Beyond Finality: How Making Criminal Judgments Less Final Can Further the Interests of Finality

Andrew Chongseh Kim
BEYOND FINALITY: HOW MAKING CRIMINAL JUDGMENTS LESS FINAL CAN FURTHER THE “INTERESTS OF FINALITY”

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Abstract

Courts and scholars commonly assume that granting convicted defendants more liberal rights to challenge their judgments would harm society’s interests in “finality”. According to conventional wisdom, finality in criminal judgments is necessary to conserve resources, encourage efficient behavior by defense counsel, and deter crime. Thus, under the common analysis, the extent to which convicted defendants should be allowed to challenge their judgments depends on how much society is willing to sacrifice to validate defendants’ rights. This Article argues that expanding defendants’ rights on posttrial review does not always harm these interests. Rather, more liberal review can often conserve state resources, will rarely affect the behavior of defense counsel, and can help reduce crime.

First, the assumption that defendants’ posttrial rights burden state resources ignores the costs of wrongful incarceration. Although posttrial review consumes judicial resources, it helps save money that would otherwise be spent incarcerating wrongfully convicted defendants and those given improperly lengthy sentences. To demonstrate the significance of wrongful incarceration, this Article estimates and compares the incarceration savings produced by state direct appeals with the costs of providing appeals. It concludes that direct appeals produce incarceration savings that are roughly as large as and may even exceed the administrative costs of appeals and new trials. In other words, protecting the rights of defendants on appeal may actually save states money. The Article then identifies specific restrictions on review,
such as those on relief from plain errors in sentencing that impose net financial costs on states.

Second, although increasing opportunities for posttrial relief theoretically reduces defense counsel’s incentives to prevent errors at trial, those reductions are unlikely to affect the actual behavior of counsel. This Article argues that harmless error rules largely eliminate ex ante incentives for attorneys to sandbag or engage in other strategic behavior. Moreover, greater restrictions on posttrial rights are unlikely to reduce inadvertent errors because resource constraints on public defenders, rather than inattentiveness, are the principal cause of such errors.

Finally, this Article reveals that the traditional deterrence arguments are based on empirical assumptions that are demonstrably false. Moreover, recent social psychological research shows that the willingness of people to obey the law is influenced heavily by their perceptions of procedural fairness and system legitimacy. Restrictions that appear subjectively “unfair” to defendants may, therefore, increase recidivism by undermining legitimacy. Conversely, reforming such restrictions may encourage defendants to comply with the law.

INTRODUCTION

Courts and scholars commonly assume that limiting the rights of convicted defendants to challenge their judgments inherently benefits society’s interests in finality. This Article challenges that assumption.
Judges and criminal law scholars routinely assert that increasing the finality of judgments, by restricting defendants’ rights on posttrial review, provides three instrumental benefits to society. First, it allows the state to conserve the considerable judicial, prosecutorial, and public defense resources that posttrial review consumes. Second, it increases incentives on defense counsel to prevent errors in the first place, improving the quality of representation defendants receive. Third, it improves deterrence by increasing the certainty and severity of punishment people can expect to receive for breaking the law. Although restrictions on review may appear unfair to defendants with legitimate claims of error, more expansive review imposes significant costs to society’s interests in finality.

The argument that increased finality of criminal judgments benefits society has had a tremendous influence on courts and criminal law scholars. Judge Henry J. Friendly, for example, argued that the interests of finality must often take precedence over defendants’ interests in life and liberty. The Supreme Court routinely invokes finality to justify harsh restrictions on defendants’ rights, even when it is unclear how those restrictions would actually further the interests of society. Indeed, even scholars like Barry Friedman who argue that broader posttrial rights are necessary in the interest of fairness routinely concede that these rights would harm the state’s generalized interest in finality.

This Article argues that although restrictions on posttrial review inherently make criminal convictions more final, they do not always serve the interests

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1 This Article uses the phrase “posttrial review” to refer to all forms of review that occur after conviction at trial, including direct appeals, state postconviction review, federal habeas corpus, and innocence commissions.


5 See Bator, supra note 2, at 451–53.


7 See, e.g., Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 98 (2009) (Stevens, J., dissenting) (accusing the majority of treating “finality [as] . . . 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”); see also Erwin Chemerinsky, Thinking about Habeas Corpus, 37 Case W. Res. L. Rev. 748, 772–75 (1987); Sigmund G. Popko, Putting Finality in Perspective: Collateral Review of Criminal Judgments in the DNA Era, 1 L.J. Soc. Just. 75, 75 (2011) (stating that in posttrial criminal law “the demands of finality [often] trump what were once viable legal issues”).

finality is presumed to protect. Rather, restrictions on review (1) can produce net waste of state resources by increasing wrongful incarceration costs, (2) will rarely affect the behavior of defense counsel, and (3) can actually make defendants less willing to obey the law in the future by making the justice system appear procedurally unfair. In other words, restricting posttrial review can often harm the very interests finality is presumed to protect.

First, although restrictions on posttrial review reduce the procedural costs of review, they increase the costs of wrongful incarceration. This Article uses the term “wrongful incarceration” to refer to the continued incarceration of three types of defendants: (1) those who are factually innocent, (2) those who are factually guilty but were convicted only through a violation of important rights, and (3) those who are factually guilty but are serving improperly lengthy sentences. Wrongful incarceration, thus, is incarceration in excess of that intended by the legislature. Although restrictions on posttrial review reduce judicial and prosecutorial workloads, they increase the amount of money the state spends wrongfully incarcerating defendants.

No study to date has attempted to compare the administrative costs of providing posttrial review with the incarceration savings that review produces. This Article offers the first such analysis. Using existing data, it demonstrates that the incarceration savings produced by state direct appeals are generally quite significant compared to the administrative costs. Indeed, it is possible that direct appeals produce net savings to some states. In other words, rather than imposing a net burden on state resources, protecting defendants’ rights through direct appeal may actually save states money.

Second, courts and scholars commonly assume that restricting posttrial review helps improve the quality of representation by increasing incentives for defense counsel to prevent errors at trial. If defense attorneys know there will be little opportunity to obtain relief from errors after convictions, they will try harder to prevent errors in the trial court. Although this reasoning is persuasive in the abstract, as a practical matter, reducing the number of trial errors would generally require attorneys to spend more time and resources representing each client. Most defense attorneys, however, work under such heavy workloads that they are already forced to ration the amount of time they spend with each client. As a result, although restrictions on posttrial review may make defense attorneys want to take more care in their representation, they will generally have little effect on the actual representation they provide.

Courts and scholars argue that granting posttrial relief from errors effectively rewards defendants for failing to correct those errors at trial. As a result, more liberal review gives defense counsel perverse incentives to ignore errors at trial in order to establish grounds for appeal. This Article demonstrates that this ubiquitous concern is largely an illusion created through the lens of hindsight. Although grants of posttrial relief appear, in retrospect, to reward defendants for failing to object to errors at trial, they can only incentivize such behavior if defense counsel knows, ex ante, that their failure to object will be rewarded. As this Article
argues, however, harmless error rules generally prevent such knowledge in all but the most unusual cases.

Third, and finally, the argument that expansions of posttrial review reduce deterrence is unpersuasive, even on its own terms. Judges and scholars often argue that expansions of posttrial relief increase crime by reducing the certainty and severity of punishment people expect to receive for violating the law.9 Such rational actor effects, however, can only be significant if those expansions significantly reduce expected punishment. Few criminal defendants appeal their convictions, and even fewer succeed on appeal without first spending a significant amount of time incarcerated. Indeed, this Article estimates that the entirety of successful federal direct appeals reduces expected punishment by only around 1%. As a result, any individual expansion or restriction of review would have only a miniscule effect on the rational incentives of people to obey the law.

At the same time, however, social psychological research has demonstrated that perceptions of procedural fairness play a significant role in the willingness of people to comply with the dictates of the law.10 For example, a recent study on violent offenders in Chicago found that those who viewed the justice system as less fair or less “legitimate” were more likely to carry a gun in violation of the law.11 Conversely, those who believed the system is generally fair and motivated to do justice were less likely to carry a gun, even if they continued to commit other crimes. This study suggests that although increased perceptions of legitimacy may not eliminate recidivism, improving perceptions of fairness may help reduce the amount and seriousness of the crimes defendants commit in the future.

This Article argues that many restrictions on posttrial review, such as rules preventing relief from clear errors in sentences, may appear arbitrary or unfair to defendants. By harming defendants’ perceptions of legitimacy, such restrictions may actually reduce their willingness to obey the law in the future, thereby increasing recidivism. Conversely, offering more meaningful opportunities for defendants to seek relief from errors may demonstrate the system’s commitment to fairness, encouraging defendants to comply with the law in the future.

This Article proceeds in three parts. Part I discusses the traditional arguments about the benefits of finality and how courts and scholars have used these presumed benefits to justify a broad range of restrictions on posttrial rights. Part II analyzes the problems of using finality as a justification for such restrictions. Part II.A discusses existing responses to finality arguments and argues that these critiques primarily assert that defendants’ rights to liberty and fair process must take precedence over the conceded benefits of finality. Part II.B offers a new conceptual framework for analyzing posttrial review. Using tools of economic

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9 See, e.g., Teague v. Lane, 489 U.S. 288, 309 (1989); Bator, supra note 2, at 451–52.

10 See generally Tom Tyler, Obeying the Law in America: Procedural Justice and the Sense of Fairness, 6 ISSUES OF DEMOCRACY 16 (2001) (discussing the role of perceptions of procedural fairness in compliance with the law).

11 Andrew V. Papachristos et al., Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders, 102 J. CRIM. L. & CRIMINOLOGY 397, 436 (2012).
analysis and social psychological research, it demonstrates that restricting review can often harm the very interests finality is assumed to protect. Part III builds on this framework by analyzing how particular forms of review and expansions of review might impact the interests of resource conservation, efficiency, and crime reduction. Debates about the proper scope of posttrial review have traditionally balanced the importance of criminal defendants’ rights against society’s competing interests in finality. As this Article argues, however, protecting defendants’ rights to fair and accurate judgments can often provide significant practical benefits to society as a whole. Replacing the language of finality with a critical analysis of the effects of posttrial review, therefore, can help courts, legislators, and scholars craft rules of procedure that better balance the moral and instrumental interests of society.

I. THE PRESUMED IMPORTANCE 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.*

Chief Justice Warren Burger

Although courts and scholars routinely decry the costs of posttrial review, all acknowledge that review of criminal judgments serves important purposes. Posttrial review provides oversight of trial courts and authoritative interpretations of the law so that the law is applied uniformly in all courts. It allows the judiciary to correct its own legal mistakes, helping to ensure that the state deprives defendants of their liberty only in accordance with the law. When new evidence of innocence surfaces, posttrial review can help set an innocent person free.

Restrictions on review, however, often prevent convicted defendants from obtaining relief from even legitimate claims of error. Some such restrictions are relatively noncontroversial. For example, few would argue that a defendant convicted at trial by a mountain of properly admitted evidence should be granted a new trial based on a claim that a minor piece of evidence was improperly

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13 See, e.g., Bator, supra note 2, at 151 (“[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.”); David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 Ariz. L. Rev. 1027, 1060–63 (2010) (“[T]he benefits [of posttrial 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.”).
14 See Wolitz, supra note 13, at 1068.
15 See generally id.
admitted. Any error in admitting the disputed evidence would be considered “harmless.” In such a case, reversing the conviction would simply waste resources on a new trial, the result of which would likely be another conviction. Even worse, if the prosecutor chose not to retry the defendant, a reversal would allow a guilty defendant to go free on a technicality. Similarly, a defendant whose attorney withheld certain evidence at trial for sound strategic reasons generally cannot obtain a new trial in order to present this “sandbagged” evidence. Allowing a new trial under such circumstances would give the defendant an unfair second opportunity to avoid conviction.

Other restrictions, however, are more controversial. Defendants who offer new evidence of innocence are often denied a new trial even when the new evidence casts significant doubt on their guilt. Contemporaneous objection rules often prohibit courts from correcting sentences that are clearly improper if the defendant’s attorney failed to catch the errors at trial. Although defendants convicted at trial always have the right to appeal their judgments, defendants in many jurisdictions are required to waive their rights to appeal by statute or as part of a plea agreement. Such broad waivers have been upheld as constitutional

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16 See Correll v. Thompson, 63 F.3d 1279, 1291–92 (4th Cir. 1995) (stating that, because two confessions by the defendant had already been properly admitted, any error in admitting a third confession would have been harmless).

17 Puckett v. United States, 556 U.S. 129, 140 (2009); see also Strickland v. Washington, 466 U.S. 668, 699–700 (1984) (stating that counsel’s decision not to present evidence at trial concerning defendant’s character and emotional state and not to present psychiatric evidence at sentencing was reasonable and not prejudicial).

18 See, e.g., In re Davis, 565 F.3d 810, 814–18, 825–27 (11th Cir. 2009) (denying a new murder trial in spite of evidence that seven of nine eyewitnesses recanted their testimony, the police felt pressure, and the eighth witness was the actual alleged shooter).

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

20 Forty-seven states and the federal government provide for at least one direct appeal as of right for defendants convicted at trial in nondeath 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 nondeath penalty cases and as of right appeals in death penalty cases, these appeals are enconced 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).

21 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 also Halbert v. Michigan, 545 U.S. 605, 609 (2005) (discussing the appellate rights of Michigan defendants who plead guilty).

22 See infra Part III.B.4.
even with respect to errors that occur after the defendant pleads guilty, such as errors that occur at sentencing.23

Debates about the proper scope of posttrial review often reduce to a balancing of the importance of the defendants’ rights against the harm protecting those rights would inflict on the state’s unitary “interest in finality.”24 A review of the literature reveals, however, that the word “finality” is actually shorthand for a collection of interests scholars assume are furthered by any restrictions on review. This Part proceeds in two sections. Section A lays out the traditional arguments offered in support of the inherent value of finality. Section B demonstrates the profound, and often uncritical, influence these arguments have had on criminal law scholarship and jurisprudence.

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 by Paul M. Bator.25 His article laid the intellectual groundwork for the Supreme Court’s posttrial review jurisprudence and has been cited in hundreds of law review articles and court opinions.26 Bator argued that the finality of criminal judgments serves important interests that are harmed by expansions of posttrial rights. The three instrumental values that have gained the most prominence in scholarship and court opinions are reduced administrative costs of review, more efficient behavior by defense counsel, and increased deterrence of crime.27

The finality benefit that courts and scholars cite most often is the reduction of the administrative costs of providing review.28 Reviewing trial court judgments

23 See 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).


25 See Bator, supra note 2, at 451–53; Bandes, supra note 24, at 509 (observing that Bator’s article “profoundly influenced the habeas jurisprudence of the Rehnquist Court”); Chemerinsky, supra note 7, at 772–75 (discussing the influence of finality and Bator’s article on the Burger Court).

26 See infra notes 42–43.

27 In addition to the primary interests of resource conservation, efficiency, and deterrence, Bator also argued that finality serves a general role in offering repose and increasing respect for the justice system. Bator, supra note 2, at 450–53. The issues of repose and respect for the system are addressed infra at Part II.B.1.a.

consumes the time of judges, 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 states can afford to pay to protect those rights.29

Restrictions on defendants’ rights to posttrial review help conserve state resources in two ways. First, making it harder for defendants to obtain relief discourages defendants from seeking review at all. As a result, restrictions on review help conserve resources by reducing the number of appeals of which states must pay. Second, procedural barriers to review, such as rules that categorically bar relief from certain types of errors, allow judges to dismiss many claims as procedurally barred without spending time considering the underlying merits of the claims.30 Conversely, more generous posttrial review increases the number and complexity of appeals, increasing the workload on the state.

A second and related finality interest is the efficient behavior of defense counsel. Courts often assert that restricting posttrial relief increases incentives on defense counsel to prevent and object to errors at trial, thereby reducing the number of errors that occur.31 Many errors, such as introductions of inadmissible evidence, violations of a plea bargain, or errors in sentencing calculations can easily be remedied if brought to the trial court’s attention in a timely manner.32 Providing opportunities to remedy errors after conviction reduces the defense counsel’s incentives to identify and object to such errors when they arise. Indeed, courts often argue that more lenient posttrial review would give attorneys upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application.” (omission and alteration in original) (quoting Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in the judgment)); Bator, supra note 2, at 451; Chemerinsky, supra note 7, at 791 (“[T]he real basis for the concern over finality . . . is a desire to conserve judicial resources.”); Friendly, supra note 6, at 148 (“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.”).). This issue is discussed further in infra Part III.A.2.

29 Bator argues that posttrial review consumes not only economic resources, but also intangible resources, such as the mental acuity of judges. Bator, supra note 2, 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 infra Part III.A.2.

30 But see Friedman, supra note 8, 531–32 (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).

31 See infra Part II.B.2.

32 See, e.g., Puckett v. United States, 556 U.S. 129, 140 (2009) (“[S]ome breaches may be curable upon timely objection. . . . And . . . 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.”).
incentives to intentionally ignore errors when they occur, “sandbagging” the errors to establish grounds for an appeal in the event the defendant is convicted. Conversely, restricting posttrial review encourages defense counsel to take more care to prevent and object to errors at trial, thereby reducing the number of errors and avoidable appeals that occur.

Finally, some scholars and courts contend that more generous posttrial review increases crime. This argument traces to Bator, who argued that providing more generous posttrial review can reduce the deterrent effect of the law in three different ways. First, appeals can delay or prevent the imposition of punishment, reducing the likelihood that criminal behavior will be punished. Second, appeals reduce the average punishment that potential criminals can expect to receive for their crimes. Third, appeals interfere with the rehabilitative function of incarceration. Bator argued that an incarcerated defendant’s rehabilitation cannot occur until “the convict [realizes] that he is justly subject to sanction, that he stands

33 Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (internal quotation marks omitted); see also Puckett, 556 U.S. at 140 (“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.” (citation omitted) (quoting United States v. Vonn, 535 U.S. 55, 73 (2002)); see also United States v. Frady, 456 U.S. 152, 164–65 (1982) (citing the state’s interest in finality in refusing to allow collateral attack on an eighteen-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) (holding that defense counsel’s claimed lack of knowledge of certain constitutional claims did not excuse defendant from failing to timely raise the claims at trial when such claims were cited in numerous contemporary cases).

34 See Bator, supra note 2, at 451–52. Although Bator’s article offers a single deterrence argument, a careful examination reveals that this argument operates through these three prongs.

Notably, Judge Friendly adopted Bator’s deterrence-based argument, as did the Supreme Court. See Teague v. Lane, 489 U.S. 288, 309 (1989) (“Without finality, the criminal law is deprived of much of its deterrent effect.”); Friendly, supra note 6, at 146–47 (adopting Bator’s deterrence argument); The Court has since continued to rely on this argument for finality. See, e.g., Calderon v. Thompson, 523 U.S. 538, 555 (1998).

35 See Bator, supra note 2, 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.”); see also 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.”).

36 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 127–28 n.32 (citing Bator, supra note 2, at 452).
in need of rehabilitation . . . ." 

In Bator’s opinion, continually reopening convictions “tells the convict that he may not be justly subject to reeducation and treatment in the first place.”

Therefore, defendants who are allowed to appeal may remain recalcitrant, which may prevent rehabilitation. Although courts and scholars rarely explain these arguments in detail, many have adopted Bator’s conclusion that limiting posttrial review helps deter crime.

Although Bator’s article specifically addressed the scope of federal habeas corpus for state prisoners, where 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 on defendants’ rights to seek posttrial relief.

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37 Bator, supra note 2, at 452.

38 Id.; see also Kuhlman, 477 U.S. at 453 (quoting Bator, supra note 2, at 452, and citing Engle, 456 U.S. at 127–28 n.32); Friendly, supra note 6, at 146 (stating that although convicted defendants generally remain in prison pending appeal, appeals nonetheless affect rehabilitation); 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 . . . .”).

39 See, e.g., Teague, 489 U.S. at 309; 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); 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); Friendly, supra note 6, at 146 (quoting Bator). But see Chemerinsky, supra note 7, 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)).


41 See, e.g., Dist. Attorney’s Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 72–73 (2009) (citing “traditional notions of finality” to justify denying the right to test potentially exculpatory DNA evidence); Puckett v. United States, 556 U.S. 129, 138–40 (2009) (stating that the contemporaneous objection rule is necessary to avoid sandbagging and encourage efficiency); Halbert v. Michigan, 545 U.S. 605, 627 (2005) (Thomas, J., dissenting) (arguing that the state’s preference for finality helps justify denying appointed counsel for defendants who plead guilty and later petition for leave to appeal); Teague, 489 U.S. at 309–10 (citing finality and Bator’s arguments to justify restrictions on retroactivity of new rules on habeas); Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring) (stating that “the burden on judicial and prosecutorial resources entailed in retrial” justifies the rule of procedural default); Lebron v. Comm’r of Corr., 876 A.2d 1178, 1191 (Conn. 2005) (citing Bator, supra note 2, to support the argument that state habeas is not available to challenge prior convictions that enhanced the sentence for subsequent convictions); Cortellesso v. Commonwealth, 238 N.E.2d 516, 517–18 (Mass. 1968) (citing Bator, supra note 2, as support for the rule of procedural default on state collateral review).
B. The Influence of Finality

Bator’s arguments about the benefits of finality have had a tremendous influence on criminal law discourse. His article and an article by Judge Henry J. Friendly, which built on Bator’s ideas about finality, have been cited in hundreds of law review articles and court opinions. Indeed, the interests of finality have been treated as “paramountly important” in the dozens of Supreme Court opinions that cite these articles by name.

The belief that increased finality inherently provides significant benefits has become so ubiquitous that courts and scholars who advocate for restrictions on review routinely invoke the state’s interest in finality as a justification in itself, with no explanation of how those restrictions would provide any particular benefit identified by Bator. Rather, they simply assume that because any restrictions on

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42 A September 2012 search of the commercially available legal databases of LexisNexis revealed that 148 state and federal cases (including twenty-two U.S. Supreme Court cases) and 381 law review articles cite Bator’s article. Additionally, 246 state and federal cases (including twenty-four U.S. Supreme Court cases) and 274 articles cite Judge Friendly’s article, which built on Bator’s arguments about finality. The importance of these two articles and the views they presented cannot be overstated. See, e.g., 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”); Wolitz, supra note 13, at 1038 n.57 (stating that Bator’s article and Friendly’s article are “the two most influential articles decrying the mid-century expansion of habeas”).

43 Chemerinsky, supra note 7, at 759. Scholars have been quick to note the influence of Bator and Friendly in the area of habeas review. See, e.g., id. (“[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 . . . .”); Susan Bandes, Taking Justice to Its Logical Extreme: A Comment on Teague v. Lane, 66 S. CAL. L. REV. 2453, 2458 (1993) (arguing that the Court has “stack[ed] the deck in favor of finality”); Judith Resnik, Tiers, 57 S. CAL. L. REV. 837, 892 (1984) (noting that the Supreme Court’s “dominant procedural concerns are finality and economy”). And the Court’s own jurisprudence sustains this obsession with finality. See, e.g., In re Davis, 557 U.S. 952, 956 (2009) (citing Bator); Osborne, 557 U.S. at 72 (citing Friendly); Danforth v. Minnesota, 552 U.S. 264, 272 n.6 (2008) (citing Bator); House v. Bell, 547 U.S. 518, 538 (2006) (citing Friendly); 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., Free v. Peters, 12 F.3d 700, 703 (7th Cir.1993) (stating that Teague v. Lane protects “the state’s interest in the finality of criminal convictions”).

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 8, at 529; see also Osborne, 557 U.S. at 72 (noting without explanation that requiring DNA testing would disrupt “our traditional notions of finality”); 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
posttrial review make criminal judgments more final, by definition those restrictions must serve the various interests of finality. Moreover, even those who deign to specify the interests they believe will benefit from restrictions on review rarely analyze the extent of such benefits. Rather, because the interests of finality are treated with such reverence in criminal law discourse, advocates of restrictions simply assume that anything that degrades finality to any degree would inflict substantial harm to society. Thus, because rules that make it easier for defendants to obtain relief inherently increase the judicial workload, courts and scholars routinely assume they impose a substantial net cost on society. Scholars like Roger J. Traynor proclaim that any “[r]eversal for error . . . encourages litigants to abuse the judicial process” and significantly increases the risk of gamesmanship. As Erwin Chemerinsky observed, even though no evidence has ever been offered to support the proposition, scholars like Henry Friendly repeatedly assert that more generous posttrial review would significantly reduce deterrence.

As such, scholars have accused advocates of restrictive review of using finality as a trump card that presumptively outranks defendants’ interests in fair process. Because finality has attained such prominence in legal discourse, even defendants’ rights advocates routinely concede that expanded posttrial review would inflict substantial harm to the generalized interests of finality. They argue, however, that those unspecified harms are less significant than the other interests at stake, such as fair process or the liberty interests of innocent defendants.
For example, in *Osborne* a man convicted of a violent sexual assault brought suit to force the State of Alaska to allow him to pay to test DNA evidence that he claimed would prove his innocence. The U.S. Supreme Court denied relief based in part on fears that allowing the test would do unspecified damage to the “traditional [interest in] finality.” Justice Stevens, in dissent, conceded that allowing the test would harm finality but argued that those interests must yield in light of the unique power of DNA evidence to prove innocence. Although both opinions agreed that granting relief would harm the interests of finality, neither made any attempt to explain how those interests would be harmed by allowing a test paid for by the defendant, or to what extent.

Similarly, in *Puckett*, the Supreme Court considered whether to grant a defendant relief after a prosecutor asked for a lengthier sentence in violation of the plea agreement. Although defense counsel objected to the increased sentence on a number of grounds, he did not specifically object to the violation of the plea agreement. Writing for the Court, Justice Scalia concluded that although the defendant’s rights were clearly violated, relief should be denied. Reciting the traditional concerns about efficient defense counsel behavior, Scalia asserted that granting relief would allow defense counsel 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.” Moreover, denying relief would encourage defense counsel to take more care to object at trial, where the error might be corrected more efficiently. Justice Souter, in dissent, agreed that granting relief would present an “undoubted risk of allowing a defendant to game the system” but argued that relief should be granted to deter such unfair prosecutorial behavior.

In *Puckett*, however, the defendant’s attorney clearly did not attempt to game the system. He objected to the error on several different grounds but failed only to

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important in that case); 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 (2005) (arguing that finality and judicial economy must be balanced against the importance of allowing innocent prisoners to present newly discovered evidence); 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 (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.”).

53 *Osborne*, 557 U.S. at 72.
54 *Id.* at 72–73; see also *Id.* at 98–100 (Stevens, J., dissenting).
56 *Id.* at 133, 139.
57 *Id.* at 136, 143.
58 *Id.* at 140 (quoting United States v. Vonn, 535 U.S. 55, 73 (2002)) (alterations in original) (internal quotations marks omitted).
59 *Id.* at 134.
60 *Id.* at 146 (Souter, J., dissenting) (“Redressing such fundamentally unfair behavior by the Government, whether by vacating the plea or enforcing the plea agreement is worth the undoubted risk of allowing a defendant to game the system and the additional administrative burdens.”).
raise the particular objection, violation of the plea agreement, which the Court ultimately found persuasive. 61 Granting relief in this case clearly would raise little, if any, risk that future defendants would try to game the system by intentionally withholding winning arguments. Nonetheless, rather than analyzing how and to what extent granting relief would encourage inefficient behavior, both Justices simply assumed that providing more lenient posttrial rights would cause substantial harm to the interests of finality.

By invoking finality or its component interests as significant factors in favor of a particular restriction of review, courts implicitly assume that (1) the restriction in question would make criminal judgments significantly more final, (2) the restriction would increase finality in a way that benefits society, and (3) the benefits of this marginal increase in finality are important enough to outweigh the other interests at stake. Using tools of economic analysis and social psychological research, Part II demonstrates that these assumptions, which are rarely made explicit, are often false.

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

As demonstrated in Part I, courts and scholars often argue that society’s interests in finality justify restrictions on posttrial review even when it is unclear how or if those restrictions would further any particular societal interests. This Part proceeds in two sections: section A reviews existing critiques of finality, identifying both the strengths and limitations of these critiques; section B presents a new conceptual framework for analyzing the costs and benefits of restrictions on posttrial review.

A. Extant Responses to Finality

As Part I illustrated, courts and scholars commonly assume that a more limited review would serve the state’s interests in finality but rarely specify what those interests are or how substantial the benefits would be. Instead, judges and academics simply presume that any restrictions that make criminal judgments more final necessarily benefit the interests of finality and assume that those benefits will be significant. 62 In light of the paramount importance given finality in legal discourse and Supreme Court jurisprudence, 63 advocates of expanded review usually concede that limiting review would offer some significant benefits to the interests of finality. They argue, nonetheless, that the purported benefits of

61 Id. at 133.
62 See Chemerinsky, supra note 7, at 759.
63 See supra Part I.B.
restrictive review cannot outweigh the other interests at stake. 64 Scholars have attempted to counter this finality trump card in three different ways.

In the first and most common approach, defendants’ rights advocates simply concede that restricting review in a particular manner would confer significant benefits to unspecified interests in finality. They argue, nonetheless, that other values, such as liberty or the integrity of the judicial process, are more important than those unspecified interests. 65 For example, in Osborne, the State argued that the defendant should be denied the right to test potentially exculpatory DNA at his own expense. 66 The only reason the State offered for denying this test was “a generalized interest in protecting the finality of the judgment of conviction from any possible future attacks.” 67 The majority, noting that DNA technology poses intricate “challenges . . . to our criminal justice systems and our traditional notions of finality,” agreed. 68 The Court’s opinion, however, failed to explain how allowing such a test would actually harm any of 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 the “State’s overriding interest in ensuring that justice is done in its courts and secured to its citizens” outweighed this interest. 69 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.

In a second approach, applied primarily in the context of federal habeas corpus for state prisoners, scholars concede the importance of finality but contend that particular restrictions would not actually make judgments more final in the sense of preventing or ending litigation. For example, in order to protect the finality interests identified by Bator, the Supreme Court in *Teague v. Lane*\(^{70}\) established a categorical bar for certain types of habeas petitions.\(^{71}\) Barry Friedman, in an insightful critique, argues that this severe curtailment of defendants’ rights could not be justified by the interests of finality because the rule failed to actually make criminal judgments more final in the sense of ending or preventing posttrial litigation.\(^{72}\) Friedman contends that rather than ending litigation by defendants whose claims were ostensibly barred, *Teague* simply forced defendants raising such claims to litigate over whether those bars actually applied.\(^{73}\) Rather than making convictions more final, *Teague* merely “substitute[d] unending litigation on the merits with unending litigation on procedural issues.”\(^{74}\)

Similarly, Joseph Hoffman and Nancy King propose that Congress restrict federal habeas for noncapital defendants to only those who make plausible claims of actual innocence, thereby deterring many petitions and conserving federal resources.\(^{75}\) As John Blume, Sheri Lynn Johnson, and Keir Weyble observe, however, “[a]lthough truly meritorious claims of actual innocence are difficult to make, facially plausible ones are not.”\(^{76}\) They argue that because habeas petitioners have nothing to lose by seeking relief, Hoffman and King’s proposal would do little to further the interests of finality.\(^{77}\)

In a third approach, scholars reduce finality to its component interests. They then argue that a particular restriction would either fail to provide the particular benefits assumed or that those benefits are less important than the other interests at

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\(^{71}\) *Id.* at 309–10 (extensively discussing and quoting Bator). Under *Teague*, 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 quotation marks omitted).

\(^{72}\) Friedman, *supra* note 8, at 530–34.

\(^{73}\) *Id.*

\(^{74}\) *Id.* at 531.


\(^{77}\) *Id.* at 460–67.
stake. Susan Bandes, for instance, contends that convicted capital defendants who claim to have new evidence of innocence should have a constitutional right to a hearing at which to present that evidence. 78 As she explains, the Supreme Court’s jurisprudence on this question ultimately reduces to a balancing of the societal benefits of increased finality against the interests of the defendant. 79 Using Bator’s taxonomy as a guide, Bandes first argues that denying capital defendants the right to present new evidence can offer no deterrent or rehabilitative benefits because the execution of innocent defendants cannot serve this function. She argues, therefore, that the only benefits of restricting defendants’ rights in this manner are conservation of resources and increased efficiency. 80 Conceding that these benefits may be significant in general, Bandes argues that they necessarily must yield when the life of a potentially innocent defendant is at stake.81

Critiques like Bandes’s make significant strides in demystifying finality by exposing finality as a collection of interests, each of which must be weighed in turn, rather than as a monolithic interest of presumptive importance. These critiques, however, like the others discussed above, argue only that the purported benefits of finality are not as significant as commonly believed. They implicitly assume that restrictions of posttrial review always confer some, albeit finite, instrumental benefits to society. As explained below, this assumption is often false.

B. A New Conceptual Critique of Finality Discourse

As discussed above, courts and scholars commonly assume that restrictions on defendants’ rights to challenge their judgments inherently further society’s paramount interests in finality. 82 Indeed, the importance of finality has attained such a prominent status in Supreme Court jurisprudence and legal discourse that even advocates of expanded review commonly presume that restrictions on review inherently provide significant instrumental benefits. 83 As a result, existing critiques of finality have argued primarily that the conceded benefits of finality are not significant enough to outweigh the other interests at stake.

Unpacking finality, however, reveals that it is a shorthand used to refer to a collection of societal interests—primarily conservation of resources, efficient defense counsel behavior, and deterrence—that scholars assume are furthered by any restrictions on review. Because restrictions on posttrial review make judgments more final, scholars presume they further the underlying interests of finality. This tautology, however, reveals the conceptual flaw in the language of finality: the term finality presumes its own value.

78 See Bandes, supra note 24, at 507–08.
79 Id.
80 Id. at 509–11.
81 Id. at 511.
82 See, e.g., sources cited supra notes 43–45.
83 See supra notes 65–82 and accompanying text.
This section uses social psychological research and tools of economic analysis to demonstrate that restrictions of posttrial review can often harm the very interests finality seeks to protect. Analyzing posttrial review through the framework of finality, therefore, can lead courts and scholars to restrict review in ways that harm the interests of both defendants and society as a whole. To move past the language of finality, it is necessary to shift the analysis away from current debates about the degree to which finality benefits society and return to the fundamental question of how individual restrictions on posttrial review actually affect the conservation of societal resources, the behavior of defense counsel, and the prevention of crime.

This section proceeds in three subsections. Subsection 1 introduces the concept of wrongful incarceration costs to the current debates about resource conservation and explains how posttrial review helps reduce these hidden costs. Conversely, restrictions on review increase the amount of wrongful incarceration for which states must pay. Subsection 2 applies economic principles to demonstrate that because most defense counsel must already limit the time and resources they spend on individual clients, restrictions on review are unlikely to increase the quality of the representation they provide. For the few defendants without such resource constraints, some restrictions on review could actually encourage defense counsel to take inefficiently high levels of care. Subsection 2 also demonstrates that the risk of more generous posttrial review encouraging gamesmanship is largely an illusion visible only in hindsight. Subsection 3 engages with recent social psychological research to argue that restrictions on posttrial review that appear subjectively unfair can actually increase crime by harming perceptions of legitimacy and increasing wrongful conviction rates.

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. Although we place great value in ensuring the accuracy of civil judgments, ongoing civil litigation imposes substantial societal costs. Appeals force both parties and courts to expend considerable resources by relitigating issues that were usually decided correctly at trial. The longer appeals drag on, the more resources are consumed. In addition, uncertainty about whether one party will eventually have to pay the other a significant sum of money can have chilling economic effects. The parties embroiled in litigation may be unable, or unwilling, to make new investments until their liabilities or damages are determined with finality. This uncertainty can spill

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84 See Teague v. Lane, 489 U.S. 288, 309 (1989) (“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.” (emphasis in original) (quoting Friendly, supra note 6, at 150) (internal quotations omitted)).
over to third parties who are unwilling to engage in business with litigants who might prove to be insolvent. Limiting the rights of civil litigants, therefore, grants “repose” by allowing the parties and society to productively move on from a judgment, even if it is erroneous.

Finality has great value in civil litigation in part because although erroneous judgments can be devastating to the losing party, the net societal cost of errors is limited. Civil suits for damages are zero sum games. An erroneous judgment unfairly shifts wealth from one party to another, but it does not destroy any of that wealth. Although unfair, the harm done to one party from an inaccurate judgment is precisely balanced by the unfair benefit granted to the other. Even though civil appeals produce value for society by making judgments more accurate, at some point, additional appeals cost society more than they are worth.85

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 a violation of his rights.86 For the state, however, wrongful incarceration brings with it the substantial burden of paying for punishment not intended by the legislature. Whereas the finality of civil judgments forces parties to productively move on from erroneous judgments, the finality of erroneous criminal judgments ensures that the defendant will continue to suffer improper punishment for which the state will continue to pay.

Although many scholars argue that criminal sentences in the United States are excessively long, the concept of wrongful incarceration begins with the assumption that the incarceration of all factually guilty87 defendants who were convicted and sentenced in accordance with 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 that particular rights should be protected even though they make it more difficult to inflict punishment on guilty defendants. By so providing, legislatures have implicitly

85 See 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 among parties and attorneys).

86 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, 6 J. GENDER RACE & JUST. 253 (2002) (cataloguing collateral consequences of wrongful conviction).

87 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 William S. Laufer, The Rhetoric of Innocence, 70 WASH. L. REV. 329, 331 n.4 (1995) (defining “factual innocence [as] 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).
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.

Using these judgments as a starting point, this Article refers to all incarceration in excess of that provided for by legislative and constitutional schema as “wrongful incarceration.” Put differently, wrongful incarceration refers to the incarceration of innocent defendants who are wrongfully convicted, guilty defendants who were convicted only through a violation of important rights, and guilty defendants who receive longer sentences because of errors in sentencing. Resources spent on wrongful incarceration, therefore, are resources the state has implicitly determined would be better spent elsewhere. By reducing the amount of wrongful incarcerations, posttrial review allows states to conserve resources that otherwise would be wasted.

(b) The Costs of Wrongful Incarceration

It is difficult to gauge in absolute terms how much wrongful incarceration occurs in the United States because wrongful incarceration cannot be distinguished from proper incarceration unless the errors that make the incarceration wrongful are identified. Nonetheless, it is clear that the financial costs of wrongful incarceration are quite large. Similarly, the wrongful incarceration savings produced by posttrial review are clearly substantial.

The most obvious costs of wrongful incarceration are the costs of incarcerating defendants who are factually innocent. 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 eighty-five men and women convicted of wrongful convictions in the State of Illinois. This study concluded that the wrongful convictions of eighty-five 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 exonerees. 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 posttrial review.

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88 In innocence literature, 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, BETTERGOV.ORG (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 eighty-five 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 exonerees. 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 posttrial review.

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

90 Cf. Conroy & Warden, supra note 88 (noting high costs to state of wrongful incarcerations).
five defendants who were wrongfully convicted of crimes they did not commit. Before being exonerated, these men and women served an average of eleven years in prison at a cost of over $200,000 per defendant. By analyzing the data collected in this study, this Article concludes that these exonerations allowed the State of Illinois to save an average of $400,000 per defendant that otherwise would have been spent continuing to incarcerate these innocent defendants. This analysis, of course, documents only the costs of wrongfully incarcerating defendants who ultimately were exonerated. No data exists to document the costs of continuing to incarcerate innocent defendants who are unable to demonstrate their innocence for evidentiary or procedural reasons.

States can also realize substantial savings by correcting errors that improperly lengthen a defendant’s sentence. For example, the Michigan State Appellate Defender Office (SADO) compiled records of its success rates for a special unit of three attorneys that handles appeals from guilty pleas. Because defendants who plead guilty have already conceded their guilt in open court, most of the appeals handled by this unit relate to errors in sentencing, most commonly those produced by inaccurate information about the defendant or miscalculations of the recommended sentence range. By correcting such errors posttrial, these three attorneys were able to reduce the defendants’ minimum recommended sentences by a cumulative total of 28.5 years and reduced maximum recommended sentences by a total of 114 years. 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 a total savings of at least $855,000 in incarceration costs.

Although existing studies demonstrate that successful posttrial review can yield large wrongful incarceration savings, the vast majority of posttrial review is unsuccessful. Determining the net effect of posttrial review on state resources requires a comparison of the administrative costs of providing all appeals with the incarceration savings produced by successful appeals. Using data collected from multiple sources, Part III demonstrates, for the first time, that the wrongful

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91 Id.
92 Author’s calculations. See id.
93 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. See id.
95 See DAWN VAN HOEK, MICHIGAN STATE APPELLATE DEFENDER OFFICE, PENNY-WISE AND POUND-FOOLISH: WASTE IN MICHIGAN PUBLIC DEFENSE SPENDING 3 (2009).
96 Id. at 5–6.
97 Id.
incarceration savings produced by state direct appeals are often quite substantial and can even exceed the administrative costs of providing review.\footnote{In personal correspondence, SADO revealed that the combined salaries for the three lawyers in the special unit was $339,564, including fringe benefits, suggesting that the special unit may have actually produced significant net savings for the state. E-mail from Dawn Van Hoek, Director, SADO, to author (Oct. 2, 2013 15:04 MDST) (on file with author). See also VAN HOEK, supra note 95, at 6. Some scholars have argued that administrative costs of posttrial 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 posttrial review. See, e.g., Thomas III et al., supra note 52, 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)).}

2. Rethinking Efficiency

Courts and scholars often argue that restricting defendants’ rights to relief from trial errors increases incentives on defense counsel to prevent and object to errors at trial where errors might be corrected without the expense of appeals. As a result, they assume that restricting review will force trial attorneys to take more care in their representation, reducing the number of uncorrected trial errors and avoidable appeals. They argue, moreover, that expanding posttrial review often will give defense counsel incentives to strategically withhold evidence or consciously refrain from objecting to trial errors in order to establish grounds for an appeal. These arguments are intuitively appealing, and indeed, scholars often treat them as matters of common sense. A more holistic analysis of the incentives and resource constraints on defense counsel, however, reveals no support for either of these assumptions. This subsection analyzes these efficiency arguments: first with respect to inadvertent errors that could be prevented with greater care by attorneys and second with respect to concerns about strategic behavior by defense counsel.\footnote{Cf. Chemerinsky, supra note 7, at 790–91 (emphasizing the importance of the difference between errors caused by strategic behavior and those that occur inadvertently).}

(a) Inadvertent Errors

Mistakes happen. Even the best criminal lawyers will sometimes make a mistake or inadvertently fail to object to a violation of their clients’ rights.\footnote{“Indeed, some (maybe most) of the time, the failure to object [to plain errors at trial] is the product of inadvertence, ignorance, or lack of time to reflect.” United States v. Escalante-Reyes, 689 F.3d 415, 422 (5th Cir. 2012).} Attorneys can, however, reduce the number of errors that occur in one of two ways: either by spending more time and resources double-checking their work or—if the attorney simply has been careless—by behaving more diligently. The
argument that restricting posttrial rights will decrease inadvertent errors, therefore, implicitly assumes either that defense attorneys have the ability to bring additional resources to bear to represent each client or that they are less than diligent in using the resources they currently have.

For irresponsible attorneys, such as those who dawdle during billable hours or fall asleep in court, reducing errors can be as simple as working more diligently. For these attorneys, restricting posttrial opportunities for relief would increase the consequence of errors for their clients and could, in theory, encourage them to work more diligently to prevent errors. Realistically, however, restrictions on posttrial relief are unlikely to spur such attorneys into diligence. Such attorneys, after all, were not motivated to work to the best of their abilities by the risk that their clients could be convicted of crimes. The additional knowledge that their clients, if convicted, would likely serve their entire sentence is, therefore, unlikely to alter their behavior.

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

Roughly 80% of felony defendants in state courts and 66% in federal courts are represented by public defenders or appointed counsel who operate under strict resource constraints. Public defenders must already ration the time they spend representing each client to levels that many contend are inadequate to provide reasonably competent representation. Indeed, several Missouri public defenders’ offices have recently begun refusing to take new clients on the grounds that accepting additional work would further degrade the quality of representation they provide. In short, increasing restrictions on posttrial relief for defendants represented by public defenders is unlikely to decrease the number of mistakes they make.

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


102 See, e.g., State v. Peart, 621 So. 2d 780, 791 (La. 1993) (stating that New Orleans public defenders are forced to carry such extremely high caseloads that courts should presume defendants received ineffective assistance at trial). See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L. J. 1, 11 (1997) (discussing the high ratio of cases to lawyers in most public defenders’ offices). 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.

103 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, 370 S.W.3d 592, 612 (Mo. 2012) (en banc).
extent that restrictions on review might induce such attorneys to spend more time on each client, they would simply increase the price of representation, forcing more defendants to seek a public defender.

Finally, for the few defense attorneys who operate without resource constraints (those with very wealthy clients) some restrictions on review can incentivize inefficiently high levels of care that waste trial court time. For example, rules of procedural default often prohibit relief from trial court decisions that appeared reasonable at trial but became clearly erroneous when the applicable law was later clarified. 104 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 decision at trial. 105 Because such decisions were ostensibly reasonable at the time they were made, defendants would normally have no reason to object and would lose any opportunity to avail themselves of their right. For defendants with unlimited resources, such rules give strong incentives to investigate and present all conceivable legal arguments at trial in order to preserve the errors for review. Such arguments could include not only ambiguities in the controlling law, but also positions that the governing appellate court had already rejected in hopes that the high court would later overrule the appellate court. Indeed, such restrictions on review give incentives to raise arguments that the high court already has rejected, in hopes that the court might reverse itself.

Similarly, Teague v. Lane and the Antiterrorism and Effective Death Penalty Act (AEDPA) 106 prohibit retroactive application of new rights recognized by the Supreme Court if the defendant’s direct appeal was completed before the new rights were acknowledged. 107 These rules create incentives for defendants charged with serious crimes to drag out direct appeals for as long as possible in order to benefit from any new federal rights the Court might create in the future. 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.

104 See, e.g., United States v. Olano, 507 U.S. 725, 734 (1993) (declining to resolve the open question of whether defendants are entitled to relief from plain errors in sentencing calculations when the calculation appeared reasonable at trial but became clearly erroneous when the applicable law was later clarified).
105 See, e.g., Puckett v. United States, 556 U.S. 129, 134 (2009) (holding that unpreserved errors are subject to more rigorous standards of plain error).
107 See, e.g., Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that no relief can be granted based on “new rules” if defendant’s conviction was finalized on direct appeal before the rule was promulgated).
(b) 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. Courts and scholars reason that granting relief in such cases would perversely reward defendants who 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. Attorneys then might rationally choose not to object to errors when they occur, hoping for a favorable outcome from the flawed proceeding but calling foul if the attorneys are displeased with the results. Such strategic behavior would produce an avalanche of unnecessary appeals and new trials and could even reward defendants with unfair acquittals. Therefore, courts argue defendants should be denied relief from any errors their attorneys could have objected to at trial in order to avoid these untenable results. Although courts and scholars treat this reasoning as common sense, a careful analysis reveals the risk of strategic behavior to be an illusion visible only in hindsight. Granting relief from errors not objected to at trial can only encourage strategic behavior by attorneys if the attorneys know, ex ante, that their clients will have a reasonable likelihood of obtaining relief on appeal. As explained below, harmless error rules, along with rules explicitly prohibiting relief from sandbagging, render the strategy highly irrational in almost all cases.

In all jurisdictions, harmless error rules prohibit relief from almost any error unless the defendant can demonstrate, in retrospect, that there was a reasonable possibility that the defendant would not have been convicted, or would have received a substantially shorter sentence, if the error had not occurred. For errors not objected 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 that the error “affected substantial rights”—a standard that can prohibit relief from errors that increase a defendant’s sentence by only a

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108 See supra note 33 and accompanying text.
109 Puckett, 556 U.S. at 140.
110 See supra note 33 and accompanying text.
111 See supra Part I.
112 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).
113 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 quotation marks omitted) (citations omitted)).
In addition, rules of posttrial 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.\textsuperscript{115}

Because the determination of harmlessness is made only in retrospect, trial attorneys generally cannot know with any certainty that allowing a particular error to pass without objection would lead to relief on appeal. Harmless error rules, however, ensure that the only errors that could give rise to relief after conviction are the most serious errors: those that would have a significant chance of producing an acquittal or a shorter sentence if corrected at trial. Thus, trial attorneys who wish to game the system must exchange the certainty that objecting to the error would significantly increase the chances of acquittal at trial for the hope that an appellate court, after months or years of incarceration pending appeal,\textsuperscript{116} will decide that the error was in fact erroneous, deem it not harmless, decide that the error was sufficiently plain to warrant relief in spite of the failure to object, and order a new trial at which the defendant might be acquitted. Although eliminating all restrictions on relief from errors made at trial might provide rational incentives to sandbag, in the current system, marginally relaxing default rules would still leave defense counsel in a position where intentional sandbagging would rarely makes sense.\textsuperscript{117}

3. How Posttrial 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 value of committing the crime outweighs that of not committing it.\textsuperscript{118} Criminals are less likely to commit

\textsuperscript{114} See, e.g., United States v. Ellis, 564 F.3d 370, 370–71 (5th Cir. 2009) (no relief from failure to object to error that likely added several months to defendant’s sentence); 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).

\textsuperscript{115} See 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 requires new evidence to “be such . . . as that, on a new trial, the newly discovered evidence would probably produce an acquittal” (quoting United States v. Frye, 548 F.2d 765, 769 (8th Cir. 1977))); see also infra notes 185–86 and accompanying text.

\textsuperscript{116} See Resnik, supra note 43, 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.”).

\textsuperscript{117} See Chemerinsky, supra note 7, at 790–91 (making similar arguments with respect to the risk of sandbagging in federal habeas corpus); Resnik, supra note 43, at 896–97 (countering the argument about sandbagging in federal habeas corpus cases by finding it “assumes a fantastically risk-prone pool of defendants and attorneys”).

\textsuperscript{118} Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169, 207–09 (1968); see also Richard A. Posner, An Economic Approach to the Law of
crimes when they face harsher potential punishments. According to this theory, liberal posttrial review increases crime by reducing the average punishment defendants can expect to receive if convicted and increasing their chances of avoiding punishment altogether. More recent research, however, demonstrates that wrongful convictions and attendant perceptions of procedural unfairness can also decrease the willingness of people to obey the law. This subsection argues that contrary to popular belief, liberalizing posttrial 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. An Illinois study of eighty-five exonerated men and women estimated that the true perpetrators of those crimes committed a total of fourteen murders, eleven sexual assaults, ten kidnappings, and at least sixty-two other felonies during the time the innocent defendants were incarcerated.

Wrongful convictions can also contribute to crime by reducing rational incentives to obey the law. When more wrongful convictions occur, there is a greater chance that a person who chose not to commit crimes will be punished nonetheless. Higher wrongful conviction rates can, therefore, undermine deterrence by decreasing the benefits of avoiding crime. Indeed, some economists argue that changes in the odds of being wrongfully convicted can have a greater impact on deterrence than changes in the odds of apprehension. Releasing innocent defendants through posttrial review reduces the severity of punishment that innocent defendants receive, thereby increasing incentives to obey the law. In addition, misconduct by police and prosecutors is often a significant contributing factor to wrongful convictions. By discouraging such misconduct,
posttrial review can help prevent wrongful convictions in the first place. By reducing the number and consequences of wrongful convictions, more liberal posttrial could help reduce crime.

Although the risk of wrongful conviction likely has little effect on the behavior of most Americans (those 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 raises the price people expect to pay for engaging in crime. But social science research shows that fear of punishment generally is not the primary reason that people obey the law. 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 raises the price people expect to pay for engaging in crime. But social science research shows that fear of punishment generally is not the primary reason that people obey the law. 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 doing so is inconvenient. It comes as no surprise then that 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.

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. 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. Studies show that litigants’ perceptions of procedural fairness are improved when they (1) are treated with respect by legal actors, (2) are granted an opportunity to fully express their views


124 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).

125 See Tyler, supra note 10, at 17.


128 See Casper et al., supra note 126, at 486–87 (citing studies reaching this conclusion).
and have them meaningfully considered, (3) believe that unfavorable outcomes are reached based on principled criterion, and (4) are offered meaningful access to further processes to correct mistakes. Posttrial review that gives defendants who believe they were unfairly convicted or sentenced a meaningful and fair opportunity to present their views and seek relief, therefore, 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 affect the law-abiding behavior even of those who have committed crimes in the past. One study, led by Raymond Paternoster, of individuals arrested in domestic assault cases found that defendants who felt they had been treated in a more procedurally fair manner were significantly less likely to commit assaults again in the future. 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 nonetheless continue to break the law. The study examined the perceptions and behavior of released prisoners in high-crime, predominantly African-American neighborhoods who were convicted of a violent offense. The sample included many gang members who had committed offenses with firearms. The study found that although all individuals in the sample had very low opinions of the fairness of police and prosecutors, those who viewed the system as generally 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. Although small improvements in perceptions of legitimacy may not stop violent offenders from committing crimes completely, such improvements may well help reduce the frequency and seriousness of criminal behavior.

If a defendant believes the processes used to convict and sentence him were 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 substance of the defendant’s complaints, or denying relief from a clear error may cause the defendant to feel that the procedures used to convict and sentence him were not fair in the first place.

129 See id.
130 See id. at 485–87, 493.
132 Papachristos et al., supra note 11, 397–400.
133 See id. at 435–36.
135 See TYLER, supra note 127, at 109–12.
The delegitimizing effects of overly strict posttrial procedures may be especially acute when criminal justice “insiders” (judges, prosecutors, and public defenders) deny a defendant relief from mistakes or misconduct. 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. . . .”\textsuperscript{136} These insiders “control the levers of power, deciding which cases to charge, which crimes and defendants should receive probation, and what prison sentences are appropriate. . . . Procedural fairness, process control, and trust in insider’s motives contribute greatly to the criminal justice system’s legitimacy.”\textsuperscript{137} When an appellate court refuses to offer relief—or even to consider the merits of a defendant’s claim that he was harmed—from 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 posttrial review would improve legitimacy in the eyes of criminal defendants, releasing more offenders on technicalities could make courts appear less legitimate to those who have less personal contact with the justice system.\textsuperscript{138} Part III offers a framework for analyzing and comparing how the deterrence effects identified by Bator and the effects of legitimacy may affect the behavior of these different populations.

III. BEYOND FINALITY

As Part II has illustrated, a simplistic approach to finality at times impedes the interests it purports to advance. Balancing society’s instrumental interests with the rights of defendants, therefore, requires a more nuanced approach that considers how those interests would actually be furthered or harmed by particular expansions of posttrial review. Building on empirical studies of the costs and benefits of posttrial review, as well as psychological studies of compliance with the law, this Part develops such an approach. It argues that reducing certain procedural barriers to substantive review and relief can actually save states money, would rarely impact the behavior of defense counsel, and may reduce the number of serious crimes committed by those who have served time in prison.


\textsuperscript{137} \textit{Id.} at 912, 949.

\textsuperscript{138} See, e.g., \textit{Tyler}, supra note 127, at 110 (“It may be that procedural irregularities, such as criminals being let free on ‘technicalities,’ are particularly important in feeding public dissatisfaction with the courts.”).
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’ rights, they rarely mention the potential wrongful incarceration savings. If expected wrongful incarceration savings are negligibly small compared to the administrative costs, ignoring wrongful incarceration would be entirely proper from a pure resource conservation perspective. But if wrongful incarceration savings are substantial, ignoring those savings while emphasizing administrative costs could cause courts to inefficiently restrict review. Using available data, subsection 1 estimates and compares the wrongful incarceration savings produced by direct appeals with the administrative costs necessary to produce them, concluding that the savings are generally substantial enough to merit consideration. Indeed, it is possible that direct appeals may produce net cost savings in some jurisdictions. Subsection 2 argues that the failure of judges to acknowledge and consider 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, excluding fixed capital expenses. As the studies 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 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 imposes a financial burden on the justice system regardless of its merits, an appeal only generates incarceration savings if it, and any subsequent hearings or retrials, are resolved in favor of the defendant. Although most observers assume that posttrial review imposes significant financial burdens on the state, whether a particular form 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

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comparison with regard to any particular form of posttrial review. However, by using the limited data available and making a number of educated guesses, it is possible to produce a rough estimate of the costs and benefits of direct appeals. To steal a term from physics, one could call this methodology a “Fermi approximation.” Named after the renowned nuclear physicist Enrico Fermi, Fermi estimates are used to estimate an unknown quantitative value when the precise value of the variables needed to calculate that quantity are also unknown. As Fermi explained, when justifiable, unbiased estimates of the independent variables are used to calculate the unknown quantity, the estimate of the unknown quantity will also be unbiased. Errors in overestimating one variable will often be balanced by errors in underestimating another variable, so that the final estimated value will usually be in the same ballpark as the actual value. Although such approximations are inherently imprecise, they are useful for obtaining rough estimates of quantities, like the financial costs and benefits of direct appeals, that otherwise would be unknowable.

In the interests of being conservative, rather than using unbiased estimates for all unknown variables, this analysis uses several estimates that likely undervalue the incarceration savings and overvalue the administrative costs of direct appeals. Nonetheless, this analysis estimates that the savings produced by direct appeals are somewhat larger than the administrative costs. These estimates are not precise enough to support a claim that direct appeals save states money, but they clearly demonstrate that the incarceration savings are significant when compared with the administrative costs. Moreover this analysis leaves open the possibility that some states actually save money by protecting defendants’ rights through 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 and benefits. The vast majority of appeals in the study (79.4%) were entirely unsuccessful for the defendant. Only 20.6% of defendants received any form of relief. In 1.9% of cases, appellate courts reversed the convictions with prejudice and ordered the defendants to be released. In 6.6% of cases, the appellate courts vacated the convictions and remanded the cases to the trial courts. In 12.1% of cases, the

141 See Joy A. Chapper & Roger A. Hanson, Nat’l Ctr. for State Courts, Understanding Reversible Error in Criminal Appeals 18–19 (1989) [hereinafter NCSC Report], available at http://caught.net/caught/ReveErrCtApp.pdf (empirical analysis of criminal appeals). 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, 84 N.Y.U. L. Rev. 791 (2009) (relying on the NCSC Report). The NCSC has commissioned an updated version of this study. However, the results will not be available for a few years.
142 Affirmance rates for the five courts included in the study ranged from 70.8% to 81.7%. NCSC Report, supra note 141, at 5 tbl.1.
143 Id.
144 Id.
145 Id.
appellate courts granted the defendants a new sentencing hearing or other relief, such as a reversal of some charges and an affirmance of others. 146 Although the NCSC study is the most detailed study of state criminal appellate outcomes 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 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 before being released on parole, the time such defendants spend incarcerated before being released, and the average sentence reductions for defendants who receive new sentence hearings or other relief.

Table 1 presents a detailed breakdown of the estimated administrative costs and incarceration savings produced by the average state direct appeal.

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146 Id. at 5 tbl.1 & 35.
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Table 1: Estimate of Savings Produced by State Direct Appeals
The mean sentence for defendants in the NCSC study was approximately 101 months. 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 are not readily available. By analyzing data on direct appeals in federal court, however, this Article found that the median federal appeal is not resolved until twenty-six months after the case was docketed in the trial court, during which time the vast majority of defendants will be incarcerated. In addition, federal defendants only serve an average of 88% of their sentences prior to being released, often on supervised release. Therefore, assuming the average successful appellant serves twenty-six months and would have served eighty-nine months but for the appeal, each conviction that is reversed with prejudice would save the state approximately sixty-three months of incarceration. For defendants whose convictions are reversed and remanded, prosecutors always have the option to seek a new conviction at a new trial. In practice, however, prosecutors usually decline to do so, largely because the defendants have already served such a substantial portion of their sentences that the benefit of a new conviction would be

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147 The NCSC study only reported sentence data in categories: approximately 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 6–10 years, 15% received sentences between 11–20 years, and 17% received sentences over 20 years. NCSC REPORT, supra note 141, at 30 tbl.1 (data used for calculations herein). By assuming that all defendants received the mean sentence for their category and assuming that all defendants who received sentences longer than twenty years received sentences of only twenty 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 twenty 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. See id. at 39 tbl.6; cf. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 451 tbl.5.48 (2003) [hereinafter SOURCEBOOK], available at http://www.albany.edu/sourcebook/pdf/section5.pdf (reporting that the average sentence for state felons sent to prison is fifty-five months).

148 Based on the Author’s calculations, for cases terminated in 2006 and 2007, the median time from the district court docket date to the docket the appeal was finalized was twenty-six months. See U. S. SENTENCING COMM’N, MONITORING OF FEDERAL CRIMINAL CONVICTIONS AND SENTENCES: APPEALS DATA, 2006 (2007), available at http://dx.doi.org/10.3886/ICPSR20101.v2 (Time from docket date to conclusion of appeal was calculated by taking the calendar day difference between the variables DDKTDATE and JUDGDATE). In order to be as conservative as possible, this latter calculation ignores the fact that some convicted defendants were not incarcerated pretrial so that they have more of their sentences left to serve and more to gain by success on appeal. Seventy-eight percent of federal defendants convicted between 2004 and 2006 were incarcerated prior to trial. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRE-TRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010, at 1 fig.1, available at http://www.bjs.gov/content/pub/pdf/pdmfcd9510.pdf.

minimal. Assuming that prosecutors pursue a new trial in half of these cases, half of which result in acquittal six months after appeal, defendants whose convictions are remanded would save the state an average of forty-five months of incarceration each. Finally, this Article assumes that resentencing hearings and other relief appeals reduce actual sentences by 14.2 months, the average reduction to minimum recommended sentences for SADO plea unit resentencing hearings in 2010 and 2011.

Consolidating these estimates, the average incarceration savings produced by state direct appeals would be approximately 5.9 months, which would yield an average wrongful incarceration cost savings of approximately $14,700 per appeal (at an average cost of incarceration of $30,000 per year).

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 on the death penalty found that the total costs of direct appeals for murder convictions in which the defendant was sentenced to life imprisonment was approximately $9,000. This figure includes the salaries and fringe benefits for judges, attorneys, and support staff, as well as facilities costs and other incidental

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

151 See Frequently Asked Questions—Death Penalty, OFFICE OF DISTRICT ATTORNEY, HARRIS COUNTY, TEXAS, http://app.dao.hctx.net/FAQs/2/Appellate/1/Death_Penalty.aspx (click on “What percentage of death penalty cases is reversed?”) (last visited September 6, 2013) (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).

152 This figure uses the same assumptions about average sentence length, time served before parole, and time to appeal as before.

153 In 2010 and 2011, the SADO plea unit succeeded in reducing the minimum recommended sentence in 33 cases, producing a cumulative reduction of 39 years, an average of 14.2 months per successful case. E-mail from Dawn Van Hoek supra note 98. The published SADO study did not report the average savings per successful case.

“Other relief” cases include those in which the appellate court dismisses some but not all of the charges of the defendants’ convictions. When the dismissed charges do not reduce the maximum or minimum sentence for which the defendant is eligible, such relief will often produce no overall reduction to the defendant’s sentence. On the other hand, when the remaining charges are less serious than those that are dismissed, the sentence reductions can be very significant. Lacking specific data on the overall effects of such relief, this analysis assumes that cases that obtain other relief produce an average sentencing reduction of only 14.2 months, the same as cases that obtain a resentencing hearing.

154 The Pew Center indicates that, based on a survey of thirty-three states, incarcerating one inmate costs states approximately $29,580 per year (adjusting for inflation). PEW CTR. ON THE STATES, supra note 139, at 12. The $30,000 figure is used in this Article for purposes of consistency with the numbers reported by VAN HOEK, supra note 95, at 5, who used $30,000, and for simplicity.

expenses. Adjusting for inflation, these costs total approximately $11,000 in 2010 dollars. 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. As such, direct appeals for the vast majority of cases likely cost much less than $11,000. Nonetheless, all appeals require some minimal amount of preparation and consideration. In order to avoid underestimating the costs of administering direct appeals, this analysis assumes that most appeals cost two-thirds of life imprisonment cases, or $7,333 per appeal. In addition, appellate courts terminate many direct appeals on procedural grounds, which require far less effort to dispose. This analysis assumes that around 35% of losing appeals cost only half as much as an appeal from a sentence of life imprisonment, or $5,500 per case.

As explained above, this analysis assumes that prosecutors pursue a new trial for half of all convictions that are vacated and remanded. A state murder trial for which prosecutors seek life imprisonment costs approximately $43,000. Murder trials, however, are among the most costly and complicated trials in state court. In addition, existing studies report only the costs of murder trials in the first instance. On retrial, prosecutors already will have completed most of the investigation, research, and trial preparation. Nonetheless, to be conservative, this analysis assumes that the average new trial costs two thirds as much as an initial murder

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156 Id.
157 The 2002 study reported its findings in year 2001 dollars. This Article adjusts for inflation at a rate of 2.5%.
158 See INDIANA COMMISSION, supra note 155, at 122F (stating that convicted murder defendants sentenced to death or life imprisonment “typically raise a large number of claims” on direct appeal to avoid waiver in subsequent hearings).
160 The author calculates the average cost of murder trials in which prosecutors could have sought the death penalty but chose to seek only life imprisonment from data reported in studies in four states (herein shown in 2010 dollars after adjusting for inflation at 2.5%). The actual figure used in this analysis is $43,281. See PHILIP J. COOK ET AL., THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA 47 (1993), available at http://www.deathpenaltyinfo.org/northcarolina.pdf (reporting mean noncapital trial cost of $17,000, or $25,236 in 2010 dollars); INDIANA COMMISSION, supra note 155, at app. H (reporting $63,094, or $75,000 in 2010 dollars, for life without parole cases); EMILY WILSON ET AL., TENNESSEE’S DEATH PENALTY: COSTS AND CONSEQUENCES 16 (2004), available at http://www.comptroller.tn.gov/repository/RE/deathpenalty.pdf (reporting $31,622, or $35,777 in 2010 dollars, for life with parole cases); KANSAS LEGISLATIVE DIV. OF POST AUDIT, PERFORMANCE AUDIT: COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 13 Chart I-1 (2003), available at http://www.kslpa.org/docs/reports/04pa03a.pdf (reporting estimated median costs of $32,000, or $37,110 in 2010 dollars, for trial cost in cases where the death penalty was not sought).
trial, or $28,854.\textsuperscript{161} This analysis also assumes that resentencing hearings, for which prosecutors already fleshed out the main legal arguments on appeal, cost only a fraction of direct appeals, or $1,222 each.\textsuperscript{162} Consolidating these estimates, the average administrative cost of providing direct appeals, including the costs of subsequent retrials and resentencing hearings, would be approximately $7,900 per case, noticeably less than the estimated incarceration savings those appeals produce.

This Article estimates that the average state direct appeal saves around $14,700 in reduced incarceration and costs around $7,900 in total administrative costs. Based on this analysis, this Article concludes that the incarceration savings produced by state direct appeals are significant when compared to the administrative costs. The burdens state direct appeals place on the judiciary and prosecutors are offset to a very significant extent by savings the state realizes in reduced incarceration. As a result, treating the administrative burdens of direct appeals as a factor weighing in favor of restrictive review while ignoring the incarceration savings could encourage policies that inefficiently restrict the rights of defendants.

Although these estimates rely on a number of assumptions, the ultimate conclusion that the incarceration savings from state direct appeals are significant is quite robust to changes in those assumptions. For example, this analysis assumes, based on prior studies, that the average successful appeal defendant receives a nominal sentence of 101 months.\textsuperscript{163} Assuming instead that the average defendant received a nominal sentence of only 50 months reduces the estimated incarceration savings from $14,700 to around $7,100, slightly less than the administrative costs, but still very significant. Similarly, this article assumes, based on the NCSC study, that 20.6% of appeals receive any form of relief.\textsuperscript{164} Assuming instead that only 10% of appeals succeed reduces the estimated incarceration savings from $14,700 to around $7,200 and reduces estimated administrative costs to around $7,300.\textsuperscript{165} Other changes in the assumptions similarly reduce the expected savings or raise the estimated costs, but do not alter the conclusion that the incarceration savings are significant enough that they cannot be safely ignored.\textsuperscript{166} Due to the imprecise nature of these estimates, this Article cannot conclude that the incarceration

\textsuperscript{161} Two-thirds of $43,281. See id.
\textsuperscript{162} Resentencing hearings are assumed to cost one-sixth of a full direct appeal.
\textsuperscript{163} See supra note 147 and accompanying text.
\textsuperscript{164} See NCSC REPORT, supra note 141, at 5 tbl.1.
\textsuperscript{165} Indeed, even when it is assumed that only 5% of appeals succeed, the incarceration savings remain significant, around $3,600.
\textsuperscript{166} For example, assuming that all, rather than half, of convictions are vacated and remanded convictions are retried reduces the incarceration savings to $12,000 per case while increasing the administrative costs to $7,900. Assuming that the average resentencing or other relief appeal reduces sentences by only 3 months rather 14.2 months reduces incarceration savings to $11,400 while administrative costs remain at $7,900. Assuming that direct appeals adjudicated on the merits cost $14,667, twice as much as assumed in this analysis, raises the expected administrative costs to $14,800, roughly equal to the expected incarceration savings.
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 incarceration savings produced by direct appeals are quite substantial compared
to the administrative costs commonly cited to justify restrictions on appellate
rights. Moreover, it cannot rule out the possibility that some states realize net
savings by providing direct appeals and protecting defendants’ rights. Whereas the
language of finality assumes that restricting defendants’ rights to posttrial relief
helps to conserve state resources, this analysis suggests that those savings often are
largely, if not entirely, offset by increased wrongful incarceration costs.167

2. Comparing Judicial and Correctional Dollars: Apples or Oranges?

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 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.168 By forcing judges, prosecutors,
and public defenders to spend more time on criminal appeals, expansions of
posttrial 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 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.169

167 See generally SADO REPORT, supra note 94; VAN HOEK, supra note 95 (arguing
that limiting appellate funding for defendants who plead guilty may actually cost the State
of Michigan financially).

168 See, e.g., Halbert v. Michigan, 545 U.S. 605, 630–31 (2005) (Thomas, J.,
dissenting) (stating that requiring Michigan to provide appellate counsel to defendants who
plead guilty would reduce funds available for defendants who appeal from conviction at
trial); Friendly, supra note 6, 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 assumed to be fixed).

169 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 posttrial 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 few noncapital federal habeas corpus petitions produce
any relief, to the extent fairness and accuracy are worth paying for, habeas is a remarkably
inefficient way in which to protect these interests. NANCY J. KING & JOSEPH L. HOFFMANN,
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,\textsuperscript{170} it can, has been, and will continue to be done in all jurisdictions in the United States as the population increases. Indeed, one only need to look at the state of California, which employs over 2,000 judges and magistrate judges,\textsuperscript{171} to confirm that state judicial systems are, for all practical purposes, infinitely scalable.\textsuperscript{172} Although judicial resources are fixed in the short term, they can be expanded in the long run with adequate political will and the financial savings produced by reduced wrongful incarcerations.

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’ posttrial 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 a few specific types of posttrial review.

1. Restrictions on Relief from Plain Errors in Sentencing Calculations

When 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 both is plain and, at least in federal court, affects substantial rights.\textsuperscript{173} Although courts justify these rules in the interests of finality,\textsuperscript{174} rules of

\textsuperscript{170} Indeed, in the current political climate, it can be difficult to maintain the size of the federal judiciary. See Charlie Savage, \textit{Obama Lags on Judicial Picks, Limiting His Mark on Courts}, \textit{N.Y. Times} (Aug. 17, 2012), http://www.nytimes.com/2012/08/18/us/politics/obama-lags-on-filling-seats-in-the-judiciary.html?pagewanted=all (noting that President Barack Obama is likely to end his term with more federal vacancies than he began).

\textsuperscript{171} \textit{FAQs}, \textit{California Courts}, http://www.courts.ca.gov/2954.htm (last visited June 15, 2013) (select “How many judges are there in the California courts?”).

\textsuperscript{172} Although state judiciaries must necessarily grow to provide adequate access to courts, some scholars have argued that the federal judiciary should be limited in size in order to maintain the quality of federal courts. See, e.g., Jon O. Newman, \textit{1,000 Judges—The Limit for an Effective Federal Judiciary}, \textit{76 Judicature} 187, 187 (1993). For an in-depth explanation of the arguments for a limited federal judiciary and strong counter arguments, see William M. Richman & William L. Reynolds, \textit{Injustice on Appeal: The United States Courts of Appeals in Crisis} 165–206 (2012).

procedural default for plain errors in sentencing calculations often impose significant net financial cost on states.

As explained in Part II.B.2, the common assumption that posttrial relief from errors provides rational incentives to strategically not object to errors is generally an illusion visible only in hindsight. This is particularly true with respect to unobjected-to errors in sentencing calculations. In the case of miscalculations that increase guideline sentencing 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.” After all, it is unlikely that an error that raises the recommended sentence would ever favor the defendant. Moreover, a defendant who won a resentencing hearing on appeal can normally expect to be resentenced by the same judge, substantially eliminating the risk that defense counsel could 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 by imposing the maximum sentence allowed under the correct calculation. In short, defense counsel has nothing to gain and often much more to lose by ignoring sentencing errors.

Many errors in sentencing calculations occur not because defense counsel was grossly negligent, but because the law that made the calculation erroneous was not clear at the time. Such an error occurred in the Fifth Circuit case of United States v. Henderson. The defendant pled guilty to being a felon in possession of a firearm, a crime for which the guideline sentencing range was thirty-three to forty-one months. At sentencing, the district court imposed a sentence of sixty 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. Defense counsel did not object at the oral hearing, apparently acting under the assumption that such a departure was within the

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174 See, e.g., id. at 134 (opining that granting relief from plain error in sentencing would waste resources and encourage sandbagging).
175 Id.
176 646 F.3d 223 (5th Cir. 2011). The Fifth Circuit refined its jurisprudence on these issues in United States v. Escalante-Reyes, 689 F.3d 415, 424 (5th Cir. 2012) (en banc) (vacating a sixty-month sentence as a Tapia error, even though the applicable guidelines prescribed 63–78 months). By doing so, it joined 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. The decision, however, 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. Id. at 418–19, 422–23. 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.
177 Henderson, 646 F.3d at 224.
178 Id.
judge’s discretion.\textsuperscript{179} 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.\textsuperscript{180} 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.”\textsuperscript{181} On Henderson’s appeal, although the Fifth Circuit conceded that the district court’s decision was clearly erroneous in retrospect, it denied relief because the decision was not clearly erroneous at the time it was made.\textsuperscript{182}

Regardless of whether this decision and others like it\textsuperscript{183} 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\textsuperscript{184} in wrongful incarceration, assuming the trial court would have resentenced the defendant to the maximum of the proper sentencing range. As discussed above, because 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 could 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 undermine the willingness of criminals to obey the law.

\textsuperscript{179} 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.’" (second alteration in original)).

\textsuperscript{180} Id. at 225.

\textsuperscript{181} Tapia v. United States, 131 S. Ct. 2382, 2393 (2011).

\textsuperscript{182} 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.").

\textsuperscript{183} See United States v. Jasso, 587 F.3d 706, 713–14 (5th Cir. 2009) (stating that the district court’s erroneous calculation of range as forty-six to fifty-seven months did not affect substantial rights when correct sentencing range was forty-one to fifty-one months, even though the district court had given the defendant the minimum forty-six month sentence under the erroneous range and could properly have resentenced the defendant to forty-one months).

\textsuperscript{184} Nineteen months of incarceration at $2,500 per month ($30,000 per year) equals $47,500. See supra note 139 and accompanying text.
Most jurisdictions apply one of two tests—the Berry test\(^{185}\) or the Larrison test\(^{186}\)—to determine whether a defendant who brings evidence of witness recantation should be granted a new trial.\(^{187}\) Both tests prohibit new trials when the falsity of the testimony could have been demonstrated with due diligence at trial.\(^{188}\) The primary difference between these tests is the level of materiality the tests require.\(^{189}\) Under the more common Berry test, which was applied in the recent case of Troy Anthony Davis,\(^{190}\) the appellate court will not order a new trial unless the new evidence is so material that a new trial would be likely to produce an acquittal.\(^{191}\) Because the defendant’s first trial was, by assumption, fair, courts consider it reasonable to require the defendant to bear the burden of demonstrating doubt with regard 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.\(^{192}\)

The more stringent Berry standard, which allows a new trial only if the defendant would “probably” be acquitted, would prevent a new trial if there was up to a 50% chance that the defendant would be acquitted.\(^{193}\) Recall that a murder trial in the first instance costs $45,000 and that a year of incarceration costs $30,000.\(^{194}\) Even assuming that a new trial would cost $45,000, if the defendant has at least five years remaining on his sentence, allowing a new trial when a defendant has even a one in three chance of acquittal would, on average, save states thousands of dollars.\(^{195}\) For new trials involving less serious crimes, which presumably cost less

\(^{185}\) Berry v. Georgia, 10 Ga. 511, 527–28 (1851).


\(^{187}\) See Cobb, supra note 186, at 973–74.

\(^{188}\) See, e.g., 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”); Berry, 10 Ga. at 527 (requiring that the new evidence come to the defendant’s knowledge after trial and that the evidence could not have been obtained earlier with the exercise of due diligence).

\(^{189}\) Cobb, supra note 186, at 974–76.

\(^{190}\) See In re Davis, 565 F.3d 810, 816–18 (11th Cir. 2009).

\(^{191}\) Id.; see also United States v. Johnson, 327 U.S. 106, 110 n.4 (1946) (acknowledging “the frequently quoted and followed rule announced in Berry v. Georgia”); United States v. Conzemius, 611 F.2d 695, 696 (8th Cir. 1979) (applying the Berry standard).

\(^{192}\) 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).

\(^{193}\) Berry, 10 Ga. at 527–28.

\(^{194}\) See supra note 139 and accompanying text.

\(^{195}\) 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.
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 because of chance alone. Nonetheless, to the extent that jurisdictions’ decisions to choose the Berry standard were influenced by the costs of new trials, those decisions should be reconsidered in light of the potential incarceration savings. In addition, when the recanted testimony of witnesses was allegedly prompted by improper behavior by police or prosecutors, failure to grant a new trial could significantly harm the legitimacy of the system and compliance with the law.

3. Federal Habeas Corpus for State Prisoners

Although federal habeas once played a crucial role in ensuring that recalcitrant state courts enforced federal constitutional rights, today very few defendants receive relief through federal habeas. In 1996, Congress, in order to vindicate the interests of “comity, finality, and federalism,” enacted AEDPA, which imposes strict limitations on the types of claims that can be presented on habeas and imposes a much higher standard for relief. Today, only around 0.35% of noncapital habeas petitions obtain relief in the form of a remand to state court. As a result, Nancy King and Joseph Hoffman argue that federal habeas in noncapital cases acts as a “lottery” for relief and that rights to petition for habeas in

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196 In Davis, seven of nine eyewitnesses recanted their testimonies, claiming they testified falsely in response to police pressure. See In re Davis, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting).
197 See supra Part II.B.3.
198 See KING & HOFFMANN, supra note 169, at 81 (only around 0.35% of non-capital federal habeas petitions receive any form of relief).
199 See generally Williams v. Taylor, 529 U.S. 362 (2007) (considering the interests of comity, finality, and federalism in relation to federal habeas corpus); Kovarsky, supra note 40 (same).
200 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 28 U.S.C. § 2254 (2006) (enacted as a part of AEDPA); Williams, 529 U.S. at 399.
201 See KING & HOFFMAN, supra note 169, at 79. In addition, 13.7% of petitions in this study included at least one claim that was procedurally barred. Id. Although Blume, Johnson, and Weyble contend that the 0.35% figure misrepresents the number of noncapital petitioners who obtain relief on habeas, their critiques do not significantly affect the analysis of this Article. See Blume et al., supra note 76, at 451–52 (noting that the study cited by King and Hoffman does not account for denials of relief by district courts that are overturned on appeal).
noncapital cases should be further restricted in order to conserve administrative resources for better use.202

At first blush, wrongful incarceration costs would appear to have little effect on King and Hoffman’s argument. As they point out, there are no data available as to whether any of the 0.35% of successful petitioners in the study were actually released after their cases were remanded to state court or if their judgments were merely reaffirmed after correcting the violations of federal law identified by the district court.203 The median sentence for habeas petitioners is twenty years, and petitions are generally not resolved until years after conviction.204 Assuming that half of successful noncapital habeas petitions actually result in the release of the prisoner, the average wrongful incarceration savings produced by federal habeas would be a paltry $600 per petition.205

As John H. Blume, Sheri Lynn Johnson, and Keir M. Weyble argue, however, part of the reason so few habeas petitions succeed is that the vast majority are prepared by the inmates themselves without the assistance of counsel.206 If barriers to appointed counsel on habeas were reduced, success rates for habeas petitions would undoubtedly rise.

In addition, about half of habeas petitions are dismissed on procedural grounds without reaching the merits of any claim, and an additional 13.7% of petitions have at least one claim that was procedurally barred.207 Moreover, under AEDPA, district courts are prohibited from granting relief from errors unless the state court’s decision was “contrary to, or involved an unreasonable application of clearly established Federal law . . . or . . . was based on an unreasonable determination of the facts . . . .”208 By preventing petitioners from obtaining relief from violations of their federal rights, these restrictions also prevent states from realizing wrongful incarceration savings. Conversely, easing these restrictions on federal habeas might dramatically increase success rates and the average incarceration savings habeas produces.

Federal habeas, as it stands, is a remarkably inefficient use of federal resources partly because access to relief has been so severely restricted. Relaxing procedural bars would allow more meritorious petitions to obtain relief, thereby increasing the wrongful incarceration savings produced by habeas. Many scholars

\[202\] KING & HOFFMAN, supra note 169, at 68.
\[203\] See KING & HOFFMAN, supra note 169, at 79.
\[204\] Id. at 75, 78 (reporting that 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).
\[205\] Assuming the average sentence for successful defendants is twenty years, of which they would have actually served 17.6 years, and successful defendants serve six 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 were actually released, the average wrongful incarceration savings per petition would be roughly $600.
\[206\] Blume et al., supra note 76, at 452–53.
\[207\] KING & HOFFMAN, supra note 169, at 78 n.44, 79 tbl.4.1.
have argued that imposing further restrictions on federal habeas would be unlikely to deter petitions or save federal resources. But it is possible that the wrongful incarceration savings produced by expanding access to substantive review and relief could help offset the administrative costs of federal habeas corpus.

4. Posttrial 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. 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. Indeed, a study by Nancy King and Michael O’Neill found that 65% of federal plea bargains in their random sample required defendants to waive many of their rights to direct or collateral review. In the Ninth Circuit, that figure is 90%.

Appeal 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. As one federal prosecutor explained, “[a] couple big appeals per year can hurt your indictment productivity.” Indeed, a 1995 survey of federal judges found that 67% of responding district judges and 62% of responding circuit judges agreed that

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209 See id. at 456 (“[W]hatever the cost of noncapital habeas, we very much doubt that anything short of its total elimination will actually save significant amounts of money.”); Friedman, supra note 8, at 531 (noting that Teague’s prohibition on relief merely “substitute[d] unending litigation on the merits with unending litigation on procedural issues”); Eve Brensike Primus, A Structural Vision of Habeas Corpus, 98 CAL. L. REV. 1, 31 (2010) (noting that “states and federal courts already invest significant resources in habeas cases” and arguing for more efficient allocation of resources).

210 Although these wrongful incarceration savings would be realized by state, rather than federal corrections budgets, they nonetheless would help save societal resources.


213 King & O’Neill, supra note 23, at 212, 231.

214 Id. at 232 fig.7.

215 As a federal defender opined, “[District court judges] kinda like [appeal waivers]. They won’t get reversed. This is how they keep score in their lives.” Id. at 222 n.54

216 Id. at 221.
“[w]aivers of appeal should be used more frequently.” Critics, however, object to appeal waivers for a number of reasons. Some 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. 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. 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.

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 waivers may be quite costly to the state as a whole. Some appeal waivers are explicitly bargained for in plea negotiations. 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. If prosecutors and defendants know that the claim in question has a particular chance of winning on appeal and 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. Both parties benefit from the bargain. 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 a 50% chance that the law, when finally

218 See King & O’Neill, supra note 23, at 223, 238–45.
219 See id. at 223, 230–38 and sources cited therein.
220 Id. at 223.
221 See, e.g., id. at 232 (discussing judge’s views on accepting pleas with waivers).
222 See United States v. Bownes, 405 F.3d 634, 636 (7th Cir. 2005) (“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 forgo 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.”); King & O’Neill, supra note 23, at 232–33.
224 Cf. Note, Multiparty Federal Habeas Corpus, 81 HARV. L. REV. 1482, 1486 (1968) (noting that the denial of a constitutional claim in one defendant’s case can settle the question for future defendants).
clarified, would decrease a defendant’s sentence by two 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 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 all defendants had appealed. Such bargains, however, come at a price. For the half of defendants whose claims would ultimately prove valid, avoiding appeal and the legal clarity it would bring forces them to accept a 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 often discussed in plea bargaining literature, but 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 applied in future cases.

For waivers that are not negotiated, those required by law, or those 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. This number has since dropped to 10%. Such waivers are 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 nonmeritorious and consume judicial and prosecutorial resources, as demonstrated above, the average wrongful incarceration savings from successful appeals would likely be significant.

In sum, when wrongful incarceration is considered, plea waivers may be quite costly. Negotiated waivers forestall the resolution of a legal issue and either cause additional wrongful incarceration or deprive the state of proper incarceration. Nonnegotiated waivers save judicial and prosecutorial resources but increase the costs of wrongful incarceration.

5. Mandatory Juvenile Life Without Parole

In Miller v. Alabama the Supreme Court concluded that “the Eighth Amendment forbids a sentencing scheme that mandates life in prison without


226 See King & O’Neill, supra note 23, at 227–28 fig.4. King and O’Neill report that the appeal rate for all offenses in 1996 was approximately 21%, compared with 15% for guilty plea defendants. Id. at 228–30 figs.4 & 6.

227 Id. at 229 fig.6.

possibility of parole for juvenile offenders." The Court’s opinion, however, left unsettled the question of whether offenders given mandatory juvenile life without parole sentences (JLWOP) prior to *Miller* are entitled to a resentencing hearing in which to seek a lesser sentence. Some courts considering this question conclude that *Miller* should not be applied retroactively in order to protect the state’s generalized interests in finality. A closer analysis reveals, however, that retroactive application of *Miller* could actually serve those interests by saving significant state resources and helping to reduce crime.

Courts argue that *Miller* resentencing hearings should be denied in order to conserve judicial resources. Because JLWOP resentencing hearings involve the lengthiest sentences and often involve a homicide, it is likely that they will be costlier and more heavily litigated than most resentencing hearings. As a result, it is fair to assume that each hearing would consume thousands of dollars in judicial, prosecutorial, and public defense resources. These adjudication costs, however, pale in comparison to the potential cost savings. One study found that the average life expectancy for juveniles given a sentence of natural life was 50.6 years. Assuming each juvenile was seventeen years old when arrested, the average JLWOP offender could expect to serve around 33.6 years before dying in prison, at a cost of over one million dollars to the state. Although denying resentencing hearings may save states thousands of dollars in adjudication costs, reducing an offender’s sentence by even five or ten years could save the state hundreds of thousands of dollars in incarceration.

Some courts also contend that allowing resentencing hearings would reduce the deterrent effect of the law. As Part III.D.1 demonstrates, however, posttrial relief generally has a negligible effect on rational incentives to obey the law.

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229 Id. at 2469.
230 See Chambers v. State, 831 N.W.2d 311, 321 (Minn. 2013) (assuming that *Miller* left the question of retroactivity unresolved).
231 See, e.g., id. at 324 (emphasizing that retroactive application of *Miller* would harm important principles of finality underlying the Teague retroactivity rule); People v. Carp, 828 N.W.2d 685, 707 (Mich. Ct. App. 2012) (applying the Teague test to conclude that the prohibition of mandatory JLWOP should not apply retroactively in the interests of finality). But see People v. Morfin, 981 N.E.2d 1010, 1019, 1022 (Ill. App. Ct. 2012) (acknowledging the interests of finality but concluding that *Miller* applies retroactively).
232 See, e.g., Carp, 828 N.W.2d at 714 (“While undoubtedly retroactive application could . . . [provide] a number of juveniles . . . some relief if resentenced, there exists a commensurate concern regarding the effect of these potential appeals on our limited judicial resources.”).
233 See supra note 162 and accompanying text (estimating that the average resentencing hearing costs no more than $1,222).
235 Incarceration of 33.6 years at $30,000 per year equals $1,008,000.
236 See, e.g., Chambers v. State, 831 N.W.2d 311, 323 (Minn. 2013) (“Without finality, the criminal law is deprived of much of its deterrent effect.” (quoting *Teague* v. *Lane*, 489 U.S. 288, 309 (1989))).
the other hand, providing more generous posttrial relief can actually encourage individuals to obey the law by making the justice system appear more fair or legitimate.\textsuperscript{237} As the Court explained in \textit{Miller}, its conclusion that mandatory JLWOP constitutes cruel and unusual punishment reflects “the evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{238} To the extent that \textit{Miller} reflects a societal understanding that adolescents who commit crimes have a reduced moral culpability and a greater capacity to reform,\textsuperscript{239} applying \textit{Miller} retroactively might make the justice system appear more legitimate, thereby decreasing crime.

By investing a few thousand dollars of judicial resources in JLWOP resentencing hearings, states could easily realize hundreds of thousands of dollars in reduced incarceration and potentially encourage compliance with the law.\textsuperscript{240}

\textbf{C. Agency and Cognitive Bias}

Although court opinions often cite the administrative burdens of posttrial review to justify restrictions on review, they rarely mention the costs of wrongful incarceration. As demonstrated above, these costs and the savings produced by posttrial review can often be quite substantial. As a result, the failure to consider wrongful incarceration often causes appellate courts to restrict posttrial rights in ways that impose net costs on states. This raises the question of why courts and other policymakers have largely ignored the costs of wrongful incarceration in decisionmaking.

A number of explanations can be offered for the absence of wrongful incarceration costs in discourse about posttrial review. Wrongful incarceration costs are largely invisible: incarceration cannot be identified as wrongful unless the errors that make it wrongful are identified on review.\textsuperscript{241} In addition, 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

\textsuperscript{237} See supra Part II.B.3.

\textsuperscript{238} Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012) (internal quotation marks omitted).

\textsuperscript{239} See \textit{id.} at 2464–65 (citing studies). But see \textit{id.} 2478–79 (Roberts, C.J., dissenting) (arguing that society is actually more accepting of mandatory juvenile life without parole).

\textsuperscript{240} Similar arguments can be made with respect to the retroactive application of new sentencing guidelines that reduce the disparities between sentences for crack and powder cocaine. See, e.g., \textit{U.S. SENTENCING COMM’N, 2011 FEDERAL SENTENCING GUIDELINES MANUAL §1B1.10} (allowing retroactive relief pursuant to the Fair Sentencing Act of 2010 for some but not all defendants given higher sentences for crack offenses), available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/1b1_10.htm. Broader retroactivity would undoubtedly save money and, in light of the racial overtones of the disparities, might significantly improve legitimacy in the eyes of some members of society.

\textsuperscript{241} See Blume et al., supra note 76, at 455–56.
of incarceration were seen as being weak on crime. This subsection explores another possible explanation, that appellate court judges directly benefit from restrictions on posttrial review, but do not internalize the increased wrongful incarceration costs such restrictions produce. This disconnect creates a problem of agency and cognitive bias among the appellate judiciary.

Scholars like William Stuntz argue that separating the costs of incarceration from charging decisions of prosecutors produces problems of agency. Although budgets and workloads directly affect prosecutors in determining when to arrange a plea bargain or which sentences to seek, prosecutors 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 trial judges, who determine the final sentences for criminals, also lack incentives to consider the financial costs of the sentences they impose. 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. Judges then attempt to balance the overall interests of justice. However, outside of capital proceedings, they are rarely asked to consider the financial cost to the state of imposing punishments on criminals. The problem of prosecutors advocating overly harsh sentences is largely one of agency, in which the prosecutors have incentives to seek longer sentences than optimal for the state. 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. Because the judiciary does not internalize the costs of incarceration, however, judges may focus excessively on whether the defendant deserves a particular punishment without considering whether the

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242 See infra note 279.
244 See infra notes 249–253.
246 See id. § 3553(a)(2)(A) (directing judges to “provide just punishment for the offense”).
247 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 High Cost of Putting Someone to Death, HARTFORD COURANT (Oct. 13, 2010), http://articles.courant.com/2010-10-13/community/hc-steven-hayes-costs-1012-20101012_1_steven-hayes-jennifer-hawke-petit-joshua-komisarjevsky.
248 See supra notes 236–247.
benefit to society of the defendant’s incarceration is worth the financial cost of 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.\textsuperscript{249} 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.\textsuperscript{250} 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.\textsuperscript{251} They are merely required to be aware of the costs of punishment.\textsuperscript{252} 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.\textsuperscript{253}

Similar problems of cognitive bias and agency affect the decisions appellate judges make when determining the proper limits of posttrial review. Approximately 80\% of direct appeals are resolved with the defendant left in the exact same position as when he began the appellate process.\textsuperscript{254} 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 posttrial review.\textsuperscript{255} At the same time, like trial court judges, appellate judges are not directly affected by the financial costs of continuing to incarcerate defendants who are wrongfully convicted or given improperly lengthy sentences. In other words, judges are likely very conscious of the administrative burdens posttrial review places on the criminal justice system and experience personal incentives to reduce these burdens on the state.\textsuperscript{256} As a result, appellate judges may unintentionally 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


\textsuperscript{250} Id.

\textsuperscript{251} See id.

\textsuperscript{252} See id.

\textsuperscript{253} See id.


\textsuperscript{255} In the words of Justice Jackson, “He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.” Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

\textsuperscript{256} See, e.g., cases cited supra note 41.
financial impact of posttrial review could help better align the rules of posttrial review with the interests of the state. Replacing the language of finality and its inherent bias towards restrictive review 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, posttrial review could have crime-reducing effects. 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 on crime; rather, the question is how significant these different effects would be. 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 posttrial review might have on the perceptions of legitimacy and law-abiding behavior of former prisoners as compared with the effects on people with less direct contact with the justice system. It concludes that liberalizing review would likely improve legitimacy and decrease crime by former prisoners, but that further research is needed to determine how liberal review would affect the rest of society.

1. Debunking the “Liberal Review Harms Deterrence” Myth

Advocates of finality offer three arguments to support the claim that liberal review harms deterrence: decreased certainty of punishment, decreased overall punishment, and decreased opportunities for rehabilitation. Although these arguments are often repeated, a close analysis reveals them to be generally unpersuasive.

First, the argument that appellate review decreases the certainty of punishment has limited value because the vast majority of defendants who succeed in appellate review are incarcerated for a substantial amount of time prior to release. 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). Stays of execution are

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257 See supra Part I.A.
259 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.”).
conviction and an appellate ruling for first-time appeals is two years, and less than 9% of appeals are resolved within twelve months of conviction, during which time the vast majority of defendants remain incarcerated. As such, the argument that appeals reduce the certainty of 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, even defendants released on bail pending appeal cannot be said to have avoided punishment entirely. As Malcolm Feeley argues, the process of being arrested, detained, interrogated, charged, and repeatedly brought to court to face charges is functionally punitive in itself. Although defendants released on bail pending appeal may escape formal punishment, they nonetheless are forced to suffer for their alleged criminal conduct.

Second, with respect to the argument that appeals reduce the average punishment that criminals expect to receive, only a small fraction of convicted defendants obtain any relief on appeal. Based on available data, this Article estimates that less than one percent of federal convictions are reversed on appeal, and less than three percent of all convicted federal defendants obtain any kind of relief on appeal, usually partial reductions of sentences. Applying assumptions similar to those in Part III.A reveals that the entirety of federal appeals reduces defendants’ expected punishment by only around one percent. As a result, the marginal effect that any individual restriction on review would have on deterrence would be, to put it mildly, minimal.

generally prohibited if a successful appeal is likely only to reduce a lengthy sentence. See, e.g., Commonwealth v. Hodge, 406 N.E.2d 1015, 1020–21 (Mass. 1980).


Author’s calculations. See reports cited supra note 148.


Author’s calculations. See reports cited supra note 148 (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)).

Assuming that half of reversed convictions are retried, half of which end in acquittal, that defendants serve twenty-six months before release on appeal, and that the average sentence reduction for defendants whose cases are reversed in part or remanded for a new sentencing hearing is 25%.

See Chemerinsky, supra note 7, at 790 (“Deterrence is a function of the certainty and the severity of the punishment imposed. The certainty of punishment includes the
Finally, modern research on incarceration has rejected the notion that incarceration serves a positive role in rehabilitating offenders, undermining Bator’s rehabilitation argument. Nonetheless, it is worth noting that this argument also 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.266 Allowing relief through appeals, however, does not cause defendants to think their punishment is unjust. Rather, a defendant pursues an 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 posttrial review undermines the deterrent function of criminal law, no evidence for this assertion is ever offered, and as explained above, these arguments are generally unpersuasive.267

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

As the preceding analysis demonstrates, restrictive posttrial review is unlikely to curb crime in the ways traditionally assumed. The question then remains as to how the legitimizing or delegitimizing effects of more liberal review actually affect crime rates. This subsection argues that liberalizing posttrial review is unlikely to have any significant effect on the law-abiding behavior of the vast majority of Americans. Liberalizing review may, however, have a significant effect on the law-abiding behavior of defendants who benefit from review, their associates, and minorities in high crime areas.

Although the economic theory of wrongful convictions predicts that reducing wrongful convictions can increase incentives on people to obey the law,268 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.

265 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 7, 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.”). Moreover, even though the public mood has become less punitive, see infra note 279, 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, 55–56 (2011) (finding that the inmate to educational staff ratio has increased dramatically since 1990 and that, with the exception of re-entry related programs, the past half-decade or so has not seen a “return to rehabilitation”).

266 See Bator, supra note 2, at 452.

267 Cf. Chemerinsky, supra note 7, 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)).

268 See supra note 118 and accompanying text.
reducing wrongful convictions by expanding review is unlikely to affect the behavior of most Americans simply because the risk of wrongful conviction for most Americans 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%.269 Professor Michael Risinger, on the other hand, estimates that approximately three to five percent of capital rape-murder convictions in the 1980s were of factually innocent people.270 Even if the overall wrongful conviction rate were 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.271 If even five percent of these convictions were of innocent people, then there would be only one wrongful conviction each year for every 4,000 American adults. More to the point, in order to be wrongfully convicted of a serious crime, one must first be suspected of the 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. For starters, people with criminal records are more likely to be suspected of crimes, making the risk of wrongful conviction much more salient to them. Additionally, people who have spent time in prison are more likely to have heard first or second hand reports of 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. 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 inmate who claims to have a new witness to attest to his innocence, but is denied a new trial, will present a far more credible story of innocence than the same inmate who continues to claim innocence after a second trial. Similarly, the innocence


270 D. Michael Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007). As Risinger explains in his article, the figure famously quoted by Justice Scalia has no empirical basis. See id.

271 In 2004 there were 1,078,900 felony convictions in state courts and 67,464 felony convictions in federal courts. See U.S. SENTENCING COMM’N, supra note 148. The current American population is approximately 300 million people, 80% of which are fifteen or older. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 11 tbl.7 (2012), available at http://www.census.gov/compendia/statatab/2012/tables/12s0007.pdf.
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. Posttrial review can help alleviate the reduced deterrent effects of wrongful convictions both by 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 posttrial review may actually increase the deterrent value of the law.272

Similarly, the risk of wrongful conviction is likely much more salient to minorities who have been the victims of racial profiling than others. After all, those who have been falsely suspected of crimes in the past are likely to be much more conscious of and concerned with the risk of wrongful conviction. By reducing the actual risk of wrongful conviction, more liberal posttrial review could increase deterrence among minorities who have been the victims of racial profiling.

Providing more liberal posttrial review would also likely have a greater effect on former inmates’ perceptions of legitimacy. Few Americans outside the legal system hear reports of procedural unfairness with any regularity. Problems of procedural unfairness in appellate review likely have little impact on the behavior of most Americans because they believe, quite rightly, that they will never be exposed to such procedures.

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 also unlikely to remain silent while they suffer in prison. As a result, prisoners are far more likely to be exposed to reports of procedural injustice than the population at large. As Professor Martin H. Pritikin argues, people’s perceptions of system legitimacy can be influenced not only by unfairness personally experienced, but also by perceived injustices they observe inflicted on others.273 Relaxing restrictions, like those on relief from plain errors in sentencing, that appear procedurally unfair could help improve legitimacy in the eyes of prisoners and increase their willingness to obey the law upon release.274

Furthermore, ex-convicts are at far greater risk of committing new crimes in the future than the population at large.275 Within three years of being released from jail, 67% of former inmates are rearrested and 52% are reincarcerated. John J. Gibbons & Nicholas de B. Katzenbach, Confronting Confinement, 22 Wash. U. J. L. & Pol’y 385, 533 (2006) (note that these figures include reincarceration for technical violations of parole).

272 Within three years of release, 67% of former inmates are rearrested and 52% are reincarcerated. John J. Gibbons & Nicholas de B. Katzenbach, Confronting Confinement, 22 Wash. U. J. L. & Pol’y 385, 533 (2006) (note that these figures include reincarceration for technical violations of parole).

273 Pritikin, supra note 134, at 1073–74.

274 As demonstrated in supra Part III.B., such reforms could also save states money.

275 See, e.g., Papachristos, supra note 11, at 398 (finding that social networks for violent ex-offenders often include other criminals and gang members and that having more criminals and gang members in the network increases the likelihood of violating gun laws).
prison, 52% of convicted defendants return to prison,276 and many more commit crimes without being caught.277 Although the legitimizing effects of more liberal posttrial review may have only a small effect on the behavior of former inmates, because recidivism rates are so high, even small effects could have a significant impact on crime.

The effects more liberal review would have on Americans who have less contact with the justice system, however, is less clear. In a recent paper, Professor Stephanos Bibas argues 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 and, thereby, make it more likely that they will engage in criminal behavior.278 Whether the legitimating effects on former inmates of more liberal review would have a greater crime reducing effect than the delegitimizing effects on the public at large is an empirical question that merits further study.

Nonetheless, there is reason to believe that offering more fair posttrial relief would not have as significant delegitimizing effect as Bibas predicts. The costs of incarceration have increased in public salience in recent years. National surveys reveal that punitive tough-on-crime attitudes have decreased significantly since the mid-1990s.279 As such, it may be that fewer people would be significantly vexed

276 Gibbons & Katzenbach, supra note 272, at 533.
277 Although a majority (65%) of reported murders in the United States were cleared or “solved” by police in 2010, clearance rates for other crimes are much lower. See Percent of Offenses Cleared by Arrest or Exceptional Means by Population Group, 2010, FBI.GOV, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl25.xls (last visited Sept. 7, 2013). For example, only 28% of reported robberies were cleared in 2010. Id. 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.
278 Bibas, supra note 136, at 949–51 (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).
279 Punitive attitudes peaked in the mid-1990s but have been steadily declining ever since. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.2.28.2010 (2010), available at http://www.albany.edu/sourcebook/pdf/t2282010.pdf (reporting that 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. tbl.2.47, available at http://www.albany.edu/sourcebook/pdf/t247.pdf (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. tbl.2.96.2006, available at http://www.albany.edu/sourcebook/pdf/t2922006.pdf (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
by posttrial procedures that are fairer to defendants. Many may even believe that
more generous appellate procedures that improve the legality of sentences while
saving states money may increase the legitimacy and fairness of the system.

As illustrated above, the traditional arguments that increased posttrial review
increases crime are without substantial merit. Rather, when the effects of
legitimacy and wrongful convictions are considered, it becomes clear that offering
more fair process in posttrial review could improve the willingness of convicted
defendants and former prisoners 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 posttrial review: society’s interests are furthered by increased finality,
while offering broader protections of defendants’ rights harm those same interests.
As a result, debates about posttrial review have revolved primarily around the
proper balancing of society’s interest in finality against the rights of defendants.
The Supreme Court and some scholars have treated finality as an interest of such
paramount importance as to outweigh all but the most pressing countervailing
interests. Advocates of limited review, therefore, have focused primarily on either
demonstrating the finite value of the underlying interests of finality or the
magnitude of the harm restrictions on review would impose on defendants’ rights.

This Article argues, however, that restrictions on defendants’ rights in
posttrial review can often harm the very interests increased finality is presumed to
protect. Limiting defendants’ rights to obtain relief from improper convictions or
excessively lengthy sentences also limits the state’s ability to identify and remedy
wrongful incarceration. Although restrictions on posttrial review invariably help
conserv[e judicial and prosecutorial time, they often impose net costs on the state as
a whole. Arguments that restrictions on relief from errors after trial encourage
defense counsel to take greater care in representation are theoretically appealing,
but falsely assume that trial attorneys have the capability to provide a higher
quality of representation with the same limited resources. The traditional
arguments that limiting defendants’ rights to appeal increases the deterrent value of
criminal law are unpersuasive in light of modern research on rehabilitation and the
miniscule effect posttrial review has on the punishment criminals can expect to
receive. On the other hand, providing defendants with fair opportunities to seek
relief from claimed errors can increase the subjective legitimacy of the system,
thereby encouraging defendants to obey the law in the future. Conversely,

Rehabilitation Versus Incarceration of Juvenile Offenders: Evidence From a Contingent
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 commenting that these results may differ from earlier surveys showing more
punitive attitudes because “attitudes may have changed since the 1990s”).
restricting posttrial relief in ways that defendants see as arbitrary or unfair may well increase recidivism.

Courts and scholars treat finality as either a thumb on the scale or a hefty interest that weighs in the favor of restrictions on posttrial review. A close analysis reveals, however, that it is often neither. Rather, restrictions on posttrial review that make criminal judgments more “final” often harm the very interests finality presumes to protect. Moving beyond the language of finality and towards a more critical analysis of the costs and benefits of posttrial review may allow society to craft more efficient and equitable systems of criminal justice.