The Financial Gains from Criminal Appeals: An Investigation into the Administrative Costs and Incarceration Cost Savings of Post-Conviction Review

Andrew Chongseh Kim*

Draft : Do not cite or quote without permission of the author.

I. Introduction

Judges, legislators, and voters are strongly sensitive to anything that increases the financial costs of adjudicating criminal cases.[1] For example, in 1994, Michigan voters amended their state constitution to provide that appeals by defendants who pled guilty would be by leave of the court, rather than by right.[2] Defendants who pled guilty could still petition for the right to appeal, but, after new legislation in 1999, could not receive publicly financed counsel to help prepare these petitions.[3] These measures were taken in order to reduce significant backlogs in the Michigan Court of Appeals[4] and, implicitly, to reduce the costs of handling such appeals.[5] The procedural rights of presumptively guilty defendants did not justify the financial and administrative burdens on the state.

Judges are also wary of the financial burden that defendants' procedural rights can impose on the states. When limiting defendants' access to appellate review or new procedural rights, the Supreme Court has often cited the "costs imposed upon the States"[6] or the "burden on judicial and prosecutorial resources" that would be necessary to enforce defendant's rights.[7] More

At the same time the Court has asserted that broader access to postconviction review reduces the deterrent effect of criminal law by adding an element of uncertainty to sentences, "undermining the principle of finality."[8] [9] Though these financial effects very defendants' postconviction procedural rights as financial burdens and as factors that reduce the deterrent effect of incarceration by making it less certain that criminal behavior will be met with punishment.

---

* Law Clerk for Justice Richard Palmer, Connecticut Supreme Court, University of Chicago B.A. 2000, Harvard Law School; J.D. 2010.

I thank William Stuntz for comments and inspiration.

[1] Cf. Halbert v. Michigan, 545 U.S. 605, 609 (2005) (Thomas, J., dissenting).

[2] See Halbert v. Michigan, 545 U.S. 605, 609 (2005) (Thomas, J., dissenting).

[3] Shortly after the constitutional amendment, some judges began denying requests for appointed counsel to assist in preparing a petition for leave to appeal. In 1999, the Michigan Legislature passed a law making such denials mandatory in most cases. Mich. Comp. Laws § 770.3a. This practice was later found unconstitutional by the United States Supreme Court. See id. at 609, 625-26.

[4] Id. at 625.

[5] Cf. id. at 629.

[6] Teague v. Lane, 489 U.S. 288, 310 (1989) (internal quotations removed).

[7] *Stumes*, 654, quoted in *Teague*; *see e.g.* District Attorney's Office for the Third Judicial District, v. Osborne, 129 S. Ct. 2308, 2326-29 (2009) (Alito concurring) cataloging a number of costs associated with post-conviction DNA testing).

[8] *Teague*, 309.

[9] *See e.g., Griffin v. Illinois, 351 U.S. 12*, 24 (1956); *Teague v. Lane, 489 U.S. 288*, 309-10 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect"); Solem v. Stumes, *465 U.S. 638*, 654 (1984); Halbert (630-31,623, Thomas dissenting); *Herrera v. Collins*, 506 U.S. 390, 417 (1993); cf. Scott and Stuntz (discussing the reduced deterrent effects if certain punishment through plea bargains were replaced with uncertain trials).

Electronic copy available at: http://ssrn.com/abstract=1680626

Though the American system of plea bargaining, which resolves 97% of criminal cases in the United States has been probably criticized, has been heavily criticized long been used to validate the American plea bargaining system that dominates American criminal justice.[10]

Judges and legislatures often conceptualize the post-conviction rights of criminal defendants as imposing burdens on society that must be balanced against the legal and moral benefits of providing those rights.[11] However, the assumption that criminal appeals impose a financial burden on the state ignores the fact that successful appeals produce substantial savings through reduced incarceration costs.[12] The assumption that the possibility of post-conviction relief reduces the deterrent effect of criminal law ignores the importance of legitimacy in obtaining compliance with the law and the negative deterrent effects of wrongful convictions.[13] This paper argues that even though the "finality" that is "disrupt[ed]" by post-conviction claims of innocence or sentencing errors may serve important social goals, the actual financial costs and reduced deterrent effects of entertaining these claims are often much lower than generally believed. In fact, in some cases, increasing access to counseled post-conviction review may created net financial savings to the state and increase the deterrent value of the law.

This paper proceeds in four parts. In part II, I compile recent research on the costs and benefits of post-conviction procedures and use back of the envelope calculations to demonstrate that for cases with lengthy sentences, increased access to post-conviction remedies may yield net cost savings to the state.

The basic economic model of criminal behavior demonstrates that wrongful convictions reduce deterrence by decreasing the benefits of not committing crimes. However some scholars have criticized this model and argued that the reduced deterrent effect of wrongful convictions is generally minimal. In part III A, I argue that the reduced deterrent effects of wrongful convictions can be much larger among those populations most at risk for criminal behavior. I demonstrate that the criticisms of the reduced deterrence of wrongful convictions theory carry far less weight when describing the incentives of at-risk people and communities.

Under economic theories of criminal law, the deterrent effect of the law is highly influenced by the expected severity of punishment. Any proposal that would reduce net incarceration must address the possibility that the net deterrent effect of criminal law would also be reduced. In part III B, I discuss the deterrent effects of legitimacy and argue that denying judicial consideration of claims perceived by defendants as potentially valid reduces their

---

10

11 *Cf. Stumes at 654*

12 *See generally*, Dawn Van Hoek, *Penny-Wise and Pound-Foolish: Waste in Michigan Public Defense Spending*, *w*ritten testimony of Dawn Van Hoek, Chief Deupty Director of the Michigan State Appellate Defender Office, to the United States House Of Representatives Committee on the Judiciary, House Subcommittee on Crime, Terrorism and Homeland Security, March 26, 2009. (Hereinafter DVH, SADO). Available at http://www.sado.org/sado_news/DVH_testimony_3-26-09.pdf, last visited April 18, 2010.

13 *See generally*, Matteo Rizzolli and Luca Stanca, *Judicial Errors and Crime Deterrence: Theory and Experimental Evidence*, Working Paper, (2009) (theorizing that "in the presence of risk aversion, loss aversion, or differential sensitivity to procedural fairness, [wrongful punishment errors] can have a larger effect on deterrence than [failures to punish]," and offering experimental evidence to support the claim) available at http://ideas.repec.org/p/mib/wpaper/170.html; Tom R.Tyler, Why People Obey the Law, (2006).

Electronic copy available at: http://ssrn.com/abstract=1680626

perception of the legitimacy of the law. While post-conviction acquittals and sentence reductions based on "technicalities" may impair the legitimacy of the law in the eyes of many law-abiding citizens, I suggest that the delegitimization effects in the eyes of criminals and their communities may be more directly related to actual deterrence of crime.

Part IV concludes.

II. Calculating the Financial Costs and Benefits of Post-Conviction Procedure

Many appellate courts are overworked, and appellate judges are likely well aware that only one out of every five criminal appeals that they process yields any relief to the defendant.[14] Crafting rules that reduce the availability of post-conviction review reduces the number of the, usually meritless, criminal claims they have to deal with. Similarly, disposing of an appeal on procedural grounds, without having to weigh the actual merits of the claim may often reduce the amount of time a judge must spend on a particular case. At the same time, the costs of continued incarceration are incurred by, and have already been budgeted for, the Department of Corrections. Judges are directly affected by decisions that increase judicial workloads, but do not internalize the cost savings to the state of reduced incarceration. Because of this, the administrative burdens of post-conviction review is likely much more salient for judges than the costs of continued incarceration. This bias is visible in the large number of judicial opinions that balance the state's interest in finality and the financial costs of post-conviction review against the rights of defendants without any mention of the costs to the state of continuing to house defendants longer than legally appropriate.[15] The failure of judges to consider the costs of legally wrongful or excessive incarceration while consistently giving explicit weight to the administrative burdens on the judiciary is essentially an agency problem and may cause judges to inefficiently prefer policies that favor judicial efficiency over the rights of defendants and the financial interests of the states.[16] This is not to say that every restriction of defendants' rights in the interests of judicial efficiency or "finality" is undesirable. The nonfinancial interests of finality can be substantial. For instance, contemporaneous objection rules, wherein the failure to promptly object to certain errors forfeits the right to have the error corrected, give incentives to defense counsel to avoid "sandbagging,"[17] wherein defense counsel consciously decides not to bring an error to the court's attention in hopes of later securing a retrial if the first trial ended unfavorably. Theoretically, if the defense had no incentives to object to errors as they occurred and could always obtain a new trial in the event of an error, trials might balloon exponentially, at

---

[14] *See* Joy A. Chapper and Roger A. Hanson, U*nderstanding Reversible Error in Criminal Appeals*, final report submitted by the National Center for State Courts (1989) (hereinafter NCSC) (empirical analysis of criminal appeals); c*f e.g.* Michigan, in Halbert.

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

[16] Cf. Stuntz, Unequal Justice (discussing the agency problem where county prosecutors are not forced to internalize the costs of lengthy sentences, which are often paid for out of state, not county budgets).

[17] *See Puckett v. United States*, 129 S. Ct. 1423, 1431-32 (2009).

Electronic copy available at: http://ssrn.com/abstract=1680626

substantial financial cost.[18] In this section, I attempt to estimate the magnitude of the incarceration savings from direct appeals to gain a better sense of how significant the state's financial interest in avoiding the administrative burdens of post-conviction procedure really are. I conclude that states do not incur substantial net costs by providing counseled direct appeals and may well realize net financial savings through reduced unnecessary incarceration costs.[19]

Much of the research comparing the costs of post conviction proceedings with the costs of punishment comes from death penalty literature. Studies have consistently found that the full costs of criminal procedural protections for capital defendants, including trials, appeals, and habeas proceedings, outstrips the costs of life incarceration and the less thorough protections offered life sentence defendants.[20] When the outcomes of capital post-conviction review favor of the defendant, the costs to the state often increase substantially, through civil settlements in cases of wrongful conviction and through incarceration costs when only the death penalty itself is overturned. For capital cases, these post-conviction protections cost states significant amounts of money that could be saved by reducing post-conviction review, seeking non-death sentences, or eliminating appellate review and proceeding straight to execution.[21] The publicity around these studies may contribute to the perception that criminal procedural rights are offered to generally guilty defendants at great financial cost to the state.

Post-conviction proceedings outside of capital cases are much cheaper and outcomes that favor the defendant produce substantial savings to the state through reduced incarceration costs. Incarcerating a prisoner for one year costs around $30,000, though this number varies significantly by jurisdiction and type of facility.[22] When a conviction is overturned, or remanded and not prosecuted further, the state no longer has to pay to imprison the defendant for the remainder of his term, which can be a considerable savings.[23] When, as occurs frequently, post-conviction proceedings lead not to acquittals, but to reduced sentences, the state accrues substantial savings on the future incarceration that will no longer occur.[24] Recent research suggests that even though success rates for post-conviction procedures tend to be relatively low, the net "costs" to the state of providing these procedures is negative in many cases.

---

[18] Cf. id.

[19] Cf. DVH, SADO (implying the same for appeals and public defense in Michigan); Richard C. Goemann, First You Cripple Public Defense: Musings on How Policymakers Dismantle the Adversarial System In Criminal Cases, *9 Loy. J. Pub. Int. L. 239* (suggesting that because defendants represented by public defenders are incarcerated more often than those represented by private counsel, the state might realize cost savings from better funding for public defenders).

[20] *See generally* *http://www.deathpenaltyinfo.org/costs-death-penalty#financialfacts* (tracking studies).

[21] *See e.g.* INDIANA, $298,585, 2002, $363,797 in 2010 dollars: cost of execution is around $25,000; Maryland, $661,000, $805,000 $2010 NC p. 3.

[22] *See* Indiana, 2001 death penalty study, translated to 2010 dollars.

[23] When a defendant is released, he may impose direct costs on the state through public assistance benefits, or indirectly if he renews a life of crime. However, he may also contribute directly to state coffers through the payment of taxes or indirectly by contributing productive labor to society. Though relevant, a full economic analysis of the costs or contributions of recidivists to society is beyond the scope of this paper.

[24] *See* DVH, SADO.

In Michigan, the State Appellate Defender Office (SADO) has compiled records of its success rates for a Special Unit of three attorneys that handle appeals from guilty pleas.[25] Because guilty plea defendants have already conceded their guilt in open court, most of the appeals handled by this unit relate to sentencing errors, in which defendants were sentenced to more serious punishment based on inaccurate information or inaccurately calculated guidelines recommended sentences.[26] These are generally not cases in which defendants exploit a legal technicality to avoid punishment, but those in which defendants have been given lengthier, and costlier, punishment than legislatively authorized or recommended. SADO has calculated that the Special Unit obtained sentencing reductions in about a third of the plea cases that they pursued. For successful cases, Special Unit attorneys obtained an average 6.3 month reduction to the minimum sentence and an average 25.3 month reduction to the maximum sentence. If incarceration costs $30,000 a year, this translates to an average minimum savings of $18,900 per successful case. The average incarceration savings for Special Unit plea appeals is $3654 per case, when all cases, including those in which defendants, after consulting with their attorney, voluntarily dismiss, are considered. [27] In 2007, the work of the three attorneys, whose salaries totaled around $200,000,[28] saved the state of Michigan at least $855,000 in incarceration costs.[29] Dawn Van Hoek, Chief Deputy Director of SADO, estimated that if the experience of the Special Unit was representative of the success rate for all Michigan represented appeals, the total incarceration savings from sentencing error correction for 2007 was at least $11,850,000.[30] Because defense costs are some of the largest expenses in post-conviction proceedings,[31] it is likely that after prosecutor and court costs are considered, rather than imposing a financial burden on the state, providing these defendants with post-conviction remedies and state-funded attorneys saves the state money while ensuring that defendants are given only legally appropriate levels of punishment.

It should be noted that around 40% of Special Unit appeals were concluded internally when clients, after discussions with their attorney, voluntarily dismissed their appeals, allowing the cases to be resolved no pleadings filed, incurring no additional expenses on behalf of prosecutors or the courts.[32] Given the relatively high success rate of appeals that are pursued and

---

[25] The Michigan Constitution was amended to eliminate appeals as of right for defendants who plead guilty and subsequent legislation denied appointed counsel to assist defendants in petitions for discretionary appeal. However, the Supreme Court in *Halbert* restored the right to appointed counsel for petitions for appeal. *Halbert* upheld the denial of appeals as of right as constitutional.

[26] See DVH, SADO, at 3.

[27] Calculated from numbers in the *2007 Annual Report for the State Appellate Defender Office, and Michigan Appellate Assigned Counsel System*, by the Appellate Defender Commission. 5-6 (Hereinafter SADO) (available at http://www.sado.org/commission/#annualreports, last visited April 18, 2010). The total annual per attorney reduction was 9 1/2 years for minimum terms and 38 years for maximum terms. Each attorney found some success in an average of 18 cases.

[28] Cf. Performance Audit of the Appellate Defender Commission, 23 (2002) available at http://audgen.michigan.gov/comprpt/docs/r0515501.pdf.

[29] See SADO at 6

[30] *See* DVH SADO at 6

[31] Cf. Indiana, post-conviction proceedings for noncapital, life without parole cases cost $3724 in public defender expenses and $3601 in Attorney General staff time. For death penalty cases, the costs were $123,101 for the defense and $37,600 (figure partially illegible) for the Attorney General.

[32] *See* SADO at 5, 5 n4. ("Historically, after Unit attorneys review the file, conduct research and fact investigation, consult with and advise the client, their clients on average voluntarily dismiss between 38% and 42% of their cases. In 2007, the average dismissal rate for the Unit was 31%.").

the fact that defendants have the right to petition for discretionary appeals, it appears that Justice Ginsburg's contention in *Halbert* that providing appointed counsel for petitions for discretionary appeal may alleviate the workload of the judiciary[33] has some merit. Conversely, Justice Thomas's implication that the provision of appellate counsel for indigent defendants would force the judiciary to expend large amounts of resources on frivolous claims[34] appears to have been mistaken. The Special Unit, perhaps in response to their own budget constraints, appear to be quite adept at weeding out genuinely frivolous claims. As a third of the claims they do pursue are granted some relief, it would be difficult to label these claims as a group, "frivolous."

The problem of sentencing errors, and the potential cost savings from error correction, is not limited to Michigan or jurisdictions that sentence under the guidelines. Sentencing errors occur in state and federal courts.[35] A 1989 study by the National Center for State Courts (NCSC) on criminal appellate practices in five different states found that sentencing issues were raised in one quarter of direct appeals.[36] In these cases, courts found error 25% of the time. Sentencing errors discovered through appeal include problems with aggravating and mitigating factors that affect statutory and guidelines ranges,[37] the accuracy of the presentence report,[38] miscalculations of the guidelines, improper imposition of consecutive as opposed to concurrent terms, and procedural problems with the sentencing hearing, like the denial of allocution, or the judge's consideration of legally irrelevant factors in sentencing, like a trial defendant's failure to plead guilty.[39] Sentencing error is not limited to guideline states. The NCSC study found a 38.5% error rate for Rhode Island, which has indeterminate sentencing.[40] 7.3% of all appeals in the study were granted a new sentencing hearing.[41]

The most obvious incarceration cost savings occur when the convictions of both guilty and innocent defendants are reversed. Defendants are rarely released through appellate proceedings. In the NCSC study, only 1.9% of all appeals were straight "acquittals."[42] It is much more common for appellate courts to vacate the conviction and remand the case to the trial court, where the prosecutor can attempt a retrial, if she chooses. In the NCSC study, 6.6% of all appeals were remanded for new trial[43] while in the federal system, 6.3% of appeals disposed on the

---

[33] *Halbert* at 623, ("While the State has a legitimate interest in reducing the workload of its judiciary, providing indigents with appellate counsel will yield applications easier to comprehend. . . . when a defendant's case presents no genuinely arguable issue, appointed counsel may so inform the court.").
[34] *Halbert* at 630-31 ("Today's decision will therefore do no favors for indigent defendants in Michigan--at least, indigent defendants with nonfrivolous claims. While defendants who admit their guilt will receive more attention, defendants who maintain their innocence will receive less.").
[35] *See John*, 597 F.3d 263 (5th Cir) (discussing plain error doctrine in the context of miscalculated federal guidelines).
[36] *See NCSC* at 18-19
[37] *Id.* at *19*
[38] DVH *SADO Congress 3*
[39] *NCSC at 19*; insisting on trial and refusing to plead guilty is not a constitutionally valid basis for imposing a harsher sentence. However, pleading not guilty and then committing perjury by falsely testifying in one's own defense has been viewed by the Supreme Court as an acceptable basis for sentence enhancement.
[40] NCSC at 19.
[41] *Id.* at 5
[42] *Id.* at 5
[43] *Id.* at 5

merits are reversed and vacated. An additional 12.1% of cases were partially affirmed, granted a new sentencing hearing, or received other relief.[44]

How do the cost savings from reduced incarcerations in the relatively few cases in which some relief is granted compare with the prosecutorial, judicial, and public defender costs of providing appellate review in the vast majority of cases in which the defendant's conviction and sentence are upheld? To date, no study appears to have attempted to directly address this question. However, by making a number of educated guesses based on data from the NCSC study and other studies on the costs of criminal procedures, including expenditures on prosecutors and public defenders, [45] it is possible to make back of the envelope calculations,[46] of the systemic financial impact of direct appeals. *See* Table 1. The results are somewhat surprising. I estimate that the total cost to the state of providing appellate representation and adversarial direct appellate procedure for 1000 cases is approximately $7.5 million, or $7,500 per defendant, a significant sum.[47] However, the expected incarceration savings from the 20% of cases that obtain at least some relief is nearly $10 million.[48] Due to the rough nature of these calculations, we cannot say with any certainty that the total incarceration savings from direct appeals is larger than the procedural costs of appeals. However, it is safe to say that, contrary to the intuitions of many, when incarceration cost savings are considered, the net financial costs of providing counseled access to direct appeals on states is not large, and might actually result in financial savings. [49]

III. Improving criminal procedure while saving money

The calculations also do not establish that a general expansion of post conviction rights would yield financial savings to the state. For one thing, these are estimates of the incarceration savings from direct appeals and subsequent retrials or resentencing hearings only. The incarceration cost savings that result from collateral review are likely quite small, as very few

---

[44] *Id.* at 35

[45] Most of my assumptions are detailed in the footnotes to Table 1. One assumption that bears highlighting is the assumption that the average sentence length for successful appeals is no greater or less than the average sentence length for appeals filed. Without this assumption, the calculations become much more complicated. This assumption is somewhat supported by the NCSC study, which found that there was little relationship between sentence length and the likelihood of success in direct appeals. Defendants with the shortest sentences were more likely to have their convictions vacated, but defendants facing the longest sentences were most likely to receive a new sentencing hearing or succeed on only some issues. *See NCSC at* 39. These relationships were statistically weak. Because there is no clear, statistically strong relationship between the likelihood of receiving at least some success and sentence length, this assumption does not obviously bias my estimates.

[46] To steal a term from physics, one might call these calculations "Fermi approximations." Fermi approximations are quick and dirty estimates of quantitative values used when precise values of the relevant variables are not easily available. So long as the estimates of the relevant variables, like the costs of an appeal, average success rates, and average sentence reductions per case, are unbiased, the calculated values will usually be in the same ballpark as the actual values.

[47] This figure includes estimated costs of new trials in one third of cases that are vacated and remanded, under the assumption that most we many cases are not pursued further and estimated costs of resentencing hearings.

[48] These figures assume that a year of incarceration costs $30,000.

[49] Cf. DVH SADO.

defendants, outside of capital cases, obtain any measure of success. More importantly, these numbers approximate the costs and benefits of direct appeals as they exist today. If an expansion of post-conviction rights provided appellate review to defendants whose cases were generally worse on the merits than those that are currently reviewed, states might end up paying more to adjudicate those cases than they would save in incarceration costs. This might be the case if, for instance, the additional appeals that would be brought as a result of better funding of appellate defenders were generally less meritorious than those currently brought. However, these numbers do suggest that, so long as these marginal cases were not entirely frivolous, the net financial burden would be significantly less than the increased spending on appellate counsel.

While general expansions of post conviction rights would not necessarily lead to net cost savings for states, as marginal cases would not necessarily yield the same cost savings as those currently reviewed, expansions of post conviction procedural rights would clearly come at a lower financial cost than most realize. Additionally, certain more particularized reforms *could* be expected to yield large cost savings to the state. One realm in which the net savings from incarceration costs might outweigh the costs of increased procedural rights is the probability standards for new trials based on newly discovered evidence. Under the *Berry* standard for new trials based on newly discovered evidence, a new trial will not be ordered if defense counsel failed to discover the evidence through lack of due diligence, "sandbagged" the new evidence, or if it is less than probable that the defendant would be acquitted at a new trial.[50] The "probable," or "more likely than not" standard prevents a new trial if there is less than a 50% chance that the defendant would be acquitted. While there may be strong "finality" interests in enforcing this fairly high standard, the financial burden to the states will rarely be one of them. If, as I assume, a retrial costs around $20,000 and a year of incarceration costs $30,000, allowing a new trial when a defendant has even a one in four chance of acquittal would, on average, yield large savings to the state whenever there are at least 32 months left on the defendant's sentence. Allowing greater access to new trials based on newly discovered evidence does raise questions about the effects on deterrence.[51] However, as I discuss in the next two sections, these deterrent effects may not be as severe as some believe.

In the application of the plain error rule to correct unobjected-to guidelines miscalculations, the issues of sandbagging and deterrence are much less relevant and the trade-off between judicial workloads and incarceration costs is stark. There is now some consensus in the federal circuits that the plain error rule can be used to overcome the forfeiture of an error when defense counsel fails to object to a judge's clearly erroneous calculation of the guideline sentence range, so long as correcting the error "would likely significantly reduce the length of the sentence."[52] However, there is disagreement about how significant the reduction must be in order to merit resentencing.[53] In *John*, the Fifth Circuit found that the district court judge, who had sentenced the defendant to 108 months, had miscalculated the guidelines sentencing range as 97-121 months, rather than the correct 70-87 months. Because defense counsel did not object to this error at sentencing, the defendant would have lost the right to appeal the error unless the

---

[50] See United States v. Johnson, *327 U.S. 106* (1946).

[51]

[52] *See United States v. Meacham*, 567 F.3d 1184, 1190 (10th Cir. 2009); FRCP 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention").

[53] See e.g. *John*, 597 F.3d 263 *dissent*

miscalculation was a "plain error that affects substantial rights."[54] The Fifth Circuit found that this plain error "affect[ed] substantial rights" because there was a "reasonable probability" that defendant would have received a lower sentence if not for the error.[55] However, in an earlier case, the Fifth Circuit had found that a an incorrectly calculated range of 46 to 57 months did not affect substantial rights when the defendant had been sentenced to a minimum and the correct sentencing range was 41 to 51 months.[56] The dissent in *John* similarly argued that a sentence that "is only 21 months above the maximum of 87 months in the proper guideline range" does not "affect substantial rights," and that it would be "unfair[] . . .[to] district judges," who already have large workloads, to force them to hold a another sentencing hearing when defense counsel could have caught the mistake. [57] Absent from the dissent, and from the majority opinion, is any consideration of the burden on the state, the ultimate party of interest, of paying for sentences that are lengthier than legislatively intended.[58]

In the case of post-conviction guidelines miscalculations that increase 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."[59] After all, it is unlikely that an error that raises the recommended sentence would ever favor the defendant, and any "second bite at the apple"[60] would be before the same judge, substantially eliminating the risk that defense counsel would use the plain error rule to game the system. Additionally, while failing to correct sentencing errors that increase sentences might have a small deterrent effect, by marginally raising the sentence a defendant expects to receive, these sentences are in excess of what the legislature, through the guidelines, has chosen as appropriate retribution and deterrence for the criminal acts. Applying the plain error rule in cases like these would clearly increase judicial workloads, either by making judges hold a resentencing hearing or by forcing them to take greater care in calculating the sentences in the first place. However, while it is debatable whether defendants or judges should suffer for mistakes made by judges and defense counsel,[61] the financial cost of the defendant's excessive incarceration is borne by the government. In *John*, even if the district court resentenced the defendant to the corrected maximum 87 months, the government would still save over $50,000 in incarceration costs on 21 months of punishment that were not justified by the guidelines. If, as I have estimated, the total cost of an appeal and resentencing hearing to the government is around $8,600, allowing the appeal and resentencing hearing in *John* saved the government over $40,000. In other words, greater deference to judicial workloads and the interests of finality would have come at a cost of over $40,000. The fact that neither the majority nor the dissent

---

[54] Id. at 27-28, quoting FRCP 52(b).
[55] *Id.* at 29-31 (applying the plain error rule described in *Puckett*, 129 S. Ct. at 1429).
[56] See *United States v. Jasso*, 587 F.3d 706, 713-14 (5th Cir. 2009).
[57] *See generally John*, at 41-42, dissent ("Judges are not like pigs, hunting for truffles . . . . Faced with hundreds of sentencings, raising thousands of issues, a district judge should be able to rely on counsel, as officers of the court and zealous advocates, to call arguable error to the court's attention." *Internal quotes removed).*
[58] Though the guidelines merely set sentencing recommendations that judges can depart from based on the details of a particular case, it is fair to assume that Congress, by creating the guidelines, intended that the sentence for a defendant should be anchored around a sentencing range that accurately describes a defendant's crime, and not anchored around a sentencing range that describes a crime the defendant did not commit.
[59] *Puckett* at 1428
[60] *John*, dissent at 42.
[61] *Cf. Puckett.*

made any reference to this financial cost of finality suggests that the court may have under weighted this factor in their ruling.[62]

Incarceration savings from correcting sentencing errors and improperly obtained convictions are a significant factor that appears to be under appreciated by judges and lawmakers. This analysis and the Michigan study by SADO demonstrate that, contrary to the assumption of some, in its current form, providing defendants with represented access to direct appeals does not impose substantial financial burdens on the state. In fact, some post-conviction procedures that would improve the accuracy of the legal process would likely produce net cost savings to the state. More lenient application of the plain error rule for miscalculated guidelines would impose slightly heavier burdens on the judiciary, but would yield much larger savings to the state by reducing unnecessary incarceration. The financial expenses of continued erroneous incarcerations are substantial. However, because judges do not benefit from reduced incarceration costs but do bear the burden of increased workloads, they tend to undervalue the importance of the cost savings to the state. In fact, they rarely mention it at all. Deference to "finality" interests reduces the administrative burdens on the judiciary but increases the financial burden on the state of continued erroneous incarceration. While courts easily recognize the "state's interest in finality" as an important policy concern, they fail to acknowledge that finality imposes a substantial financial cost to the state.

[62] It bears noting that a significant number of defendants in Michigan file motions to reconsider sentences in the trial court, allowing the trial judge to correct sentencing errors without the expense of full proceedings in the higher appellate courts. See SADO at 6 (the Special Unit's success rate for cases initiated in the trial court is around 85%). Encouraging a similar procedure in federal courts in instances of truly "plain," non-debatable, error would reduce the administrative costs of obtaining the incarceration savings while allowing district court judges to correct their mistakes without having to suffer a reversal of their decisions by an appellate court.

IV. Deterrence

Many have argued that allowing convicted defendants greater opportunities to challenge their sentences and convictions "undermines the principle of finality" and "deprive[s] [criminal law] of much of its deterrent effect."[63] The deterrence argument is that by marginally decreasing the certainty that criminal behavior will be met with punishment and marginally decreasing the sentences criminals expect to receive, post-conviction procedure reduces the incentives on potential criminals to avoid crime.[64] This rational actor analysis has been critiqued and criticized by studies that demonstrate that these rational incentives often do not have a strong effect on people's decisions to break the law,[65] that certainty of punishment is generally more important than severity,[66] and that people's subjective sense of the fairness of the law has a strong influence on their willingness to obey the law.[67]

These deterrence concerns are significantly less problematic in the context of post conviction review. First, the vast majority of defendants who succeed in appellate review are in fact incarcerated for a substantial amount of time. Second, appellate review can contribute to the deterrent effect of criminal law by reducing the number of wrongful convictions, increasing the benefits of not committing crimes. Third, appellate review gives defendants a voice with which to air their concerns about the fairness of their procedures and helps ensure that defendants' sentences and convictions themselves comply with the law, increasing the appearance of legitimacy in the eyes of defendants. Because an individual's beliefs about the fairness of legal systems has a substantial effect on their willingness to comply with the law, increased access to post-conviction remedies, particularly to correct mistakes by criminal "insiders," like prosecutors, judges, and public defenders, may actually improve the deterrent effect of criminal law.[68]

A.Sentencing Reductions through Appellate Review

Several important factors distinguish the deterrence question for sentence reductions through post-conviction review from sentence reductions generally. The first is that almost all defendants who receive some success in post conviction review still receive substantial punishment. Many studies show that increased certainty of receiving some substantial amount of punishment has a greater deterrent effect than increasing the severity of the punishment. Post conviction review takes time. In federal courts, the median time between conviction in trial court and appellate

---

[63] Teague v. Lane, 309.

[64] Cf. Scott & Stuntz, at 1934, (increasing trial rates, as opposed to guilty plea rates, would creat a "loss of certainty of punishment [that] would lead to a loss of deterrence"); Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. Rev. 911, 947 (2006) (describing "[t]he traditional Benthamite" that deterring would-be criminals requires "making the expected punishment for the crime exceed the expected benefit").

[65] *See e.g.* Robert J. MacCoun, *Drugs and the Law: A Psychological Analysis of Drug Prohibition*, Psychological Bulletin 1993. Vol. 113. No.3, 497-512 at 501 (Certainty and severity effects are quite modest in size, generally accounting for less than 5% of the variance in marijuana use reported in perceptual deterrence surveys).

[66] See George Antunes and A. Lee Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis*, 64 J. Crim. L. & Criminology 486, 489-90 (1973); Scott & Stuntz, Plea Bargaining as Contract, at 1939 n. 105 (citing studies).

[67] See Tom Tyler, Why People Obey the Law, 161.

[68] *See generally* Bibas, *Transparency and Participation*, (discussing how the opacity of the criminal justice system damages the legitimacy of the law in the eyes of "outsiders," the general public).

ruling for first-time appeals is two years and fewer than 9% of appeals are resolved less than a year after conviction.[69] This means that for the relatively few defendants are released through direct appeals, "success" comes only after serving at least a year or two in prison.[70] For the majority of appellate defendants, success means that instead of serving a sentence that was arbitrarily lengthy due to a procedural error, they will serve sentences that conform with the law. These corrected sentences are not arbitrarily short, but are instead in line with the levels of retribution and deterrence chosen by the legislature. Additionally, less than 1% of all federal convictions are reversed through appellate procedures and fewer than 3% of convictions receive appellate relief of any kind.[71] Though the incarceration cost savings from appellate procedure are quite significant compared to the cost of post-conviction review, successful appeals have a very small effect on the punishment would be criminals should expect to receive if convicted of their crime. Additionally, because post-conviction review, when it is successful, reduces, but does not eliminate punishment, offering more generous post-conviction review would likely have only a small effect on deterrence.

[69] For guidelines cases that were not reopened or remanded. Calculated from Federal Appellate Court Data of all criminal cases for 2006 and 2007:

[70]

[71] 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 and vacated, reversed in part, or remanded (3,759). From BJS tables.

B. **Wrongful Convictions**

Under the economic model of deterrence, a rational person will commit a crime when the expected costs and benefits of committing the crime outweighs the expected costs and benefits of not committing the crime.[72] The more likely it is that people who commit crimes will be caught and the harsher the punishment, the less likely they are to commit crimes. At the same time, when wrongful convictions occur, there is a chance that a person who chooses not to reap the benefits of committing a crime will be punished for it nonetheless. Higher wrongful conviction rates decrease deterrence by decreasing the benefits of remaining factually innocent, giving people less to lose by committing crimes. Some scholars believe that changes in the odds of being wrongfully convicted can actually have a greater impact on deterrence than changes in the odds of apprehension.[73] RIZZOLLLI Post-conviction review can help reduce wrongful convictions by identifying and overturning factually incorrect convictions and exposing practices that contribute to wrongful convictions in the first place.[74]

One important critique of the reduced deterrence effects of wrongful convictions is that wrongful convictions will only affect the incentives for potential criminals if the criminals are aware that the risk of punishment *without* committing a crime exists.[75] If potential criminals believed that all convictions were accurate, wrongfully convicting an innocent defendant of a crime that would otherwise go unpunished would appear to raise the likelihood that a person who commits a crime would in fact be punished. In this case, reversals of convictions as a result of DNA testing or other newly discovered evidence would in themselves reduce deterrence by exposing the risk of wrongful conviction. However, potential criminals, like most of America, are already aware that wrongful convictions occur with some frequency.

---

[72] *See generally* Png, Ivan P. L., _Optimal Subsidies and Damages in the Presence of Judicial Error,_ International Review of Law and Economics, 1986, 6 (1), 101_05.; Richard Posner (1999, p. 1484)

[73] *See e.g.* Rizzolli and Stanca, (theorizing that "in the presence of risk aversion, loss aversion, or differential sensitivity to procedural fairness, [wrongful punishment errors] can have a larger effect on deterrence than [failures to punish]," and offering experimental evidence to support the claim).

[74] IMPORTANT NOTE: Henrik Lando wrote an article in 2006 arguing that under the basic economic model for wrongful convictions, wrongful convictions of mistaken identity for crimes that factually occurred do not reduce incentives to refrain from crimes. See Henrik Lando, *Conflict or Credibility: Does Wrongful Conviction Lower Deterrence?*, 35 J. Legal Stud. 327 (2006). His basic math checks out, but I haven't been able to look more closely at it. I have seen a reference to an unpublished article that critiques Lando.

[75] *See* Isaac Ehrlich, *The Optimum Enforcement of Laws and the Concept of Justice: a Positive Analysis International Review of Law and Economics* (1982), 2 (3-27) at 17.

Professor Michael Risinger has estimated that in the 1980s, around 3-5% of capital rape-murder convictions were of factually innocent people.[76] If the wrongful conviction rate for crimes in general is in this ballpark, the rational deterrent effects of wrongful convictions are most likely small for the vast majority of Americans. Roughly 7,000,000 felony and misdemeanor convictions occur each year in America, or about one for every 40 Americans aged 15 and older.[77] If even 5% of these convictions are of innocent people, then the average American would have a one in 800 chance of being wrongfully convicted each year and would be unlikely to personally know someone who had been wrongfully convicted. Thus, for the majority of Americans, the effect of wrongful convictions on deterrence are likely small.

[76]*See* D. Michael Risinger, *An Empirically Justified Factual Wrongful Conviction Rate, 97 J. Crim. L. & Criminology 761*, 780 (2006). Justice Scalia famously opined in his concurrence to Kansas v. Marsh that the wrongful conviction rate for felony convictions in America is around .027%. 126 S. Ct. 2516, 2538 (2006)(quoting an op-ed piece by Joshua Marquis). As Risinger explains in his article, this number has no empirical basis

[77]In 2004, were 1,078,900 felony conviction in state courts, (http://bjs.ojp.usdoj.gov/content/glance/tables/felcovtab.cfm), and 67,464 felony convictions in federal courts. (BJS Table 4.2, 2004: Federal). In 1998-99 in North Carolina, there were 24,168 felonies and 157,611 misdemeanors sentenced under North Carolina's structured sentencing, or around six times as many misdemeanors as felonies. (http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=184300). The current American population is around 3 million people, 80% of whom are 15 or older. Wikipedia.

However, wrongful convictions may have a significant impact on deterrence for people who have spent time in prison. For one thing, people who already have criminal records are more likely to be suspected of crimes that occur, which may make the risk of wrongful conviction more salient for such people.[78] Additionally, people who have spent time in prison are more likely to have first or second hand reports about wrongful convictions. If the wrongful conviction rate is even one percent, then any sizable prison facility will contain a number of inmates who are factually innocent of the crimes for which they were convicted. There will also be many more who falsely profess their innocence. A prisoner is unlikely to believe every protestation of innocence may hear in prison. Indeed, studies have shown that prisoners are significantly better at detecting lies than detectives, customs agents, prison guards, and laypeople.[79] Additionally, other studies have demonstrated that the more feedback people receive from individual liars, the better they become at detecting lies from those individuals.[80] Because of this, the perceptions that former inmates have about their own likelihood of being wrongfully convicted will depend in large part on the number of factually innocent defendants in prison. Additionally, the willingness of prisoners to believe stories of innocence will undoubtedly depend on the plausibility of the innocence stories other inmates present. An "innocent" inmate who claims to have an ironclad new eyewitness but was denied a new trial will be more credible than the same inmate who still protests his innocence after a second trial. The innocence claim of an inmate who offers to pay for the DNA testing he claims will prove his innocence but is refused the opportunity will be much more credible than the innocence claim of the same inmate after the DNA test has confirmed his guilt.[81] Post-conviction review helps alleviate the reduced deterrent effects of wrongful convictions both by reducing the number of actual wrongful convictions and by reducing the credibility of 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 than most people, more generous post-conviction review may actually increase the deterrent value of the law.[82]

C. Legitimacy and Compliance

Much of criminal law attempts to reduce crime rates through deterrence: by increasing the likelihood that people who break the law will be caught and punished. However, studies fear of punishment is generally not the primary motivator for compliance with the law. For instance, one study by Robert MacCoun found that people's perceptions of their likelihood of being caught using marijuana and the severity of punishments they expect explained only 5% of the variance

---

[78]

[79]Vrij, A. (1996). 'Lie expert's beliefs about nonverbal indicators of deception', Journal of Nonverbal Behavior, 20(1): 65–80.

[80] Zuckerman, M., Koestner, R., & Alton, A. *Learning to detect deception*, Journal of Personality and Social Psychology, *46*, 519-528 (1984).

[81] This example is based on *Osborne*, in which the Supreme Court upheld the right of Alaska to refuse to allow the defendant to test DNA samples that were already in the state's possession at his own expense.

[82] Within three years of release, 67% of former inmates are rearrested and 52% are reincarcerated. See John J. Gibbons and Nicholas de B. Katzenbach, the Vera Institute, *Confronting Confinement* (2006).

in their actual use.[83] Studies show that compliance with the law in everyday life is motivated primarily by an internalized sense that one *should* obey the law, even when they think the law is wrong.[84] When people believe they have been treated fairly by legal authorities, they are more likely to accept the law as legitimate and obey the law even without the fear of reprisal. [85]

Studies by Tom Tyler reveal the central importance of procedural fairness in people's assessments of system legitimacy.[86] Favorable outcomes play a role in people's perceptions of the fairness of the procedures they receive, but are often not the dominant factor.[87] People are more likely to feel that they received fair procedure when they "hav[e] an opportunity to present their arguments . . . and hav[e] their views considered by authorities," are judged by authorities they believe are motivated to be fair, are treated with respect, and are able to a access some further procedure to correct mistakes.[88]

The vast majority of criminal defendants who appeal do not receive favorable outcomes.[89] However, even for these defendants, providing meaningful access to post-conviction review may help legitimize the criminal justice system and increase the likelihood that they will obey the law in the future. If a defendant, through his lawyer, feels he may have a legitimate claim, like if the jury was given a biased instruction, or if the defendant has discovered a new witness he feels is compelling, allowing these claims to be heard on the merits in an appellate court offers an opportunity to be heard. Conversely, if a defendant is not provided with counsel to help him prepare an appeal or his claims are dismissed on technicalities without reaching the merits, he may feel that, even though he was factually guilty, the procedures used to convict and sentence him were not fair in the first place.[90]

The delegitimizing effects of overly strict post-conviction procedures may be especially acute when the defendant feels that he has been prejudiced by the mistakes or misbehavior of criminal justice "insiders."[91] Consider the different standards for using the plain error rule to correct unobjected to sentencing miscalculations discussed in section II. In these cases, due to technical errors by a judge that were not objected to by defense counsel, who is usually employed by the government, defendants are sentenced under recommended sentence ranges longer than the law prescribes. Appellate courts will usually apply the plain error rule to allow a resentencing hearing when the miscalculation is very large. Doing so gives defendants an opportunity to voice their concerns, demonstrates a judicial commitment to fairness, and shows respect for the rights of defendants, helping to legitimize the system in the eyes of defendants. However, some circuits decline to do so when the miscalculation is not "substantial." In these

---

[83] See MacCoun at 501.
[84] See Tom Tyler, *Obeying the Law in America: Procedural Justice and the Sense of Fairness*, Issues of Democracy, July 2001, at 17 (2001), http://usinfo.state.gov/journals/itdhr/0701/ijde/tyler.htm.
[85] Cf. Tyler, Why People Obey the Law
[86] See e.g. Why People Obey the Law, at 163-65, 106-107.
[87] See Why People Obey the Law, at 107; Obeying the Law 19
[88] See Why People Obey the Law, at 163-64.
[89] *See supra*
[90] *See* Why People Obey the Law, at 109-112.
[91] Bibas uses the terms "insiders" and "outsiders" in discussing how the informational gap between institutional members like judges, prosecutors, and public defenders and the public makes it difficult for the public, and especially victims, to understand the criminal justice process or accepted as legitimate. Bibas, *Transparency and Participation*

cases, defendants end up serving sentences imposed out of compliance with law as a result of clear mistakes by criminal justice insiders which the justice system refuses to take responsibility for. It is difficult to imagine that defendants would accept these procedures as fair.

The Supreme Court recently denied application of the plain error rule in a case that might have even worse delegitimizing effects. In *Puckett*, the defendant reached a plea agreement with prosecutors and pled guilty.[92] However, at sentencing, the prosecutors reneged and the defendant received a significantly longer sentence than agreed upon. Defense counsel made objections at the sentencing hearing, but failed to explicitly object to the prosecution's violation of the plea agreement. The Supreme Court ruled that in spite of the fact that the prosecutor's behavior was most likely unlawful, because defense counsel failed to raise the appropriate objection, the defendant would have to serve a sentence that was years longer than agreed upon. The defendant was given the opportunity to voice his concerns but may have been left with the impression, shared by Justice Souter, that the Court was not motivated primarily to reach fair results.[93] The interests of judicial efficiency that the Court cited in this case[94] are unlikely to alleviate the delegitimizing effects of this decision. As a result of the intentional misconduct by the prosecutor the defendant received a much longer sentence than he agreed to in good faith. When the defendant raised this abuse by a judicial insider in appellate review, the Court did not allow the defendant the opportunity for relief, but instead laid the blame on the defendant, for the failure of his defense counsel, another judicial insider, to prevent the abuses by the Government. Justice Souter observed on moral grounds that "[r]edressing such fundamentally unfair behavior by the Government . . . is worth the undoubted risk of allowing a defendant to game the system and the additional administrative burdens."[95] He might have also added that failing to redress these abuses may have delegitimized the justice system in the eyes of convicted criminals, making them less willing to obey the law.

While the failure to provide fair post-conviction processes delegitimizes the justice system in the eyes of convicted criminals, releasing criminals on "technicalities" and providing costly appeals to criminals may reduce the legitimacy of the system in the eyes of the public, and particularly of victims.[96] The relative magnitude of these effects is an empirical question that merits further research. Citizens who have never been to prison vastly outnumber convicted criminals in the United States, so that even small changes in the public's sense the legitimacy of the justice system could conceivably have a greater impact on crime rates than larger changes for convicts. However, only about 3% of all American adults have ever been in prison[97] while 52% of former inmates will return to prison within three years of release.[98] It is conceivable that convicted criminals, whose senses of system legitimacy are clearly very low and would be more directly affected by reforms, would be more responsive to these changes than most. On the other hand, many victims who live in high crime areas may also be at high risk of offending and may be less willing to obey laws that are more lenient to their victimizers. Because the costs of incarceration have gained increased public salience in recent years and the national mood has

---

[92] 129 S. Ct. at 1429.
[93] See *Puckett,* Souter, dissenting,
[94] Id. at 1429
[95] *Puckett,* Souter, dissenting
[96] See Why People Obey the Law, at 109-10; see generally Bibas, *Transparency and participation.*
[97] http://www.csmonitor.com/2003/0818/p02s01-usju.html
[98] See Confronting Confinement.

shifted significantly to a less anti-criminal mentality,[99] it may be that fewer people would be significantly vexed by post-conviction procedures that are more fair to defendants. Some may even feel that more generous appellate procedures that improve the legality of sentences at little net costs to the states increases the legitimacy and fairness of the system. To the extent that increased legitimacy in the eyes of criminals would be balanced by marginally decreased willingness to obey laws by the population at large, crime reductions in high crime areas might be balanced by slight increases in low crime areas, not necessarily a bad tradeoff. However, if the legitimacy effects for victims who live in high crime areas were large, increased post-conviction review might not reduce crime in high crime areas, but would be unlikely to increase it.

By making the criminal justice system appear more fair to convicted criminals, who reoffend at alarming rates, providing more meaningful access to post-conviction review and relief may significantly increase the willingness of criminals to obey the law after release.

V. Conclusion

This paper argues that a significant judicial and legislative bias exists that causes policymakers to overweight the importance of the administrative burdens of protecting defendants' post-conviction rights while generally ignoring the financial costs of continued erroneous incarceration. When the financial savings from correcting erroneously lengthy sentences and convictions are taken into account, direct appeals do not impose substantial net costs on states, and may in fact produce cost savings for some states. Offering better representation and more generous opportunities for review post conviction is unlikely to significantly reduce the deterrent effect of punishment because releases through post-conviction procedures generally occur after at least a year of incarceration and sentence corrections have a small impact on average incarceration length. On the other hand, denial of fair post-conviction review and relief, particularly with wrongful convictions or when the errors are the result of mistakes or misbehavior of criminal justice insiders, significantly decreases the legitimacy of the law in the eyes of convicted criminals. It may be that sentencing reductions or other relief for criminals based on "technicalities" reduces legitimacy for the public at large, but because post release criminality rates for convicted criminals are so high, this trade-off may be worth it.

The cognitive bias that causes judges to underweight the financial costs of incarceration is likely a problem of agency; judges bear the burden of increased judicial review but are not responsible for and do not see the costs of the punishment they order or refuse to correct. Increasing the salience of these costs could help correct this bias. States could legislate that presentence reports that offer sentence length recommendations include estimates of the financial cost of the recommended punishment. At the same time, appellate counsel arguing about a mistake in sentencing might mention in their briefs that, in addition to the injustice of punishing a defendant more severely than legislatively intended, failing to correct the error would likely cost the state thousands or tens of thousands of dollars in unnecessary punishment. Though such reforms might be seen as crass attempts by the defense bar to distort the pursuit of justice with morally irrelevant financial concerns, the fact is that the financial concerns already exist in the

[99] See Robert Weisberg, How Sentencing Commissions Turned Out To Be a Good Idea, *12 Berkeley J. Crim. L. 179, 184-85,* 199-202.

debates, in the guise of "the state's interest in finality," the costs to the state of preserving evidence,[100] or the burdens to the state of relitigating convictions that "conformed to then-existing constitutional standards."[101] The financial costs of ensuring the accurate administration of justice may or may not be a legitimate factor in determining the procedural rights of defendants. However, if, as has occurred, the costs to the state are to be considered, it is important that all the costs be considered, and not just those that are most salient to judges. Forcing judges to be aware of the full impact to the states of their decisions should lead to policies that more efficiently utilize the limited resources of the state. To borrow language from Justice Alito, my point is not to denigrate the importance of the administrative costs of accurate justice to the state. Instead, my point is that while refusing to correct errors of justice is free to judges, prosecutors, and the police, it is not free to the state.[102] Though the interests of finality includes the administrative burdens of reviewing often meritless claims, finality itself comes at a price.

[100] *Osborne,* Alito concurring 2326-29 (cataloging a number of costs associated with post-conviction DNA testing to make the point that).
[101] *Teague v. Lane*
[102] Cf. *Osborne,* Alito concurring 2329 ("My point in recounting the burdens that postconviction DNA testing imposes on the Federal Government and the States is not to denigrate the importance of such testing. Instead, my point is that requests for postconviction DNA testing are not cost free.").

Table 1

Rough Approximations of Adjudication Costs and Cost Savings for State Direct Appeals

Appeal Outcomes	Outcomes[103]	Incarceration Months Saved per Case	Incarceration Costs Saved per Case[104]	Incarceration Costs Saved For 1000 Cases		Cost of Procedure per Case	Procedural Costs For 1000 Cases		Total Costs of Providing Appeals For 1000 cases
Win nothing	79.4%	0	$0	$0		$6,722[105]	$5,337,268		$5,337,268
"Acquittal"	1.9%	48[106]	$120,000	$2,280,000		$7,333[107]	$139,327		(-$2,140,673)
Vacated and Remanded	6.6%	39[108]	$86,250	$5,692,500		$14,333[109]	$945,978		(-$4,746,522)
Resentencing/Other	12.1%	6.3[110]	$15,750	$1,905,750		$8,555[111]	$1,035,155		(-$870,595)
Totals				**$9,878,250**			**$7,457,728**		**(-$2,420,522)**

[103] Taken from NCSC 35, Table 3

[104] Assuming one year of incarceration costs $30,000 and ignoring discounting of future costs.

[105] A very rough approximation based on numbers from a 2002 study on the costs to the state of death penalty cases compared with murder cases in which the death penalty was not sought. In Indiana, on direct appeal, defendants are only allowed to raise legal challenges, and not reopen the case or present new evidence. The costs for direct appeals for felony murder cases in a life sentence was granted and the death penalty was not sought was around $9000, or $11,000 in 2010 dollars. (This figure includes the expenses to the county, which pays for the defense and some other expenses, and expenses to the Attorney General's office). See *Indiana* at F-G, T-V.

For this approximation, I assume that the appellate costs for most cases are a third lower than the Indiana costs for felony murder cases in which the death penalty could have been, but was not sought, or $7,333 per case. In federal appellate cases that "win nothing," a third are dismissed on procedural grounds or deemed frivolous. *06-07 Federal Data.* Because of this, I assume that a third of these cases are disposed of more cheaply, at $5,500 per case.

[106] Assuming average sentence of six years and two years are served before acquittal in appellate court.

[107] *See supra*, note 105. I assume that the costs of direct appeals for acquittals is more expensive than those that may have been disposed of on more obvious grounds.

[108] Prosecutors usually decline to retry cases that are vacated and remanded. Assuming that prosecutors do not pursue new trials for 2/3 of these cases and that half of the cases that are tried again lead to acquittal in six months.

[109] For the two thirds of vacated and remanded cases that I assume are not pursued, I assume that the cost of the post-conviction procedure is equal to the costs of acquittals plus $500 for the added paperwork of declining to pursue a new trial. For the cases that are tried again, the costs would be the costs of the appellate procedure plus the costs of the new trial. A noncapital murder trial costs around $45,000 in 2010 dollars. *See IN, TN, KS, NC studies.* Assuming that most trials cost a third less than this, and assuming that a retrial, (for which most of the investigation, research, and trial preparation have already been done), cost a third less than a trial in the first instance, the cost of a retrial would be about $20,000.

[110] 6.3 months was the average sentence reduction for successful plea appeals

[111] For cases that are granted a new sentencing hearing, the total procedural costs would be the cost of the appellate procedure plus the cost of the new sentencing hearing. Assuming, as above, that the direct appeal costs $7,333, I arbitrarily guess that the costs of the new sentencing hearing, for which the main arguments were already fleshed out in the appellate procedure, is cheap, 1/6 of the cost of the direct appeal, or $1,222.