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Just five years ago, Justice Antonin Scalia could barely contain his giddiness at the ascendance of the *Apprendi* revolution that he had helped lead. That revolution had begun in 2000 in *Apprendi v. New Jersey*[1] with the Court's landmark Sixth Amendment holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[2] Two years later, the Court decided in *Ring v. Arizona*[3] that the Sixth Amendment, as interpreted by *Apprendi*, required the overturning of capital sentences that relied upon judicial fact-finding.[4] The argument at which Justice Scalia had first hinted in his 1998 *Almendarez-Torres v. United States*[5] dissent had become the law of the land, and there seemed to be no logical stopping point to the revolution's scope.

Writing separately in concurrence with the result in *Ring*, Scalia chastised those who had not yet appreciated the extent of this reshaping of how criminals are sentenced in the United States. He singled out for his scorn Justice Breyer, who had concurred in the *Ring* result on separate grounds,[6] informing his Brother that there was only one legitimate way to arrive at the appropriate result in the case:

> There is really no way in which Justice Breyer can travel with the happy band that reaches today's result unless he says yes to *Apprendi*. Concisely put, Justice Breyer is on the wrong flight; he

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1. 530 U.S. 466 (2000).
2. *Id.*
3. 536 U.S. 584 (2002).
4. *Id.*
5. 523 U.S. 224, 258 (1998) (Scalia, J., dissenting) ("In the end, the Court cannot credibly argue that the question whether a fact which increases maximum permissible punishment must be found by a jury beyond a reasonable doubt is an easy one.").
6. *Ring*, 536 U.S. at 610 (Breyer, J., concurring) ("Given my views in *Apprendi* v. *New Jersey* . . . I cannot join the Court's opinion. I concur in the judgment, however, because I believe that jury sentencing in capital cases is mandated by the Eighth Amendment.").

> should either get off before the doors close, or buy a ticket to *Apprendi*-land.[7]

Scalia's tone was that of the dissident finally come to power; his views, once eccentric, had become ascendant.

When the Supreme Court overturned Washington state's sentencing guidelines in 2004 in *Blakely v. Washington*,[8] the flight to *Apprendi*-land was nearing its destination. It now seemed only a matter of time before the Supreme Court completed its undoing of modern sentencing regimes by invalidating the granddaddy of those regimes: the Federal Sentencing Guidelines. In her *Blakely* dissent, Justice O'Connor anticipated this result, her tone nearly as despondent as Scalia's was celebratory in *Ring*: "What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy."[9]

However, it now seems quite possible that those without tickets to *Apprendi*-land will have the last laugh. As expected, the Supreme Court decided in *United States v. Booker*[10] in 2005 that the view of the Sixth Amendment adopted in *Apprendi* and *Blakely* required the invalidation of the federal Guidelines as written.[11] However a separate majority of five Justices crafted a remedy for the constitutional infirmity of the Guidelines that threatened to undo much of what Justice Scalia and his fellow-travelers had so carefully crafted.[12]

Writing for this remedial majority, Justice Breyer defined the question for the Court as one of congressional intent: What would Congress want done if it knew that its sentencing scheme based on judges finding facts and then sentencing within fixed ranges based upon those facts were found unconstitutional? He concluded that Congress's preference would be to keep the Guidelines in place as written and make them advisory rather than mandatory.[13] Furthermore, Justice Breyer acknowledged that making the Guidelines merely advisory would necessitate the creation of a new standard of appellate review of criminal sentences.[14] He

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7. *Id.* at 613 (Scalia, J., concurring).
8. 542 U.S. 296 (2004).
9. *Id.* at 326 (O'Connor, J., dissenting).
10. 543 U.S. 220 (2005).
11. *Id.* at 226-27.
12. *Id.* at 245, 259. Justice Ginsburg changed sides, forming the fifth vote for both the constitutional majority and the remedial majority. *See* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U.L. REV. 665, 678 (2006).
13. In doing so, Justice Breyer rejected the possibility of invalidating the Guidelines in their entirety (and allowing judges to sentence within the minima and maxima set by federal statute) and maintaining the mandatory nature of the Guidelines but engrafting *Apprendi*'s jury fact finding requirement to them (the approach preferred by Justice Stevens's opinion).
14. Prior to *Booker*, sentences within the Guidelines were evaluated for correctness; those outside the guideline range were reviewed to determine whether the sentence "is unreasonable." United States v. Booker, 543 U.S. 220, 261 (2005).

concluded for the remedial majority that the sentences that trial judges impose under the newly advisory Guidelines ought to be reviewed for reasonableness.[15]

Thus, *Booker* was clearly a change in the Court's direction; *Apprendi*, *Ring*, and *Blakely* all trumpeted the role of the jury in sentencing, while the juror is strangely missing from the remedial opinion in *Booker*. What was far less clear after *Booker* was where sentencing in the United States was headed. Would *Booker* mark the return of the judge as sentencer, freeing trial judges from the yoke of the Guidelines so many of them found so oppressive? Or would Justice Breyer's solution merely become the Guidelines by another name: Would the new "advisory" Guidelines become mandatory in practice? Would Congress step in to correct the remedial majority's assumption regarding its intent? To validate that assumption? Furthermore, how would reasonableness review work in practice? What weight would be placed on the "advisory" guideline range in determining whether a particular sentence was reasonable? Would the same weight be placed on the guideline range if the sentence was within the "advisory" range as if it was outside of that range? Would reasonableness depend on proximity to the "advisory" range?

This confusion was essentially the state of the law at the time *Rita v. United States* was decided on June 21st of this year.[16] The Supreme Court granted certiorari in *Rita* in order to determine whether an appellate presumption of reasonableness (which had been adopted by several of the circuits and rejected by others) was consistent with the remedial opinion in *Booker*.[17] The Court, with only Justice Souter dissenting, concluded that such an appellate presumption was permissible. Writing for the majority once again, Justice Breyer reasoned that Congress had instructed both the Sentencing Commission and the federal district courts to weigh a number of factors in determining the appropriate sentence for particular conduct. Where both the Commission and the trial judge agree on a sentence—that is, where the judge sentences within the suggested sentencing range—it is permissible for an appellate court to presume that the sentence is a reasonable one.

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15. Rita v. United States, 127 S. Ct. 2456, 2462 (2007). Justice Breyer's remedial decision in *Booker* has not proven popular in the two years since it was issued. In this survey, Professor Douglas Berman states: "Justice Breyer created this remedy in *Booker* out of whole cloth with only a nod to applicable constitutional, statutory and administrative laws." Douglas A. Berman, Rita, *Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 10 (2007). Others have been less charitable: *See, e.g.*, Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After* United States v. Booker, 41 U. RICH. L. REV. 625 (2007); McConnell, *supra* note 12, at 666.

16. *Rita*, 127 S. Ct. at 2456. *Rita*'s companion case, *Claiborne v. United States*, was dismissed as moot after the defendant died following oral argument. 127 S. Ct. 2245 (2007).

17. 177 Fed. App'x 357 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (U.S. Nov. 3 2006).

In this symposium we have five different perspectives on the state of federal sentencing after *Rita*. Professor Douglas Berman leads off with a taxonomy of the legal issues raised by the opinions in *Booker* and how those issues stand post-*Rita*. Berman writes that in *Rita*, "the Supreme Court was genuinely eager to provide [] guidance to lower courts about how they should administer an advisory federal guideline sentencing system. Unfortunately [] various passages throughout the *Rita* opinions raise new questions about the major federal sentencing issues that the *Booker* remedy stirred up."[18] Berman concludes that, however the Supreme Court resolves the various and sundry questions remaining after *Booker* and *Rita*, "the history of modern sentencing reforms demonstrates that changes in legal doctrines have become revolutionary only when they ultimately transformed the legal cultures in which these doctrines operate."[19]

Following this recognition that it is actual outcomes that ultimately matter, Paul J. Hofer, the former Senior Research Associate at the United States Sentencing Commission, provides us with a wealth of data on an important empirical question raised by *Rita*: "Does an appellate presumption of reasonableness for sentences within the guideline range have an effect on the outcomes of appeals or on sentences imposed by the district courts?"[20] Although Hofer concedes that the Supreme Court expressly rejected the legal import of this empirical question,[21] it remains crucial both in understanding the impact (or lack of impact) that *Booker* and *Rita* will have on actual federal sentencing outcomes and in crafting doctrine to govern that sentencing. While the Supreme Court largely ignored the "daunting" statistical briefing in *Rita*, Hofer remains optimistic about the role that empirical research can play in this process.

> Could it be that the *Rita* Court is inviting the lower courts to hear evidence that particular Guidelines are not working to achieve the statutory purposes? Only time, and perhaps the upcoming opinion in *Kimbrough*, will tell. If it turns out the Court is now open to categorical challenges of the type many commentators have long encouraged, *Rita* may be just the beginning of empirical evidence on sentencing questions presented to the Court.[22]

We turn then from these academic analyses of the state of sentencing to the views of those actually engaged in the practice. First, a federal district judge and his clerk "urge district courts to exercise the discretion

18. Berman, *supra* note 15, at 15.

19. *Id.* at 19.

20. Paul J. Hofer, *Empirical Questions and Evidence in* Rita v. United States, 85 DENV. U. L. REV. 27, 28 (2007).

21. *Id.* at 30 ("[T]he [appellate presumption of reasonableness], even if it increases the likelihood that the judge, not the jury, will find 'sentencing facts,' does not violate the Sixth Amendment.") (citing *Rita*, 127 S. Ct. at 2465).

22. *Id.* at 50 (citing Kimbrough v. United States, 127 S. Ct. 2933 (2007), *cert. granted*, 60 U.S.L.W. 3661 (U.S. June 11, 2007) (No. 06-6330)).

[*Rita*] reaffirms."[23] While some might read *Booker* and *Rita* as at least implicitly re-imposing the Guidelines on trial judges, the Hon. Lynn Adelman and Jon Deitrich argue in their essay that *Rita* in fact encourages trial judges to use their discretion to determine the appropriate sentence. They argue that the Court went out of its way in *Rita* to limit its holding and to avoid re-instituting the Guidelines on trial judges: The Court held that circuits may, but are not required to, adopt the presumption of reasonableness for sentences within the guideline range; that circuits may not adopt a presumption of unreasonableness for out-of-range sentences; and that the reasonableness presumption that it approved is an appellate presumption, not a trial one.[24] Adelman and Deitrich remind us that most federal judges on the bench today "have little or no sentencing experience except under mandatory Guidelines,"[25] and that the present circumstances create the first real opportunity in a generation for trial judges to create a "common law of sentencing": "[Federal trial judges] can only do this by exercising their discretion to impose non-guideline sentences and by explaining their reasons for doing so."[26] Such discretion, the authors argue, has the power to overcome many of the injustices so often associated with the Guidelines.

The other sentencing judge in our symposium views the future far less optimistically than does Judge Adelman. For Judge Nancy Gertner, the fear is that "'presumptive' will, once again, slide to 'mandatory,' or something short of that, namely, 'Guidelines-Lite.'"[27] Judge Gertner worries that the gravitational pull of the reasonableness presumption approved by the *Rita* Court will discourage trial courts from thinking beyond the parameters of the Guidelines. Using the facts of *Rita* itself, she critiques the Supreme Court's assertion that the reasonableness presumption is appropriate for a sentence within the guideline range because in such a case the Sentencing Commission and the trial court have agreed on the appropriate sentence. More likely, Judge Gertner argues, when a judge sentences within the guideline range, she has merely acquiesced to the guideline sentence without independently examining it.

> [T]he fact that a district court's sentence is aligned with that of the Commission does not necessarily indicate that there was careful reflection about what the appropriate sentence should have been, but may simply reflect a judge's good faith effort to comply with the Guidelines (knowing their traction even post-*Booker*) or the failure of effective advocacy at sentencing. . . . The "gravitational pull" of the Guidelines, particularly in a circuit that is amenable to the "Guide-

23. Lynn Adelman & Jon Deitrich, Rita, *District Court Discretion, and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 51 (2007).

24. *Id.* at 52-53.

25. *Id.* at 54.

26. *Id.* at 55.

27. Nancy Gertner, Rita *Needs* Gall—*How to Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63, 71 (2007).

> lines as presumptive" approach, limits sentencing arguments, stops meaningful critique of the Guidelines, and encourages cursory treatment of the sentence on all levels, at trial and on appeal.[28]

Finally, we get the perspective of a federal appellate judge on a Supreme Court opinion that the Court emphasized was entirely about appellate presumptions rather than trial ones. Judge Jeffrey Sutton ends this survey on an optimistic note. He argues that "if an utterly indeterminate sentencing regime slights consistency and if an overly determinate sentencing regime slights individualized sentencing, it may be that *Booker* and *Rita* present an opportunity to thread the sentencing needle."[29] This needle-threading, he argues, will require collaboration between trial and appellate judges within the federal system; trial judges have been entrusted by Congress with the task of determining appropriate sentences in individual cases, and appellate judges, by virtue of their smaller number and supervisory position, are well-situated to prevent extreme disparities in like cases.

What the contributions to this volume emphasize is the triumph of legal realism. The authors focus not so much on doctrine as on how that doctrine will be applied by the actors who actually make the decisions about the futures of criminal defendants. For all of Justice Scalia's enthusiasm for the *Apprendi* revolution, that revolution will not fail because Justice Ginsburg changed her vote in *Booker* to join Justice Breyer's remedial majority. Rather, the flight to *Apprendi*-land was rerouted because the Supreme Court, for all of its power to say what the law is, has very little power to change what happens in individual courtrooms every day. It is the collective efforts of all of the various players in the sentencing puzzle—trial judges, appellate judges, Congress, the Sentencing Commission—rather than any edict from the Supreme Court that will ultimately determine the future direction of sentencing in the federal courts.

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28. *Id.* at 73.

29. Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After* Booker *and* Rita, 85 DENV. U. L. REV. 79, 81 (2007).