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COMMENT

The *Bostic* Question

INTRODUCTION

Federal criminal procedure regularly struggles with a tension between fairness and finality. The Constitution provides defendants with special privileges and protections designed to prevent injustice,¹ but systemic concerns about efficiency, comity, and finality make it impossible to guarantee a perfect and errorless trial to every defendant.² Given the impossibility of perfection, and the tremendous burden associated with carefully scrutinizing each page of each trial transcript, appellate courts rely on defendants to flag possible errors as they arise. One manifestation of that reliance is the fact that the rigor of appellate review often depends on whether the defendant-appellant objected to the purported error at trial.³

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1. *E.g.*, U.S. CONST. amend. V (containing the Grand Jury Clause, the Double Jeopardy Clause, and the Self-Incrimination Clause); *id.* amend. VI (containing the rights to a speedy trial, a jury trial, the confrontation of witnesses, a compulsory process for obtaining witnesses, and the assistance of counsel); *In re Winship*, 397 U.S. 358, 363-64 (1970) (holding that proof of guilt beyond a reasonable doubt is a constitutional requirement in criminal cases).
 2. *See, e.g.*, *Tanner v. United States*, 483 U.S. 107, 120-21 (1987) (discussing the importance of the “finality” of the criminal justice system and the impossibility of “perfect[ing]” it); *United States v. Hasting*, 461 U.S. 499, 508-09 (1983) (discussing *Chapman v. California*, 386 U.S. 18 (1967), which established the standard for “harmless error”). *But see* *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (distinguishing quotidian “trial errors” from “structural defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards”).
 3. The Supreme Court has explained that “[i]f an error is not properly preserved” by a timely objection in the trial court, then “appellate-court authority to remedy the error . . . is strictly circumscribed. . . . ‘[E]rrors are a constant in the trial process . . . [and] a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.’” *Puckett v. United States*, 556 U.S. 129, 134 (2009) (quoting *United States v. Padilla*, 415 F.3d 211, 224 (1st Cir. 2005) (en banc) (Boudin, C.J., concurring)); *see* FED. R. CRIM. P. 51(b).

In *United States v. Bostic*,⁴ the Sixth Circuit, aiming to facilitate appellate review of sentencing, adopted a prudent procedural rule: the “Bostic Question” (“the Question”).⁵ Invoking its “supervisory powers over the district courts,” the court of appeals issued the following instructions:

[D]istrict courts, after pronouncing the defendant’s sentence but before adjourning the sentencing hearing, [must] *ask the parties whether they have any objections to the sentence just pronounced that have not previously been raised*. If the district court fails to provide the parties with this opportunity, they will not have forfeited their objections and thus will not be required to demonstrate plain error on appeal. If a party does not clearly articulate any objection and the grounds upon which the objection is based, when given this final opportunity to speak, then that party will have forfeited its opportunity to make any objections not previously raised and thus will face plain error review on appeal.⁶

The Sixth Circuit explained that the Question would serve at least two purposes: (1) “permitting the district court to correct on the spot any error it may have made,” and (2) “guiding appellate review” of the sentence imposed.⁷

This Comment endorses these rationales and also draws attention to a third justification, heretofore unrecognized. The Question promotes what Lani Guinier and Gerald Torres have called “demosprudence” – that is, “a democracy-enhancing jurisprudence” grounded not only in “logical reasoning [and] legal principles” but also in a need to “inform and [be] informed by the wisdom of the people.”⁸ It does so by inviting oral objections to, and public dialogue about, the sentence imposed by the district court. Further, it tends to “expand the audience for judicial decisionmaking and to engage that audience in democratic deliberation” about criminal law and procedure.⁹

4. 371 F.3d 865 (6th Cir. 2004).

5. On occasion, the Sixth Circuit also uses the terms “Bostic rule” or “Bostic requirement.” See, e.g., *United States v. Daniels*, 641 F. App’x 481, 487 (6th Cir. 2016) (using both); *United States v. Vonner*, 516 F.3d 382, 399 (6th Cir. 2008) (en banc) (Clay, J., dissenting) (using “Bostic rule”). As discussed *infra* text accompanying notes 33-34, the Bostic Question was inspired by a nearly identical rule in the Eleventh Circuit.

6. *Bostic*, 371 F.3d at 872-73 (emphasis added) (footnote omitted).

7. *Id.* at 873 (quoting *United States v. Jones*, 899 F.2d 1097, 1102 (11th Cir. 1990), *overruled on other grounds* by *United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993)).

8. Lani Guinier, *The Supreme Court 2007 Term—Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15-16 (2008); see Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014).

9. Guinier, *supra* note 8, at 16.

This Comment aspires to persuade all federal courts of appeals to adopt the *Bostic* Question as a requirement for the district courts under their supervision. Part I explains why standards of appellate review have become important in the sentencing context and why, as a result, the Question is necessary. Part II first articulates reasons why courts have been reluctant to follow the Sixth Circuit's lead and then proceeds to a two-part normative case for the *Bostic* Question: the Question is sound judicial policy that produces real benefits at a minimal cost, and it has the potential to advance demosprudential values.

I. APPELLATE REVIEW OF SENTENCING ERRORS

Federal criminal appeals usually fail,¹⁰ especially when the reviewing court applies plain-error review, or a similarly deferential standard.¹¹ The standard of review, some judges have stated, “is everything,” and it “more often than not determines the outcome.”¹² On plain-error review, in the Seventh Circuit's words, a decision is reversible only if it “strike[s] [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish.”¹³

The scope of appellate deference has evolved in the decade since *United States v. Booker*.¹⁴ Before *Booker*, the statutory Sentencing Guidelines were mandatory, and departures from the Guidelines were reviewed de novo on appeal.¹⁵ But *Booker* shifted power from prosecutors to judges,¹⁶ rendering the Guidelines advisory and affording district courts more discretion to depart

10. See, e.g., Table B-5: U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2012, U.S. CTS. (2012), <http://www.uscourts.gov/statistics/table/b-5/judicial-business/2012/09/30> [http://perma.cc/C7JD-YW3A] (reporting just a seven percent reversal rate of criminal proceedings across all courts of appeals).

11. See Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 680 (2015) (“When a criminal defendant fails to object at trial, such that a district court judge has no warning of a potential problem, appellate judges may be exceedingly reluctant to undo their colleague’s hard work. This hesitance may well surpass whatever caution an appellate judge would exercise before overturning a lower court decision reviewed for abuse of discretion.”). Of course, not all courts of appeals “necessarily treat deference identically.” *Id.* at 661.

12. *Id.* at 657 (quoting Judge Tacha, of the Tenth Circuit, and Judge Wald, of the D.C. Circuit).

13. *Id.* at 658 (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

14. 543 U.S. 220 (2005) (rendering the Federal Sentencing Guidelines merely advisory for district judges and establishing a “reasonableness” standard for appellate review of sentences).

15. See *Gall v. United States*, 552 U.S. 38, 46 (2007).

16. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1472-94 (2008).

from Congress's recommendations. Today, if a defendant timely objects to an error, the standard on appeal is clear: "reasonableness," a standard essentially coextensive with "abuse of discretion."¹⁷ But if the defendant fails to object, or objects only indistinctly, courts of appeals apply plain-error review to those "unpreserved" claims of error—that is, alleged errors to which the defendant did not make a contemporaneous objection at trial.¹⁸ In the particular context of sentencing, some disparity persists, but there is an emerging consensus.¹⁹ Unpreserved *procedural* reasonableness claims receive only plain-error review,²⁰ while *substantive* reasonableness claims, even if unpreserved, are reviewed through the same abuse-of-discretion lens as preserved claims.²¹

In the sentencing context, it is increasingly critical to scrutinize these standards of review. After all, in the twenty-first century, American criminal justice is "a world of guilty pleas, not trials."²² The vast majority of federal prosecutions

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17. See *Rita v. United States*, 551 U.S. 338, 351 (2007) ("[We] expla[ined] in *Booker* that appellate 'reasonableness' review merely asks whether the trial court abused its discretion . . ."). *Gall*, too, suggests that "abuse of discretion" review and "reasonableness" review are essentially identical. See *Gall*, 552 U.S. at 51; see also Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 775 (2008) ("[A]ppellate courts . . . must review all sentences individually and deferentially for abuse of discretion.").
 18. See FED. R. CRIM. P. 52 ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded . . . A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").
 19. As recently as 2010, the circuit split was more tangled. See Benjamin K. Raybin, Note, "Objection: Your Honor Is Being Unreasonable!"—*Law and Policy Opposing the Federal Sentencing Order Objection Requirement*, 63 VAND. L. REV. 235, 244-50 (2010). Since Raybin's survey, however, several circuits have decided to impose plain-error review for unpreserved procedural-unreasonableness claims. See, e.g., *United States v. Flores-Mejia*, 759 F.3d 253, 257 (3d Cir. 2014) (en banc) ("Our new rule is consistent with the holdings of most other circuit courts of appeals that have ruled on the issue.").
 20. See *Flores-Mejia*, 759 F.3d at 257-58 (collecting cases). But see *United States v. Howard*, No. 15-4533, 2016 WL 519119, at *1 (4th Cir. Feb. 10, 2016) ("Offering '§ 3553 arguments [before the sentence's imposition] in the district court for a different sentence than the one he received' is sufficient to 'preserve [the defendant's] claim of procedural sentencing error on appeal.'" (quoting *United States v. Lynn*, 592 F.3d 572, 581 (4th Cir. 2010))); *Flores-Mejia*, 759 F.3d at 259-66 (Greenaway, J., dissenting) (assailing the majority for abandoning circuit precedent and adopting a procedural-unreasonableness objection requirement).
 21. Only in the Fifth Circuit must defendants lodge a post-imposition substantive-reasonableness objection to avoid plain-error review. See *United States v. Peltier*, 505 F.3d 389, 391-92 (5th Cir. 2007). Six other circuits do not require objections to preserve a substantive-reasonableness claim. See *United States v. Ruiz-Huertas*, 792 F.3d 223, 228 (1st Cir. 2015) (collecting cases). In *Ruiz-Huertas*, the First Circuit took note of the circuit split but declined to pick a side. See *id.* at 228 & n.4 ("We need not resolve this apparent anomaly today.").
 22. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1100 (2001).

end in guilty pleas, and therefore the vast majority of defendants appear in open court only for sentencing before a judge—never a jury of their peers.²³ Judges are under no obligation to follow whatever sentencing recommendation the government and defendant may have agreed upon,²⁴ and so even defendants who are pleading guilty in exchange for sentencing considerations are exposed to the possibility of judicial error.

When broad judicial discretion is combined with the requirement to lodge objections to preserve errors for appeal, odd situations can arise. Consider a normal federal sentencing hearing. The prosecution and the defense have assembled the Presentence Report; the attorneys have offered their final oral arguments; and the district court, after deliberation and with solemn gravitas, has announced the defendant's sentence. Haggling with a judge after a ruling is rarely a wise lawyering choice, and yet in this context any competent defense attorney would promptly object.²⁵ Thus, objecting to a freshly imposed sentence is both obligatory and awkward.²⁶ Enter the *Bostic* Question.

II. THE VIRTUES OF THE *BOSTIC* QUESTION

The Tenth and D.C. Circuits have dismissed the *Bostic* Question as “gratuitous superintendence”—unnecessary procedural handholding for lawyers whom the legal system assumes to be “competent professionals.”²⁷ But these courts' opposition is misguided. As I argue in this Part, the Question has two principal virtues. First, it facilitates efficient, informed, and accurate appellate review, which improves the fairness and finality of criminal sentences. Second, it has the heretofore unrecognized potential to advance demosprudential values

23. See, e.g., *Criminal Cases*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> [<http://perma.cc/QAE3-B7RG>] (“More than 90 percent of defendants plead guilty rather than go to trial.”); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty> [<http://perma.cc/K89J-8RJ2>] (“In 2013, while 8 percent of all federal criminal charges were dismissed . . . more than 97 percent of the remainder were resolved through plea bargains . . . The plea bargains largely determined the sentences imposed.”).

24. See U.S. SENTENCING GUIDELINES MANUAL § 6B1.1(b) (U.S. SENTENCING COMM'N 2016) (“To the extent the plea agreement is of the type specified in [Federal Rule of Criminal Procedure] 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.”).

25. See Raybin, *supra* note 19, at 236–37.

26. See *id.* at 236 (remarking upon the nonsensical fact that “[t]his sentencing order objection requirement is mandatory even if the party had presented all appropriate arguments earlier during the sentencing hearing”).

27. See *United States v. Hunter*, 809 F.3d 677, 683 (D.C. Cir. 2016) (quoting *United States v. Steele*, 603 F.3d 803, 807 (10th Cir. 2010)).

and help to create a sentencing regime that emerges from a dialogue involving not only legal elites but also the people and their elected representatives.

A. *The Bostic Question and Its Critics*

The *Bostic* Question, in large part, responds to the awkward situation described at the end of Part I.²⁸ In *Bostic*, the Sixth Circuit noted that the Federal Rules do not penalize a claim with plain-error appellate review if the appellant had “no opportunity” to object below.²⁹ Thus, the court decided it would be prudent to require district courts affirmatively to *invite* objections after pronouncing a sentence.³⁰ This rule, the court said, would save appellate courts from “the difficulty of parsing a transcript” to determine whether each party had been afforded “a meaningful opportunity to object.”³¹ The rule would also “serve the dual purposes of permitting the district court to correct on the spot any error it may have made and of guiding appellate review.”³²

The Sixth Circuit borrowed the idea for the *Bostic* Question from the Eleventh Circuit.³³ That court has similarly praised the Question’s ability to facilitate appellate review by eliciting “fully articulated objections” and to give the district court an opportunity to correct errors on the spot.³⁴ But other courts, regrettably, have been reluctant to follow suit. Some have offered a lukewarm endorsement of the Question but have declined to require it.³⁵ Others have rejected it outright.³⁶ The Tenth Circuit, for example, directly rejected the idea: “Competent professionals do not require such gratuitous superintendence; as

28. See *supra* notes 25–26 and accompanying text.

29. *United States v. Bostic*, 371 F.3d 865, 871 (6th Cir. 2004) (noting that Federal Rule of Criminal Procedure 51(b) “excuses the failure to object if that party had no opportunity to do so”).

30. *Id.* at 872–73.

31. *Id.* at 872 n.6.

32. *Id.* at 873 (internal quotation marks and other marks omitted) (quoting *United States v. Jones*, 899 F.2d 1097, 1102 (11th Cir. 1990), *overruled on other grounds by* *United States v. Morrill*, 984 F.2d 1136 (11th Cir. 1993)).

33. See *id.* at 872 n.6.

34. See, e.g., *United States v. Louissant*, 558 F. App’x 893, 894–95 (11th Cir. 2014) (per curiam) (unpublished opinion) (quoting *Jones*, 899 F.2d at 1102).

35. See *United States v. Hunter*, 809 F.3d 677, 682–83 (D.C. Cir. 2016); *United States v. Flores-Mejia*, 759 F.3d 253, 258 n.8 (3d Cir. 2014) (en banc) (“To ensure that timely objections are made, we encourage district courts at sentencing to inquire of counsel whether there are any objections to procedural matters. However, unlike the Sixth and Eleventh Circuit Courts of Appeals, we will not make this a requirement that district judges must follow. We believe that the burden of objecting to errors remains with the parties.” (citations omitted)).

36. See *United States v. Steele*, 603 F.3d 803, 807 (10th Cir. 2010); *United States v. Vanderwerfhorst*, 576 F.3d 929, 934 (9th Cir. 2009).

long as there is a fair opportunity to register an objection, ask for an explanation or request factual findings, counsel must take the initiative thereby [e]nsuring that silence is not mistaken for acceptance.”³⁷

The Tenth Circuit’s concern appears to underlie the misgivings of the other courts that have rejected the Question.³⁸ There is such a thing as too much handholding, the argument goes, and district courts should not have to bear an additional burden on top of the “numerous requirements” that already exist in the sentencing context.³⁹ As I explain in the next Section, I find that concern puzzling and unpersuasive, because the Question, applied broadly, will *improve* efficiency and reduce the burden that resentencing imposes on district courts.

B. *Facilitating Efficient and Accurate Appellate Review*

Courts of appeals ought to be concerned with generating and preserving as comprehensive a district court record as possible. By affirmatively eliciting objections from the parties – that is, by saying something more specific and solicitous than “Anything further?”⁴⁰ – the district court can (1) make clear when the required “opportunity to object” is at hand;⁴¹ (2) help to avert the possibility of a confusing web of standards of review on appeal;⁴² and (3) spark a dialogue that is likely to clarify further the reasonableness, or lack thereof, of the court’s decision making.⁴³

To be sure, most attorneys who represent criminal defendants at sentencing hearings are competent enough to lodge the objections that could be useful on appeal, so the *Bostic* Question may indeed be “gratuitous” in certain circumstances. But the annoyance – if any – caused by the Question is insignificant compared to the benefits it can confer.

Consider, as a concrete example, a recent Eleventh Circuit case.⁴⁴ John Valera was caught paying a friend to use a “skimmer” to steal credit-card infor-

37. *Steele*, 603 F.3d at 807.

38. *See supra* notes 35-37 and accompanying text.

39. *Flores-Mejia*, 759 F.3d at 258.

40. *Steele*, 603 F.3d at 806.

41. *See supra* notes 29-32 and accompanying text.

42. *See United States v. Cortés-Medina*, 819 F.3d 566, 574 n.10 (1st Cir. 2016) (Lipez, J., dissenting) (urging the First Circuit to implement the *Bostic* Question and opining that “such a rule . . . would have avoided, or at least minimized, the confusing jumble of standards deemed applicable by the majority”).

43. *See infra* Section II.C.

44. *United States v. Valera*, 622 F. App’x 876, 876 (11th Cir. 2015) (unpublished opinion). Recall that the Eleventh Circuit has its own counterpart to the *Bostic* Question. *See supra* notes 33-34 and accompanying text.

mation from customers.⁴⁵ He pleaded guilty to access-device fraud, an offense exposing him to an advisory range of twelve to eighteen months' imprisonment under the Sentencing Guidelines.⁴⁶ The district court, having given the defense no notice that it was considering an upward variance,⁴⁷ imposed a sixty-month sentence⁴⁸ at a seven-minute sentencing hearing.⁴⁹ Rather than eliciting objections to the sentence it had just imposed, the court simply asked "Mr. Chang?" and then "directed the courtroom deputy to call the next case."⁵⁰

The Eleventh Circuit was palpably frustrated with the consequences of the district court's haste and had no choice but to vacate and remand. The district court, disregarding *Gall*,⁵¹ had failed to identify the correct Guidelines range,⁵² had evinced no meaningful consideration of the section 3553(a) factors,⁵³ and had given minimal explanation for its decision to issue a sentence dramatically above that recommended by the Guidelines.⁵⁴ Consequently, the court of appeals was "unable to determine with any certainty" the rationale behind the district court's sentencing decision, because the record was "insufficient for meaningful review" of the "procedural errors and abnormalities" that appeared to have occurred.⁵⁵ Although one cannot know how the *Bostic* Question would have affected Valera's first sentencing hearing, there is a reasonable chance that the Question would have prompted a dialogue, or at least a more substantive explanation, for the Eleventh Circuit to review.

A Sixth Circuit case, *United States v. Fout*,⁵⁶ illustrates how the *Bostic* Question can help prevent inefficient and frustrating sentencing appeals like in *Valera*. Steven Fout pleaded guilty to possessing and distributing child pornography, and his Guidelines range was 151 to 188 months.⁵⁷ The district court

45. Brief of the United States at 2-4, *Valera*, 622 F. App'x 876 (No. 15-10084-BB), 2015 WL 1950947, at *2-3.

46. *Valera*, 622 F. App'x at 880.

47. *Id.* at 879 n.2.

48. *Id.* at 876.

49. *Id.* at 878 n.1.

50. *Id.* at 877 ("As the deputy began calling the next case, defense counsel attempted to object to the reasonableness of Valera's sentence, but was interrupted mid-statement by the court's terse comment, 'They're noted.'").

51. *Gall v. United States*, 552 U.S. 38 (2007); see *supra* notes 15-17 and accompanying text.

52. *Valera*, 622 F. App'x at 878-79.

53. *Id.* at 879-80.

54. *Id.* at 881.

55. *Id.*

56. 614 F. App'x 335 (6th Cir. 2015).

57. *Id.* at 336.

rejected Fout's arguments for a downward departure and sentenced him to 151 months.⁵⁸ The district court then asked the *Bostic* Question, in response to which Fout "objected to certain statements made about his alleged involvement with minors" and to "the court's use of the online chat transcripts to reach a conclusion about [his] level of functioning."⁵⁹ These objections gave the district court an opportunity to clarify that, while it had made an "incorrect reference to involvement with minors," that reference had not influenced its determination of Fout's sentence.⁶⁰ The court also used that opening to explain that, far from ignoring Fout's mitigating evidence, the court had taken that evidence into account by deciding to impose a sentence at the bottom of the Guidelines range.⁶¹ On appeal, the Sixth Circuit—unlike the Eleventh Circuit in *Valera*—had the luxury of reviewing a clear statement of the district court's reasoning.⁶²

To be clear, when the Question is properly applied,⁶³ defendants lucky enough to have attentive counsel should not be the only ones to benefit. The focus of the *Bostic* inquiry on appeal is simply whether the court afforded counsel an adequate opportunity to object—not whether counsel managed to articulate those objections with sufficient clarity to preserve them. If counsel misses or squanders the *Bostic* opportunity, his client will face plain-error review, but ought to be no worse off in that regard than if the *Bostic* Question had never been asked at all.

In that vein, the Sixth Circuit, having taken two steps forward by implementing the *Bostic* Question, subsequently took a step back in *United States v. Vonner*.⁶⁴ There, the court signaled that defendants who have already presented section 3553(a) arguments earlier in the hearing must object again on procedural grounds, after the *Bostic* Question, if they wish to avoid plain-error review.⁶⁵ The majority reasoned that it would "undermine [the Question's] effectiveness" if the court did not "impos[e] any consequences on a party's failure to answer it."⁶⁶

58. *Id.* at 336-37.

59. *Id.* at 337.

60. *Id.*

61. *Id.*

62. *See id.* at 338-39.

63. To interpret the *Bostic* Question as requiring attorneys to reiterate previously raised objections is to undercut its effectiveness significantly. *See infra* notes 64-70 and accompanying text.

64. 516 F.3d 382 (6th Cir. 2008) (en banc).

65. *Id.* at 386-87.

66. *Id.* at 391.

This conclusion follows only if one sees the proper effect of the *Bostic* Question as imposing a formalistic procedural rule upon defendants. Instead, as the *Vonner* dissenters pointed out, the purpose of the *Bostic* Question is to *add* opportunities for objection and colloquy,⁶⁷ not to wipe the slate clean of procedural objections already raised and thereby penalize defendants with inattentive or incompetent attorneys. To insist otherwise, as did the *Vonner* majority, is to “create a trap for unwary defendants.”⁶⁸ It is regrettable that the *Vonner* majority misinterpreted the Question as a double-edged sword, rather than as a clarity-seeking device that benefits both defendants and courts.

Nor does the “additive” understanding of the Question undermine its ability to promote efficiency. Even if the *Bostic* Question does not force defendants to renew all their objections at a single spot in the sentencing transcript—thereby requiring appellate judges to search for valid objections in that transcript—the court of appeals is no worse off in that regard than it would be otherwise. And the Question’s purpose is not only to clarify and enumerate the *defendant’s* objections, but also, where appropriate, to clarify or correct the *judge’s* reasoning. A district judge’s concise response to a post-sentence objection can be helpful, as in *Fout*, to a reviewing court that might otherwise have to piece together the judge’s reasoning from statements scattered throughout the hearing transcript.

The *Vonner* majority also erred in implying that defendants will have no incentive to respond meaningfully to the *Bostic* Question if they are not obligated to reassert their procedural reasonableness objections.⁶⁹ To the contrary, defendants will retain a significant incentive to identify sentencing errors promptly, or at least to elicit further explanation about the court’s decision making. When a district court offers an explanation for a harsh sentence that is “recondite at best,”⁷⁰ no one benefits—neither the defendant nor the appellate judges who are left with precious few “reasons” with which to evaluate “reasonableness.”

For reasons that the Sixth and Eleventh Circuits have articulated, I encourage the Sixth Circuit, as well as its sister circuits, to return to the original conception of the *Bostic* Question.

67. *Id.* at 399 (Clay, J., dissenting).

68. *Id.* at 398 (quoting *United States v. Castro-Juarez*, 425 F.3d 430, 433-34 (7th Cir. 2005)).

69. *Id.* at 390-92 (majority opinion).

70. *United States v. Cortés-Medina*, 819 F.3d 566, 571 (1st Cir. 2016).

C. *Fostering Demosprudential Values*

In addition to the *Bostic* Question's tendency to facilitate efficient and accurate appellate review, there is a second and underexplored argument in its favor: it promotes demosprudential values. "Demosprudence" is a methodological concept borrowed from Lani Guinier and Gerald Torres, who define it as "the study of the dynamic equilibrium of power between lawmaking and social movements."⁷¹ Guinier and Torres distinguish demosprudence, which "focuses on the ways that ongoing collective action by ordinary people can . . . chang[e] the people who make the law and the landscape in which that law is made," from "jurisprudence, which analyzes the work of judges acting in formal sites such as courts."⁷²

When I refer to "demosprudential values" in this Comment, I have two broad (and interrelated) concepts in mind: dialogue and participation. By "dialogue," I principally mean dialogue between legal and nonlegal actors that improves understanding between those two groups, whose ability to communicate with one another is often hindered by the complexity of the law or legal jargon.⁷³ By "participation," I mean ordinary people's engagement with democratic processes – not only by voting, but also by effecting political and social change through group mobilization. I consider a law or rule "demosprudential" if it opens up new opportunities for such participation or if it simply tends to motivate and mobilize ordinary citizens. Publicly sourced power often effects more fundamental change than could arise from legal institutions alone. Because the authority and legitimacy of the law and of the courts emanate from the people, the "dynamic equilibrium" that Guinier and Torres envision can withstand stronger shocks when people participate in the process of effectuating change.⁷⁴

One example of demosprudence that can have an especially potent effect is what Guinier has called "demosprudence through dissent."⁷⁵ For example, Supreme Court dissents read from the bench, although without power to alter the

71. Guinier & Torres, *supra* note 8, at 2749.

72. *Id.* at 2750.

73. *See id.* at 2752 ("Demosprudence is in the nature of an acid bath to remove the corrosion that has isolated the realm of the state from the legitimizing power of the people, except as it is expressed through conventional partisan politics and the act of representation by elites.").

74. *See id.* at 2742 (borrowing a metaphor from Rev. Jim Wallis: "I say here's how you recognize a member of Congress. They're the ones walking around with their fingers up in the air. And then they lick their finger and they put it back up and they see which way the wind is blowing. You can't change a nation by replacing one wet-fingered politician with another. You change a nation when you change the wind").

75. *See* Guinier, *supra* note 8, at 47-52.

Court's judgment, can serve other functions: telling a "public story" that is "organized around values, critique, or actions" more than pure logic, and speaking to "non-judicial actors" in a manner that invites them to "step in or step up to revisit the majority's conclusions."⁷⁶

Judicial dissents, to be sure, are not the only activities with demosprudential potential. From the perspective of nonlegal actors, "culture shifting" through political activism and mobilization might have more demosprudential potential than "rule shifting."⁷⁷ And from the perspective of legal actors, one might view as demosprudential any activity that tends to invite the public to exert influence on the law or the bounds of legal decision making, or to ameliorate ordinary individuals' understanding of the law and legal institutions. The jury is an obvious example. Jury service not only allows ordinary citizens to express the public's conception of justice with respect to an individual case, but also informs jurors about the contours of the law and encourages them to respond democratically if they wish to change the status quo.⁷⁸

The *Bostic* Question, viewed from a broad and systemic perspective, also has potential to foster these demosprudential values. In one sense, the Question invites "dissent": it encourages advocates to lodge objections to the sentence imposed by the court. In another sense, the Question invites dialogue: it encourages the court to offer clarification and further explanation of its reasoning and decision-making processes—just as occurred in *Fout*.⁷⁹ Viewed through either lens, the Question tends to provide the public with more information about the dynamics of sentencing decisions and to encourage more publicly accessible discussion of the statutory and discretionary factors that dictate sentencing outcomes. And if one accepts the premise that participation is desirable in the sentencing context—that "the demos" can, and should, contribute to the

76. *Id.* at 49. Guinier argues that this sort of dissent, if executed thoughtfully and effectively, is not "[m]ere public grandstanding" but rather "a powerful pedagogical opportunity to open up space for public deliberation and engagement." *Id.* at 51.

77. Guinier & Torres, *supra* note 8, at 2752; see also *supra* note 74 and accompanying text (describing the importance of changing the underlying political climate instead of one's political representatives). Social movements during the Civil Rights Movement—for example, the Montgomery Bus Boycotters and California's United Farm Workers—played an integral role in "forg[ing] new understandings of the status quo," "chang[ing] norms," and "creating an alternative narrative of constitutional meaning." Guinier & Torres, *supra* note 8, at 2756-57.

78. Juries serve not only a fact-finding function but also a demosprudential one: the institution of the jury both engages nonlawyer citizens in criminal justice and educates them about the law and its consequences. See John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 124 (1992). The ever-increasing scarcity of the jury trial makes it all the more desirable to favor demosprudential procedures at a defendant's sentencing—in open court.

79. See *supra* notes 59-61 and accompanying text.

development of both criminal law and legislative sentencing guidelines—then one ought to support a procedure that provokes discussion not only between legal elites but also between the court and a wider public audience.⁸⁰

To understand this function of the *Bostic* Question more concretely, consider another Sixth Circuit case, *United States v. Thomas*.⁸¹ Kenneth Thomas was convicted of bank robbery and sentenced to 240 months in prison—the statutory maximum.⁸² After announcing the sentence, the district court elicited objections only halfheartedly, rather than properly asking the *Bostic* Question.⁸³ Appropriately applying abuse-of-discretion review, the Sixth Circuit vacated Thomas’s sentence, finding that the district court had “never mentioned anything resembling the section 3553(a) factors, save a conclusory reference to ‘considering the additional factors contained within . . . Section 3553(a).’”⁸⁴

Had the district court used the *Bostic* Question to elicit objections from Thomas’s counsel, perhaps the story would have been the same. However, the Question could also have prompted Thomas’s counsel to challenge the court’s perfunctory treatment of the section 3553(a) factors, which in turn would have prompted the court to reconsider the sentence or, more likely, to provide a more robust explanation of the court’s decision making. At a minimum, the *Bostic* Question would have opened up space for Thomas (or the government, for that matter) to react to the sentence and elicit further clarification. Even if a district court has committed no reversible error—as is usually the case—this dialogue has intrinsic value.

80. Frederick Schauer has written that, as a general matter, “giving reasons” for legal outcomes “may be a sign of respect” for the subject of the decision and can enhance the decision’s legitimacy:

[W]hen decisionmakers expect voluntary compliance, or when they expect respect for decisions because the decisions are right rather than because they emanate from an authoritative source, then giving reasons becomes a way to bring the subject of the decision into the enterprise. Even if compliance is not the issue, giving reasons is still a way of showing respect for the subject, and a way of opening a conversation rather than forestalling one.

Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995); see also *Rita v. United States*, 551 U.S. 338, 356 (2007) (“Judicial decisions are reasoned decisions. Confidence in a judge’s use of reason underlies the public’s trust in the judicial institution. A public statement of those reasons helps provide the public with the assurance that creates that trust.”).

81. 498 F.3d 336 (6th Cir. 2007).

82. *Id.* at 338-39.

83. *Id.* at 340 (“In this case, the district court asked Thomas’s counsel, ‘Do you have anything further for the record, Mr. Canady?’ We have previously determined that a similar question by the district court is not clear enough to satisfy the requirements of the *Bostic* rule.” (citation omitted)).

84. *Id.*

Such dialogue does more than create a more robust transcript for appellate courts to parse. It also facilitates reaction to, and dialogue about, the manner in which the judge synthesized the facts and then applied the Guidelines or other relevant law. Members of the public—whether the defendant, those attending the hearing, or recipients of secondhand news—benefit in the aggregate when they gain access to more information about the law and legal institutions that bind them. At a time in American history when criminal sentencing reform is widely viewed as a necessary,⁸⁵ but still politically fraught,⁸⁶ topic, we ought to seize opportunities to tie public participation and mobilization more closely to the realities of sentencing procedure and judicial decision making.

CONCLUSION

The *Bostic* Question manages to promote both fairness and finality at once—no small feat in criminal procedure. District courts using the Question will be more likely to correct errors on the spot, more likely to record a more complete account of their reasoning for appellate courts to evaluate, and more likely to “enhance [courts’] democratic potential”⁸⁷ and accountability for sentencing outcomes. I urge all courts to seize this opportunity to reap considerable benefits at a minimal cost.

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85. See, e.g., Inimai Chettiar, *Don’t Lock Up Prison Reform: Congress’ Fight over the Supreme Court Shouldn’t Doom Desperately Needed Sentencing Reform*, U.S. NEWS (Mar. 7, 2016, 12:15 PM), <http://www.usnews.com/opinion/articles/2016-03-07/supreme-court-battle-shouldnt-kill-criminal-justice-sentencing-reform> [<http://perma.cc/JQ4K-W7BH>].

86. See, e.g., Lydia Wheeler, *Trump Marks Change for Criminal Justice Reform*, HILL (Nov. 27, 2016) <http://thehill.com/homenews/administration/307377-trump-marks-change-for-criminal-justice-reform> [<http://perma.cc/23AL-WX4B>] (speculating as to whether the “bipartisan agreement that many aspects of our criminal justice system need reform” will result in new legislation under the Trump Administration).

87. Guinier & Torres, *supra* note 8, at 2756.

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