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INTRODUCTION

Federal judges have struggled mightily to comprehend the meaning and impact of the Supreme Court's landmark sentencing decision in *United States v. Booker*.[1] In *Booker*, the Court remedied Sixth Amendment problems with judicial fact-finding under the U.S. Sentencing Guidelines by making the Guidelines "effectively advisory" and fashioned a new "reasonableness" standard for appellate review of sentences.[2] But, as documented by conflicting lower court opinions, few judges or practitioners could be sure whether the *Booker* remedy should significantly change or only slightly alter the operational realities of the federal sentencing system.[3]

The Supreme Court seemed poised to provide needed guidance on *Booker*'s meaning and application when, in late 2006, the Court granted certiorari in *Claiborne v. United States*[4] and *Rita v. United States*.[5] In *Claiborne*, the Court was to examine circuit court approaches to judging the reasonableness of below-guideline sentences imposed by district courts; in *Rita*, the Court was to examine approaches being used to judge within-guideline sentences. But the sudden death of petitioner Mario Claiborne required the Supreme Court to vacate the *Claiborne* case after oral argument.[6] The Court took up two new cases, *Kimbrough v. United States*[7] and *Gall v. United States*,[8] in order to address below-guideline sentences, but they are not to be heard until the Court's October 2007 Term.

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1. 543 U.S. 220 (2005).
2. *Id.* at 245-46, 260-65.
3. *See generally* NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY ch.3 (2d ed. 2007) (reviewing post-*Booker* uncertainties).
4. 439 F.3d 479 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (U.S. Nov. 3, 2006) (No. 06-5618).
5. 177 Fed. App'x 357 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 551 (U.S. Nov. 3, 2006) (No. 06-5754).
6. 439 F.3d 479 (8th Cir. 2006), *vacated as moot*, 127 S. Ct. 2245 (2007).
7. 174 Fed. App'x 798 (4th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (U.S. June 11, 2007) (No. 06-6330).
8. 446 F.3d 884 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (U.S. June 11, 2007) (No. 06-7949).

Left only with a within-guideline case to resolve, the Justices in *Rita v. United States*[9] issued four opinions that raise more questions than they answered. The opinions in *Rita* revealed not only that the Court is still struggling with its Sixth Amendment jurisprudence, but also that the Justices have divergent views on the many other dynamic issues raised by the *Booker* remedy of an advisory guideline system.

As explained in Part I below, the *Booker* remedy transformed a constitutional debate into a multi-dimensional cacophony of sentencing issues that *Rita* could only begin to address. Moreover, as detailed in Part II, though *Rita* does answer a few key post-*Booker* questions, the opinions in *Rita* have passages that present new puzzles for anyone trying to sort through the post-*Booker* world of federal sentencing. Finally, as discussed in Part III, *Rita* and lower courts' early reactions to the decision ultimately reveal, yet again, that dramatic legal changes face resistance from sentencing actors who become acclimated to the status quo. Indeed, the history of modern federal sentencing reforms demonstrates that changes in legal doctrines become revolutionary only when they ultimately transform the legal cultures in which these doctrines operate. This lesson should be heeded not only by the Supreme Court as it considers another set of sentencing cases, but also by all would-be legal reformers in the field of sentencing and beyond.

I. THE MANY ISSUES RAISED—BUT NOT RESOLVED—BY *BOOKER*

Though implicating other issues,[10] the Supreme Court's numerous divided sentencing rulings over the last decade—including the merits opinion in *Booker*—have been principally focused on the meaning and application of the Sixth Amendment's jury trial provision.[11] But the remedial opinion in *Booker* converted a constitutional debate into a confusing battle royale over a wide array of modern federal sentencing laws and practices.[12] Specifically, *Booker*'s advisory guideline remedy brought at least six dynamic and challenging legal issues into play for lower courts

9. 127 S. Ct. 2456 (2007).

10. In another article, I have highlighted that the Supreme Court's recent Sixth Amendment rulings implicate and reflect, both expressly and implicitly, an array of constitutional provisions and principles beyond the right to a jury trial. *See* Douglas A. Berman, *Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. CRIM. L. CRIMINOLOGY 653, 653 (2005); *see also* Frank O. Bowman, III, *Function Over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment*, 17 FED. SENT'G REP. 1, 5-12 (2004) (assailing the Supreme Court's Sixth Amendment jurisprudence while suggesting new approaches to interpretations of the Fifth and Eighth Amendments to address sentencing issues).

11. *See* Cunningham v. California, 127 S. Ct. 856 (2007); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002); Harris v. United States, 536 U.S. 545 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 526 U.S. 227 (1999); Almendarez-Torres v. United States, 523 U.S. 224 (1998).

12. The start of Justice Souter's dissent in *Rita* captures this reality in one simple sentence: "Applying the Sixth Amendment to current sentencing law has gotten complicated, and someone coming cold to this case might wonder how we reached this point." *Rita*, 127 S. Ct. at 2484 (Souter, J., dissenting).

involved in sentencing decision making. Even an abridged account of these multiple and often cross-cutting legal issues raised—but not resolved—by the *Booker* remedy highlights why so much doctrinal and practical uncertainty has followed in the wake of the Supreme Court's creation of an advisory federal guideline sentencing system.

A. Issue #1: The Import of Constitutional Jurisprudence

The merits ruling in *Booker* declared unconstitutional judicial fact-finding to enhance sentencing ranges within a mandatory guideline system.[13] But, as many have noted, because judges still engage in extensive judicial fact-finding within an advisory guideline scheme, the *Booker* remedy arguably undermines the very jury trial concerns that seemed to animate the Court's modern Sixth Amendment jurisprudence.[14] Consequently, as a matter of constitutional law after *Booker*, lower courts have struggled to figure out if the Sixth Amendment is to have real substantive bite or is only to be given lip-service in the application of an advisory guideline system.

B. Issue #2: The Meaning of Statutory Provisions

The specific remedy adopted in *Booker* was purportedly driven by statutory law: Justice Breyer emphasized Congress's intent in the Sentencing Reform Act (SRA) to justify making the Guidelines advisory,[15] and the *Booker* remedy championed the SRA's detailed sentencing instructions in 18 U.S.C. § 3553(a) as still controlling law for both district and circuit judges.[16] But the *Booker* remedy said very little about how lower courts are to assess and balance the numerous (and vague) sentencing factors set out in § 3553(a), and *Booker* never even mentioned § 3553(a)'s command that courts "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of punishment set out by Congress.[17] Consequently, as a matter of statutory law after *Booker*, lower courts have struggled to give effect to the express text of the SRA and the perceived goals of Congress in the application of an advisory guideline system.

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13. *See Booker*, 543 U.S. at 258-59.

14. *See, e.g.*, Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665, 679-80 (2006); *see also* Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1113 (2005).

15. *See Booker*, 543 U.S. at 249-58.

16. *See id.* at 259-61, 268-70.

17. 18 U.S.C.A. § 3553(a) (2007); *see also* Posting of Douglas A. Berman to Sentencing Law and Policy Blog, *The Power of Parsimony (and Justice Breyer's Notable Omission)*, http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/the_power_of_pa.html (Jan. 12, 2005, 08:54 PM).

C. Issue #3: The Force of Administrative Regulations

The *Booker* remedy extolled the Guidelines and the U.S. Sentencing Commission's efforts to promote "better sentencing practices,"[18] and stressed that 18 U.S.C. § 3553(a) still requires judges to "consider" the Guidelines and the U.S. Sentencing Commission's policy statements.[19] In turn, many post-*Booker* lower court rulings emphasize the importance and value of the Guidelines as the considered work of an expert agency seeking to achieve congressional sentencing goals.[20] But, even when lauding the Guidelines, lower courts acknowledge that the Commission's Guidelines cannot be given binding force without creating the constitutional problems that led to the *Booker* ruling.[21] Moreover, the Commission's own research and analysis has spotlighted that certain Guidelines—such as the hundred-to-one ratio in calculating crack-to-powder cocaine sentences, and the severe career-offender enhancement—undermine the sentencing goals set forth by Congress in the SRA.[22] Consequently, as a matter of administrative law after *Booker*, lower courts have struggled to determine exactly how much emphasis can and should be given to the Guidelines and the Sentencing Commission's other work product in the application of an advisory guideline system.

D. Issue #4: The Development of Common Law Standards

The *Booker* remedy's conversion of the Guidelines to be "effectively advisory" and its creation of a new reasonableness standard of appellate review was ultimately a tour-de-force of judicial lawmaking. Justice Breyer crafted this remedy in *Booker* out of whole cloth with only a nod to applicable constitutional, statutory and administrative laws. Perhaps inspired (or even required) by *Booker*'s creation of a new common-law federal sentencing framework, lower courts have developed common-law standards for sorting through various recurring post-*Booker* issues; the most prominent such creation is the appellate "presumption of reasonableness" for within-guideline sentences, which was at issue in *Rita*.[23] But, because common-law doctrines in the federal criminal justice system are not common, the legal foundation and the evolution of post-*Booker* judge-made sentencing doctrines have been confounding

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18. *Booker*, 543 U.S. at 263-65.

19. *Id.* at 259-60.

20. *See, e.g.*, United States v. Ministrio-Tapia, 470 F.3d 137, 142 (2d Cir. 2006); United States v. Terrell, 445 F.3d 1261, 1265 (10th Cir. 2006).

21. *See, e.g.*, United States v. Moreland, 437 F.3d 424, 433 (4th Cir. 2006); United States v. Ferguson, 456 F.3d 660, 664-65 (6th Cir. 2006); United States v. Myers, 439 F.3d 415, 417 (8th Cir. 2006).

22. *See* U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 131-34 (2004), *available at* http://www.ussc.gov/15_year/Chap4.pdf; *see also* U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY *passim* (2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm.

23. Rita v. United States, 127 S. Ct. 2456, 2462 (2007).

and sometimes convoluted. Consequently, as a matter of common law after *Booker*, lower courts have struggled to decide whether and how to craft new sentencing doctrines in the application of an advisory guideline system.

E. Issue #5: The Scope of Judicial Sentencing Discretion

Congress passed the SRA to limit and guide, but not eliminate, the discretion that district judges had traditionally exercised at sentencing.[24] Thus, long before the Supreme Court's modern Sixth Amendment jurisprudence, the scope of judicial discretion within the federal guideline sentencing system was a fundamental concern and a matter of extensive debate.[25] Moreover, though the Supreme Court in its Sixth Amendment rulings has sought to distinguish mandatory judicial fact-finding from traditional judicial discretion, these issues are readily conflated because both relate to judges' overall power and authority at sentencing. The *Booker* decision further clouded these issues by declaring unconstitutional certain judicial fact-finding in a mandatory guideline system, but then crafting a remedy which permits similar fact-finding within a sentencing system that enhances traditional judicial discretion. Consequently, when seeking to define the scope of judicial sentencing discretion after *Booker*, lower courts have struggled to figure out whether they should embrace and encourage further expansion of judicial sentencing discretion or instead should now try to place whatever limits on this discretion that the Constitution might permit in the application of an advisory guideline system.[26]

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24. *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 77 NOTRE DAME L. REV. 21, 37-41 (2000) (discussing the SRA's interest in achieving a healthy balance of judicial sentencing discretion). Notably, roughly a decade after the SRA's enactment and a decade before *Booker*, a unanimous Supreme Court in *Koon v. United States*, 518 U.S. 81 (1996), asserted that Congress in the SRA sought to ensure "that district courts retain much of their traditional sentencing discretion" by giving judges statutory authority to depart from the Guidelines. *Id.* at 97. As commentators have noted, however, this assertion may have been more wishful thinking than a statement of actual fact by the Court. *See, e.g.*, Douglas A. Berman & Mark Harris, *The* Koon *Case: Departures and Discretion*, 9 FED. SENT'G REP. 4 (1996) (questioning the Supreme Court's various assertions in *Koon* about judicial sentencing discretion).

25. *See generally* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992); Charles J. Ogletree, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944 (1988).

26. *See, e.g.*, Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System after* Booker, 43 HOUS. L. REV. 279 (2006); Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in* Booker *and* Fanfan, 33 PEPP. L. REV. 615, 616 (2006); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693 (2005).

F. Issue #6: The Reality of Sentencing Outcomes (and Reactions Thereto)

Legal doctrines and highfalutin constitutional and sentencing theory notwithstanding, the rubber always hits the road in the criminal justice system, for defendants and society, in terms of concrete sentencing outcomes. Debates over sentencing law, policy, and practice typically take place in the shadow of concerns about particular substantive offenses and particular individual offenders; principle necessarily gives way to outcome-oriented pragmatism when judges and others have to make case-specific sentencing choices. Consequently, within any sentencing structure, lower courts will always struggle to decide what is a fair, effective, and appropriate sentencing outcome for a particular defendant. Further, as the *Booker* opinion itself emphasized, Congress always retains authority to revise or restructure the basic framework and ground rules of federal sentencing law and procedure.[27] In the period after *Booker*, sentencing decisions were being made in the shadow of concerns about how Congress might respond to certain outcomes or particular sentencing patterns. Consequently, when imposing sentences after *Booker*, lower courts have struggled to balance case-specific justice and broader system-wide interests in the application of an advisory guideline system.

This brief taxonomy of six dynamic and challenging issues that the *Booker* remedy brought into play for lower courts does not comprehensively canvass all the important policy concerns and legal questions raised by *Booker* and the major rulings that preceded it.[28] Nevertheless, this taxonomy still highlights how the *Booker* remedy transformed what had primarily been a constitutional debate into a cacophony of sentencing issues that no single subsequent ruling could seriously hope to resolve. Moreover, as detailed in the next Part, though *Rita* does usefully illuminate a few key post-*Booker* issues, mysterious passages in all the *Rita* opinions present new puzzles for those seeking greater clarity about the application of an advisory guideline system after *Booker*.

II. WHAT *RITA* CLEARS UP AND WHAT *RITA* CONFOUNDS

Though many hoped that *Rita* would help straighten out post-*Booker* sentencing realities, the wide array of challenging issues raised by the *Booker* remedy ensured that *Rita* could not conclusively settle exactly how advisory guidelines in the federal system are to operate. Moreover, because the opinions in *Rita* revealed that the Court is fractured on an array of constitutional and non-constitutional sentencing

27. United States v. Booker, 543 U.S. 220, 264 (2005).

28. *See generally* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37 (2006) (discussing broader theoretical issues raised by the Supreme Court's modern sentencing rulings); Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1; Berman, *supra* note 10 (discussing broader constitutional concerns raised by the Supreme Court's modern sentencing rulings).

issues, perhaps the Justices should be lauded for delivering an opinion in *Rita* that settles at least a few post-*Booker* issues. Nevertheless, as the next two sections highlight, a close review of the *Rita* opinions can leave a reader feeling more befuddled than enlightened.

A. What Seems Clear After Rita

A few aspects of constitutional jurisprudence and post-*Booker* sentencing realities are settled by *Rita*. For example, the Court expressly held that the Sixth Amendment does not preclude a circuit court from applying a presumption of reasonableness when reviewing a within-guideline sentence imposed by the district court.[29] Critically, though, such a presumption apparently is not an essential aspect of the common law of post-*Booker* sentencing: none of the opinions in *Rita* hold or even suggest that those circuits which have resisted this presumption ought now to adopt it. Nevertheless, by extensively praising the U.S. Sentencing Commission's "serious, sometimes controversial, effort to carry out" congressional sentencing reform goals,[30] the majority opinion in *Rita* suggests that adopting the presumption is a wise circuit choice.

The majority opinion in *Rita* further clarifies what this (permissible but not essential) presumption of reasonableness for within-guideline sentences is ***not***: (1) it is "not binding";[31] (2) it "does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case";[32] and (3) it does not "reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge."[33] Though before *Rita* no circuit clearly approached the presumption in these now verboten ways, the Supreme Court's numerous assertions about what the presumption isn't apparently are meant to indicate that the presumption must be genuinely rebuttable.[34]

Fortunately, the majority opinion does provide some helpful guidance about what the presumption of reasonableness for within-guideline sentences actually is: "the presumption before us is an *appellate* court presumption,"[35] which means that it "applies only on appellate review,"[36] which further means that at initial sentencing a district court "does not

29. Rita v. United States, 127 S. Ct. 2456, 2462-66 (2007).
30. *Id.* at 2463-65.
31. *Id.* at 2463.
32. *Id.*
33. *Id.*
34. *See id.* at 2474 (Stevens, J., concurring). In his *Rita* concurrence, Justice Stevens cites to the majority's (anti-)explanatory statements about the presumption of reasonableness to support his assertion that "the Court acknowledges moreover [that] *presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable." *Id.* (emphasis in original).
35. *Id.* at 2465.
36. *Id.*

enjoy the benefit of a legal presumption that the guideline sentence should apply."[37] This point about the presumption's inapplicability at initial sentencing is perhaps the most significant and consequential aspect of the *Rita* decision. More than a few district courts, sometimes on their own and sometimes influenced by the adoption of a presumption of reasonableness in their circuits, have indicated to defendants and litigants that they planned to impose a within-guideline sentence unless and until a party presented a potent justification for a non-guideline sentence.[38] *Rita* suggests that it is inappropriate—and, one would think, reversible error—for a district judge to look to the Guidelines as providing a default sentencing range at initial sentencing.

The majority opinion in *Rita* also clarifies that some doctrines are off-limits to circuit courts after *Booker*. The opinion explains that the "fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness" for certain types of sentences.[39] The opinion further notes that "[e]ven the Government concedes that appellate courts may not presume that every variance from the advisory Guidelines is unreasonable."[40] Circuits that had adopted a presumption of reasonableness before *Rita* typically made similar points;[41] but the frequent reversal of below-guideline sentences could justify a conclusion that some circuits have been applying, *de facto* if not *de jure*, a presumption of unreasonableness when reviewing sentences imposed below the applicable guideline range.[42]

Last but not least, the majority opinion in *Rita* discusses at length the procedures that district courts apparently should follow when imposing sentences within an advisory guideline system after *Booker*. This nuanced (and dicta-filled) treatment of post-*Booker* sentencing practices indicates that a "sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines,"[43] and then "may hear arguments by prosecution or defense that the Guidelines sentence should not apply."[44] This process, suggests the *Rita* Court, "subjects the defendant's sentence to the thorough adver-

37. *Id.*

38. *See, e.g.*, United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005); *see also* United States v. Ross, No. 07-1215, 2007 WL 2593509 (7th Cir. Sept. 11, 2007) (vacating sentence and remanding for resentencing because "it appears from the record that the district court improperly applied a presumption of reasonableness for a within-guidelines sentence").

39. *Rita*, 127 S. Ct. at 2467.

40. *Id.*

41. *See, e.g.*, United States v. Matheny, 450 F.3d 633, 642 (6th Cir. 2006); United States v. Howard, 454 F.3d 700, 703 (7th Cir. 2006); United States v. Valtierra-Rojas, 468 F.3d 1235, 1239 (10th Cir. 2006).

42. Of course, the appellate approach to below-guideline sentences was to be examined in the dismissed *Claiborne* case, and will be addressed by the Court in the now-pending *Kimbrough* and *Gall* cases. *See supra* text accompanying notes 4-8.

43. *Rita*, 127 S. Ct. at 2465.

44. *Id.*

sarial testing contemplated by federal sentencing procedure,"[45] and enables a district judge to exercise "his reasoned sentencing judgment, resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors."[46]

Upon reaching a sentencing decision, explains the *Rita* majority, "[t]he sentencing judge should set forth enough [sentencing reasons] to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."[47] A decision to impose a within-guideline sentence "will not necessarily require lengthy explanation,"[48] although when a party presents a viable argument for a different sentence "the judge will normally . . . explain why he has rejected those arguments."[49] And when deciding to impose "a sentence outside the Guidelines, the judge will explain why he has done so."[50]

In this discussion of the sentencing process, the *Rita* majority stresses that "[j]udicial 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."[51] But the Court further indicates that the "appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances . . . . Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation."[52]

B. What Seems More Puzzling After Rita

The extensive dicta in *Rita*—about the Guidelines in general and about the post-*Booker* sentencing process in particular—suggests that the Supreme Court was genuinely eager to provide more guidance to lower courts about how they should administer an advisory federal guideline sentencing system. Unfortunately, as detailed below, various passages throughout the *Rita* opinions raise new questions about the array of federal sentencing issues that the *Booker* remedy stirred up.

1. Issue #1: The Import of Constitutional Jurisprudence

Though *Rita* settles that there are no constitutional problems with the general application of an appellate presumption of reasonableness, Justice Scalia reads the majority opinion as leaving open the prospect of

45. *Id.*
46. *Id.* at 2469.
47. *Id.* at 2468.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

defendants raising (and sometimes succeeding with) "as-applied Sixth Amendment challenges" to certain within-guideline sentences.[53] But neither Justice Scalia's concurrence nor any other opinion in *Rita* provides any guidance as to exactly when a particular within-guideline sentence based on judicial fact-finding could or would transgress the Sixth Amendment.[54] Consequently, as a matter of constitutional law after *Rita*, lower courts still cannot be sure if the Sixth Amendment is to have some real substantive bite or is only to be given lip-service in the application of an advisory guideline system.

2. Issue #2: The Meaning of Statutory Provisions

The majority opinion in *Rita* says surprisingly little about the express text of § 3553(a), even though the Court reaffirms *Booker*'s determination that this statutory provision now controls federal sentencing decision making. Moreover, what little the majority opinion does say about § 3553(a) is more mysterious than meaningful: the Court says that a district judge should make "an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors,"[55] but it never explains what this means in practical terms; the Court indicates a party can argue that a "Guidelines sentence itself fails properly to reflect § 3553(a) considerations,"[56] but it never explains when this type of argument could support or even require a sentence outside the Guidelines. Justice Stevens' concurrence in *Rita* further asserts "that § 3553(a) authorizes the sentencing judge to consider" many individual characteristics that "are not ordinarily considered under the Guidelines,"[57] but he too fails to articulate with particularity what this entails for sentencing decision making by district and circuit judges. Consequently, as a matter of statutory law after *Rita*, lower courts still cannot be confident about how they are supposed to give effect to the express text of the SRA and the perceived goals of Congress in the application of an advisory guideline system.

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53. *Id.* at 2479 (Scalia, J., concurring).

54. Justice Scalia's opinion in *Rita* seems to suggest that a within-guideline sentence depending too much on judicially found facts would trigger "as-applied" Sixth Amendment concerns even within an advisory guideline scheme. *See id.* But Justice Scalia's opinion for the Court in *Blakely* argued for a "bright-line" approach to what types of judicial fact-finding violates the Sixth Amendment because of the "need to give intelligible content to the right of jury trial." Blakely v. Washington, 542 U.S. 296, 305-08 (2004). It is ironic and surprising that Justice Scalia in *Rita* now seems to be advocating a vague, judicial-administered, not-yet-very-intelligible standard for applying the Sixth Amendment in the context of advisory guideline systems.

55. *Rita*, 127 S. Ct. at 2469.

56. *Id.* at 2465; *see also id.* at 2468 (discussing the possibility of a litigant "contest[ing] the Guidelines sentence generally under [18 U.S.C.] § 3553(a)"); *id.* at 2470 (asserting that the defendant failed to press in the lower courts the "claim that the Guidelines sentence is not reasonable under § 3553(a) because it expressly declines to consider various personal characteristics of the defendant").

57. *Id.* at 2473 (Stevens, J., concurring).

3. Issue #3: The Force of Administrative Regulations

The majority opinion in *Rita* lauds the U.S. Sentencing Commission's construction of "a set of Guidelines that seek to embody the § 3553(a) considerations, both in principle and in practice."[58] Yet the same opinion also suggests that there may be cases—perhaps many cases—in which a "Guidelines sentence itself fails properly to reflect § 3553(a) considerations."[59] Similarly, Justice Stevens' concurrence asserts a district court's sentencing choice merits "added respect"[60] when consistent with the Guidelines, even though his opinion stresses that the Court's work in *Rita* clarifies that "the Guidelines are truly advisory."[61] Consequently, as a matter of administrative law after *Rita*, lower courts still cannot be confident about exactly how much emphasis can and should be given to the Guidelines in the application of an advisory guideline system.

4. Issue #4: The Development of Common Law Standards

As noted before, the Court in *Rita* approved the circuit courts' creation of a presumption of reasonableness for reviewing within-guideline sentences,[62] but it did not command or even directly encourage all the circuits to adopt this presumption. Meanwhile, Justice Stevens' concurrence emphasizes that the presumption "must be genuinely rebuttable,"[63] but he provides no insights or suggestions about when and how the presumption is to be rebutted. Relatedly, the majority seems untroubled with the prospect that the "presumption will encourage sentencing judges to impose Guidelines sentences,"[64] while the opinions of both Justice Stevens and Justice Souter express great concern with the creation of appellate doctrines that could unduly push district judges toward following the Guidelines. Moreover, when discussing judicial sentencing practices, the *Rita* majority suggests that cases raising "conceptually simple" issues may generally require only a "brief" statement of reasons;[65] but the Court does not indicate how lower courts should determine or police when conceptually challenging issues require "the judge to write more extensively."[66] Consequently, as a matter of common law after *Rita*, lower courts cannot be sure whether and how they should craft common-law sentencing doctrines in the application of an advisory guideline system.

58. *Id.* at 2464.
59. *Id.* at 2465; *see also id.* at 2468, 2470.
60. *Id.* at 2474 (Stevens, J., concurring).
61. *Id.*
62. *See id.* at 2465-66 (majority opinion).
63. *Id.* at 2474 (Stevens, J., concurring).
64. *Id.*
65. *Id.* at 2469 (majority opinion).
66. *Id.*

5. Issue #5: The Scope of Judicial Sentencing Discretion

The majority opinion in *Rita* devotes far more energy to extolling the Guidelines and the pursuit of "increased uniformity" than to promoting discretionary judgments by district courts.[67] Nevertheless, the *Rita* Court does suggest the importance of "the sentencing court's judgment as to what is an appropriate sentence for a given offender."[68] Meanwhile, Justice Stevens' concurrence exalts the unique information and insights of district courts and the importance of an appellate court deferring to a district court's "individualized sentencing determination."[69] Indeed, Justice Stevens' final sentence stresses "the importance of paying appropriate respect to the exercise of a sentencing judge's discretion."[70] Consequently, when seeking to define the scope of judicial sentencing discretion after *Rita*, lower courts still cannot be sure if they should embrace further expansion of judicial sentencing discretion or seek to judicially regulate this discretion in the application of an advisory guideline system.

6. Issue #6: The Reality of Sentencing Outcomes (and Reactions Thereto)

Perhaps because the Court focused on broader post-*Booker* considerations, its brief discussion of Victor Rita's specific sentencing claims had the feel of an afterthought. The Supreme Court can simply deny review of the thousands of sentences appealed in the federal system every year, and thus the Justices in *Rita* perhaps unsurprisingly invested great energy and devoted nearly all their opinions to an extended discussion of system-wide sentencing concerns. Nevertheless, neither district courts nor circuit courts have the luxury of ignoring case-specific realities at sentencing: district judges have an obligation to unpack and assess the factual and legal issues raised by each individual case; circuit judges must be concerned with examining and correcting claimed errors in the appeal at hand before worrying about developing legal standards for future cases. Consequently, when deciding upon specific sentencing outcomes after *Rita*, lower courts are still faced with the special challenges of balancing case-specific justice and broader system-wide interests in the application of an advisory guideline system.[71]

This brief post-*Rita* review of six dynamic and challenging issues that the *Booker* remedy brought into play for lower courts surely has the feel, in the memorable words of Yogi Berra, of *déjà vu* all over again. Though *Rita* does usefully illuminate a few key post-*Booker* issues, it

67. *See id.* at 2463-67.
68. *Id.* at 2465.
69. *Id.* at 2472 (Stevens, J., concurring).
70. *Id.* at 2474.
71. *Cf.* Jeffrey S. Sutton, 85 DENV. U. L. REV. 79, 79-81 (2007) (explaining dilemma of balancing individual sentencing and system-wide consistency).

does not even begin to quell the cacophony of sentencing issues that have necessarily arisen in *Booker*'s wake as lower courts try to make sense of an advisory federal guideline sentencing system. In short, doctrinal mysteries still abound after *Rita*. And yet, as the concluding Part of this article explains, the post-*Rita* sentencing landscape may be more predictable than this Part's legal analysis might suggest.

III. THE PERSISTENCE OF RESISTANCE TO CHANGE (A/K/A THE NEED TO CHANGE PERSPECTIVES ALONG WITH DOCTRINE)

Part I highlighted the many challenging issues raised—but not resolved—by the *Booker* remedy, and Part II highlighted that these issues remain muzzy after *Rita*. Nevertheless, doctrinal and practical uncertainties notwithstanding, the federal sentencing system keeps humming along, sentencing more than 5000 federal defendants each and every month.[72] Moreover, and more importantly, even a cursory review of federal sentencing realities in lower courts after *Booker* and now after *Rita* reveals a sentencing system that is still extraordinarily similar in operation and appearance to the federal sentencing system before *Booker* and *Rita*.

Lower courts' general responses to *Booker* and their early reactions to *Rita* document, yet again, that dramatic legal changes face resistance from sentencing actors who have become acclimated to the status quo. Indeed, as highlighted briefly below, the history of modern federal sentencing reforms demonstrates that changes in legal doctrines have become revolutionary only when they ultimately transformed the legal cultures in which these doctrines operate. This is a broad lesson that should be heeded not only by the Supreme Court as it considers another set of sentencing cases, but also by all would-be legal reformers in the field of sentencing and beyond.

A. The (Inevitable?) History of Resistance to Sentencing Change

Social scientists have long noted the realities (and potential problems) of status quo biases—that is, the natural tendency of people to generally prefer things to stay relatively the same.[73] Legal theorists have come to recognize the import and impact of these biases in the arena of legal reform.[74] Significantly, the modern history of federal sentencing

72. U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2006), *available at* http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm.

73. *See* William F. Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988); *see also* Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194 (1991).

74. *See generally* Gary Blasi & John T. Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CAL. L. REV. 1119 (2006); Raquel Fernandez & Dani Rodrik, *Resistance to Reform: Status Quo Bias in the Presence of Individual-Specific Uncertainty*, 81 AM. ECON. REV. 1146 (1991)

reforms provides interesting and diverse examples of status quo biases at work in many different legal settings.

Status quo biases were evident in the early development of modern sentencing reforms. Many leading academics, policy advocates, and politicians were talking serious about the need for federal sentencing reforms by the mid-1970s.[75] But, surely influenced by a kind of status quo bias, Congress took nearly a decade to finally pass the landmark Sentencing Reform Act of 1984.[76] That Act created the U.S. Sentencing Commission to develop guidelines for federal sentencing. But, surely influenced by a kind of status quo bias, that Commission was unable to chart a new conceptual path for federal sentencing, and ultimately developed a set of guidelines that were premised largely on past sentencing practices.[77] These Guidelines for federal sentencing were due to take effect in 1987. But, surely influenced by a kind of status quo bias, many lower federal courts initially declared the federal sentencing Guidelines unconstitutional and therefore inapplicable.[78] Tellingly, the Supreme Court in *Mistretta v. United States*[79] ultimately upheld the constitutionality of aspects of the Sentencing Reform Act of 1984 by asserting, somewhat inaccurately, that the SRA really did not radically change the status quo traditions of the federal sentencing system.[80]

Since the Guidelines were in place and received an initial constitutional blessing from the Supreme Court, status quo biases have been evident in the application and continued development of modern sentencing reforms. Both the U.S. Sentencing Commission and federal judges have focused virtually all their sentencing decision making on the basic structure and particularized regulations set forth in the Guidelines. Despite long-standing and widespread criticisms of the Guidelines from federal

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75. *See, e.g.*, MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER ix (1973); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 3 (1976); *Criminal Sentencing: A Game of Chance*, 60 JUDICATURE 208, 209 (1976); Edward M. Kennedy, *Foreward* to PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM xiii (1977); Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 267 (1977).

76. Sentencing Reform Act of 1984, Pub. L. No. 98-473 (codified at 28 U.S.C.A. § 991 (2007)); *see* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 229 (1993) (reviewing the long congressional debates over the process of enacting a federal sentencing reform bill).

77. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 24 (1988) (discussing the challenges and choices surrounding the development of the initial Guidelines).

78. *See* MICHAEL TONRY, SENTENCING MATTERS 73-74 (1996) (discussing arguments made against the SRA's constitutionality). Professor Michael Tonry sensibly suggests that many of these rulings, "though necessarily couched in constitutional terms . . . [revealed] judges' deep antipathy to the guidelines themselves." *Id.* at 73.

79. 488 U.S. 361 (1989).

80. *Id.* at 406-08; *see also* Koon v. United States, 518 U.S. 81, 97 (1996) (asserting curiously that Congress in the SRA sought to ensure "that district courts retain much of their traditional sentencing discretion" by giving judges statutory authority to depart from the Guidelines).

judges, academics, defense attorneys, and even many prosecutors,[81] the U.S. Sentencing Commission has never seriously considered any sizeable or systemic change to the Guidelines' structure or basic operations. Similarly, even though many federal judges have often vocally complained about the Guidelines, the federal judiciary had generally failed to contribute to the development of federal sentencing law within a guideline system.[82] Moreover, though the SRA radically transformed the nature, inputs, and import of the traditional sentencing process, nearly all courts have continued to rely upon informal procedures for sentencing decision making under the Guidelines, and the Supreme Court reaffirmed pre-reform holdings about defendants' limited procedural rights at sentencing.[83]

Of course, the *Booker* decision seemed to mark an extraordinary break from the stories of status quo bias in the federal sentencing system. Despite nearly two decades of judicial fact-finding under mandatory Guidelines, the Supreme Court in *Booker* concluded that the system violated the Sixth Amendment and it crafted a novel and unexpected set of sentencing standards for both district courts and circuit courts.[84] And yet, lower court opinions and cumulative post-*Booker* data reveal that the *Booker* remedy has been applied, especially by circuit courts, to preserve the pre-*Booker* status quo.[85] Soon after *Booker*, circuit courts were quick to hold that district judges still must properly calculate guideline sentencing ranges and must still provide a reasoned justification for any decision to deviate from the Guidelines.[86] Other players in the federal sentencing system also appeared highly disinclined to change their standard operating procedures in response to *Booker*: probation officers kept preparing presentence reports relying on the same sources of information as before *Booker*; prosecutors and defendants kept on dickering over guideline application issues in plea negotiations and before sentencing courts; dis-

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81. *See* Berman, *supra* note 28, at 42-62 (detailing criticism of the Federal Sentencing Guidelines).

82. *See* Douglas A. Berman, *A Common Law for this Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL'Y REV. 93 (1999) (discussing the federal judiciary's failure to help shape federal sentencing doctrines).

83. *See, e.g.*, United States v. Watts, 519 U.S. 148, 151-53 (1997) (per curiam) (relying heavily on pre-Guideline jurisprudence to permit enhancements based on acquitted conduct); *cf. id.* at 162 (Stevens, J., dissenting) (arguing that pre-guideline sentencing jurisprudence should not be directly applied to a structure sentencing system). *See generally* Berman, *supra* note 10, at 669-79 (discussing the failure to update modern sentencing procedures in light of the new substance of sentencing structures).

84. *See* United States v. Booker, 543 U.S. 220, 245-46 (2005).

85. *See* Douglas A. Berman, *Tweaking* Booker: *Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341 (2006); Douglas A. Booker, *Perspectives on* Booker*'s Potential*, 18 FED. SENT'G REP. 79, 79 (2005).

86. One of the first major circuit court decisions about *Booker* stressed these points, United States v. Crosby, 397 F.3d 103, 113-14 (2d Cir. 2005), and other circuit court rulings have seemed eager to reiterate and reinforce these points. *See, e.g.*, United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005); United States v. Webb, 403 F.3d 373, 383 (6th Cir. 2005); United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005); United States v. Crawford, 407 F.3d 1174, 1178 (11th Cir. 2005).

trict courts kept on relying on uncharged conduct in calculating the (now advisory) guideline sentencing ranges; and appellate courts kept being primarily concerned with whether guideline ranges had been properly calculated.[87]

Indeed, the post-*Booker* era has revealed that the legal and political culture has made the federal sentencing system almost impervious to dramatic doctrinal change in the status of the Guidelines. *Booker*'s muted impact on federal sentencing practices and outcomes highlights that the pre-*Booker* legal culture acclimated case-level sentencing decision-makers—judges, prosecutors, defense attorneys, and probation officers—to a rule-bound sentencing process that, through judicial fact-finding, resulted in significant terms of imprisonment for most federal offenders. In addition, the pre-*Booker* political culture was marked by systemwide sentencing decision-makers—Congress, the U.S. Sentencing Commission, the Department of Justice—becoming astute at enforcing compliance with a rule-bound sentencing process. Consequently, years after *Booker,* we still observe (1) a federal sentencing process that remains exceedingly focused on guideline calculations based on judicial fact-finding, and (2) federal sentencing outcomes in which most sentences are still imposed within the (now advisory) guideline ranges and include significant terms of imprisonment. In short, providing another example of status quo bias in the operation of modern sentencing systems, a culture of guideline compliance has persisted after *Booker.*

The *Rita* decision enters into the post-*Booker* universe appearing almost designed to preserve the status quo. As noted before, the *Rita* decision approved circuit court use of a presumption of reasonableness, but also indirectly approved of other circuits' choice not to adopt this presumption.[88] The *Rita* decision encourages a statement of reasons in support of sentencing determinations in an advisory guideline system, but it also holds that judges need not say much when they follow the (status quo) Guidelines and notes that judges are naturally inclined to state reasons for their sentencing choices in any event.[89] With the *Rita* decision appearing to bless the existing post-*Booker* universe, it is hardly surprising that nearly every major circuit decision after *Rita* concludes that the Supreme Court's work is a ratification of that circuit's pre-*Rita* jurisprudence.[90]

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87. *See* Berman, *Tweaking, supra* note 85; *see also* Neil Weinberg, *Lock 'Em Up*, FORBES, Jan. 30, 2006 (noting that "not much has changed" since *Booker*); *see generally* David L. McColgin & Brett G. Sweitzer, *Grid & Bear It: Post-*Booker *Litigation Strategies (Part I)*, THE CHAMPION, Nov. 2005, *available at* http://www.fd.org/pdf_lib/Grid%20Bear%20I.pdf (discussing "the early trend toward business-as-usual sentencing after *Booker*").

88. *See* Rita v. United States, 127 S. Ct. 2456, 2465 (2007).

89. *Id.* at 2468-69.

90. *See, e.g.*, United States v. Conlan, No. 06-1510, 2007 WL 2538047, at *2 (10th Cir. 2007); United States v. Goff, No. 05-5524, 2007 WL 2445637, at *4 (3rd Cir. 2007); United States v. Boleware, No. 06-4108, 2007 WL 2350180, at *1-2 (8th Cir. 2007); United States v. D'Amico,

B. The Need (and Means) to Change Sentencing Perspectives

Despite the force of status quo biases, legal and political cultures can and do evolve. Over time, innovations and dramatic developments that are at first resisted can become the prevailing status quo that thereafter becomes favored and defended by status quo biases. Indeed, as noted above and as detailed more fully by others,[91] the federal judiciary's initial resistance to the Guidelines ultimately transformed into a surprising affinity for intricate sentencing rules. An evolution in judicial personnel and attitudes over the past two decades has resulted in many more federal judges feeling much more comfortable handing out long sentences and having their sentencing choices micro managed by general Guidelines and appellate court review. Critically, though, these realities help explain not only why the Guidelines are still being embraced like a security blanket after *Booker*, but also why those eager for improved federal sentencing justice should still have hope about the current development and future status of the federal sentencing system.

To its credit, the *Rita* decision emphasized (though opaquely) the importance of sentencing rulings as reasoned decisions. Disappointingly, the decision did not rigorously question the reasoning behind the specific Guidelines being applied to Victor Rita. Nevertheless, the ruling still sent an important signal that district and circuit judges should—indeed, must—explore and contemplate the reasons for specific sentencing outcomes. An emphasis on reasons and reasoning at federal sentencing—especially when combined with the *Rita* Court's admonition that a district court "does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply"[92]—should help ensure that, over time, the post-*Booker* culture of excessive guideline compliance will change for the better.

Over time, lawyers should become more adept at emphasizing policy and case-specific reasons based on § 3553(a)'s list of factors for sentences outside the Guidelines in order to encourage judges to exercise the expanded discretion *Booker* bestows. Sentencing judges should, in turn, become more skeptical of the Guidelines' least reasoned provisions as they become more comfortable viewing the Guidelines only as advice and look deeper into the reasons supporting (or failing to support) the Guidelines' recommendations. The articulation and reasoned assessment of suggested reasons for deviating from the Guidelines can and should provide meaningful feedback for the continuous evolution of sentencing law and policy within the Guidelines system. Indeed, as I have stressed

Nos. 05-1468, 05-1573, 2007 WL 2253494, at *10 n.10 (1st Cir. 2007); United States v. Wachowiak, No. 06-1643, 2007 WL 2189561, at *1 (7th Cir. 2007); United States v. Liou, 491 F.3d 334, 338 (6th Cir. 2007); United States v. Campbell, 491 F.3d 1306, 1314 n.11 (11th Cir. 2007).

91. *See* Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 524 (2007).

92. *Rita*, 127 S. Ct. at 2465.

in prior work,[93] early proponents of guideline sentencing systems viewed reasoned departures from the guidelines' suggested sentences to play a fundamental part in a guideline system's development of purposeful and principled sentencing law. According to these reformers, judicial articulation and review of the reasons for deviating from the guidelines would contribute to the development of a "common law of sentencing" and enable judges, informed by case-specific insights, to have their say in the evolution of principled and purposeful sentencing law and policy.[94]

In order to achieve the effective and wise development of a common law of sentencing after *Booker*, circuit courts need to encourage reasoned sentencing decisions by district judges and also should issue reasonableness rulings that contribute to the reasoned development of principled and purposeful sentencing law and policy. Unfortunately, as noted before, many post-*Booker* doctrines developed by the circuit courts have shown an affinity for the pre-*Booker* status quo with its inevitable emphasis on the Guidelines rather than on the broader sentencing considerations reflected in § 3553(a)'s list of factors. Circuits have often suggested that few reasons need be given to support a within-guideline sentence, and they have also sometimes rejected as categorically inappropriate many thoughtful policy-based reasons given by district judges for non-guideline sentences.

Though the result and some rationales in *Rita* may be read to support the notion that few reasons need to be given to justify a within-guideline sentence, the tone and some dicta in *Rita* also support the notion that sound reasons may ultimately be more important than specific results after *Booker*. Further, *Rita* suggests that district courts can justifiably vary from the Guidelines based solely on policy disagreements with the Guidelines. Indeed, the Government's briefs to the Supreme Court in the *Gall* case indicate that it reads *Rita* for the proposition that "sentencing courts may impose non-Guidelines sentences based on policy disagreements with the Sentencing Commission."[95] This is an important—and very valuable—concession by the Government given that many circuit courts have held that below-guideline sentences could not be based solely on policy disagreements with the Guidelines. Helpfully, the Government stresses the importance of policy-based decisions to

93. *See* Berman, *supra* note 24.

94. *See* LESLIE T. WILKINS ET AL., SENTENCING GUIDELINES: STRUCTURING JUDICIAL DISCRETION xvii (1978) (discussing value of judicial departures from the guidelines to provide "an informational feedback loop," which "inject[s] a continuous element of self-improvement and regeneration into the guidelines"); O'DONNELL, *supra* note 75, at 59-60 (asserting that requiring specific reasons for decisions to deviate from the guidelines' presumptive ranges provides "an ideally suited institutional mechanism to upgrade—through the gradual development of case law—the rationale and rationality of sentencing"); *see also* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1455 (1997).

95. Brief for the United States, Gall v. United States, 127 S. Ct. 2933 (2007) (No. 06-7949), 2007 WL 2406805, at *37 n.11; *see also id.* at *32 ("[V]ariances need not be justified solely on *factual* grounds but may . . . be based on reasoned policy considerations.").

vary from the Guidelines being based on "reasoned policy considerations": in the Government's words, "[c]onsiderations of policy, as well as facts, can support a variance; the test is the cogency and strength of the rationale [for a variance], not whether it is fact-based."[96]

In the pending *Gall* and *Kimbrough* cases, the Supreme Court should continue to emphasize the importance of reasons and reasoning at federal sentencing after *Booker*. The Court should particularly focus its discussion and analysis on the text that Congress set forth in § 3553(a). The statutory text of § 3553(a), which now formally governs federal sentencing, provides a useful script and virtuous agenda for reasoned post-*Booker* sentencing decision-making. As noted before, the Court in both *Booker* and *Rita* failed to seriously engage with the text of § 3553(a), and this fact may in part account for the Guidelines unduly dominating post-*Booker* sentencing practices. With the Supreme Court setting a poor tone, many practitioners—and, in turn, many circuit and district judges—have failed to recognize and explore the significant guidance and helpful insights reflected in the explicit text that Congress enacted as specific instructions to sentencing judges. Especially given that Congress has not seen fit to alter this text in the nearly three years since *Booker* was decided, the Justices ought in *Gall* and *Kimbrough* to emphasize and begin to elaborate on the centrality of this statutory text to reasoned decision making within an advisory guideline system.

CONCLUSION

The history of modern federal sentencing reforms highlights why evolutions in the culture surrounding federal sentencing may prove more critical to the future of the system than any doctrinal modifications coming from Congress or the Sentencing Commission. But it also provides an important lesson for the Supreme Court as it considers another set of sentencing cases this coming Term.

Specifically, two forefathers of federal sentencing reform—Judge Marvin Frankel and Professor Norval Morris—stressed the fundamental importance of reasons in the development of any sound sentencing system. Judge Frankel closed his seminal work, *Criminal Sentences: Law Without Order*, with this sentiment: "It is our duty to see that the force of the state, when it is brought to bear through the sentences of our courts, is exerted with the maximum we can muster of rational thought, humanity, and compassion."[97] And Professor Morris emphasized similar points a few years later in this way: "Principled sentencing lies at the heart of an effective criminal justice system. It is obvious that sentencing involves a heavy responsibility and raises issues of difficulty; it thus requires reasons given, critical public consideration of those reasons, criti-

96. *Id.* at *32; *8.
97. FRANKEL, *supra* note 75, at 124 (final sentence).

cal appellate review of those reasons."[98] The Justices should take these wise sentiments to heart by emphasizing that the touchstone and hallmark of federal sentencing should be judicial exercise of reasoned sentencing judgment in response to unique case-specific factors and broader norms set by the Constitution and Congress.

98. Morris, *supra* note 75, at 275-76.