysis of direct appeals in federal courts, however, shows that the median federal appeal is not resolved until 24 months after the date of conviction.[123] In addition, federal defendants only serve an average of 88% of their sentences prior to being released, often on supervised release.[124] Therefore, assuming the average successful appellant serves 24 months and would have served 88 months but for the appeal, each reversal of a conviction with prejudice would save the state approximately 64 months of incarceration. For defendants whose convictions are reversed and remanded, although prosecutors have the option to seek a new trial, they often decline to, largely because the defendants have already served such a substantial portion of their sentences.[125] Assuming, conservatively, that prosecutors pursue a new trial in two thirds of all cases, half of which result in acquittal six months

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122. The NCSC study only reported sentence data in categories: 12% of defendants who appealed received sentences of little or no incarceration, 31% received sentences of "1-5 years" in length, 25% received sentences between "6 to 10 years," 15% received sentences between "11 to 20 years," and 17% received sentences "over 20 years." NCSC STUDY, *supra* note 117. By assuming that all defendants received the mean sentence for their category and assuming, conservatively, that all defendants who received sentences longer than 20 years received sentences of *only* 20 years, the mean sentence for defendants in the study can be estimated as roughly 101 months. The study reported that defendants who received the shortest punishment (little or no incarceration) and the longest (longer than 20 years) were both more likely to obtain *some* relief on appeal, but the study did not specify the kinds of relief they obtained. For simplicity, this analysis assumes that these differences balance each other out and disregards them. *Id.* at 39, Table 6 (data used for calculations herein). *Cf.* HINDELANG CRIMINAL JUSTICE RESEARCH CENTER, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 451 Table 5.48 (2003), available at http://www.albany.edu/sourcebook/pdf/section5.pdf (average sentence for state felons sent to prison is 57 months) [hereinafter SOURCEBOOK].

123. Author's calculations. The median value of time from date of judgment to date appeal terminated for cases terminated between 2006 and 2007 is 24 months. BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS PROGRAM, FEDERAL JUSTICE STATISTICS, 2006(2007)-STATISTICAL TABLES (2010), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=6# data_collections.

124. Federal Defender Services of Wisconsin, Inc., *Federal Inmates and Cases*, THE DOING TIME TIMES, Winter 2006, at 4, *available at* http://www.federaldefenders.org/000 Newsletter %20Issue%206.pdf.

125. Gail Donoghue, *Section 1983 Cases Arising from Criminal Convictions*, 18 TOURO L. REV. 725, 728 (2001-2002) ("[N]ine times out of ten, the prosecution declines to reprosecute after a reversal on *Brady* grounds.").

after the appeal,[126] defendants whose conviction are remanded would save the state an average of 41 months of incarceration each. Finally, this Article assumes that resentencing hearings and other relief reduce actual sentences by 6.3 months, the average minimum reduction found in the SADO study.[127]

Consolidating these conservative estimates, the average incarceration savings produced by state direct appeals would be approximately 4.7 months which, at an average cost of incarceration of $30,000 per year,[128] would yield an average wrongful incarceration cost savings of approximately $11,800 per appeal.

Compare these savings to the costs of administering direct appeals. No one has compiled the applicable data for appeals in general, but a 2002 study found that the total costs of direct appeals from murder convictions in which the death penalty could have been imposed was approximately $9,000, including the salaries and fringe benefits for judges, attorneys, support staff, and the expenses of facilities and other incidentals.[129] Adjusting for inflation, these costs total approximately $11,000 in 2010 dollars.[130] Direct appeals for defendants convicted of murder and sentenced to life are among the most expensive because they tend to be staffed by the most experienced attorneys, the stakes are high on both sides, and defense counsel will typically raise many more claims than in other appeals.[131] As such, direct appeals for the vast majority of cases likely cost much less than $11,000. Furthermore, a large proportion of direct appeals−23% in federal courts−are dismissed on procedural grounds, and so require far less effort to dispose.[132] This analysis assumes that most direct appeals cost two thirds of

126. *See generally Frequently Asked Questions – Death Penalty*, OFFICE OF DISTRICT ATTORNEY, HARRIS COUNTY, TEXAS (last visited Aug. 6, 2012), http://app.dao.hctx.net/FAQs/2/Appellate/1/Death_Penalty.aspx (reporting that approximately 20% of convictions in death penalty cases in Harris County, Texas are reversed on appeal, roughly half of which are reaffirmed on retrial).

127. SADO STUDY, *supra* note 67.

128. The Pew Center indicates that in 2008, one year of prison in Michigan cost roughly $32,839. *Id.* at 23. The $30,000 figure is used in this Article for purposes of consistency with the numbers reported by Van Hoek, *supra* note 68, who used $30,000, and to avoid being overly precise.

129. *See* INDIANA COMMISSION, *supra* note 115, at F-G, T-V.

130. *Id.* The 2002 study reported its findings in year 2000 dollars, which, for the purposes of this Article, are adjusted by an inflation rate of 2.5%.

131. *See generally* INDIANA COMMISSION, *supra* note 115, at F, T-V (convicted murder defendants sentenced to death or life "typically raise a large number of claims" on direct appeal to avoid waiver in subsequent hearings).

132. THE URBAN INSTITUTE, FEDERAL JUSTICE STATISTICS 2006 – STATISTICAL TABLES NCJ 225711, at Table 6.2 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2006/fjs06st.pdf.

the cost cited in this death penalty study, or $7,333 per case, and that 23% of appeals cost half as much, or $5,500 per case. Similarly, whereas initial murder trials in which the state seeks life imprisonment cost approximately $45,000,[133] this analysis assumes that the vast majority of retrials (for which almost all the investigation, research, and trial preparation has already been done) cost the state only half as much and that resentencing hearings cost much less.[134] Consolidating these estimates, the average administrative cost of providing direct appeals, including the costs of subsequent retrials and resentencing hearings, would be approximately $9,000 per case, noticeably less than the estimated incarceration savings those appeals produce.

Due to the imprecise nature of these estimates, this analysis cannot conclude that the incarceration savings from direct appeals are larger than the administrative costs, either in general or for any particular state. This analysis does, however, demonstrate that the wrongful incarceration savings produced by direct appeals are quite substantial compared to the administrative costs commonly cited to justify restrictions on appellate rights. Moreover, in light of the conservative nature of this analysis, it cannot rule out the possibility that some states realize significant net cost savings by providing direct appeals. Whereas the language of finality assumes that restricting defendants' rights to post-conviction relief helps to conserve state resources, this analysis suggests that those savings may be largely, if not entirely, offset by costs of wrongful incarceration.[135]

2. Comparing Judicial and Correctional Dollars: Apples to Apples?

One important limitation to the comparison of administrative and wrongful incarceration costs as a tool to analyze resource conservation is that dollars spent on incarceration are not directly fungible with dollars

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133. A noncapital murder trial costs approximately $45,000 in 2010 dollars. PHILIP J. COOK & DONNA B. SLAWSON (WITH LORI A. GRIES), THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 47 (1993), *available at* http://www.deathpenaltyinfo.org/northcarolina.pdf (providing average cost of murder trials in which the death penalty could have been but was not sought, herein adjusted for inflation); Goodpaster, *supra* note 115, at 122A, 122F.; EMILY WILSON ET AL., TENNESSEE'S DEATH PENALTY: COSTS AND CONSEQUENCES 16 (2004), *available at* http://www.comptroller1.state.tn.us/repository/RE/deathpenalty.pdf. *See* LEGISLATIVE DIVISION OF POST AUDIT, COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT FOR THE DEPARTMENT OF CORRECTIONS 10-12 (2003), *available at* http://www.kslpa.org/docs/reports/04pa03a.pdf.

134. Resentencing hearings are assumed to cost one sixth of a full direct appeal, or $1,222.

135. *See generally* SADO STUDY, *supra* note 67; Van Hoek, *supra* note 68 (arguing that limiting appellate funding for defendants who plead guilty may actually cost the state of Michigan financially).

spent on the administration of justice. For starters, the cost savings from reduced wrongful incarceration are not realized immediately; they accrue gradually over the months and years during which the state does not have to pay for wrongful incarceration.

Moreover, as scholars have often noted, judicial, prosecutorial, and public defense resources are fixed in the short term.[136] By forcing judges, prosecutors, and public defenders to spend more time on criminal appeals, expansions of post-conviction rights give these actors less time to spend on other matters. This can create a delay in the processing of all judicial matters, including civil appeals and criminal trials. In the long run, states must then either hire additional judges and lawyers to deal with the backlog, at significant expense, or reduce the time judges and lawyers spend on all cases, thereby reducing the quality of the legal system as a whole.[137]

Thus, the expected wrongful incarceration savings from expansions of review are directly comparable to administrative costs *only* in the long term and *only* to the extent that the size of the judiciary, if necessary, can be increased to cope with the new workload. Although increasing the size of the judiciary can be a politically difficult process, it can and has been done in all jurisdictions in the United States. Indeed, one need look only to the state of California, which employs over 2,000 judges and magistrate judges,[138] to confirm that the United States justice system is, for all practical purposes, infinitely scalable. Although judicial resources are fixed in the short term, in the long run, anything can be fixed with money.

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136. *See, e.g.*, Halbert v. Michigan, 545 U.S. 605, 630-31 (2005) (Thomas, J., dissenting) (requiring Michigan to provide appellate counsel to defendants who plead guilty reduces funds available for defendants who appeal from conviction at trial); Friendly, *supra* note 17, at 149 ("To say we must provide fully for [collateral review] has a virtuous sound but ignores the finite amount of funds available in the face of competing demands."); Erik Lillquist, *Improving Accuracy in Criminal Cases*, 41 U. RICH. L. REV. 897, 909 (2007) (noting that the amount of resources available within any criminal justice system is generally fixed).

137. Indeed, as Justice Thomas argued in his dissent in *Halbert*, if we assume that judicial budgets are fixed, as they are in the short term, offering greater post-conviction rights to some defendants reduces the time and care judges can spend on the remaining cases, so that trying to protect the rights of some defendants could perversely reduce the protections for defendants overall. *See Halbert*, 545 U.S. at 630 (Thomas, J., dissenting). Similarly, as King and Hoffman argue, because fewer than one percent of non-capital federal habeas corpus petitions produce any relief, that to the extent fairness and accuracy are worth paying for, habeas is a remarkably inefficient way in which to protect these interests. *See* King & Hoffman, *supra* note 116. *See generally* Bator, *supra* note 1.

138. *How Many Judges Are There in California Courts?*, JUDICIAL COUNCIL OF CALIFORNIA (Aug. 6, 2012), http://www.courts.ca.gov/2954.htm.

B. Implications of Wrongful Incarceration Costs for Particular Reforms

The preceding analysis draws into question the validity of the general assumption that expansion of defendants' post-conviction rights imposes a significant net financial burden on governments. Rather, when expansions of review decrease wrongful punishment, the cost savings can often be significant. The relative importance of administrative costs and potential wrongful incarceration savings varies significantly with the type of review in question. This section explores the implications this more nuanced analysis of costs and benefits may have with respect to several particular types of post-conviction review.

1. Restrictions on Relief from Plain Errors in Sentencing Calculations

As discussed in Part II.B, if defense counsel fails to object to an error at trial or otherwise fails to preserve an error for review, rules of procedural default generally prohibit relief unless the error is both "plain" and, at least in federal court, "affects substantial rights."[139] For plain errors in sentencing calculations, these restrictions often impose a significant net financial cost to states.

Also as discussed in Part II.B, contrary to the assumptions of many,[140] defense counsel will very rarely have any incentive to ignore an error that improperly increases the guideline range the trial court uses to determine a defendant's sentence. In the case of miscalculations that increase guideline ranges, it is difficult to imagine what strategic advantage defense counsel might gain by "remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor."[141] After all, it is unlikely that an error that raises the recommended sentence would ever favor the defendant, and any "second bite at the apple"[142] would be before the same judge, substantially eliminating the risk that defense counsel would use relief through the plain error rule to game the system. Indeed, if the judge suspected that counsel had acted strategically, she could easily respond with a much higher sentence. In short, defense counsel has nothing to gain by ignoring sentencing errors and often has much to lose.

Many errors in sentencing calculations result not because defense counsel was grossly negligent but because the law that made the calculation

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139. *See generally* Puckett v. United States, 556 U.S. 129, 135 (2009) (discussing plain-error doctrine).

140. *See generally id.* at 134 (opining that granting relief from plain error in sentencing would encourage sandbagging).

141. *Id.* (citations omitted).

142. United States v. John, 597 F.3d 263, 292 (5th Cir. 2010) (Smith, J., dissenting).

erroneous was not clear at the time. Such an error occurred in the Fifth Circuit case of *United States v. Henderson*.[143] The defendant pled guilty to being a felon in possession of a firearm for which, under the circumstances, the guideline range was 33 to 41 months.[144] At sentencing, the district court imposed a sentence of 60 months, explaining that, in the opinion of the court, this upward variance from the guideline was necessary to ensure that the defendant could enroll in a drug treatment program.[145] Defense counsel did not object at the oral hearing, apparently acting under the assumption that such a departure was within the judge's discretion.[146] It was later revealed that although the Fifth Circuit had never considered the issue, a split among the circuits existed as to whether it was proper for a judge to lengthen a sentence in hopes of aiding the defendant's rehabilitation.[147] Over a year later, the Supreme Court held that it is error for a court to "impose or lengthen a prison sentence to enable an offender to complete a treatment program."[148] On the appeal, the Fifth Circuit conceded that the district court's decision was clearly erroneous *in retrospect* but denied relief because it was not clearly erroneous *at the time it was made*.[149]

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143. United States v. Henderson, 646 F.3d 223, 224 (5th Cir. 2011). The Fifth Circuit refined its jurisprudence on these issues in *United States v. Escalante-Reyes*, 2012 U.S. App. LEXIS 15385 (5th Cir. July 25, 2012) (en banc) (vacating a 60 month sentence as a *Tapia* error, even though the applicable guidelines prescribed 63-78 months), joining the majority of circuits in holding that when the law at the time of trial is unsettled, but becomes clear while an appeal is pending, the law at the time of the appeal will guide the appellate decision. *See infra* note 148. In so holding, however, the court reaffirmed the primacy of the contemporaneous objection rule, recognized that the Supreme Court has not spoken directly on the issue, noted that the severity of the error (as considered under the law at the time of appeal) will determine if relief is warranted, and reaffirmed its discretion in correcting even plain errors. *Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *3, *6, *16, *20. Of course, the state still incurs the costs of wrongful incarceration during the lengthy time that appeals are pending, regardless of which law the court applies. *See infra* note 199 and accompanying Article text.

144. *See, e.g.*, United States v. Henderson, 646 F.3d 223, 224 (5th Cir. 2011).

145. *Id.*

146. *Id.* ("When asked if there was 'any reason why that sentence as stated should not be imposed,' [Henderson's] attorney responded, '[p]rocedurally, no, Your Honor.'").

147. *Id.* at 225.

148. Tapia v. United States, 131 S. Ct. 2382, 2393 (2011).

149. Henderson, 646 F.3d at 224-25. *See also* United States v. Henderson, 665 F.3d 160, 165 (5th Cir. 2011) (Haynes, J., dissenting from denial of rehearing en banc) ("Without doubt, Henderson was sentenced based upon an impermissible consideration."). Again considering the question of appellate law timing, four judges of the *Escalante-Reyes* decision, *supra* note 143, reinforced the value of this approach. "The problem—that the legal theory rests on muddled law—arises because the law is unclear at the time of trial, and it is independent of what happens by the time of appeal. Accordingly, the same measure of plainness—the law at the time of forfeiture—should apply in both cases." *Escalante-Reyes*, 2012 U.S. App. LEXIS 15385, at *29 (Smith, J., dissenting).

Regardless of whether this decision and others like it[150] are correct as a matter of statutory interpretation, the financial cost of a defendant's excessive incarceration is borne by the state. Denying relief to the defendant in this case cost the federal government nearly $50,000 in wrongful incarceration, assuming the trial court would have resentenced the defendant to the maximum of the proper sentencing range.[151] Because, as discussed above, such decisions are unlikely to alter the behavior of defense counsel and prevent errors in the future, it is difficult to imagine what benefit they offer to the state or society. Indeed, as discussed in Part II.B, by forcing defendants to bear the burden of mistakes of justice system "insiders," such decisions may well hurt the willingness of criminals to obey the law.

2. New Trials Based on Evidence of Witness Recantation

Most jurisdictions apply one of two tests, the *Berry* test[152] or the *Larrison* test,[153] to determine whether a defendant who brings evidence of witness recantation should be granted a new trial.[154] Both tests prohibit new trials when the falsity of the testimony could have been demonstrated with due diligence at trial.[155] The primary difference between these tests is the level of materiality the tests require.[156] Under the more common *Berry* test, which was applied in the recent case of Troy Anthony Davis,[157] a new trial will not be ordered unless new evidence is so material that a new trial will, more likely than not, result in an acquittal.[158] Because the defendant's first

150. *See also* United States v. Jasso, 587 F.3d 706, 713-14 (5th Cir. 2009) (district court erroneous calculation of range as 46 to 57 months did not "affect substantial rights" when correct sentencing range was 41 to 51 months, even though the district court had given the defendant the minimum 46 month sentence under the erroneous range and so could properly have resentenced the defendant to 41 months).

151. Nineteen months at $30,000 per year totals $47,500.

152. Berry v. Georgia, 10 Ga. 511, 527-28 (1851).

153. Larrison v. United States, 24 F.2d 82, 87-88 (7th Cir. 1928). The *Larrison* standard is followed by the Third, Fourth, and Seventh Circuits. *See* Sharon A. Cobb, *Gary Dotson as Victim: The Legal Response to Recanting Testimony*, 35 EMORY L.J. 969, 974 (1986).

154. *See* Cobb, *supra* note 153, at 973-74.

155. *See, e.g.*, *Berry*, 10 Ga. at 527 (requiring that the new evidence have come to the defendant's knowledge after trial and that the evidence could not have been obtained earlier with the exercise of due diligence); *Larrison*, 24 F.2d at 87-88 (requiring "that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial").

156. Cobb, *supra* note 153, at 974-76.

157. *See generally* In re Davis, 565 F.3d 810, 816-18 (11th Cir. 2009).

158. *Id. See, e.g.*, United States v. Conzemius, 611 F.2d 695, 696 (8th Cir. 1979) (applying the *Berry* standard); United States v. Johnson, 327 U.S. 106, 110 n.4 (1946)

trial was, by assumption, "fair," it is considered reasonable to require the defendant to bear the burden of demonstrating doubt with regards to his guilt. Other jurisdictions, maintaining that false testimony by witnesses can fundamentally prejudice a defendant's right to a fair trial, apply the *Larrison* test, which permits a new trial if the recanted testimony is so material that the jury "might have reached a different conclusion" in its absence.[159]

The more stringent "more likely than not" *Berry* standard would prevent a new trial if there was up to a 50% chance that the defendant would be acquitted. Recall that a murder trial in the first instance costs $45,000 and that a year of incarceration costs $30,000.[160] Even assuming that a new trial would cost as much as a murder trial in the first instance, allowing a new trial when a defendant has even a one in three chance of acquittal would, on average, save states thousands of dollars if at least five years remain on the sentence.[161] For new trials involving less serious crimes, which presumably cost less to process, and for defendants serving longer sentences, the savings could easily be much more.

The financial impact of new trials itself is not, of course, the only factor to consider in deciding the appropriate level of materiality to require before granting a new trial. For one, new trials based on newly discovered evidence, which often occur years after the first trial, carry a particularly strong risk that a guilty defendant could be acquitted because the evidence has grown stale or by chance alone. Nonetheless, to the extent that some jurisdictions may have been persuaded to choose the *Berry* standard based on the costs of new trials, those costs should be revisited. In addition, as argued in Part II.B, when the recanted testimony of witnesses was allegedly prompted by improper behavior by police or prosecutors, failure to grant a new trial may have a significant impact on legitimacy and compliance with the law.

3. Federal Habeas for State Prisoners

Although federal habeas played a crucial role during the civil rights movement in ensuring that recalcitrant state courts enforced the constitutional rights newly recognized by the Supreme Court, today very

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(acknowledging "the frequently quoted and followed rule announced in *Berry v. Georgia*").

159. *See* United States v. Johnson, 149 F.2d 31, 44 (7th Cir. 1945) (citing *Larrison*); State v. Caldwell, 322 N.W.2d 574, 585-86 (Minn. 1982) (applying *Larrison* rule).

160. *See* sources cited *supra* note 115; Cook & Slawson, *supra* note 133.

161. Five years of incarceration costing $30,000 per year, reduced by a probability of 33%, yields an expected total cost of $50,000, compared to a total cost of $45,000 for a new trial.

few defendants receive relief through federal habeas.[162] In 1996, the U.S. Congress, in order to vindicate the interests of "comity, finality, and federalism,"[163] enacted the AEDPA, which imposes strict limitations on the types of claims that can be presented on habeas and imposes a much higher standard for relief from errors of federal law.[164] Today, over 86% of non-capital habeas petitions are dismissed as procedurally barred and only 0.35% of non-capital habeas petitions obtain relief in the form of a remand to state court.[165] As a result, Nancy King and Joseph Hoffman have argued that federal habeas in non-capital cases acts as a "lottery" for relief and that rights to petition for habeas in non-capital cases should be further restricted in order to conserve administrative resources for better use.

At first blush, wrongful incarceration costs would appear to have little effect on King and Hoffman's argument. As they point out, there is no data available as to whether any of the 0.35% of "successful" petitioners in the study were actually released after their cases are remanded to state court or if their judgments were merely reaffirmed after correcting the violations of federal law identified by the district court.[166] The median sentence for habeas petitioners is 20 years, and petitions are generally not resolved until years after conviction.[167] Assuming that half of successful non-capital habeas petitions actually result in the release of the prisoner, the expected wrongful incarceration savings from habeas would be a paltry $600 per petition.[168] As noted above, however, the vast majority of habeas petitions today are denied as procedurally barred under the strict rules of *Teague v. Lane* and AEDPA, without reaching the merits of the claims. Although federal habeas, as it stands, is a remarkably inefficient use of federal

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162. *See generally* King & Hoffmann, *supra* note 116.

163. *See generally* Williams v. Taylor, 529 U.S. 362 (2007); Kovarsky, *supra* note 31.

164. These restrictions include a statute of limitations for filing petitions and a requirement that relief cannot be granted when a defendant was prejudiced by a state court's mistaken interpretation of federal law, so long as that interpretation was not "unreasonable" at the time the state court interpreted the law. *See Williams*, 529 U.S. at 399; 28 U.S.C. § 2254 (enacted as a part of AEDPA).

165. *See* King & Hoffman, *supra* note 116, at 79. In addition, all of the remaining 13.7% of cases in this study included at least one claim that was procedurally barred.

166. *Id.*

167. *Id*. at 75, 78 (Habeas petitions that complied with filing deadlines reached federal court more than five years after sentencing in district court. Resolving habeas petitions requires roughly one year.).

168. Assuming the average sentence for successful defendants is 20 years, of which they would have actually served 17.6 years, and successful defendants serve 6 years prior to release, each successful defendant would save 11.6 years, or $348,000 in wrongful incarceration costs. If half of the 0.35% of defendants who obtain any relief on habeas are actually released, the average wrongful incarceration savings per petition would be roughly $600.

resources, this is in large part because substantive relief has been so severely restricted. Relaxing procedural bars would allow more petitions to succeed on the merits, thereby increasing the wrongful incarceration savings produced by habeas. Therefore, it is possible that expanding rather than further restricting defendants' habeas rights could actually make it more systemically efficient.

4. Post-Conviction Review for Defendants Who Plead Guilty

Defendants who plead guilty often experience strict limitations on their rights to seek review of their judgments. The state of Michigan, for example, only allows defendants who plead guilty to appeal by leave of the court.[169] In federal court and other jurisdictions, prosecutors routinely insist that defendants waive their rights to both direct appeal and collateral review as a condition of a plea bargain.[170] Indeed, a study by Nancy King and Michael O'Neill found that 65% of all federal plea bargains require defendants to waive many of their rights to direct or collateral review.[171] In the Ninth Circuit, that figure is 90%.[172]

Such waivers are popular because they allow prosecutors and judges to conserve resources that might otherwise be spent litigating appeals, and help trial court judges avoid reversals of their judgments.[173] As one federal prosecutor explained, "A couple big appeals per year can hurt your indictment productivity."[174] Indeed, a 1995 survey of federal judges found that 67% of responding district judges and 62% of responding circuit judges agreed that "[w]aivers of appeal should be used *more* frequently."[175] Critics, however, object to appeal waivers for a number of reasons. Some

169. *See* Halbert v. Michigan, 545 U.S. 605, 625 (2005) (Thomas, J., dissenting).

170. *See, e.g.*, United States v. Navarro-Botello, 912 F.2d 318, 321 (9th Cir. 1990) (waivers of right to appeal constitutional). *See generally* Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871 (2010). In federal court, defendants who plead guilty without a plea bargain automatically receive a 25-30% "acceptance of responsibility" discount to their guideline recommended sentencing range. *See generally* Andrew Chongseh Kim, *Federal Trial Penalty* (forthcoming).

171. King & O'Neill, *supra* note 11, at 212, 231.

172. *Id.* at 232.

173. *See generally id.* at 221 nn.49-54 (quoting federal defender opining that "[District court judges] kinda like [appeal waivers]. They won't get reversed. This is how they keep score in their lives.").

174. *Id.* at 221.

175. MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 22 Table 14 (1997). Only 30% of district judges and 24% of circuit judges agreed that appeal waivers should be used *less* frequently. *Id.*

argue that because appeal waivers require defendants to waive their rights to appeal sentencing errors *before* sentencing, defendants cannot possibly know what claims they are waiving.[176] Critics also argue that because prosecutors in some jurisdictions routinely insist on including appeal waivers in plea bargains, the agreements act as contracts of adhesion where defendants have no choice but to accept.[177] Finally, critics argue that waivers are simply bad policy because they allow trial judges and attorneys to insulate their misconduct from review, possibly encouraging lawless sentencing in violation of guidelines.[178]

It is undeniable that appeal waivers allow prosecutors, judges, and perhaps even public defenders to conserve scarce resources. Analyzing waivers in light of the costs of wrongful incarceration, however, reveals that they may be quite costly to the state as a whole.

Some appeal waivers are explicitly bargained for in plea negotiations.[179] Defendants who anticipate that a legal ambiguity might, on appeal, benefit their position negotiate with prosecutors to waive that right only in exchange for particular concessions, such as a recommendation for a lower sentence.[180] If prosecutors and defendants know that the claim in question has a particular chance of winning on appeal and, if successful, would reduce the sentence by a certain amount, agreeing to give the defendant some portion of that reduction in exchange for waiving the claim allows prosecutors to avoid a costly appeal and allows defendants to lock in a reduced sentence.[181] Although such a transaction might be efficient in an individual case, it leaves resolution of the legal issue for another day, prolonging uncertainty in the aggregate.

Consider the effects such negotiated bargains have on the costs of wrongful incarceration. For example, assume that there is a 50% chance that the law, when finally clarified, would decrease a defendant's sentence by 2 years and a 50% chance that the defendant's sentence would remain the same. Assume further that the parties agree to a one year sentence reduction

176. *See* King & O'Neill, *supra* note 11, at 222-23, 238-245.

177. *See id.* at 223, 230-38 and sources cited therein.

178. *Id.* at 223.

179. *See generally id.* at 232.

180. *See generally id.* at 232-33; United States v. Bownes, 405 F.3d 634, 636 (7th Cir. 2005) (Judge Posner notes, "The government didn't want [the defendant] to appeal and was willing to offer concessions that he and his lawyer considered adequate to induce him to forego his right to appeal. Had [the defendant] insisted on an escape hatch that would have enabled him to appeal if the law changed in his favor after he was sentenced, the government would have been charier in its concessions.").

181. *Cf.* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (discussing the market theory of plea bargaining with respect to chances for acquittal).

in exchange for a waiver of appeal. This would save the parties the expense of an appeal and, when such bargains are struck repeatedly, would on average produce the same total amount of incarceration as if the matters were never appealed. As discussed in Part II.B, however, this Article presumes that incarceration of defendants in full compliance with the law is "proper," while incarceration of defendants not in compliance is "wrongful." For half of all defendants who strike such deals, those whose claims are valid, avoiding appeal and the legal clarity it would bring forces them to accept one year of wrongful incarceration at a cost of $30,000 to the state. For the other half, those whose claims are invalid, the plea bargain deprives the state of a year of "proper" punishment. This dynamic is similar to that discussed in normal plea bargaining literature, but it differs in one significant way: whereas plea bargaining over odds of acquittal is fact based and depends on the particulars of each case, legal issues raised on appeal can be authoritatively clarified and so need not be repeated with each case.

For waivers that are not "negotiated," those required by law[182] or included as a routine condition of plea bargains, neither prosecutor nor defendant anticipates that particular grounds for appeal will arise. Rather, such waivers are intended simply to foreclose the *possibility* of an appeal. For the vast majority of defendants, such waivers are harmless. King and O'Neill report that, before appeal waivers became popular in federal courts, only 15% of defendants who pled guilty appealed.[183] This number has since dropped to 10%.[184] Such waivers are only problematic if defendants discover a potential error *after* agreeing to waive their rights. In such circumstances, waivers act not only to diminish protections for defendants' rights but also to prevent appellate courts from correcting costly wrongful incarceration. Although many such alleged errors may ultimately prove non-meritorious and wastefully consume judicial and prosecutorial resources, as suggested above and in the SADO study discussed in Part II.B, the wrongful incarceration savings from successful appeals would likely be significant.

In sum, when wrongful incarceration is considered, plea waivers may be quite costly. For negotiated waivers, they forestall the resolution of a legal issue, either causing more costly wrongful incarceration or depriving the state of proper incarceration. For non-negotiated waivers, however, they will often save judicial and prosecutorial resources, but only at a substantial net cost to states.

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182. *E.g.*, Halbert v. Michigan, 545 U.S. 605 (2005).

183. *See id.* at 228-30 (appeal rate for all offenses in 1996 was approximately 21%, compared with 15% for guilty plea defendants. This number has dropped to 10%, as appeal waivers have become more prevalent).

184. *Id.*

C. Agency and Cognitive Bias

Although court opinions often cite the administrative burdens of post-conviction review to justify restrictions on review, they rarely mention the costs of wrongful incarceration. As demonstrated above, these costs and the savings produced by post-conviction review can often be quite substantial. As a result, this Article argues that the failure to consider wrongful incarceration often causes appellate courts to restrict post-conviction rights in ways that impose net costs on states. This raises the question of why courts and other policymakers have thus far largely ignored the costs of wrongful incarceration in decision making. This section argues that it is in large part the result of a problem of agency and cognitive bias.

A number of explanations can be offered for the absence of wrongful incarceration costs in discourse about post-conviction review. As discussed above, wrongful incarceration costs are largely invisible: incarceration cannot be identified as wrongful *unless* the errors that make it wrongful are identified on review. Moreover, when wrongful incarceration is corrected, the financial benefits are not realized in lump sum but accrue over a long period of time. Some of the failure to acknowledge the costs of wrongful incarceration may be related to the general trend towards punitiveness in the 1980s and 1990s, during which time complaints about the costs of incarceration were seen as being weak on crime.[185] Much of it, however, may have to do with the incentives of judges and prosecutors.

Procedural barriers to review allow judges and prosecutors to dispose of appeals without having to consider the merits of a defendant's substantive claims of error. Such barriers also discourage defendants from filing appeals in the first place. Respect for the finality of trial convictions helps protect prosecutors' hard-earned convictions and may increase the prestige of trial judges by minimizing reversals.[186] By observing these facts, which few would contest, this Article does not suggest that judges and prosecutors consciously work to subvert the interests of justice for their own benefit. Instead, this Article merely argues that the burdens to the state of reopening judgments may be more salient to the officers charged with efficiently administering criminal law than the benefits that may otherwise accrue to

185. *See infra* note 216.

186. *See, e.g.*, Bator, *supra* note 1, at 451 (There is "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.").

other state entities or society as a whole.[187] As a result, judges, prosecutors, and policymakers influenced by their experiences may often choose policies that seem to be optimal from their point of view but are in fact inefficient for society as a whole.

William Stuntz has argued that the separation of the costs of incarceration from charging decisions of prosecutors produces problems of agency.[188] Though prosecutors are directly affected by their own budgets and workloads in determining when to arrange a plea bargain or which sentences to seek, they are not forced to internalize the costs of the punishments they obtain. As a result, prosecutors, who often receive professional or political benefits from securing lengthier sentences for criminals, may pursue harsher punishments for individual criminals than is optimal for the state as a whole.

Recently, some policymakers have begun to recognize that judges, who determine the final sentences for criminals, also lack incentives to consider the financial costs of the sentences they impose.[189] Judges weigh a host of factors in determining the proper sentence for a criminal. They look to the statutory requirements, the economic and moral harm caused by the crime, the dangerousness of the criminal, the needs of the victims and their families, and the rights of the defendant and his chances for rehabilitation.[190] Judges then attempt to balance the overall interests of justice.[191] However, outside of capital proceedings, they are rarely asked to consider the financial cost to the state of imposing punishments on criminals.[192] The problem of prosecutors advocating overly harsh sentences

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187. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 310 (1989) (discussing the financial burdens on states of having to relitigate finalized cases when a new constitutional rule is made retroactive without mentioning the costs of continued incarceration) (citing *Stumes*, 465 U.S. at 654); *Osborne*, 557 U.S. at 79-85 (Alito, J., concurring); *Halbert*, 545 U.S. at 624-31 (2005) (Thomas, J., dissenting); Chapman v. California, 386 U.S. 18, 57 (1967) (Harlan, J., dissenting) ("[Applying a reasonable doubt standard to harmless error] cuts sharply into the finality of state criminal processes; it bids fair to place an unnecessary substantial burden of work on the federal courts; and it opens the door to further excursions by the federal judiciary into state judicial domains."); United States v. John, 597 F.3d 263, 290-91 (5th Cir. 2010) (Smith, J., dissenting) (not every sentencing error that increases a sentence merits relief under plain error doctrine).

188. *See generally* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

189. *See infra* note 194.

190. *See generally* 18 U.S.C. § 3553(a) (describing factors judges must consider at sentencing).

191. *See* 18 U.S.C. § 3553(a)(2)(A) (directing judges to "provide just punishment for the offense").

192. During the penalty phase of capital cases, some defense attorneys have attempted to rely on cost data to argue against capital punishment, highlighting the state's expenses for providing long term incarceration. *E.g.*, Alaine Griffin, *Steven Hayes Defense Outlines*

is primarily one of agency, in which the prosecutors have incentives to seek longer sentences than is optimal for the state. However, the analogous problem for judges is more accurately described as one of cognitive bias. Judges generally seek to impose the punishment that best serves the interests of justice and society, after weighing all of the relevant factors.[193] Because the judiciary does not internalize the costs of incarceration, however, judges may focus excessively on whether the defendant deserves a particular punishment instead of on whether the benefit to society of the defendant's incarceration is worth the state paying for a lengthy sentence.

The state of Missouri recently took a major step towards correcting this cognitive bias by making the costs of incarceration more salient in the judicial mind. The state sentencing commission created a spreadsheet that trial judges are required to complete prior to sentencing that calculates the financial cost to the state of the punishments they intend to impose. Judges are not held responsible for the costs of incarceration or even required to place any particular weight on the financial cost to the state. They are merely required to be *aware* of the costs of punishment. The Missouri sentencing commission's new policy does not suggest that the interests of retribution, incapacitation, or rehabilitation are any less valuable; rather, it suggests only that judges may have previously failed to appreciate the extent to which handing down lengthy punishments directly impacts the state's budget.[194]

This Article argues that similar problems of cognitive bias and agency affect the decisions appellate judges make when determining the proper limits of post-conviction review. Approximately 80% of direct appeals are resolved with the defendant left in the exact same position as when he began the appellate process.[195] Because appellate court judges directly experience the time-consuming burdens of these many fruitless appeals, they are likely very conscious of the administrative costs to the state of post-conviction review. However, like trial court judges, they are not directly affected by and rarely discuss the financial costs of continuing to

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High Cost Of Putting Someone To Death, HARFORD COURANT, Oct. 13, 2010, http://articles.courant.com/2010-10-13/community/hc-steven-hayes-costs-101220101 012_1_steven-hayes-jennifer-hawke-petit-joshua-komisarjevsky (describing defense counsel's efforts to cite several state studies concerning the costs of life imprisonment).

193. *See supra* notes 190 & 191.

194. *Sentencing Information on www.mosac.mo.gov Now Includes Costs of Recommended Sentences and Risks of Reincarnation*, SMART SENTENCING (Missouri Sentencing Advisory Council), August 17, 2010, at 1-2, http://www.mosac.mo.gov/file.jsp?id=45502.

195. *See* NCSC STUDY, *supra* note 117. *Cf.* Halbert v. Michigan, 545 U.S. 605, 627, 630 (2005) (Thomas, J., dissenting) (noting Michigan's interest in avoiding those appeals unlikely to merit relief).

incarcerate defendants who are wrongfully convicted or sentenced for longer than appropriate. In other words, judges are likely very conscious of the administrative burdens post-conviction review places on the criminal justice system and experience personal incentives to reduce these burdens on the state.[196] As a result, appellate judges may undervalue the potential wrongful incarcerations savings in determining what level of substantive appellate review is socially and legally optimal.

Although there is, of course, no way to force appellate judges to internalize the costs of wrongful incarceration, simply asking them to be *conscious* of the total financial impact of post-conviction review could help better align the rules of post-conviction review with the interests of the state. Replacing the language of "finality" with the language of wrongful incarceration could be a substantial step in that direction.

D. Promoting Deterrence and Legitimacy

As discussed in Part II, by reducing wrongful convictions and improving legitimacy, post-conviction review can have an effect in reducing crime. Like "finality" and "reduced deterrence," however, "legitimacy" and "reduced wrongful convictions" cannot be treated as trump cards. The question is not whether these factors would have *any* effect; rather, the questions are how significant those effects would be and how they might interact on net. This section first argues that traditional reduced deterrence arguments are unpersuasive in light of modern understandings of rehabilitation and rates of appellate relief. It then explores the effects that expanded post-conviction review might have on the perceptions of legitimacy by different populations and concludes that although liberalizing review would likely decrease crime by former prisoners, further research must be done to determine what the net effects would be.

1. Debunking the "Liberal Review Harms Deterrence" Myth

As explained in Part I, there are three general arguments that liberal

196. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989) (discussing the financial burdens on states of having to relitigate finalized cases when a new constitutional rule is made retroactive without mentioning the costs of continued incarceration); *Halbert*, 545 U.S. at 624-31 (2005) (Thomas, J., dissenting); Chapman v. California, 386 U.S. 18, 57 (1967) (Harlan, J., dissenting) ("It cuts sharply into the finality of state criminal processes; it bids fair to place an unnecessary substantial burden of work on the federal courts; and it opens the door to further excursions by the federal judiciary into state judicial domains."); United States v. John, 597 F.3d 263, 290-91 (5th Cir. 2010) (Smith, J., dissenting) (not every sentencing error that increases a sentence merits relief under plain error doctrine).

review harms deterrence: decreased certainty of punishment, decreased overall punishment, and decreased opportunities for rehabilitation. Although these arguments are often repeated,[197] when examined closely, they are generally unpersuasive.

First, the vast majority of defendants who succeed in appellate review are incarcerated for a substantial amount of time prior to release.[198] In federal courts, the median time between conviction and an appellate ruling for first-time appeals is two years, and fewer than nine percent of appeals are resolved within twelve months of conviction, during which time the vast majority of defendants remain incarcerated.[199] As such, the argument that appeals reduce deterrence by allowing some defendants to avoid any official punishment is relevant only for death penalty cases, where appeals decrease the likelihood capital punishment will be imposed, and for the very few defendants who are released on bail pending appeal. Moreover, as Malcolm Feeley argues, because the entire process of being arrested, detained,

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197. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 452-54 (1986) (lack of finality undermines deterrence).

198. It is generally quite difficult for defendants sentenced to a term of incarceration to obtain a stay of execution of sentence pending appeal. *See, e.g.*, Hagen v. Commonwealth, 772 N.E.2d 32, 36 (Mass. 2002) ("[T]he Legislature was aware that the appellate process may be time consuming, but that sentences are not normally stayed pending appeal.").

Although specific standards vary by jurisdiction, in general, defendants bear the burden of demonstrating that there is a reasonable possibility that the defendant will succeed on appeal and that the issue on appeal is such that a successful appeal would likely cause the conviction to be overturned or produce a sentence that is shorter than the length of time it would take to process the appeal. *See, e.g.*, United States v. Miller, 753 F.2d 19, 23-24 (3rd Cir. 1985) (interpreting the Bail Reform Act of 1984); Mass. Crim. Pro. R. 31 reporter's notes (2009) ("[S]entences are not routinely stayed pending appeal."). Stays of execution are generally prohibited if a successful appeal is likely only to reduce a lengthy sentence. *See*, *e.g., id.*; Commonwealth v. Hodge, 380 N.E.2d 1010, 1012-13 (Mass. 1980).

Additionally, the defendant typically bears the burden of demonstrating that he does not present a danger to the community or a risk of flight. *E.g.*, Mass. Crim. Pro. R. 31. In federal court, the defendant must prove this by "clear and convincing evidence." *See, e.g.*, 18 U.S.C. § 3143(b)(1)(A). Some jurisdictions specifically prohibit bail pending appeal for defendants convicted of crimes of violence or crimes that carry a lengthy maximum sentence. *See, e.g.*, 18 U.S.C. § 3142(f) (enumerating excluded offenses). *But see* United States v. DiSomma, 951 F.2d 494, 496 (2nd Cir. 1991) (prohibition may be lifted under exceptional circumstances); Doug Keller, *Resolving a "Substantial Question": Just Who is Entitled to Bail Pending Appeal Under the Bail Reform Act of 1984?*, 60 FLA. L. REV. 825, 842 n.89 (2008).

Indeed, even Rod Blagojevich, the disgraced former governor of Illinois and star of the reality TV show "Celebrity Apprentice," who presented no danger to the community and an only hypothetical risk of flight, was denied permission to delay his sentence pending his appeal from conviction for public corruption.

199. Author's calculations. *See* reports cited *supra* note 123.

interrogated, charged, and being repeatedly brought to court is a significant punishment in itself, even defendants who avoid *formal* punishment nonetheless suffer for their crimes.[200]

Second, only a small fraction of convicted defendants obtain any relief on appeal. In the federal system, less than one percent of all convictions are reversed through appellate procedures, and fewer than three percent receive relief of any kind.[201] As a result, post-conviction review has only a small effect on reducing the punishment potential criminals can expect to receive if convicted.[202]

Finally, modern research on incarceration has rejected the notion that incarceration serves a positive role in rehabilitating offenders, undermining Bator's rehabilitation argument.[203] Nonetheless, it is worth noting that this argument fails on its own terms. Bator argues that the possibility for appeal sends a message that the defendant's punishment might not be "just," thereby causing him to believe he is being unjustly punished, thereby causing him to refuse to rehabilitate. Allowing relief through appeals, however, does not cause defendants to think their punishment is unjust. Rather, a defendant seeks to appeal because he *already* thinks his judgment was unfair. Refusing to allow such defendants an opportunity to air their complaints is unlikely to convince them that their punishment is just.

Although courts and commentators often contend that post-conviction review undermines the deterrent function of criminal law, no evidence for this assertion is ever offered, and an analysis of the arguments offers no

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200. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992).

201. *See* reports cited *supra* note 123 (estimated by comparing the total number of federal convictions for 2004 and 2005 (152,824) with the total number of cases for 2006 and 2007 that were reversed and vacated (1,438), or reversed in part or remanded (3,759)).

202. *See generally* Chemerinsky, *supra* note 13, at 790 ("Deterrence is a function of the certainty and the severity of the punishment imposed. The certainty of punishment includes the likelihood of being apprehended, the chance of being convicted, and the probability of a sentence being imposed. The fact that one in a thousand prisoners succeeds in gaining a reversal of a conviction on habeas hardly seems likely to have any effect on the deterrence of crime.").

203. *See, e.g.,* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 34-47 (1971) (explaining reasons why rehabilitation should not be a goal of the criminal justice system); Chemerinsky, *supra* note 13, at 790 ("[I]f there is anything in the criminal justice system about which there is widespread consensus, it is that prisons do not rehabilitate.") (citations omitted). Moreover, even though the public mood has become less punitive, *see infra* note 216, that shift has not contributed to a corresponding rise in rehabilitative programming. Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC. REV. 33, 35, 55 (2011) (finding that that the inmate to educational staff ratio has increased dramatically since 1990 and, with the exception of re-entry related programs, the past half-decade or so has not seen a "return to rehabilitation").

support.[204]

2. The Effects of Legitimacy and Wrongful Convictions on Whom?

As discussed above, restrictive post-conviction review is unlikely to curb crime in the ways traditionally assumed. The question then remains what effects more liberal review would have in increasing or reducing crime. This subsection argues that liberalizing post-conviction review is unlikely to have any significant effect on the law-abiding behavior of the vast majority of Americans. Liberalizing review *could*, however, have a significant effect on the law abiding behavior of the defendants who benefit from review, their criminal associates, and at-risk minorities.

Although the economic theory of wrongful convictions predicts that reducing wrongful convictions can increase incentives on people to obey the law,[205] reducing wrongful convictions by expanding review is unlikely to affect the behavior of most Americans simply because the risk of wrongful conviction for them is already negligible. For obvious reasons, the actual number of wrongfully convicted defendants in the United States is unknown. Joshua Marquis famously claimed that the wrongful conviction rate in the United States is only ".027 percent."[206] Professor Michael Risinger, on the other hand, has estimated that approximately three to five percent of capital rape-murder convictions in the 1980s were of factually innocent people.[207] Even if the wrongful conviction rate is as high as five percent, however, the rational deterrent effects of wrongful convictions would be very small for the vast majority of Americans. Roughly 1,100,000 felony convictions occur each year in America, or about one for every 260 Americans aged 15 and older.[208] If even five percent of these convictions are of innocent people, then there would be only one wrongful conviction each year for every 4000 American adults. Moreover, in order to be wrongfully convicted of a serious crime, one must first be *suspected* of the

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[204] *Cf.* Chemerinsky, *supra* note 13, at 789 ("[T]he Court and commentators continue to say that habeas is undesirable because it undermines the deterrent function of the criminal law. Yet, no evidence for this assertion is ever offered.") (citation omitted).

205. *See supra* note 96.

206. Kansas v. Marsh, 548 U.S. 163, 197 (2006) (Scalia, J., concurring) (quoting Joshua Marquis).

207. *See* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate,* 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2006). As Risinger explains in his article, the figure famously quoted by Justice Scalia, *supra* note 206, has no empirical basis.

208. In 2004, there were 1,078,900 felony convictions in state courts and 67,464 felony convictions in federal courts. *See* reports cited *supra* note 123. The current American population is approximately 300 million people, 80% of whom are 15 or older.

crime and charged. Because the majority of Americans can expect to spend their lives without being accused, wrongfully or otherwise, of a serious crime, even substantial reductions in the wrongful conviction rate are unlikely to influence their behavior.

The same, however, may not be true for people who have spent time in prison and their associates in high-crime communities. For one thing, people with criminal records are more likely to be suspected of crimes, making the risk of wrongful conviction much more salient. Additionally, people who have spent time in prison are more likely to have first or second hand reports about wrongful convictions. If the wrongful conviction rate is even one percent, then any sizable prison or jail facility will contain a number of inmates who are factually innocent of the crimes for which they were convicted. There will also be many more who falsely profess their innocence. A prisoner is unlikely to believe every protestation of innocence they may hear in prison. Indeed, studies have shown that prisoners are significantly better at detecting lies than detectives, customs agents, prison guards, and laypeople.[209] Additionally, other studies have demonstrated that the more feedback people receive from individual liars, the better they become at detecting lies from those individuals.[210] Because of this, the perceptions that former inmates have about their own chances of being wrongfully convicted in the future will depend in large part on the number of factually innocent defendants in prison.

The willingness of prisoners to believe stories of innocence will undoubtedly depend on the plausibility of the innocence stories other inmates present. An "innocent" inmate who claims to have a new witness to attest to his innocence but is denied a new trial will be far more credible than the same inmate who continues to protest his innocence after a second trial. Similarly, the innocence claim of an inmate who offers to pay for the DNA testing he claims will prove his innocence will be much more credible than the innocence claim of the same inmate after the DNA test has confirmed his guilt. Post-conviction review can help alleviate the reduced deterrent effects of wrongful convictions by both reducing the number of actual wrongful convictions and by reducing the credibility of spurious wrongful conviction claims.

Though wrongful convictions may have little effect on deterrence for most people, they may significantly reduce deterrence for former inmates. Because former inmates are much more likely to commit additional crimes, more generous post-conviction review may actually increase the deterrent

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209. Aldert Vrij & Gün R. Semin, *Lie Experts' Beliefs About Nonverbal Indicators of Deception*, 20 J. NONVERBAL BEHAVIOR 65 (1996).

210. Miron Zuckerman et al., *Learning to Detect Deception,* 46 J. PERSONALITY & SOCIAL PSYCHOL. 519 (1984).

value of the law.[211]

Similarly, providing more liberal post-conviction review would likely have different effects on the perceptions and behavior of high-risk populations than for society as a whole.

After all, the vast majority of Americans already refrain from committing serious crimes, and few outside the legal community hear reports of procedural unfairness with any regularity. The risk of wrongful conviction and problems of procedural unfairness in appellate review likely have little impact on the behavior of most people because they believe, quite rightly, that they will never be exposed to such things.

The same cannot be said for many defendants who have served time in prison. A defendant who, for instance, was given an improperly lengthy sentence as the result of a trial judge's error is unlikely to view the system as fair if he is denied relief because his attorney, also a system insider, failed to catch the error. Such defendants are unlikely to remain silent while they suffer in prison. As a result, prisoners and their associates are far more likely to be exposed to reports of procedural injustice than the population at large.

Furthermore, ex-convicts and their associates in their often impoverished home neighborhoods are at far greater risk of committing new crimes in the future than the population at large.[212] Within three years of being released from prison, 52% of convicted defendants are caught committing a new crime and returned to prison, and many more commit crimes without being caught.[213] A recent study found that 90% of murders in New York City were committed by defendants who already had criminal records.[214] Stories of unfairness in post-conviction review may have a significant effect on the behavior of individuals like former prisoners, their criminal associates, and

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211. Within three years of release, 67% of former inmates are rearrested and 52% are reincarcerated. *See* John J. Gibbons & Nicholas de B. Katzenbach, Vera Institute of Justice, *Confronting Confinement*, 22 WASH. U. J.L. & POL'Y 385, 533 (2006).

212. *See generally* Papachristos, *supra* note 110 (Social networks for violent ex-offenders often include other criminals and gang members, and having more criminals and gang members in the network increases the likelihood of violating gun laws.)

213. *See* report cited *supra* note 211. Although a majority of reported murders in the United States, 65%, were cleared, or "solved," by police in 2010, clearance rates for other crimes are much lower. For example, only 28% of reported robberies were cleared in 2010. If 52% of ex-convicts are *caught* committing a new crime within three years, the proportion who *actually* commit new crimes is likely much higher. CRIMINAL JUSTICE INFORMATION SERVICE DIVISION, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2010, at Table 25 (2011), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl25.xls.

214. Jo Craven McGinty, *New York Killers, and Those Killed, by Numbers*, THE NEW YORK TIMES (April 28, 2006), http://www.nytimes.com/2006/04/28/nyregion/28homicide.html.

many low-income minority youths, who already consider police and prosecutors to be illegitimate, by suggesting that the courts, judges, and even the law itself are also unfair.

Therefore, for criminals and their associates, more liberal post-conviction review may increase legitimacy and compliance with the law by reducing the incidence of such stories and providing post-conviction review more closely in line with what defendants and their communities might consider fair.

The effects more liberal review would have on Americans who have had less unfavorable contact with the justice system, however, is less clear. In a recent paper, Stephanos Bibas argued that spending large amounts of money on appeals and releasing criminals on "technicalities" may reduce the legitimacy of the system in the eyes of the public, particularly of victims, and thereby making it more likely that these ordinary citizens would engage in criminal behavior.[215] Indeed, many victims of crimes in high-crime neighborhoods are criminals themselves who may be less willing to obey laws that are more lenient to their victimizers. Whether the legitimating effects on criminals and their associates of reduced procedural barriers to substantive relief would have a greater crime reducing effect than the delegitimizing effects on the public at large is an empirical question that merits further study. However, because the costs of incarceration have gained increased public salience in recent years, and the national mood has become less punitive,[216] it may be that fewer people would be significantly

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215. *See* Bibas, *supra* note 113, at 949-951 (arguing that a lack of transparency in the justice system prevents victims and the public from understanding the legal and practical rationales behind such releases, degrading the legitimacy of the system in their eyes).

216. Punitive attitudes peaked in the mid-1990s but have been steadily declining ever since. *See* SOURCEBOOK, *supra* note 122, at Table 2.28.2010 (In response to the question "Which of the following approaches to lowering the crime rate in the United States comes closer to your own view—do you think more money and effort should go to attacking the social and economic problems that lead to crime through better education and job training or more money and effort should go to deterring crime by improving law enforcement with more prisons, police, and judges?," 64% of respondents in 2010 said "Attack social problems" while 32% of respondents said "More law enforcement" versus 51% and 42% respectively in 1994.); *id.* at Table 2.47 (In response to the question "In general, do you think the courts in this area deal too harshly or not harshly enough with criminals?," 9% of respondents in 2002 said "Too harshly" while 67% of respondents said "Not harshly enough" versus 3% and 85% respectively in 1994.); *id.* at Table 2.92.2006 (tracking whether college freshmen agree "somewhat" or "strongly" that there is "too much concern in the courts for the rights of criminals" and showing agreement was at 64% in 2002 versus 73.2% in 1995). *See also* Daniel S. Nagin et al., *Public Preferences for Rehabilitation Versus Incarceration of Juvenile Offenders: Evidence From a Contingent Valuation Survey*, 5 CRIMINOLOGY & PUB. POL'Y 627, 642, 645 (2006) (finding a greater willingness to pay for rehabilitation versus longer incarceration for youths charged with serious crimes, and an even greater willingness to pay for early childhood prevention programs, and

vexed by post-conviction procedures that are fairer to defendants. Some may even feel that more generous appellate procedures that improve the legality of sentences at little net cost to the states increase the legitimacy and fairness of the system. Moreover, even if increased legitimacy in the eyes of former prisoners were balanced by a decreased willingness to obey laws by the population at large, the result would be a slight reduction in crimes by "criminals" and a slight increase crimes by the rest of society. The net result, then could easily be a decrease in serious crimes in high crime areas accompanied by a slight increase in minor crimes in lower crime areas. Such a tradeoff would not necessarily be undesirable.

As argued in this section, the traditional arguments that increased post-conviction review increases crime are unlikely to have any substantial effect. Rather, when the effects of legitimacy and wrongful convictions are considered, it becomes clear that offering more "fair" process in post-conviction review would likely *improve* the willingness of convicted defendants and their criminal associates to obey the law in the future. Although the criminal justice system is designed to reduce crime by punishing criminals, being "fair" to criminals and imposing punishment in compliance with the law can also help reduce crime.

CONCLUSION

The language of "finality" embodies an implicit assumption about the interests at stake in post-conviction review: society's interests are furthered by increased finality, while offering broader protections of defendants' rights harms those same interests. Although the harms of waste, inefficiency, and lack of deterrence would likely occur if society were to eliminate all restrictions on appeals, the marginal changes in contention today are unlikely to work such disastrous results. Indeed, some of these changes would likely save money and reduce crime. Moving beyond the language of finality, therefore, may allow society to craft a more efficient and equitable system of post-conviction review.

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commenting that these results may differ from earlier surveys showing more punitive attitudes because "attitudes may have changed since the 1990s").