Booker Reconsidered

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INTRODUCTION

By some measures, *United States v Booker*[1] is the most important case the Seventh Circuit has decided in decades. On the heels of the Supreme Court's decision in *Blakely v Washington*[2] to invalidate Washington State's mandatory sentencing guidelines,[3] the Seventh Circuit held that the Federal Sentencing Guidelines were constitutionally infirm as well.[4] Prompted by the Seventh Circuit, the Supreme Court granted certiorari and struck down the Federal Sentencing Guidelines six months later in *United States v Booker*,[5] uprooting the decades-old system of determinate federal sentencing. *Booker*'s reverberations continue to be felt, as federal courts struggle with the newly permissive sentencing regime and the Supreme Court decides case after subsequent case in an effort to iron out the wrinkles caused by its decision.[6]

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1 375 F3d 508 (7th Cir 2004).

2 542 US 296 (2004).

3 Id at 302–05.

4 *Booker*, 375 F3d at 510–13 ("[I]f a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency.").

5 543 US 220, 243–44 (2005) (concluding that the Sentencing Guidelines ran afoul of the Sixth Amendment's requirement that "[a]ny fact . . . necessary to support a sentence . . . must be admitted by the defendant or proved to a jury beyond a reasonable doubt").

6 See, for example, *Nelson v United States*, 129 S Ct 890, 892 (2009) (holding that the Sentencing Guidelines should not be presumed reasonable by sentencing courts); *Spears v United States*, 129 S Ct 840, 843–44 (2009) (holding that the district court was entitled to reject the 100-to-1 ratio in the crack-cocaine sentencing guidelines); *Oregon v Ice*, 129 S Ct 711, 716–20 (2009) (holding that the decision to impose sentences consecutively, rather than concurrently, was not traditionally considered to fall within the "domain of the jury," and allowing judges to do so); *Greenlaw v United States*, 128 S Ct 2559, 2562 (2008) (holding that the court of appeals could not, on its own initiative, increase a defendant's sentence when the original sentence was fifteen years less than the applicable law required); *Irizarry v United States*, 128 S Ct 2198, 2202–04 (2008) (holding that FRCrP 32(h) does not apply to variances from the recommended Sentencing Guidelines range); *Kimbrough v United States*, 552 US 85, 91 (2007) (holding that district court judges can sentence below the Sentencing Guidelines for drug trafficking purely based on a policy disagreement with the Guidelines' disparate treatment of crack and powder cocaine of-

The judges who formed the *Booker* majority on the Seventh Circuit have undoubtedly had a profound impact upon the law. Indeed, for most judges, influence is defined by victory. An opinion the judge has written might carry the day in the judge's own court and then be adopted across the country. Or the judge may find herself in the minority at home but be vindicated by a higher court, her reasoning validated. This is the conventional account, and one that has been repeated throughout Judge Frank Easterbrook's career.[7]

Yet Judge Easterbrook's opinion in *Booker* may turn out to be one of the most significant he has written, despite the fact that his views in that case were rejected—twice. Judge Easterbrook, unable to command a majority in the Seventh Circuit, instead penned a pointed dissent that urged the Supreme Court to take the case. The Court did just that, but then affirmed the majority and rejected Judge Easterbrook's arguments to the contrary. For most judges, the narrative would end there.

But Easterbrook's dissent will likely exert a far greater influence in the years to come. In the course of a few short pages, Easterbrook exposes the majority position as excessively formalist in crucial respects and prefigures a series of problems that have since developed with the Supreme Court's new sentencing framework. And as a mere prologue, Easterbrook offers a compelling meta-analysis of the appellate courts' appropriate institutional role in cases where Supreme Court precedent has been thrown into doubt.

This Essay begins with a discussion of Easterbrook's meta-analysis of the role of appellate courts within the federal system. It then scrutinizes Easterbrook's substantive arguments regarding *Booker*, *Blakely*, and the institutional structures surrounding federal sentencing. On both issues, Easterbrook's position of disagreement

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fenses); *Gall v United States*, 552 US 38, 51–53 (2007) (holding that, under *Booker*, a sentence must be reviewed under an abuse of discretion standard, regardless of whether it falls within the Sentencing Guidelines range); *Rita v United States*, 551 US 338, 347–51 (2007) (holding that an appellate court can presume that a sentence is reasonable when it falls within the Sentencing Guidelines range).

7 See, for example, *Miller v Civil City of South Bend*, 904 F2d 1081, 1120–35 (7th Cir 1990) (Easterbrook dissenting) (arguing that Indiana was free to regulate public nudity even though the regulation had the inadvertent effect of also regulating expressive dancing), revd, *Barnes v Glen Theatre, Inc*, 501 US 560 (1991) (holding that a valid governmental interest allowed restrictions on nude dancing without violating the First Amendment); *International Union, UAW v Johnson Controls, Inc*, 886 F2d 871, 908–15 (7th Cir 1989) (Easterbrook dissenting) (noting that courts regularly see sex, race, and age discrimination for the purpose of protecting members of the public as disparate treatment requiring a "bona fide occupational qualification" and asserting that there is no reason why this requirement should be any different for fetuses), revd, 499 US 187, 206–07 (1991) (holding that Johnson Controls could not establish a bona fide occupational qualification and that Judge Easterbrook correctly observed that the welfare of the next generation cannot be considered a part of the essence of Johnson's business).

with the Seventh Circuit majority, and with the Supreme Court, has been substantially vindicated.

I. THE APPELLATE COURTS AND THE FEDERAL SYSTEM

Booker's history begins with the Supreme Court's decision in *Blakely v Washington* striking down the state of Washington's determinate sentencing regime as a violation of the Sixth Amendment's right to trial by jury.[8] To review: the Washington legislature had enacted guidelines directing judges to sentence convicted criminals to fixed terms of imprisonment that depended partially on the elements of the crime, either found by the jury or admitted by the defendant,[9] and partially on other facts found only by the judge at sentencing.[10] Ralph Blakely, Jr had been convicted of second-degree kidnapping, which carried a presumptive guideline sentence of forty-nine to fifty-three months in prison.[11] However, Washington's guidelines permitted the judge to impose an "exceptional sentence" of up to 120 months if she found a "substantial and compelling reason[]" for doing so.[12] In Blakely's case, the judge found that the kidnapper acted with "deliberate cruelty."[13] The judge made this finding (without a jury) and sentenced Blakely to a ninety-month term.[14] On writ of certiorari, the Supreme Court invalidated Washington's sentencing guidelines, holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[15] And the Court held that the "prescribed statutory maximum" under Washington's system was the presumptive forty-nine to fifty-three month sentence dictated by the defendant's guilty plea.[16]

The decision in *Blakely* immediately cast doubt upon the continued viability of the Federal Sentencing Guidelines, despite the fact that the Supreme Court had upheld them against a similar challenge

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8 *Blakely*, 542 US at 302–05 ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority.").

9 Id at 298–99 (clarifying that Blakely pleaded guilty only to second-degree kidnapping, domestic violence, and use of a firearm, resulting in a sentence within the forty-nine to fifty-three month Guidelines range, which included a thirty-six month enhancement for use of a firearm).

10 Id at 299.

11 Id.

12 Wash Rev Code Ann § 9.94A.120(2) (West 1998), recodified at § 9.94A.505(2) (West).

13 *Blakely*, 542 US at 300.

14 Id.

15 Id at 301, quoting *Apprendi v New Jersey*, 530 US 466, 490 (2000) (quotation marks omitted).

16 *Blakely*, 542 US at 303–05.

just seven years prior.[17] The Sentencing Guidelines differed from Washington's only in that they had been written by an administrative body—the United States Sentencing Commission—rather than the legislature. Accordingly, in response to an "avalanche of motions for resentencing in the light of *Blakely*,"[18] the Seventh Circuit immediately expedited review of a case that raised the same issues regarding the federal Guidelines.[19] The appellate court perceived no meaningful distinction between Washington's legislative rules and the federal administrative rules and struck down the Federal Sentencing Guidelines.[20]

Easterbrook dissented from the panel's opinion. Before he turned to the merits of the case, however, he paused to offer a pointed exegesis on the propriety of the Seventh Circuit effectively overturning standing Supreme Court precedent, even precedent that appeared to have been undone by more recent developments.[21] "Just as opera stars often go on singing after being shot, stabbed, or poisoned," he noted colorfully, "so judicial opinions often survive what could be fatal blows."[22] Easterbrook catalogued a series of Supreme Court precedents that retained their vitality despite being seemingly contradicted by more recent holdings.[23] He concluded that the appellate court should stay its hand pending further instruction from the Supreme Court: "The alternative is bedlam—which is the likely consequence of today's decision."[24]

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17 See *Edwards v United States*, 523 US 511, 513–14 (1998). To be clear, the Seventh Circuit *Booker* majority may have been within its rights to overturn the Sentencing Guidelines even taking *Edwards* into account. As a rule, an appellate court may not overturn an existing Supreme Court decision in light of a newer one unless the latter explicitly overruled the former. *State Oil Co v Khan*, 522 US 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."). However, it is at least arguable that the *Booker* decision did not require overruling *Edwards* because the Court in *Edwards* never addressed the Sixth Amendment argument raised in *Booker*. Compare *Booker*, 375 F3d at 513–14 (noting that the *Edwards* opinion did not address the constitutional right to a jury trial, and the *Edwards* petitioners never even mentioned the Sixth Amendment) with id at 516–17 (Easterbrook dissenting) (arguing that constitutional issues were raised in *Edwards*, and the *Edwards* Court still upheld the Sentencing Guidelines). The point that follows here is not that the majority violated the Supreme Court's rules in striking down the Sentencing Guidelines, but that it would have been well advised to have stayed its hand.

18 *Booker*, 375 F3d at 510.

19 *Blakely* was decided June 24, 2004; *Booker* was argued before a panel of the Seventh Circuit on July 6, 2004, and decided on July 9, 2004.

20 *Booker*, 375 F3d at 510–13.

21 Id at 516 (Easterbrook dissenting) (arguing that, for the majority to reach its result, it "must conclude that *Edwards v United States* was wrongly decided," a decision that is inappropriate for "intermediate judges in a hierarchical system").

22 Id (noting that while *Blakely* may suggest that *Edwards* is "on its last legs[,] . . . [i]t does not imply that we are entitled to put it in a coffin while it is still breathing").

23 Id, citing *Lemon v Kurtzman*, 411 US 192 (1973); *Almendarez-Torres v United States*, 523 US 224 (1998).

24 *Booker*, 375 F3d at 516 (Easterbrook dissenting).

Easterbrook's complaint had merit. The Supreme Court was almost certain to review *Booker*—the Court granted certiorari on August 2, 2004, less than a month after the Seventh Circuit decision[25]—and so the appellate ruling was unlikely to stand long in any event. But what if the Supreme Court's interest had been less evident? An appellate decision that contravenes existing Supreme Court precedent, and especially one that overturns a national legislative or regulatory apparatus, effectively forces Supreme Court action. Once the Seventh Circuit has struck down the Federal Sentencing Guidelines, the Court is forced to take the case, irrespective of whether it has any intention of acting or feels the time for intervention is right. The costs of remaining uninvolved—uncertainty and chaos in the federal criminal justice system, and inequities and disparities in sentencing rules across circuits—are simply too great. This is the "bedlam" Judge Easterbrook warned of, and while it was unlikely to occur in *Booker*, it might easily erupt in a subsequent case.[26] Decisions such as the Seventh Circuit's compel the Supreme Court to consume judicial resources whether or not those resources could be better deployed elsewhere.

What, then, was to be gained from striking down the Sentencing Guidelines? The majority's decision undoubtedly sent a strong signal to the Court that the issue was ripe for adjudication and helpfully described the logic by which *Blakely* undermined the Federal Sentencing Guidelines. But these are objectives that could have been accomplished equally well under the opposite holding. The circuit court simply could have made the identical arguments regarding the constitutionality of the Sentencing Guidelines, highlighted the question for the Supreme Court, and then left the Guidelines in place. In fact, Judge Richard Posner, the author of the *Booker* majority opinion, did precisely this eight years earlier in *Khan v State Oil Co*.[27] The availabil-

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25 *United States v Booker*, 542 US 956 (2004) (granting certiorari).

26 The federal courts stayed nearly every sentencing proceeding in the wake of *Blakely* and the Seventh Circuit's decision in *Booker* pending the Supreme Court's decision in that case. See, for example, *United States v Love*, 2004 WL 2011445, *2 (WD Wis) (staying the defendant's motion for reduction of his sentence).

27 93 F3d 1358, 1363–64 (7th Cir 1996) (noting the "increasingly wobbly, moth-eaten foundations" of the Court's precedent, arguing that the precedent should be overruled, but concluding that it was not within the authority of the court of appeals to do so), vacd and remd, *State Oil Co v Khan*, 522 US 3, 20 (1997) (expressing approval of the court of appeals' decision to follow precedent, despite its disagreement with the result). It is notable that both the majority and dissent in *Booker* cited to the Supreme Court's decision in *Khan*, but neither explicitly mentioned the alternative course of action it suggested. Compare *Booker*, 375 F3d at 513 (discussing that although *Khan* does not allow the court to overrule Supreme Court precedent, *Edwards* does not discuss the constitutional questions and therefore no overruling would be necessary) with id at 516 (Easterbrook dissenting) (explaining that the majority decision would essentially overrule the Sentencing Guidelines, replacing them with the court's interpretation). Another possibility for this court would have been to invoke the rarely used Supreme Court Rule 19, also

ity of this option casts doubt upon the manner in which the appellate courts fulfill their mission of "developing the law," particularly when they are called upon to review federal statutory schemes that have already been approved—in one form or another—by the Supreme Court.[28] That problem was potentially even more acute in the context of the Federal Sentencing Guidelines. Had the Supreme Court not acted expeditiously, the Seventh Circuit's actions would have undermined the Guidelines' very reason for existence: uniformity in federal criminal sentencing.

Judge Easterbrook's protest raises a more general point about the interaction between principals and agents within a hierarchical administrative system. In choosing a course of action, the agent must always take into account the costs to the principal of monitoring the agent and reversing the decision. If the transition costs of reversing one potential course of action are low and the costs of reversing an alternative course of action are higher, it may be preferable for the agent to adopt the former course even if it believes, with some probability, that the latter course is superior.[29] The systemic costs of choosing the right path—including the principal's monitoring and reversal costs—may be lower if the agent initially adopts the program that is cheaper to undo.[30] And where the inferior actor's correct course of action is highly unclear, as it may be in a contested Supreme Court case, discrepancies in reversal costs could be decisive.

Consider the following stylized example.[31] An agent has a choice between enacting Policy A or Policy B. Policy A yields a benefit of 10

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allowed under 28 USC § 1254, and certify the question to the Supreme Court for resolution. The Fifth Circuit recently used this procedure. See *United States v Seale*, 577 F3d 566, 567 (5th Cir 2009) (certifying the question of a statute of limitations for a kidnapping that occurred in 1964, but was indicted in 2007). However, the Supreme Court dismissed the certified question. *United States v Seale*, 130 S Ct 12, 12 (2009). In fact, the Supreme Court has said that in most cases the courts of appeals should decide the issues in front of them, except for "in the rare instances, as for example the pendency of another case before this Court raising the same issue, when certification may be advisable in the proper administration and expedition of judicial business." *Wisniewski v United States*, 353 US 901, 902 (1957).

28 See Richard A. Posner, *Federal Courts: Crisis and Reform* 230 (Harvard 1985) (noting the existence of a large audience for judicial opinions beyond the immediate litigants to the case). See also id at 251–52.

29 See Yair Listokin, *Learning through Policy Variation*, 118 Yale L J 480, 524–29 (2008).

30 Of course, there are systemic advantages to "guessing" what the Supreme Court will decide. If an appellate court stubbornly adheres to old Supreme Court precedent that may be outdated, and the Court eventually overturns that precedent, the appellate court may be forced to revisit the decisions it made in the interim. This can be costly. However, the lower court can avoid these costs by simply staying all related cases while the case is pending before the Supreme Court. Indeed, this is precisely what occurred after the Seventh Circuit's decision in *Booker*. See, for example, *United States v McKee*, 389 F3d 697, 701 (7th Cir 2004).

31 For the purposes of this model, I assume that the interests of the principal and agent are aligned.

with 60 percent probability and a benefit of 0 with 40 percent probability. Policy B yields a benefit of 10 with 50 percent probability and a benefit of 0 with 50 percent probability. After the agent selects a policy, the principal can observe the effect of the policy and, if necessary, switch to the alternative policy. Imagine that these switching costs are asymmetric: the principal can switch from Policy B to Policy A at a cost of 3, but incurs a cost of 4 to switch from Policy A to Policy B. Based on the agent's actions alone, the expected value of choosing Policy A is greater than the expected value of Policy B (6 to 5). But once the principal's role in monitoring is introduced, this inequality is reversed: the expected value of Policy A is 8.4, and the expected value of Policy B is 8.5.[32] If the agent can observe the principal's transition costs, she should select Policy B, despite the fact that by itself it yields a lower expected outcome.

In this sense, the rule prohibiting an appellate court from overturning Supreme Court precedent can be understood as a proxy for an inquiry into the monitoring and reversal costs faced by the Supreme Court. If the Supreme Court has not expressly overturned its own precedent, it is possible that it may elect not to do so, even if subsequent cases have undercut the foundations of that precedent.[33] This suggests that the lower court should pay particular attention to the costs of a potential reversal. But it is only a proxy; there may be conditions under which similar caution by the lower court is warranted, even if one course of appellate action does not require specifically overruling existing Supreme Court precedent. A case challenging the constitutionality of a national administrative system, and one that will turn on a 5-4 vote, presents such an example.[34] Thus, from an institutional standpoint Judge Easterbrook may well have been correct that the Seventh Circuit should have stayed its hand.

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32 Policy A is 60 percent likely to yield a benefit of 10 and 40 percent likely to yield a benefit of 6 (10 after the principal switches to Policy B minus 4 in switching costs), for an expected benefit of 8.4. Policy B is 50 percent likely to yield a benefit of 10 and 50 percent likely to yield a benefit of 7 (10 after the principal switches to Policy A minus 3 in switching costs), for an expected benefit of 8.5.

33 As an example, Judge Easterbrook cites *Lemon*. See *Booker*, 375 F3d at 516 (Easterbrook dissenting) (remarking that *Lemon*, though inconsistent with later decisions and criticized by several justices, has not been overruled).

34 Both *Blakely* and *Booker* were decided by 5-4 votes, and the *Booker* Court was so divided over the result that Justice Ruth Bader Ginsburg switched sides and formed a different majority when deciding the remedy.

II. PRAGMATISM AND FORMALISM IN INSTITUTIONAL DESIGN

A. Institutional Incongruities

Judge Frank Easterbrook has frequently described himself (and been described) as a legal formalist,[35] particularly when it comes to statutory interpretation.[36] These labels of course represent an oversimplification, and Judge Easterbrook has demonstrated an admirable willingness to reason pragmatically when the situation appears to call for it.[37] An important opportunity of this type arose in *Booker*. In *Blakely*, the Supreme Court had held that only a jury could find facts that increased the possible penalty for a crime above the "statutory maximum."[38] *Booker* turned on whether the maximum sentences set by the Sentencing Guidelines—regulations created by an administrative body—were to be considered "statutory" limits per the terms of *Blakely*. The *Booker* majority held that they were.[39]

The majority's argument rested on fundamental axioms of institutional delegation: "The Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency."[40] If the legislature could not delegate sentencing factfinding to a judge per *Blakely*, neither can an agency employ delegated congressional authority to do the same.[41] This argument not only carried great intuitive force;[42] it also

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35 See, for example, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo Wash L Rev 1119, 1121 (1998) (arguing that contractarian models, which provide "[t]he fundamental theory of political legitimacy in the United States," require formalism); Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 Harv J L & Pub Pol 13, 20 (1998) (arguing for formalism in constitutional interpretation); *Kham & Nate's Shoes No 2, Inc v First Bank of Whiting*, 908 F2d 1351, 1357 (7th Cir 1990) (Easterbrook) (calling for greater formality in contract doctrine); Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 Nw U L Rev 1409, 1409 (2000) (classifying Judge Posner as a pragmatist and Judge Easterbrook as a formalist). Compare Richard A. Posner, *Law, Pragmatism, and Democracy* 1 (Harvard 2003) (classifying himself as a pragmatist).

36 See, for example, Easterbrook, 22 Harv J L & Pub Pol at 17–18 (cited in note 35) (remarking that "there is no good argument for judges," rather than the legislature, "to have the final word").

37 See Farber, 94 Nw U L Rev at 1410, 1416–23 (cited in note 35) (noting that Easterbrook's dissent in *Adams v Plaza Finance Co*, 168 F3d 932, 937–43 (7th Cir 1999), is "much more pragmatic than one might have expected" and that his opinion "does not quite fit his own description of formalism").

38 *Blakely*, 542 US at 301.

39 *Booker*, 375 F3d at 511–12.

40 Id.

41 Id.

42 Nonetheless, Judge Easterbrook rejected this argument out of hand, noting that the majority had cited nothing for this proposition. Id at 519 (Easterbook dissenting) ("Phrases such as 'it seems plain' are poor substitutes for authority in the Constitution's text or interpretive history.").

comported with Judge Easterbrook's own *Chevron* jurisprudence, which explicitly justifies judicial deference on delegation grounds.[43]

Yet as Judge Easterbrook pointed out, a variety of other institutional actors were in violation of these same rules, and in ways that the majority apparently did not find troubling.[44] The *Booker* majority believed that an agency could not make binding sentencing determinations based upon facts that had not been found by a jury,[45] yet thought it presented no constitutional problem if a federal or state parole board were permitted to play precisely the same role.[46] (Before the advent of the Federal Sentencing Guidelines criminals were often sentenced to fixed terms with the possibility of parole, and the United States Parole Commission had developed guidelines based on the facts of the crime to determine when prisoners should be released.[47]) As Easterbrook explained, those guidelines frequently depended on facts not proven to the jury beyond a reasonable doubt,[48] and nevertheless the *Blakely* Court did not believe that parole boards' actions ran afoul of the Constitution.[49]

More importantly, Easterbrook observed that the majority's reading of *Blakely* would appear to allow judges to accomplish through precedent and common law adjudication what the Sentencing Commission could not achieve via rulemaking—and again without the presence of a jury.[50] Consider a statute setting the maximum prison

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43 See, for example, *Horn Farms, Inc v Johanns*, 397 F3d 472, 476 (7th Cir 2005) (Easterbrook) ("If agencies and legislators read ambiguous language differently, the agency wins under *Chevron.* When Congress delegates to the Executive Branch a power of interpretation, it surrenders any opportunity to rule the outcome via statements in committee."); *Flores v Ashcroft*, 350 F3d 666, 671 (7th Cir 2003) (Easterbrook) ("Yet *Chevron* deference depends on delegation.").

44 *Booker*, 375 F3d at 519 (Easterbrook dissenting).

45 Id at 511.

46 Consider *Blakely*, 542 US at 309 (implying that parole boards raise no constitutional concerns). See also *United States v Addonizio*, 442 US 178, 182 (1979) (explaining that the United States Parole Commission took into consideration the "gravity of the offense," among other factors, when deciding whether to grant parole).

47 See *Addonizio*, 442 US at 180–82 (describing the impact of these guidelines on one prisoner who, despite expecting to serve only one-third of his sentence, was denied parole twice because of the Parole Commission's new policies). The Federal Parole Board and the practice of paroling federal prisoners were abolished by the Sentencing Reform Act of 1984, at the time of the Guidelines' creation. See Sentencing Reform Act of 1984 §§ 218(a)(5), 235, Pub L No 98-473, 98 Stat 1837, 2027, 2031 (repealing the federal parole laws, effective as of November 1, 1987).

48 See *Booker*, 375 F3d at 520 (Easterbrook dissenting) (providing an example of the type of system the Parole Commission might create in order "to ensure consistent treatment of offenders": "Hold bank robbers in prison for 10 years; hold armed bank robbers for 20; hold armed bank robbers who discharge their weapons or take hostages for 30 . . . .").

49 See *Blakely*, 542 US at 309 (explaining that the facts considered by a parole board "do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference").

50 *Booker*, 375 F3d at 519 (Easterbrook dissenting) (noting that there would be no issue, under *Blakely*, if a defendant was convicted of a crime with an open-ended sentence, and the

term for distributing cocaine at twenty years. *Booker* held that a sentencing commission could not establish mandatory guidelines prescribing different terms depending on *judicial* findings regarding the amount of cocaine the criminal had distributed, whether the criminal had brandished a weapon, and so forth. Yet these same rules could legitimately evolve through the common law: an appellate court might rule that it was presumptively reasonable for a judge to sentence a cocaine dealer to twenty years if he brandished a weapon and ten years if he did not, based purely on the judge's view of the facts.[51] That rule would hold precedential value in the lower courts. It would effectively function as an alternative system of determinate sentencing based on judicial factfinding, precisely what the *Booker* court believed was impermissible.

If the Sentencing Guidelines were unconstitutional, explained Judge Easterbrook, then so too were parole boards and precedential judicial sentencing rules (unless they were based purely on jury findings).[52] Overturning those institutions in addition to the Sentencing Guidelines would cast the entire federal criminal justice system into disarray, creating operational nightmares for judges, attorneys, and defendants that might prove intolerable.[53] For this eminently practical reason, Judge Easterbrook could not believe that the Sentencing Guidelines were truly infirm. Yet that is what the Seventh Circuit and the Supreme Court held.

B. The Pragmatic Problems with *Booker*'s Logical Consequences

1. *Booker*'s aftermath.

The perceived evil that the Supreme Court intended to address in *Booker* was the practice of judges sentencing convicted offenders based upon facts that only the judge—and not a jury—had found. The most straightforward remedy might have been to require that all sentencing facts be found by juries.[54] (More on this later.) But it was not the remedy the Court selected. Rather, the Supreme Court declared

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judge relied on a common law rule—"10 years unless the burglar uses a gun; if a gun, then 40 years"—to determine the length of the sentence).

51 See 18 USC § 3742 (stating that sentences must be reasonable).

52 *Booker*, 375 F3d at 519–20 (Easterbrook dissenting) (explaining that both *Apprendi* and *Blakely* apply only to statutes, and posing the question: "[i]f parole regulations are valid, why not the federal Sentencing Guidelines?").

53 Or, as Judge Easterbrook put it, "Today's decision will discombobulate the whole criminal-law docket." Id at 521 (predicting that the Supreme Court would respond quickly to the decision).

54 In fact, when the Seventh Circuit's *Booker* opinion was appealed to the Supreme Court, the justices who dissented from the Court's remedial opinion argued for exactly this result. See *United States v Booker*, 543 US 220, 284–85 (2005) (Stevens dissenting).

that the Guidelines were only advisory, not binding, on the federal courts.[55] Of course, this did not alter the absolute upper limit on sentences imposed by criminal statutes; it only eliminated the mandatory gradations within that statutory limit. Thus, if the maximum penalty permitted by statute for distribution of cocaine was forty years in prison, judges could now sentence a convicted cocaine dealer to any term in prison subject only to the forty-year ceiling. The only constraints on judicial discretion were the judge's duty to consider a particular set of (broad) factors,[56] and the requirement that the sentence be reasonable.[57]

As a formal matter, after *Booker*, judges are no longer required to find relevant facts and sentence within a mandatory guidelines range. Nonetheless, the *Booker* remedial opinion is clear in its expectation that judges will continue to engage in the practice of "real conduct" sentencing—that is, sentencing offenders based upon their actual offense conduct, not the offense of conviction—even under the advisory guidelines.[58] As a practical matter, this is precisely what continues to take place.[59] Judges have to find some means of selecting sentences within the broad ranges permitted by statute, and they can hardly ignore facts presented at trial, even where those facts were not formally proven to a jury beyond a reasonable doubt. Accordingly, judges continue to sentence offenders based on the facts of the case as they believe them to exist, not merely based on what the prosecution proves to the jury.

Yet with the Guidelines eliminated as a constraining force on real offense sentencing, criminal sentences immediately began to diverge from one another, and courts struggled to evaluate reasonableness within a set of legal rules that provided very little guidance. The appellate courts moved to impose some order on this haphazard system. Not

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55 Id at 244–45 (Breyer) (requiring courts to *consider* the Guidelines, but allowing them to consider additional factors).

56 18 USC § 3553 (listing the relevant factors, including the "nature and circumstances of the offense," the defendant's history, the types of sentences available, the need to demonstrate the seriousness of the crime, and the sentence's potential deterrent effects).

57 18 USC § 3742 (allowing the court of appeals to consider whether the sentence appears to be "unreasonable" in light of the Guidelines range and the factors listed in § 3553). See also *Booker*, 543 US at 261–63 (Breyer) (requiring appellate courts to consider the § 3553 factors to determine whether a sentence is "reasonable").

58 See *Booker*, 543 US at 251. See also 18 USC § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

59 David Alan Sklansky, *Anti-Inquisitorialism*, 122 Harv L Rev 1634, 1659 n 153 (2009) (explaining that sentencing judges have never needed to rely solely on the "facts and arguments put forward by the parties," and that *Blakely* and *Booker* did not lessen judges' abilities to inquire into additional facts when determining a sentence).

surprisingly, they latched onto the Sentencing Guidelines themselves as a means for gauging reasonableness and curbing trial court discretion. Every institutional actor involved in the criminal justice system—prosecutors, defense lawyers, judges, and perhaps even criminals—had formed a set of expectations based on the Sentencing Guidelines and (one hopes) structured its conduct with those Guidelines in mind. If nothing else, the Guidelines were "reasonable" in the sense that they were predictable (and predicted). Moreover, the Sentencing Guidelines were the product of an expert body, created by the political branches to determine appropriate federal criminal sentences.[60]

The Federal Sentencing Guidelines have been criticized on many accounts since their inception,[61] but to the courts they appeared to serve as a useful starting point from which to judge reasonableness—perhaps a better one than any group of federal judges could devise if writing on a clean slate. Thus, in a series of decisions following *Booker,* the appellate courts held that any sentence imposed within the (advisory) Guidelines range was presumptively reasonable,[62] and that the greater the divergence between a sentence and the Guidelines' advised range, the greater the burden placed upon the district court to justify it.[63]

The Supreme Court was willing to follow the lower courts only halfway. The Court agreed that sentences within the Guidelines range should be viewed as presumptively reasonable.[64] But it explicitly re-

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60 See *Mistretta v United States*, 488 US 361, 363–70 (1989) (describing the history and creation of the Guidelines, and the duties of the Sentencing Commission).

61 See, for example, Ryan Scott Reynolds, Note, *Equal Justice under Law: Post*-Booker*, Should Federal Judges Be Able to Depart from the Federal Sentencing Guidelines to Remedy Disparity between Codefendants' Sentences?*, 109 Colum L Rev 538, 559 n 148 (2009) (citing sources); Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 95–103 (Chicago 1998) (arguing that the Guidelines "rob the traditional sentencing rite of much of its moral force and significance").

62 See, for example, *United States v Green*, 436 F3d 449, 456–57 (4th Cir 2006) (noting the difficulty of assessing the district court's sentencing decision as such review involves applications of binding law, consideration of advisory guidelines, factual findings, and judgments made to give effect to congressional policies); *United States v Mykytiuk*, 415 F3d 606, 607–08 (7th Cir 2005) (concluding that, because *Booker* requires district courts to take the Guidelines into consideration, a rebuttable presumption of reasonableness is a useful tool when the sentence falls within the Guidelines range).

63 See, for example, *United States v Claiborne*, 439 F3d 479, 481 (8th Cir 2006) (finding that a fifteen-month sentence, twenty-two months less than the bottom of the advisory guideline range, constituted an extraordinary reduction and was not justified by "comparably extraordinary circumstances"). However, a sentence outside of the Guidelines range would not be presumptively *un*reasonable. See, for example, *United States v Howard*, 454 F3d 700, 703 (7th Cir 2006) ("[A] sentence outside the range . . . does not warrant a presumption of unreasonableness."); *United States v Matheny*, 450 F3d 633, 642 (6th Cir 2006) (same); *United States v Myers*, 439 F3d 415, 417 (8th Cir 2006) (same).

64 *Rita v United States*, 551 US 338, 347–51 (2007) (stressing, however, that the presumption was nonbinding, and that it was relevant only during appellate review).

jected the idea of tying the extent of departure from the Sentencing Guidelines to the burden of justification placed on the district court.[65] The Court refused to demand that a trial judge offer a justification for a sentence "proportional to the extent of the difference between the [Guidelines] range and the sentence imposed,"[66] and rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range."[67] To hold otherwise, thought the Court, would be to verge on reinvesting the Guidelines with the mandatory authority stripped by *Booker*.[68]

Moreover, the Supreme Court explicitly sanctioned the practice of deviating from the Guidelines for broad-based policy reasons, not only because of circumstances particular to the case before the judge.[69] For instance, a judge may sentence a particular criminal more harshly than the Guidelines demand not because that criminal has done something worse than the typical offender, but because the judge believes that the Guidelines range for that crime is generally too low.[70] The re-

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65 *Gall v United States*, 552 US 38, 45–47 (2007).

66 Id at 45, quoting *United States v Gall*, 446 F3d 884, 889 (8th Cir 2006).

67 *Gall*, 552 US at 47 (rejecting, in addition, the use of a formula to calculate the strength of the required justifications). The Court did note that "[i]n reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines." Id. See also id at 46 ("It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."). It is not entirely clear how to reconcile these competing statements, but they are most likely best understood as an admonition that the Sentencing Guidelines are not irrelevant but may not receive anything approaching the deference they previously commanded.

68 Consider *Gall*, 552 US at 47 ("[T]he approaches we reject come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.").

69 See *Kimbrough v United States*, 552 US 85, 110–12 (2007) (allowing the district court to consider criticisms of the 100-to-1 ratio when deciding to impose a sentence outside of the Guidelines range for crack cocaine offenses); *Rita*, 551 US at 351 (allowing a judge to deviate from the Guidelines "because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations"). See also *Spears v United States*, 129 S Ct 840, 843–44 (2009) (allowing the "categorical rejection and replacement" of the 100-to-1 ratio suggested by the Guidelines for crack cocaine violations).

70 Consider *Kimbrough*, 552 US at 110–12 (suggesting, in contrast, that the Guidelines for crack cocaine violations are often too high). But see id at 109 (noting that a district court judge may be subject to additional scrutiny if she sentences outside of the Guidelines range because she believes the range does not reflect the policy considerations described in § 3553(a)). This is not to say that the result in *Kimbrough* is unbeneficial. The 100-to-1 powder-to-crack cocaine disparity at issue in that case was likely misguided and ineffective, and the Sentencing Commission had attempted to alter it on several occasions. See id at 99 (noting a proposed amendment to change the 100-to-1 ratio to a 1-to-1 ratio in 1995, as well as reports issued by the Commission recommending change in 1997, 2002, and 2007). See also Amendments to the Sentencing Guidelines for United States Courts, 60 Fed Reg 25074, 25075–77 (1995) (recommending equal sentences for crack and powder cocaine offenses).

sult is a new set of judge-made rules to govern sentencing, much as Easterbrook predicted.

2. The misallocation of institutional authority.

What the Court never fully acknowledged was the mismatch between the problem *Booker* set out to cure and the structural remedy it chose. Consider the range of potential institutional divisions of sentencing authority. There are two relevant dimensions: which institutional actor (agencies or courts) will set the rules governing the relationship between criminal conduct and penal sentence; and which institutional actor (courts or juries) will apply those rules to the case at hand, including finding the relevant facts upon which to base sentencing. Along these two dimensions, four institutional arrangements are possible, as represented in Figure 1 below.

FIGURE 1: FOUR POSSIBLE INSTITUTIONAL ARRANGEMENTS

Factfinding Body	Rulemaking Body		
		Agency	Court
	Judge	I. Sentencing Guidelines Regime	II. Pre–Sentencing Guidelines and Post-*Booker*
	Jury	IV. Solution?	III. —

Before *Booker*, Cell I represented the status quo. Because *Booker* addressed itself exclusively to the problem of judicial factfinding, a move to Cell IV might have seemed appropriate. In particular, the Court could have cured the Guidelines' constitutional infirmity simply by structuring trials such that juries found all of the relevant facts through special verdict forms. For instance, in a prosecution for possession of narcotics with intent to distribute, the jury could have been asked to find the precise quantity of narcotics in the defendant's possession, whether the defendant had employed a firearm in a narcotics transaction, and so forth—the same facts that courts were finding under the Guidelines regime.[71] Prosecutors would have submitted to the

[71] Special verdict forms are already commonly used in civil cases. See FRCP 49. For instance, juries in tort cases are often called upon to decide what proportion of fault is attributable to the plaintiff and what proportion to each of multiple defendants. Special verdict forms in criminal cases would present no unique challenges. See Stuart F. Schaffer, Comment, *Informing the Jury of the Legal Effect of Special Verdict Answers in Comparative Negligence Actions*, 1981 Duke L J 824, 828–29 ("[T]he use of special verdicts enables both trial and appellate courts to

jury the same evidence they were already in the practice of presenting to the judge.[72] Accordingly, the additional administrative costs involved in setting up and running such a system (above and beyond the costs of operating before *Booker*) would have been minimal.[73]

But because of the remedy the Court chose, the move was instead to Cell II—to a sentencing system dominated by the judiciary. To the courts' preexisting authority to find facts in individual cases, the Supreme Court added the power to craft retail (and perhaps wholesale) sentencing policy.

This transfer of authority may turn out to be a positive development for the law of sentencing. The Sentencing Commission's work was hardly viewed as an unqualified success; rather, many observers viewed the Commission as needlessly punitive and inadequately attuned to modern criminal realities.[74] Perhaps the judiciary will do a better job, particularly because it is less subject to political whim and influence. But it is notable that the original evil targeted by *Blakely* and *Booker* remains essentially undiminished.[75]

At the same time, the problems that the Sentencing Guidelines had been designed to address have now reappeared. Determinate sentencing was created to alleviate perceived injustices that spanned the political spectrum. Conservatives were concerned that liberal judges were awarding overly lenient sentences; liberals were concerned that

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monitor closely the jury's performance of its designated task. By permitting full disclosure of the findings of fact, special verdict submission fits neatly into the comparative negligence regime."). Such a system would have placed greater control in the hands of prosecutors, who would have the authority to decide what conduct to charge. *Booker*, 543 US at 256 (Breyer dissenting) (using verdict forms "would prohibit the judge from basing a sentence upon any conduct other than the conduct the prosecutor chose to charge"). But this might well have been an improvement over a system that allows judges to sentence based on conduct that prosecutors could never have proven beyond a reasonable doubt, whether or not they chose to charge it.

72 This has been the case with drug quantities that have continued to be submitted to juries after *Blakely*. See Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 Am Crim L Rev 217, 229 (2004).

73 Alternatively, the Supreme Court could simply have required that juries determine sentences, presumably with regard to the Guidelines. The Guidelines would have maintained much—perhaps all—of their force, the Sixth Amendment violation would have ceased to exist, and the hassle of employing special verdict forms would have been avoided. Yet the Court eschewed this option as well.

74 See, for example, Thomas N. Whiteside, *The Realities of Federal Sentencing: Beyond the Criticism*, 91 Nw U L Rev 1574, 1576 (1997) (noting that much of the early criticism of the Guidelines focused on their severity, especially in the drug context).

75 I do not mean to take a position on whether it was in fact a negative feature of the prior system. I mean only to illustrate that the structural problem *Blakely* and *Booker* meant to address has survived those cases largely intact.

conservative judges were sentencing too harshly or that judges were sentencing based on race or other prohibited characteristics.[76]

In the wake of *Blakely* and *Booker*, judges will undoubtedly elect to sentence outside of the Guidelines in some meaningful fraction of cases. And when a judge takes this step, it is likely to be for reasons that invoke the sorts of concerns the Sentencing Guidelines were originally meant to address. For a judge to impose a sentence outside of the Guidelines range, she must believe that the cost of doing so—the threat of being reversed, with attendant reputational penalties and increased workload—is outweighed by some personal benefit.[77] The more that a judge believes an especially harsh or especially lenient sentence is justified (on ideological or other grounds),[78] the more likely she will be to impose that outlier sentence.[79]

Accordingly, judges at the extremities of the ideological spectrum will be most likely to impose out-of-Guidelines sentences, and they will be abetted in this tendency where the ideology of the appellate judges tracks that of the district judges. Thus, the majority of out-of-Guidelines sentences will be handed down by conservative judges in conservative circuits and liberal judges in liberal circuits, in many cases on the basis of reasons that the Guidelines sought to place out of bounds.[80] The Supreme Court has managed to enshrine (or even dis-

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76 See James M. Anderson, Jeffrey R. Kling, and Kate Stith, *Measuring Interjudge Sentencing Disparity: Before and after the Federal Sentencing Guidelines*, 42 J L & Econ 271, 272 (1999) (noting the "unusual coalition of liberals and conservatives" that worked together to pass the Sentencing Reform Act of 1984).

77 See Richard A. Posner, *How Judges Think* 140–41 (Harvard 2008) (noting that, even in the absence of financial incentives, judges are likely to be concerned about how their quarterly statistics will affect their reputations). This threat is probably fairly low; since *Booker* was decided, very few sentences have been reversed as substantively unreasonable. See David C. Holman, Note, *Death by a Thousand Cases: After* Booker*,* Rita*, and* Gall*, the Guidelines Still Violate the Sixth Amendment*, 50 Wm & Mary L Rev 267, 279 (2008) (stating that courts rarely overturn within-range and above-range sentences as unreasonable, although they are much more likely to reverse below-range sentences). Nonetheless, the prospect of reversal remains salient for district court judges, and it is of course possible that this threat is itself responsible for the prevalence of within-Guidelines sentences and the low number of reversals. There are judicial incentives to sentence within the Guidelines, see note 67, and judges will thus deviate from the Guidelines only in selected cases where the incentives to do so are higher.

78 See *Kimbrough*, 552 US at 110–12 (permitting judges to deviate from the Guidelines based on disagreements with the policies embedded within them).

79 See, for example, id (noting that the district court came to its decision, in part, because of the Commission's "consistent and emphatic" criticisms of the crack-powder disparity).

80 Consider Max M. Schanzenbach and Emerson H. Tiller, *Strategic Judging under the Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J L, Econ, & Org 24, 47–52 (2007) (finding similar effects even under the mandatory Sentencing Guidelines regime). See also Stephanos Bibas, Max M. Schanzenbach, and Emerson H. Tiller, *Policing Politics at Sentencing*, 103 Nw U L Rev 1371, 1388–91 (2009) (demonstrating how the sentencing disparities based on policy and political affiliation will develop further in light of post-*Booker* Supreme Court decisions); Max M. Schanzenbach and Emerson H. Tiller, *Reviewing the Sentencing Guidelines:*

till) the sentencing disparities that motivated the Guidelines' creation in the first instance.

The result is a system that is likely to underperform the prior regime in several important respects.[81] There will certainly be cases in which judges will be better able to tailor sentences to fit offenders and their crimes under the advisory Guidelines.[82] This ability to consider penalties on a case-by-case basis is, of course, the principal advantage of charging judges with the task of sentencing. Yet the cost of endowing the federal courts with this modicum of flexibility in sentencing is that racial and ideological disparities are likely to reappear, possibly in even more pernicious form. And that cost may not be balanced by a corresponding benefit from reinvigorating the role of the courts.[83]

In many cases the judges who diverge from the advisory Guidelines' ranges will do so for the wrong reasons. The most ideologically extreme judges will be the most likely to sentence outside of the advised range.[84] And where courts and the Sentencing Commission disagree on sentencing policy, the Commission holds numerous comparative advantages. Like other administrative agencies, the Sentencing Commission is staffed by individuals chosen for their expertise in sentencing law and procedure who have studied the problems involved in criminal sentencing far more thoroughly and systematically than the typical district court judge.[85] Similarly, and again like the typical administrative agency, the Sentencing Commission has at its disposal a wide range of procedural tools that judges cannot draw upon.[86] In the course

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Judicial Politics, Empirical Evidence, and Reform, 75 U Chi L Rev 715, 732–40 (2008) (demonstrating sentencing disparities based on the political affiliation of the judge and the particular circuit, and discussing the implications of these disparities post-*Booker*).

81 Consider Bibas, Schanzenbach, and Tiller, 103 Nw U L Rev at 1377–80 (cited in note 80) (arguing, based on the behavior of judges with particular political affiliations in different districts, that clear, binding rules are necessary to prevent "evasion and manipulation" in sentencing).

82 Of course, even the mandatory Guidelines never specified a precise sentence, only a range. Accordingly, the fact that the Guidelines are now advisory will only aid judges in sentencing properly in those cases where the appropriate sentence—by some proper metric—is outside of the Guidelines range.

83 See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L J 1420, 1481–82 (2008) (describing *Booker* as having "recharged" the sentencing judge).

84 See Joshua B. Fischman and Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing* *16–21 (unpublished manuscript, 2009), online at http://ssrn.com/abstract=1434123 (visited Feb 14, 2010).

85 See, for example, Ronald J. Krotoszynski, Jr, *Why Deference? Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 Admin L Rev 735, 737 (2002) (arguing that administrative expertise provides the best rationale for judicial deference to administrative agencies).

86 See, for example, Richard J. Pierce, Jr, *Reconciling* Chevron *and Stare Decisis*, 85 Georgetown L J 2225, 2239 (1997) (noting the superiority of the notice-and-comment procedure over judicial decisionmaking procedures); Colin S. Diver, *Statutory Interpretation in the Administrative*

of designing sentencing policy, the Sentencing Commission can conduct studies, analyze data, and solicit public comments.[87] Courts, by contrast, are limited in the main to the evidence presented by the parties before them. They have neither the resources nor the ability to examine issues or evidence beyond the immediate case. The Supreme Court has recognized as much in its post-*Booker* jurisprudence.[88]

To be sure, the Sentencing Commission is subject to much of the same political pressure for ever-higher sentences that Congress faces. As a result, the Guidelines have grown ever more draconian throughout their lifetime. Democratic responsiveness[89] is often viewed as an advantage of relying upon agencies rather than courts to formulate policy. Here, if political pressure is generating excessively severe sentencing guidelines,[90] allowing judges to craft sentencing policy could lead to superior results.[91]

State, 133 U Pa L Rev 549, 575 (1985) (noting that agency members are often involved in creating legislation, and therefore have a better understanding of legislative intent).

87 This is not to say that the Commission has always performed this role faithfully or effectively. For instance, despite a statutory mandate, the Sentencing Commission never used data on the rate and degree of Guidelines departures to modify the Guidelines to better reflect judicial views on their accuracy. See Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) § 401(a)(2), Pub L No 108-21, 117 Stat 650, 667. Of course, this is only one example; in other domains the Sentencing Commission has engaged in the technocratic study of sentencing much as its creators presumably intended. See, for example, *Kimbrough*, 552 US at 97–99 (describing the Sentencing Commission's work to analyze and restructure the crack cocaine Guidelines).

88 See *Rita*, 551 US at 349:

> The result is a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice. Given the difficulties of doing so, the abstract and potentially conflicting nature of § 3553(a)'s general sentencing objectives, and the differences of philosophical view among those who work within the criminal justice community as to how best to apply general sentencing objectives, it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.

89 See, for example, William N. Eskridge, Jr and Kevin S. Schwartz, Chevron *and Agency Norm-Entrepreneurship*, 115 Yale L J 2623, 2626 (2006) (arguing that agencies are more democratically accountable than judges); Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 Yale L J 2580, 2587 (2006) (noting the executive branch's political responsiveness and accountability); Charles H. Koch, Jr, *Judicial Review of Administrative Discretion*, 54 Geo Wash L Rev 469, 485 (1986) (arguing that agencies are better than courts at distilling public opinion).

90 By which I mean greater than necessary to promote any reasonable social objective, be it utilitarian or retributivist. See generally John Bronsteen, Christopher Buccafusco, and Jonathan Masur, *Happiness and Punishment*, 76 U Chi L Rev 1037 (2009) (discussing the purposes of punishment and hypothesizing that contrary to expectations, longer prison sentences and greater fines do not significantly impact happiness).

91 There is some evidence that *Booker* has led to reduced sentences by comparison with the standard Guideline ranges. See United States Sentencing Commission, *U.S. Sentencing Commission Preliminary Quarterly Data Report* 7 (2009), online at http://www.ussc.gov/sc_cases/USSC_2009_Quarter_Report_4th.pdf (visited Feb 14, 2010) (reporting that through the first nine months of 2009, approximately 14 percent of all sentences were lower than the applicable Guide-

The particular hybrid solution chosen in *Booker* is ill suited to that end, however. Whatever sense there might be in allowing politically independent judges to set sentencing policy, the hundreds of district judges who will now be undertaking that task simultaneously and with only minimal appellate supervision are unlikely to arrive at more satisfactory outcomes. And this is accompanied by the fact that the Supreme Court's innovations in *Booker* and its progeny do not even alleviate the problem they were designed to address, namely the sentencing of offenders based on facts never proven to a jury beyond a reasonable doubt. In these respects, the *Booker* line of cases can hardly be considered a success.

If Congress's decision to create the Sentencing Commission was the correct one, the Court's transfer of power from that administrative body to the courts will be costly in the net. And if Congress erred in creating the Sentencing Commission, a shift in authority to the less-able courts is unlikely to produce the advantages the Court envisioned.

CONCLUSION

In his dissent in *Booker*, Judge Frank Easterbrook predicted dire consequences if the Supreme Court were to invalidate the Federal Sentencing Guidelines. Those consequences have not arisen, largely because the Court has ducked the implications of Judge Easterbrook's pragmatic logic (and its own). But in an effort to salvage a set of workable sentencing rules, the Supreme Court has settled upon a division of institutional responsibilities that serves none of the parties involved in the criminal justice system well and fails to address the problem that catalyzed its intervention in the first instance. The Sentencing Commission may not have functioned perfectly, but the Supreme Court's attempt at ad hoc institutional design seems unlikely to produce any better results.

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lines ranges based on § 3553(a) factors, while only slightly more than 1 percent of sentences were higher than the relevant Guidelines due to § 3553(a) factors).