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Marquette Law Review

Volume 93
Issue 2 *Symposium: Criminal Appeals: Past, Present, and Future*

Article 13

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John F. Pfaff, *The Future of Appellate Sentencing Review: Booker in the States*, 93 Marq. L. Rev. 683 (2009).
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THE FUTURE OF APPELLATE SENTENCING REVIEW: *BOOKER* IN THE STATES

JOHN F. PFAFF*

I. INTRODUCTION

For much of our nation's history, appellate courts played almost no role in criminal sentencing. With trial judges possessing almost unfettered sentencing discretion, there was little for appellate courts to review. That began to change in the 1970s. States started to develop more structured sentencing systems, and appellate courts were called on to ensure that trial judges complied with the new regulations. But in a string of cases starting in 2000, the United States Supreme Court upended many of these sentencing reforms "like[] . . . a legal earthquake, a forty-car pileup, a bombshell, and a bull in a china shop," including the ability of appellate courts to police compliance.[1] At first, the Supreme Court's decisions (culminating in *Blakely v. Washington*[2]) appeared to confine appellate review to one narrow space, but later cases (in particular *United States v. Booker*[3]) have awkwardly attempted to reintroduce it more widely. The result: complete confusion, confusion that continues to pervade sentencing throughout the country.

In this Article, I look at the theoretical implications of the Court's recent contradictory sentencing cases, and I then examine how they are playing out in practice at the state level. Though *Booker* purports to follow, not repudiate, *Blakely*, its view of the role of appellate courts is wholly inconsistent with *Blakely*'s view. Many states have sidestepped this contradiction by simply following *Blakely* and ignoring the option laid out in *Booker*. But at least three states have chosen to pass through the door opened by *Booker*. Their experiences allow us to examine the implications of *Booker* and *Blakely* for state sentencing outcomes and for appellate review in a post-*Booker* world more generally. The results indicate that, by and large, *Booker* is a failure. Despite its drafters' intentions, *Booker* does not meaningfully revitalize

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* Associate Professor of Law, Fordham Law School. Thanks to Michael O'Hear and the participants at the symposium for helpful comments. Andrew Owen and Jessica Sonpal provided excellent research assistance. All errors are my own. In a departure from the formatting used elsewhere in this symposium, this Article capitalizes the word "guideline" uniformly for both state and federal guidelines.

1. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1086 (2005).

2. 542 U.S. 296 (2004).

3. 543 U.S. 220 (2005).

appellate review, but only reintroduces it in a rarely used form—and does so in a deeply illogical way.

To demonstrate *Booker*'s failure, it is first necessary to describe the state sentencing systems developed since the 1970s that *Blakely* undermined. Of central importance to the discussion here are "presumptive" guidelines. These guidelines established sets of facts that judges had to find to impose certain sentences. For example, the statutory maximum for assault may have been ten years, but guidelines would state that the default (or presumptive) sentence was only five years, and a judge could impose something greater than five only if he found certain aggravating factors (the defendant used a gun, for example), and if he did not find mitigating factors (the defendant was, say, the sole supporter of his children) which sufficiently offset any aggravators.

Such guidelines created two possible forms of substantive appellate review. The first is what I will refer to as "boundary maintenance." Appellate courts could review the trial court's factual findings: Was there sufficient evidence in the record for the aggravators and mitigators that the trial judge found? Did the trial judge overlook any relevant factors? Did the trial judge rely on factors that were legally impermissible? Under this type of review, as long as the trial judge had sufficient support for the aggravators and mitigators he used, then the appellate court would not disturb how that judge had chosen to weigh them. The second type of review directly regulated the judge's discretion: I will call this "regulatory review." Under regulatory review, the appellate court could find that the trial judge's findings of aggravators and mitigators were all correct, yet still reverse or remand the sentence for being substantively unreasonable.

Clearly, regulatory review is a much more aggressive form of appellate review, and appellate courts—at least in the states considered here—appear to have preferred boundary maintenance to regulatory review. This is a critically important development. As I show below, *Blakely* renders both boundary maintenance and regulatory review constitutionally impermissible, and to the extent that *Booker* reestablishes a form of review, it reinvigorates only regulatory review—the type of review states prefer *not* to use.

Most of the states that have opted to follow *Booker*, however, have missed this point. They have read *Booker* as bringing back a weaker form of pre-*Blakely* boundary maintenance. But it has not: Boundary maintenance remains impossible even after *Booker*. What *Booker* creates is a confusing, and perhaps unappealing, form of regulatory review. Interestingly, *Booker*-following states have either implicitly or accidentally acknowledged this, since their post-*Booker* boundary maintenance has become purely procedural review.

I have three goals in this Article. The first is to sketch out the competing effects of *Blakely*, *Booker*, and the other recent Supreme Court sentencing cases to lay bare just how confusing and self-contradictory the Supreme Court's foray into sentencing law has been. *Blakely*'s key holding was that any fact *required* to impose a particular sentence could not be found by a judge, but had to be found by a jury beyond a reasonable doubt. Thus, in the hypothetical guidelines above, after *Blakely* a judge could not impose a sentence above five years unless a jury (as opposed to the judge) found any relevant aggravating factor, such as the use of a gun. Judicial fact-finding at sentencing—and the appellate review of such practices—was effectively killed. Boundary maintenance is clearly impossible following *Blakely*, but so too is regulatory review. As I will point out, regulatory review effectively creates boundary conditions, implying that the two types of review are logically almost indistinguishable.

Booker attempted to roll back *Blakely*, but it did so awkwardly. The Supreme Court held that the Federal Sentencing Guidelines, which required extensive judicial fact-finding, violated *Blakely*. Its remedy, however, was to declare the guidelines voluntary but subject to appellate "reasonableness review." Unfortunately, as Justice Scalia pointed out in *Booker*, these two holdings (written by different majorities) are inherently self-contradictory. Rigorous appellate review creates sets of facts that trial judges must find before imposing a sentence. Once they do so, *Blakely* charges back into the scene, forcing such fact-finding back onto a jury or requiring that the common law rules developed by the appellate court be abrogated. Subsequent efforts by the Court to clarify this paradoxical rule have failed, and thus they have only added to the confusion.

Stephanos Bibas and Susan Klein, however, have argued that *Booker* does create a viable review process.[4] Though they do not use the boundary maintenance or regulatory review terms that I do, their argument effectively is that *Booker* authorizes a form of blurry, case-specific totality-of-the-circumstances regulatory review. Though I believe that they are wrong doctrinally and logically—as long as *Blakely* is good law, substantive review of any sort is simply impossible—they could very well be right pragmatically. If nothing else, the five Justices who signed off on Justice Breyer's reasonableness-review opinion in *Booker* surely believed that it meant something. That the illogical is constitutional, however, is disheartening.

The second goal of this Article is to examine what appellate review looks like in the three states—Indiana, New Jersey, and Tennessee—that have opted

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4. Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 784 (2008).

to *Booker*-ize their guidelines.[5] The results suggest that *Booker* has had little effect, and they also indicate why. Prior to *Blakely*, appellate courts in New Jersey and Tennessee engaged almost exclusively in boundary maintenance, and the state supreme court in New Jersey and the legislature in Tennessee have interpreted *Booker* as reintroducing a weaker form of such review. But even Bibas and Klein admit that such review remains impermissible post-*Booker*, and appellate courts in those states have implicitly agree by reducing boundary maintenance to purely procedural review, and thus steering clear of any constitutional concerns.[6]

Indiana's experience differs from those in New Jersey and Tennessee, and in the process it provides evidence that Bibas and Klein's theory may work in practice. Unlike those in New Jersey and Tennessee, appellate courts in Indiana engaged in both boundary maintenance and regulatory review prior to *Blakely*. Following *Booker*, boundary maintenance in Indiana, like that in New Jersey and Tennessee, has been reduced to a purely procedural process. But its regulatory review has continued unimpeded. In fact, there is not a single case in Indiana that even discusses the possibility that regulatory review could be—as I believe it must be—unconstitutional under *Blakely*. Thus, at least one state has successfully preserved substantive appellate review by (implicitly) drawing the very distinction laid out by Bibas and Klein.

The third goal of this Article, then, is to consider whether this type of regulatory review is appealing. As I will demonstrate, while *Booker*-ized regulatory review is able to accomplish some of the goals that motivated states to adopt guidelines, it is antithetical to other guideline aims: where guidelines sought to inject clarity and objectivity into sentencing, totality-of-the-circumstances regulatory review works only if it is opaque and subjective. So we must ask whether the returns to such review justify the costs. The evidence base is currently too weak to answer the question in any substantial way, but I highlight some of the important questions that states should ask before they attempt to follow in *Booker*'s footsteps.

This Article is organized as follows: Part II describes the sentencing reforms of the past thirty years and examines the effects of the Supreme Court's recent adventure into sentencing policy. Part III then discusses why *Booker* review has failed in New Jersey and Tennessee but succeeded in

5. California presently purports to follow *Booker* as well. However, California's current sentencing law derives from stopgap emergency legislation subject to a short sunset provision. Given the fiscal and criminal justice turmoil in that state, the future of sentencing in California is unclear, so I do not consider it here.

6. Even Justice Scalia, the strongest opponent of post-*Blakely* appellate review, acknowledges that purely procedural review remains permissible. *See* Rita v. United States, 551 U.S. 338, 378–84 (2007) (Scalia, J., concurring in part).

Indiana, and it uses the experiences in those states to clarify what *Booker*-compliant review must look like. And Part IV lays out the challenging questions that states must answer before adopting *Booker*'s remedy.

II. SENTENCING REFORM AND THE SUPREME COURT

It is easy to summarize the first two hundred years of appellate sentencing review in the United States: there was none. The criminal justice regime, wedded in theory, if not always in practice, to the goal of rehabilitating the spirit (through the early 1800s) or the psyche (since the early 1800s), traditionally vested in judges and parole boards almost limitless discretion at sentencing. Doctors do not treat patients for a fixed number of days and then release them regardless of whether they are cured; so too, the theory went, with the rehabilitation of offenders. Illustrative of this type of sentencing system was California's old robbery statute, which allowed a judge to impose a sentence ranging from one year to life.[7]

Given the tremendous amount of discretion delegated to trial judges and parole boards, there was little for appellate or supreme courts to oversee. If nothing else, as Kevin Reitz points out, with no substantive law of sentencing to use for guidance, and with trial judges rarely, if ever, required to explain themselves, appellate courts had no real record to review.[8] Moreover, as the Supreme Court made clear in *Williams v. New York*,[9] as long as the trial court sentenced within the discretionary realm granted to it by an indeterminate sentence regime, the decision was simply not reviewable.

In the 1970s, however, the indeterminate system began to collapse as states across the country modified these regimes.[10] And by 2000, the Supreme Court in turn started to take an interest in the constitutionality of some of these developments. The next section describes the sentencing innovations adopted by the states and the effect of the Court's recent decisions on them—and on the role of appellate courts in particular.

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7. *See Ex parte* Jordan, 212 P. 913 (Cal. 1923).

8. Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1445 (1997).

9. 337 U.S. 241, 252 (1949).

10. Though this is a point beyond the scope of this Article, it is worth noting that the loss of faith in judges' judgment coincided with a decline in trust of expertise more generally and with the rise of the "actuarial turn." *See* John F. Pfaff, *A Plea for More Aggregation: The Looming Threat to Empirical Legal Scholarship* 23 (Fordham Law Legal Studies Research Paper No. 1444410, 2009), *available at* http://ssrn.com/abstract=1444410. The development of guidelines and other forms of structured sentencing is thus part of a broader move to regulate often-problematic discretion.

A. The Fall of Indeterminacy and the Rise of Structured Sentencing

Indeterminacy began to collapse under multiple vectors of attack.[11] First, Americans lost faith in the very idea of rehabilitation, adopting a "Nothing Works!" attitude toward rehabilitative interventions.[12] Second, indeterminacy was opposed by conservatives for being soft on crime, and by liberals for exacerbating racial tensions. And third, judges themselves assailed it for being abused by their fellow judges.[13] For our purposes here, the merits of these concerns are irrelevant; what matters is that they encouraged a shift away from rehabilitation toward deterrence, just deserts, and incapacitation, and as a result they pushed numerous states away from indeterminacy.

The result has been a wide range of reforms that vary from state to state. States have adopted mandatory minimums, abolished parole, implemented truth-in-sentencing laws (which require certain inmates to serve a large fraction of their sentences, usually 85%, before release is possible), and imposed two- and three-strike laws. In this Article, I focus on perhaps the most important sentencing innovation: sentencing guidelines.

Between 1970 and 2004, twenty-six states adopted some form of sentencing guidelines, although two later eliminated them. Eight states adopted "determinate sentencing laws" (DSLs), ten adopted "presumptive" sentencing guidelines, and eight adopted "voluntary" guidelines.[14] DSLs and presumptive guidelines differ only in style, not substance. In both cases, the guidelines—I will use "presumptive guidelines" to refer to both presumptive guidelines and DSLs—set default sentences or ranges from which a judge cannot depart (either up or down) without making some sort of additional

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11. David Garland provides one of the more detailed and provocative accounts of the changes taking place in criminal law in the 1970s and 1980s. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 53–64 (2001). For a survey of these arguments, see also John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 241–46 (2006).

12. The article often cited as the catalyst for this movement is Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974). Subsequent efforts to point out the flaws in Martinson's work failed to gain traction. *See, e.g.*, GARLAND, *supra* note 11, at 58, 64; Francis T. Cullen & Paul Gendreau, *From Nothing Works to What Works: Changing Professional Ideology in the 21st Century*, 81 PRISON J. 313 (2001).

13. Perhaps the most famous example here is by Judge Marvin E. Frankel, in his CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

14. The eight DSL states are Alaska, Arizona, California, Colorado, Indiana, Illinois, New Jersey, and New Mexico. The ten presumptive guideline states are Kansas, Michigan, Minnesota, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, and Washington, with Florida adopting and then repealing its presumptive guidelines during this period. The eight voluntary guideline states are Arkansas, Delaware, Maryland, Missouri, Utah, Virginia, and Wisconsin (which briefly repealed then readopted its guidelines), with Louisiana adopting and then repealing its voluntary guidelines. Since 2004, Washington, D.C. has adopted voluntary guidelines as well. It should also be pointed out that North Carolina started as a DSL state in the 1970s, but converted its DSLs to presumptive guidelines in 1994. *See generally* Pfaff, *supra* note 11, at 240–46.

factual finding, such as the defendant used a gun during the crime (an aggravating factor) or was operating under duress (a mitigating factor). Imposing a sentence outside the guideline range without the appropriate facts, or imposing the default range despite the presence of aggravators or mitigators, was grounds for appeal by either the state or the defendant, although most states adopted a fairly deferential approach.[15]

Voluntary guidelines are similar to presumptive guidelines with one key difference: judges are simply encouraged, not required, to follow them, and there is no error—and thus no grounds for appeal—if the trial judge declines to do so. Statutes in Virginia and Maryland, for example, state that the failure to follow the guidelines or any of their procedural requirements (such as filing an explanation for departures) is not appealable.[16] Other states, such as Delaware, allow for some appellate review, but it is essentially procedural: As long as the trial judge takes notice of relevant factors, the appellate court will not set aside the sentence.[17]

The development of guidelines changed the role of appellate courts. In states using presumptive guidelines, appellate courts had a new task: ensuring that the trial courts followed the guidelines, whether through boundary maintenance or regulatory review. The need for such oversight varied from jurisdiction to jurisdiction. If nothing else, appellate oversight was surely more important in jurisdictions adopting prescriptive as opposed to descriptive guidelines.[18] But regardless, appellate courts found themselves playing an important role in reviewing sentencing outcomes. Some evidence suggests that when compared to judges in states with voluntary guidelines or no guidelines at all, judges operating under presumptive guidelines sentenced more consistently and relied less on impermissible factors such as the defendant's race and sex; the threat of appellate reversal surely played some role in this.[19]

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15. *See, e.g.*, State v. Blakely, 47 P.3d 149, 157–58 (Wash. Ct. App. 2002). For cases from New Jersey and Tennessee, see *infra* Part III.A.

16. VA. CODE ANN. § 19.2-298.01(F) (2008); MD. CODE ANN., [CRIM. PROC.] § 6-211(b) (LexisNexis 2008).

17. *See* White v. State, No. 442, 2002, 2002 WL 31873703, at *1 (Del. Dec. 20, 2002); *see also* Smith v. United States, 837 A.2d 87, 100 (D.C. 2003).

18. Descriptive guidelines attempt to mimic how the average judge sentenced in pre-guidelines days. The goal of such guidelines is to facilitate the judges' own desires to sentence consistently, and thus appellate oversight may not be particularly important. Prescriptive guidelines, however, seek to change how judges sentence. For example, assume that the average judge imposed five-year sentences for assault. Descriptive guidelines would set the presumptive sentence at five years, while prescriptive would set it at, say, two or ten, depending on whether the legislature is concerned about resource management or leniency. Distinguishing the types of jurisdiction can be tricky, however. The federal guidelines, for example, purported to be descriptive, but they were clearly prescriptive.

19. *See* Pfaff, *supra* note 11, at 274–76. My results do not isolate the particular importance of appellate review.

To make the implications of *Blakely* and *Booker* clear to those who may not spend much time studying guidelines, a simple story can demonstrate how guidelines worked, and thus how *Blakely* and *Booker* undermined them.[20] In 1998, in the midst of a bitter divorce proceeding in Washington State, Ralph Blakely kidnapped his wife, Yolanda, tying her up with duct tape and forcing her at knifepoint into a box in his truck. He also coerced his thirteen-year-old son to follow him by threatening to harm Yolanda with a shotgun. The son escaped and called for help, and Blakely was arrested shortly thereafter. He ultimately pled guilty to, among other things, second-degree kidnapping with a firearm.

Had Blakely committed his crime prior to July 1, 1984—the date Washington State's sentencing guidelines went into effect—he would have been sentenced under an indeterminate sentencing regime. The maximum sentence for second-degree kidnapping was ten years, and the statutory maximum was the maximum sentence any defendant faced; the judge had substantial discretion for setting the minimum.[21] Blakely thus could have been sentenced to "one year to ten years in prison," with the actual date of release determined by the parole board, which itself possessed significant discretionary powers. This type of indeterminacy defined sentencing in all states prior to the 1970s, and it is the kind of regime in which appellate courts play almost no role.

But by committing his crime after July 1, 1984, Blakely faced a much different outcome. The statutory maximum for second-degree kidnapping remained ten years. But under Washington State's guidelines, the standard range for this offense was forty-nine to fifty-three months, and the judge could depart from it only if he made specific additional factual findings, either aggravating (for upward departures) or mitigating (for downward); the state's statutes provided illustrative lists of such factors. Importantly, such fact-finding was *required*, and failure to find and report adequate facts was grounds for appeal by prosecution and defense alike. In Blakely's case, the judge found that Blakely acted with "deliberate cruelty" and sentenced him to ninety months in prison, well below the statutory maximum but also well above what the judge could have imposed without making additional findings. Though unsuccessful, Blakely at least had grounds for challenging both the factual basis and the substantive merit of his sentence.[22]

20. The facts here are taken from *Blakely v. Washington*, 542 U.S. 296, 298–300 (2004).

21. *See* WASH. REV. CODE § 9.95.011(1) (2003 & Supp. 2008–2009).

22. *See* State v. Blakely, 47 P.3d 149, 159 (Wash. Ct. App. 2002). Like most of the state courts discussed here, Washington appellate courts engaged primarily in boundary maintenance, refusing to regulate a trial court's otherwise-valid discretion unless "no reasonable judge would have imposed the same sentence." *Id.*

Though the design of guidelines—as well as that of mandatory minimums, strike laws, truth-in-sentencing laws, and other structural devices—varied from state to state, the general move toward greater structure was a consistent theme during the last three decades of the twentieth century. By the 1990s, no state relied solely on indeterminate sentencing procedures. This shift, however, captured the attention of the Supreme Court and ultimately led to the confusion we find ourselves in today.

B. The Court Charges Forward: Apprendi*,* Ring*, and* Blakely

With the rise of structured sentencing, the Supreme Court abandoned its traditionally laissez-faire attitude toward sentencing. The Supreme Court's particular concern was not so much that judicial discretion was being limited, but the way in which that was taking place. It was troubled by the fact that indeterminacy was constrained by requiring judges, as opposed to juries, to make factual findings. As we will see, the result is ironic: Afraid that too much power was transferred from the jury to the judge (by imposing *limits* on the judges), the Supreme Court handed down a string of opinions that encouraged states to *lift* the limits on judges.[23]

The first key case is *Apprendi v. New Jersey*.[24] Charles Apprendi, Jr., a white man, pled guilty to various weapons charges after firing several bullets into the house of a black neighbor. The charges carried statutory maximums of ten years. At the time, however, New Jersey possessed a hate-crime statute that allowed a judge to impose a sentence of up to twenty years if the judge (not the jury) found that the crime was motivated by certain types of animus, and the judge accordingly sentenced Apprendi to twelve years in prison. The Supreme Court threw out Apprendi's aggravated sentence on grounds that it violated the Sixth Amendment: "[A]ny fact," the Court held, "that increases the penalty . . . beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[25] Thus, the maximum sentence the judge could have given Apprendi was ten years.

The logic of *Apprendi* is clear. Imposing a sentence above the maximum set by the statute is akin to sentencing the defendant for a different crime than the one for which he was convicted. But while it targeted a legitimate concern, *Apprendi* ran the risk of simply being a drafting rule. Consider the following two regimes: In Regime One, there are two offenses, "second-

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23. As two members of Ohio's sentencing commission bitterly quipped: "Did you hear the one about the defendant whose right to a jury trial was vindicated by giving judges more power?" *See* Memorandum from David Diroll, Executive Director, and Scott Anderson, Staff Attorney, Ohio Criminal Sentencing Comm'n, to Judges and Other Interested Parties 1 (Mar. 28, 2006), http://www.sconet.state.oh.us/Boards/Sentencing/resources/Publications/foster.pdf.

24. 530 U.S. 466 (2000).

25. *Id.* at 490.

degree drug trafficking," which carries a maximum sentence of five years and applies to defendants who sell no more than fifty grams of cocaine, and "first-degree drug trafficking," which carries a maximum sentence of ten years and applies to defendants who sell more than fifty grams of cocaine. In Regime Two, there is just one offense, "drug trafficking," with a statutory maximum of ten years, but a guideline provision that states a judge cannot impose a sentence of more than five years without finding that the defendant sold at least fifty grams of cocaine. According to *Apprendi*, a jury must find the weight in Regime One, but a judge can make the finding in Regime Two.[26]

In *Ring v. Arizona*,[27] the Supreme Court effectively closed this loophole. In *Ring*, the Supreme Court evaluated Arizona's death penalty procedures, which required a judge to make certain factual findings before imposing the death penalty. Importantly, in *Ring* the statutory maximum *is* the death penalty, so unlike in *Apprendi*, in imposing the death penalty the trial judge in *Ring* was sentencing within the statutory maximum. Nonetheless, the Court held this sentence to be improper as well, stating again that such required fact-finding had to be made by a jury. And the Court explicitly stated that its holding was general, not death penalty-specific.

Although presumptive guidelines survived *Apprendi*—as the drug-statute hypothetical makes clear—they could not survive *Ring*.[28] Judges operating under presumptive guidelines were engaged in the exact same conduct as the judge in *Ring*: adjusting sentences upward but within the statutory limits only after making required factual findings. And in *Blakley v. Washington*, the Supreme Court acknowledged the implications of *Ring*, declaring presumptive guidelines unconstitutional for exactly this reason. Specifically, any fact required to impose a higher sentence had to be found by a jury beyond a reasonable doubt.

Blakely's is a doctrinal view of the Sixth Amendment.[29] When the state

26. The majority in *Apprendi*—which is also the majority in *Blakely* and in the merits part of *Booker*—is Justices Ginsburg, Scalia, Souter, Stevens, and Thomas. Though at first a strange-seeming alliance, Walter Dellinger has pointed out that it reflects not the usual right/left split on the Court but a doctrinal/pragmatic rift. *See* Walter Dellinger, *A Supreme Court Dialogue*, SLATE, June 28, 2004, http://slate.com/id/2102895/entry/2103016/. That a doctrinal ruling leads to pragmatic confusion is perhaps to be expected. Noting the nature of this divide helps explain why—as I will argue below—*Booker* is such a chaotic and self-contradictory opinion: one half of the opinion is written by doctrinalists, the other by pragmatists.

27. 536 U.S. 584, 609 (2002).

28. The inevitable doom of presumptive guidelines is made clear by the fact that a federal district court judge declared the presumptive Federal Sentencing Guidelines unconstitutional a week before the Supreme Court issued its opinion in *Blakely*, based solely on *Apprendi* and *Ring*. *See* United States v. Green, 346 F. Supp. 2d 259, 300–01 (D. Mass. 2004).

29. Though predominantly a doctrinal opinion, there was a pragmatic concern motivating it as well, but this concern was misplaced. Scalia expressed concern that states could set the statutory maximum for low-level crimes very high and then make the commission of separate felonies

creates an expectation, that expectation can be broken only by the jury. A statutory maximum is one such way of creating an expectation, but so too is a guideline cap.[30] So *Blakely* held that states can continue to use presumptive guidelines, but all aggravating facts must be found by a jury beyond a reasonable doubt.[31]

The Court made it clear, though, that judicial fact-finding under voluntary guidelines does not run afoul of *Blakely*.[32] The majority favorably cited *Williams* for the proposition that as long as the state does not create any expectation, the judge is free to make any findings he wants and to impose any sentence (within the maximum and minimum) that he fancies. This implicit support for voluntary guidelines proves important down the road.

Blakely has effectively foreclosed any possibility of substantive appellate oversight—whether boundary maintenance or regulatory review—unless the jurisdiction uses sentencing juries, and even in that setting, *Blakely* restricts it severely. Assume, for example, that based on aggravating factors found by a jury, a judge imposed an elevated eight-year sentence for a crime with a statutory maximum of ten years but a presumptive sentence of five years. Boundary maintenance here would require the appellate court to reverse the factual findings of a jury, something that appellate courts are generally loathe to do, and so such review will likely be rare in the presence of sentencing juries.[33] But an appellate court could engage in regulatory review, and hold

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aggravating factors, thus allowing the defendant to effectively be sentenced for a crime for which he was never convicted, gutting the Sixth Amendment. For example, a state could set the maximum sentence for theft at life without parole but define the default range as three to five years. The guidelines could then state that a judge could impose a sentence of twenty years or more only if he found by a preponderance that the defendant committed a murder during the course of the theft. The defendant has essentially been sentenced for murder, even though the charge need never be brought before the jury.

This is a fair concern—at the time *Blakely* was decided, a federal case was pending on appeal involving a sentence for credit card fraud that was aggravated because of an uncharged murder—but it had nothing to do with the case before the Court. Washington State's statutes, like those of many states, explicitly stated that conduct constituting a separate offense could not be used as an aggravating factor. WASH. REV. CODE § 9.94A.370(3) (2003) (now found at § 9.94A.530(3) (Supp. 2008–2009)). The federal system, however, had embraced this type of "real offense" sentencing regime wholeheartedly, and in both *Blakely*'s majority and dissenting opinions there is a strong sense that the Justices were not actually debating Washington's guidelines, but rather the federal guidelines.

30. One could make both doctrinal and pragmatic arguments for why a statutory maximum and a guideline range are not similar expectations, but the Court did not do so.

31. *Blakely* is asymmetric. Aggravating facts must be found by a jury, but mitigating facts can still be found by a judge. The logic is that the Sixth Amendment is designed to protect the defendant from state severity, not state lenience. *See* Blakely v. Washington, 542 U.S. 296, 301 (2004).

32. *See generally* Pfaff, *supra* note 11.

33. But not impossible. For example, in many jurisdictions a factor that is an element of a separate crime cannot be used as an aggravator, so an appellate court could toss an aggravator found by a jury that violates this principle, even if it did not want to review the evidentiary support for

that the eight-year sentence was unreasonable given the factors found by the jury. Such a decision, however, would be confusing: the judge would know that future juries would need to find more facts than the current jury did, but the judge would not necessarily know what those facts are. Nonetheless, regulatory review can exist in this context.

But for jurisdictions that do not wish to rely on sentencing juries, either type of substantive review is impossible. Without sentencing juries, jurisdictions are forced to rely on voluntary guidelines.[34] Such guidelines were already inimical to boundary maintenance review, and *Blakely* only strengthens this effect. To reverse because, say, the trial court relied on an improper aggravator would imply that the guidelines are not wholly voluntary—unless such a reversal were purely procedural—and thus would trigger *Blakely*'s concerns about jury rights.[35]

Regulatory review is likewise impossible in voluntary guideline regimes after *Blakely*. As in the sentencing jury example above, a reversal for unreasonableness would imply that there is some extra fact out there that the trial court was required to find but had not. But in the absence of sentencing juries, there is no one to make this finding. In such a setting, the appellate courts are either incredibly powerful—by reversing sentences they can undermine the voluntary guideline system and force the state to adopt sentencing juries—or absolutely powerless, unable to reverse on any sort of substantive ground. The latter outcome is by far the more likely.[36]

Though perhaps troubling from a policy perspective, *Blakely* laid down a clear and intelligible rule. In its subsequent efforts to shift fact-finding back to the trial judge, the Supreme Court undermined this rule without developing a similarly intelligible alternative.

C. A Partial Retreat: Booker*,* Rita*,* Gall*, and* Ice

Blakely represents the high-water mark for the aggressive interpretation of the Sixth Amendment begun in *Apprendi*. In three follow-up cases—*United States v. Booker*, *United States v. Rita*, and *Oregon v. Ice*—the Court has retreated from the hard line it took in *Blakely*. In a fourth case, *United States v. Gall*, however, the Court still seems committed to the *Blakely*

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specific findings.

34. Or return to indeterminacy, which as we have seen does not support much if any review.

35. Procedural boundary maintenance could survive *Blakely*. Were an appellate court to remand, not alter, a sentence because the trial court relied on an unsupported or impermissible aggravator, *Blakely* is not immediately implicated. The appellate court would have to make it clear, however, that the trial court remains free to impose the exact same sentence as before with a different explanation.

36. Especially in the long run. That the state adopted voluntary guidelines over jury sentencing indicates a preference for the former. Were the appellate courts to start imposing jury fact-finding, the legislature would likely strip them of their review power.

view. It should thus come as little surprise that states are somewhat baffled about what options remain open to them.

Booker,[37] which confronted the question of whether the Federal Sentencing Guidelines violated *Blakely*, is likely one of the most self-contradictory opinions in the United States Reports. The federal guidelines relied on required judicial fact-finding more than any other sentencing regime in the nation, and in the merits half of the opinion, the same five-Justice majority that handed down *Apprendi* and *Blakely* found the federal guidelines unconstitutional.

The remedial half of the opinion was written by the dissenters from the merits half along with Justice Ginsburg, the only Justice to sign on to both halves of the opinion.[38] Given that four of the authors of the remedial majority dissented from the merits majority on the grounds that *Blakely* was simply wrongly decided,[39] that *Booker*'s remedy severely undermined *Blakely* is as expected.

In *Blakely*, the Court left Washington's guidelines essentially untouched, simply informing the state who the relevant fact finder had to be. Not so in *Booker*. In *Booker*, the remedial majority severed two provisions from the federal Code: 18 U.S.C. § 3553(b)(1), which made the guidelines binding, and 18 U.S.C. § 3742(e), which established the standard of review for sentencing appeals. As a result, the federal guidelines now appear to be voluntary.

But not quite. The remedial majority held that while the guidelines are voluntary, and while the statutory provision for review has been excised, a standard of review nonetheless implicitly exists.[40] The Court thus declared that the guidelines were voluntary but subject to "reasonableness review." Unfortunately, the Court declined to explain what this term means. Trial judges are called on to make sure that sentences are consistent with the punishment goals set forth in 18 U.S.C. § 3553(a), but that provision is so broad as to provide almost no guidance at all.[41] Other than that, the remedial

37. 543 U.S. 220 (2005).

38. It is unfortunate that Justice Ginsburg did not write her own opinion, since she is the lone Justice who apparently saw a way to reconcile the two seemingly incompatible majority opinions.

39. The dissenters from the merits opinion essentially reiterated their opposition to *Apprendi* and *Blakely*. They also made a stab at distinguishing *Blakely* from *Booker* on the grounds that the federal guidelines were administrative rules, not statutes, but the argument is not convincing. First, *Blakely* makes no reference about where the required fact-finding comes from. And second, Washington State's guidelines were created by an administrative body and then adopted by the legislature, so the distinction is purely academic at best and nonexistent at worst. For a history of Washington's guidelines, see Washington State Sentencing Guidelines Commission, Powers and Duties of the Commission, http://www.sgc.wa.gov/Informational/About_SGC.htm (last visited May 28, 2010).

40. *Booker*, 543 U.S. at 260.

41. Among the factors to be considered are "the nature and circumstances of the offense" and

majority simply stated that this was a type of review in which appellate courts have traditionally engaged—albeit under a set of rules that *Blakely* eliminated (a point the remedial majority failed to address).[42]

This lack of guidance is disappointing, because creating reasonableness review makes *Booker* logically untenable. As long as *Blakely* remains good law, any sort of substantive review will ultimately prove self-contradictory and self-defeating. As pointed out above, both boundary maintenance and regulatory review create fact-finding requirements that trigger *Blakely*'s jury trial right. And while reasonableness review may be possible in a world with extensive sentencing juries, *Booker* is explicitly about reasonableness review of judicial, not jury, fact-finding.

In a recent paper, however, Stephanos Bibas and Susan Klein attempt to reconcile *Booker* with *Blakely*.[43] Their argument fails to overcome the illogic of *Booker*, because that illogic is insurmountable. But it may nonetheless be constitutionally correct, in that the distinction they draw—nonexistent as it may be—is one that the Court will quite likely accept. Given its constitutional strength, and the fact that it explains what we see taking place at the state level, the argument deserves our attention.

Bibas and Klein argue that the totality-of-the-circumstances-type review that the Court envisions for its reasonableness standard often "cannot isolate a specific fact or judgment that is necessary to justify the imposition of a particularly high . . . sentence."[44] They go on then to state that:

> [A]n appellate court could not reverse a sentence as unreasonably high . . . because of a specific fact, as that would turn that fact into a jury issue. But it could reverse a sentence because under the totality of circumstances, no reasonable judge would impose this sentence. Appellate courts would reverse sentences without pinpointing exactly which facts and policies their reversals rested on. This vague approach would resemble the old but still constitutional model of unfettered sentencing discretion. Thus, there would be no Sixth Amendment violation.[45]

In short, they are arguing that while *Blakely* eliminates boundary maintenance—the definition of particular facts that must be found—it does

of the defendant, the need to reflect the seriousness of the offense (just deserts), the need to deter, the need to protect (incapacitate), and the need and ability to rehabilitate: in short, almost every justification for punishment proposed over the past several centuries. 18 U.S.C. § 3553(a) (2006).

42. *Booker*, 543 U.S. at 262–63.

43. Bibas & Klein, *supra* note 4.

44. *Id.* at 783.

45. *Id.* at 784.

not foreclose regulatory review.

With all due respect to Bibas and Klein, who are among the most astute scholars of sentencing today, I cannot accept their argument. First, *Blakely* does not hold that any *named* fact necessary for a greater sentence must be found by a jury beyond a reasonable doubt, but just that *any* essential fact must be found that way. At the risk of repeating myself, by reversing a sentence as unreasonable an appellate court is saying that some extra fact was needed; whether it is pinpointed or not is immaterial to *Blakely*. Second, the presence of review means quite specifically that sentencing is *not* akin to unfettered discretion. Some discretionary decisions will be reversed, and so some trial courts will not always be able to accomplish what they desire. Fetters very much exist.

Bibas and Klein's approach may also be normatively unappealing. One of the key goals of structured sentencing is to inject greater transparency and objectivity into sentencing decisions. It is troubling to save such a system by imposing review that is intentionally vague and ill-defined—after all, a well-defined reversal would be boundary maintenance, which Bibas and Klein admit is unconstitutional.

In the end, regulatory review cannot conceptually survive where boundary maintenance is impermissible because they are not wholly distinct ideas. Regulatory review is just a more sophisticated form of boundary maintenance. We can think of boundary maintenance as "unconditional boundary control" and regulatory review as "conditional boundary control."[46] Under unconditional boundary control, once a judge finds certain facts on a particular list, he is free to set a sentence within a particular range. It is a lumpy, dichotomous approach. Conditional boundary control is more sophisticated: conditional on the particular set of facts a judge has initially found, he may need more facts to impose a particular sentence.

A simple, concrete example may clarify the relationship between the two. Consider a guideline regime that includes a list of ten aggravators, not all of which are equally severe. Let A1 be the most severe aggravator and A10 the least; for each default sentencing range there is also an aggravated sentencing range. In an unconditional, boundary maintenance-type regime, once the judge finds an aggravator, he is free to impose any sentence in the aggravated range. In a conditional, regulatory review-type regime, the quality of the aggravators matter, but this can be phrased in boundary maintenance terms. Conditional on finding A1 and A2, the judge is free to impose the highest sentence, but conditional on finding only A9 and A10 he may be allowed to

46. There is no linguistic or logical difference between "maintenance" and "control." I am using "control" here simply to prevent chaos were I to talk about boundary maintenance, unconditional boundary maintenance, and conditional boundary maintenance.

impose only a lower sentence within the aggravated range. This could be framed as regulatory review—with only A9 and A10 the highest sentence is unreasonable—or boundary maintenance, with different sets of aggravators needed for different sentences within the aggravated range. Both boundary maintenance and regulatory review are forms of substantive review, so it makes sense that they are opposite sides of the same coin, with the difference between them one of granularity. Boundary maintenance is no more detailed than the guideline provisions, while regulatory review operates at a more nuanced level. In the end, however, the implications of a reversal are roughly the same under both.

Yet the (ephemeral) distinction between boundary maintenance and regulatory review is one the Court may very well ultimately adopt, as suggested in several subsequent cases it has handed down in an effort to clarify *Booker*. In *United States v. Gall*, the Court stated that it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one,"[47] a claim wholly consistent with the Bibas–Klein view of permissible regulatory review.[48] The Court's implicit adoption of a Bibas–Klein approach is further strengthened by its opinion in *Rita*, which held that appellate courts could create a presumption of reasonableness for within-range sentences.

That the Court is willing to entertain artificial distinctions to limit *Blakely*'s reach is made strikingly apparent in *Oregon v. Ice*.[49] In *Ice*, the Court confronted a sentencing rule that required judicial fact-finding before a judge could impose consecutive, as opposed to concurrent, sentences. The Court upheld the rule, despite it being almost impossible to reconcile with *Blakely* (as Scalia pointed out in a blistering dissent). *Blakely*'s rule is a general one, focusing not on required judicial fact-finding under guideline systems, but on judicial fact-finding that results in longer sentences in general. That *Blakely* involved sentencing guidelines is an immaterial detail. Thomas Ice received a sentence longer than he otherwise could as the result of required judicial fact-finding, and Justice Ginsburg's opinion is forced to draw fine distinctions—in fact, arguably nonexistent ones—to circumvent *Blakely*. It is quite conceivable that a majority of Justices could similarly

47. 552 U.S. 38, 50 (2007). Complicating this statement, though, is the fact that *Gall* held that appellate courts could *not* create a presumption of *un*reasonableness for sentences outside the guideline ranges, thus making the above quote seem more like dicta.

48. Not surprisingly, in his grudging concurrence, Justice Scalia pointed out that *Gall* still requires some sort of fact-finding somewhere and thus still violates *Blakely* and the merits half of *Booker*. Scalia concurred only because he gives stare decisis weight to *Rita*—from which he dissented—and because he feels that the Supreme Court's rule in *Gall* will result in fewer unconstitutional sentences than the appellate decision it reversed.

49. 129 S. Ct. 711 (2009).

reconcile the Bibas–Klein proposal with *Blakely*.

In the end, the problem with *Booker* is that it is only a partial reversal of *Blakely*, and an inept one at that. The dissenters from *Apprendi* and *Blakely* apparently lacked the votes to reverse those opinions, but were able to sway Justice Ginsburg to agree to what could be termed a "modification." Such partial repeals are, unfortunately, not uncommon in the Supreme Court's criminal law jurisprudence. Ronald Allen and Ethan Hastert in fact suggest that they happen with surprising frequency.[50] Among their examples: mental states are subject to constitutional oversight until they are not;[51] factual presumptions are subject to scrutiny until they are not;[52] and perhaps most famously, the *Mullaney* and *Patterson* cases that ultimately hold that the state bears the burden of proof for every element of the crime, unless it drafts its statutes carefully.[53]

The problem with such indirect attacks on an opinion is that it becomes increasingly difficult to understand what the rule actually is. In many ways, *Mullaney* and *Patterson* simply delegate tremendous discretion to the Court: it is free to decide when a state has excessively shifted the burden of proof onto the defendant. Rather than confront a bad (or at least disliked) decision head-on, the Court often simply undermines it, but in doing so produces an outcome far muddier than need be the case. So too with *Blakely* and *Booker*.

While the Court's post-*Booker* cases have focused almost exclusively on federal sentencing, at least three states are currently developing *Booker*-esque reasonable review standards of their own. Their experiences suggest that post-*Booker* review which focuses on boundary maintenance (as is the case in New Jersey and Tennessee, and to a lesser extent, Indiana) fails to restore any sort of meaningful review, but that which adopts a more regulatory review approach (as happens in Indiana) succeeds. In other words, the Bibas–Klein distinction appears to be playing out at the state level. The next section examines in more detail these state experiences.

III. *BOOKER* IN THE STATES: UNMAINTAINED BOUNDARIES AND

50. Ronald J. Allen & Ethan A. Hastert, *From* Winship *to* Apprendi *to* Booker*: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195, 195 (2005).

51. *Compare* United States v. Dotterweich, 320 U.S. 277 (1943) *with* Morissette v. United States, 342 U.S. 246 (1952) *and* United States v. Park, 421 U.S. 658 (1975).

52. *Compare* Tot v. United States, 319 U.S. 463, 472 (1943) *with* United States v. Gainey, 380 U.S. 63, 70 (1965).

53. *Compare* Mullaney v. Wilbur, 421 U.S. 684, 703 (1975) (invalidating Maine's murder statute) *with* Patterson v. New York, 432 U.S. 197, 216 (1977) (upholding New York's). Simplifying only slightly, the defect in Maine's statute was that it explicitly defined malice aforethought as an element of the crime but put the burden of refuting it on the defendant. New York avoided that error by not including its equivalent of malice aforethought in its murder provision, but instead made proving its absence an affirmative defense (via an extreme emotional disturbance provision). In the end, the statutory distinction is almost wholly semantic.

ACCIDENTAL REGULATORY REVIEW

Blakely invalidated guideline systems in thirteen states.[54] Eight responded by *Blakely*-izing their guidelines—seven by adopting sentencing juries and one by making its guidelines wholly voluntary.[55] One of the thirteen has yet to officially respond to *Blakely*.[56] Indiana, New Jersey, and Tennessee (and possibly California), however, have decided to follow *Booker* and have converted their presumptive guidelines into voluntary guidelines subject to some sort of reasonableness review.

In this section, I examine how *Booker* review has played out in Indiana, New Jersey, and Tennessee.[57] Their experiences both highlight the confusion that *Booker* has wrought and provide evidence of the viability of the Bibas–Klein distinction. To summarize briefly: Appellate courts in New Jersey and Tennessee engaged almost exclusively in boundary maintenance before *Blakely*, and these two states have read *Booker* as restoring a weakened form of such review. But boundary maintenance is at the heart of the *Booker* paradox—even Bibas and Klein admit it cannot survive *Blakely* and *Booker*—and though they never directly acknowledge the paradox, appellate courts in these two states have reduced boundary maintenance to purely procedural review. Appellate courts in Indiana, however, undertook both boundary maintenance and regulatory review prior to *Blakely*. Boundary maintenance review in Indiana, like that in New Jersey and Tennessee, has become nothing more than procedural review, but its regulatory review continues as if nothing has changed. In fact, there is not a single Indiana appellate or state supreme court opinion that even raises the possibility that its regulatory review violates *Blakely*. Given the similarity between Indiana's regulatory review and the blurry totality-of-the-circumstances review advocated by Bibas and Klein, Indiana's experiences provide some direct evidence that the Bibas–Klein proposal may in fact be constitutionally viable.

A. Boundary Maintenance in New Jersey and Tennessee

Sentencing review practices in New Jersey and Tennessee were fairly

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54. *Supra* note 14 listed seventeen states that had either DSLs or presumptive guidelines. But for various technical reasons, those in four states—Illinois, Kansas, Michigan, and Pennsylvania—do not run afoul of *Blakely*. I provide a more detailed explanation in Pfaff, *supra* note 11, at 240–46.

55. The seven sentencing jury states are Alaska, Arizona, Colorado, Minnesota, North Carolina, Oregon, and Washington. The voluntary guideline state is Ohio. *See* Pfaff, *supra* note 11, at 240–46; Bibas & Klein, *supra* note 4, at 786 app. A at 799–801 tbls.II–IV. The Ohio Supreme Court relied extensively on *Booker*, but only for the proposition that supreme courts can modify sentencing statutes to make guidelines voluntary. It otherwise rejected the remedial majority's remedy. State v. Foster, 845 N.E.2d 470, 496 (Ohio 2006).

56. As of this writing, New Mexico had not reached a solution.

57. As mentioned in *supra* note 5, the State of California's sentencing law remains ambiguous, and I do not consider it in this Article.

similar before *Blakely* and remain so after *Booker*. In effect, appellate courts in both states engaged in boundary maintenance. Pre-*Blakely* review in Tennessee was more finely grained and more aggressive, but for our purposes here the distinctions are more superficial than substantive. And following *Booker*, both states attempted to preserve boundary maintenance but failed. Appellate courts do not directly acknowledge this failure, but it is clear from their decisions that they have not been able to reconcile meaningful, substantive boundary maintenance with *Blakely*. This section starts by describing pre-*Blakely* review in the two states, and it then examines their similar post-*Booker* experiences.

1. New Jersey and Tennessee Before *Blakely*

After almost a decade of debating the issue, New Jersey adopted a determinate sentencing law in 1978.[58] The law established a specific default sentence for each degree of offense as well as an upper and lower bound around that default. A judge could not impose a sentence above the default without finding certain aggravating factors or below without finding mitigating factors; the code provided an exhaustive list of these factors.[59] Appellate review followed a three-step process: the appellate court determined whether (1) the proper guidelines had been followed; (2) there was sufficient factual support for the aggravators and mitigators on which the judge relied; and (3) the trial court "clearly erred" by imposing a sentence that could not be supported by any reasonable weighing of the aggravators and mitigators.[60] Steps (1) and (2) are clearly boundary maintenance conditions. Step (3) is a form of regulatory review, but the bar was set so high that it was rarely, if ever, used.[61]

Thus, appellate courts in New Jersey focused on boundary maintenance. In *State v. Thomas*, for example, the appellate court remanded for resentencing after pointing out that the trial court had aggravated a sentence based on past offenses that the trial judge had earlier admitted were not very serious.[62] And in *State v. Mirakaj*,[63] the appellate court remanded for

58. A detailed history of New Jersey's sentencing reform process is given in *State v. Roth*, 471 A.2d 370 (N.J. 1984).

59. N.J. STAT. ANN. §§ 2C:44-1, 2C:43-6 (2005).

60. *Roth*, 471 A.2d at 387.

61. At least one New Jersey appellate judge noted the difficulty of reversing sentences that satisfy boundary maintenance review. *See* Edwin H. Stern, *Frustrations of an Intermediate Appellate Judge (and the Benefits of Being One in New Jersey)*, 60 RUTGERS L. REV. 971, 991–94 (2008).

62. In other words, the trial court's own statements suggested that the aggravators were not "'based upon findings of fact that are grounded in competent, reasonably credible evidence.'" 812 A.2d 409, 415–16 (N.J. Super. Ct. App. Div. 2002) (quoting *Roth*, 471 A.2d at 386).

63. 632 A.2d 850, 851 (N.J. Super. Ct. App. Div. 1993).

resentencing after holding that the trial court had improperly failed to find a relevant mitigating factor. In both cases, the appellate courts were effectively stating that the trial court lacked the right documentation to cross the border; by remanding—the procedure appellate courts were strongly encouraged to follow—the appellate courts avoided something more like regulatory review.

Pre-*Blakely* appellate review in Tennessee was likewise focused on boundary maintenance, though the line between boundary maintenance and regulatory review was blurrier because appellate courts resentenced rather than remanded. Tennessee's Criminal Sentencing Reform Act of 1989 established presumptive guidelines with appellate review. The conviction offense and the defendant's criminal history determined a range, and for all but the most serious felonies, the trial judge was to impose the minimum sentence in the range unless he found that certain aggravating factors dominated mitigating factors.[64] Appellate courts reviewed sentences under a "presumptive de novo" standard. The appellate court reviewed the sentence de novo, but the trial court's sentence was presumptively correct as long as the appellate court found that it had considered all relevant aggravators, mitigators, and sentencing principles; absent such a finding review was simply de novo.[65]

In practice, appellate review in Tennessee focused on the sufficiency of the evidence—on boundary maintenance. An indicative case is *State v. Embry*.[66] When sentencing Charles Embry for rape, the trial court imposed a sentence above the minimum after finding no mitigators and four aggravators, including that the crime was committed with "exceptional cruelty" and that the victim's injuries were "particularly" great. The appellate court held that the record showed cruelty and harm, but neither exceptional cruelty nor particularly great harm. In light of these findings (and skepticism about a third aggravator), the court reduced the sentence from twelve years to ten, which was still above the presumptive minimum of eight.[67]

At one level, this appears to be regulatory review, but upon closer inspection it is actually more like boundary maintenance (though the ambiguity illuminates the difficulty and ultimate artificiality of distinguishing

64. Pre-*Blakely* procedures are described in *State v. Carter*, 254 S.W.3d 335, 342 (Tenn. 2008).

65. TENN. CODE ANN. § 40-35-402(d) (2003); State v. Pierce, 138 S.W.3d 820, 826 (Tenn. 2004); State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991); State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

66. 915 S.W.2d 451, 456 (Tenn. Crim. App. 1995), *rev'd on other grounds*, State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000).

67. For other instances of appellate courts eliminating some but not all aggravators as insufficiently supported by the record and partially adjusting the sentence accordingly, see State v. Spratt, 31 S.W.3d 587, 609 (Tenn. Crim. App. 2000) (remanding rather than resentencing); State v. Williams, 920 S.W.2d 247, 259–60 (Tenn. Crim. App. 1995); State v. Claybrooks, 910 S.W.2d 868, 872–73 (Tenn. Crim. App. 1994).

the two types of review). What makes this type of review more boundary maintenance than regulatory review is the appellate court's focus on the specific missing factors. The appellate court adjusts the sentence only because the trial court lacked all the aggravators the trial court thought it possessed. The appellate court is not so much disagreeing with an otherwise-valid sentence (regulatory review), but is instead arguing that the sentence fell in a region the trial court lacked the authority to enter (boundary maintenance).

Tennessee's statutes appeared to vest its appellate courts with the right to engage in even more thorough regulatory review by asking whether the trial court properly weighed the aggravators and the mitigators.[68] But Tennessee courts viewed the weighing of factors as falling primarily within the trial court's discretion;[69] tellingly, *zero* pre-*Blakely* cases cite the relevant section of Tennessee's code (section 40-35-401(b)(2)). There are some instances in which appellate courts nonetheless reversed how trial courts weighed aggravators and mitigators, but these appear to be rare.[70]

2. New Jersey and Tennessee After *Booker*

Pre-*Blakely* appellate review in both New Jersey and Tennessee clearly violated *Blakely*: their boundary maintenance effectively imposed on judges fact-finding requirements that *Blakely* held only juries could undertake. Consider the *Embry* case from Tennessee. Following the appellate court's ruling, a trial court sentencing a defendant for rape would not be able to impose a sentence above ten years without finding the one aggravator that survived review plus at least one more aggravator, or a different set of aggravators altogether. Either way, in a post-*Blakely* world, *Embry* would define the statutory maximum for rape as at most ten years, absent additional jury fact-finding.

Though both states responded to *Blakely* and *Booker*, they did so differently. In New Jersey, the fix came from the state supreme court, which in *State v. Natale* issued an opinion that parallels *Booker* in striking ways.[71] The court held that New Jersey's guidelines created unconstitutional judicial fact-finding requirements, stated (like *Booker*) that the state legislature did not intend for jury fact-finding but wanted sentencing to be conducted by judges,

68. TENN. CODE ANN. § 40-35-401(b)(2) (2003); *see also Carter*, 254 S.W.3d at 344.

69. *See, e.g.*, State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

70. One example is *State v. Grissom*, 956 S.W.2d 514, 519 (Tenn. Crim. App. 1997), in which the appellate court reduced a sentence back to the presumptive minimum, stating that "in our opinion the abundance of mitigating evidence necessitates that the sentence be reduced back down to the minimum." Yet even this type of review can be seen as a form of boundary maintenance, given its explicit reference to the number of mitigators.

71. 878 A.2d 724, 739 (N.J. 2005).

excised (like *Booker*) the sections that made the guidelines presumptive, and insisted (like *Booker*) that appellate courts would still play "'a central role'" and that "[s]entencing decisions will continue to be reviewed under our established appellate sentencing jurisprudence."[72] And like the *Booker* Court, the court in *Natale* provided no meaningful guidance as to what "established appellate sentencing jurisprudence" meant.

In Tennessee, the legislature amended its guidelines in 2005 to comply with *Booker*, rendering them voluntary but subject to appellate review. It is clear that the drafters intended for review to be more than merely procedural, since excessiveness or inconsistency with the purposes of punishment—substantive factors—remain grounds for appeal.[73] The drafters even acknowledged that such review was perhaps unconstitutional under *Blakely* until *Booker* (in their eyes) modified *Blakely*.[74] Today, the constitutionality of Tennessee's revised statutes is not in doubt, given that they are cited favorably in the Supreme Court's decision in *Cunningham v. California*.[75]

There is a striking feature of Tennessee's amendments that deserves notice. In order to comply with (its interpretation of) *Booker*, the legislature struck the guidelines' regulatory review provision that allowed appellate courts to resentence when they felt that the trial judge had not properly weighed the aggravating and mitigating factors.[76] In other words, the legislators felt that *Booker required* them to *disavow the very type of review that Bibas and Klein favor*. If nothing else, such a contradiction lays bare *Booker*'s fundamental illogic.

Like the United States and New Jersey Supreme Courts, the Tennessee Supreme Court has provided little clear guidance about what review should look like. On the one hand, for example, it noted in *State v. Carter*[77] that there is no reversible error if the trial court does not increase the sentence

72. *Id.* at 741 (citation omitted).

73. TENN. CODE ANN. § 40-35-401 (2006).

74. *See* Tennessee's "Official" *Blakely* Fix, Sentencing Law & Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2005/03/tennessees_offi.html (Mar. 3, 2005, 16:23 CST).

75. 549 U.S. 270, 294 (2007). In *State v. Gomez*, 163 S.W.3d 632, 649–50 (Tenn. 2005), the state supreme court relied on *Booker* to argue that the pre-2005 guidelines were constitutional, focusing on the fact that the federal guidelines were mandatory (if a judge found an aggravating fact he was required to adjust the sentence accordingly) while Tennessee's were more optional (judicial fact-finding was necessary for aggravation, but did not compel it). The U.S. Supreme Court held this reading incorrect in *California v. Cunningham*. But *Gomez* and *Cunningham* had little to do with Tennessee's post-*Blakely* guidelines, and instead were focused on whether pre-reform sentences needed to be corrected because of constitutional defects.

76. In *Carter*, the state supreme court referred to this change as "significant." Given that few cases appeared to have been resolved along these lines before *Blakely* and *Booker*, it is not so clear to me that this is actually all that important.

77. 254 S.W.3d 335 (Tenn. 2008).

despite finding aggravators or declines to reduce it despite finding mitigators. But on the other hand, it went out of its way to assert that the appellate courts should make sure that the trial courts comply with the "purposes of punishment" set forth in the Tennessee Code.[78] Given that Tennessee includes among the theories of punishment just deserts, deterrence, incapacitation, rehabilitation, and restitution—like 18 U.S.C. § 3553(a), all the major theories of punishment—this opens the door to meaningful substantive review.[79]

Though the two states constitutionalized their guidelines differently, the state of post-reform appellate review in both jurisdictions is remarkably similar. In both states, appellate courts have viewed the reforms as restoring, albeit in a weaker form, the boundary maintenance that they engaged in before *Blakely*, precisely contrary to the lesson Bibas and Klein draw from *Booker*. And as a result, the review they (re)establish ends up being procedural. Where boundary maintenance is the norm, states need to view *Booker* as revamping, not restoring, appellate review procedures. The appellate courts in New Jersey and Tennessee thus mistakenly look backwards, not forwards.

Consider the few relevant post-*Natale* decisions from New Jersey.[80] Appellate courts continue to cite *Roth*—the 1984 state supreme court case that established New Jersey's boundary maintenance conditions—and other pre-*Blakely* cases as if nothing has changed; so too does the state supreme court.[81] In *State v. Schuster*, in fact, the court cites *Roth* and *Natale* side by side. And even the courts that do not cite *Roth* by name follow it in spirit, engaging in the clear, precise factor-by-factor analysis that defines boundary maintenance and distinguishes it from the muddy regulatory review embraced by Bibas and Klein.[82]

A similar pattern emerges in Tennessee. Given that the 2005 amendments

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78. *Id.* at 344 n.10.

79. *See* TENN. CODE ANN. § 40-35-102 (2006).

80. Almost every single Westlaw-available appellate sentencing opinion from New Jersey issued since *Natale* focuses on retroactivity issues arising from applying *Natale* to crimes committed prior to the case. Only a handful of cases are "pure" post-*Natale* cases not raising issues of retroactivity.

81. *See, e.g.*, State v. Schuster, No. A-5388-06T4, 2008 WL 4809497, at *8 (N.J. Super. Ct. App. Div. Nov. 6, 2008); State v. Robinson, No. A-1918-06T4, 2008 WL 398299, at *5–6 (N.J. Super. Ct. App. Div. Feb. 15, 2008). In *State v. Cassady*, 966 A.2d 473, 482 (N.J. 2009), the New Jersey Supreme Court quoted *State v. Roth*, 471 A.2d 370, 387 (N.J. 1984), for the principle that as long as the boundary is properly crossed, appellate review will not disturb the sentence: "[w]hen conscientious trial judges exercise discretion in accordance with the principles set forth in the Code and defined by us . . . , they need fear no second-guessing" (alteration and omission in original).

82. *See, e.g.*, State v. Tilelli, No. A-3135-05T1, 2008 WL 833752, at *8–9 (N.J. Super. Ct. App. Div. Mar. 31, 2008); *Robinson*, 2008 WL 398299, at *8; State v. Arnold, No. A-1921-06T4, 2008 WL 190439, at *5 (N.J. Super. Ct. App. Div. Jan. 24, 2008).

rejected regulatory review, this should not come as a surprise. Appellate courts continue to focus on the validity of individual findings and explicitly refuse to evaluate the balancing that takes place.[83] And as in New Jersey, Tennessee's supreme and appellate courts continue to cite pre-*Blakely* cases to explain post-*Booker* decisions.[84]

But these efforts at boundary maintenance fail. While the appellate courts never explicitly acknowledge this, their decisions reflect the impossibility of the task they have undertaken. In short, boundary maintenance in a post-*Booker* world turns into nothing more than procedural review. The Tennessee case of *State v. Guy* lays bare the hollowness of post-*Blakely* boundary maintenance. In *Guy*, the appellate court struck two of the six aggravating factors found by the trial judge yet upheld the sentence, stating: "Although the court improperly applied two enhancing factors, we nonetheless conclude that the sentences imposed are appropriate. The record reflects that in determining the specific sentence length, the trial court considered [relevant sources of evidence], as well as the required principles of sentencing . . . ."[85] In other words, as long as the trial judge jumps through the required procedural hoops—as long as he thinks about the necessary sources of evidence and theories of punishment—improper application of the guidelines generally results in the sentence being upheld.

That is not to say that review, at least in Tennessee, is wholly toothless. Even procedural review can have some punch. Consider *State v. Bible*, which appears to be the only available opinion to adjust a sentence since the 2005 amendments. The appellate court held that the trial court had improperly used an aggravator, and it noted that the trial court had stated in its sentencing report that it had put great weight on that factor when deciding to aggravate the defendant's sentence. As a result of this error, the appellate court reduced the sentence, rather than remanding for resentencing. Despite appearances, this is not substantive boundary maintenance. The appellate court was not saying that the invalid factor was *required* to impose a greater sentence. Instead, the appellate court took the trial court at its word that the invalid aggravator was critical to its decision and adjusted the sentence accordingly.

83. *See, e.g.*, State v. Carter, No. M2007-02706-CCA-R3-CD, 2009 WL 1349206, at *7 (Tenn. Crim. App. May 14, 2009); State v. Guy, No. E2007-01827-CCA-R3-CD, 2008 WL 5130729, at *8 (Tenn. Crim. App. Dec. 8, 2008); State v. Bible, No. M2007-02489-CCA-R3-CD, 2008 WL 5234755, at *7 (Tenn. Crim. App. Dec. 16, 2008).

84. For example, in *State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008), the court cited a 1998 case, *State v. Pike*, 978 S.W.2d 904 app. at 926–27 (Tenn. 1998), to justify a highly deferential (i.e., nonregulatory) standard of review. And in *State v. Huffman*, No. M2007-02103-CCA-R3-CD, 2009 WL 1349223, at *7 (Tenn. Crim. App. May 14, 2009), the appellate court relied on a 1995 case (*State v. Hayes*, 899 S.W.2d 175 (Tenn. Crim. App. 1995)) that cited a case from 1986 (*State v. Moss*, 727 S.W.2d 229 (Tenn. 1986)).

85. *Guy*, 2008 WL 5130729, at *12.

Thus, the outcome in *Bible* has no implications for future cases—a subsequent case identical to *Bible* in every way except for a different sentencing statement would likely not result in resentencing—but it nonetheless exemplifies meaningful procedural review.

Post-*Natale* review in New Jersey appears to be even more procedural than that in Tennessee. As mentioned above, very few Westlaw-available cases in New Jersey involve issues other than the retroactive application of *Natale*. Of these, none appears to lead to a remand due to sentencing error, and none even holds that a particular aggravator is unsupported by the record. Indicative of post-*Natale* review in New Jersey is *Robinson*, in which the appellate court demonstrated that the aggravating factors on which the trial court relied were supported by the record and then tersely concluded: "The trial judge properly reviewed the record, made findings regarding the applicable aggravating and mitigating factors, and then balanced those factors. The record supports the judge's conclusion that the aggravating factors substantially outweighed the mitigating."[86] The second sentence seems to suggest room for more substantive, meaningful review, but in the context of the rest of the opinion and the other appellate and supreme court sentencing decisions, it is clear that the first sentence is the key one. Once the trial court has fulfilled its procedural obligations, there is little a boundary-maintenance appellate court can do.

The experiences in New Jersey and Tennessee thus provide partial support for Bibas and Klein's proposal. If a jurisdiction attempts to preserve boundary maintenance, it will fail. Whatever the defects of Bibas and Klein's proposal, their form of regulatory review appears to be the only option available. Of course, that boundary maintenance cannot work does not necessarily imply that regulatory review will. Evidence from Indiana, however, fills this gap and suggests that in fact regulatory review can (at least politically and legally) survive *Booker*.

Before turning to Indiana, however, I just want to stress that procedural review is not synonymous with ineffectual review. *Bible* alone demonstrates its potential efficacy. Furthermore, as Michael O'Hear points out in this symposium, simply asking judges to explain themselves—and ensuring that they do so—can shape the sentences they impose.[87] Certainly a cynical ends-oriented judge can write an explanation to justify (almost) any sentence, but I would imagine that most judges take guideline suggestions seriously, and being forced to explain themselves, or go through other procedural hurdles, will likely influence their decision-making processes and thus the sentences

86. *Robinson*, 2008 WL 398299, at *8.

87. Michael O'Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751 (2009).

they impose.

*B. Indiana's (Accidental) Post-*Booker *Success*

Unlike their counterparts in New Jersey and Tennessee, appellate courts in Indiana have been able to continue to engage in meaningful review after *Booker*. The reason, however, is more historical accident than intentional planning. Indiana implemented both boundary maintenance *and* the type of regulatory review advocated by Bibas and Klein well before the Supreme Court issued *Booker*. As in New Jersey and Tennessee, post-*Booker* boundary maintenance has been reduced to purely procedural (and perfunctory) review. Regulatory review, however, has survived unscathed. In fact, Indiana courts have maintained regulatory review without even mentioning any possible tension with *Blakely* or *Booker*. So while they have not explicitly adopted Bibas and Klein's reasoning, they appear to have done so implicitly (and perhaps unintentionally).

Indiana was among the first states to implement a presumptive sentencing system, adopting its regime in 1976. Indiana's code established a specific presumptive sentence for each class of crime as well as upper and lower bounds; trial courts could depart from presumptive sentences only if they found aggravating or mitigating factors.[88] Like those in New Jersey and Tennessee, Indiana's guidelines provided for appellate review, establishing an "abuse of discretion" standard that was essentially used for boundary maintenance.[89]

But Indiana also developed a second type of review derived from its state constitution, one that pre-dated the guidelines. In the wake of constitutional amendments in 1970, Indiana adopted what is now Appellate Rule 7(B), which allows a court to revise an otherwise valid sentence if "after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender."[90] While the guidelines' abuse of discretion review targeted procedural errors, Rule 7(B) review adopted a more substantive, Bibas-and-Klein-like approach.[91]

88. IND. CODE ANN. §§ 35-50-2-3 to 35-50-2-7, 35-38-1-7.1 (LexisNexis 2009); *see also* Smylie v. State, 823 N.E.2d 679, 683 (Ind. 2005).

89. *See, e.g.*, Henderson v. State, 769 N.E.2d 172, 179 (Ind. 2002).

90. IND. R. APP. P. 7(B) (2009); *see also* Randall T. Shepard, *Robust Appellate Review of Sentences: Just How British Is Indiana?*, 93 MARQ. L. REV. 671 (2009); Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 36 IND. L. REV. 1003, 1025 (2003). Prior to amendments in 2003, the standard was "manifestly unreasonable," not the less-deferential "inappropriate." *See* Ketcham v. State, 780 N.E.2d 1171, 1182 n.7 (Ind. Ct. App. 2003); Lewis v. State, 759 N.E.2d 1077, 1087 (Ind. Ct. App. 2001).

91. Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 41 IND. L. REV. 955, 963–64 (2008).

Both standards of review were fairly deferential, and appellate courts generally upheld most sentences prior to *Blakely*. Yet both prongs of review did yield some remands (under the abuse of discretion review) and resentencings (under Rule 7(B)). Abuse of discretion remands paralleled reversals in New Jersey and Tennessee, with appellate courts finding that trial courts had failed to properly explain or justify their use of at least one or more aggravating factors.[92] Rule 7(B) reversals often resulted in the appellate court adjusting the sentence directly, though under special circumstances the appellate court would remand the case for resentencing.[93]

State v. Jordan makes clear the difference between the two types of review. Though the appellate court held that the trial court improperly found some aggravators, the appellate court appeared inclined to uphold the sentence based on the guidelines alone. In other words, the trial court had permission to cross the boundary.[94] But the court nonetheless reduced the sentence under Rule 7(B) from twenty years (the maximum) to fifteen years, arguing that while the offense justified the imposed sentence, offender characteristics rendered the maximum sentence inappropriate.

Jordan illuminates the distinction between boundary maintenance and regulatory review, and it also highlights the key concern with the latter type of review. Regulatory review allows an appellate court to adjust a sentence that is perfectly legal but somehow unappealing to the appellate judges. This can be problematic. On the one hand, such review may allow appellate judges to rein in excessive sentences. On the other hand, it seems inconsistent with guideline goals such as transparency and uniformity, especially since the appellate court has less information at its disposal than the trial judge.[95]

92. *See, e.g.*, Meadows v. State, 785 N.E.2d 1112, 1126–27 (Ind. Ct. App. 2003); Cox v. State, 780 N.E.2d 1150, 1158–59 (Ind. Ct. App. 2002); Powell v. State, 751 N.E.2d 311, 318 (Ind. Ct. App. 2001).

93. For example, the appellate court adjusted a twenty-year sentence down to fifteen years in *Jordan v. State*, 787 N.E.2d 993, 997 (Ind. Ct. App. 2003), but it remanded in *Lewis*, 759 N.E.2d at 1087. *See also* Schumm, *supra* note 90, at 1031 n.242.

94. Not all the aggravators were improper, and the court pointed to state supreme court precedent holding that the trial court need find only a single aggravator to justify imposing the maximum sentence. *Jordan*, 787 N.E.2d at 997 (citing Wooley v. State, 716 N.E.2d 919, 932 (Ind. 1999)).

95. It is worth pointing out here that the debates about "uniformity" or "disparity" in sentencing decisions and scholarly works are distressingly incomplete. Almost without fail the term "disparity" is invoked without any clarifying explanation. But as Kevin Cole has pointed out, despite the way it is used by judges and academics alike, "disparity" has no inherent meaning. Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997). What is disparate to a retributivist need not be disparate to a rehabilitationist: a retributivist would disagree with sentencing a twenty-year-old offender differently than a forty-year-old one for the same crime, although an incapacitationist—taking into account the literature on desistance—may view imposing the same sentence as disparate.

Since *Blakely*, Indiana has modified its abuse of discretion review, but not its Rule 7(B) review. The Indiana Supreme Court held that *Blakely* invalidated its sentencing guidelines and demanded that required facts be found by juries.[96] The Indiana legislature, however, speedily amended its guidelines to make them voluntary. Whether it *Booker*-ized them or made them wholly advisory was less clear: After the amendments, Indiana appellate courts were unsure of their exact role with respect to the guidelines.[97] In *Anglemyer v. State*, the state supreme court made it clear that the guidelines had been *Booker*-ized, and thus that appellate review had been retained. The supreme court held that appellate courts would still review sentences under the same abuse of discretion standard, noting that "[n]othing in the amended statutory regime changes this standard."[98] Tellingly—and akin to what happened in New Jersey and Tennessee as well—the court relied on several pre-*Blakely* cases to explain the nature of post-*Booker* abuse of discretion review.[99] More provocative, however, was its discussion of Rule 7(B): It treated Rule 7(B) as if nothing had changed.[100]

By now, it should be easy to predict the nature of Indiana's post-*Booker* abuse of discretion review: it is almost wholly procedural and perfunctory. To the extent that there are remands, they appear to be solely for failures to properly explain sentences.[101] Again, such review need not be toothless, since forcing a judge to explain himself may cause him to think more carefully about the sentence he is imposing. But it is a mild form of review.

More interesting is the continued vitality of Rule 7(B) review. This type of regulatory review appears to be as robust as ever—in fact, perhaps more so, ever since amendments in 2003 lessened appellate deference.[102] In *Cardwell v. State*, for example, the Indiana Supreme Court reduced a defendant's sentence under Rule 7(B), despite holding that the trial court did not abuse its

96. Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005).

97. *See* Anglemyer v. State, 868 N.E.2d 482, 488–89 (Ind. 2007) (quoting Gibson v. State, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006)).

98. *Anglemyer*, 868 N.E.2d at 490.

99. The court cites *Smallwood v. State*, 773 N.E.2d 259 (Ind. 2002), *Page v. State*, 424 N.E.2d 1021 (Ind. 1981), and *In re LJM*, 473 N.E.2d 637 (Ind. Ct. App. 1985).

100. In particular, the court discusses Anglemyer's Rule 7(B) claim without a single mention of *Blakely* or *Booker*. "*See*" (in the negative) *Anglemyer*, 868 N.E.2d at 491–94.

101. In *Powell v. State*, 895 N.E.2d 1259, 1262 (Ind. Ct. App. 2008), for example, the court defines "abuse of discretion" as either not providing a sentencing statement or relying on aggravating or mitigating factors not supported by the record. As long as the factors are supported, the court appears to take a hands-off approach. *Eversole v. State*, 873 N.E.2d 1111, 1113 (Ind. Ct. App. 2007), makes this clear: "[W]here the trial court has entered a reasonably detailed sentencing statement explaining its reasons for a given sentence that is supported by the record, we may only review the sentence through Appellate Rule 7(B)."

102. *See* Stewart v. State, 866 N.E.2d 858, 865 (Ind. Ct. App. 2007); Schumm, *supra* note 91, at 967–70.

discretion in setting the sentence.[103] That such a move took place at the state supreme court, without any mention of possible *Blakely* problems, indicates that the Indiana Supreme Court has implicitly adopted the Bibas and Klein view of what constitutes acceptable review in a post-*Booker* world.

The results in Indiana thus suggest that the Bibas and Klein proposal is a politically and legally viable way for appellate review to survive *Booker*. Boundary maintenance fails in Indiana (as well as in New Jersey and Tennessee), but the blurry regulatory review that Bibas and Klein propose has survived. And absent some sort of intervention from the U.S. Supreme Court—which seems unlikely, given recent decisions cabining *Blakely*'s reach—it is apparently good law.

103. 895 N.E.2d 1219, 1226 (Ind. 2008).

IV. LOOKING FORWARD: IS *BOOKER* REVIEW A GOOD THING?

At present, *Booker*'s efforts to revitalize appellate review have essentially failed. But Bibas and Klein point to a possible route states can follow to develop a more rigorous type of review, and Indiana's experiences suggest that it is viable. In this Part, I want to turn away from doctrinal and constitutional issues and briefly consider whether this path is a normatively appealing one for states to take. That many states adopted presumptive guidelines rather than voluntary suggests that they specifically believed appellate review was important, and thus that its elimination by *Blakely* is undesirable.[104] It is not immediately clear, however, that the type of review permitted by *Booker* is an appealing way to fill the gap.

The tradeoffs are easy to establish. On the one hand, Bibas–Klein review allows appellate courts to police particularly extreme sentencing decisions by trial judges. But on the other hand, this enforcement power works only if it is opaque, subjective, and individualistic[105]—contrary to guideline goals of transparency, objectivity, and consistency, and much more vulnerable to misuse or even abuse. Moreover, the federal experience suggests that the doctrinal ambiguity of meaningful *Booker* review leads to a substantial amount of costly litigation and uncertainty about what exactly trial courts must do and appellate courts can do.[106]

Unfortunately, there is very little empirical evidence available to resolve this debate. We can, however, at least flesh out the questions that must be answered and consider what the few available findings suggest. The two central questions are: (1) Given the range of internal and external pressures that may induce trial judges to adhere to guidelines (such as personal senses of obligation, greater public accountability, institutional pressures, and so on), how important is appellate review in general?; and (2) What are the marginal benefits of substantive review over procedural review? The more closely outcomes in voluntary guideline systems track those in presumptive guideline systems, and the more procedural review appears to be as effective as

104. Joanna Shepherd argues that presumptive guidelines were correlated with higher crime rates and thus a "silver lining" of *Blakely* was that it undid sentencing policies that hurt crime-fighting efforts. Even accepting that the correlation is causal, however, does not mean that *Blakely* benefited the affected states. These states may have made the rational decision to divert limited resources from criminal justice to other state functions, such as public health or education, accepting higher crime rates as the necessary cost. If so, *Blakely* may force them to "purchase" reduced crime rates they did not want to buy. *See* Joanna Shepherd, Blakely*'s Silver Lining: Sentencing Guidelines, Judicial Discretion, and Crime*, 58 HASTINGS L. J. 533 (2007).

105. After all, appellate opinions violate *Blakely* if they define clear rules.

106. That New Jersey and Tennessee have not seen extensive litigation over these issues is most likely the result of these states not really adopting substantive review after *Booker*. That Indiana has had no apparent debate about this issue, at least as it pertains to Rule 7(B), is harder to explain; perhaps there are simply not enough Rule 7(B) adjustments to generate sufficient attention.

substantive review, the more states can use (truly) voluntary guidelines or procedural review to accomplish the goals of presumptive guidelines without having to risk the potential costs of the Bibas–Klein approach.

There does not appear to be any research at all yet addressing the second question. A few studies, however, shed some light on the first. These explore the relative effects of voluntary and presumptive guidelines, and their evidence is mixed. Voluntary guidelines appear to be better than no guidelines at all, but presumptive guidelines similarly seem to tie trial judges' hands more than voluntary guidelines.

My own work, for example, indicates that sentences are more consistent, and that the race and sex of the defendant appear to influence sentencing outcomes less, in presumptive guideline jurisdictions compared to voluntary guideline ones, although voluntary guidelines are better than no guidelines at all.[107] And a study by Thomas Marvell similarly suggests that appellate review may matter, since he finds that prison population growth is slower in states with presumptive guidelines than with voluntary guidelines; though again, voluntary guidelines are better than no guidelines.[108] Both of these studies thus suggest that something is lost when appellate review is eliminated, and so—despite its logical and doctrinal defects—there may be some merit to trying to follow in *Booker*'s footsteps. But saying more than this is difficult. The question remains whether the apparent marginal gains of appellate review are worth whatever costs Bibas–Klein review would introduce.

Assessing the importance of appellate review is further confounded by a significant empirical blind spot. There is almost no evidence on how changes in jury rights (such as the holdings in *Blakely* and *Booker*) affect plea bargains—despite the fact that pleas resolve approximately 91% of all

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107. *See* Pfaff, *supra* note 11, at 274–76.

108. Thomas B. Marvell, *Sentencing Guidelines and Prison Population Growth*, 85 J. CRIM. L. & CRIMINOLOGY 696, 701–02, 707 (1995). Indicative of a general challenge in law and criminology of classifying guidelines, Marvell purports to study only presumptive guidelines, on the grounds that voluntary guidelines likely have little or no effect. But two of the states he classifies as presumptive—Delaware and Wisconsin—are in fact voluntary. Moreover, like almost all students of structured sentencing, he excludes those states that used determinate sentencing laws instead of presumptive guidelines, despite the fact that the difference is purely semantic. *See* Pfaff, *supra* note 11, at 274–76.

Note too that the causal story in Marvell's paper is tricky. States do not randomly adopt voluntary or presumptive guidelines: there is a reason for each state's choice. States more committed to reducing prison population growth may have adopted presumptive guidelines to exert more control over judges. If other forces that rein in prison growth are correlated with this choice, at least some of the reported effect of presumptive guidelines may be spurious. Moreover, Marvell's results should be viewed with some caution due to other statistical limitations that I discuss in John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547, 549 (2008).

criminal cases (compared to 5% for bench trials, with jury trials comprising the remaining 4% of dispositions). With little understanding of how defendants and prosecutors bargain in the shadow of any one sentencing regime, it is nearly impossible to predict how they respond to changes in regimes.[109]

Right now, then, the available evidence is slight, but it at least suggests that there was a cost to *Blakely*, and thus some potential gross (though not necessarily net) benefit to *Booker*'s attempted repeal. In a few years, better answers to these questions will emerge. Empirically, *Blakely* has the advantage of being an exogenous shock to sentencing practices, which will make it much easier to address these issues.[110] By randomly eliminating appellate review from many states, *Blakely* will help illuminate its importance. Moreover, the regimes currently used in New Jersey and Tennessee may shed some light on the effectiveness of procedural review. Right now, however, there is simply not enough post-*Blakely*, post-*Booker*, post-Tennessee-reform-act, post-*Natale*, post-*Anglemyer* data to be able to extract any meaningful conclusions.

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109. Theory cannot provide much guidance, unfortunately. As Stephanos Bibas points out, prosecutors, defense attorneys, defendants, and judges are subject to a host of competing incentives and biases, many of which cut in contradictory or ambiguous directions. Jury sentencing hearings are time-intensive, for example, so *Blakely*-izing guidelines may induce the prosecutor to offer a better plea, but may likewise force an overworked defense attorney to accept a worse deal. *Booker*-ization, by eliminating the need for a jury, would have opposite effects. (And the game theory implications are actually far more complex, since the prosecutor and defense attorney are likely aware of these incentive effects and may try to game them.) Or, comparing again a *Blakely* world to a *Booker* one, defendants may overstate the likelihood of a jury "acquittal" on aggravators and thus be less willing to take a plea (or demand better terms), but a jury may be less predictable which could make a risk-averse defense attorney more likely to encourage his client to take it. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

110. Supreme Court decisions are a perhaps undervalued source of exogenous variation. The timing and nature of Court decisions can often be uncorrelated with state-level variables of interest. A good example of an interesting study exploiting this trait of Court decisions is Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping Out the Consequences of the Exclusionary Rule*, 46 J. L. & ECON. 157, 158 (2003). Atkins and Rubin note that at the time of *Mapp v. Ohio*, 367 U.S. 643 (1961), which constitionalized the exclusionary rule, half the states already had such a rule and half did not. Thus, *Mapp* provides a tidy experiment: the half with the rule already act as a control group for the other half, which at that point effectively received a randomized treatment. This is perhaps as close to an observational randomized clinical trial as one can hope for. In a few years, when more data are available, *Blakely* will do for sentencing what *Mapp* did for the exclusionary rule.

V. CONCLUSION

In *Booker*, the Supreme Court awkwardly attempted to restore the substantive appellate review of criminal sentences after effectively destroying such review less than a year earlier in *Blakely*. The result is confusing and contradictory, since the Court attempted this restoration while simultaneously upholding its decision in *Blakely*. Nonetheless, at least three states have waded into *Booker*'s logical quicksand.

Their experiences are informative. *Booker* appears to restore at least some substantive review, but not the type states had traditionally encouraged their courts to undertake before *Blakely*. *Booker* does not restore boundary maintenance review, in which appellate courts ensure that trial courts follow the dictates of the guidelines. But it does revitalize a form of regulatory review, in which appellate courts review the substantive judgment of the trial courts. Reversals under such an approach, however, appear to be rare, suggesting that *Booker* authorizes review only at the very edges of trial court discretion, at least at the state level. It thus fails to meaningfully restore appellate review, and the review it does reestablish raises significant normative concerns.

It remains to be seen what will be the effects of *Blakely* and of *Booker*'s failure to indirectly repeal it. At present, there are simply insufficient data to make any meaningful predictions, but we can at least identify the two key questions that must be answered: does appellate review (as opposed to other guideline-created constraints) matter, and if so, does regulatory review induce more compliance than procedural review? With the passage of time, we will be able to map out more fully whether *Booker*'s failure is a minor inconvenience or a serious blow to states that want structured sentencing.