Punishing Taxpayers for Erroneous Convictions

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Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the Interests of Finality*, 2014 **Utah L. Rev.** (forthcoming), available at SSRN.

Appellate courts often adjudicate as if prison is free. While no doubt many judges and justices are concerned with the accuracy and fairness of the convictions they review, at least to a degree, they also make economic judgments as if the costs at issue were principally borne by the judiciary. Criminal defendants can lose appeals not because their claims are meritless, but because the issue was not timely or sufficiently raised below; courts affirm in the face of error on considerations of judicial economy or avoidance of further proceedings which would not have been necessary had the issue been raised in a timely manner.[1]

A court-focused analysis of costs might have been reasonable in an era when prison populations were much smaller and probationary sentences were available for almost every offense. Today, however, at issue in almost every criminal appeal is whether to affirm the issuance of a six- or even seven-figure check, paid not by the judiciary but by the taxpapers. Professor Andrew Chongseh Kim's paper suggests that courts have been looking at the economics through the wrong end of the telescope.

The paper defines wrongful incarceration as that "in excess of that provided for by legislative and constitutional schema," including but not limited to the incarceration of the factually innocent. Not everyone cares that defendants must serve legally unjustified sentences because they were not properly challenged, but all should care that affirming such cases forces "states to pay for incarceration in excess of that intended by the legislature." The heart of the paper presents empirical evidence that more liberal review might indeed cause the judiciary to have some additional sentencing hearings and trials, but the net savings to the taxpayers would apparently be substantial, particularly in the case of plain error review of sentence errors.

There are, of course, sound reasons for requiring some issues to be raised at a particular moment in a judicial proceeding or not at all. An objection to the form of a question or to the language of a charging instrument, which certainly could have been fixed at the time, should be looked at skeptically if raised later.

But there are relatively few instances where defense lawyers reserve issues for appeal in case of loss. Issues rarely improve with age, and an issue likely to be viable in the court of appeals after conviction is at least as useful if raised at trial or sentencing. The paper persuasively argues that a forfeiture rule is not needed as an incentive for defense lawyers; most cases are defended by institutional providers who are already overworked and are doing the best that they can. And, I have yet to see an example of a case where a defendant had a viable absolute defense (say, the statute of limitations or ex post facto clause) but nevertheless wanted a trial and an acquittal for the principle of the thing: If a defendant has a case-ending card, they play it. Moreover, at sentencing, there is no argument that claims may be strategically held back for appeal; the only relief from a successful appeal would be a chance to present the same claim to the same judge.

Consideration of issues raised for the first time on appeal—or on habeas—pose no unfair burden on courts and judges. These courts and these judges can protect themselves by following the law and making sure that defense counsel does not make legal blunders. Some prosecutors, for example, will file a motion to admit particular evidence where the defense lawyer seems to have negligently failed to file a plausible motion to suppress that same evidence. And, judges and prosecutors may be incentivized to ensure the legal soundness of their cases if they thought that these cases

might come back to them if they failed to do so. While defense lawyers should not “sandbag” legal errors, neither should prosecutors or judges.

The paper’s argument is not entirely economic. Our system—we hope—is based on morality and justice as well as efficiency. Arguing from Tom Tyler’s work, the paper suggests that affirming a conviction in the face of legal error diminishes the legitimacy of the law. This seems right; again, almost never will the failure to raise an issue be the fault of the defendant personally. It is not clear why a defendant and the taxpayers should pay the whole cost, while the prosecutors, trial judge, and defense counsel do not suffer. (Of course, some or all of them could be punished—but again, why not use those resources to correct the mistakes in the criminal judgment?)

I hope that all appellate judges will seriously consider this paper. Admittedly, reversing convictions and vacating sentences increases the workload of the judiciary of which appellate judges are a part. But having criminal judgments comply with the law is what the legislature and the founders directed, promotes respect for the law, and, apparently, can save money.

1. See *United States v. Vontsteen*, 950 F.2d 1086 (5th Cir. 1992) (en banc), for a discussion of the traditional rationale. [?]

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