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APA 7th ed.

Malani, Anup. (2006). Habeas settlements. Virginia Law Review, 92(1), 1-68.

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Malani, Anup. "Habeas Settlements." Virginia Law Review, vol. 92, no. 1, March 2006, pp. 1-68. HeinOnline.

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VIRGINIA LAW REVIEW

VOLUME 92

MARCH 2006

NUMBER 1

ARTICLES

HABEAS SETTLEMENTS

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INTRODUCTION

WHY is it that criminal cases nearly always settle, but habeas corpus cases do not? The vast majority of criminal cases are resolved by guilty pleas, without a trial. But it is the rare habeas petition that is resolved out of court rather than litigated to completion.¹

This is a significant puzzle because criminal and habeas corpus cases have a lot in common. They involve the same parties and the same attorneys. Prosecutors who actively negotiate plea agreements in criminal cases are very often the attorneys responsible for defending the government in habeas cases. The public defenders who negotiate pleas on behalf of their clients nearly always represent the same prisoners again later in credible habeas cases. Settlement of criminal and habeas cases also involves similar bargains: The defendant or prisoner receives a shorter, more certain sentence, and the government attorney avoids having to litigate a criminal or habeas case, respectively.

¹ This puzzle is similar in spirit to that posed by Professor Alan Schwartz regarding bankruptcy workouts: Although nearly all civil cases settle, fewer than half of the cases between insolvent firms and their creditors are resolved without a Chapter 11 reorganization. Alan Schwartz, *Bankruptcy Workouts and Debt Contracts*, 36 J.L. & Econ. 595, 595 (1993). The distinction between the bankruptcy settlement puzzle and the habeas settlement puzzle is that there is a larger difference between bankruptcy and ordinary civil cases than there is between habeas and criminal cases. While bankruptcy cases involve a collective-action problem among multiple creditors seeking to allocate the insufficient assets of the debtor, most civil cases involve just two parties. Schwartz argues that this collective-action problem explains the gap in settlement rates, though the reasoning is more sophisticated than the reader might suspect. *Id.* at 598. Habeas and criminal cases do not have such an obvious difference: Both involve not just two parties, but the same types of parties. Therefore, the puzzle in this Article is a bit more perplexing.

Active settlement of habeas cases could reduce habeas caseloads by nearly one-third. Although most habeas petitions are sure losers under current law, I estimate that at least thirty percent are sufficiently credible or costly for the government to defend that they warrant settlement.² These cases include those where petitioners (i) are appointed counsel by the court, (ii) win at least one vote to grant their petition, even though the petition is ultimately denied, or (iii) are ultimately successful at the state or federal level. (This last category alone accounts for eight percent of cases.) Moreover, habeas settlements are as constitutionally valid as plea bargains: The former involve rights similar in importance to those waived by the latter.

In this Article I will attempt to resolve this puzzle and will propose a series of reforms to pave the way for active (but safe) settlement of habeas cases. Based on extensive interviews and a nationwide survey of prosecutors and public defenders, as well as statistical analysis of new data on prison populations and habeas judgments, I will identify three primary obstacles to habeas settlements. First, parties to habeas cases simply do not think to settle, since there is no culture of out-of-court, private resolution of habeas claims. This is not to suggest that there is opposition to compromise: Most attorneys interviewed said they would welcome settlement, but it had just never come up. Second, in cases where settlement was considered, rigidities in state and federal sentencing guidelines historically have often ruled out the possibility of any reasonable compromise. Sentences arising from habeas settlements have to comply with sentencing guidelines, and many compromises lie outside the guidelines' range for the crime committed. (This constraint was recently lifted when the Supreme Court invalidated certain mandatory sentencing guidelines in *Blakely v. Washington*³ and *United States v. Booker*.⁴ But more on that in a moment.) A third obstacle to habeas settlements is that few state and no federal courts have the authority to revise a prisoner's sentence after a habeas filing and settlement. Therefore, to implement habeas settlements, government attorneys have to concede a prisoner's habeas

² See *infra* Table 3 and accompanying text.

³ 542 U.S. 296 (2004).

⁴ 125 S. Ct. 738 (2005).

claims on the condition that the prisoner pleads to a lesser-included crime. The need to maintain good relations with police—or simply pride—often prevents prosecutors from making such a concession and thus implementing a settlement.

Two basic reforms would, for the most part, eliminate these obstacles to settlement. First, training programs for prosecutors and public defenders should include modules on habeas settlements just as such programs currently include modules on plea bargaining. Second, Rule 35 of the Federal Rules of Criminal Procedure and its state analogues should be amended to permit courts, upon the government's motion, to amend a prisoner's sentence if the prisoner drops her habeas claims, even if the new sentence does not conform to the applicable sentencing guidelines.⁵

The same bargaining-power asymmetries that raise concerns about prosecutorial advantage in plea negotiations also may allow government attorneys to exploit prisoners in habeas settlement talks. Therefore, once the obstacles to habeas settlement are removed, I will recommend two additional reforms to ensure that these compromises are fair to defendants. Following Rule 11, which requires that courts conduct a formal colloquy with defendants to ensure they understand the implication of their guilty pleas,⁶ Rule 35 and its analogues at the state level should be amended to require similar colloquies with prisoners to ensure they understand the implications of any habeas settlement that they sign. This reform is uniquely important because most of the habeas settlements I have uncovered are oral contracts, which are difficult to reconstruct and enforce. The second reform is that courts should permit prisoners to challenge a habeas settlement on the grounds that it was not voluntary or knowing due to ineffective assistance of counsel with regard to the settlement. There is little reason to fear that this exception would negate the value of habeas settlements to government attorneys because the use of Rule 11-type colloquies to vet settlements would render facially baseless most complaints about ineffective assistance of counsel.

These last two reforms are particularly important after *Blakely* and *Booker*. These cases hold that sentencing guidelines may not

⁵ Fed. R. Crim. P. 35.

⁶ Fed. R. Crim. P. 11.

require judges to impose a sentence above the range justified by the facts found beyond a reasonable doubt by the jury.⁷ In addition, *Booker* excised the mandatory provisions of the federal sentencing guidelines, making them merely advisory.⁸ If this remedy survives at the federal level, is adopted at the state level, and alters the behavior of judges (three very non-trivial conditions),⁹ one of the three main obstacles to habeas settlements would be lowered,¹⁰ increasing the number of habeas cases that are settled. The likely candidates are those plausibly meritorious cases where the parties think to compromise and where the prosecutor is willing to admit error. These changes have two implications for the reforms proposed in this Article. On the one hand, making sentencing guidelines merely advisory eliminates the need for modifying Rule 35 to allow amendments that do not conform to sentencing guidelines. On the other hand, an increase in settlements makes more urgent the reforms proposed to protect defendants from disparities in bargaining power.

Before diving into an extended discussion of habeas settlements, it is important to distinguish them from so-called “habeas waivers.” These are clauses in plea agreements that waive the defendant’s right to collaterally challenge her conviction in addition to the right to trial. Habeas waivers occur prior to a habeas petition, during the plea-bargaining stage, and they bar defendants from ever filing a habeas petition. By contrast, habeas settlements occur after a prisoner files a habeas petition and resemble an ordinary out-of-court settlement of a criminal or other civil case (see Figure 1). Because the rights surrendered in habeas settlements are a subset of the

⁷ See *Booker*, 125 S. Ct. at 749 (Stevens, J.); *Blakely*, 542 U.S. at 303–04.

⁸ See *Booker*, 125 S. Ct. at 756–57 (Breyer, J.).

⁹ See, e.g., John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines 2–4* (Jan. 2005) (unpublished manuscript, on file with author) (finding that voluntary guidelines reduce variation in sentencing nearly as much as presumptive guidelines; that is, judges conform even to guidelines that are advisory).

¹⁰ The obstacle will not have been eliminated because *Blakely* only applies to upward adjustments in sentence. Downward adjustments, which lower a sentence below the maximum permitted by the facts presented to the jury, are not affected. Because habeas settlements only lower sentences, they are less likely to be released from the constraints of the sentencing guidelines. Therefore, Congress and state legislatures can make their guidelines binding for downward adjustments—resulting in fewer habeas settlements—without running afoul of *Blakely* or *Booker*.

rights surrendered in habeas waivers, the case law on habeas waivers sets the benchmark against which the legality of habeas settlements are judged. Therefore, this Article will begin with a brief discussion of habeas waivers.¹¹

The remainder of this Article may be outlined as follows. Part I will discuss the enforceability of habeas waivers and why such waivers have little value to defendants and prosecutors. Part II will turn to the primary focus of this Article, the prevalence and enforceability of habeas settlements. Part III will discuss the constitutional validity and the policy benefits of settlement to parties in habeas litigation. It will then recommend procedural reforms to promote habeas settlements. The Conclusion will take up the benefits of habeas settlements that flow to courts and the quality of habeas case law. Appendix A will summarize the data employed by the analysis in Part II. Appendix B will complement Part III with proposed text for an amendment to Rule 35 that would give courts the authority to review and implement habeas settlements.¹²

¹¹ It does not, however, advocate the use of habeas waivers, since there are few gains to trade with habeas waivers. Such waivers purchase defendants only trivial reductions in sentences because defendants who plead guilty retain few procedural rights that can be vindicated on collateral review and generally receive sentences that expire before the habeas review can be completed. Moreover, habeas waivers offer prosecutors little respite from habeas litigation because only a small percentage of all habeas petitions are filed by prisoners who pleaded guilty, and such petitions are almost never granted.

¹² In order to place it in academic context, this Article can be said to advance the literature on state and federal habeas review in three ways. First, it is, to the best of my knowledge, the only Article to discuss the settlement of habeas petitions after they are filed. Second, it is the first Article to conduct a nationwide survey to determine the prevalence of both habeas waivers and habeas settlements. Third, Appendix A offers the first detailed examination of outcomes in 28 U.S.C. § 2254 (2000) (state prisoner in federal court) habeas cases after the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of Titles 8, 18, and 28 of the U.S. Code). This analysis is based on a detailed study of nearly three hundred cases filed in the Eastern District of New York in 2001-02. The cases were gathered by Marc Falkoff, the special master appointed by Judge Jack Weinstein to handle a backlog of habeas cases in that district. This Article is also the first to employ prisoner release data (as opposed to merely sentencing data), assembled by Professor John Pfaff, to construct a more accurate estimate of the number of prisoners with meaningful habeas rights—those with rights that might plausibly reduce a prisoner's actual time served.

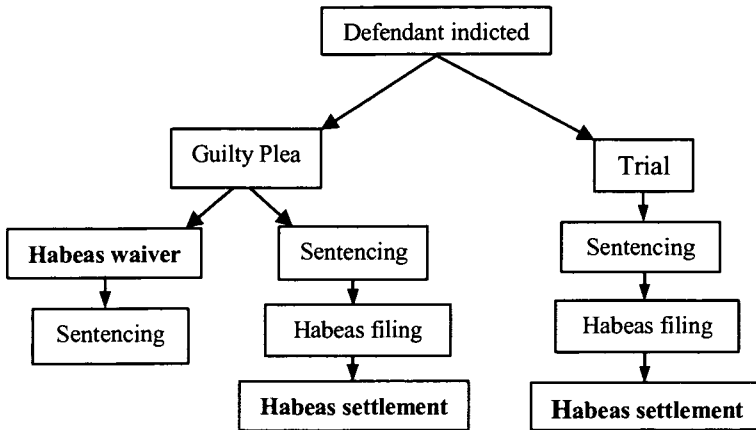


Figure 1. Timing of Habeas Bargains in Criminal Process

I. HABEAS WAIVERS

Although the aim of this Article is to explain habeas settlements, this first Section briefly focuses on habeas waivers for several reasons. First, habeas waivers precede habeas settlements in the criminal process. Second, their mutual exclusivity means the prevalence of habeas waivers may partially explain the paucity of habeas settlements. In addition, the case law on habeas waivers sets the benchmarks against which the legal validity of habeas settlements is judged because it is better developed than the law on habeas settlements. Moreover, habeas waivers, which surrender the right to challenge errors in the criminal process before the errors even occur, are in some sense more provocative than habeas settlements since habeas settlements surrender the (lesser) right to challenge procedural errors that have already occurred.

This Section begins with some examples of habeas waivers, and then discusses the enforceability of these waivers. In the end, however, my investigation suggests that habeas waivers do not provide sufficient value to defendants or prosecutors to warrant a policy of promoting such agreements.

The data for the discussion in this Section and the next are drawn from a nationwide survey of state and federal prosecutors

and public defenders. The survey asked respondents whether they have observed the use of habeas waivers or habeas settlements in their jurisdiction. This survey was answered by parties to criminal and habeas litigation in twenty-two states and forty-one federal districts.¹³ Approximately ten percent of the survey relies on open-ended phone conversations with respondents. The remainder of the survey is based on a formal survey instrument filled out by respondents over the phone or by fax. The results of the survey are reproduced in Table 1.

Table 1. Results of Nationwide Survey of Federal and State Public Defenders and Prosecutors

Federal				States		
State	District	Waivers	Settle-ments	State	Waivers	Settle-ments
AL	SD	.	Yes	AL	Yes (case law)	.
AK		Yes	Yes	AR	.	Yes
AZ		Yes	.	CO	No	Yes
AR	ED & WD	No	No	CT	Yes	No
CA	CD	Yes	No	DE	No	No
CA	ED	Yes	Yes	FL	PD says No; 1 Pros. says No & 1 says Yes	No
CA	ND	Yes	.	GA	No/case law says yes	.
CO						
&		Yes	Yes	IL	.	No
WY						

¹³ Parties from the following states responded: Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Jersey, New Mexico, Pennsylvania, South Carolina, Washington, and Wisconsin. Parties from the following federal districts responded: S.D. Ala., D. Alaska, D. Ariz., E.D. Ark., W.D. Ark., C.D. Cal., E.D. Cal., N.D. Cal., D. Colo., D. Conn., D.D.C., N.D. Fla., D. Haw., D. Idaho, S.D. Ill., E.D. La., M.D. La., W.D. La., W.D. Mich., D. Minn., E.D. Mo., W.D. Mo., D. Nev., D.N.J., D.N.M., N.D.N.Y., W.D.N.Y., E.D.N.C., E.D. Okla., N.D. Okla., W.D. Okla., D. Or., M.D. Pa., D.S.D., E.D. Tex., M.D. Tex., S.D. Tex., D. Utah, D. Vt., W.D. Wash., and D. Wyo. Table 1 reports the federal districts of Colorado and Wyoming together because the public defenders in the former also serve the latter. The same is true for the Northern District of New York and Vermont.

CT		Yes	.	IN		.	No
DC		No	Yes	IA	PD says Yes; Pros. Says No		No
FL	ND	No	Yes	KY	Yes		No
HI		Yes	No	LA	No		.
ID		Yes	.	MD	No		.
IL	SD	Yes	.	MA	No		No
LA	ED	Yes	No	MI	No		.
LA	MD	Yes	.	MS	PD says Yes; Pros. says No		.
LA	WD	No	.	MO	No		.
MI	WD	Yes	Yes	NJ	No		No
MN		Yes	Yes	NM	Yes (case law)		.
MO	ED	Yes	.	PA	.		Yes
MO	WD	No	No	SC	PD says Yes; Pros. says No		.
NC	ED	No	.	WA	Yes		Yes
NJ		Yes	No	WI	No		.
NM		No	Yes				
NY	SD	.	No				
NY	WD	Yes	No				
NY	ND	No	.				
& VT	(NY)						
NV		Yes	Yes				
OK	ND & ED	Yes	.				
OK	WD	Yes	No				
OR		.	Yes				
PA	MD	Yes	Yes				
SD		Yes	No				
TX	ED	Yes	Yes				
TX	MD	Yes	.				
TX	SD	Yes	No				
UT		Yes	Yes				
WA	WD	Yes	Yes				
Total		Yes: 27/35	Yes: 15/26	Total	Yes: 10/19		Yes: 4/13

A. Examples

The case of *United States v. Nicoloff*¹⁴ provides a fairly standard example of a habeas waiver. The defendant, a convicted felon, was arrested in Oklahoma while in possession of a firearm. She was charged accordingly¹⁵ and pleaded guilty rather than risk trial. Importantly, her agreement with the prosecutor stipulated that “[t]he defendant agrees to waive all appellate rights, including any and all collateral attacks including but not limited to those pursued by means of a writ of habeas corpus, save and except claims of ineffective assistance of counsel.”¹⁶ This is a fairly standard habeas waiver. It surrenders the right to collateral review of the defendant’s sentence except in the case where the defendant challenges the effectiveness of his counsel. (The value of this exception should not be overstated since every jurisdiction that enforces habeas waivers has carved out an implicit exception for ineffective assistance claims that attack the voluntary-and-knowing nature of the plea agreement.)

It is difficult to determine from the text of most plea agreements how much prosecutors agree to reduce a defendant’s sentence in return for a habeas waiver. There is typically a list of concessions by the defendant followed by a list of concessions by the prosecutor with no express language connecting specific concessions by each side. Occasionally, however, habeas waivers are made conditional on a certain sentence. This sheds some light on the marginal contribution of the habeas waiver to the defendant’s welfare. Consider the following example from a plea agreement arising out of a felon-in-possession indictment in Minnesota:

In the event that the Court accepts the plea agreement, including the guidelines calculations set out in paragraph 5, and sentences the defendant at or below the guideline range for an offense level of 17 and a criminal history of III, the defendant waives his right to appeal or to contest, directly or collaterally, his sentence on

¹⁴ Indictment, *United States v. Nicoloff*, No. 03-CR-109-K (N.D. Okla. Aug. 8, 2003).

¹⁵ 18 U.S.C. §§ 922(g)(1), 924(a) (2000).

¹⁶ Plea Agreement at 3, *United States v. Nicoloff*, No. 03-CR-109-K (N.D. Okla. Dec. 11, 2003). This agreement was provided by Julie O’Connell, Assistant Federal Public Defender, D. Okla., on December 3, 2003.

any ground, with the exception of the grounds of ineffective assistance of counsel, unless the Court should impose a sentence in violation of the law apart from the sentencing guidelines.¹⁷

In this case, the parties disagreed on the proper sentence for the defendant under the federal sentencing guidelines. The defendant thought he deserved a sentence of thirty to thirty-seven months as implied by an offense level of 17 for a defendant in criminal history category III. The prosecutor believed the defendant deserved a sentence of forty-six to fifty-seven months as implied by an offense level of twenty-one and criminal history category III.¹⁸ The agreement thus suggests that the defendant was willing to exchange his appellate and habeas rights for a sentence of less than thirty-seven months, but not for one greater than forty-six months.

Each of the agreements above involves waivers of both appellate and habeas rights. This appears to be true of all plea agreements that contain habeas waivers. Some plea bargains contain appellate waivers without habeas waivers, but no agreements were found that contain a habeas waiver without an appellate waiver. Moreover, none of the defense attorneys or prosecutors interviewed could recall a plea agreement that only waived collateral review rights.¹⁹

¹⁷ Plea Agreement and Sentencing Stipulations at 6, *United States v. Robert Michael Martin*, No. 03-109 (02) (D. Minn. June 16, 2003).

¹⁸ U.S. Sentencing Guidelines Manual § 5A (2005).

¹⁹ Finally, while most habeas waivers in plea agreements exchange collateral review rights for marginal reductions in sentence, there are cases in which parties say that a habeas waiver's primary purpose is to secure compliance with the remainder of the plea agreement contract rather than to secure additional sentence reductions. For example, if the parties agree that, given the uncertainty of conviction, the expected sentence for a defendant is less than the statutory minimum for the crime he has committed, no deal may be possible if the defendant pleads to that crime. A deal may be possible, however, if the defendant pleads to a different crime that he has not technically committed, but that permits the agreed-upon sentence that is less than the statutory minimum of the crime he did commit. The difficulty is that such a plea agreement is vulnerable to a collateral challenge on the grounds that the defendant is innocent of the crime to which he pleaded. The defendant would have to demonstrate the plea was involuntary or unintelligent because of, for example, ineffective assistance of counsel, but the risk that the plea agreement will unravel is greater than zero. To eliminate this risk, parties will agree to habeas waivers. As in waiver-for-sentence bargains, however, such plea agreements contain both appellate and habeas waivers. Unlike waiver-for-sentence bargains, such agreements generally do not contain appellate waivers without habeas waivers. See, e.g., Telephone Interview with Daniel Scott,

B. Legal Status and Scope

Habeas waivers have been accepted in all but one of the jurisdictions (Indiana) that have considered them.²⁰ That said, there are a handful of federal district courts that have held that a habeas waiver bars a petitioner's habeas claims, but nonetheless addressed those claims on the merits.²¹ These cases probably will dwindle as habeas waivers become more commonplace. Furthermore, at least one district court has held—in an unpublished memorandum opinion—that if a prisoner files a habeas petition despite a habeas waiver in his plea, the prosecutor may treat the plea agreement as having been breached by the prisoner.²² The government may then reinstate charges and try the defendant.

There are two steps to identifying the scope of rights that can be relinquished by a habeas waiver: (1) determining the rights that remain after a guilty plea, and (2) identifying which rights an appellate waiver can relinquish. First, the rights that remain after the guilty plea are an upper limit on the scope of rights that can be surrendered in a habeas waiver. When a defendant agrees to plead guilty, whether as part of an agreement with the prosecutor or not, she waives her right to trial.²³ The plea also has implications for

Assistant Fed. Pub. Defender, D. Minn. (Dec. 3, 2003); Telephone Interview with Ahilan Arulanantham, former Assistant Fed. Pub. Defender, W.D. Tex. (Nov. 20, 2003).

²⁰ See *Garcia-Santos v. United States*, 273 F.3d 506, 508–09 (2d Cir. 2001); *United States v. Cockerham*, 237 F.3d 1179, 1181–82 (10th Cir. 2001); *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000); *Mason v. United States*, 211 F.3d 1065, 1069 (7th Cir. 2000); *Watson v. United States*, 165 F.3d 486, 488–89 (6th Cir. 1999); *Allen v. Thomas*, 161 F.3d 667, 670–71 (11th Cir. 1998); *United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994); *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993) (per curiam); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993); *Boglin v. State*, 840 So. 2d 926, 929–30 (Ala. Crim. App. 2002); *Allen v. Thomas*, 458 S.E.2d 107, 108 (Ga. 1995). Indiana rejects habeas waivers, though such waivers do not void the entire plea. See *Majors v. State*, 568 N.E.2d 1065, 1067–68 (Ind. Ct. App. 1991). It is likely that other jurisdictions that reject appellate waivers—Arizona and certain jurisdictions in Michigan—also would reject habeas waivers, if for no other reason than that most jurisdictions that permit habeas waivers do so because they liken habeas waivers to appellate waivers.

²¹ See, e.g., *Rodriguez v. United States*, No. 02 Civ. 9036, 2003 WL 21638079, at *3–4 (S.D.N.Y. July 14, 2003).

²² See *United States v. Schaffer*, No. 02 C. 50463, 2002 WL 31748619, at *1 (N.D. Ill. Dec. 3, 2002).

²³ See, e.g., Fed. R. Crim. P. 11(b)(1) (enumerating the rights waived by a guilty plea that the court must explain to the defendant).

post-trial phases. Most importantly, a plea generally waives the right to challenge all constitutional errors predating the plea, either on appeal or through collateral review. This waiver may be called the *Tollett* rule, after the Supreme Court case establishing its validity.²⁴ The scope of this waiver is summarized in Table 1.

A defendant who pleads guilty still retains the right to raise certain claims on appeal. These claims can be divided into two groups. One group includes claims that the trial court lacked jurisdiction to convict the defendant or that the sentence imposed was otherwise illegal.²⁵ This group also includes any challenge that the defendant's plea was not voluntary and knowing²⁶ because, for example, defense counsel rendered ineffective assistance with regard to the plea.²⁷

The other group of claims a defendant retains includes challenges based on certain narrow pre-plea rights, such as the right to protection from prosecutorial vindictiveness or the privilege against double jeopardy.²⁸ This group also includes claims based on certain statutory exceptions to the *Tollett* rule.²⁹ For example, in California and New York, the defendant may raise claims challenging trial court decisions on motions to suppress specific evidence.³⁰

²⁴ See *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

²⁵ See, e.g., *United States v. Broce*, 488 U.S. 563, 569 (1989).

²⁶ See *Brady v. United States*, 397 U.S. 742, 747 (1970) (citing *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)).

²⁷ See *McMann v. Richardson*, 397 U.S. 759, 769–70 (1970) (discussing the need for competent counsel during the plea stage).

²⁸ See *Menna v. New York*, 423 U.S. 61, 62 & n.2 (1975) (per curiam) (acknowledging that, while a plea agreement that includes a specific double jeopardy waiver may waive double jeopardy claims, a general plea does not automatically do so); *Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (upholding a collateral attack on a guilty plea by a defendant who was re-indicted on felony charges following his appeal of a misdemeanor conviction, on the grounds that the defendant should be free from fear of prosecutorial vindictiveness). Note, however, that the Supreme Court appears to have backed off, though not overruled, the decisions that created these exceptions to the *Tollett* rule. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 365 (1978); see also *Broce*, 488 U.S. at 569–70.

²⁹ See *Lefkowitz v. Newsome*, 420 U.S. 283, 291–93 (1975). Note that the plea agreement, with specific language, also may permit the defendant to challenge certain pre-plea errors.

³⁰ Cal. Penal Code § 1538.5(m) (West 2002); N.Y. Crim. Proc. Law § 710.70(2) (McKinney 1998). A 1989 study by the National Center for State Courts found that appeals based on these statutory exceptions account for a significant percentage of appeals. Specifically, it noted that appeals from guilty pleas and other non-trial dispo-

A final set of claims in this group includes those challenging any errors made by the trial court in determining the defendant's sentence.³¹

The second step to identifying the scope of rights that can be surrendered in a habeas waiver is to determine the scope of rights that can be surrendered by an appellate waiver. I explain why in a moment, but for now note that, as a general matter, courts will permit a defendant to waive only his rights to appeal claims in the second group.³² Such appellate waivers are accepted in all but three states—Arizona, Indiana, and Michigan—and all federal districts except the District of Columbia.³³ The waiver language must be specific to the claim in order to be enforceable.³⁴ But appellate waivers, like plea agreements, are not enforceable if the waiver was not voluntary and knowing,³⁵ perhaps because the defendant re-

sitions averaged between fourteen percent and twenty-five percent of all appeals in states without statutory exceptions to the *Tollett* rule, and forty-three percent of appeals in certain California and New York jurisdictions. Nat'l Ctr. for State Courts, *Understanding Reversible Error in Criminal Appeals* 30–31, 44 n.8 (1989).

³¹ See, e.g., *United States v. Hahn*, 359 F.3d 1315, 1320 (10th Cir. 2004) (per curiam).

³² See, e.g., *United States v. White*, 258 F.3d 374, 380 (5th Cir. 2001) (ruling that an appellate waiver does not imply waiver of the right not to be imprisoned for conduct that is legal). With respect to sentencing errors, most federal courts permit express waivers of all sentencing errors on appeal, even though the nature of the error was unknown to the defendant at the time of the plea and appellate waiver. See, e.g., *United States v. Melancon*, 972 F.2d 566, 567–68 (5th Cir. 1992); *United States v. Rutan*, 956 F.2d 827, 830 (8th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990). California permits sentencing errors to be waived only if the language of the appellate waiver is specific. See *People v. Sherrick*, 24 Cal. Rptr. 2d 25, 26 (Ct. App. 1993); *People v. Vargas*, 17 Cal. Rptr. 2d 445, 451 (Ct. App. 1993). Only Minnesota does not allow any appellate waiver of sentencing errors. See *Ballweber v. State*, 457 N.W.2d 215, 217 (Minn. Ct. App. 1990).

³³ See Kristine Cordier Karnezis, *Annotation, Validity and Effect of Criminal Defendant's Express Waiver of Right to Appeal as Part of Negotiated Plea Agreement*, 89 A.L.R. 3d 864, §§ 3(a)–(b) (1979 & Supp. 2005). Appellate waivers are per se unenforceable only in Arizona and Indiana. See *id.*

³⁴ See *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003); *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001); see also *People v. Charles*, 217 Cal. Rptr. 402, 409 (Ct. App. 1985) (involving waiver of right to appeal decision regarding suppression motion); *People v. Williams*, 331 N.E.2d 684, 685 (N.Y. 1975) (per curiam) (same).

³⁵ Courts have, in specific instances, held appellate waivers invalid where relevant language in the plea was ambiguous; see, e.g., *United States v. Joseph*, 38 F. App'x 667, 669 (2d Cir. 2002); *United States v. Phillips*, 174 F.3d 1074, 1076 (9th Cir. 1999); or where the court's plea colloquy failed to inform the defendant properly that as part of the plea agreement he had agreed to waive the right to appeal or was otherwise de-

ceived ineffective advice of counsel with respect to the waiver.³⁶ Where a waiver is held invalid, the remedy is typically to allow the appeal to proceed, perhaps with the prosecutor also given the option to void the plea bargain.³⁷ Finally, appellate waivers do not bar prisoners from raising claims from either group in a state or federal habeas motion to the extent that such claims are not procedurally barred.

Appellate waivers provide guidance regarding the scope of habeas waivers in two ways. First, because courts that approve of habeas waivers analogize them to appellate waivers, the scope of rights that habeas waivers can surrender is likely the same as the scope surrendered in appellate waivers. This logic suggests that habeas waivers can relinquish claims based on certain narrow pre-plea rights such as the right to protection from prosecutorial vindictiveness or the privilege against double jeopardy, claims based on state statutory exceptions to the *Tollett* rule, and claims asserting sentencing errors. They cannot waive claims that the trial court lacked jurisdiction to convict the defendant, claims that the sentence imposed was otherwise illegal, or claims that the defendant's plea was not voluntary and knowing. Moreover, to be enforceable, habeas waivers, like appellate waivers, must themselves be knowingly and voluntarily made,³⁸ a condition that requires the defendant to have received effective assistance of counsel with regard to the habeas waiver.³⁹ Where a habeas waiver is invalidated, the prisoner may proceed with her post-conviction review ("PCR") or ha-

fective; see, e.g., *United States v. Benson*, 63 F. App'x 88, 90 (4th Cir. 2003) (per curiam) (finding that the district court failed to address the waiver during the plea colloquy); *United States v. Normand*, 58 F. App'x 679, 680 n.1 (9th Cir. 2003) (finding that the court informed the defendant that he had a right to appeal); *United States v. Portillo-Cano*, 192 F.3d 1246, 1252 (9th Cir. 1999).

³⁶ See *Jimenez v. United States*, 168 F. Supp. 2d 79, 83 (S.D.N.Y. 2001).

³⁷ See *Majors v. State*, 568 N.E.2d 1065, 1068 (Ind. Ct. App. 1991) (permitting the appeal to proceed); *State v. Gibson*, 348 A.2d 769, 775 (N.J. 1975) (permitting the appeal to proceed and the prosecutor to void the plea bargain); cf. *People v. Butler*, 204 N.W.2d 325, 331 (Mich. Ct. App. 1972) (voiding the conviction).

³⁸ See, e.g., *United States v. Cockerham*, 237 F.3d 1179, 1183 (10th Cir. 2001); *Allen v. Thomas*, 458 S.E.2d 107, 108 (Ga. 1995).

³⁹ See, e.g., *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993) (per curiam); *Boglin v. State*, 840 So. 2d 926, 931 (Ala. Crim. App. 2002); see also *United States v. Steadman*, 198 F. Supp. 2d 730, 733-34 (E.D. Va. 2002) (finding the habeas waiver unenforceable because the judge failed to mention it during the plea colloquy).

beas claims.⁴⁰ (I shall use the terms PCR and habeas interchangeably.)

Second, as mentioned in Section I.A, every habeas waiver I have found has been accompanied by an appellate waiver. This is important because appellate waivers render a habeas waiver far less valuable. Most states require that a prisoner raise her PCR claims on direct appeal unless this procedural default can be excused. The federal government has an analogous rule requiring the exhaustion of state remedies—whether a direct appeal or a state PCR motion—before a claim may be brought in a federal habeas petition. Exhaustion may be excused at the federal level either for the reasons that excuse exhaustion at the state level or because the state remedies are inadequate.

Although the law on the interaction between appellate and habeas waivers is not yet firm, a number of state and federal courts have held that an appellate waiver does not excuse the exhaustion requirement for state and federal habeas relief, respectively.⁴¹ This means that an appellate waiver effectively bars state or federal PCR relief on most claims that survive a plea because it prevents the exhaustion of claims on direct appeal. The only claims that may succeed are those that are excused from exhaustion. Table 2 summarizes these conclusions.

Table 2. Claims Waived by Plea, Appellate Waivers, and Habeas Waivers

Status	Claims
Waived by plea	<ul style="list-style-type: none"> ▪ Right to trial (and thus trial-type errors) ▪ Most errors predating the plea ▪ Certain double jeopardy and prosecutorial vindictiveness claims (if waiver is specific)

⁴⁰ See, e.g., *Boglin*, 840 So. 2d at 936.

⁴¹ See, e.g., *United States v. Pipitone*, 67 F.3d 34, 38–39 (2d Cir. 1995). Indeed, one court has held that a plea agreement itself implies both an appellate and a habeas waiver, see *United States v. Viera*, 931 F. Supp. 1224, 1228 (M.D. Pa. 1996), and another that an appellate waiver in a plea agreement implies a habeas waiver, see *Bouley v. Brooks*, 97 F.3d 284, 288–89 (8th Cir. 1996). For criticism of these cases, see Sanford I. Weisburst, Comment, *Adjusting a Criminal Defendant's Sentence After a Successful Collateral Attack*, 64 U. Chi. L. Rev. 1067, 1075–78 (1997).

Not waived by plea, but may be waived by appellate waiver	<ul style="list-style-type: none"> ▪ Certain double jeopardy and prosecutorial vindictiveness claims (if waiver is specific) ▪ Statutory exceptions to <i>Tollet</i> (if waiver is specific) ▪ Errors by the court with respect to sentencing (Cal. (if waiver is specific), N.Y., most federal courts), but not illegal sentences
Not waived by plea or appellate waiver, but may be waived by habeas waiver	<ul style="list-style-type: none"> ▪ Claims for which exhaustion is excused
Cannot be waived	<ul style="list-style-type: none"> ▪ Jurisdiction ▪ Plea was not voluntary and knowing ▪ Ineffective assistance of counsel with respect to the plea ▪ Specific rights in specific states, e.g., speedy trial or defendant's competency to stand trial in N.Y. ▪ Sentencing error (Minn.); illegal sentences (Cal., N.Y., most federal courts)

C. Habeas Waivers Have Little Value

Habeas waivers are primarily used in federal rather than state plea agreements, but even in federal agreements, these waivers are a recent innovation.⁴² Although it is natural to ask why only federal plea agreements contain waivers, and why those only recently started doing so, it is also prudent to ask why habeas waivers would ever be included in plea bargains at either the state or federal level. The potential for habeas relief has little benefit for prisoners who plead guilty. The only significant procedural risks these defendants face and can waive are sentencing errors. But such errors generally are resolved on appeal, not on habeas review. The trivial value of habeas rights to defendants who plead guilty suggests that the di-

⁴² For a discussion on the prevalence of habeas waivers, see notes on file with the author.

rect value of that right in trade, for example, a shorter sentence, is also small. Nor do those rights have "nuisance" value. From the prosecutor's perspective, the expected cost of habeas litigation by defendants who plead guilty is very low. Most prisoners do not file habeas petitions because they are released from prison before any relief can be granted.⁴³

This is especially true for prisoners who pleaded guilty because their plea typically affords them a shorter sentence than the average for their crime. Not surprisingly then, only a small percentage of federal habeas petitions are filed by prisoners who were convicted following a guilty plea. Moreover, the probability of success conditional on having pleaded guilty is very close to—if not exactly—zero. This is consistent with the above claim that defendants who plead guilty retain few procedural rights that can be vindicated on habeas review.⁴⁴ These facts suggest that habeas waivers are low-value transactions and relatively cheap to insert in plea agreements. Although courts require habeas waivers to be voluntarily and knowingly entered, defendants already have access to counsel for the guilty plea. Because the value of habeas waivers is low, prosecutors need only offer a negligible sentence reduction, if any, to induce a waiver.

The fact that waivers are of low cost, however, does not warrant legal reforms to encourage waivers. If waivers proliferate, so be it. They offer no serious, undervalued benefit that needs encouragement from the legislatures or the courts.

II. HABEAS SETTLEMENTS

Though habeas waivers have little value, habeas settlements could be very valuable to both prisoners and the government in habeas litigation. Once a prisoner files a motion for PCR or a habeas petition, she or the government's attorney may settle her claims outside of court in the same way a plaintiff and defendant might settle any civil suit. The resulting habeas agreement would involve an exchange of the prisoner's habeas claims for a reduction in sentence. This Part provides examples of such settlements and discusses whether they are subsequently enforceable in court.

⁴³ See *infra* Appendix A.

⁴⁴ *Id.*

More importantly, this Part attempts to explain why so few habeas petitions are resolved in this manner. This is surprising since the attorneys who litigate habeas cases are the same attorneys that litigate criminal cases, and those attorneys settle the vast majority of criminal cases via plea agreements. The absence of compromise in habeas cases is also surprising because habeas settlements, as opposed to waivers, have a great deal of value to all parties involved.⁴⁵

A. Examples

Although it may be obvious, note that, whereas federal prisoners may only file federal habeas petitions, state prisoners may file both state and federal habeas petitions. This fact suggests sorting habeas settlements into three categories: (1) those involving state prisoners, a state government defendant, and a state PCR petition; (2) those involving state prisoners, a state government, and a federal habeas petition; and (3) those involving federal prisoners, the federal government, and a federal habeas petition. I have been able to find examples of settlements from the first and last category, but none involving state actors and a federal petition.

For a typical example of a settlement involving a state PCR petition, consider the case of Clinton Flud. Flud was convicted in an Arkansas trial court of rape and sexual solicitation of a child and was sentenced to ten years for the first charge and six years for the second, to be served concurrently.⁴⁶ After his direct appeal failed, Flud brought a state PCR motion. His claim had sufficient merit that he was appointed counsel, who subsequently negotiated a settlement with the state prosecutor whereby a first-degree sexual abuse conviction would be substituted for the rape charge. The benefit to Flud was not only that the sexual abuse charge carried a sentence that was one year shorter, but also that he avoided an Arkansas rule that a prisoner must serve seventy percent of his sentence if convicted of rape before he may be paroled.⁴⁷

⁴⁵ See *infra* Part III.

⁴⁶ Flud v. State, No. CACR 00-695, 2001 WL 249984, at *1 (Ark. Ct. App. Mar. 14, 2001).

⁴⁷ Telephone Interview with Craig Lambert, Assistant Fed. Pub. Defender, D. Ark. (Dec. 5, 2003); see also Transcript of Hearing Before the Honorable Robert W. McCorkindale II, Circuit Judge for the 11th Judicial District of Arkansas, Flud v. State, No. CR-99-240 (Ark. Cir. Ct. Oct. 4, 2002) (on file with author).

For general examples of habeas settlements involving federal prisoners, consider the habeas compromises that followed *Bailey v. United States*.⁴⁸ If an individual possesses a firearm during commission of a drug crime, her sentence can be enhanced two levels under Section 924(c) of the federal sentencing guidelines.⁴⁹ Before *Bailey*, she also could be convicted for "use" of a firearm under the federal criminal law.⁵⁰ Federal prosecutors almost always sought a Section 924(c) conviction rather than a Section 2D1.1 enhancement because a Section 924(c) conviction carried a longer sentence (five years) than the enhancement, and a Section 2D1.1 enhancement was not available if an individual was convicted under Section 924(c).⁵¹ In *Bailey*, the Supreme Court ended this practice when it held that a conviction under Section 924(c) requires active employment of a firearm; mere possession is insufficient.⁵² There were two groups of Section 924(c) convicts who benefited: (1) those who had not actively employed a firearm, and (2) those who *may* not have employed a firearm. The first had clearly not actively employed a firearm and therefore would certainly prevail on a Section 2255 habeas motion.⁵³ The only risk the convicts in this group faced concerned their remedy: Would they simply have five years knocked off their sentences or could the district court re-sentence them using the Section 2D1.1 enhancement, in which case their sentences would be reduced by less than five years? Unfortunately for convicts in this group, the federal sentencing guidelines eliminated any scope for a negotiated settlement with prosecutors. Once prosecutors seek a Section 2D1.1 enhancement, courts must increase the defendant's offense level by two levels. They do not have discretion to bargain and raise the offense level by only one level.⁵⁴ Therefore, the law gave prosecutors a choice only between seeking no enhancement or a two-level enhancement, which is identical to a choice between total capitulation and total success. For convicts in the second group, the facts of their cases suggested

⁴⁸ 516 U.S. 137 (1995).

⁴⁹ U.S. Sentencing Guidelines Manual § 2D1.1(b)(1) (2005).

⁵⁰ 18 U.S.C. § 924(c) (2000).

⁵¹ U.S. Sentencing Guidelines Manual § 2D1.1(a)(1)–(2) (2005).

⁵² *Bailey*, 516 U.S. at 142–43.

⁵³ 28 U.S.C. § 2255 (2000).

⁵⁴ U.S. Sentencing Guidelines Manual § 2D1.1(b)(1) (2005).

that they did not actively employ a firearm, but that conclusion was less than certain. These convicts therefore faced a second risk: They might not even win their Section 2255 claims. But this fact made possible a settlement where the convict simply received the Section 2D1.1 enhancement. Because there was a risk that these convicts would lose their Section 2255 claims and receive no sentence reductions, they were willing to plead to a Section 2D1.1 enhancement if the prosecutors would concede the convicts' habeas claims. Many prosecutors took this deal because it gave them a certain two-level sentence enhancement and avoided the risk of losing both a Section 2255 claim and a request to re-sentence the defendant with the Section 2D1.1 enhancement.

Most habeas settlements, whether at the state or federal level, appear to be oral agreements. They are neither on the record nor reduced to a written contract. I have found only two exceptions. The first is Clinton Flud's case, which was presented orally, but on the record, at a hearing before the Arkansas trial court to which Flud's PCR motion was assigned. The second exception is post-*Bailey* habeas settlements from the Northern District of California. An example is the case of prisoner David Eliot Everett, who filed a motion to vacate his conviction and sentence citing *Bailey*.⁵⁵ Before the district court ruled on the motion, the parties settled and requested that the court treat the prisoner's motion as one for relief under Section 2255, grant such relief and vacate the Section 924(c) conviction, and accept a plea agreement whereby the prisoner accepted a Section 2D1.1 enhancement.

Habeas settlements are implemented in one of two ways. More typical are cases like Flud's and Everett's: In each case, a prosecutor conceded the prisoner's PCR claim on the condition that he sign a plea agreement with a sentence that was lower than his present sentence, but not as low as he would have received had he won his PCR claim. An alternative approach is to request that the court with jurisdiction over the prisoner's sentence amend his sentence to reflect, for example, the fact that he provided assistance to prosecutors. An example of this approach is the case of Susan

⁵⁵ Motion to Vacate Conviction and Sentence, *United States v. Everett*, No. CR S-92-115 (E.D. Cal. Jan. 16, 1997) (on file with author).

Jones.⁵⁶ Charged with killing her husband, Jones was convicted by an Arkansas jury of second-degree murder and sentenced to twenty years in prison. After losing her direct appeal she filed a state habeas petition claiming that her counsel was ineffective because he failed both to raise a colorable battered-woman syndrome defense and to object that the prosecutor violated *Griffin v. California*⁵⁷ by commenting on Jones's invocation of her right to remain silent during closing arguments. Her claim was sufficiently credible such that, before any court had an opportunity to evaluate her claims, Jones's PCR counsel and the prosecutor negotiated an oral settlement whereby Jones would drop her PCR motion in return for the prosecutor filing a motion requesting that the court amend Jones's conviction to manslaughter and reduce her sentence to eight years.⁵⁸

Habeas settlements may be found in quite varied circumstances. They involve sentences less than life, life sentences, and capital sentences (as illustrated by examples below).⁵⁹ They also occur at different times during the criminal process, though by definition always after sentencing.⁶⁰ The earliest habeas settlement I found was one agreed to before the direct appeal of a federal prisoner in the District of Columbia was completed.⁶¹ The prisoner had pleaded guilty, but at sentencing, the defense counsel failed to alert the court to a fact that would have affected its sentencing guideline calculation and would have lowered the prisoner's sentence. Unfortunately, because the issue was fact bound, appellate counsel could not raise it on appeal. The prisoner, however, could raise it in a Section 2255 motion as part of an ineffective assistance of trial counsel claim. Nevertheless, before filing the prisoner's direct appeal, appellate counsel proposed, and the federal prosecutor accepted, an oral deal in which the prisoner would drop other admit-

⁵⁶ The prisoner's true name has been altered at the request of her PCR counsel, who is concerned about the legal validity of her habeas settlement.

⁵⁷ 380 U.S. 609, 615 (1965).

⁵⁸ Telephone Interview with Craig Lambert, *supra* note 47.

⁵⁹ See *Johnston v. Dobeski*, 739 N.E.2d 121, 123 n.2 (Ind. 2000) (listing examples of habeas agreements in capital cases).

⁶⁰ See *id.* at 123 nn.1-2 (giving examples of agreements reached just before the trial court and the appellate court, respectively, ruled on a state PCR motion).

⁶¹ The public defender for this prisoner requested that neither the prisoner's nor the defender's name be revealed.

tedly weak claims on appeal and the prosecutor would not contest the prisoner's Section 2255 claim of ineffective assistance and permit the prisoner to be re-sentenced. All the recommendations from the original plea remained in place; the only change was the sentencing guideline calculation.

Like habeas waivers in plea agreements, habeas settlements are typically exchanges of habeas claims for sentence reductions. Occasionally, however, the terms differ. In at least two cases, I have found proposed habeas agreements where the defendant not only relinquished his habeas claims, but also offered the state a defense in any subsequent civil suit by the prisoner in return for a sentence reduction. Both cases are from the same state in the United States Court of Appeals for the Third Circuit.⁶² In each case, the prisoner had been convicted in the 1970s of first-degree murder and sentenced to life. After unsuccessful state PCR claims, the prisoners filed federal habeas claims. In the first case, the prisoner asserted that there was insufficient evidence to show that he was the shooter and that his counsel was ineffective for failing to object, for example, to the prosecutor's comments to the jury regarding the prisoner's invocation of his right to silence. In the second case, the prisoner asserted that government witnesses intentionally altered documents and testified falsely as to his guilt. In both cases the prisoners won in the district court and the state offered a settlement. The state's motivation was not simply to avoid losing the habeas claims, but to avoid liability for monetary damages if either prisoner filed a subsequent civil suit asserting, for example, malicious prosecution. In each case, the settlement offer was that the state would concede the habeas claims if each prisoner would plead to second-degree murder with a maximum twenty-year sentence. The state's hope was that the plea agreement would prevent each defendant from asserting innocence and thus make it difficult to assert that the state was malicious.⁶³ In both cases, although each

⁶² The names of the prisoners and the state are withheld at the request of an attorney who was involved in both cases and informed me of the agreement in both cases.

⁶³ Although a guilty plea does not bar a subsequent civil action for damages under § 1983, see *Haring v. Prosise*, 462 U.S. 306, 323 (1983), the Supreme Court has enforced an agreement in which the prisoner released all § 1983 claims in return for dismissal of certain charges. See *Town of Newton v. Rumery*, 480 U.S. 386, 392–98 (1987) (holding that such release agreements are not unenforceable per se, but they might be under certain circumstances).

prisoner's counsel recommended that he take the deal, each prisoner did not. In the first case, the prisoner lost on appeal to the Third Circuit and continues to serve his life sentence. In the second, the prisoner prevailed and is now suing the state in a civil action.

B. Legal Status

The legal status of habeas settlements is very much up in the air. Only one court has directly ruled on the validity of habeas settlements involving state habeas claims. In *Johnston v. Dobeski*, a prisoner sentenced in 1964 to two consecutive life terms for the murder of two children agreed to drop his PCR motion in 1985 in return for a modification of his sentence to two consecutive forty-year terms, with credit for time served.⁶⁴ The victims' parents filed a motion with the PCR court to intervene and vacate the habeas agreement, but it was rejected. The Indiana Court of Appeals upheld this decision, but found that the trial court lacked the power to amend the sentence because the state murder statute in 1964 did not authorize forty-year sentences for murder.⁶⁵ The Supreme Court of Indiana reversed this ruling.⁶⁶ It initially took judicial notice of the fact that Indiana prosecutors and prisoners reach habeas settlements⁶⁷ and explicitly affirmed this practice and the power of courts to accept habeas settlements.⁶⁸ It then found that the lower court had the legal authority to impose the revised sentence be-

⁶⁴ 739 N.E.2d 121, 122 (Ind. 2000).

⁶⁵ Id. at 122.

⁶⁶ Id. at 126.

⁶⁷ The court noted habeas agreements struck before the trial court ruled on a PCR motion, id. at 123 n.1 (citing *State ex. rel. Woodford v. Marion Superior Court*, 655 N.E.2d 63, 64-65 (Ind. 1995) (describing how the prosecutor petitioned the court to set aside convict's life sentence and impose a sentence of fifty years with ten years suspended to probation)), as well as those struck just before appeal, *Johnston v. Dobeski*, 739 N.E.2d 121, 123 n.2 (Ind. 2000) (citing *McCullum v. State*, No. 45S00-9403-PD-228 (Ind. filed Apr. 29, 1999); *Townsend v. State*, No. 45S00-9403-PD-227 (Ind. filed Apr. 29, 1999) (noting that in both cases convicts on death row were re-sentenced to two consecutive sixty-year sentences due to habeas agreements struck prior to appeal)).

⁶⁸ *Johnston*, 739 N.E.2d at 123.

cause, for example, the prisoner could have been paroled under the sentencing rules in effect in 1964.⁶⁹

There is a temptation to suggest that this case implies that habeas settlements involving state PCR claims stand on solid ground because the judgment above was issued in a jurisdiction that refuses to enforce either appellate or habeas waivers in plea agreements.⁷⁰ It is important to recognize, however, that such an inference rests on only one case. If the tension between habeas waivers and habeas settlements were brought to the attention of the Indiana Supreme Court, it is plausible that the court would reverse not its opposition to habeas waivers, but its support of habeas settlements. Perhaps the tension can be reconciled by the fact that in a plea the defendant waives the right to challenge errors that have yet to occur, while in a post-sentencing agreement the prisoner waives the right to challenge an error that has already occurred. The collateral review right is much harder to value in the former case than in the latter.⁷¹

I have found no federal cases where a court has taken judicial notice of a habeas settlement, let alone a case where a federal court has explicitly stated that such agreements are enforceable. In *Williams v. Duckworth*, however, a panel of the United States Court of Appeals for the Seventh Circuit (including Judge Frank Easterbrook, the current Chief Judge of the Seventh Circuit) acknowledged the existence of a habeas settlement where the prisoner exchanged his state PCR claims for a modification of his Indiana conviction from a class A felony to a class B felony.⁷² The prisoner later filed a federal habeas petition asserting that there was insufficient evidence to convict him of the class A felony in the first place. The district court dismissed this petition as moot, and the Seventh Circuit affirmed in light of the prior habeas agreement.⁷³ Moreover, in *United States v. Everett*, the district court issued an order grant-

⁶⁹ Id. at 125–26. The dissenting opinion disagreed with the ability of the trial court to impose the revised sentence. See id. at 126 (Shepard, C.J., dissenting).

⁷⁰ See *Majors v. State*, 568 N.E.2d 1065, 1067–68 (Ind. Ct. App. 1991).

⁷¹ Moreover, habeas waivers technically require the prisoner to surrender his PCR rights, while habeas settlements may be implemented in such a manner that the government concedes a PCR claim in return for a guilty plea to a lesser offence. This was not the case in *Johnston*, where the original sentence was modified. 739 N.E.2d at 122.

⁷² No. 95-CV-253, 1997 WL 9786, at *1 (7th Cir. Jan. 6, 1997).

⁷³ Id. at *2.

ing a federal prisoner habeas relief under Section 2255 and re-sentencing him to a shorter term of years based on "the parties' stipulation."⁷⁴ This stipulation was an agreement whereby the prisoner agreed to drop his motion to vacate his sentence and to consent to a sentence enhancement for possession of a firearm during a drug transaction pursuant to Section 2D1.1(b)(1) of the federal sentencing guidelines.⁷⁵ In return, the Assistant U.S. Attorney agreed to concede to a Section 2255 motion based on *Bailey v. United States*.⁷⁶ I described the logic behind this deal in Section II.A.

C. The Lack of Habeas Settlements

Although it is not possible to provide a systematic survey of the prevalence of habeas settlements, interviews with state and federal public defenders and state prosecutors revealed numerous examples of agreements involving state prisoners and state habeas claims or federal prisoners and federal habeas claims. As noted earlier, these interviews uncovered no settlements involving state prisoners and federal habeas claims.⁷⁷ Overall, my survey of state and federal practice with regard to habeas settlements suggests that they can be found in approximately one-third of states and three-fifths of federal districts of the states and districts that responded.⁷⁸

⁷⁴ Motion to Vacate Conviction and Sentence, *United States v. Everett*, No. CR S-92-115 (E.D. Cal. Jan. 16, 1997) (on file with author).

⁷⁵ *Id.*; United States Sentencing Manual § 2D1.1(b)(1) (2005).

⁷⁶ Motion to Vacate Conviction and Sentence at 1, *Everett*, No. CR S-92-115.

⁷⁷ See *supra* Section II.A. That Section also provided an example from a federal habeas case filed by a state prisoner of a settlement offer that was rejected by the prisoner. In addition, Michael Tanaka, a public defender in the Central District of California, provided an example in which a federal magistrate judge requested that the parties settle a federal habeas claim involving a state prisoner. That case involved a mentally disabled prisoner who was given a life sentence for a \$25 theft under California's three-strikes law. Tanaka filed a federal habeas petition with a claim that he said was reasonable on the merits and strong on the equities. At a hearing in open court, the magistrate judge requested that the parties to go off the record. He said he was strongly inclined to grant the writ but was not sure he could provide grounds that would be sustained on appeal. He pleaded with the state to compromise. The state district attorney, although personally inclined to do so, refused on the grounds that it was the policy of the state attorney general not to compromise on habeas claims. Telephone Interview with Michael Tanaka, Pub. Defender, C.D. Cal. (Dec. 9, 2003).

⁷⁸ More precisely, habeas settlements were found in four of thirteen states surveyed and fifteen of twenty-six federal districts surveyed. See *supra* Table 1.

The states include Arkansas, Colorado, Pennsylvania, and Washington; the federal districts include many western states—Alaska, Colorado, Nevada, New Mexico, Utah, Washington, and Wyoming—as well as Minnesota, the Middle District of Pennsylvania, the District of Columbia, the Northern District of Florida, and the Eastern District of Texas.

My only impression regarding the difference between habeas settlements involving state prisoners and those involving federal prisoners is that the former agreements are more evenly distributed across time. Habeas settlements involving federal prisoners tend to be bunched in the periods immediately following U.S. Supreme Court cases announcing significant reinterpretations of substantive criminal laws or new criminal procedural rights. Examples of such decisions include *McNally v. United States*,⁷⁹ *Bailey v. United States*,⁸⁰ *Apprendi v. New Jersey*,⁸¹ and *Ring v. Arizona*.⁸² Going forward, they may even include *Blakely v. Washington*⁸³ and *United States v. Booker*.⁸⁴ If such a ruling is retroactive under *Teague v. Lane*,⁸⁵ it triggers a surge in federal habeas filings that continues until the stock of convicts affected by the ruling have either filed a habeas claim or have been released because their sentences have been served. Even if such a ruling is not retroactive, it can trigger a surge of filings until a federal court in the relevant jurisdiction declares the ruling is not retroactive. Such a surge over-

⁷⁹ 483 U.S. 350, 360 (1987), abrogated by 18 U.S.C. § 1346 (2000).

⁸⁰ 516 U.S. 137, 143–44 (1995).

⁸¹ 530 U.S. 466, 476 (2000).

⁸² 536 U.S. 584, 609 (2002).

⁸³ 542 U.S. 296, 303–04 (2004).

⁸⁴ 125 S. Ct. 738, 755–56 (2005).

⁸⁵ 489 U.S. 288 (1989). *Teague* held that, with two exceptions, “new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” *Id.* at 310. New rules are those that “break[] new ground or impose[] a new obligation on the States . . . [or were] not dictated by precedent.” *Id.* at 301 (emphasis in original). The first exception is for rules that place certain primary private conduct beyond the power of the state to proscribe or that address a substantive guarantee accorded by the U.S. Constitution. *Id.* at 307; *Perry v. Lynaugh*, 492 U.S. 302, 329–30 (1989). The second exception is for “watershed rules of criminal procedure” that are necessary to the fundamental fairness of the criminal proceeding” because they “not only improve accuracy, but also ‘alter our understanding of the *bedrock procedural elements*’ essential to the fairness of a proceeding.” See *Sawyer v. Smith*, 497 U.S. 227, 241–42 (1990) (quoting *Teague*, 489 U.S. at 311) (emphasis in original).

whelms the resources available to U.S. Attorneys' offices, encouraging them to settle cases they would otherwise litigate.⁸⁶

In the grand scheme of things, however, habeas settlements are very rare. They are a tiny fraction of all habeas cases, even in jurisdictions where habeas settlements can be found. Not only are the number of government or defense attorneys who have settled habeas claims a small fraction of all such attorneys, but those attorneys who have ever settled habeas claims have only settled a small fraction of the habeas cases they have handled. This is surprising because so many of these attorneys also handle criminal cases, which they settle with great frequency, often with habeas waivers.

The remainder of this Part attempts to explain the aforementioned patterns in the prevalence of habeas settlements. Specifically, it examines: first, why habeas settlements are not more common at either the state or federal level; and, second, why such agreements concerning federal habeas claims are bunched after certain significant Supreme Court cases.⁸⁷

1. Why So Few Habeas Cases Settle

The first step in explaining the dearth of habeas settlements is to identify cases that are poor candidates for settlement, either because there is little room for negotiation or the costs of negotiation are greater than the benefits. The second step is to consider cases in which it makes sense for parties to settle, but still they fail to do so.

⁸⁶ Telephone Interview with David Porter, Assistant Fed. Pub. Defender, E.D. Cal. (Dec. 5, 2003); Telephone Interview with Daniel Scott, *supra* note 19.

⁸⁷ It should be noted throughout that the frequency of habeas settlements will be less than that of habeas waivers. One difference is that there are far fewer candidates for habeas settlements than habeas waivers because few defendants who are convicted ultimately file for habeas relief. At the very least, only those who have been incarcerated long enough to complete their direct appeal and exhaust any remaining state remedies are able to file.

Table 3. Four Basic Groups of Habeas Cases, Their Suitability for Habeas Settlement, and Shares of Cases in Each Group

Group		Share of non-capital habeas cases involving (capital numbers are in parentheses):			Suitable for habeas settle- ment?
No.	Description	State prisoner in state court	State prisoner in federal court	Federal pris- oner in fed- eral court	
1	Petitioner pleaded guilty ⁸⁸ or is about to be released, or petition is pro- cedurally de- faulted ⁸⁹	Pleaded guilty: 12% (1%) Proc. default: 7% (assume same) Total: 12–19% (7–8%)	Pleaded guilty: 9% (0%) Proc. default: 6% (assume same) Total: 9–15% (6%)	Pleaded guilty: Unknown Proc. default: Unknown Total: Unknown	No

⁸⁸ The figures are computed as follows. Consider first the non-capital cases. According to Victor E. Flango of the National Center for State Courts, before AEDPA, 35% and 26% of filings by state prisoners in state and federal courts, respectively, were cases involving guilty pleas or nolo contendere pleas. Nat'l Ctr. for State Courts, *Habeas Corpus in State and Federal Courts* 36 (1994). According to my analysis of Marc Falkoff's data, after AEDPA 8.8% of filings (26 of 296 filings) by state prisoners in federal court involved guilty pleas and no procedural default. See *infra* notes 183–184. Applying the ratio for filings by state prisoners in federal courts after and before AEDPA ($9/26 = 0.34$) to filings by state prisoners in state court yields 11.9%. The capital case numbers are based on pre-AEDPA numbers in Flango, *supra*, at 86 tbl.22. No post-AEDPA data are available.

⁸⁹ See Flango, *supra* note 88, at 66–67 tbl.19 (providing the data to compute the procedural default numbers for non-capital cases). Data on capital petitioners denied relief due to procedural default are unavailable. I will assume, therefore, that the procedural default rate for capital cases is the same as for non-capital cases so that I can provide estimates of the size of each group. This is likely an overestimate as courts give capital cases more attention—meaning they treat them more liberally from a procedural perspective—than non-capital cases. Data on filings where the prisoner is released before courts can adjudicate his claims are unavailable. I assume this number is small enough to ignore.

2	Not in group 1 or 4 ⁹⁰ and petitioner proceeds pro se ⁹¹	At most 56–65% (0–12%)	At most 76–82% (0–39%)	Unknown	No
3	Not in group 1 or 4 and petitioner has representation ⁹²	At most 15–17% (78–86%)	At most 8% (38–54%)	Unknown	Perhaps

⁹⁰ The upper (lower) bound on the number of people not in Groups One or Four is one minus the lower (upper) bound on the numbers of people in Groups One and Four. So, for non-capital cases for state prisoners in state courts, the upper and lower bounds are $0.80 (= 1 - (0.12 + 0.08))$ and $0.73 (= 1 - (0.19 + 0.08))$, respectively. In non-capital cases for state prisoners in federal court, the upper and lower bounds are $0.9 (= 1 - (0.09 + 0.01))$ and $0.84 (= 1 - (0.15 + 0.01))$, respectively. For capital cases, the bounds are $0.9 (= 1 - (0.07 + 0.03))$ and $0.82 (= 1 - (0.08 + 0.1))$, for state prisoners in state courts, and $0.77 (= 1 - (0.06 + 0.17))$ and $0.54 (= 1 - (0.06 + 0.4))$, for state prisoners in federal court.

⁹¹ The upper (lower) bound on the number of people not in Groups One or Four and without representation is one minus the lower (upper) bound on the numbers of people in Groups One, Three, and Four. So for non-capital cases, the upper and lower bounds are $0.65 (= 1 - (0.12 + 0.15 + 0.08))$ and $0.56 (= 1 - (0.19 + 0.17 + 0.08))$, respectively, for state prisoners in state courts, and $0.82 (= 1 - (0.09 + 0.08 + 0.01))$ and $0.76 (= 1 - (0.15 + 0.08 + 0.01))$, respectively, for state prisoners in federal court. For capital cases, the bounds are $0.12 (= 1 - (0.07 + 0.78 + 0.03))$, 0 (because $1 - (0.08 + 0.86 + 0.1) < 0$), $0.39 (= 1 - (0.06 + 0.38 + 0.17))$, and 0 ($= 1 - (0.06 + 0.54 + 0.4)$), respectively.

⁹² According to Flango, *supra* note 88, at 86 tbl.22, for non-capital cases, $0.21 (= ((0.24 \times 1266) + (0.13 \times 431)) / (1266 + 431))$ of state prisoners in state court, and $0.09 (= ((0.08 \times 1220) + (0.12 \times 381)) / (1220 + 381))$ of state prisoners in federal court had representation. For capital cases, the numbers are $0.95 (= 1 - 0.05)$ and $.7 (= 1 - 0.3)$, respectively. (It should be noted that I am probably underestimating the number of not-Group One claims that have representation. The reason is that procedurally defaulted claims are less likely to have representation than other denied cases.) The upper (lower) bounds for Group Three are the product of the upper (lower) bounds on not-Group One or Four filings, and the figures just derived above. See *supra* note 88. So the upper and lower bounds for non-capital cases are $0.17 (= 0.80 \times 0.21)$ and $0.15 (= 0.73 \times 0.21)$, respectively, for state prisoners in state court, and $0.08 (= 0.9 \times 0.09)$ and $0.08 (= 0.84 \times 0.09)$, respectively, for state prisoners in federal court. For capital cases, the upper and lower bounds are $0.86 (= 0.9 \times 0.95)$ and $0.78 (= 0.82 \times 0.95)$, respectively, for state prisoners in state court, and $0.54 (= 0.77 \times 0.7)$ and $0.38 (= 0.54 \times 0.7)$, respectively, for state prisoners in federal court.

4	Petitioner secured vote of at least one judge ⁹³	At least 8% ⁹⁴ (3–10% ⁹⁵)	At least 1% ⁹⁶ (17–40% ⁹⁷)	12% ⁹⁸ (21% ⁹⁹)	Yes
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One group of habeas cases that are clearly not candidates for settlement includes those cases in which the prisoner pleaded guilty or is scheduled to be released very shortly after the petition is filed and those cases in which the petition has an obvious procedural flaw, such as being time-barred. This set of cases (labeled “Group One” in Table 3) includes at least twenty-five percent of all peti-

⁹³ Shares in this row are based on the fraction of petitions ultimately granted. It excludes petitions that succeeded below but were denied on appeal. Therefore, the numbers are an underestimate of the size of this group.

⁹⁴ The exact figure, 8.48%, is based on the life imprisonment and other sentence columns in Flango, *supra* note 88, at 86 tbl.22.

⁹⁵ The 3% figure is from *id.* The 10% figure is from James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973–1995*, at 6 n.40 (June 12, 2000), <http://ccjr.policy.net/cjedfund/jpreport/finrep.PDF>.

⁹⁶ The exact figure is 1.24% and is calculated from the life imprisonment and other sentence columns in Flango, *supra* note 88, at 86 tbl.22.

⁹⁷ The 17% figure is from *id.* The 40% figure is from Liebman, *supra* note 95, at 6 n.40. Liebman finds that in 82% of capital cases reversed, on state habeas or federal habeas, the defendant was not re-sentenced to death. *Id.* at 7.

⁹⁸ This figure is the share of § 2255 petitions granted in 2000 according to the Administrative Office of U.S. Courts. This is available via a convenient web-form query at <http://teddy.law.cornell.edu:8090/questcv3.htm>, a service by Professor Theodore Eisenberg; see also Fed. Judicial Ctr., *Federal Court Cases: Integrated Data Base, 1970–2000*, at pts. 115–18 (Inter-Univ. Consortium for Political and Soc. Research (ICPSR) Study No. 8429, 2005), available at <http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/08429.xml> (providing data for the Administrative Office of U.S. Courts).

⁹⁹ Tracy L. Snell & Laura M. Maruschak, U.S. Dep’t of Justice, *Capital Punishment 2001 Bulletin* NCJ 197020, Dec. 2000, at 15 app. tbl.3, available at <http://www.ojp.usdoj.gov/bjs/abstract/cp01.htm> (citing the 21% figure). This figure suffers from two errors. First, it overestimates the grant rate on federal habeas actions because it includes convictions and sentences overturned on direct appeal. The Bureau of Justice Statistics reports that six of twenty-eight defendants sentenced to death in the federal system between 1973 and 2001 had their sentences or conviction overturned. *Id.* It does not indicate whether this was on direct appeal or federal habeas review. Second, the figure underestimates the grant rate because the twenty-eight cases include ones where the federal habeas process has not run its course. It is possible that more petitions by defendants sentenced to death between 1973 and 2001—especially in recent years—will be granted. *Id.*

tions filed by non-capital state prisoners.¹⁰⁰ Each of these petitions has the common feature that one can predict with great accuracy at the time of filing that the petition will not attract the vote of a single state or federal judge or magistrate. This group includes only cases that are poor candidates for habeas settlements because the petitioners' habeas rights are of *de minimis* value. The only incentive prosecutors have to settle these cases is the cost of litigating the cases. This cost is likely to be low because most of these cases will be rejected by the trial court before the government is even asked to file a reply. More importantly, the marginal transaction cost of negotiating a settlement is likely to be quite high. For a settlement to stand up to subsequent scrutiny in court, it likely has to be voluntary and knowing, like a plea agreement. This in turn requires that the petitioner have counsel. Because petitioner has no constitutional right to counsel on collateral review,¹⁰¹ this means the government would have to pay for the prisoner's counsel if it decides to settle, but probably would not have to pay if it does not settle.

There are two groups of cases that are good candidates for settlement. One such group includes those habeas petitions that garner the vote of at least one judge in the state or federal habeas review process. This set (which is labeled "Group Four" in Table 2) includes at least the nine percent of non-capital state prisoner petitions ultimately granted at the state or federal level.¹⁰² It also includes at least nineteen to forty-six percent of capital state prisoner petitions.¹⁰³ Like Group One cases, the members of Group Four are easily identified prior to final adjudication, though perhaps not at

¹⁰⁰ The overall rate of procedural default is the probability of default in state court plus the probability that a case reaches the federal court—that is, is not granted at the state level—and is defaulted. Therefore, assuming the probability of default at the federal level is independent of that probability on the state level, the probability of default is calculated from the figures in Table 2 as follows: $0.125 = 0.07 + [(1 - 0.08) \times 0.06]$. Assume—against the interests of my thesis—that twelve percent plead guilty and that this number is independent of the procedural default number. Then the overall percentage of cases in Group One is twenty-five percent.

¹⁰¹ *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.").

¹⁰² $0.09 = 0.08 + (0.92 \times 0.01)$.

¹⁰³ $0.19 = 0.03 + (0.97 \times 0.17)$ and $0.46 = 0.1 + (0.9 \times 0.4)$.

the moment a petition is filed. The reason they should settle is that they have significant expected value to petitioners, they are likely to cost the government significant resources to litigate since the prisoner had a strong enough case to get the vote of at least one judge, and, importantly, the transaction cost of settlement is lower in these cases because they are likely to require appointment of counsel whether or not the government settles.

The second group that should settle has three characteristics: They are not obviously without merit (like Group One cases) and have not already come close to being granted (like Group Four cases), but the petitioner has been appointed habeas counsel by a court.¹⁰⁴ State courts generally appoint counsel for a prisoner if her habeas claims are colorable.¹⁰⁵ Federal courts appoint counsel as long as a prisoner's petition is not "patently frivolous or false."¹⁰⁶ The reason why cases with habeas counsel (which are labeled "Group Three" cases in Table) should be resolved out of court is that the marginal cost of settlement is very low. Although it may not be easy to estimate the probability that these petitions will be granted and thus it will be more difficult to determine the appropriate price for these cases, these cases at least warrant a settlement offer that reflects the expected cost to the government of litigating the cases. The fact that the government is willing to pay for

¹⁰⁴ The remaining cases—those that are not obvious losers, or close or actual winners and that are not prosecuted with the assistance of habeas counsel—are probably not good candidates for settlement. The probability of success is neither high nor evident. Most importantly, the marginal cost of negotiation is high because the government would have to pay for the prisoner to hire counsel for settlement talks.

¹⁰⁵ See, e.g., 725 Ill. Comp. Stat. Ann. 5/122-4 (West 2002); *People v. McNeal*, 742 N.E.2d 269, 273 (Ill. 2000). Note that states are not required to do so under the U.S. Constitution. See *Coleman v. Thompson*, 501 U.S. 722, 757 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987).

Other states require a higher standard, requiring that the claims be more substantial, though the court retains the discretion to appoint an attorney so long as the claims are not frivolous. All states, however, appoint counsel for the prisoner if a hearing is to be held on any of his claims. See, e.g., Mont. Code Ann. § 46-21-201(2) (2005); S.C. R. Civ. P. 71.1(d); Vance L. Cowden, *Indigent Defense Services for Post-Conviction Relief in South Carolina: Current Problems and Potential Remedies*, 42 S.C. L. Rev. 417, 428-30 (1991).

There are a very small number of cases where prisoners hire their own counsel, but for practical purposes, these can be ignored.

¹⁰⁶ 28 U.S.C. app. § 2254 (2000) (Rule 4 of Rules Governing Section 2254 Cases in the United States District Courts); see also *Blackledge v. Allison*, 431 U.S. 63, 76 (1977).

habeas waivers in plea agreements even though habeas petitions by those who plead guilty have virtually zero probability of success buttresses this conclusion.¹⁰⁷ Data on state prisoners suggest that Group Three includes twenty-one to twenty-three percent of all non-capital state prisoner petitions and eighty-three to ninety-two percent¹⁰⁸ of all capital state prisoner petitions.¹⁰⁹

So why do parties to cases in Groups Three and Four fail to settle? One public defender suggested that the cost of habeas litigation to the government is actually quite small even in these cases because most government submissions to the court are “form filings,” requiring only that government attorneys fill in the prisoner’s name, her crime, and a few case-specific facts related to her claims.¹¹⁰ The contention is hard to reconcile, however, with the fact that so many federal plea agreements contain habeas waivers, despite the low probability that defendants who plead will file for habeas relief and the high probability that those who do file make claims that are identifiably without merit.¹¹¹ Something must be driving habeas waivers despite the fact that meritorious habeas litigation is extremely rare following a plea. Common sense suggests it is litigation costs.¹¹² Even if it is true that the cost of litigation is low in most cases, the cost is most certainly not low in cases where a prisoner’s petition is granted at some level of the court system or is

¹⁰⁷ Governments are willing to negotiate habeas waivers in cases where the probability of success is zero because the cost of negotiation is zero, too—there is a right to counsel in criminal cases regardless of whether the prisoner chooses to negotiate. But you have the same situation in Group Three cases: at worst a zero probability of success, but the government has already paid for the prisoner to have habeas counsel.

¹⁰⁸ This is calculated assuming the probability of appointment of counsel on state habeas is independent of the same probability on federal habeas. To avoid double counting, I ignore cases where the state prisoner had counsel in state court when determining the cases where the state prisoner was appointed counsel in federal court. For non-capital cases: $0.21 = 0.15 + [(1 - 0.15 - 0.08) \times 0.08]$ and $0.23 = 0.17 + [(1 - 0.17 - 0.08) \times 0.08]$. For capital cases: $0.83 = 0.78 + [(1 - 0.78 - 0.1) \times 0.39]$ and $0.92 = 0.86 + [(1 - 0.86 - 0.03) \times 0.54]$. See *supra* Table 2.

¹⁰⁹ This leaves a final group of cases: those that do not fall in Groups One, Three, or Four. These cases—labeled Group Two in Table 2—probably would not settle. Unlike Group Four cases, the government cannot predict they will win and thus be costly to litigate. Unlike Group Three cases, they are costly to settle because the prisoner has not yet been appointed counsel.

¹¹⁰ Telephone Interview with Ahilan Arulanantham, *supra* note 19.

¹¹¹ Telephone Interview with Gary Weinberger, Assistant Fed. Pub. Defender, D. Conn. (Dec. 3, 2003); see *infra* Appendix A.

¹¹² Telephone Interview with Gary Weinberger, *supra* note 111.

denied but subject to a dissent, let alone cases where the petition is ultimately granted. In these cases, the government surely is required to give serious effort to answering the prisoner's claims.

A second possible explanation for the dearth of habeas settlements is that parties cannot agree on the probability that the petition ultimately will be granted and thus on a price for the petitioner's habeas rights. This is particularly likely where a court uses the vehicle of a collateral review petition to announce a new criminal right. Yet it is unlikely that such disagreements are sufficiently widespread to explain the paucity of settlements, particularly because the parties on both sides—the public defender for the prisoner and the government's attorney—are repeat players. Moreover, there are few collateral review cases that announce a new right. Indeed, *Teague v. Lane* bars such a result in most federal cases.¹¹³ Finally, how is it that the defendants and the government nearly always agree on price in exchanges of trial rights for sentence reductions in plea agreements but cannot agree on price in exchanges of habeas rights for sentence reductions in habeas settlements? Over ninety percent of defendants plead guilty, most pursuant to a plea agreement, yet habeas claims' rate of settlement is nowhere near this percentage.

A third explanation is that a certain segment of the prison population—namely those who do not plea bargain—may be generally unwilling to settle at all. The majority of prisoners who file habeas petitions, that is, the majority of prisoners eligible for habeas settlements, did not plead guilty but were convicted. Perhaps these prisoners' failures to plead demonstrates that they are less cooperative or that they assess probabilities of winning a case differently than government attorneys. There are three problems with this logic. First, although the individuals who plead guilty are often different than those who file habeas petitions, both groups are represented by the same defense counsel, typically state or federal public defenders, public interest organizations, or private criminal defense attorneys. It is unlikely that prisoners ignore their counsel's advice on settlement with much frequency or that defense attorneys are able to compromise for plea agreements but not for habeas agreements. Second, at least one county district attorney's

¹¹³ 489 U.S. 288, 310 (1989); see *supra* note 85.

office reports that it frequently gets calls from defendants seeking to bargain their habeas claims for sentence reductions.¹¹⁴ Although none of the calls appears to have resulted in a habeas settlement, they do suggest that recalcitrant—or principled, depending on your point of view—prisoners are probably not to blame for the dearth of settlements. Finally, and perhaps most fundamentally, the fact that parties cannot agree on probable outcomes of a criminal case in order to reach a plea bargain does not mean that they cannot agree on probable outcomes of a collateral challenge in order to reach a habeas settlement.

A fourth explanation is that, until recently, the federal sentencing guidelines made sentencing compromises difficult because they reduced the discretion of courts over sentencing and permitted only a narrow and rigid range of sentences for a crime. Even if parties agreed on a revised sentence in return for the prisoner dropping her habeas petition, it was difficult to implement that compromise unless the compromise sentence fell in the guidelines' range or the parties were able to find a crime for which the petitioner could be convicted and which corresponded to a sentence equal to the compromise reached by the parties. This is a non-trivial task as demonstrated by the example in Section II.A of the Section 924(c) cases following *Bailey v. United States*.¹¹⁵

Although this explanation is the most promising so far, it has some weaknesses. It does not work for most state defendants, who are unlikely to be subject to sentencing guidelines¹¹⁶ and who constitute all state habeas petitions and one-third of federal habeas petitions. Moreover, some federal public defenders suggest that government attorneys may be open to compromises where the prisoner pleads to a lesser-included offense of the crime for which the prisoner is currently serving time. This, combined with the prosecutor's adroit use of a recommendation of a downward departure for substantial assistance to the prosecution,¹¹⁷ should have made feasible a larger number of compromises. Further, the rigid

¹¹⁴ Telephone Interview with Wendy Lehmann, Head of Appellate Div., Monroe County Dist. Attorney's Office, N.Y. (Dec. 9, 2003).

¹¹⁵ 516 U.S. 137 (1995); see also *supra* Section II.A.

¹¹⁶ Currently only fifteen states employ sentencing guidelines. Of these, only nine use presumptive (or mandatory) guidelines. See Pfaff, *supra* note 9, at 7.

¹¹⁷ Fed. R. Crim. P. 35.

structure of the federal sentencing guidelines cannot explain the dearth of settlements going forward after the Supreme Court's decision in *United States v. Booker* holding those guidelines as merely advisory.¹¹⁸ This means that, unless Congress intervenes, judges may be able to implement compromise sentences arising out of habeas settlements even if they do not conform to the sentencing guidelines. But since my goal here is to explain the historical paucity of habeas settlements, I reserve discussion of *Booker* until the discussion on recommended policy reforms, Section III.C.

The final—though important—explanation for the low prevalence of habeas settlements is that few state courts and no federal courts have the power to amend a sentence after sentencing. Therefore, to implement a habeas settlement, the government attorney must concede a prisoner's habeas claim in return for the prisoner agreeing to plead guilty to another crime. (Recall the *Flud* and *Everett* cases from Section II.A.) The difficulty with this strategy is that conceding a habeas claim requires the government attorney—often the prosecutor on the initial charge—to admit error by either the police or himself. The former concession may jeopardize cooperation between police and prosecutors, which is too high a cost for a settlement. The latter concession may be blocked by pride, often a very powerful human emotion.¹¹⁹ This concern has been expressed in interviews with more than one public attorney and may underlie other government attorneys' assertions that they do not negotiate habeas settlements because no prisoners have valid habeas claims.¹²⁰

¹¹⁸ 125 S. Ct. 738, 756–57 (2005) (Breyer, J.).

¹¹⁹ Another possible explanation for the dearth of habeas settlements is that the compromise sentence for which the parties litigating a habeas petition would negotiate is often less than the time already served by the prisoner. Therefore, the only chance the government has to keep the prisoner incarcerated in these cases is to defeat the habeas petition in court. This explanation fails, however, because the premise is untenable. From the government's perspective, the worst case scenario from litigation is that the prisoner is set free, serving zero additional days. If the government has a non-zero probability of prevailing against the prisoner's habeas petition, the lowest the government will settle for is a positive additional sentence. In other words, the compromise sentence would always be greater than the time served. See Telephone Interview with Gary Weinberger, *supra* note 111.

¹²⁰ Telephone Interview with Wendy Lehmann, *supra* note 114; Telephone Interview with Randolph P. Murrell, Fed. Pub. Defender, Tallahassee, Fla. (Dec. 5, 2003).

2. *Why There Is Bunching in Settlements of Section 2255 Cases*

The second puzzle concerning habeas settlements is why they are more uniformly distributed over time at the state level than at the federal level. As noted above, most federal agreements come on the heels of Supreme Court opinions that significantly reinterpret federal criminal laws or announce important new criminal procedural rights. One explanation is that, although state prisoners are more successful in state court than in federal court, they also are more successful in federal court than federal prisoners. Their greater success suggests more room for compromise and the continuous flow of settlements over time. The reason state prisoners are more successful than federal prisoners in federal court may be that federal courts commit fewer errors in criminal cases than state courts, at least with respect to errors not caught by courts of appeal. The only significant errors that federal courts make are those that are the subject of landmark Supreme Court opinions. Thus, settlements involving federal prisoners are bunched after these decisions. The flaw with this story, other than the fact that habeas grant rates are poor indicators of error rates at trial and sentencing,¹²¹ is that there are still a number of federal prisoner petitions that succeed on claims unrelated to those landmark rulings. It is reasonable to ask why the vast majority of these are not settled.

3. *Conclusion*

My investigation reveals that sentencing guidelines, which reduce the scope of feasible sentencing compromises, and the inability of courts to revise sentences, which forces prosecutors to admit error in order to implement settlement, might explain some of the dearth in habeas settlements. There remain a significant number of cases, however, that should be settled but are not. The fact that habeas waivers frequently can be found in federal pleas and that habeas settlements are struck in a wide array—although not a large quantity—of habeas cases, suggests that in many cases where habeas settlement is possible but missing, defense attorneys and prosecutors simply failed to imagine that habeas claims could be

¹²¹ For example, it could be that federal direct appeals are better at catching errors than state direct appeals. See, e.g., Liebman, *supra* note 95, at 6.

settled for a sentence reduction or other such benefit to the prisoner. Interviews confirm this. Numerous defenders have suggested to me that parties often do not think to negotiate an out-of-court resolution of habeas claims. In fact, many defenders and prosecutors found the idea of settling habeas claims quite novel—and potentially useful.¹²² This suggests that there is considerable scope for settling habeas claims that currently are litigated fully.

III. POLICY RECOMMENDATIONS

In this Part, I turn from a positive analysis of patterns in the use of habeas settlements to a normative endorsement of these settlements, subject to certain caveats. This is a three-step process. First, I argue that habeas settlements are no more suspect, and thus no less enforceable, under the Constitution than are plea bargains, appellate waivers, and habeas waivers. Second, I demonstrate that, in contrast to habeas waivers, habeas settlements can significantly benefit both prisoners and government attorneys. Finally, in order to maximize the value from habeas settlements, I urge legislatures to actively promote the resolution of habeas claims without full litigation and to remove certain legal impediments to the implementation of habeas settlements. In addition, courts should screen settlements to ensure that they protect the interests of prisoners.

A. The Right to Settle and the Constitutionality of Habeas Claims

To eliminate any confusion about exactly what I am claiming, the reader should note that I take as given the proposition that plea bargains, if properly policed, are both constitutional and normatively desirable from a public policy perspective. These issues have been thoroughly debated in numerous venues and I have nothing unique to contribute to that discussion.¹²³ I also take as

¹²² See, e.g., Telephone Interview with Alexander Bunin, Pub. Defender, N.D.N.Y. and D. Vt. (Dec. 5, 2003); Telephone Interview with Madeline Cohen, Pub. Defender, D. Colo. and D. Wyo. (Dec. 3, 2003); Telephone Interview with Michael Tanaka, *supra* note 77.

¹²³ See, e.g., Frank Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1978 (1992); Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1 (1992); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548 (2004); William J. Stuntz, *Waiving Rights in*

given the constitutionality of appellate waivers and habeas waivers. Although appellate waivers and habeas waivers—again, if properly policed—have not been as widely debated as plea bargains, the vast majority of courts that have considered their constitutionality have found them unobjectionable.¹²⁴ I am comfortable with these assumptions in part because I agree with them, and in part because I do not think it is likely that an additional argument against these waivers would change courts' opinions of their validity.

From these caveats I proceed, first, to make what should be a non-controversial claim: Prisoners have the right to settle their habeas claims. Individuals certainly have the right to settle civil suits, and habeas petitions are merely a species of civil actions. In particular, individuals have the right to settle suits concerning the conditions of their imprisonment, including Section 1983 and *Bivens* actions alleging violations of their civil rights in prison.¹²⁵ These actions are closely related in an aesthetic sense, if not a strictly legal one, to habeas claims. Individuals also have the right to settle criminal cases, which from a formal legal perspective are very closely related to habeas actions, even if not governed by the same procedural rules. Habeas actions are challenges to the procedure followed in prosecuting a criminal case. It is true that habeas settlements may potentially waive a larger set of errors in the criminal process than plea bargains. The latter waive all but a small set of pre-trial rights. Habeas settlements, however, can theoretically waive any error, even if unwaivable in a plea bargain—such as ineffective assistance of counsel relating to a plea agreement—or error that postdates a plea. Indeed, a habeas settlement can involve rights that cannot be the subject of either appellate waivers or habeas waivers. An important feature of habeas settlements, however, makes them “safer” than plea bargains, appellate waivers, and habeas waivers; namely, habeas settlements arise only after an error in the criminal process has allegedly occurred, whereas plea bargains and the other waivers may occur before such error is de-

Criminal Procedure, 75 Va. L. Rev. 761, 831–34 (1989); see also Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2015–32 (2000).

¹²⁴ See *supra* Section I.B.

¹²⁵ See, e.g., *Jessup v. Luther*, 277 F.3d 926, 927 (7th Cir. 2002); *Young v. Quinlan*, 960 F.2d 351, 361–65 (3d Cir. 1992).

tected. The additional information based on this error, if available to prisoners, makes settlements less likely than plea bargains or waivers to corrupt the fairness or accuracy of the trial process.

My second claim is that habeas settlements do not offend the U.S. Constitution. In order to be more precise with this statement, it is necessary to identify the provisions that settlements might violate. The most likely candidate is the Due Process Clause.¹²⁶ The legal theory might be that habeas settlements undermine the sanctity of the criminal process, and that habeas litigation is necessary to ensure that the process was and continues to be without prejudicial error.¹²⁷ Settlement, by itself, does not hinder this result. Such a settlement may include a reduction in sentence that accounts for the likely result if the habeas litigation were to run its course. Moreover, settlement does not diminish the deterrence effect of habeas litigation—if there were some—any more than settlement of medical malpractice suits undermines the deterrence effect of medical malpractice law. Perhaps the argument could be made that habeas settlements allow the state to “bribe” defendants for cutting corners in the criminal process. But that is exactly what plea bargains do as well. Habeas settlements are not qualitatively different from plea bargains on this dimension.

A second constitutional provision one may be concerned that habeas settlements violate is the Equal Protection Clause. The theory would be akin to that which renders the trading of voting rights unconstitutional, that is, individuals who are poor might feel greater pressure to trade their voting rights—to feed themselves or pay for medical care—than those who are rich. Therefore, rich people may be in a better position to exercise their voting rights.¹²⁸ The flaw in the analogy between voting rights and habeas rights is that the Constitution demands—or has been interpreted to demand—that all individuals have equal capacity to exercise their

¹²⁶ U.S. Const. amend. V, *id.* at amend. XIV, § 1.

¹²⁷ A separate theory is that such settlements undermine the sanctity of the habeas litigation process. But that process is not its own master. Rather, it serves to clean up after the criminal process. Even if one were concerned with the habeas litigation process, it is unclear why habeas settlements undermine that process any more than settlements of contract disputes undermine the process by which courts police contract violations.

¹²⁸ See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

voting rights.¹²⁹ There is no such demand with respect to habeas rights. True, the Constitution indicates that Congress shall not "suspend" the "Privilege of the Writ of Habeas Corpus," but that is a prohibition on complete denial of such rights, not a ban on regulation.¹³⁰ Indeed, the Court has sanctioned implicitly, if not explicitly, rather severe regulations of that right in Antiterrorism and Effective Death Penalty Act ("AEDPA").¹³¹ This statute treats state prisoners differently than federal prisoners and capital prisoners differently than non-capital prisoners.¹³² Another distinction between trading voting rights and settling habeas claims is that voting rights are exchanged for money, whereas a habeas settlement involves the exchange of a habeas claim for a shorter sentence. Thus, a habeas settlement is closer to the exercise of the habeas right than a sale of one's vote is to the exercise of that vote. Moreover, any variation in the effect habeas settlements have on different prisoners is a function not of the underlying characteristics of those prisoners, but of the differential value of those prisoners' rights. It may be a violation of the Equal Protection Clause to treat differently two individuals who are equal under the law, but prisoners who receive different settlements are not equal under the law. A prisoner with a better claim will receive a better deal than someone with a weaker claim. Finally, if habeas settlements violate the Equal Protection Clause, surely plea bargains, appellate waivers, and habeas waivers do as well, which would violate the basic assumptions of my analysis.

B. Habeas Settlements Promote Public Policy

Assume, for the sake of argument, that legal obstacles to habeas settlements are removed and that parties to habeas litigation ac-

¹²⁹ See *id.* at 667–68; *United States v. Classic*, 313 U.S. 299, 314–15 (1941).

¹³⁰ U.S. Const. art. I, § 9, cl. 2.

¹³¹ Pub. L. No. 104–132, 110 Stat. 1214 (1996) (codified in scattered sections of Titles 8, 18, and 28 of the U.S. Code).

¹³² Not inconsistent with this view is the argument that, while there is only one Equal Protection Clause, restrictions on voting rights are treated to more exacting scrutiny than restrictions on other rights. Justices Black and Harlan suggested as much in their respective dissents in *Harper*: In their view, the Court was not applying the standard rational basis test, but relying on the fact that electoral processes—and by extension voting rights—are “‘precious’ and ‘fundamental.’” *Harper*, 383 U.S. at 683 (Harlan, J., dissenting) (quoting *Harper*, 383 U.S. at 670); *id.* at 673–77 (Black, J., dissenting).

tively pursue settlement. The resulting habeas agreements would promote the welfare of prisoners by guaranteeing them a reduction in sentence proportional to that which the latter might expect from vindication of their collateral review rights. The best illustrations of how valuable such a guarantee might be are the two cases from the Third Circuit, recounted in Section II.A, where prisoners were serving life sentences for first-degree murder. After refusing offers to settle their habeas petitions, one of the prisoners won, was released, and is now seeking civil damages. The other, however, lost and remains behind bars. It is true that some prisoners would prefer to take such a gamble, but surely there are others—perhaps a majority—that would rather take a guaranteed shorter sentence than risk a lifetime in jail.

Settlement would save government attorneys the time and expense of habeas litigation. These cost reductions are significant because the cases identified in Section II.C.1 as reasonable candidates for settlement are also the most expensive cases to litigate. All of these cases are ones where the prisoner has been appointed habeas counsel, who is typically paid by the government. The appointment of habeas counsel also raises costs because claims made by counsel are harder to defend, holding quality of the claims constant, and because appointment of counsel indicates that the claims in a petition are of higher quality. In those cases where the petition wins the vote of at least one judge along the way to final adjudication, the costs can be particularly large because litigation can be drawn out. Each of these arguments about costs is particularly compelling in the case of prisoners serving capital sentences. Estimates from more than ten years ago suggest that the cost of state and federal habeas review is between \$3.5 and \$4.5 million per death row inmate.¹³³ The cost is surely even higher today.

The policy objections to habeas settlements fall into two classes: those concerning the interests of the parties to the deal and those concerning the interests of those not party to the deal (that is, externalities). The first class of objections can be broken down into two further inquiries: Are the parties to the deal no worse off than

¹³³ Charles L. Lindner, *Cost of Death: A Billion Dollars and Counting*, L.A. Times, Aug. 29, 1993, at M1; see also Donald P. Lay, *The Writ of Habeas Corpus: A Complex Procedure for a Simple Process*, 77 Minn. L. Rev. 1015, 1016–17 & n.9 (1993).

if they had not struck a deal? And if they are no worse off, how are the rents of the deal allocated among the defendant/prisoner and the government?

I believe the concern that motivates the first inquiry—the consent of the prisoner—can be addressed by policy reforms requiring courts to police habeas settlements to ensure that the exchanges are knowing and voluntary. This in turn demands, among other things, that the prisoner receive the advice of habeas counsel.¹³⁴ While one might be concerned about the quality of this counsel, no one suggests that habeas counsel, when appointed, perform worse than trial counsel. Therefore, to the extent that the criminal justice system promotes plea bargains, it should be willing to promote habeas bargains.¹³⁵

The concern underlying the second inquiry—the distribution of gains from trade—is difficult to brush aside. Habeas bargains are between a monopolist (the government) and a competitive entity (the prisoner). The prisoner who seeks insurance against the risk of habeas litigation, in the form of a habeas settlement, must purchase that insurance from the government. Yet the government, when it seeks relief from the expense of litigation, again in the form of a habeas settlement, can turn to any of a large number of prisoners. This imbalance implies that any rents to a habeas settlement will accrue to the government. By itself, this complaint does not require that courts invalidate habeas settlements. So long as they are voluntary, prisoners will not be left worse off by such agreements. Ordinarily, the concern with monopoly pricing is that it precludes consumers who are willing to pay more than marginal cost from purchasing a product. But this deadweight loss is something that should not trouble people who are concerned about habeas settlements because it simply means there will be fewer habeas settlements. Moreover, the government is more like a discriminating monopolist than an ordinary monopolist. Where the government

¹³⁴ See *infra* Section III.C.

¹³⁵ Courts also may be encouraged to vet the substance of settlements to ensure that they are “fair.” This would be similar to the logic behind why courts apply greater scrutiny to duty of loyalty violations than to duty of care violations in corporate law. The reason for the difference in treatment is that, with duty of loyalty violations, the board of directors of the corporation has a conflict of interest that impedes its ability adequately to represent the corporate shareholders.

sees that a party cannot “afford” the price—here a smaller reduction in sentence—that the government is demanding for insurance against habeas litigation risk, the government can lower the price of that insurance. The reason is that it has a good deal of information on the criminal history, medical condition, and age of the prisoners with which it negotiates. Finally, habeas settlements are qualitatively no worse on this score than plea bargains, which extract all rents from defendants when they want to avoid a trial.

Habeas settlements arguably have important externalities—the second class of policy objections. Cases that are settled have no opportunity to establish new rules of criminal procedure, which in turn are necessary to ensure that the criminal justice system treats defendants fairly. Moreover, it could be argued that courts must publicly punish the government for procedural errors lest the government not be deterred from ignoring or even manipulating the criminal process to the disadvantage of defendants. Finally, public policing of criminal procedure by the courts is necessary to prevent erosion of public confidence in and therefore support for the criminal justice system.

Although these objections sound plausible, they do not stand up to scrutiny. To begin with, habeas settlements do not meaningfully hinder the creation of new procedural rights. First, *Teague v. Lane* bars the creation of such rights in federal habeas litigation.¹³⁶ Such litigation can only resolve questions about rights to habeas review. Second, the option to settle does not bar litigation. Just as many prisoners go to trial rather than plea bargain, many prisoners with meritorious habeas claims will not settle but instead will litigate. These prisoners will provide courts with many opportunities to establish new habeas law. (Nearly one-third as many habeas cases (21,345) were filed by federal prisoners in 2000 as criminal cases (62,152) were filed against defendants in federal district court that year.¹³⁷) Third, legally meaningful cases are unlikely to settle. These are cases where habeas law is not clear and therefore parties are more likely to disagree about what the court will do. And even if

¹³⁶ 489 U.S. 288 (1989); see *supra* note 85.

¹³⁷ For the habeas filing statistics, see *infra* Table 6 in Appendix A. For the criminal case statistic, see U.S. Dep’t of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics 2001*, at 402 tbl.5.9 (Ann L. Pastore & Kathleen Maguire eds., 2002) [hereinafter *Sourcebook 2001*].

legally significant cases are settled, what is the purpose of habeas law if not to correct errors in the criminal process that improperly extend a prisoner's sentence? If habeas settlements can achieve the same end without changing the law, are they still objectionable on the grounds that they do not facilitate changes in habeas law?

Concerns that settlements erode deterrence of procedural errors are similarly overblown. First, there is little evidence that suggests government officials are more likely to implement legal reforms if they lose a court judgment than if they settle a complaint. Although the absence of such data may be a product of the secrecy that typically surrounds settlements, there are other problems with the deterrence objection. If judgments deter errors in the criminal process, one would expect that rates at which petitions are filed and are granted would decline over time. There is no evidence of such a trend.¹³⁸ Moreover, because courts cannot announce new rules of criminal procedure in most habeas cases after *Teague*, deterrence depends on the frequency with which courts grant habeas petitions. Since the number of settlements will exceed the number of cases where courts grant habeas petitions, however, settlements may actually promote deterrence.

Finally, there is no empirical data suggesting that confidence in the criminal justice system is a function of how robust habeas law is. To the contrary, any observer paying even a modicum of attention to academic discussions of AEDPA¹³⁹ would conclude that the system is broken in the absence of habeas settlements. If anything, people pay attention to criminal justice results and not the process that generates those results. If habeas settlements lead to reductions in sentences in cases where the criminal process was perverted, they will have the same effect on public confidence as judgments. Would it have made any difference to public perception regarding insider trading law that Martha Stewart was convicted by a jury rather than pleading guilty? Most of the lay public likely

¹³⁸ See *infra* Table 6 in Appendix A.

¹³⁹ See, e.g., James S. Liebman, An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases, 67 *Brook. L. Rev.* 411, 425-27 (2001) (noting that AEDPA has complicated the review of death sentences and suggesting that the process be streamlined); Jordan Steiker, Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism, 1998 *U. Chi. Legal F.* 315, 332 (1998) (observing that AEDPA's attempt at shortening the timeframe for post-conviction appeals has been ineffective).

does not even know that Ms. Stewart was indicted for obstruction of justice, not for violating insider trading laws.¹⁴⁰

C. Recommended Policy Reforms

In light of the gains to trade from habeas settlements, the federal government and the states should act to promote habeas settlements. This requires, first, that training programs for government attorneys and public defenders at both the state and federal levels begin including practicums on bargaining over habeas rights. These may be modeled after those on plea bargaining. In addition, to overcome the inertia of tradition, judges presiding over habeas proceedings should continually encourage parties to resolve their differences out of court. This is not unheard of: One federal public defender from California recounted how a magistrate judge strongly urged the parties to a habeas case involving a three-strike sentence to settle their dispute without his intervention.¹⁴¹ Although the state's attorney ultimately balked, other government attorneys will likely pay heed to judges, who are the ultimate arbiters of their defenses.

Although exhortation may promote settlement talks, there remain important obstacles to implementing a settlement agreement. Until recently, mandatory sentencing guidelines—found at the federal level and in nine states¹⁴²—rendered a number of sentencing compromises illegal. Even when the guidelines do not bar a settlement, the current process for implementing a settlement may derail many compromises. Neither federal nor state rules of procedure authorize judges to amend sentences after habeas settlements. Therefore, in order to implement a sentencing compromise, the government attorney must offer to concede a prisoner's habeas claims on the condition that the prisoner pleads guilty to another crime with the compromise sentence. Because this concession may involve admitting that the police or prosecutor erred, it may be effectively barred either by the need to maintain good relations between the government attorney's office and the police or prosecutor, or by pride.

¹⁴⁰ See *United States v. Stewart*, 323 F. Supp. 2d 606, 609–10 (S.D.N.Y. 2004).

¹⁴¹ Telephone Interview with Michael Tanaka, *supra* note 77.

¹⁴² See Pfaff, *supra* note 9, at 7.

To overcome these structural obstacles to settlement, Congress should amend Federal Rule of Criminal Procedure 35 to permit courts, upon the government's motion, to amend a prisoner's sentence if she drops her habeas claims, regardless of whether the modified sentence was within the statutory or guideline range for the prisoner's offense.¹⁴³ Currently, Rule 35 requires that the prisoner provide substantial assistance to prosecutors in another case before the court may reduce her sentence. Moreover, any modification in her sentence must comport with the policy goals of the sentencing guidelines. Possible language for the proposed amendments to Rule 35 is presented in Appendix B. State legislatures should enact analogous changes in their codes of criminal procedure.¹⁴⁴

Because the constitutional and public policy arguments in favor of habeas settlements depend on the settlements being knowingly and voluntarily made, legislatures and courts should take two precautions to ensure that habeas settlements are fair to defendants.¹⁴⁵ First, state and federal legislatures should establish a more formal process for court review of habeas bargains. Already the Federal

¹⁴³ Congress would need to enact these changes to Rule 35. The Rules Enabling Act authorizes the Supreme Court to revise the Federal Rules of Criminal Procedure so long as the revision does not abridge, enlarge, or modify any substantive rights. See 28 U.S.C. § 2072(b) (2000). While the proposed modification to Rule 35 permitting judges to amend sentences may not affect substantive rights, a change that permits such amendments notwithstanding the federal sentencing guidelines may affect substantive rights and require Congressional sanction. Although *United States v. Booker* renders the federal guidelines merely advisory, Congress can make them mandatory for downward revisions of sentences without running afoul of *Blakely v. Washington*. *Booker*, 125 S. Ct. at 775–76 (Stevens, J., dissenting). If Congress does so, the proposed modification of Rule 35 would affect substantive rights under the guidelines because it would require judges to violate those hypothetical guidelines. In any case, the proposal to modify Rule 35 to permit amendments to sentences notwithstanding statutory minimums certainly affects substantive rights and requires Congress's imprimatur.

¹⁴⁴ Although this reform appears to displace the sentencing guidelines, it is a narrow exception that does not undermine their purpose. Those guidelines are intended to reduce arbitrary variation in sentencing. Sentence reductions due to successful habeas claims are not arbitrary, even if discounted by the probability of success.

¹⁴⁵ For a more general discussion of the procedures that courts ought to require of litigants who employ private dispute resolution mechanisms, especially in the case of disparities in bargaining power, see Judith Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 665–66 (2005) (arguing against blanket acceptance of contract principles when courts scrutinize, for example, settlements).

Rules of Criminal Procedure require that Rule 11 colloquies discuss any habeas waivers in federal plea agreements.¹⁴⁶ There is no formal procedure, however, at the federal or state level for Rule 11-type colloquies for habeas settlements with prisoners. This is a concern because a significant percentage of the habeas settlements revealed by interviews with prosecutors and public defenders are purely oral contracts. If these are challenged, the outcome will be highly uncertain in the absence of a paper trail. As a result, courts may ultimately choose not to enforce such agreements, robbing prisoners of the benefits of their bargain with the government. This can be avoided by amending Rule 35 to require courts to screen habeas settlements along the lines that they screen plea bargains under Rule 11. Plausible language for such an amendment also can be found in Appendix B.

Second, courts should permit prisoners to challenge the validity of their settlements on the grounds that either the bargain was not voluntarily or knowingly entered into or they received ineffective assistance of counsel with respect to the settlement. Indeed, courts that have addressed the validity of habeas waivers in plea agreements have carved out exactly these exceptions to the enforcement of such waivers.¹⁴⁷ These exceptions are unlikely to lower the value of habeas settlements to government attorneys so long as courts conduct proper Rule 11-type colloquies at the time a habeas bargain is struck. Such colloquies would render meritless most ex post voluntary-and-knowing challenges to habeas bargains in the same way that Rule 11 screening of guilty pleas reduces the number of habeas filings (and the success rate of these filings).

The Supreme Court's recent decisions in *Blakely v. Washington*¹⁴⁸ and *United States v. Booker*¹⁴⁹ affect the urgency of these reforms in two ways. First, they reduce the need to modify Rule 35 to exempt habeas settlements from the constraints of sentencing guidelines in order to promote such settlements. Second, these cases increase the urgency of reforms to ensure that habeas settlements are fair to prisoners because of the likely rise in habeas claims.

¹⁴⁶ Fed. R. Crim. P. 11(b)(1)(N).

¹⁴⁷ See *supra* note 20.

¹⁴⁸ 542 U.S. 296, 303–04 (2004).

¹⁴⁹ 125 S. Ct. 738, 746 (2005) (Stevens, J.).

Blakely held that the Sixth Amendment right to a jury bars legislatures from requiring judges to consider facts—other than a prior conviction or facts admitted by the defendant—to impose a sentence beyond the statutory range authorized by *the facts submitted to the jury*.¹⁵⁰ Because *Blakely* involved a state statute, the Supreme Court remanded to allow the state to address the Court's concerns.¹⁵¹ *Booker*, however, involved the federal sentencing guidelines. The Court not only applied *Blakely*,¹⁵² but severed those provisions of the federal guidelines that made them mandatory.¹⁵³ As a result, the federal guidelines are now merely advisory. As such, they do not bar the sorts of sentencing concessions that are necessary for many habeas settlements.

This outcome suggests that one of the three serious hurdles to habeas settlements has been removed. Settlements may proliferate even without modification of Rule 35 to exempt habeas settlements from the guidelines. This outcome also suggests that a large number of prisoners may add *Blakely/Booker* claims to their habeas petitions. The resulting surge in claims may overwhelm federal prosecutors and encourage them to settle rather than litigate these claims, just as they did after *Bailey v. United States*.¹⁵⁴ Therefore, it becomes even more imperative that courts protect prisoners from unfair settlements by employing Rule 11-type colloquies to ensure that habeas settlements are knowingly and voluntarily entered and by permitting prisoners to challenge settlements negotiated without effective assistance of counsel.

That said, the implications of *Blakely* and *Booker* for the reforms proposed in this Article should not be overstated. First, Congress may respond to *Booker* by making the guidelines mandatory for cases where the sentence imposed lies below the maximum authorized by statute given the facts presented to the jury. This change would not violate *Blakely*, which only applies to upward departures.¹⁵⁵ It would, however, bar many habeas settlements, which require sentence reductions. Alternatively, Congress could

¹⁵⁰ *Blakely*, 542 U.S. at 303.

¹⁵¹ *Id.* at 313–14.

¹⁵² *Booker*, 125 S. Ct. at 749–50 (Stevens, J.).

¹⁵³ *Id.* at 756–57 (Breyer, J.).

¹⁵⁴ 516 U.S. 137 (1995); see *supra* Section II.A.

¹⁵⁵ *Booker*, 125 S.Ct. at 775 (Stevens, J., dissenting).

require that prosecutors simply submit to the jury all relevant facts required to apply the federal guidelines and then make the guidelines mandatory.¹⁵⁶ This would block the same habeas settlements barred by the federal guidelines before *Booker*. Second, even if the guidelines remain advisory, it is unclear whether judges will depart from them. A recent study that compared sentencing in states with presumptive, with voluntary, and with no guidelines, found that even voluntary guidelines substantially reduce the variance of sentence lengths.¹⁵⁷ In other words, judges may balk at sentencing compromises that deviate from the guidelines even when those guidelines are merely advisory. One reason could be that judges feel that conformity with the guidelines provides a safe harbor from reversal, and that safe harbor is worth more than facilitating compromise between the government and a prisoner. Thus, if judges continue to adhere to voluntary guidelines, it may be necessary to revise Rule 35 to explicitly exempt such settlements from the guideline restrictions. Third, it is unlikely that *Blakely* or *Booker* will be the basis of many successful habeas claims and, therefore, unlikely that these cases will encourage a large number of additional habeas settlements. Both cases are based on *Apprendi v. New Jersey* and eight federal appeals courts have held that *Apprendi* is not retroactive to cases that have completed direct appeal.¹⁵⁸ In addition, already three appellate courts have directly held that *Booker* does not apply retroactively to cases on collateral review.¹⁵⁹ To summarize, although *Blakely* and *Booker* may encourage somewhat higher habeas settlement rates and thus bolster the case for adopting reforms to police settlements sooner rather than later, they do not go so far as to eliminate the need to clearly remove sentencing guidelines as an obstacle to settlement in the first place.

¹⁵⁶ *Id.* at 774–75.

¹⁵⁷ See Pfaff, *supra* note 9, at 3–4 (finding that for violent and property crimes, voluntary guidelines reduce the variance of sentence lengths by 35% and 21%, respectively, while mandatory guidelines reduce the variance of sentence lengths by 57% and 54%, respectively).

¹⁵⁸ See, e.g., *Coleman v. United States*, 329 F.3d 77, 90 (2d Cir. 2003); see also *id.* at 82 (listing the other seven appellate courts reaching a similar conclusion).

¹⁵⁹ See *Humphress v. United States*, 398 F.3d 855, 860 (6th Cir. 2005); see also *Green v. United States*, 397 F.3d 101, 103 (2d Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005).

CONCLUSION

My discussion of the policy merits of habeas settlements in Section III.B focused on the welfare of the parties to the settlement. There are, however, two equally important beneficiaries that I failed to mention. One is the court system. Post-conviction litigation has exploded in the last few decades. For example, the number of federal habeas petitions tripled between 1980 and 2000, when courts docketed more than 30,000 cases.¹⁶⁰ I estimate that a policy of promoting the settlement of post-conviction review motions could reduce habeas litigation by one-third. I arrive at this number by estimating the share of habeas petitions that are good candidates for settlement, that is, where the petitioner makes credible claims that warrant the appointment of habeas counsel or where the habeas petition receives one or more votes to grant during the course of litigation. These two groups of petitions—which account for at least thirty to thirty-two percent of all non-capital cases and all capital cases—are natural candidates for settlement because the cost of litigation is sufficiently high and the cost of negotiation is sufficiently low.¹⁶¹ Importantly, because these two groups of cases are among the more complicated and resource-intensive cases to litigate, mere case counts underestimate the full benefit to the courts.

The other—and perhaps more important—beneficiaries may be prisoners not directly involved in settlements. The caseload relief offered by habeas settlements would reduce the pressure courts and legislatures feel to adopt procedural rules to expedite the handling of habeas cases, rules which may lead to the rejection of petitions that are otherwise meritorious simply because prisoners have failed to follow procedure. A reduced caseload would also free up courts to spend time on habeas cases that do not settle. Significantly, these cases probably would include petitions involving novel habeas claims. Such claims are poor candidates for settlement because parties are less likely to agree on the probable outcome of the claims. In this manner, and perhaps counter-

¹⁶⁰ See *infra* Table 6 in Appendix A.

¹⁶¹ True, not all of these cases ultimately would settle, but the fact that 90% to 95% of criminal cases settle suggests that a very high proportion of these habeas cases also would settle. See *supra* Table 3; see *supra* notes 102–03, 108, and accompanying text.

intuitively, habeas settlement may actually improve the quality of habeas case law rather than replace it.

APPENDIX A: STATISTICAL APPENDIX ON HABEAS LITIGATION

This Appendix presents statistics on the demand for, prevalence of, and outcomes in habeas litigation. These numbers suggest three conclusions relevant to habeas settlements. First, the small subset of the population that is incarcerated long enough to benefit from habeas relief generates most of the habeas litigation. Second, most convicts plead guilty but convicts who pleaded guilty are only responsible for filing a small percentage of the overall number of habeas petitions. Third, the probability of obtaining federal habeas relief is certainly small, but not as small as suggested in prior studies. These studies generally ignore the fact that state prisoners have two bites at the PCR apple, once in state court and once in federal court. The one exception to this conclusion concerns federal habeas petitions by convicts who pleaded guilty. Their probability of success is basically zero.

*A. Few Convicts Have Sentences Long Enough
to Benefit from Collateral Review*

My empirical survey of habeas litigation begins with data on the number of individuals who possess state or federal PCR rights. Table 4 presents data from 1980 to 2000 on the number of individuals on probation, in jail, in prison, and on parole.¹⁶² In 1998, for example, roughly 3.7 million people were on probation, 590,000 were in jail, 1.2 million were in prison, and 700,000 were on parole.¹⁶³ This total is a rough estimate of the population eligible for collateral review. Omitted are individuals who have completed their sentences, but are eligible to attack their convictions due to the collateral consequences on future convictions because of habitual offender sentencing rules.

¹⁶² See Sourcebook 2001, *supra* note 137, at 478 tbl.6.1.

¹⁶³ *Id.*

Table 4. Population Under Jurisdiction of State or Federal Correction

Year	Probation	Jail	Prison	Parole	Total
1980	1,118,097	182,288	319,598	220,438	1,840,400
1981	1,225,934	195,085	360,029	225,539	2,006,600
1982	1,357,264	207,853	402,914	224,604	2,192,600
1983	1,582,947	221,815	423,898	246,440	2,475,100
1984	1,740,948	233,018	448,264	266,992	2,689,200
1985	1,968,712	254,986	487,593	300,203	3,011,500
1986	2,114,621	272,735	526,436	325,638	3,239,400
1987	2,247,158	294,092	562,814	355,505	3,459,600
1988	2,356,483	341,893	607,766	407,977	3,714,100
1989	2,522,125	393,303	683,367	456,803	4,055,600
1990	2,670,234	405,320	743,382	531,407	4,350,300
1991	2,728,472	424,129	792,535	590,442	4,535,600
1992	2,811,611	441,781	850,566	658,601	4,762,600
1993	2,903,061	455,500	909,381	676,100	4,944,000
1994	2,981,022	479,800	990,147	690,371	5,141,300
1995	3,077,861	507,044	1,078,542	679,421	5,342,900
1996	3,164,996	518,492	1,127,528	679,733	5,490,700
1997	3,296,513	567,079	1,176,564	694,787	5,734,900
1998	3,670,441	592,462	1,224,469	696,385	6,134,200
1999	3,779,922	605,943	1,287,172	714,457	6,349,800
2000	3,826,209	621,149	1,316,333	724,486	6,445,600

With few exceptions, only incarcerated convicts file PCR motions.¹⁶⁴ Convicts on probation or release have little incentive to file a habeas claim since they are not imprisoned. Pre-trial detainees will almost always obtain a trial before they will obtain PCR relief because state and federal speedy trial statutes generally mandate that trials commence in a shorter time span than it usually takes for PCR claims to be heard.¹⁶⁵

¹⁶⁴ Paul H. Robinson, U.S. Dep't of Justice, *An Empirical Study of Habeas Corpus Review of State Court Judgments* 9 (1979).

¹⁶⁵ 18 U.S.C. § 3161 (2000); Cal. Penal Code § 686 (West 1985); N.Y. Crim. Proc. Law § 30.30 (McKinney 2003); see also Roger A. Hanson & Henry W.K. Daley, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 12 (Bureau of Justice Statistics Discussion Paper NCJ-155504, 1995); John Scalia, U.S. Dep't of Justice, *Prisoner Petitions in the Federal Courts, 1980-1996*, at 7 tbl.7 (1997).

The criminal process takes time. The median time for processing convicts in federal courts in fiscal year 2001 was 11.1 months for jury trials and six months for guilty pleas.¹⁶⁶ Median time for processing convicts in state courts in 1998 was 379 days for jury trials and 216 days for guilty pleas.¹⁶⁷ This delay serves to further reduce the population that has habeas rights valuable enough to exercise because defendants spend much of this time in jail, and this time counts against any sentence ultimately imposed. Table 5 provides data from 1980 to 2000 on the number of prisoners with sentences longer than one year, broken down by those in the federal system and the state system.¹⁶⁸ In 1998, for example, there were roughly 104,000 inmates in federal prisons and 1.14 million inmates in state prisons serving sentences longer than one year.¹⁶⁹

¹⁶⁶ Sourcebook 2001, *supra* note 137, at 442 tbl.5.41.

¹⁶⁷ *Id.* at 447 tbl.5.48.

¹⁶⁸ Data on stock and flow of incarcerated population data are from Bureau of Justice Statistics ("BJS"), National Prisoner Statistics data series ("NPS-1"), George Hill & Paige Harrison, *Sentenced Prisoners Under State or Federal Jurisdiction Sentenced to More Than One Year* (Oct. 26, 2000), available at <http://www.ojp.usdoj.gov/bjs/dtdata.htm#ncrp>. The figures for 1990 to 1992 and 1999 to 2000 are projections from prior years using the annual growth rate imputed from the prison population column in Table 4. Importantly, these figures do not include convicts with life or capital sentences, though these convicts are a very small fraction of the total.

Estimates for the share of prisoners with sentences greater than one who remained in prison for longer than four and five years are based on a data extraction from National Correction Reporting Program ("NCRP") data. The extract was performed by John Pfaff. Information on the NCRP data is available in Pfaff, *supra* note 9, at 53. Shares incarcerated for more than four (three) years are calculated by taking the number of individuals released in years $t+1$ to $t+4$ ($t+3$) who were admitted in year t , summing them and the subtotal from the total number of admissions in year t , and dividing by the total number of admissions in year t . Since data on releases by year of admission are only available for 1984 to 1998, data on shares are only available for 1984 to 1993 for greater-than-four year incarceration and 1984 to 1992 for greater-than-five year incarceration. One problem with the NCRP data is that they only contain data on states that voluntarily report their prison populations on the NCRP questionnaire. Many states do not. (This problem does not afflict the incarceration data from the BJS.) This gap in the NCRP data means the numbers on the share incarcerated more than four and five years implicitly assume that states that report to the NCRP are representative of states that do not.

¹⁶⁹ *Id.* The state and federal breakdown is relevant insofar as state prisoners have both state and federal PCR rights, whereas federal prisoners have only federal PCR rights. To some extent, such a simplistic description overstates the bundle of rights that state prisoners possess relative to federal prisoners. A state prisoner's federal habeas rights are limited by procedural rules that require the prisoner to exhaust state PCR and that accord state judgments a certain respect in federal court. That said,

Table 5. Stock and Flow of Incarcerated Population, by Sentence Length and Actual Time of Incarceration (Excluding Prisoners Serving Life or Capital Sentences), 1978–2000 (1999–2000 Projected)

Year	Sentence length > 1 year (thous.)			Incarceration length (%)			
				> 4 yr.		> 5 yr.	
	Stock			Flow		Flow	Flow
	Fed.	State	Total	Fed.	State	State	State
1980	20.6	295.3	316.0	10.9	131.2		
1981	22.2	331.5	353.7	11.1	149.2		
1982	23.7	371.9	395.5	12.5	164.6		
1983	26.3	393.0	419.3	14.1	173.3		
1984	27.6	415.8	443.4	13.5	166.9	0.22	0.16
1985	32.7	447.9	480.6	15.4	183.1	0.22	0.15
1986	36.5	485.6	522.1	16.1	203.3	0.19	0.12
1987	39.5	521.3	560.8	16.3	225.6	0.19	0.12
1988	42.7	561.0	603.7	15.9	245.3	0.18	0.11
1989	47.2	633.7	680.9	18.4	297.8	0.16	0.08
1990	50.4	689.6	740.0	18.5	323.1	0.13	0.09
1991	56.7	732.9	789.6	20.2	317.2	0.14	0.09
1992	65.7	780.6	846.3	22.2	334.3	0.16	0.07
1993	74.4	857.7	932.1	23.7	318.1	0.16	
1994	79.8	936.9	1,016.7	24.0	321.1		
1995	83.7	1,001.4	1,085.0	24.0	337.5		
1996	88.8	1,048.9	1,137.7	27.3	326.5		
1997	95.0	1,099.3	1,194.3	30.6	334.5		
1998	103.7	1,144.7	1,248.4	34.4	347.3		
1999	109.0	1,203.3	1,312.3	36.1	365.1		
2000	111.5	1,230.6	1,342.0	37.0	373.3		

Table 5 also breaks down prison populations into the stock of individuals in prison each year and the annual flow of individuals into prison. The stock is the sum of the flow in and the flow out. The table shows the flow for state and federal prisons in 1998 was roughly 350,000 and 34,000, respectively. Although there was no statute of limitations on federal habeas claims prior to AEDPA, there were strong rules that limited successive and fragmented pe-

state prisoners likely have greater PCR rights than federal prisoners because federal rules excuse exhaustion if state remedies are inadequate or state judgments are not fully res judicata on federal courts.

titions.¹⁷⁰ Such rules, along with the gradual decay of evidence, likely ensured a steady flow of prisoners with habeas claims into federal court over time that was proportional to the flow of convicts into prisons.¹⁷¹ Of course the time required for direct appeal—one study suggests that this typically takes a year¹⁷²—and the statute of limitations for state and federal PCR claims suggests that the current year's admissions will not affect the number of state petitions filed by state prisoners and federal petitions filed by federal prisoners until at least one year into the future. For state prisoners filing federal petitions the lag between admission and filing is extended further by the time required to exhaust state remedies. Indeed, a Bureau of Justice Statistics study of habeas filings in 1992 found that the average amount of time that elapsed between the date a state prisoner was convicted and the date he filed a federal habeas petition was 1802 days, or nearly five years.¹⁷³

¹⁷⁰ 28 U.S.C. § 2244 (2000); Cal. Penal Code § 1475 (West 2000); N.Y. C.P.L.R. 7003 (McKinney 1998).

¹⁷¹ That said, there was a dramatic spike in monthly habeas corpus filings exactly one year after AEDPA was enacted due to the one-year statute of limitations imposed retroactively on prisoners with claims more than one year old when AEDPA was enacted. The clock on these claims started when AEDPA went into effect in April 1996 and expired on April 1997, subject to tolling for claims filed in state court in the interim. John Scalia, *Prisoner Petitions Filed in U.S. District Courts, 2000*, with Trends 1980–2000, Bureau of Justice Statistics Special Report, at 5–6 (2002). This spike also shows up in annual statistics in Table 4. After 1997, however, the growth rate of habeas filings is similar to that in the mid-1990s prior to AEDPA.

¹⁷² See, e.g., Daniel J. Foley, *The Tennessee Court of Criminal Appeals: A Study and Analysis*, 66 *Tenn. L. Rev.* 427, 442–43 (1999) (finding that criminal appeals in Tennessee, which has one of the faster state appellate court systems, took a little more than eleven months on average during the period 1993 to 1995).

¹⁷³ Hanson & Daley, *supra* note 165, at 12. This lag has been increasing over time. A Department of Justice study from 1979 estimated that the time from conviction to filing was around 1.5 years. Robinson, *supra* note 164, at 4(a).

Table 6. Prisoners with Valuable Federal Habeas Rights and Quantity of Federal Habeas Filings, by Jurisdiction and Year

Year	State prisoners released after		Federal prisoners released after		State prisoners	Federal prisoners
	4 years	5 years	4 years	5 years		
1980	28575	20513	2375	1705	7029	2735
1981	32488	23323	2414	1733	7786	2877
1982	35855	25740	2714	1948	8036	3113
1983	37737	27091	3075	2207	8523	3225
1984	36352	26096	2938	2109	8335	3332
1985	40244	26649	3377	2236	8520	4932
1986	39603	24568	3130	1941	9040	3235
1987	42339	27135	3051	1956	9524	3472
1988	45182	26806	2934	1741	9867	3938
1989	46619	23273	2878	1437	10545	4344
1990	41613	28023	2380	1603	10817	4937
1991	42851	29025	2734	1852	10325	5440
1992	53300	22780	3539	1513	11296	5490
1993	50275	21674	3739	1612	11574	6846
1994	50751	21879	3787	1632	11908	6069
1995	53345	22997	3789	1634	13627	7331
1996	51615	22252	4322	1863	14726	11432
1997	52876	22795	4830	2082	19956	13577
1998	54891	23664	5434	2342	18838	8608
1999	57702	24876	5712	2462	20493	9342
2000	59009	25439	5841	2518	21345	10211

Not only do direct appeals, statutes of limitations, and exhaustion requirements delay filing of prisoner petitions, they also likely reduce the number of petitions filed. Prisoners may take into account the time required to obtain PCR relative to the length of their sentences when deciding whether to file for such relief.¹⁷⁴ If the time to relief is greater than one's sentence, there is little value in filing for PCR. Table 6 uses data from Table 5 on the share of state admissions that will remain in prison for four and five years

¹⁷⁴ See Hanson & Daley, *supra* note 165, at 12–13. This delay certainly affects the number of dispositions since a prisoner is likely to drop a petition once he is released.

before being released to calculate the number of state and federal inmates admitted into prisons from 1980 to 2000 who will remain there long enough to make filing for PCR relief worthwhile.¹⁷⁵ The four- and five-year data are chosen because it is assumed that a trial, direct appeal, delay before filing a PCR petition, disposition of a state petition, and disposition of a federal petition each take around one year.¹⁷⁶ While data on processing times for state PCR claims are generally unavailable, data on federal habeas petitions suggest that in 1995 these took on average 273.9 days to process.¹⁷⁷ My assumptions imply a four-year delay before relief for a state prisoner filing a state PCR motion and a federal prisoner filing a federal habeas petition. For a state prisoner filing a federal habeas petition the delay is five years because of exhaustion requirements.¹⁷⁸

Table 6 also presents the number of federal habeas petitions filed by state and federal prisoners from 1980 to 2000. The number of petitions state prisoners filed in a given year reflects the number of petitions filed by state prisoners admitted four years earlier but who will not be released for at least five years. Because federal prisoners do not have to exhaust state remedies, the relevant population of federal prisoners is that admitted three years earlier, but who will not be released for at least four years. Moreover, the total number of habeas filings has to be adjusted downwards to account for the fact that the prisoner data in Table 5 and Table 6 do not include convicts with life or capital sentences. The Bureau of Justice Statistics study of pre-AEDPA habeas filings estimated that such convicts account for twenty-one percent and less than one percent

¹⁷⁵ The figures in Table 6 on the number of admissions incarcerated more than four or five years are calculated by taking the shares from Table 5 and applying them to estimates of prison populations by the Bureau of Justice Statistics. See *supra* note 168. I do not have data on the share of federal inmates in prison more than four and five years so I estimate the number of federal inmates incarcerated for more than four and five years using the shares for state inmates. The admissions-by-incarceration-length numbers in Table 6 that lie outside the range for which their analogous shares in Table 5 are available are based on projections assuming that the admission shares are constant at the 1984 rate before 1984 and at the 1992 or 1993 rates after those years. I do not make linear projections because the actual data are not monotonic.

¹⁷⁶ See *supra* notes 166–67 and accompanying text.

¹⁷⁷ Scalia, *supra* note 165, at 7 tbl.7.

¹⁷⁸ Hanson & Daley, *supra* note 165, at 12.

of habeas filings, respectively.¹⁷⁹ Under this logic, 22,000 of the state prisoners admitted in 1994 are responsible for roughly 15,000 federal habeas filings by state prisoners in 1998, and 3800 of the federal prisoners admitted in 1995 are responsible for the 6700 federal habeas filings by federal prisoners in 1998.¹⁸⁰

These statistics suggest that federal prisoners are far more litigious than state prisoners. In 1998, each state prisoner filed less than one federal habeas petition while each federal prisoner appears to have filed more than two such petitions. The difference in filing rates cannot be explained by federal rules regarding successive and fragmented habeas petitions because these rules, which discourage but do not prevent multiple petitions, apply equally to state and federal prisoners. Part of the difference in filing rates may be explained by the fact that some state prisoners obtain relief from errors in their convictions or sentences by means of a state PCR motion and therefore do not file for federal habeas relief. For those state prisoners denied state PCR, a federal habeas petition is not as valuable as for federal prisoners because federal courts will respect, to some extent, state court judgments denying a state prisoner's claims of error, even if those judgments are based on state procedure rather than federal constitutional law. The remainder of the difference in filing rates is likely attributable to the fact that my assumption about the time required to obtain habeas relief is off or that there may be federal prisoners who file without reasonable hope for timely relief.

*B. Prisoners Who Pleaded Guilty Rarely File Habeas Petitions
and Their Petitions Are Almost Never Granted*

To more precisely pin down the population responsible for federal habeas filings, Table 7 presents data from 1990 to 2000 on the number of defendants in federal criminal cases, the number of defendants convicted of federal crimes, data on the manner in which

¹⁷⁹ Hanson & Daley, *supra* note 165, at 11.

¹⁸⁰ The numbers from which these statistics are derived are boldfaced in Table 6 to facilitate determination of the prisoner populations responsible for habeas filings in other years. The statistics on filings are 78% of the bolded numbers in order to account for the share of federal filings by prisoners serving life sentences or on death row, prisoners who are not included in prison admissions numbers. See *supra* note 168 and accompanying text.

they were convicted, and the number of defendants sentenced to incarceration.¹⁸¹ The most important numbers are the high share of individuals who plead guilty and the share of individuals who opt for trial. In 1995, for example, these numbers were ninety-two percent and eight percent, respectively. These numbers are important for three reasons. First, the method of conviction determines the scope of claims available to prisoners in habeas petitions. Individuals who plead guilty cannot, for the most part, assert errors that predate the plea or trial-type errors. Their claims are confined to sentencing errors. The scope of claims in turn affects the time consumed by habeas filings from the perspective of both parties and the courts. Second, and more relevant for my purposes, pre-AEDPA data suggest that state prisoners who plead guilty brought twenty to thirty percent of federal habeas petitions.¹⁸² Post-AEDPA data from the Eastern District of New York¹⁸³ suggest an even lower number: ten to twelve percent.¹⁸⁴ These data reduce sig-

¹⁸¹ Sourcebook 2001, *supra* note 137, at 419 tbl.5.22; see also U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Criminal Case Processing, 1982–1993, at 8 tbl.8, 9 tbl.9, 15 tbl.15 (1996), available at <http://www.ojp.usdoj.gov/bjs/abstract/fccp93.htm>; U.S. Dep't of Justice, Bureau of Justice Statistics, Federal Criminal Case Processing, 2000, at 32 tbl.A11 (2001), available at <http://www.ojp.usdoj.gov/bjs/abstract/fccp00.htm>; U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 1992–1993, at tbl.3.1, available at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm#C>; U.S. Dep't of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 1994–1999, at tbl.4.2, available at <http://www.ojp.usdoj.gov/bjs/pubalp2.htm#C>.

Analogous data on state prisoners are not readily available. Nor are data on the manner of conviction for federal defendants in 1990 and 1991.

¹⁸² Flango, *supra* note 88, at 36; Robinson, *supra* note 164, at 7; Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. Rev. L. & Soc. Change 637, 678 (1991). Importantly, these estimates are based on data on federal habeas filings by state prisoners, not federal prisoners.

¹⁸³ These were assembled by Marc Falkoff, a special master assigned to handle a backlog of federal habeas petitions filed by state prisoners in the Eastern District of New York. This data set includes 487 cases between 1996 and 2002, 296 in 2001 and 2002 alone. I analyze the 1996–2002 and 2001–02 data separately because the 1996–2000 filings were backlogs of other judges. As such, that subset is not the universe of claims from 1996–2000. Nor am I sure that the subset is a perfectly random sample from the universe of claims.

¹⁸⁴ *Id.* For example, of the 296 cases in the period 2001–02, thirty-five (11.8%) were by prisoners who pleaded guilty. Of these, twenty-four lost on the merits, nine were dismissed on procedural grounds, and two were stayed pending exhaustion of state procedures. Of the 487 cases for the period 1996–2002, forty-eight (9.9%) were by

nificantly the possible number of prisoners responsible for most habeas filings. Third, the latter data suggest that the probability of having a petition granted conditional on the petitioner having pleaded guilty is virtually zero.¹⁸⁵

Table 7. Disposition of Federal Criminal Cases

Year	Total defen- dants	Defendants convicted (thousands)						Defen- dants sen- tenced to prison (thous.)
		Total	By guilty plea	By guilty plea (%)	By nolo con- tendere plea	By jury trial	By bench trial	
1990	58.70	47.49						28.66
1991	60.19	48.95						30.56
1992	63.12	52.35	46.13	0.88	0.52	5.09	0.61	34.35
1993	64.64	53.44	48.02	0.90	0.35	4.58	0.49	34.84
1994	61.40	50.70	45.96	0.91	0.39	3.86	0.50	33.02
1995	56.48	47.56	43.58	0.92	0.30	3.20	0.48	31.81
1996	61.43	53.08	48.69	0.92	0.28	3.62	0.48	36.37
1997	64.96	56.57	52.51	0.93	0.28	3.26	0.52	39.43
1998	76.95	68.16	64.56	0.95	0.38	2.57	0.65	43.04
1999	75.72	66.06	62.40	0.94	0.42	2.73	0.50	47.66
2000	76.95	68.16	64.56	0.95	0.38	2.57	0.65	50.45

*C. The Probability of a Habeas Petition Ultimately Being
Granted Is Larger than Previously Suggested*

The final empirical feature of PCR litigation relevant to habeas bargaining is the percentage of PCR petitions that are granted. Only one study—sponsored by the National Center for State Courts—contains data on outcomes in PCR litigation in state courts. Looking at four states (Alabama, California, New York, and Texas), that study found that eight percent of state PCR claims

prisoners who pleaded guilty. Of these, none won. Thirty-five lost on the merits, ten were dismissed on procedural grounds, and three were stayed pending exhaustion.

¹⁸⁵ See supra note 184.

involving non-capital sentences were granted in 1992.¹⁸⁶ Table 8 reproduces a table from that study that breaks down this success rate by type of claim raised.¹⁸⁷ It reveals that the success rate varies dramatically across claims, ranging from one percent for Fourth and Sixth Amendment claims to eight percent for ineffective assistance claims and eleven percent for Eighth Amendment claims.¹⁸⁸

Table 8. Success Rate of PCR Petitions by Court and Claim Raised

Claim raised in PCR petition	State courts		Federal courts	
	No. of claims	Percent granted	No. of claims	Percent granted
Ineffective assistance of counsel	732	8	584	<1
Trial court error	528	6	378	2
Prosecutorial misconduct	199	3	206	<1
Fourth Amendment	79	1	172	<1
Fifth Amendment	414	2	380	<1
Sixth Amendment	220	1	224	<1
Eighth Amendment	463	11	261	<1
Fourteenth Amendment	728	7	426	1

Data on federal habeas litigation initiated by state prisoners suggest a lower rate of success—between one percent and four percent—than in state court.¹⁸⁹ The most recent pre-AEDPA study was the Bureau of Justice Statistics's study of petitions filed by state prisoners disposed in 1992.¹⁹⁰ (These data include the federal court data from the four states in the National Center for State

¹⁸⁶ Flango, *supra* note 88, at 28, 86 tbl.22; see *supra* note 94 (deriving the 8% number).

¹⁸⁷ See Flango, *supra* note 88, at 62 tbl.17.

¹⁸⁸ It should be noted that the high rate of success on Eighth Amendment claims can be attributed to a spate of excessive bail claims from New York. Ignoring these, the success rate for Eighth Amendment claims probably falls significantly, though an exact number cannot be derived from the data presented in the study. Flango, *supra* note 88, at 62.

¹⁸⁹ *Id.*; Faust et al., *supra* note 182, at 681; David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321, 333 (1973); see also Robinson, *supra* note 164, at 31 tbl.8, 35 (looking at success rate on appeal conditional on losing at the district court level). One systematic exception is the set of capital cases. They account, however, for a very small percentage of all habeas cases.

¹⁹⁰ Hanson & Daley, *supra* note 165, at 7.

Courts study, plus data from federal courts in four other states.) Ignoring dismissals for failure to exhaust procedures, the Bureau's study found that only 1.5% of petitions were granted.¹⁹¹ This is not far off from estimates drawn from post-AEDPA data on non-capital cases from the Eastern District of New York. Those data suggest a success rate of 1.5% to 2.1%.¹⁹²

As for capital cases, according to National Center for State Courts data, petitioners on death row obtain relief in three percent of petitions they file in state court and seventeen percent of petitions they file in federal court.¹⁹³ The numbers from Professor James Liebman's work suggest the success rates are as high as ten percent and forty percent, respectively.¹⁹⁴ Together, the outcome statistics suggest that although the success rate on habeas is low, it is not as low as suggested by other studies. The probability of obtaining relief at either the state or federal level is ten percent in non-capital cases and just nineteen to forty-six percent in capital cases.¹⁹⁵ If one were to condition on cases with sufficiently colorable claims that habeas counsel is appointed, the probability of success even in non-capital cases is as high as forty-seven percent.¹⁹⁶

¹⁹¹ *Id.* at 17. The 1.6% figure is calculated as follows: Of the 5167 issues raised in federal petitions by state prisoners, 3068 were dismissed and 1% or approximately 52 were granted. Of those dismissed, 57% or approximately 1479 had failed to exhaust state remedies. That means that 1.5% or 52 of 3418 ($= 5167 - 1479$) issues that had exhausted state remedies were granted. Assuming that the number of issues per petition is not correlated with exhaustion or grant, the same percentage of petitions was granted given exhaustion.

¹⁹² In the 2001–2002 Falkoff data from the Eastern District of New York, *supra* note 183, out of 296 petitions, four were granted and twenty-one were stayed to allow the prisoner to exhaust his state remedies. That implies that 1.5% ($= 4 / (296 - 21)$) were granted conditional on exhaustion. In the full 1996–2002 data set, of 487 petitions, ten were granted and thirty-one were stayed to allow the prisoner to exhaust his state remedies. That implies that 2.1% ($= 10 / (487 - 31)$) were granted conditional on exhaustion.

¹⁹³ Flango, *supra* note 88, at 86 tbl.22.

¹⁹⁴ Liebman, *supra* note 95, at 6.

¹⁹⁵ The probability of no success at either level is $0.9 (= (1 - 0.92) \times (1 - 0.98))$ for non-capital cases and between $0.81 (= (1 - 0.03) \times (1 - 0.17))$ and $0.54 (= (1 - 0.1) \times (1 - 0.4))$. See *supra* Group Four in Table 3.

¹⁹⁶ The probability of no success at either level given that the prisoner has counsel is $0.53 (= (1 - (8/(8 + 16))) \times (1 - (2/10)))$, where all the numbers are percentages from Group Four in Table 3, except the win-rate for state prisoners in federal court accounts for stays to exhaust. The latter makes the win-rate two per one hundred according to the E.D.N.Y. data, *supra* note 183.

APPENDIX B: PROPOSED AMENDMENT TO RULE 35

The text below should be appended to Federal Rule of Criminal Procedure 35 (Correcting or Reducing a Sentence). The language is modeled on Rules 11(b) and 35(b). It was drafted with Section 2255 motions by federal prisoners in mind. State analogues should allow for settlement of motions for post-conviction review under the appropriate state statute and under Section 2254.

(c) Reducing a Sentence Pursuant to a Settlement of a 28 U.S.C. § 2255 Motion.

(1) In General. Upon the government's motion, the court may reduce a sentence if the defendant agrees to voluntarily dismiss a pending petition under 28 U.S.C. § 2255.

(2) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(3) Considering and Accepting a Settlement of a 28 U.S.C. § 2255 Motion.

(A) Advising and Questioning the Defendant. Before the court accepts a settlement of a motion under 28 U.S.C. § 2255, the prisoner may be placed under oath, and the court must address the prisoner personally in open court. During this address, the court must inform the prisoner of, and determine that the prisoner understands, the following:

- (i) the right to persist with his or her § 2255 motion;*
- (ii) the right to have the motion considered by the district court;*
- (iii) the defendant's waiver of these rights to collateral review if the court accepts the settlement;*
- (iv) the right to advice of counsel during the negotiation and finalization of the settlement;*
- (v) the right to challenge the settlement as the product of ineffective assistance of counsel;*
- (vi) the nature of each claim proffered to support the prisoner's § 2255 motion;*
- (vii) the maximum possible penalty, including imprisonment, fine, and term of supervised release to which the prisoner is subject if the district court denies the § 2255 motion;*

(viii) the minimum penalty to which the prisoner is subject if the § 2255 motion is granted in part or in full;

(ix) the penalty to which the prisoner is subject if the court grants the government's motion to reduce the prisoner's sentence; and

(x) the terms of any settlement provision waiving the right subsequently to collaterally attack the sentence imposed by the district court pursuant to the settlement, save and except claims of ineffective assistance of counsel.

(B) *Ensuring that a Settlement Is Voluntary.* Before accepting a settlement of a § 2255 motion, the court must address the prisoner personally in open court and determine that the settlement is voluntary and did not result from force, threats, or promises (other than promises in the settlement agreement).

(C) *Determining the Factual Basis for a Settlement.* Before entering judgment on a settlement, the court must determine that the prisoner's § 2255 motion contains a colorable claim under that provision.

(4) *Withdrawing from a Settlement.* A defendant may withdraw consent to a settlement of a § 2255 motion:

(A) before the court accepts the settlement, for any reason or no reason; or

(B) after the court accepts the settlement, but before it imposes sentence if the defendant can show a fair and just reason for requesting the withdrawal.

(5) *Finality of a Settlement.* After the court imposes a sentence, the prisoner may not withdraw consent to a settlement, and the settlement may be set aside only on collateral attack for ineffective assistance of counsel.

(6) *Recording the Proceedings.* The proceedings during which the prisoner enters a settlement must be recorded by a court reporter or by a suitable recording device. The record must include the inquiries and advice to the prisoner required under Rule 35(c)(3)(A).

(7) *Harmless Error.* A variance from the requirements of this rule is harmless error if it does not affect substantial rights.
