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APPEAL WAIVERS AND THE FUTURE OF SENTENCING POLICY

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ABSTRACT

This paper is the first empirical analysis of appeal waivers—clauses in plea agreements by which defendants waive their rights to appellate and postconviction review. Based on interviews and an analysis of data coded from 971 randomly selected cases sentenced under the United States Sentencing Guidelines, the study's findings include (1) in nearly two-thirds of the cases settled by plea agreement, the defendants waived their rights to review; (2) the frequency of waiver varies substantially among the circuits, and among districts within circuits; (3) the government appears to provide some sentencing concessions more frequently to defendants who sign

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waivers than to defendants who do not, including agreeing to "C" pleas (binding sentencing terms), downward departures, safety-valve credits, and a variety of stipulations; (4) many defendants who waive their rights to review obtain clauses in their agreements that limit their exposure to unexpected negative results at sentencing; (5) some defendants appear to receive neither greater certainty nor leniency in return for signing wide-open and unlimited waivers of their rights to review; (6) three-quarters of the defendants who waived appeal also waived collateral review, and of these, fewer than one-third preserved the right to raise a claim of ineffective assistance; and (7) waivers have been enforced to bar a variety of claims, including claims of ineffective assistance at sentencing and assertions of constitutional violations under Blakely *and* Booker. *The observed trend of increased use of stipulations combined with no review raises the risk that sentences not in compliance with the law can proliferate without scrutiny. The uneven practice of trading sentencing concessions for waivers among cases and courts also suggests that waivers are undercutting efforts to advance consistency in federal sentencing.*

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INTRODUCTION

The United States Supreme Court's recent decisions in *Blakely v. Washington*[1] and *United States v. Booker*[2] have disrupted presumptive

1. 124 S. Ct. 2531 (2004).
2. 125 S. Ct. 738 (2005).

sentencing systems in the federal courts and in several states, prompting a level of activity in sentencing reform that this country has not seen for three decades. As new sentencing policy takes shape, information about the successes and failures of various sentencing practices will be in demand. One particular practice—appellate review—is likely to remain a popular means of advancing sentencing consistency.[3] This Article examines one potential limitation of appellate review as a means of regulating sentencing: clauses in plea agreements by which defendants waive their rights to appellate and postconviction review of sentencing errors, known as appeal waivers.

For well over a decade, anecdotal evidence has suggested that appeal waivers have become increasingly frequent in federal cases. Scholars and litigants disagree about what is waived, by whom, at what price, and how often. In every circuit, litigation challenging the enforcement of appeal waivers has raised conflicting claims about their drawbacks and benefits. Recent decisions embracing broad appeal waivers have continued to provoke criticism from commentators.[4] And the Supreme Court has yet to rule on their validity. Yet despite this sustained controversy, in the seventeen-year history of the Federal Sentencing Guidelines (Guidelines), no empirical examination of sentencing appeal waivers in federal cases has ever been conducted. Our study was undertaken to present a snapshot of the use and impact of appeal waivers in cases sentenced under the Guidelines in the hope that the findings will prompt further research and better inform evolving sentencing policy.

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3. *See, e.g.*, *Booker*, 125 S. Ct. at 767 (noting that Congress strongly favors the "retention of sentencing appeals" to "iron out sentencing differences"); *Implications of the* Booker/Fanfan *Decision for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec., House Comm. on the Judiciary*, 109th Cong. 14 (2005) (statement of the Honorable Christopher A. Wray, Assistant Att'y Gen., Criminal Div., U.S. Dep't of Justice) [hereinafter Wray], *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi? dbname=109_house_hearings&docid=98624 ("A rigorous and consistent appellate standard is essential to any guideline system since appellate review will be an important means for the parties to obtain consistent sentencing.").

4. *See, e.g.*, Sentencing Law and Policy, Appeal Waivers in the Wake of *Booker*, http://sentencing.typepad.com/sentencing_law_and_policy/2005/04/appeal_waivers_.html (Apr. 27, 2005, 17:17 EST) ("[I]t is against public policy to let prosecutors and defendants completely opt-out of appellate review. . . . [D]istrict courts post-*Booker* should reconsider the appropriateness of accepting pleas with broad appeal waivers."); *see also* Spann v. State, 704 N.W.2d 486, 494–95 (Minn. 2005) (refusing to uphold a waiver of appeal rights in a posttrial agreement, noting that "[a]llowing a defendant to waive his right to appeal creates a system that discourages the development of the law, permits the results of unfair trials to be preserved, and may encourage prosecutors and courts to hide their errors").

To collect basic information about appeal waiver practice in federal felony cases, we turned to two sources. First, we conducted open-ended interviews of twenty-two defense attorneys and nine prosecutors in thirteen different districts.[5] The districts were selected to represent every circuit, as well as small, medium, and large caseloads. They also include some "border districts," where bargaining practices reportedly differ from other districts in certain types of cases. Second, with the cooperation of the United States Sentencing Commission (Commission), we coded information from 971 cases randomly selected from among those sentenced in fiscal year 2003 (FY 2003) with written plea agreements.[6]

In brief, our most important findings demonstrate the following: the rate at which plea-based sentences are appealed declined somewhat over the period between the adoption of sentencing appeal waivers (in the early- to mid-1990s) and 2003. In nearly two-thirds of the cases settled by plea agreement in our sample, the defendant waived his right to review. The frequency of waivers varies substantially among the circuits, and among districts within circuits. Immigration cases in our sample were more likely to contain waivers than drug trafficking cases, and both were more likely to contain waivers than firearms cases.

The United States rarely waived its rights to appeal; usually only the defendant waived his review rights. In the plea agreements we examined, the government appears to have provided some sentencing concessions more frequently to those defendants who signed waivers than to those who did not. These concessions included "*C* pleas,"[7] downward departures,[8] safety-valve credits,[9] and a variety of stipulations to facts that determined sentences under the

5. Our interviewees are identified only by role (defender or prosecutor); to protect confidentiality, districts and other identifying information are not provided. Professor King conducted the interviews between August 2004 and May 2005 by telephone, and each lasted about thirty minutes. A sample of the open-ended questions posed to each interviewee is on file with the *Duke Law Journal*.

6. We originally selected 1,000 cases from among those coded by the Commission as including a written agreement of some sort in the file. *See infra* note 70 and accompanying text. Cases with no written plea agreements were omitted. Once the coding of the agreements was complete, we combined the data that we coded from our sample cases with other information about these cases that was included in the Commission's FY 2003 data.

7. A *C* plea is a guilty plea under subsection (C) of Rule 11(c)(1) of the Federal Rules of Criminal Procedure.

8. *See infra* note 38 and accompanying text.

9. *See infra* note 39 and accompanying text.

Guidelines—facts that would normally be determined by judges at sentencing. Many defendants who waived their rights to review obtained clauses in their agreements that limited their exposure to unexpected negative results at sentencing.

Our preliminary study also corroborates some concerns raised by critics of appeal waivers. Some defendants in our study appear to have received neither greater certainty in sentencing nor leniency in return for waiving all rights to review. Three-quarters of the defendants in our sample who waived appeal also waived collateral review; of these, fewer than one-third preserved the right to raise a claim of ineffective assistance of counsel. Waivers have been enforced to bar a variety of claims, including claims of ineffective assistance at sentencing and assertions of constitutional violations under *Blakely* and *Booker*. The increased use of stipulations, combined with waiver of review, increases the risk that sentences not in compliance with the law will proliferate without scrutiny. The uneven practice among cases and courts of trading sentencing concessions for waivers also suggests that waivers are undercutting efforts to advance consistency in federal sentencing.

I. APPELLATE REVIEW OF FEDERAL SENTENCING

Appellate review became part of modern sentencing policy in the 1970s and 1980s. Previously, under indeterminate sentencing, federal trial judges rarely spelled out factual findings or gave reasons for their sentences. Courts of appeals reviewed trial court compliance with the rules that governed sentencing procedure, but those rules were relatively uncomplicated. A sentence was virtually unreviewable so long as the penalty imposed was on the menu of punishments that Congress had authorized for the offense.[10]

In the 1960s and 1970s, with equal treatment of similarly situated offenders high on social and legal agendas and with crime rates soaring,[11] reformers took aim at the enormous power exercised by

10. *See* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1443–47 (1997) (describing the lack of meaningful appellate review of sentencing decisions in state and federal courts prior to 1980).

11. *Compare* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 61 tbl.2 (1973) (noting 285,980 violent crimes in the United States in 1960), *with* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 41 tbl.2 (1981) (noting 1,308,900 violent crimes in the United States in 1980).

judges and parole boards to discriminate among offenders in allocating punishment. This flexibility, reformers worried, had resulted in both unwarranted leniency and arbitrary punishment.[12] By the 1980s, the federal government and several states had subdivided statutory sentence ranges that spanned decades into multiple, smaller ranges of limited months.[13] Movement within or between ranges was carefully regulated and made contingent upon the presence or absence of designated information about the offender or offense. In these presumptive sentencing systems, only acceptable factors could enter the sentencing calculus. Judges were forbidden to sentence using extralegal factors such as race, gender, or unique local norms for punishment.[14] In the federal system, the Sentencing Reform Act of 1984, with its new guidelines for sentencing, promised to "control the effects of philosophical differences among judges and varying local conditions."[15] Parole was abandoned because it was perceived as failing in its missions to reduce crime, distinguish reformed convicts from potential recidivists, and administer release decisions equitably and predictably.[16] Reformers hoped that this reduction in sentencing discretion would advance not only the equality of punishment, but also its certainty.[17]

The glue holding these new presumptive sentencing systems together was appellate review. Prosecutors could appeal if a judge sentenced a defendant to a sentence lower than the law provided,

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12. *See, e.g.*, ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 5 (1974) (reporting a disparity in mock and actual sentencings, including one case in which sentences by different judges for the same case ranged from three to twenty years); Brian Forst & Charles Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically from Principles of Punishment*, 33 RUTGERS L. REV. 799, 808–14 (1981) (reporting a disparity in mock sentencings, including nine out of sixteen scenarios in which some judges recommended twenty-year sentences while others recommended no imprisonment).

13. *See generally* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.3, at 1210–14 (3d ed. 2000) (describing the movement from indeterminate to determinate sentencing systems).

14. *Id.*

15. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 93 (2004), *available at* http://www.ussc.gov/15_year/15_year_study_full.pdf [hereinafter FIFTEEN-YEAR REPORT]; *see also* William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 87 (1993) ("No purpose was more important to Congress and the several Administrations that worked for years to enact the Sentencing Reform Act of 1984 than the avoidance of unwarranted disparity and resulting unfairness in the sentencing of similarly situated defendants.").

16. S. REP. NO. 98-225, at 40, 56–58, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3223, 3239–41.

17. *Id.*

defendants could appeal to make sure judges did not exceed authorized sentences, and both could appeal violations of sentencing procedures.[18] Appellate review of sentencing emerged as the primary enforcement mechanism for sentencing reform in federal courts as well as in the courts of more than a dozen states.[19] Appellate judges would also participate in developing the scope and meaning of the Guidelines provisions in an ongoing dialogue with the Commission about fair process and just punishment.[20]

Appellate review has served these goals, but not as well as reformers had hoped. Thousands of appellate cases have helped to define the permissible application and scope of hundreds of provisions in the Guidelines, ranging from those determining when sentence increases are warranted by a defendant's criminal history, to those determining when a judge may depart upwards or downwards from the recommended sentencing ranges.[21] The Commission has monitored appellate decisions to determine when to propose Guidelines amendments.[22] The Supreme Court itself has resolved over a dozen disputes about the Guidelines.[23] But over the years, the consistency of appellate review—so central to controlling disparity under the Guidelines—has been undercut by three developments.

First, parties have manipulated the application of the Guidelines through stipulations, expressly resolving sentencing facts and Guidelines "scoring" questions as part of the plea agreement. When

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18. *See* Reitz, *supra* note 10, at 1451–57 (stating that appellate review in a guidelines system should perform two functions: (1) enforcement—that is, making sure that judges apply the law, and (2) law making—that is, defining the meaning of terms in statutes and creating a common law of departures).

19. *See generally* Reitz, *supra* note 10 (reviewing the rise of appellate review). For a sampling of scholarship advocating appellate review of sentencing, see AM. LAW INST., MODEL PENAL CODE: SENTENCING REPORT 56 (Kevin R. Reitz reporter, 2003), *available at* http://www.ali.org/ali/ALIPROJ_MPC03.pdf; Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 4 FED. SENT'G REP. 161, 164 (1991); Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93 (1999); Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 284–86 (1977); Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621 (1992).

20. Reitz, *supra* note 10, at 1455.

21. *See* Reitz, *supra* note 10, at 1466 (terming federal appellate review "high enforcement/low judicial creativity").

22. Wilkins & Steer, *supra* note 15, at 76–81.

23. *See generally* JEFRI WOOD, FED. JUDICIAL CTR., GUIDELINE SENTENCING, AN OUTLINE OF APPELLATE CASELAW ON SELECTED ISSUES (2002) (outlining significant developments in federal court decisions on the Guidelines).

the Guidelines first assigned a specific punishment price to each fact, "fact bargaining"—long a component of the criminal justice system—assumed added importance. Defendants and the government could anticipate, with greater certainty, which facts might best be tied down in the agreement to obtain specific sentence reductions.[24] A change to Rule 11 of the Federal Rules of Criminal Procedure in 1999 made this easier still. It authorized parties to enter into not only a plea agreement that is conditioned upon the court's acceptance of a negotiated sentence, but also plea agreements conditioned upon the court's acceptance of a negotiated sentence range or sentencing factor.[25] The result was even more "buried" deals and virtually no appellate review of stipulations.[26]

Admittedly, Congress and the Commission did see this coming.[27] Probation officers were enlisted to provide objective factual information that judges could rely upon to determine the "real" story. The Commission warned parties not to "stipulate to misleading or non-existent facts," but instead to "fully disclose the actual facts and then explain to the court the reasons why the disposition of the case

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24. *See, e.g.*, Berthoff v. United States, 140 F. Supp. 2d 50, 62 n.19 (D. Mass. 2001), *aff'd* 308 F.3d 124 (1st Cir. 2002) (defining "fact bargaining" as "the knowing abandonment by the government of a material fact developed by law enforcement authorities or from a witness expected to testify in order to induce a guilty plea"); *see also* Douglas Berman, *Is Fact Bargaining Undermining the Guidelines?*, 8 FED. SENT'G REP. 300, 300 (1996) ("[F]act bargaining may simply be the process by which parties seeking to strike plea agreements create certainty in the guideline calculation.").

25. FED. R. CRIM. P. 11(c)(1)(C). Opponents of the 1999 amendment argued that it would "allow parties to agree to offense characteristics regardless of the actual facts . . . found in the Pre-Sentencing Report. . . . [T]he primary danger is allowing parties to bind the court to certain facts, thus taking away more of the court's discretionary authority and shifting it to the prosecutor's office." Memorandum from Professor Dave Schlueter, Reporter, to Members, Advisory Committee on Federal Rules of Criminal Procedure, Comments on Proposed Amendments to Rule 11, at 3 (Mar. 23, 1998) [hereinafter Schlueter Memo] (on file with the *Duke Law Journal*). Opponents also worried that parties would "circumvent the guidelines" to reach agreement, and that probation officers' assessments would be bypassed. *Id.* at 5.

26. For example, as one district court held:

> The district judge can stop this practice, of course, by refusing to accept the plea—but will he? Maybe not, if the agreed sentence accords with the judge's personal sense of justice. After all, there will never be any appeal so the matter is beyond review. No downward departure will ever be reported, and the case will be resolved simply, finally, and completely.

United States v. Green, 346 F. Supp. 2d 259, 277 (D. Mass. 2004).

27. The Sentencing Reform Act, a Senate Report assured, provided that the Commission should issue policy statements to "assure that judges can examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." S. REP. NO. 98-225, at 52 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3246.

should differ from that which such facts ordinarily would require under the guidelines."[28] Judges were instructed not to "rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence."[29] The Attorney General, too, ordered prosecutors to argue for the application of only those charges and factors supported by the facts and not to negotiate facts.[30]

But in many districts, bargaining over sentencing factors has continued.[31] Busy trial judges have little incentive to reject stipulations by the parties. In some districts, probation officers do not disturb stipulations, and in any event they are rarely asked for their opinion until after the plea deal is accepted.[32] As the Second Circuit admitted recently, "It will ordinarily not be necessary for the court taking the plea to question a defendant specifically about each factual stipulation . . . . [F]acts admitted in a plea agreement can, and usually will, be accepted by the sentencing court as true."[33] The four Supreme Court Justices dissenting in *United States v. Booker* concluded that fact bargaining is "quite common under the current system."[34] Writing for the majority, Justice Breyer admitted that the "system has not worked perfectly; judges have often simply accepted an agreed-upon

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28. U.S. SENTENCING GUIDELINES MANUAL § 6B1.4 cmt. (2004).

29. *Id.*; *see also* FIFTEEN-YEAR REPORT, *supra* note 15, at 27–32 (discussing the administration of guideline sentencing, including procedures for transparent plea agreements and reliable fact-finding).

30. Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All Fed. Prosecutors (Sept. 22, 2003), *available at* http://www.crimelynx.com/ashchargememo.html [hereinafter Ashcroft Memo]; Memorandum from Richard Thornburgh, Att'y Gen., U.S. Dep't of Justice, to All Fed. Prosecutors (Mar. 13, 1989), *reprinted in* 6 FED. SENT'G REP. 347, 347 (1994) (directing federal prosecutors to "charge the most serious, readily provable offense or offenses consistent with defendant's conduct").

31. *See* FIFTEEN-YEAR REPORT, *supra* note 15, at 92 (concluding that "[a]lthough a lack of data raises a serious obstacle to quantitative research, a variety of evidence suggests that disparate treatment of similar offenders is common at presentencing stages"); *id.* at 88–92 (discussing the limitations of existing research and concluding that more research is "sorely needed"). Some are convinced that the expectation that the judiciary could control prosecutorial manipulation of the Guidelines "has proved utterly in vain." *Green*, 346 F. Supp. 2d at 268; *see* KATE STITH & JOSE CABRANES, FEAR OF JUDGING 89–90 (1998) (describing the adversarial nature of fact-finding in the sentencing process).

32. According to some research, "[i]n a significant number of districts, probation officers reported that the court would usually or nearly always defer to the plea agreement when it conflicted with information in the presentence report." FIFTEEN-YEAR REPORT, *supra* note 15, at 86. Other research found that the vast majority of district judges and probation officers reported that agreements contained stipulated facts, and a significant percentage indicated that these stipulations understated the offense conduct. *Id.*

33. United States v. Granik, 386 F.3d 404, 413 (2d Cir. 2004).

34. United States v. Booker, 125 S. Ct. 738, 782 (2005) (Stevens, J., dissenting).

account of the conduct at issue."[35] A recent Commission report, too, concluded that "surveys . . ., field research . . ., and analysis of information provided to the Commission in presentence reports have suggested that uneven charging and plea bargaining undermine the guidelines and result in sentencing disparity in a substantial number of cases."[36] Furthermore, "[r]ejection of plea agreements that undermine the guidelines, though not unknown, appears to have been relatively rare throughout the guidelines era."[37]

Second, appellate review as a means to control sentencing disparity has been weakened by federal law exempting from judicial review decisions by prosecutors to (1) grant a downward departure for the defendant's substantial assistance in investigating or prosecuting another,[38] (2) file a safety-valve motion for a sentence below the statutory minimum sentence,[39] (3) seek a reduced sentence under Rule 35,[40] or (4) subtract a third point for acceptance of responsibility.[41] These rules have meant that the decisions to select certain defendants for special treatment—and to determine the extent of the discount provided—have rested entirely with prosecutors.[42] The

35. *Id.* at 762 (Breyer, J., for the Court).

36. FIFTEEN-YEAR REPORT, *supra* note 15, at 141.

37. *Id.* at 144.

38. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004) (authorizing, upon government motion, a lower sentence for a defendant providing substantial assistance in the investigation or prosecution of another person).

39. *See* 18 U.S.C. § 3553(e)–(f) (2000) (providing authority for imposing a sentence below the mandatory minimum sentence upon government motion and substantial assistance in the investigation or prosecution of another).

40. *See* FED. R. CRIM. P. 35(b) (providing authority for a court to reduce a defendant's sentence below the mandatory minimum upon government motion and substantial assistance in the investigation and prosecution of another).

41. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2004) (providing for up to a three-point reduction in a defendant's offense level for the defendant's acceptance of responsibility); Margareth Etienne, *Acceptance of Responsibility and Plea Bargaining Under the Feeney Amendment*, 16 FED. SENT'G REP. 109, 110 (2004) (discussing the possible effects of the Feeney Amendment, which authorized prosecutors to determine eligibility for the third point).

42. Assistant Attorney General Christopher Wray explained:

> [I]t is essential that the Department retain control over whether consideration at sentencing will be given for cooperation. Cooperation agreements are an essential component of law enforcement and are necessary to penetrate criminal organizations and to obtain convictions in court. First, the Department is in the best position to evaluate the truthfulness and value of a cooperator's assistance, by evaluating it within the context of the entire body of investigative information and by determining whether it is consistent and corroborated by other evidence. But there is a more important reason—the Department needs the leverage in order to insist that cooperating defendants testify to the complete truth, rather than half-truths.

Wray, *supra* note 3, at 15.

latest research shows "irregular and inconsistent policies and practices among the various districts" for employing departures for substantial assistance and that similar variations plague Rule 35(b) motions as well.[43] The *Booker* Court's decision to make all Guidelines provisions advisory rather than mandatory, including guidelines governing departures for substantial assistance and acceptance of responsibility, has arguably relegated the government's control over these adjustments to mere suggestions. Nevertheless, judges after *Booker* must find a reasonable basis for disregarding these Guidelines. And judges continue to be powerless to disregard the government's preferences regarding reductions below mandatory minimum penalties using either the safety valve or Rule 35.[44]

Finally, clauses in plea agreements by which parties waive appeal rights have undercut the ability of appellate review to regulate inconsistent sentencing practices. Agreements to forego review of the sentence and the sentencing process have the potential to disable the tools for regulating sentencing discretion that remain after *Booker*, as well as those that are being created in *Booker*'s wake. The remainder of this Article is devoted to an examination of appeal waivers and their effects.

II. THE APPEAL WAIVER DEBATE

Waivers were a consequence of the explosion in the number of criminal appeals after the Guidelines went into effect.[45] Prior to the Guidelines, once a defendant entered a guilty plea, there was little to appeal. Because defendants waived most pretrial and trial rights when pleading guilty, and because sentencing appeals were futile, criminal appeals were primarily reserved for those few defendants who were convicted after trial. But the new sentencing statutes and the Guidelines changed that. The Guidelines provided hundreds of new sentencing issues for defendants to raise on appeal, even after

43. FIFTEEN-YEAR REPORT, *supra* note 15, at 103–06.

44. Pending legislation would increase even further prosecutorial power regarding safety-valve reductions. *See* H.R. 1528, 109th Cong. §§ 2, 3, 6 (2005) (seeking to amend 18 U.S.C. § 3553(f)).

45. *See* Catherine M. Goodwin, *Summary: 1996 Committee on Criminal Law Memo on Waivers of Appeal and Advisement of the Right to Appeal*, 10 FED. SENT'G REP. 212, 212, 214 n.2 (1998) (predicting an increase in appeal waivers due to the high number of appeals and other factors).

pleading guilty. The hope of avoiding these sorts of challenges motivated prosecutors to include appeal waivers in plea agreements.

Appeal waivers appeared early in the Fourth Circuit, which held them enforceable in the early 1990s, and in border districts with unprecedented numbers of illegal reentry cases.[46] Under so-called fast-track programs,[47] prosecutors in 1995 began to allow defendants who pled guilty early to obtain a much lower sentence, often through prosecutors' agreements to drop or not to add a charge, so long as the defendant agreed in return to waive everything including the right to appeal.[48]

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46. *E.g.*, United States v. Melancon, 972 F.2d 566, 567–68 (5th Cir. 1992); United States v. Navarro-Botello, 912 F.2d 318, 321 (9th Cir. 1990); United States v. Wiggins, 905 F.2d 51, 52–53 (4th Cir. 1990).

47. *See* FIFTEEN-YEAR REPORT, *supra* note 15, at 34 (discussing fast-track programs).

48. This fast-track system for trafficking and immigration cases was eventually upheld by the Ninth Circuit in 1995 and later authorized by Congress. *See* United States v. Estrada-Plata, 57 F.3d 757, 761 (9th Cir. 1995) (finding "absolutely nothing wrong with (and, quite frankly, a great deal right) with" the fast-track policy); *see also* The PROTECT Act of 2003, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675 (2003) (instructing the Commission to issue a policy statement authorizing an early disposition program); Government's Memorandum of Law in Opposition to the Defendant's Motion for a Non-Guideline Sentence Based on the Existence of Fast-Track Programs 2–8, United States v. Krukowski, No. 04 Cr. 1308 (2d Cir. June 10, 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/61005_govt_opposition_to_sg_variance_due_to_fasttrack.pdf [hereinafter Government's Memo] (tracing the history of fast-track programs and noting that entitlement to fast-track departures or concessions requires waiver of the rights to file any pretrial motions, appeal, or seek review under 28 U.S.C. § 2255). The PROTECT Act limited judicial discretion to depart below the Guidelines sentence, but specifically authorized departures in accordance with fast-track programs—at least those fast-track programs authorized by the Attorney General. § 401(m)(2)(B). The Commission soon adopted a policy statement on fast-track provisions. U.S. SENTENCING GUIDELINES MANUAL § 5K3 (2004); *see also id.* at app. C, amend. 651 (issuing a policy statement effective October 27, 2003). One of the requirements for fast-track approval by the Attorney General is that the district must require each defendant "to waive appeal" and "to waive the opportunity to challenge his or her conviction under 28 U.S.C. § 2255, except on the issue of ineffective assistance of counsel." Memorandum Regarding Dep't Principles for Implementing an Expedited Disposition or Fast-Track Prosecution Program in a District, from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All United States Attorneys (Sept. 22, 2003) [hereinafter Fast-Track Memo], *available at* http://www.crimelynx.com/fasttrack.html. Interviewees also commented on the link between fast-track cases and the origins of appeal waivers. *See, e.g.*, Telephone Interview with Defender #15 (stating that waivers started "seven to ten years [ago] . . . in immigration [fast-track cases]"). As one defender noted:

> Where they first started was in a category of cases: mule cases. These are cases where you have very low level drug couriers. . . . [O]ur district adopted a policy because of volume, and maybe because everybody recognized the sentences were inappropriate for these people, who are more like victims themselves, that let you plead to an amount that carried a sentence of zero to twenty rather than the ten to life. They just did it on their own, justified on the basis of volume. . . . That policy has existed almost twenty years, and we started to see appeal waivers there first. As a condition for getting this, appeal waiver crept in . . . . We were pissed off when it began, but frankly

Once appeal waivers caught on in the Fourth, Fifth, and Ninth Circuits, they soon took hold elsewhere. Prosecutors loved them. Recalled one prosecutor, "We were spending attorney resources on appeals [in cases that] we eventually won. We have in the office only generalists; our trial attorneys do their own appellate briefs. A couple big appeals per year can hurt your indictment productivity."[49] By the end of 1995, six additional courts of appeals had upheld the validity of appeal waivers, and United States Attorneys received a memo from Washington encouraging them to consider whether the employment of appeal waivers would be a "useful addition" in their districts.[50]

At roughly the same time, Congress was considering limiting collateral relief for federal prisoners under 28 U.S.C. § 2255. Federal prisoners who pleaded guilty not only could appeal their sentences, but they also retained access to § 2255 for claims such as breach of the plea agreement, ineffective assistance of counsel, failure of the prosecutor to disclose exculpatory evidence, some double jeopardy violations, and the unconstitutionality of the statute defining the defendant's offense.[51] Waiver clauses in plea agreements were modified to bar this sort of collateral review as well.[52]

But it was not only prosecutors who supported appeal waivers. Many judges encouraged them too.[53] In 1995, in response to a Federal

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from the prosecutor's point of view it made lots of sense. You are giving up the store. Then it spread to everything.

Telephone Interview with Defender #9.

49. Telephone Interview with Prosecutor #1; *see, e.g.*, Telephone Interview with Defender #14 ("They finally saw from other districts that this was a very effective thing to cut down on what they saw were frivolous appeals."); Telephone Interview with Defender #15 ("I think they started here because they have a relatively small appellate division . . . . The guys running it adopted a rule that if you didn't have an appeal waiver you had to write your own appeal. There were only [a small number of] lawyers doing all the appellate work, they just decided to do this, after hearing about it nationally."); Telephone Interview with Defender #21 ("[Prosecutors started asking for waivers] [b]ecause they're lazy. [They] don't want to do their work. My friends in the United States Attorney's office at the time told me . . . they were tired of people . . . filing baseless claims, and they didn't want to fool with them.").

50. Memorandum from John C. Keeney, Acting Asst. Att'y Gen., U.S. Dep't of Justice, to All United States Attorneys (Oct. 4, 1995), *reprinted in* 10 FED. SENT'G REP. 209, 209 (1998) [hereinafter Keeney Memo].

51. *See* LAFAVE ET AL., *supra* note 13, at § 21.6(a) (synthesizing the law regarding the rights waived or forfeited by a plea).

52. *See* Anup Malani, *Habeas Settlements* 28–32 (Univ. of Va. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 7, 2004), *available at* http://law.bepress.com/uvalwps/uva_publiclaw/art7 (tracing the rise of "habeas waivers").

53. *See* Lynn Fant & Ronit Walker, *Reflections on a Hobson's Choice: Appellate Waivers and Sentencing Guidelines*, 11 FED. SENT'G REP. 60, 60 (1998) ("From an examination of the

Judicial Center survey on the Guidelines sent to over 1,100 of the 1,189 federal district and circuit judges, 67 percent of district judges who responded and 62 percent of responding circuit judges agreed that "[w]aivers of appeal should be used *more* frequently."[54] In 1996, judges from the Committee on Criminal Law of the Judicial Conference proposed that Federal Rule 11 be amended specifically to require the court to discuss with defendants any term in a plea agreement that waives the right to appeal or collateral attack.[55] This change, it was argued, would not only better inform defendants, it would "help protect any appeal waivers against reversal."[56]

Opponents viewed the proposed amendment as an invitation to adopt waiver provisions that were unconstitutional, unnecessary, and unwise.[57] Waivers are unconstitutional, opponents first argued,

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spate of opinions upholding appellate waivers in almost every circumstance, however, it appears that the courts of appeals want to limit their participation in the sentencing game."). In *United States v. McGilvery*, 403 F.3d 361, 363 (6th Cir. 2005), after finding that the waiver clause barred appeal, including any *Booker* claim, the Sixth Circuit stated:

> The Court and the parties have unnecessarily devoted substantial time and resources on this appeal. In order to avoid similar situations in the future, we strongly encourage the government to promptly file a motion to dismiss the defendant's appeal where the defendant waived his appellate rights as part of a plea agreement, and to attach a copy of the appellate-waiver provision and the transcript of the plea colloquy showing the district court's compliance with Rule 11(b)(1)(N). Once the defendant responds, the matter can then be referred to a motions panel for disposition.

54. MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES, RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY, REPORT TO THE COMMITTEE ON CRIMINAL LAW OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22 tbl.14 (1997). Judges were also given the opportunity to agree or disagree with the following statement: "Waivers of appeal should be used *less* frequently." Thirty percent of the district judges and 24 percent of the circuit judges agreed. *Id.* Our interviewees also reported that district judges appreciated waivers. *See, e.g.*, Telephone Interview with Defender #12 ("[T]he judges like 'em, because their decisions don't get reviewed by anybody."); Telephone Interview with Defender #14 ("Newer judges really do like [the appeal waivers]."); Telephone Interview with Defender #15 ("[Judges] kinda like them. They won't get reversed. This is how they keep score in their lives."); Telephone Interview with Prosecutor #4 ("These district court judges carry the same docket, they want to get rid of these cases just like we do.").

55. *See* Minutes of the Advisory Comm. on the Fed. Rules of Criminal Procedure, at 4 (Oct. 7–8, 1996), *available at* http://www.uscourts.gov/rules/Minutes/cr10-796.htm.

56. Goodwin, *supra* note 45, at 213. Many of the practitioners interviewed mentioned trial bench support for appeal waivers. *See, e.g.*, Telephone Interview with Defender #6 ("The judges have not tried to change the appeal waivers. They are standard operating procedure. . . . It's just routine, [a]ccepted by everybody as part of the deal."); *see also infra* notes 84 & 124 and accompanying text.

57. *See* Schlueter Memo, *supra* note 25 ("A majority of the commentators addressing this amendment . . . are opposed to [it]. The general view is that this provision will signal an approval of such provisions before the Supreme Court has had an opportunity to settle the question of whether such a provision is constitutional.").

because there could be no *knowing* waiver of potential future errors that might occur at a proceeding that had yet to take place. Because sentencing had yet to take place, defendants could not possibly know and the judge at the plea proceeding could not describe what claims defendants were waiving.[58] Opponents also protested that waiver "is not a condition over which criminal defendants can bargain."[59] They argued that to promote appeal waivers was to promote contracts of adhesion. Third, critics pointed out that trial judges and attorneys should not be encouraged to insulate from review their *own* past and future misconduct through waiver of direct and collateral review.[60] Finally, waivers were assailed as bad policy because they undercut the function of appellate courts in regulating the sentencing process.[61] Even the Department of Justice warned, in its memo encouraging the inclusion of appeal waivers, that the "disadvantage of the broad sentencing appeal waiver is that it could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines."[62]

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58. *See, e.g.*, Letter from Robert W. Ritchie, Chairman, Fed. Criminal Procedures Comm., Am. Coll. of Trial Lawyers, to Peter G. McCabe, Sec'y, Comm. on Rules of Practice and Procedure, at 2 (Feb. 11, 1998) (on file with the *Duke Law Journal*) ("At the time of a plea . . . a defendant does not have the ability to see into the future to predict how a judge might erroneously sentence him or her.").

59. David E. Carney, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1044 (1999); *see* United States v. Melancon, 972 F.2d 566, 570–80 (5th Cir. 1992) (Parker, J., concurring specially) (emphasizing that a waiver of "the right to appeal a sentence that has yet to be imposed . . . is inherently uninformed and unintelligent").

60. *See* Letter from the Nat'l Ass'n of Criminal Def. Lawyers, to Peter G. McCabe, Sec'y, Standing Comm. on Rules of Practice and Procedure, at 9 (Feb. 15, 1998) (on file with the *Duke Law Journal*) ("We have no research on how appellate waivers would affect sentencing. It would appear, however, that where both parties and the court know that nothing they do will be subject to review, we are on the road to encouraging lawlessness.").

61. *See, e.g.*, *id.* at 10 (arguing that "[t]he wholesale use of appellate waivers will make it impossible for the Commission to 'review and revise' sentences in a rational way," and that without a complete review of sentences, "it will be impossible to determine whether or when unwarranted disparity of sentences exists").

62. Keeney Memo, *supra* note 50, at 210; *see, e.g.*, United States v. Raynor, 989 F. Supp. 43, 45 (D.D.C. 1997) (expressing concern over possible unchecked prosecutorial manipulation of sentences after an appeal waiver); *Melancon*, 972 F.2d at 575 (Parker, J., concurring specially) (arguing that enforcing appeal waivers insulates from review violations of departure rules, erroneous applications of the Guidelines, and "*factual inadequacies* in the presentence reports generated by nonjudicial probation officers").

The rule change moved ahead despite these objections,[63] and when the amendment went into effect in 1999, it was the green light some prosecutors and judges had been waiting for.[64] With the exception of the D.C. Circuit, which has not yet squarely ruled on the propriety of appeal waivers,[65] each circuit has now endorsed their validity while adopting its own exemptions for certain sorts of claims. Common exemptions include claims that a sentence is based on race discrimination,[66] exceeds the statutory maximum authorized,[67] or is the product of ineffective assistance of counsel.[68] In the wake of the Court's decision in *Blakely* in 2004, defense attorneys in districts where appeal waivers were still uncommon found waivers proposed as part of every plea agreement.[69]

Despite the near-uniform acceptance of appeal waivers by the courts of appeals, their validity is as controversial as ever and has yet to be addressed by the Supreme Court. With reformers poised to rely on appellate review in the next wave of sentencing reform, it is time

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63. The Advisory Committee on the Rules of Criminal Procedure believed "it was appropriate to recognize what is apparently already taking place in a number of jurisdictions and formally require trial judges in those jurisdictions to question the defendant about whether his or her waiver was made knowingly, voluntarily, and intelligently." H.R. DOC. NO. 106-55, at 13 (1999) (Conf. Rep.) (on file with the *Duke Law Journal*). A "disclaimer" was added to the Committee Note, which reads "the Committee takes no position on the underlying validity of such waivers." *Id.* at 21–22.

64. *See, e.g.*, Telephone Interview with Defender #7 ("[E]very single plea agreement had appeal waivers. . . . [starting] about the same time they were codified in Rule 11. Cases started coming down saying that they are valid. As they became more and more prevalent, the practice widened. When they put it in the rule it made it seem reasonable and expected.").

65. In *United States v. West*, 392 F.3d 450 (D.C. Cir. 2004), the court enforced a waiver clause in the defendant's plea agreement, but only after noting that the defendant had failed to provide a reason not to, *id.* at 452, and stating specifically that the court was not addressing the question whether such waivers were valid as a general matter, *id.* at 460–61.

66. *E.g.*, United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996); United States v. Jacobson, 15 F.3d 19, 22–23 (2d Cir. 1994).

67. *E.g.*, United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992).

68. *E.g.*, United States v. Attar, 38 F.3d 727, 732–33 (4th Cir. 1994). For a further discussion of ineffective assistance claims, see *infra* notes 115–122 and accompanying text. Some circuits have adopted a multifactor "miscarriage of justice" test. *E.g.*, United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001); United States v. Teeter, 257 F.3d 14, 24–25 (1st Cir. 2001).

69. In districts where appeal waivers had not been used before *Blakely*, prosecutors suddenly announced waivers would be standard policy in every agreement. Memorandum Regarding Departmental Legal Positions and Policies in Light of *Blakely v. Washington* from James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice, to All Fed. Prosecutors 4 (July 2, 2004) (on file with the *Duke Law Journal*). Complained one defender interviewed shortly after *Blakely*, "[T]his is hitting us all at once, in one fell swoop—*Blakely*, then waivers." Telephone Interview with Defender #5.

to take a closer look at appeal waivers to see how they have affected criminal practice.

III. ASSESSING APPEAL WAIVERS

Much of the debate about appeal waivers turns upon empirical assertions, such as the claim by critics that defendants have no choice but to sign waivers to secure plea agreements, or the claim by supporters that ineffective assistance claims are usually exempted from waivers. The interviews and data in this study provide a rich source of new information about the nature, frequency, and effects that appeal waivers have today. Before turning to the findings, however, it is important to understand some of the limitations of the statistical results reported here.

First, the data is based on a random sample from the group of FY 2003 cases that were coded by the Commission staff as including a written plea agreement or other written agreement in the file. The sample is quite large (971 cases), but it does not include the unknown percentage of cases in which a plea agreement existed but was not physically submitted to the Commission, nor does it include cases in which a plea agreement was placed under seal (approximately 3 percent of all cases).[70]

Perhaps for these reasons, the mix of cases in our randomly selected sample is somewhat different than the overall mix of cases nationwide for FY 2003. For example, as shown in Figure 2, our sample contains a slightly higher percentage of drug trafficking and firearms cases, and a slightly lower percentage of fraud and immigration cases. Our sample is also a bit heavy on Ninth Circuit cases, and a bit light on Fifth Circuit cases, compared to the mix of cases sentenced in FY 2003.[71] Because downward departures are much more common in drug trafficking cases than in any other type of case (nearly 40 percent of trafficking cases in 2003 received a downward departure), and more common in the Ninth Circuit than in any other circuit (39 percent of all cases in 2003 from the Ninth Circuit received a downward departure), it is also not surprising to see in Figure 3 that in our sample there is also a larger proportion of

70. Of the approximately 70,000 cases sentenced in FY 2003, about 96 percent involved conviction by guilty plea, and about 75 percent included some kind of written agreement. U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 6 tbl.1A, 23 tbl.10 (2003).

71. *See infra* Figure 1.

cases with downward departures than there is in all cases sentenced under the Guidelines in 2003.[72]

Figure 1. Case Distribution Among Circuits, Sample Compared to FY 2003 Complete

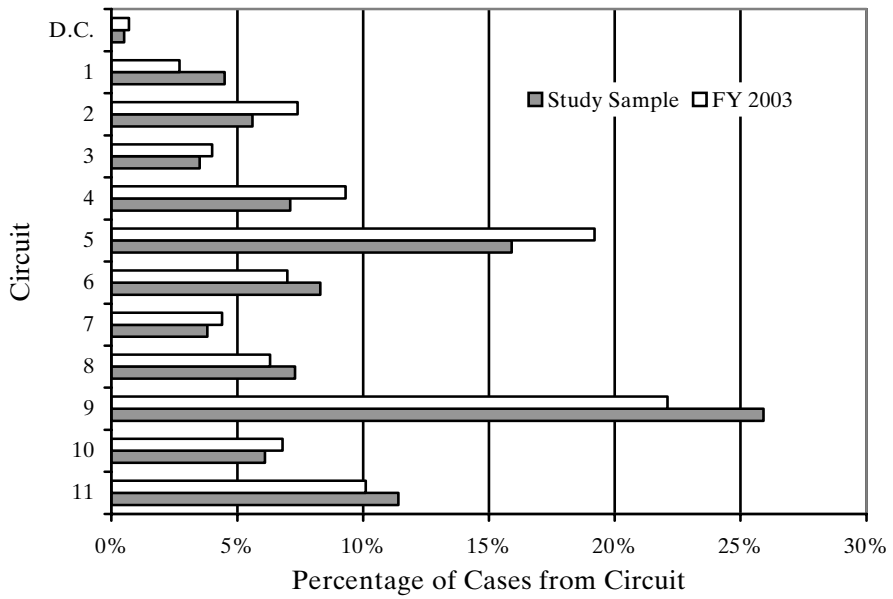
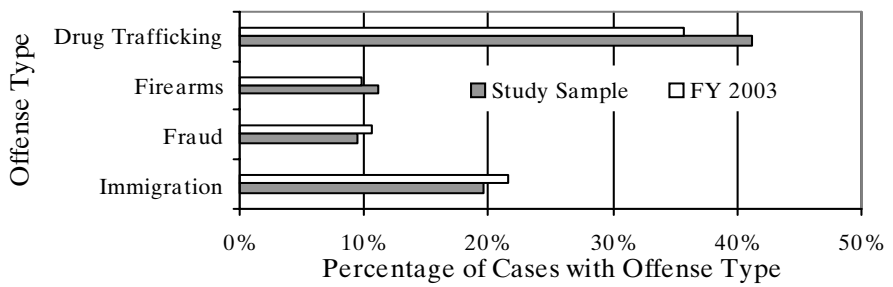
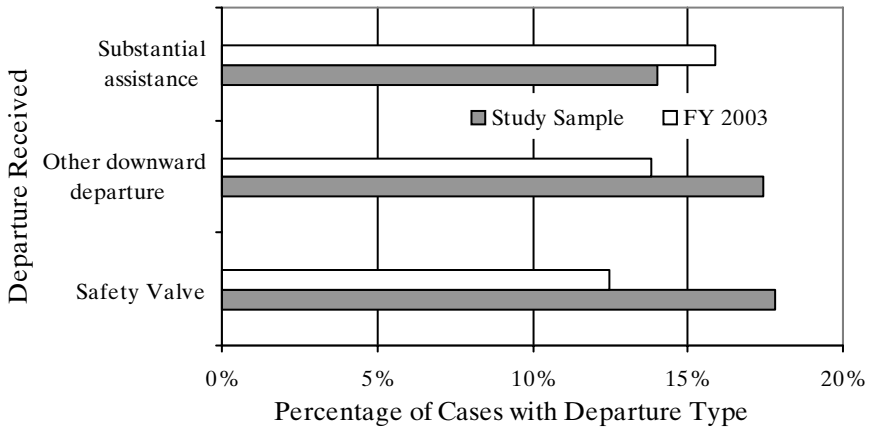


Figure 2. Case Distribution among Offense Type, Sample Compared to FY 2003 Complete



72. Comparing the sample with 2003 data showed a nonrandom difference in the distribution of cases among circuits and among the top four offense types, as well as a nonrandom difference in the proportion of cases with substantial assistance or other downward departures.

Figure 3. Relative Frequency of Departures, Sample Compared to FY 2003 Complete



We begin our examination of appeal waivers by considering whether they have achieved the benefits that supporters hoped for. We then turn to whether the costs of appeal waivers predicted by opponents are reflected in our findings.

A. The Benefit of Waivers: Slowing the Rate of Appeals

Prosecutors and courts adopted appeal waivers primarily because they hoped to reduce the number of sentencing appeals.[73] A lower appeal rate not only saves government resources, it also means more finality—a particular concern for victims.[74] Our evidence suggests that appeal waivers have probably had these intended effects.

Throughout the 1990s, the number of convictions grew faster than the number of appeals.[75] Specifically, as Figure 4 illustrates, the *rate* of appeals per conviction peaked in 1994 at about double the rate prior to 1987 (when the Sentencing Reform Act became effective) and has consistently declined since then. Importantly, the appeal rate declined even when considering only cases sentenced after a *guilty plea*, which are less likely to generate appeals than tried cases.[76] This

73. *See supra* notes 46–52 and accompanying text.

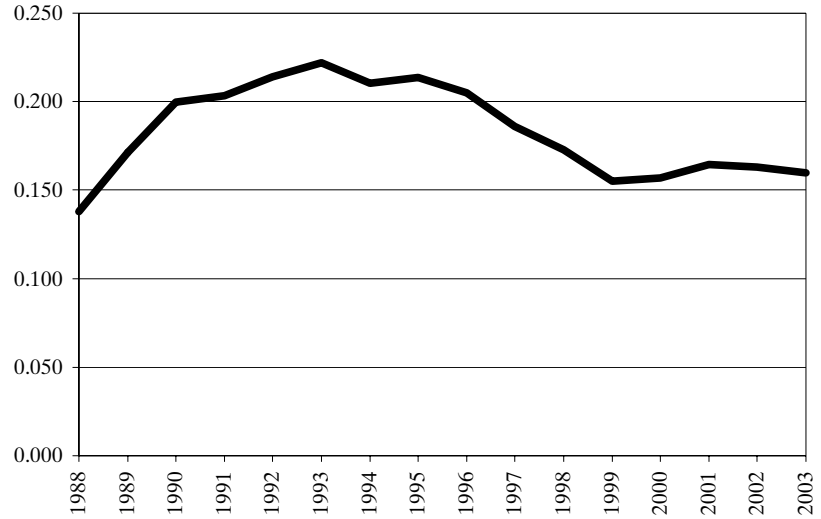
74. Carney, *supra* note 59, at 1037–38.

75. JOHN SCALIA, BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL APPEALS, 1999, WITH TRENDS 1985–99 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fca99.pdf.

76. *See infra* Figure 6. The government's more frequent insistence on appeal waivers may cause some defendants to forego written agreements altogether, instead pleading guilty

suggests that the drop in the overall appeal rate cannot be attributed solely to the decline during the same period in the number of cases that went to trial.[77] It is possible that the shrinking appeal rate was caused by other factors, but the general timing of the decline coincides with the increased enforcement of waivers by the courts of appeals.[78]

Figure 4. Appeal Rate 1998–2004—All Offenses



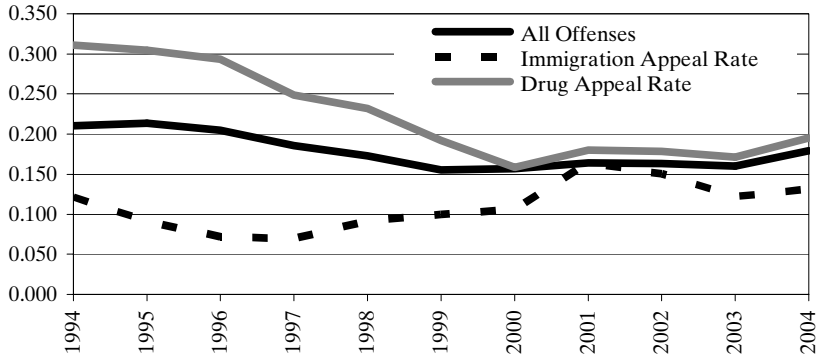
Note: Rate is the total number of criminal appeals for the year divided by the total number of defendants convicted in district court for the same year.

"straight up" to the indictment, sometimes known as "open" or "blind" pleas. An effort to determine whether the proportion of "open" or "blind" pleas had increased compared to the proportion of guilty pleas with agreement using the Commission's data was inconclusive. The coding of variables that could help identify the presence or absence of a plea agreement rather than an open plea was entirely revised in 1997 and 1998. Even after 1998, the variable (DSPLEA) is an unreliable measure of open versus negotiated pleas over time, due to missing cases and the ambiguous meaning of some values.

77. BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING, 2001, WITH TRENDS 1982–2001 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fccp01.pdf.

78. Among alternative explanations for a decline in the frequency of appeals during this period are the 1999 amendment to Rule 11 allowing stipulations to Guidelines ranges and factors, *see supra* notes 24–26 and accompanying text, and the gradual resolution of initially controversial sentencing issues by the courts of appeals.

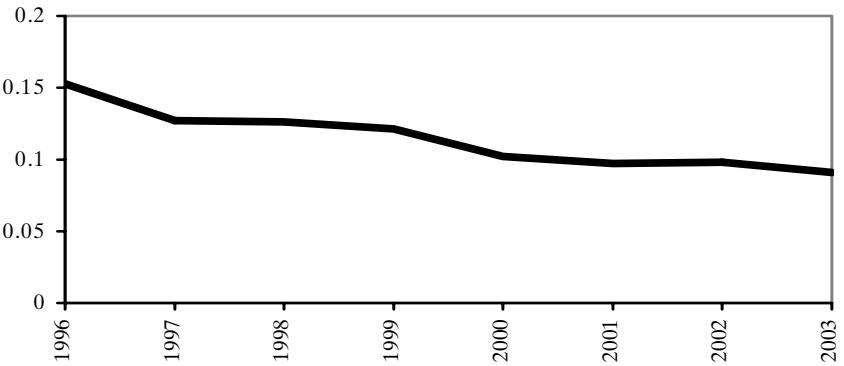
Figure 5. Appeal Rate 1994–2004—All, Drug, and Immigration Offenses Compared



Note: Appeal rates are derived by dividing the number of appeals filed in cases of the specified type by the number of defendants convicted that year of that offense type.

Sources: Federal Criminal Case Processing, 1982–1993; Federal Criminal Case Processing 1982–2002; Statistical Tables for December 2003 and 2004, Tables B7 and D4, from the website for the Administrative Office of the United States Courts (values for 2003 and 2004).

Figure 6. Appeal Rate Comparing Total Appeals to Guilty Plea Convictions



Note: Rate is the total number of criminal appeals for the year divided by the number of defendants convicted by guilty plea for the same year.

Source: Commission Annual Statistical Reports.

Prosecutors interviewed for our study also reported that they believed waivers had reduced their appellate burden. One prosecutor commented that the adoption of appeal waivers "has been wildly successful. Looking at the stats, we are writing far fewer briefs. . . . I would say it [has] led to a 25% drop."[79] Another prosecutor volunteered that waivers save "significant resources. . . . From a prosecutor's perspective with limited resources, the broader we can make these waivers the better. If [defendants] give up the right to jury trial, they should give up the rest as well."[80] Reported another, "Seems to me that it has narrowed the issues on appeal[;] even if there is no proof that the number of appeals went down, appeals are now easier to respond to."[81]

B. The Costs of Appeal Waivers

As for the anticipated costs of appeal waivers, our findings do not present a simple story. We review below the information that the interviews and data have provided relating to six criticisms of appeal waivers.

1. *Are They Adhesion Contracts?* Based on our interviews and waiver sample, we must answer this question, "No." The prediction that defendants have neither power to avoid signing agreements with unlimited waivers, nor leverage to negotiate benefits in return for signing them, has proved demonstrably *untrue*, at least in some districts. Defense attorneys in some districts report that they have had the ability, particularly when supported by the trial bench,[82] to avoid

79. Telephone Interview with Prosecutor #1.

80. Telephone Interview with Prosecutor #2.

81. Telephone Interview with Prosecutor #6.

82. Some trial judges initially balked at endorsing appeal waivers and would reject agreements with waivers in them. Consider the comments of Defender #9:

> I used to say at the plea that these things were illegal because you can't waive your right to appeal voluntariness and knowing understanding of the waiver itself. If I held a gun to my client's head and say "Sign this," he's gotta be able to appeal on that basis. That's what I'd say to the judge. For a while they took it out. But I gave up. They put it all back in.

See also Telephone Interview with Defender #7 ("Some [trial judges] will still resist accepting them if there is a real dispute, but this is borderline participation in the negotiations in my view. One judge was against these, and the government was going to go after him with a writ of mandamus, because he wasn't accepting them."); Telephone Interview with Defender #20 ("[J]udges didn't like it. . . . [They b]elieved it would insulate them from being reviewed. Thought it was wrong. They harassed the government about it—why did they really need them? [The] [g]overnment eventually gave up.").

these waivers, to limit them, or, alternatively, to obtain significant concessions in return for signing them.

a. Evidence That Defendants Are Avoiding Appeal Waivers. Several interviewees reported negotiating agreements without appeal waivers, sometimes as a result of a threat to plead guilty without an agreement (known as pleading "open" or "blind") or to go to trial if the waiver was not removed.[83] Over one-third (323, or 34.8 percent) of the agreements in our random sample contained no clause waiving review, while 619 (65.2 percent) included some waiver clause. As illustrated in Figure 7, the proportion of agreements with waiver clauses varied widely among the circuits. It was a rare plea agreement in the Ninth Circuit that lacked a waiver clause, whereas in the D.C., First, and Third Circuits, waivers were the exception, not the rule. If the cases from the Ninth Circuit are excluded, only 52 percent of the agreements in the sample contained any sort of waiver.

Additionally, Prosecutor #2 said:

> Some judges were opposed to any language. They refused to take a plea. If we felt that the government was conceding something or giving something up, they were waiving this knowingly and with advice of counsel we would stick to it. The judges would understand. Not sure if we ended up with [a] complete standoff. There were two judges who didn't like them, questioned whether they constitutionally should be allowed. Others look at them on a case-by-case basis.

Similarly, Prosecutor #1 indicated:

> Initially, there were judges who said this is not right. One or two who made statements later [at the plea hearing or at sentencing] that undercut the appeal waiver. We always include in an advice of rights we prepare as a back up on the judge's colloquy, asking what he is waiving in [the] plea agreement. Some judges are resistant, but our court of appeals has educated them.

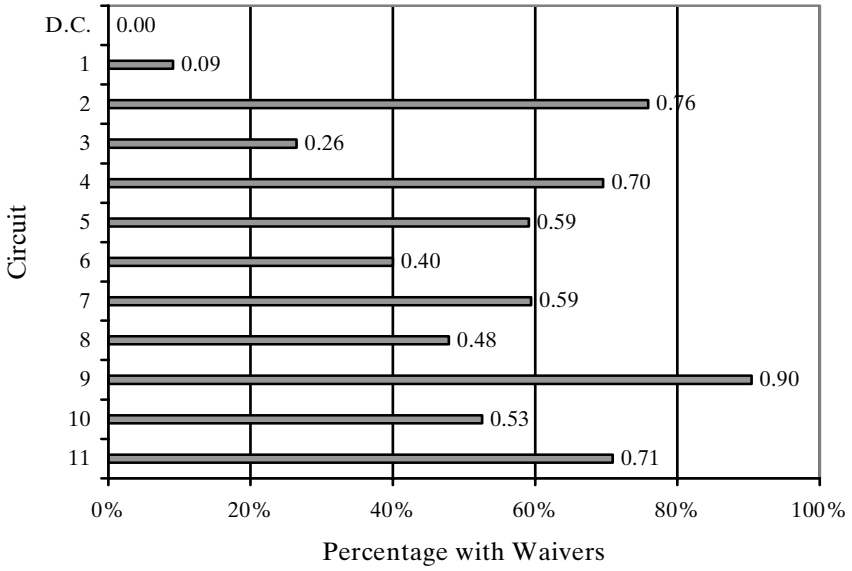
83. For example, one defense attorney reported,

> Only a very small percentage of agreements will include waivers, and then only if [they] receive approval . . . . We have a very aggressive United States Attorney's office and they will seek them in every case, but we refuse them, in all but the most compelling circumstances. . . . Only if there is a significant advantage that could be achieved by entering into it, an advantage that we couldn't obtain otherwise, by trial or negotiation [do we agree to waivers]. Usually the prosecutor would have to agree not to file an 851 [a charge that increases the minimum sentence] or drop a charge or not bring a charge. Not very common.

Telephone Interview with Defender #19. Similarly, Defender #21 reported,

> [Signing an appeal waiver meant y]ou get the third point [off for acceptance of responsibility under 3E1.1]. Can't get it here if you plead open. . . . Second, we can still bargain counts in this district. May have a 924(c) [firearm charge carrying a mandatory minimum consecutive sentence] dismissed, and take the two-point enhancement for gun. Third, they might limit drug quantity. Particularly if there are several transactions separated by time [the parties will agree not to count some]. . . . [I]t is the regular practice that if you can't come to an agreement, and the defense attorney says I'm going to plead open . . . then the United States Attorney would agree to take out the appeal waiver.

Figure 7. Percentage of Plea Agreements with Waivers, by Circuit



b. Obtaining Concessions in Exchange. Waiver supporters also argue that defendants who sign waivers are getting something in return as part of the bargain. One defender's comments are telling:

> Two of our judges said they will not accept an agreement with a waiver. . . . The defendant complained. The defendant would say, "I want this because I want the 5K1 [downward departure for substantial assistance]. I want my 5K1!" The judges realized there was a problem, that they were hurting some defendants by refusing these [waivers].[84]

Appellate courts, too, often point out that they must uphold waivers to preserve their value for defendants.[85] Judge Posner, for example, recently described why a waiver should be enforced:

> The government didn't want [the defendant] to appeal and was willing to offer concessions that he and his lawyer considered adequate to induce him to forego his right to appeal. Had [the

84. Telephone Interview with Defender #7.

85. *See, e.g.*, United States v. Granik, 386 F.3d 404, 412 (2d Cir. 2004) ("Knowing and voluntary appellate waivers included in plea agreements must be enforced because, if they are not, 'the covenant not to appeal becomes meaningless and would cease to have value as a bargaining chip in the hands of defendants.'" (citations omitted)).

> defendant] insisted on an escape hatch that would have enabled him to appeal if the law changed in his favor after he was sentenced, the government would have been charier in its concessions.[86]

Many practitioners confirmed that when waivers are included as part of a plea agreement, those waivers are often exchanged for concessions of one sort or another from the prosecutor. One defender's explanation was typical of many of those interviewed: "Our position is we're only going to sign one if we get a significant concession. . . . If not, we plead open, [because there's] not much advantage to entering into an agreement."[87] Another explained,

> When the prosecutor insisted on these, in one or two cases, we would withdraw, saying it was a conflict of interest. Then the court and the government were put in the position of spending a lot more money, [and] the government backed down in a hurry. Eventually we came to this agreement: [n]o appeal waivers without a significant chit in return. In my office any appeal waiver has to be approved by me. So they don't bother to ask unless they can come up with something in hand.[88]

Another defender listed the usual price for agreeing to an appeal waiver in his district:

> An agreement that an enhancement [under the Guidelines] doesn't apply; that they will not oppose the minimum sentence in the Guidelines range; that they will not bring an additional charge

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86. United States v. Bownes, 405 F.3d 634, 636 (7th Cir. 2005).

87. Telephone Interview with Defender #14. Pleading open was a common response to appeal waivers. *See, e.g.*, Telephone Interview with Defender #1 ("Most cases plead open, but enter into agreement when consequences of not agreeing are so bad, they'll drop a charge or some relevant conduct."); Telephone Interview with Defender #4 ("[M]y response is to plead guilty without a plea agreement [in about 50 to 75 percent of cases]. They are throwing so much crap in the plea agreements these days."); Telephone Interview with Defender #5 ("Originally, when this first happened, we reacted by entering open pleas and abandoning agreements. . . . My fear is that if we refuse to sign and do an open plea, then they will overcharge to preclude open pleas."); Telephone Interview with Defender #9 ("The default position was plead open, so unless you were afraid of upward departure or you want the Guidelines calculations in front of probation [i.e., prior to the preparation of the presentence report], you don't sign it. This was allegedly the office position."); Telephone Interview with Defender #19 ("We reject them. Mostly open pleas, but we also reject them from plea agreements as well. . . . Now it may be different in districts where you can get substantial advantages from waivers, under fast-track or negotiation, I understand waivers might be more attractive."); Telephone Interview with Defender #21 ("[A]bout 25–30% of the open pleas are in meth cases. The penalties are so outrageous, and they have a hard time proving quantity. And even with acceptance they don't give you much.").

88. Telephone Interview with Defender #8.

> carrying a consecutive sentence . . . ; that they won't enhance with a prior [conviction] that would up the mandatory minimum . . . ; or a stipulation that there is no other relevant conduct, or [otherwise limiting an] enhancement under Chapter 3.[89]

Explained another,

> [I]f the government was dropping . . . a mandatory minimum, they can stick whatever they want into it. There has to be a significant benefit to the client. . . . Say a safety-valve stipulation or in some cases a stipulation to a mitigating role. Anything really significant like that. . . . We say we don't like them but when you tell the client this will save you two years, they'll say, "I'll sign."[90]

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89. Telephone Interview with Defender #3. "Relevant conduct" is defined in U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004) (providing that a sentence should take into account "all acts and omissions committed, aided, . . . or willfully caused by the defendant; and . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" that occurred during the preparation or commission of the offense of conviction, or during attempt to avoid detection and responsibility for that offense). Chapter 3 of the Guidelines includes provisions specifying certain increases in the defendant's offense level, which is used to determine the sentence, depending upon whether or not certain facts are present. *Id.* §§ 3A1.1–C1.2.

90. Telephone Interview with Defender #15. This attorney also reported, "This is a district that will do charge bargains as part of a deal." *Id.* For additional comments on the same topic, see Telephone Interview with Defender #3 ("[I]n a drug case, the government would threaten to give nothing on priors, say he's got to waive his appeal or we're going to enhance him."); Telephone Interview with Defender #8 ("We would require either a departure or a misdemeanor or something similar."); Telephone Interview with Defender #14 ("[W]e're only going to sign one if we get a significant concession. Generally we get a downward departure for cooperation. If not, we plead open, not much advantage to entering into an agreement."). Similarly, Defender #7 reported,

> Our policy was not to agree unless we would actually get something of substance in return, more than the bottom of the Guidelines range and acceptance points. These would be worthless because the judge would give them anyway in a blind plea. So it would boil down to a 5K departure or, if there was a closely contested Guidelines issue, then the government would have to agree that the enhancement would not apply. . . . They'll agree to dismiss a bunch of counts, but it doesn't matter because of the Guidelines. If they agree to dismiss a count that carries a consecutive sentence that would be [enough to sign a waiver].

Defender #17 also reported,

> [We] won't enter one unless there is a major concession [such as a] declination to charge a readily provable offense, limitation of relevant conduct, sometimes an agreement to a minor role, 5K cooperation. . . . Our leverage is that we'll just go to trial. Then you have to be sure to . . . explain [to the judge] that you were ready to plead open to X felony, but the government decided to pile this on unless you signed the appeal waiver. Judges wouldn't like that. . . . [I]n our office, you have to go through a supervisor to do a plea agreement with an appeal waiver. The policy here is we won't sign unless we get something for it.

Admittedly, the claims of defenders that they are negotiating good deals for waivers are self-serving. Several prosecutors, however, confirmed that they paid a price for the appeal waivers: "Often we give up cooperation [5K departure]. . . . There are individual defenders who will not enter into agreements with waivers, but will plead open . . . . So they can pressure [us] to give something else up in return for the waiver."[91]

To examine whether these reports were reflected in the data, we compared the frequency of the same sentencing concessions in cases with and without waivers. Some government concessions appeared more frequently in agreements with waivers than in agreements without. Specifically, as shown in Tables 1 and 2, those who waived appeal were more likely than nonwaiving defendants to receive a promise by the government to seek a safety-valve reduction (applicable in drug cases only), as well as to actually receive downward departures.[92]

Several cases in our sample had text explanations for departures. Looking specifically at these cases,[93] judges were more likely to list "pursuant to plea agreement" as a reason for departure if there was a waiver present. The judge in one waiver case expressly credited the waiver as the reason for the downward departure.[94]

91. Telephone Interview with Prosecutor #1. Said another, "The only way to free fall from the man[datory] min[imum] is the safety valve; that will mean we can get a broader appeal waiver." Telephone Interview with Prosecutor #4.

92. It is important not to overstate the direction or degree of any relationship between the presence of waiver clauses and the use of downward departures. Mapping the rate of substantial-assistance departures and the rate of other departures for FY 2003 by circuit, the patterns look nothing like the pattern of waiver usage among circuits. This suggests that although the presence of a waiver has some influence on the likelihood of a downward departure, factors other than waivers have a much stronger influence.

93. *See infra* Table 3.

94. The explanation given was "waiver of rights" (the case was from the Southern District of California). Another case credited "savings to government" as the reason for downward departure.

Table 1. Substantial Assistance & Safety Valve, by Presence of Waiver

Type of Departure	% Cases with Waiver (n=619)	% Cases without Waiver (n=323)
Substantial Assistance Departure Part of Agreement	15.5% (96)	13.9% (45)
Safety Valve Part of Agreement	7.1% (44)	6.2% (20)
Substantial Assistance Departure Received	14.4% (89)	13.6% (44)
Safety Valve Received*	19.7% (122)	14.6% (47)

*$p < 0.05$.

Note: The first two measures were coded from the agreements in each of the sample cases; the last two are from Commission FY 2003 data for each case.

Table 2. Other Departures, by Presence of Waiver

	% Cases with Waiver (n=619)	% Cases without Waiver (n=323)
Other Downward Departure Part of Agreement	3.1% (19)	2.8% (9)
Other Downward Departure Received*	22.0% (136)	9.6% (31)

*$p < 0.05$.

Note: The first measure was coded from the agreements in sample cases; the second is from Commission FY 2003 data for each case. Ninety-three cases (68 percent) receiving departures other than for substantial assistance were in two districts—Arizona and Southern District of California.

Table 3. Cases with Specified Reason for Departure, by Presence of Waiver

Reason Specified for Downward Departure	% Cases with Waiver (n=619)	% Cases without Waiver (n=323)
Substantial Assistance Motion*	39.3% (90)	57.1% (44)
Pursuant to a Plea Agreement*	22.7% (52)	10.4% (8)

*$p < 0.05$.

Note: Source is Commission FY 2003 data, for sample cases.

A number of concessions were no more likely to appear in cases with waivers than in cases without them. Defendants who waived review were no more likely than defendants who entered into plea

agreements without waivers to receive two or three credits for accepting responsibility.[95] And defendants who waived review were actually less likely to be sentenced at the bottom of the range or to receive charge concessions.[96]

Table 4. Where in Range Sentenced, by Presence of Waiver

	% Cases with Waiver (n=619)	% Cases without Waiver (n=323)
Guideline Range Minimum Sentence Imposed*	35.4% (219)	46.4% (150)
Guideline Range Maximum Sentence Imposed*	4.4% (27)	6.5% (21)

*$p < 0.05$.

Note: Source is Commission FY 2003 data, for sample cases.

Table 5. Charge Agreements, by Presence of Waiver

Type of Agreement	% Cases with Waiver (n=619)	% Cases without Waiver (n=323)
Government Agrees Not to Add, or to Drop Charges*	50.4% (311)	57.9% (187)
Government Agrees to Drop Charges*	42.3% (262)	49.5% (160)

*$p < 0.05$.

Note: Charge bargaining was measured in two ways. The first measure (PLEATYPE) was coded based on the specific subsection of Rule 11 that the parties noted in the agreement as well as the actual promises made. The second measure looked solely at whether the government expressly agreed to drop a charge.

95. *See infra* Table 6.

96. *See infra* Tables 4 & 5. A large percentage of all agreements included promises not to add charges or promises to drop charges, despite the tough stand against charge bargains by official Department of Justice policy. *See* Ashcroft Memo, *supra* note 30 ("[C]harges should not be filed simply to exert leverage to induce a plea."); *see also* Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice*," 90 CORNELL L. REV. 237, 239 (2004) (examining the effect of the Ashcroft Memo requiring federal prosecutors to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case" unless the case meets one of the enumerated exceptions and authorization is obtained from a designated supervisor (quoting Ashcroft Memo, *supra* note 30)); *cf.* United States v. Morgan, 406 F.3d 135, 137 (2d Cir. 2005) (barring a *Booker* claim because of the presence of an appeal waiver and reasoning that because the defendant "learned the sentencing range sought by the government and avoided exposure to additional drug counts, ... [l]imiting his criminal exposure in this way presumably was of considerable value to him").

Table 6. Acceptance of Responsibility Credits, by Presence of Waiver

	% Cases with Waiver (n=619)	% Cases without Waiver (n=323)
Agreed to Three Points for Acceptance of Responsibility	40.2% (249)	41.8% (135)
Agreed to Two Points	15.8% (98)	13.3% (43)
Agreed to Unspecified Adjustment*	12.6% (78)	23.8% (77)
Three Points Received	70.3% (435)	72.1% (233)
Two Points Received	25.5% (158)	24.8% (80)

*$p < 0.05$.

Note: The first three values were coded from the agreements in the sample cases. The last two were from Commission FY 2003 data for those cases. In FY 2003, 63.2 percent of all defendants convicted by trial or guilty plea received 3 points for acceptance of responsibility; 29.4 percent received 2 points.

These findings tend to confirm most defenders' reports that they consider it a bad deal to trade an appeal waiver for acceptance points, a sentence at the bottom of the range, or a bargained charge without a meaningful cap on relevant conduct. Defenders reported that these promises offer few advantages over the sentence a defendant would receive by pleading guilty to the indictment without waiving review. The sentencing concessions related to the presence of a waiver are much more substantial. More than one of every five waiver cases received a downward departure other than substantial assistance, compared to one of every ten nonwaiver cases in our sample. And nearly one in five waiver cases received a safety valve adjustment, compared to less than one in eight nonwaiver cases.

2. *Unknowing Waivers*. Perhaps the most common objection to appeal waivers is that defendants are waiving the possibility of challenging future error, error which is unknowable at the time the waiver is signed.[97] Some comments by defenders echoed this concern. "What I don't like about them is you are waiving something you don't know. You cannot know whether you are going to make a mistake, a number of things can happen. It is a dangerous thing to do. . . . Your client may suffer for it."[98]

97. *See supra* note 58.

98. Telephone Interview with Defender #7. As Defender #5 said:

Both the interviews and the data from the agreements in the sample suggested that this objection overstates the uncertainty that many defendants face when signing waivers. As waiver critics fear, some defendants are heading blindly into sentencing having waived whatever error may come their way. Other defendants, however, are able to minimize the risk of waiving review by tying down much of what goes into the sentencing calculation with stipulations about sentencing facts, by agreeing upon a sentence or a sentence cap, or by reserving certain claims for appeal.

a. Stipulations. Defenders and prosecutors both reported that once appeal waivers appeared, stipulations to specific sentences, sentence ranges, or sentencing factors became more common in plea agreements. Defenders insisted upon stipulations to reduce the risk of a later surprise at sentencing that could not be reviewed because of the waiver.[99] Explained one defender,

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> [Waivers] are unconscionable. Nobody's perfect. Lawyers aren't perfect, judges aren't perfect. Defendants should have the right to challenge their sentencing if we get it wrong. I don't see what interest the government has in cutting off the right to review—what interest would they have in an unconstitutionally excessive or erroneous sentence? . . . The uncertainty because of what judges will do with sentence, that makes it unfair.

Similarly, Defender #6 said:

> I'm worried about when Probation comes in and contradicts the stipulation. I always had to worry about whether Probation is going to do what we expect. . . . Appeal waivers risk agreeing to something you didn't anticipate.

Additionally, Defender #3 commented:

> [Because of all of the legal uncertainty about sentencing,] I'm very uncomfortable with them . . . . I have a case on appeal where the defendant has a prior conviction, but [it] may not be a 'crime of violence' . . . [and] the question is whether that qualifies for four point adjustment. . . . So [you] really don't know what you are waiving. . . . But the government holds all the cards, and you don't want to screw your client because you're trying to look smart.

99. *See* Telephone Interview with Defender #7 ("[I]f there was a closely contested Guidelines issue, then the government would have to agree that the enhancement would not apply."). As Defender #8 indicated:

> In this district, . . . we'll sit down and negotiate, say "We'll eat this enhancement, but you have to drop the others." We'll agree that—using 11(c)(1)(C)—this is the appropriate range, or agree that this is not going to apply, that it will go away. Then the case is appeal proof for everybody. We'd probably agree to waive appeal from *Blakely* if we've agreed like this.

Defender #12 concurred:

> [I rejected the agreement in one case] but it sort of backfired. At the sentencing hearing, the government brought in a guy to testify about how he had [x] kilos of cocaine and that judge found for the government. Lost everything I tried to gain, trying to save my client's right to appeal. So the risk is that at sentencing, where the probation office, government witnesses come in that can raise the sentence above what you were expecting.

> We have some aggressive probation officers that would stick in all sorts of adjustments, or criminal history would come back messed up. Our concern is if the court makes an error, we wouldn't be able to fix it. [So w]e'd negotiate it. . . . Most of the time the judges go along with the stipulation. . . . If you stipulate that night is day, you're going to have a problem. But if it isn't obviously false, they will go along . . . . The agreements are more detailed. It is getting to the point where we agree on almost everything.[100]

Reported another defender,

> About the same time appeal waivers came in, that's when probation said, "We're accepting the stipulations." Except really obvious stuff, like if my guy shot somebody, he can't claim he didn't have a gun. So this is important in considering appeal waivers, because we're going into it knowing that the [p]robation [o]fficer will not upset stipulations.[101]

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100. Telephone Interview with Defender #15. Additionally, consider the comments of Defender #21:

> The Probation Office will follow the plea agreement. It's the practice in [names location], but in [different location], they do not. They routinely report on everything. Some judges will go along with it, some will not. For over fifteen or sixteen years, the judges have decided that if the prosecutor makes the recommendation and the client looks at it and says, "[T]his is what I'm facing if I sign this agreement," then they shouldn't change it, because the defendant is expecting it as part of the deal. Now in [the other district, in the other circuit], it has never been like that. You could plead to five grams and find out at sentencing it was 300.

Defender #16 noted:

> [It d]epends on the judge, whether you want an open plea. . . . If I went in with an open plea and the government is going to present all of this relevant conduct[, *see infra* note 89,] and the court might be receptive to finding by a preponderance that the relevant conduct occurred, it's a risk. [It is d]ifferent if there is no relevant conduct. If there is, you'd want to stipulate.

As Defender #12 indicated, "[W]hat is the advantage of signing that agreement? The advantage is you know what you get. Without it, it is possible you wouldn't get what you are expecting, you never know what is lurking for you at sentencing." Finally, Defender #11 reported that

> [in return for an appeal waiver] they may not put in the drug amounts that trigger the man[datory] min[imum], [they] might stipulate to an amount for the Guideline[s] range rather than man min, or in a fraud case where the investigators have so far turned up a small loss amount, they will agree not to look for more frauds, agree on that loss amount. Now the [p]robation [o]fficer could come up with more at sentencing, but if the government hasn't already looked in that next box to find it, the [p]robation [o]fficer won't either. . . . In most cases where there is an appeal waiver, there are no issues. The prosecutor generally agrees on all the Guidelines factors; if not in agreement, have a hearing rather than an agreement. Usually [you are] not losing anything by waiver. But if you are losing, [you] shouldn't have to go without appeal, [and] the case law here allows most to get heard. I'm sure we've had some good issues that have been waived, I don't see many.

101. Telephone Interview with Defender #2; *see also* Telephone Interview with Defender #10 ("[They t]ried appeal waivers a couple of times early on, we resisted, judges resisted, they

Prosecutors agreed that in return for appeal waivers defendants

> are looking for stipulations to sentencing factors. . . . In money cases, they are looking for stipulations on loss amounts. . . . If I agree to come down from the provable loss, I'll insist that you have to agree to a much broader appeal waiver. They are looking for role reductions. The loss amount is one they can argue over and negotiate. The role is harder. I can't always look the other way on that.[102]

Table 7. Sentence-Related Stipulations, by Presence of Waiver

Parties Agreed to . . .	**% Cases with Waiver (n=619)**	**% Cases without Waiver (n=323)**
Sentence Range*	32.2% (200)	20.4% (66)
Sentence Length	5.2% (32)	4.0% (13)
Sentence Cap*	6.0% (37)	.6% (2)
Sentence Type	1.1% (7)	.9% (3)
Base-Offense Level	33.9% (210)	33.4% (108)
Specific-Offense Characteristics	11.1% (69)	8.7% (28)
Final-Offense Level	6.8% (42)	8.4% (27)
Chapter 3 Adjustment other than 3E1.1 (Role, etc.)	12.3% (76)	8.4% (27)
Criminal History Category*	8.9% (55)	5.3% (17)
Drug Amount	11.0% (68)	11.1% (36)
Loss Amount	5.3% (33)	3.7% (12)
Government Will Not Seek Upward Departure	6.5% (40)	5.9% (19)

*$p < 0.05$.

Table 7 shows that stipulations as to sentence ranges, caps, or criminal history category are more common in waiver cases than in nonwaiver cases. Not only do these stipulations appear to occur more often in waiver cases, but the data suggests that another feature

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didn't take. Recently they are trying again, we resist. The only time we will allow them is with a[Rule 11](c)(1)(C) plea. The [assistant U.S. attorneys] started to get more strident for a while, but they backed off.").

102. Telephone Interview with Prosecutor #4. A defendant's "role" in the offense may influence the sentence: a leader faces a more severe sentence than a defendant who played only an insignificant part in the crime. U.S. SENTENCING GUIDELINES MANUAL §§ 3B1.1–2 (2004).

associated with more predictable sentencing is more prevalent in waiver cases: parties are much more likely to have entered into some sort of binding sentence agreement, sometimes known as a *C* plea, when a waiver is present. A *C* plea is a guilty plea under subsection (C) of Rule 11(c)(1). Unlike a guilty plea entered under subsection (A) or (B) of Rule 11(c)(1), which may include a sentence recommendation that the judge can accept or reject, a *C* plea includes sentencing stipulations that the judge may not later reject once the plea agreement is accepted.[103]

Table 8. C *Pleas, by Presence of Waiver*

	% Cases with Waiver (n=619)	***% Cases without Waiver (n=323)***
Plea Conditioned upon Judge's Acceptance of Stipulations*	21.5% (133)	3.7% (12)
Judge Rejects Stipulations	14.9% (92)	18.9% (61)

*$p < 0.05$.

Note: The first value was coded from the agreements in the sample cases. There is considerable variation between districts in the use of *C* pleas. In the Western District of Texas, of 60 cases, 52 had waivers but none were *C* pleas; in the District of Arizona of 128 cases, 120 had waivers, and 111 were *C* pleas; in the Southern District of California, of 37 cases all had waivers but none were *C* pleas. Source for judge rejections is Commission FY 2003 data (ACCGDLN=0) for sample cases.

b. Limiting Scope of Waiver. Another way defendants can reduce the risk posed by an appeal waiver is to limit the scope of the waiver itself, so that appeal remains available under certain circumstances. Some very broad, blanket waivers discard the right to challenge the sentence or the conviction on any ground whatsoever, on appeal or collateral attack.[104] Of the waivers in our sample, nearly

103. *See infra* Table 8.

104. *See, e.g.*, Goodwin, *supra* note 45, at 213 (quoting from a broad appeal waiver in which the defendant waived the right to appeal or collateral attack on any ground). See also *United States v. Raynor*:

> [Y]our client voluntarily and knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction, or the manner in which that sentence was determined . . . on any ground whatever. Your client also voluntarily and knowingly waives your client's right to challenge the sentence or the manner in which it was determined in any collateral attack, included but not limited to a motion under [§ 2255].

80 percent barred both direct and collateral challenges.[105] About one-third (35 percent) barred review of sentence only, whereas 63 percent barred review of both sentence and conviction.

Narrower waivers bar enforcement of the waiver under certain situations or allow appeal of certain claims. Both our interviews and the cases suggest that most waiver clauses have been narrowed in some respect. For example, one waiver provides: "Defendant waives all rights on direct appeal except for up or down departure, and waives all habeas rights except ineffective assistance and prosecutorial misconduct."[106] Under another, the defendant "waive[s] any right to appeal all . . . issues with the exception of an illegal sentence, or a sentence over the statutory max[imum]."[107]

Interviewees reported that many waivers expressly allow appeals should the sentence exceed the specified sentencing range or number of months[108] or should the defendant raise specific issues—presumably those sentencing issues that worry the defendant most. For example, one defender reported,

> If you have a clearly arguable Guidelines difference, when you could go either way, 50% of the time I can get that guideline excluded from the appeal waiver. . . . [I]n the alternative, we just agree to a lower number, lower the cap below which you can't appeal. See[,] as a result of [our circuit's case law], the agreements specify that you waive your right to appeal unless the sentence is above [X], a

989 F. Supp. 43, 43 (D.D.C. 1997) (quoting from the plea agreement). Defender #4 reported that under the standard clause in his district, "[T]he defendant waives direct appeal, 2255 and habeas, [including] ineffective assistance."

105. Of the sample, 113 barred appeal only (18.3 percent of 619 waivers), and 494 barred appeal and collateral review (79.8 percent of all 619 waivers). *Cf.* Defender #17 ("I don't know why the government has not included 2255 [waivers] in the agreements here. Part of it might be the AEDPA [Antiterrorism and Effective Death Penalty Act of 1996] doesn't leave much, so they don't view it as so essential. They almost encourage that first petition now.").

106. Telephone Interview with Defender #3. Others reported similar standard waiver language. *See, e.g.*, Telephone Interview with Defender #13 ("We waiv[e] any attack on [the] sentence other than ineffective assistance [or] prosecutorial misconduct, and [retain the right to] appeal [an] upward departure.").

107. Telephone Interview with Defender #17; *see also* United States v. Gibson, 356 F.3d 761, 765, 767 (7th Cir. 2004) (vacating a conviction and sentence due to sentencing over the statutory maximum when an appeal waiver reserved this sort of claim).

108. *See, e.g.*, Telephone Interview with Defender #9 ("Defendant will not file an appeal or otherwise challenge the conviction or sentence in the event of an imposed sentence of [X] months or less."). For an argument that all waivers should be contingent upon sentencing within a specified range or up to a specified maximum, see Recent Case, 111 HARV. L. REV. 1116, 1121 (1998).

> specified sentence. The government thinks they have to read this way to comply with the case law. So if you have a dispute about some Guidelines calculation, you just lower the number in the waiver.[109]

Findings from our sample indicated that a significant proportion of waivers were limited in these ways.[110]

Table 9. Agreements with Exemptions from Waiver That Limit Exposure

Appeal Allowed If . . .	**% Cases with Waiver (n=619)**
Judge Departs Upward from Guidelines Range	36.5% (226)
Sentence Exceeds Statutory Maximum	28.9% (179)
Ineffective Assistance of Counsel	28.6% (177)
Sentence Exceeds Specified Range	22.8% (141)
Prosecutorial Misconduct/Brady Violation	18.1% (112)
Government Appeals	13.2% (82)
Sentence is "Illegal"	7.4% (46)
Sentence Exceeds Specified Sentence	4.8% (30)
Retroactive Application of Law	4.5% (28)
Unconstitutional Statute	1.6% (10)
No Limitations on Waiver	21.0% (130)

c. Uncertainty and No Concessions for Some. Despite the variety of concessions and terms tying down potential sentencing factors in many of these agreements, the interviews suggested that in some districts the concessions given in exchange for a defendant's waiver were negligible, and the waivers were sweeping. Some defenders reported getting no stipulations, exemptions for certain

109. Telephone Interview with Defender #9; *see also* Telephone Interview with Defender #1 ("[We a]lso have been successful in getting in exceptions for upward departures."); Telephone Interview with Defender #2 ("When we pushed 'em we could get the appeal waiver taken out, or we'd modify it. For example, we'd agree to everything except one issue, and exempt that one from the waiver. So we'd stip[ulate] to everything and agree to the waiver, but would be able to dispute that one issue, gave us some latitude.").

110. *See infra* Table 9. Case law confirms that defendants who reserve issues for appeal in their appeal waivers sometimes benefit from doing so. *See, e.g.*, United States v. Apodaca, 127 F. App'x 726, 727 (5th Cir. 2005) (vacating a sentence because of trial judge error in departing upward, when upward departure was the only claim excepted from appeal waiver in plea agreement).

claims, sentencing discounts, or charging breaks in return for signing waivers. Reported one defender: "The offers they make[,] they don't negotiate. The United States Attorney doesn't see this as deserving extra consideration. Nothing additional is given. . . . 'It's our way or the highway.'"[111] Some prosecutors reported giving no additional concessions, "If they don't like the deal, they can plead open."[112] Reported another,

> I've rarely seen a defense attorney bargain a waiver out of the agreement. Have I seen more stipulations as a result of the agreements? No, not really. There are big differences in the use of stipulations, but these are much more a function of the historical practice in a given district than whether or not there is a waiver in the agreement.[113]

3. *Licensing Misconduct or Lack of Care.* Several interviewees echoed the concern of critics that waivers, particularly those that forfeit collateral review, allow attorneys to insulate themselves from potential claims for misconduct related to the defendant's case. This sort of agreement poses an obvious conflict of interest because barring the defendant from raising allegations of improper conduct is in the attorney's self-interest. Consider this candid comment by one defender: "[F]rom the attorney's standpoint[, waivers] do have the advantage of putting an end to it. It's peace of mind, nice to know you're not going to end up in two years arguing a 2255 [a collateral

111. Telephone Interview with Defender #5; *see also* Fant & Walker, *supra* note 53, at 60 ("Although courts have touted appellate waivers as providing additional bargaining power for defendants during plea negotiations, the reality is that defendants have little power to refuse prosecutors' demands for appellate waivers."); Telephone Interview with Defender #16 ("[T]he government is not giving you more. I never had a case where the appeal waiver would make any difference in the deal. That's not an experience I've had. To me it is something they put in to protect themselves from their own errors."); Telephone Interview with Defender #7 ("[Q: Were the deals better after appeal waivers? A:] No, they know in 95% of the cases there are no issues to appeal. In my experience defendants in these cases have absolutely no bargaining power."); Telephone Interview with Defender #13 ("The reality is unless we had a bargaining chip we'd have to go along."); Telephone Interview with Defender #20 ("We didn't ask [for benefits in return for the waivers]. We didn't consider the benefits would be better. There may be some cases where we're getting such a good deal that we would sign these, but not many."); Telephone Interview with Defender #4 ("[Q: What more would you get for the waiver? A:] Nothing, really. Have to have an idea where your client will fall in the Guideline[s] range, have to be right. If not, good luck withdrawing the plea.").

112. Telephone Interview with Prosecutor #9.

113. Telephone Interview with Prosecutor #6.

challenge, often based on ineffective assistance] . . . . It's a harsh reality, but there it is."[114]

Claims of ineffective assistance and misconduct by the government may be excluded from waivers for this very reason.[115] Consider, for example, the provision discussed in *United States v. Robinson*,[116] which included this caveat:

> *provided* however, . . . consistent with principles of professional responsibility imposed on [defense] counsel and counsel for the Government, [the defendant does] not waive his right to challenge his sentence to the extent that it is the result of a violation of his constitutional rights based on claims of ineffective assistance of counsel or prosecutorial misconduct of constitutional dimension.[117]

Of all agreements in our sample that included some sort of waiver, only about 30 percent exempted ineffective assistance of counsel claims.[118] Of all defendants in the sample who signed waivers, 80 percent waived collateral review as well as appeal.[119] Of those defendants waiving collateral review, only 32 percent reserved the right to raise ineffective assistance claims.[120] Even fewer agreements excluded prosecutorial misconduct claims from waivers.

This pattern might be related to early developments in appellate case law on the enforcement of waivers. Several early decisions stated that ineffective assistance of counsel claims could not be waived in plea agreements, and some courts still adhere to this position.[121]

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114. Telephone Interview with Defender #21; *see also* Telephone Interview with Defender #7 ("It is a lot easier to explain to the client [that] there are no issues when there is an appeal waiver there."). Defense attorneys do not escape appellate duties entirely when a client signs an appeal waiver. *See* United States v. Garrett, 402 F.3d 1262, 1266–67 (10th Cir. 2005) ("[T]he waiver does not foreclose all appellate review of [the] sentence. . . . If [the defendant] actually asked counsel to perfect an appeal, and counsel ignored the request, [the defendant] will be entitled to a delayed appeal.").

115. Ineffective assistance claims are also the only claims exempted from the Attorney General's mandatory waiver for fast-track cases. *See* Fast-Track Memo, *supra* note 48, at 3 ("The defendant agrees to waive the opportunity to challenge his or her conviction under [§ 2255], except on the issue of ineffective assistance of counsel.").

116. 117 F. App'x 973 (5th Cir. 2004).

117. *Id.* at 974 (quoting the plea agreement).

118. *See supra* Table 9.

119. *See supra* note 105 and accompanying text.

120. Of the 494 cases waiving collateral review, 158 exempted ineffective assistance claims.

121. *E.g.*, United States v. Parra, 112 F. App'x 910, 911 (4th Cir. 2004) (per curiam) (considering an appeal after the first appeal was remanded for fact-finding on counsel's conduct, despite a waiver); United States v. Carrion, 107 F. App'x 545, 546 (6th Cir. 2004) (reaching the

Following *Blakely* and *Booker*, however, appellate panels have enforced such waivers, so long as the claim of attorney error does not involve advice about the plea agreement itself, but instead relates to representation that occurred pre- or post-plea.[122]

As the discussion above indicates, one concern with full blanket waivers is that attorneys will not be as careful as they should be if they know their past and future mistakes are protected from scrutiny. Additionally, some defenders interviewed worried that waivers lead judges to cut corners. Consider one defense attorney's perception:

> There are unjustified Guidelines enhancements that I fight about with the judge, and you can see the judge, flipping back to the plea agreement, making sure that the appeal waiver is there, then looking you in the eye and denying everything. [Some] judges give significantly shorter shrift to what are complicated close arguments

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merits of a claim of ineffectiveness for failing to file an appeal despite an appeal waiver); *see also, e.g.*, Telephone Interview with Defender #17 ("I told one judge that he'd have to appoint a separate counsel to advise the client before waiving that. He agreed [and] yelled at the government, and they had to take it out. You know so much of federal court practice is peculiar to the personality and views of individual district judges."); *supra* note 68.

122. *See, e.g.*, United States v. Jeronimo, 398 F.3d 1149, 1156 n.4 (9th Cir. 2005) (collecting authority, but declining to decide the issue); United States v. Bowen, 121 F. App'x 569, 570 (5th Cir. 2005) (per curiam) (enforcing an appeal waiver to bar a claim of ineffectiveness at sentencing); Williams v. United States, 396 F.3d 1340, 1342 (11th Cir. 2005) (collecting authority from Second, Fifth, Sixth, Seventh, and Tenth Circuits, holding that a waiver of the right to challenge a sentence collaterally includes a waiver of the right to raise a claim of ineffective assistance at sentencing, and noting that "a contrary result would permit a defendant to circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless"); United States v. Price, 113 F. App'x 374, 376 (10th Cir. 2004) (refusing, because of a waiver, to consider a claim of ineffective assistance during the two weeks of trial before the defendant terminated the trial by pleading guilty, reasoning that "none of the alleged errors Defendant cites pertain to plea negotiations," and that "poor previous trial performance [that] put [the defendant] in a position in which a plea was simply the best option. . . . is not the sort of argument which survives a waiver of post-conviction rights"); United States v. Monzon, 359 F.3d 110, 119 (2d Cir. 2004) (enforcing an appeal waiver when the defendant raised an ineffectiveness claim, noting that otherwise a defendant "could escape the fairly bargained-for appeal waiver by the simple expedient of asserting an ineffective-assistance-of-counsel claim that had no merit"); United States v. Cockerham, 237 F.3d 1179, 1187, 1188 (10th Cir. 2001) (concluding that collateral attacks based on ineffective assistance of counsel claims that fall outside a challenge to the validity of the plea or waiver are waivable, and finding that the defendant's claim that counsel was ineffective at sentencing did not relate to the validity of the plea or waiver); *see also* Braxton v. United States, 358 F. Supp. 2d 497, 503 (W.D. Va. 2005) ("[M]otions claiming ineffective assistance of counsel that do not relate directly to the validity of the plea or the § 2255 waiver itself are waivable.").

> when they know they can't be appealed. . . . It is not a good idea for judges to know that they are insulated from appeal.[123]

Another defender offered, "[L]et's face it, [judges] didn't want to be reversed, [and] these waivers gave them a level of comfort."[124] Beyond anecdote, however, our study cannot shed light on the effect, if any, that appeal waivers might have on the level of care that judges devote to sentencing decisions.

4. *Illegal Sentences*. It is also difficult to test critics' warnings that because of appeal waivers, serious error goes uncorrected.[125] More than half of the defense attorneys interviewed reported that some valid, nonfrivolous claims were turned away due to appeal waivers. Attorneys reported that waivers had blocked Guidelines issues concerning departures, ranges, and enhancements.[126] "[T]he defendant had a twin brother," recalled one defender, "and there were criminal history issues about whether the prior was related to this defendant or his brother, but there was an appeal waiver."[127] Case

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123. Telephone Interview with Defender #9; *see also* Telephone Interview with Defender #14 ("Strategically, what we realized was that if a [Guidelines] issue arises at sentencing that was not anticipated by the parties, especially criminal history (this happens a lot), the judge is looking at the plea agreement that allows appeal by the government and not for the defense. Who is he going to rule for to avoid appeal? It creates a built-in bias."); Telephone Interview with Defender #15 ("The [Pre-Sentence Report] comes in stamped 'appeal waiver,' and the judges will see that and just refuse to listen to arguments. The judge has to pay more attention if the appellate judges are looking over his shoulder."). *But cf.* Telephone Interview with Defender #4 ("One judge says that he's going to err on the side of the defense, he's not a liberal soft judge, and resolve any close call in favor of the defendant because the defendant has no appeal."); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 36 (1990) (arguing that "if the trial court also seeks to avoid reversal, the prohibition on government appeal of acquittals provides an incentive to make pro-defendant errors"); Steven Shavell, *The Appeals Process and Adjudicator Incentives* 16 (Nat'l Bureau of Econ. Research, Working Paper 10754, 2004), *available at* http://www.nber.org/papers/w10754 ("Where there is only one litigant who can make an appeal, the appeals process fails to alter adjudicator decisions if they would favor that litigant. Thus, the appeals process may have lower social value than where there are two opposing litigants.").

124. Telephone Interview with Defender #7. For other comments on acceptance of waivers by trial judges, see *supra* note 54.

125. Carney, *supra* note 59, at 1032–33.

126. *See, e.g.*, Telephone Interview with Defender #19 (reporting that defendants waive "scoring of enhancements, refusal to apply mitigators, [and] upward departures"); Telephone Interview with Defender #21 (relating cases in which waiver barred defendants from raising a double-counting problem and errors in calculating drug amount).

127. Telephone Interview with Defender #15. For another example, consider Telephone Interview with Defender #14: "I've tried to get around [the waiver] and argue the exception

law, too, suggests that the broadest waiver clauses bar claims that certain penalties violate statutes[128] or the Constitution.[129] Because those claims are not reviewed, however, it is not possible to determine whether relief would have been appropriate absent the waiver. And of course, the likelihood that sentences are based on false "facts" is greater when trial and appellate judges alike abandon scrutiny.

As just one example of the type of serious error insulated from review by waivers, consider challenges to sentences under *Apprendi v. New Jersey*,[130] *Blakely*, or *Booker*. Ten circuits held that once a defendant waives his right to appeal the sentence, that waiver blocks any claim that the sentence violated his rights under the Fifth and Sixth Amendments.[131] Other courts have also expressed this view, but as an alternative ground, or in cases that did not squarely present the

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applies when the judge sentenced within the range that he calculated, but it was the wrong range. Didn't allow it."

128. *See, e.g.*, United States v. McAninch, 109 F. App'x 885, 886 (9th Cir. 2004) (declining to address the defendant's argument that a fine was authorized because "waiver includes the right to appeal all the forms of punishment listed in that statute, including fines"); United States v. Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000) (appeal may be barred by a waiver even "where the sentence was conceivably imposed in an illegal fashion or in violation of the Guidelines, but . . . within the range contemplated in the plea agreement"). *But cf.* United States v. Gordon, 393 F.3d 1044, 1050 (9th Cir. 2004) (reviewing a restitution order alleged to be erroneous under the Mandatory Victims Restitution Act, because if the restitution order is in excess of the statutory maximum penalty, it is illegal and the waiver of appeal is inapplicable); Telephone Interview with Defender #21 ("We can appeal an illegal sentence. Three years ago a judge restricted a guy's access to the [I]nternet and the court of appeals said [the sentence] was illegal because the [probation] condition was bad. It's a way around the waiver.").

129. *See, e.g.*, United States v. Smith, 389 F.3d 944, 953 (9th Cir. 2004) (holding that a waiver barred the right to argue that facts should have been established by a clear and convincing evidence standard).

130. 530 U.S. 466 (2000).

131. United States v. Morgan, 406 F.3d 135, 138 (2d Cir. 2005); United States v. Lockett, 406 F.3d 207, 214 (3d Cir. 2005); United States v. Johnson, 410 F.3d 137, 153 (4th Cir. 2005); United States v. Blick, 408 F.3d 162, 170–71 (4th Cir. 2005); United States v. Bond, 414 F.3d 542, 546 (5th Cir. 2005); United States v. McKinney, 406 F.3d 744, 746–47 (5th Cir. 2005); United States v. Bradley, 400 F.3d 459, 463 (6th Cir. 2005); United States v. Bownes, 405 F.3d 634, 637 (7th Cir. 2005); United States v. Parsons, 396 F.3d 1015, 1017–18 (8th Cir. 2005) (per curiam), *vacated on other grounds*, 408 F.3d 519 (8th Cir. 2005); United States v. Cardenas, 405 F.3d 1046, 1048 (9th Cir. 2005); United States v. Porter, 405 F.3d 1136, 1142–43 (10th Cir. 2005); United States v. Grinard-Henry, 399 F.3d 1294, 1296 (11th Cir. 2005); United States v. Rubbo, 396 F.3d 1330, 1335 (11th Cir. 2005). *But see* United States v. Henderson, 135 F. App'x 858, 862–63 (6th Cir. 2005) (finding that although the defendant expressly waived the right to challenge the constitutionality of the Guidelines or the Guidelines sentence, *Booker* error was not waived, and remanding for resentencing under an advisory system).

issue.[132] No circuit has expressly exempted claims under *Blakely* or *Booker* from waivers.

If sentencing error remains uncorrected because of waiver clauses, three types of harm may result. First, defendants barred by their waivers from raising valid claims may be punished illegally in violation of a statute or the Constitution—that is, punished more severely than they otherwise would have been had they not signed appeal waivers but had instead pursued appellate relief for the error in their cases. However, many defendants receive significant advantages by signing the waivers, advantages that for these defendants might outweigh or exceed any potential relief that preserving a valid claim might have yielded.[133] By signing a waiver, defendants gamble that the deals they have negotiated are better than the dispositions they might ultimately receive if they preserved their right to review. Some win this bet, others do not. Because not all defendants barred from waiving a valid claim by their plea agreements suffer as a result of the waiver, there is no basis for claiming that waivers are, for example, more likely than not to lead to excessive punishment for defendants. We simply do not know what proportion of defendants end up worse off because of their waivers.

Second, gaps in enforcement created by appeal waivers pose an additional risk unrelated to the interest of the defendant or the prosecutor. If prosecutors are negotiating (and judges are approving) lower sentences in cases with waivers to avoid the trouble of appeal, the sentences that result may be more lenient than what either Congress or the Commission had authorized. Defendants may be receiving substantial sentencing discounts for a reason—to avoid

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132. *See* United States v. Sahlin, 399 F.3d 27, 32–33 (1st Cir. 2005) (finding that the defendant's claim that the judge should have found the predicate facts for the enhancement by proof beyond a reasonable doubt was foreclosed by stipulation to the application of the enhancement); United States v. West, 392 F.3d 450, 460–61 (D.C. Cir. 2004) (rejecting a *Blakely* claim and enforcing a waiver clause in the defendant's plea agreement because the defendant failed to provide a reason not to, but expressly declining to decide whether such waivers are valid as a general matter).

133. Consider this explanation by Prosecutor #6:

> Is it a contract of adhesion, is it unfair that we are demanding an awful lot but not giving up much? Yes, you could argue that. But we don't *have* to give up anything, and as a matter of judicial efficiency it makes sense. Especially when the sentences are high, who is to say that agreeing to 45 years instead of life is wrong or an inappropriate punishment? And if you ask is the defendant benefiting from the agreement, is it still, even with the waiver, an agreement that inures to the benefit of the defendant in the end? Yeah, it is, that's why they sign the agreement at all. Is there a real benefit the defendant is getting? Yes.

appeals—that neither Congress nor the Commission has endorsed as a basis for imposing lower sentences. With so much attention devoted to regulating unauthorized leniency under the Guidelines, it is rather remarkable that the trading of sentencing discounts for appeal waivers has gone unnoticed.

Finally, appeal waivers may also hide from view the extent of uneven application of the law regulating the criminal process. When appellate correction is bought and sold in some cases but not others, Congress, the Commission, and the courts that develop and interpret sentencing law are left with an incomplete picture of the extent and frequency of compliance. This concern is addressed below in Section 6.

5. *Bargaining Savvy*. Interviews turned up another interesting pattern that has not been raised by current critics of appeal waivers. Many interviewees reported that compared with less-experienced attorneys, repeat players from federal defender offices get better deals in return for waivers and are more likely to avoid waivers by counseling their clients to reject plea agreements and plead guilty to the indictment "blind."[134] Explained one defender:

> The economics are quite different for the private and CJA attorneys [attorneys appointed under the Criminal Justice Act]—they are thrilled to have no appeal, because they won't get paid for it, and the CJA attorneys are trial attorneys at heart. They don't relish appeals either. The [United States Attorneys] will tell you they get waivers in every case, and they are getting more of them in the cases represented outside this office. . . . They backed down on the appeal waiver [with us] but have made headway with the private lawyers.[135]

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134. *See* Telephone Interview with Defender #4 ("[T]he retained attorneys don't know what they are doing. . . . I've seen two occasions where the judge made the wrong ruling and the defendant had no recourse . . . [T]hey were panel attorney cases.").

135. Telephone Interview with Defender #19; *see also* Telephone Interview with Defender #8 ("[Q: What percentage of plea agreements do you think have appeal waivers in your district? A:] Two to five percent or so, no more, doesn't happen that often. Private counsel do it all the time. . . . They don't know doodly about the Guidelines, they get a deal, they go for it. They don't realize [that] fewer charges doesn't lower [the] sentence."); Telephone Interview with Defender #1 ("I know there are a lot of panel attorneys with less experience in the federal system who are eating appeal waivers when they shouldn't. They don't have these waivers in the state system."); Telephone Interview with Defender #3 ("A fair number really don't know what they're doing, don't know if they are getting anything in return for the appeal waiver."); Telephone Interview with Defender #9 ("[T]he panel attorneys and private attorneys . . . [will] sign anything, but my policy was if [you're] not going to plead to a lesser, or [get] something in

Several prosecutors confirmed that "repeat customers may be more resistant than others. . . . [There are s]ome who bargain harder."[136] Reported one prosecutor:

> A CJA attorney will say, "[W]ell this is part of every plea agreement, I might as well sign it, I've got to get ready for trial in my civil case anyway." Defenders are different. They have no other sorts of cases. They look at these and say, "I can litigate this." They can give it more thought at the time.[137]

Some defenders' offices have even negotiated with the United States Attorney in their districts to narrow the language in boilerplate appeal waivers.[138] Unfortunately, information about whether a defendant was represented by a federal defender, panel attorney, or retained counsel was missing from the Commission data in 73 percent of the cases in our sample, so we could not test the accuracy of interviewees' reports of better deals for those represented by federal defenders.

That defense attorney savvy and influence might make a difference is not exactly headline news. But it is a reminder that variations in the quality of defense counsel will impede any system that hopes to reduce, rather than exacerbate, disparity in sentencing among similarly situated offenders.[139]

6. *Law Distortion*. That brings us to the last objection to appeal waivers—their potential to *distort* the law. Waivers may hide violations of certain rules more often than violations of other rules, hide violations in certain jurisdictions more often than in other jurisdictions, and hide error in certain types of cases more often than

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the deal, don't sign the plea agreement."); Telephone Interview with Defender #10 (stating that his office will not sign agreements with waivers except in Rule 11(c)(1)(C) cases, and that "the cases with waivers that did get to the courts were by panel attorneys"); Telephone Interview with Defender #15 ("If they see one of these, they wouldn't know what it was. We have more understanding about these.").

136. Telephone Interview with Prosecutor #1.

137. Telephone Interview with Prosecutor #6.

138. Telephone Interview with Defender #5.

139. A similar point is made by Professor Margareth Etienne, in her article, *Parity, Disparity, and Adversariality: First Principles of Sentencing*, 58 STAN L. REV. 309, 321 (2005) ("A tremendous knowledge gap currently exists between federal public defenders and private lawyers, many of whom understand little about the intricate Guidelines. This knowledge gap . . . leads to a disparity in sentencing outcomes among defendants. . . . [A] sentencing system that unnecessarily magnifies these differences should be avoided.").

in other types of cases. All bargaining skews appellate lawmaking because rules that survive the bargaining process receive attention and development that rules waived as part of bargains do not. For most legal rules, we accept that parties will bargain in the shadow of the few cases that do reach judicial decision, and that some rules will be enforced less vigorously in some cases than in others. But sentencing rules are premised explicitly upon the goal of minimizing disparity between cases. Blind spots of enforcement are more costly when the very reason for the regulation being traded away inconsistently is consistency itself.[140]

Critics have worried that waivers hide from view bargaining practices in some jurisdictions but not others.[141] Even within the same circuit, the proportion of cases with waivers varies greatly from district to district. Table 10 shows the frequency of waivers for the eight districts that had at least twenty cases in the sample. Cases settled by plea agreement appear to be almost entirely insulated from review in some districts, whereas in other districts appeal waivers are the exception, not the rule. For example, our sample contained sixty cases from each of two adjoining districts in Texas; in one district over 93 percent of the agreements had waivers; in the other only 30 percent did.

Given the marked differences in the use of waivers, it is likely that the mix of sentencing issues that reach the courts of appeals from the Southern District of California (with 5.4 percent of offenders, but only 3.1 percent of appeals during FY 2003) might be different from the mix that rises out of the Southern District of Texas (with 7.2 percent of offenders and 8.5 percent of appeals during FY 2003).

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140. *See* United States v. Melancon, 972 F.2d 566, 570–80 (5th Cir. 1992) (Parker, J., concurring specially) (arguing that, like waiving the statutory right to a speedy trial, which offends the goals of the Speedy Trial Act, waiving the right to sentencing in accordance with the Guidelines offends the systematic goals reflected in the Guidelines); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 132 (1999) ("[R]egulating waiver makes sense as a means to protect public or third-party interests that are advanced by the government's adherence to procedural requirements. Regulation of the waiver of a potentially nonnegotiable right must be tailored to the specific third-party or public interests that the right protects."); *cf.* Town of Newton v. Rumery, 480 U.S. 386, 401 (1987) (O'Connor, J., concurring in part and in the judgment, casting the fifth vote) (stating that the enforcement of release-dismissal agreements, in which a defendant agrees to release authorities from civil liability in return for dismissal of charges, requires proof that the agreement is in the public interest). *But cf. infra* note 151.

141. *See* Telephone Interview with Defender #9 ("And the other thing that is bad is that sentencing law in this circuit is made by cases out of [names a different location]. There are no appeals from here.").

Unfortunately, without further analysis using appellate data, we do not have enough information to attribute lower rates of appeal, or differences in issues appealed, directly to higher rates of waiver.

Table 10. Districts with 20 or More Cases in Sample

District	% Cases from District with Waivers	% Cases from Dist. Trafficking / Immigration (Total)	Of Cases from Dist. In FY 2003, % Traf. / Immig. (Total)	Of Cases FY 2003, % from Dist.	% Appeals FY 2003, from Dist.
P.R.	3.7%	74.1% / 3.7% (77.8%)	64.6% / 9.0% (73.6%)	1.2%	1.0%
E.D.N.Y.^	70.4%	48.1% / 7.4% (55.5%)	42.9% / 6.7% (49.6%)	2.7%	1.9%
S.D. Fla.	445.0%	62.5% / 7.5% (70.0%)	43.5% / 19.7% (63.2%)	3.3%	3.9%
S.D. Tex.*^	30.0%	48.3% / 45.0% (93.3%)	34.2% / 53.8% (88.0%)	7.2%	8.5%
W.D. Tex*	93.3%	76.7% / 10.0% (86.7%)	52.5% / 32.3% (84.8%)	7.2%	6.7%
D. Ariz.*^	97.7%	13.3% / 62.5% (75.5%)	21.2% / 53.4% (74.6%)	6.5%	2.8%
C.D. Cal.*	95.7%	21.7% / 13.0% (44.7%)	17.6% / 19.0% (36.6%)	2.6%	4.6%
S.D. Cal.*^	100.0%	35.1% / 56.8% (91.9%)	28.3% / 54.2% (82.5%)	5.4%	3.1%

* denotes fast-track immigration program.

^ denotes fast-track drug trafficking program.[142]

Another concern is that waiver may insulate from review sentencing issues for particular types of offenses. Because Department of Justice policy mandates waivers for fast-track dispositions, it is not surprising that immigration and drug trafficking

142. *See generally* Memorandum from James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice, Authorization of Early Disposition Programs (Oct. 29, 2004), *appended to* Government's Memo, *supra* note 48 (listing districts with fast-track programs and describing each program). Although the fast-track programs noted in Table 10 were officially authorized during the sample period, many, like the fast track in the Southern District of California, had been in existence for the entire sample period (FY 2003). After the sample period ended, additional fast-track programs were approved for drug trafficking in the Western District of Texas and for false immigration documents in the Southern District of Florida, but these are not noted above. *See id.*

cases appear more likely to contain waivers than the other two most prevalent categories of federal felonies. Yet as Table 10 demonstrates, any pattern of waiver use that rises as the proportion of immigration and drug cases rises is not uniform at the district level. The likelihood of waivers does not appear to correspond directly to the proportion of the district's caseload devoted to drug trafficking or immigration cases.

More importantly, based on 2003 data, the two offense categories with the highest incidence of waivers in our sample—drug trafficking and immigration—seem to make up a slightly larger proportion of the appeals than they do cases sentenced.[143] Fraud cases, with a waiver rate lower than either trafficking or immigration, comprise a lower proportion of appeals, not higher. This comparison of waiver rates and appeals by district and offense type, although simplistic, fails to support claims of waiver critics that waivers are choking off review for entire districts or types of offenses.

Table 11. Waivers and Appeals by Crime Type

Crime Type	Of Sample Cases of Type, % with Waiver	Of Cases FY 2003, % of This Type	Of Appeals FY 2003, % of Type
Drug Trafficking	62.3%	35.7%	41.4%
Fraud	60.4%	10.7%	8.2%
Immigration	71.6%	21.6%	22.1%
Firearms	53.7%	9.8%	10.5%

Note: Source for data in last two columns is Commission FY 2003 Statistical Report, Tables 3 and 61.

A final concern has been that waivers are essentially one-sided, which leads to another sort of distortion in the development of appellate sentencing law.[144] As Table 12 shows, we found that very few waivers are mutual.[145] This has not, however, translated into a

143. *See infra* Table 11.

144. *See, e.g.*, United States v. Raynor, 989 F. Supp. 43, 46 (D.D.C. 1997) (stating that unilateral waivers "undermine the statutory balance" created when both sides were given access to appellate review).

145. However, not all trial judges allow one-sided waivers, according to some interviewees. *See, e.g.*, Telephone Interview with Defender #6 ("[O]ne case where the United States tried to get one without waiving itself, and [the judge] rejected [it], order[ed] them to do it over."); Telephone Interview with Defender #13 ("After [the new United States attorney] came in [one assistant U.S. attorney] started asking for waivers by the defendant with no waiver by [the] government. [The] judge refused to accept it."). *Compare* United States v. Calderon, 388 F.3d

change in the balance between defense- and government-initiated sentencing appeals. Government appeals have always been few and far between compared to defense appeals; this disparity may be partially explained by the requirement that prosecutors seek supervisory approval prior to any appeal.[146]

Table 12. Party Waiving

	% Cases with Waiver (n=616)
Defendant Only	87.0% (536)
Defendant & United States	12.5%* (77)
United States Only	0.5% (3)

* Of these 77 cases, 19 (24.4 percent) are from the Central District of California and 8 (10.2 percent) are from the District of Arizona. No other district with 20 or more cases in our sample had mutual waivers.

Based on this limited study, the safest conclusion to draw about the distorting influence of waivers on the development of sentencing doctrine in the courts of appeals is that we have not seen evidence that waivers have changed the balance of appeals between parties. Nor does this study support the conclusion that waivers have precluded appeals by defendants convicted of certain offenses or from certain districts. Waivers may affect the issues that appeals courts address, but we cannot confirm or refute this without additional research.

CONCLUSION

Appeal waivers are firmly entrenched in plea agreement practice in federal courts. By adopting deferential reasonableness review, the Court in *Booker* has reduced the value of appeal waivers to prosecutors. But waivers still hold value and are not likely to fade away. Already the language of clauses in some districts has been changed to respond to the new post-*Booker* regime by including an express waiver of review for reasonableness.[147] More importantly,

197, 200 (6th Cir. 2004) (rejecting an argument that enforcing a defense waiver in light of the government's right to appeal was unfair) *with* United States v. Blick, 408 F.3d 162, 168 n.5 (4th Cir. 2005) (noting an earlier decision holding that whenever a defendant waives the right to appeal in a plea agreement, the government has a reciprocal obligation not to appeal).

146. 18 U.S.C. § 3742(b) (2000).

147. Prosecutor #4 commented:

waivers are proving their worth to prosecutors by deflecting *Booker* claims on appeal,[148] and they will continue to insulate sentences from attack should the Court later expand the *Apprendi* rule to include findings of prior convictions or facts necessary to mandatory minimum sentences, consecutive sentences, forfeitures, or restitution orders.[149] With the constitutional regulation of sentencing statutes uncertain, prosecutors and courts will turn to appeal waivers to maximize finality.

Rather than count on appellate review as a means of assuring consistent application of sentencing law, reformers should assume that in most felony cases in which the parties enter into agreements, appellate review of the sentence is simply not available. At best, appellate review enforces sentencing consistency in only a minority of federal cases—cases that go to trial, cases in which the defendant pleads open with no agreement, and cases in which the defendant is able to resist signing an appeal waiver. At worst, widespread bargaining over waivers has turned appellate review into a bargaining chip, increasing, rather than decreasing, sentencing disparity. Appellate review is as likely to be traded for sentencing concessions as it is to deter or correct sentencing error. Reform should go forward, then, with serious skepticism about the ability of appellate review to ensure consistent sentencing practices.

The obvious question is whether it makes sense to regulate the exchange of waivers for charge and sentence concessions. At least two options present themselves, each with its own drawbacks. The first alternative would be for courts to refuse to enforce waivers on

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> [D]istrict judges are putting pressure on the Department of Justice to get the defendant to agree that any sentence within the Guidelines is reasonable. . . . It would make some sense to include a stipulation that the sentence is a reasonable sentence for all purposes under 3553(a)—a *Booker* waiver, but we aren't doing that. We'd have to decide whether a defendant could waive the constitutional rule in *Booker*. It's the next logical step. We do see some judges asking for this.

Another prosecutor reported that each agreement now includes a clause which reads, "The defendant and the United States agree that any sentence that falls within the appropriate Guidelines range, as determined by the probation office, . . . is per se reasonable and not an abuse of discretion." Telephone Interview with Prosecutor #6.

148. *See supra* note 131 and accompanying text.

149. *See, e.g.*, United States v. Fruchter, 411 F.3d 377, 382 (2d Cir. 2005) (collecting authority rejecting the application of *Apprendi* and *Blakely* to criminal forfeiture); *see also* Brian Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711, 2755–59 (2005) (discussing application of *Blakely* to restitution).

policy grounds. Prohibition would maximize the goal of sentencing consistency; once deprived of value, waivers would cease to be traded. The interest in maximizing the uniformity of sentences for like offenders is not represented by the attorneys at the bargaining table in criminal cases. If sentencing law is to trump the preferences of parties, and not merely to serve as an opening bid, then courts must enforce it, despite waiver. Policy must serve as the basis for refusal to enforce waivers, because at present any constitutional or statutory prohibition of waivers is unlikely. The Court's precedent is not likely to support a constitutional ban on the waiver of sentencing appeals. If a defendant can waive the right to a jury trial, then surely, proponents have argued, defendants can choose to waive statutory rights to appellate review of their sentences.[150] To read current federal statutes as prohibiting waivers is also a stretch.[151]

Of course, as Congress considers new sentencing legislation in the wake of *Booker*, it could choose to mandate appellate review of every sentence, or prohibit appeal waivers entirely,[152] but it would be difficult for legislators to deny prosecutors and courts the finality and fiscal relief that appeal waivers afford. Already, Congress has opted for efficiency over consistency in authorizing fast-track programs, for example. For waiver proponents, banning waivers would mean abandoning a handy way to encourage the speedy disposition of criminal cases, regardless of whether the ban is based in constitutional law, statutory command, or sentencing policy. There is no easy solution to reconciling the efficient administration of justice with the need to ensure uniform sentencing, but the need for such reconciliation will continue to be at the very heart of sentencing policy for years to come.

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150. *See* cases collected *supra* note 46.

151. *See* New York v. Hill, 528 U.S. 110, 117 (2000) (upholding the waiver of the Interstate Agreement on Detainers (IAD) timing provisions and noting that (1) the Court has allowed the waiver of numerous constitutional protections for criminal defendants that also serve broader social interests; (2) in general, those social or public interests are protected by the participants in the litigation; and (3) the time provisions of the IAD are not so central to the statute that they are "part of the unalterable 'statutory policy'"). In supporting its conclusion that the provisions of the IAD may be waived, the Court in *Hill* also pointed out that unlike the time limits of the Speedy Trial Act, which run automatically without request of the defendant, IAD time limits are triggered only by a request of one of the parties. *Id.* at 117 n.2. Notably, appellate review of noncapital sentencing also requires a request of one of the parties.

152. Professor Chanenson has suggested that "Congress should statutorily eliminate sentence appeal waivers." Steven L. Chanenson, *Guidance From Above and Beyond*, 58 STAN. L. REV. 175, 182 (2005).

An entirely different approach to regulating this market would be to attempt to standardize the price of appeal waivers instead of driving that price to zero. Critics might observe that efforts to standardize another process discount—the sentencing break defendants receive for waiving trial—have not been particularly successful.[153] Parties continue to set the price of a trial higher than (or the discount for a plea deeper than) the three points allocated by the Guidelines for acceptance of responsibility whenever they have the leverage to do so.[154] And it is the absence of any enforceable ceiling on the penalty gap between plea sentences and trial sentences that most troubles commentators, who worry that even an innocent defendant will plead guilty and accept a moderate penalty rather than risk conviction and a sentence many times greater. A similar inability to constrain the amount of discount would plague any attempt by Congress or the Commission to set a price for appeal waivers.

Yet even though the Guidelines have been ineffective in setting a ceiling on the price of the waiver of trial, they have changed bargaining by setting a floor—an opening bid. The waiver of appeal presently has no similar pricing norm deliberately selected as part of nationwide policy. Some defendants who waive review rights get nothing in return. It is possible, then, that simply recognizing a going rate might have some tendency to improve the consistency of federal sentencing.

Inevitably, though, any minimum, legislatively endorsed price tag on the right to appeal would be challenged as an unconstitutional penalty on the exercise of the statutory rights to direct and collateral review.[155] The Guidelines plea discount—"acceptance of responsibility"—has withstood constitutional challenge as a trial penalty because it is easy to justify as related to the purposes of punishment and sentencing philosophy. Pleading guilty can be recast

153. *See, e.g.*, Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 961 n.4 (2005) (collecting authority).

154. *See* FIFTEEN-YEAR REPORT, *supra* note 15, at 30 ("Department [of Justice] policies allow prosecutors to invoke statutory minimum penalties and statutory enhancements as further incentives for guilty pleas, even barring their declination or dismissal except as part of a plea agreement.").

155. Although there is no constitutional right to appeal, the Supreme Court has held that imposing a higher sentence as a penalty for exercising the right to appeal violates due process. *See, e.g.*, LAFAVE ET AL., *supra* note 13, at § 26.8 (discussing North Carolina v. Pearce, 395 U.S. 711 (1969), and the cases that followed).

as feeling guilty without raising too many eyebrows, and a defendant who feels guilty is arguably in need of less punishment than one who denies his responsibility for the crime and demands that the government prove his guilt. Even snitches who receive lesser sentences for helping to prosecute others are arguably exhibiting a greater earnestness about becoming law-abiding citizens than those who could rat on their pals but choose not to.[156] By contrast, defendants who waive all of their rights to seek appellate correction of any future constitutional and statutory errors that may occur at sentencing are no less culpable or easier to rehabilitate than defendants who do not waive these rights. Defendants who receive discounts for appeal waivers may simply be opportunists, sacrificing whatever the prosecutor wants (here, a free pass on any future law violations) so long as it means less punishment.

These are only a few of the issues policymakers will encounter as they consider how to take account of the increasingly pervasive use of appeal waivers in federal cases. A full evaluation of the various options for regulating waivers is beyond the scope of this initial study.[157] But hopefully, that evaluation will no longer be based entirely on blind speculation about what waivers say, who signs them, in what cases, and for what concessions. Ideally, the glimpse into appeal waiver practice provided by this limited study will not be the last, and the Commission will begin to collect basic information about appeal waivers and their effects on federal sentencing.

Even if the Commission continues to ignore waivers in its data collection practices, there are reasons to expect that scholars will soon begin to fill the void. A new rule has been proposed that will require all districts (not just a handful of pilot districts) to post all unsealed documents filed in criminal cases on PACER, the searchable online

156. *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J., 85, 135 (discussing "the moral side of cooperation").

157. Other creative proposals exist, including the suggestion that groups of defendants coordinate their bargaining positions to gain leverage, like unions. *See* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1177–79 (2005) (discussing strategies for limiting the defendant's right to waiver). Indeed, as illustrated by some of the interviewees' comments, *see supra* notes 135–138 and accompanying text, some federal defender offices have been able to negotiate default waiver policies applicable to all the defendants represented by the office, using leverage that private defenders lack.

database for federal courts.[158] Internet access to actual plea agreements in federal cases nationwide has the potential to support a new generation of empirical evaluation of bargaining practices.[159]

Finally, although this study has evaluated waivers of review in federal cases, there are lessons here for the states. As states consider more rigorous appellate review of increasingly detailed sentencing rules, the experience in the federal system should furnish a cautionary tale. The more closely that sentencing is regulated by appeal, the more likely it is that appellate review will be traded as part of plea negotiations, creating an additional source of sentencing disparity between those who are able to extract sentencing concessions for waivers, and those who are not.

158. Memorandum from Professor Sara Sun Beale, Consultant, to Members, Criminal Rules Advisory Comm., Proposed New Rule 49.1, to Implement E-Government Act (Mar. 15, 2005) (on file with the *Duke Law Journal*).

159. PACER research will always be an imperfect substitute for Commission analysis, however, because only the Commission has access to the case identification information that can link information from PACER to the detailed sentencing information coded into the Commission's many data sets (which are unavailable on PACER itself). The PACER database is available online at http://pacer.psc.uscourts.gov/.