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RITA, DISTRICT COURT DISCRETION, AND FAIRNESS IN FEDERAL SENTENCING

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INTRODUCTION

In *Rita v. United States*,[1] the Supreme Court held that a sentence within a properly calculated advisory guideline range is, on appeal, entitled to a rebuttable presumption of reasonableness.[2] While *Rita* spoke primarily to appellate courts, which under *United States v. Booker*[3] must review sentences for "unreasonableness,"[4] the decision also assured district court judges that the Guidelines truly are advisory and that they retain considerable discretion to impose non-guideline sentences. To the extent the *Rita* Court emphasized that in the post-*Booker* era district courts have discretion to sentence outside the Guidelines, *Rita* is a plus in the ongoing effort to achieve greater fairness in federal sentencing.

The Sentencing Reform Act and the rigid guideline regime it ushered in have not produced fairness, and the only way to ameliorate the harmful effects of the present system is for district courts to exercise greater discretion. In this article, we discuss *Rita* and urge district courts to exercise the discretion it reaffirms. We also discuss the present sentencing landscape and some of the obstacles that courts and the U.S. Sentencing Commission ("Commission") will have to overcome if they are to achieve greater fairness.

I. *RITA* AND DISTRICT COURT DISCRETION

In the immediate aftermath of *Booker*,[5] two schools of thought emerged. The first held that *Booker* represented an opportunity for district judges to, after a long hiatus, again play an important role in sen-

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1. 127 S. Ct. 2456 (2007).
2. *Id.* at 2462.
3. 543 U.S. 220 (2005).
4. *Id.* at 261.
5. Although those interested enough in the topic to read this article surely need no reminder, *Booker* held that the mandatory Federal Sentencing Guidelines violated the Sixth Amendment because they required judges to base sentences on facts neither admitted by the defendant nor proven to the jury beyond a reasonable doubt. *Id.* at 236-37. As a remedy, a different majority of the Court excised those provisions of the Sentencing Reform Act that required judges to follow the Guidelines, rendering them "effectively advisory." *Id.* at 245 (Rehnquist, C.J., O'Connor, J., Kennedy, J., and Ginsberg, J., in part).

tencing instead of simply calculating and applying the Guidelines;[6] the second, believing that the Commission took all relevant factors into account when it came up with the Guidelines, held that courts should continue to follow the Guidelines in all but extraordinary cases.[7] The position of the second school later morphed into the notion that appellate courts should "presume" that sentences within the advisory guideline range were reasonable, subject to rebuttal by the defendant.[8] Most federal circuits adopted this view,[9] and in *Rita*, the Supreme Court addressed it.

Rita held that appellate courts could apply a presumption of reasonableness to within-range sentences. However, the Court based its decision on a rationale somewhat different from that articulated by lower courts. The Court did not uphold the presumption on the ground that the Commission had already considered all of the sentencing factors set forth in 18 U.S.C. § 3553(a).[10] Rather, the Court held that:

> The presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, both the sentencing judge and the Sentencing Commission will have reached the same conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.[11]

Thus, under *Rita*, the district court must first independently apply the § 3553(a) factors and determine the appropriate sentence. The presumption of reasonableness arises only if the judge (specifically) and the Commission (generally) separately reach the conclusion that a guideline sentence is proper. The *Rita* Court also clarified that "the presumption is not binding. It does not, like a trial-related evidentiary presumption, insist that one side or the other shoulder a particular burden of persuasion

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6. *See, e.g.*, United States v. Ranum, 353 F. Supp. 2d 984, 985-86 (E.D. Wis. 2005).

7. *See, e.g.*, United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005).

8. Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker, CHAMPION, Sept.-Oct. 2006, at 32-33 (discussing the genesis of the presumption); *see, e.g.*, United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) (adopting the presumption based on the Commission's expertise and the belief that Guidelines remained "an essential tool in creating a fair and uniform sentencing regime across the country"). Fortunately, the appellate courts rejected the notion that district courts should presume the guideline sentence to be the correct one. *See, e.g.*, United States v. Demarce, 459 F.3d 791, 794-95 (7th Cir. 2006) ("The judge is not required—or indeed permitted, United States v. Brown, 450 F.3d 76, 81-82 (1st Cir. 2006)—to 'presume' that a sentence within the guidelines range is the correct sentence and if he wants to depart give a reason why it's not correct."), *cert. denied*, 127 S. Ct. 3055 (2007).

9. *See, e.g.*, United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006); United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 555 (5th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005).

10. The most the Court would say is that "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." Rita v. United States, 127 S. Ct. 2456, 2464-65 (2007).

11. *Id.* at 2463 (emphasis omitted).

or proof lest they lose their case."[12] In this respect also, the Court dealt with the presumption differently than some lower courts, which had required defendants to demonstrate the unreasonableness of guideline sentences.[13]

Further, although *Rita* endorsed a presumption of reasonableness on appeal (and praised the Commission's work), it did not suggest that district courts must or should follow the Guidelines. First, the Court stressed that the presumption of reasonableness applies at the appellate level only; "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."[14] The Court noted that district judges may consider non-guideline sentences when "the case at hand falls outside the 'heartland' to which the Commission intends individual Guidelines to apply, USSG § 5K2.0, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless."[15] Second, the Court stated 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 non-guideline sentences.[16] Thus, while the Court acknowledged that the presumption may encourage judges to sentence within the range, it carefully avoided intimating that sentences outside the range were in any way suspect.

II. POST-*RITA* CHALLENGES

A. Establishing Collaboration Between Courts and the Commission

Rita represents another effort by the Court to promote both the sentencing Guidelines and the exercise of discretion by district courts.[17] Although there is a surface tension between the Guidelines and judicial discretion, the tension is more apparent than real. As *Rita* notes, the Guidelines need not be static.[18] The original idea behind the Guidelines was that courts and the Commission would interact and improve sentencing practices through criticism and collaboration.[19] District courts would, in sentencing, depart (pre-*Booker*) or impose non-guideline sentences (post-*Booker*) and in doing so would offer critiques of particular Guidelines.[20] The Commission would in turn collect and examine dis-

12. *Id.*

13. *See, e.g.*, United States v. Garner, 454 F.3d 743, 751 (7th Cir. 2006) ("A defendant challenging such a sentence bears the burden of demonstrating that it is unreasonable.").

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

15. *Id.*

16. *Id.* at 2467.

17. The Court first attempted this in *Koon v. United States*, 518 U.S. 81, 99, 106 (1996) (holding that appellate courts should review departures from the Guidelines for abuse of discretion only, and that only the Commission, not the appellate courts, could decide what sorts of sentencing considerations are always inappropriate).

18. *See Rita*, 127 S. Ct. at 2464.

19. *See id.*

20. *See id.*

trict court decisions, obtain additional input, and modify the Guidelines appropriately.[21]

Unfortunately, things did not work out as contemplated, either pre- or post-*Booker*. Pre-*Booker*, appellate courts enforced the Guidelines "more rigidly than anyone predicted or than the relevant statutes appear[ed] to require"[22] and made it unreasonably difficult for district courts to depart.[23] Thus, the Guidelines failed to evolve (other than as a "one-way ratchet" as the Commission promulgated amendment after amendment increasing sentencing ranges).[24] Even after *Booker*, appellate courts continued to police the exercise of district court discretion (at least to impose sentences below the Guidelines) with unwarranted zeal.[25]

Nor did district courts distinguish themselves post-*Booker*. One might have expected district courts to eagerly exercise their newfound discretion, but generally speaking, they did not do so. A number of factors contributed to the sluggishness of district courts in acclimating to the new regime. First, until recently, it appeared that the new regime might not last long. Powerful Congressmen threatened to re-impose mandatory guidelines in one form or another if district courts got out of line.[26] And, the Attorney General promoted proposals to overturn *Booker*.[27] Second, most judges on the bench have little or no sentencing experience except under mandatory guidelines and were not used to exercising discretion in sentencing. Finally, the fact that it is easier to sentence within the Guidelines may also have disinclined judges to exercise discretion.

Post-*Rita*, all parties to the sentencing process, the Commission, and appellate and district courts, must redouble their efforts to make the col-

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21. *See id.*

22. Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 83 (2003).

23. The so-called Feeney Amendment, which replaced *Koon*'s abuse of discretion standard with de novo review of departures, made departures even more difficult. *See* PROTECT Act of 2003, Pub. L. No. 108-21, § 401(d)(2), 117 Stat. 650, 667-70 (codified as amended at 18 U.S.C.A. § 3742(e) (2007)).

24. *See* Frank O. Bowman III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 AM. CRIM. L. REV. 217, 260 (2004) ("The process of making sentencing rules by commission, which was designed, perhaps over optimistically, to minimize the influence of narrowly political concerns, has become a one-way upward ratchet. Raising Guideline sentencing levels is common and easy. Lowering them is difficult and scarcely ever done.").

25. *See, e.g.*, Sandra Guerra Thompson, *The* Booker *Project: The Future of Federal Sentencing: Introduction*, 43 HOUS. L. REV. 269, 270 (2006) (stating that "an overall assessment reveals that the appellate courts are mostly ensuring that the Guidelines still have sufficient teeth to be treated as nearly mandatory in practice"); *see also* United States v. McDonald, 461 F.3d 948, 960 (8th Cir. 2006) (Bye, J., dissenting) (noting that the circuit court had reversed twenty-five below-guideline sentences and affirmed only four, while affirming sixteen above-guideline sentences and reversing only one).

26. *See, e.g.*, Thomas W. Hillier, II, *Letter from Federal Defenders Concerning H.R. 1528*, 17 FED. SENT'G REP. 319, 319-20 (2005).

27. Lynn Adelman and Jon Deitrich, *AG's Misguided Proposals*, NAT'L L.J., Sept. 19, 2005, at 1, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1126861513487.

laborative process work. If, as we believe, *Booker* and now *Rita* represent the last best chance of developing a common law of sentencing, district courts in particular must do a better job of developing such law. They can only do this by exercising their discretion to impose non-guideline sentences and by explaining their reasons for doing so. And the Commission in turn must begin to listen to the district judges when they sentence outside the Guidelines.

B. Recognizing the Consequences of the Sentencing Reform Act and the Guidelines

Although a detailed critique of the Guidelines is outside the scope of this article, we make two general observations about the current federal sentencing system. It is critical that parties interested in federal sentencing keep in mind how the present system came about and what its effects have been. Only by honestly evaluating what we have now will we be able to make improvements.

1. Racial Impact

Some of the early sentencing reformers perceived the then-existing discretionary system as leading to arbitrariness and unfairness in sentencing and wanted to address these problems.[28] But others had different motives. As Professor Naomi Murakawa has shown, sentencing "reform" ran on a parallel track with post-civil rights racial politics.[29] The Sentencing Reform Act, which created the framework for mandatory federal sentencing, fit squarely within the anti-judge themes of the reactionary post-*Brown v. Board of Education*[30] movement—judges cannot be trusted, judges improperly rely on squishy sociological evidence to excuse bad behavior, and liberalized racial policies, to which judges contribute, generate more crime.[31] Professor Murakawa writes:

> By the time Congress gave its final roll-call votes on the Sentencing Reform Act of 1984, the narratives of discontent about judicial discretion had been in place for three decades, beginning sharply with southern Democrats' criticism of *Brown v. Board of Education* in 1954 and gaining momentum after seemingly pro-Communist and pro-criminal Supreme Court decisions. Criticisms of judges in the 1950s and 1960s informed the criticisms that continued through the 1970s and 1980s. Recall the three arguments launched against judges after *Brown*: judges abuse their power, judges worship socio-

28. MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5-11 (1973).

29. Naomi Murakawa, *The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from* Brown *to* Booker, 11 ROGER WILLIAMS U. L. REV. 473, 480-81 (2006); *see also* Glenn C. Loury, *Why Are So Many Americans in Prison? Race and the Transformation of Criminal Justice*, BOSTON REVIEW, July/August 2007, at 1, *available at* http://bostonreview.net/BR32.4/article_loury.php (discussing a "front-lash" in which opponents of civil rights sought to gain the upper hand by shifting to a new issue—crime).

30. 347 U.S. 483 (1954).

31. Murakawa, *supra* note 29, at 483-86.

> logical evidence, and judges disregard the beneficial constraints of Jim Crow. These arguments, issued first in debates over racial integration in the context of low crime rates, had lasting power three decades later in debates over sentencing reform and crime control. Some supporters of Sentencing Guidelines emphasized a fairness rationale, such as northern Democrat Senator Kennedy. But other supporters of Sentencing Guidelines revealed a far more complex rationale, such as southern Democrat Senator McClellan and Republican Senator Thurmond.[32]

The Guidelines responded to the first count of the reactionaries' indictment—that judges were out of touch and abused their power—by mandating strict adherence to the sentencing ranges adopted by the Commission. Indeed, as Professor Murakawa notes: "During final debates over the Sentencing Reform Act of 1984, supporters of Sentencing Guidelines trumpeted judicial incompetence as a truism."[33] Similarly, the Guidelines responded to the second count of the indictment of judges—that they relied on sociological evidence—by prohibiting sentencing judges from considering *why* an offender may have committed a crime. The Guidelines removed from the sentencing equation any consideration of motive or circumstance, as well as most aspects of the defendant's character and background.[34] Sentencing courts could consider only "objective" measures of "harm" on one axis and criminal history scores on the other.[35]

As Professor Murakawa also points out, the third count of the indictment of judges—that they "generate crime by loosening the beneficial constraints of Jim Crow—holds a subtle and complex connection to sentencing and crime policy."[36] We accuse no one of racism, but no fair-minded person can consider the results of the sentencing Guidelines without noticing their racial dimension. In the post-civil rights era, when the country has made genuine progress towards racial equality in many areas, "the racial composition of prisons fully reversed, with prisons turning from seventy percent white in 1950 to seventy percent black and Latino in 2000."[37] Not only has the racial identity of most prisoners changed, so has the length of sentences offenders of different races receive. The Commission acknowledges that racial disparity in federal sentencing has worsened since promulgation of the Guidelines. In its recent Fifteen Year Report, the Commission stated that the "gap between white and minority offenders was relatively small in the preguidelines

32. *Id.* at 489.
33. *Id.* at 490.
34. *See* U.S. SENTENCING GUIDELINES MANUAL, §§ 5H1.1-5H1.12 (2006).
35. *See id.* at ch. 5, pt. A.
36. Murakawa, *supra* note 29, at 492.
37. *Id.* at 492-93; *see also* Loury, *supra* note 29, at 8 (noting that the extent of racial disparity in imprisonment rates is greater than in any other area of American life).

era."[38] However, "[c]ontrary to what might be expected at the time of guidelines implementation . . . the gap between African American offenders and other groups began to widen."[39] Today, the average sentence for a black defendant is about 25 percent higher than for a white defendant.[40]

The Commission's research suggests that disparate treatment by judges accounts for little if any of this disparity.[41] Rather, it appears that the disparity is the result of sentencing rules that have a disproportionate impact on minorities.[42] In particular, the law's treatment of one gram of crack cocaine as equal to one hundred grams of powder cocaine[43] and the career offender guideline, which mandates much higher sentences for defendants who have certain prior convictions, have had a racial impact.[44] The Fifteen Year Report concludes:

> The evidence shows that if unfairness continues in the federal sentencing process, it is more an "institutionalized unfairness" built into the sentencing rules themselves rather than a product of racial stereotypes, prejudice, or other forms of discrimination on the part of judges . . . . Today's sentencing policies, crystalized into the sentencing guidelines and mandatory minimum statutes, have a greater impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation. Attention might fruitfully be turned to asking whether these new policies are necessary to achieve any legitimate purpose of sentencing.[45]

Thus, the data suggest that judges did better in treating offenders of different races equally without guidelines. And, racial disparity—the most pernicious sort—has worsened under the system ostensibly de-

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38. UNITED STATES SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING (AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM) 115 (2004), *available at* http://www.ussc.gov/15_year/15_year_study_full.pdf. [hereinafter FIFTEEN YEAR REPORT].

39. *Id.*

40. *See id.* at 116.

41. *See id.* at 127.

42. *See id.* at 131.

43. *Id.* at 131-32. The Controlled Substances Act and the Guidelines treat one gram of crack cocaine the same as one hundred grams of powder cocaine, despite the fact that the two substances are pharmacologically indistinguishable. *See* United States v. Smith, 359 F. Supp. 2d 771, 777-82 (E.D. Wis. 2005). To its great credit, the Commission has sought to rectify this imbalance. *Id.* at 781.

44. FIFTEEN YEAR REPORT, *supra* note 38, at 133-34. The Commission has suggested that African-Americans are more likely to be subject to this guideline because easily detected drug offenses taking place in open-air drug markets are more likely to occur in impoverished minority neighborhoods. *Id.* The Commission has also noted that basing career offender status on prior drug convictions actually makes the Guidelines a less accurate measure of recidivism. *Id.* at 134. We suspect that in the "old days" a judge confronted with an African-American offender with two petty drug delivery cases on his record would decline to give those priors substantial weight. Now, the judge must sentence that defendant under the career offender guideline, which typically produces a range of fifteen years or more, often two to three times as long as the range otherwise.

45. *Id.* at 135 (citation omitted).

signed to stamp out unwarranted disparity.[46] These unpleasant but unavoidable facts further indicate the importance of restoring judicial sentencing discretion and of judges being more willing to exercise such discretion. At least in the immediate future, we see no other way of ameliorating the dismaying effects of our present sentencing policies.

2. Harshness

With the advent of the Guidelines, the length of the average federal sentence rose from twenty-eight months to fifty months.[47] Although the Commission originally stated that it based the guideline ranges largely on past sentencing practices, its methodology immediately tilted sentences higher. The Commission decided "to calculate average pre-guideline sentences by counting only incarcerative sentences,"[48] thus ignoring the fact that in many cases courts imposed sentences of probation. The Commission also constructed the sentencing grid so as to prohibit probation in all but a very small percentage of cases.[49] In so doing, the Commission gave short shrift to Congress's directive that it "insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . ."[50] Further, in some areas, the Commission "departed from past practice and for ill-defined policy reasons decided to impose harsher sentences."[51] Based on the Commission's choices and the concurrent abolition of parole, the average time served by federal defendants rose from thirteen months to forty-three months.[52] Professor Marc Miller describes the result:

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46. Although the Commission did not intend this result, we suspect that some of the promoters of the Sentencing Reform Act would not be surprised or displeased by it.

47. Lynn Adelman & Jon Deitrich, *Disparity: Not a Reason to "Fix"* Booker, 18 FED. SENT'G REP. 160, 160 (2006) (citing KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 63 (1998)).

48. Morris E. Lasker & Katherine Oberlies, *The Medium or the Message? A Review of Alschuler's Theory of Why the Sentencing Guidelines Have Failed*, 4 FED. SENT'G REP. 166, 167 (1991).

49. *See, e.g.*, Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1222 (2004) ("Before the guidelines, almost 50% of federal sentences were to straight probation. Under the initial guidelines, that figure dropped to around 15%.").

50. 28 U.S.C.A. § 994(j) (2007); *see also* Beverly G. Dyer, *Revising Criminal History: Model Sentencing Guidelines §§ 4.1-4.2*, 18 FED. SENT'G REP. 373 (2006) ("Congress directed the Commission to provide alternatives to prison for first offenders in 28 U.S.C. § 994(j), but the Commission has never done so, despite empirical research revealing that first offenders recidivate at substantially lower rates than defendants with criminal histories."); Lowell Dodge, *Congressional Oversight*, 2 FED. SENT'G REP. 210, 210 (1990) ("Remarkably, the Commission viewed this statutory directive as a 'problem' (U.S.S.G. Ch.1 Pt.A, p.1.8), because the Commission believes 'under present sentencing practice, courts sentence to probation an inappropriately high percentage of offenders guilty of certain economic crimes such as theft, . . . fraud, and embezzlement . . . .'").

51. Lynn Adelman & Jon Deitrich, *Fulfilling* Booker*'s Promise*, 11 ROGER WILLIAMS U. L. REV. 521, 527 n.16 (2006) (collecting sources).

52. Adelman & Deitrich, *supra* note 47, at 160.

> Changes in sentencing patterns over the past twenty years include a dramatic increase in the length of federal sentences, a monumental shift towards incarceration and away from use of straight probation, a dramatic increase in the size of the federal prison population, and a significant increase in the proportion of drug offenders, especially lower-level drug offenders, in the federal system. This system loves punishment.[53]

These harsh sentencing policies have not significantly affected the crime rate,[54] and any positive effects that they have produced have been more than offset by the harmful consequences of mass incarceration.[55] We hope that *Booker* and *Rita* are harbingers of a reversal of course in federal sentencing policy. By exercising the discretion conferred on them—more secure since *Rita*—district courts can contribute to making this hope become a reality.[56]

C. Overcoming Institutional Resistance to Discretionary Sentencing

While we urge district courts to boldly exercise the discretion conferred on them by *Booker* and *Rita* to attempt to ameliorate the harmful effects of the Guidelines, we acknowledge that in doing so, they are unlikely to have many partners. Congress, which obviously could reform federal sentencing laws, is unlikely to do anything significant. As discussed, in the post-Warren Court era, the criminal justice system became a salient political issue. Legislators are unlikely to take any action that would make them vulnerable to a charge that they are "soft on crime." As for the Commission, although its staff has produced some excellent studies, it has shown little inclination to seriously rethink the original Guidelines, to downwardly modify any Guidelines, or to seriously address post-*Booker* judicial decisions critiquing the Guidelines. Instead of embracing the exercise of judicial discretion, the Commission has con-

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53. Miller, *supra* note 49, at 1212.

54. *See* United States v. Jaber, 362 F. Supp. 2d 365, 375 (D. Mass. 2005) ("Indeed, most studies attribute falling crime rates to factors other than incarceration rates, much less to the Federal Sentencing Guidelines."); *see also* Loury, *supra* note 29, at 2 ("Estimates of the share of the 1990s reduction in violent crime that can be attributed to the prison boom range from five percent to 25 percent. Whatever the number, analysts of all political stripes now agree that we have long ago entered the zone of diminishing returns.").

55. A number of scholars have recently written eloquently and persuasively about these consequences. *See, e.g.*, BRUCE WESTERN, PUNISHMENT & INEQUALITY IN AMERICA 2-3 (2006); JAMES G. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT & THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 3 (2003); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS INCARCERATION 1 (Marc Mauer & Meda Chesney-Lind eds., 2003); DAVID GARLAND, THE CULTURE OF CONTROL, CRIME & SOCIAL ORDER IN CONTEMPORARY SOCIETY 8-9 (2001).

56. Although discretion does not inevitably result in lower sentences, the Commission's data show that in Fiscal Year 2006, 61.7 percent of sentences were within the guideline range, 36.6 percent below, and just 1.6 percent above. U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 52 tbl.N (2006), *available at* http://www.ussc.gov/ANNRPT/2006/tableN.pdf. Thus, discretion is almost always exercised in favor of leniency.

tinued to trumpet the notion that the existing Guidelines take into consideration all of the factors in § 3553(a).[57]

Nor can district courts seeking to remedy the deficiencies in the Guidelines expect any help from the Department of Justice. The Department has all but defied the *Booker* Court by asking district courts to impose guideline sentences in virtually all cases, rather than to apply all of the § 3553(a) factors. And, as indicated, appellate courts at least before *Rita* policed below-guideline sentences with inexplicable zeal, insisting without justification that in an advisory guideline system judges are not free to disagree with policies embedded in the Guidelines, such as the misguided disparate treatment of crack and powder,[58] or to impose sentences based on "'factors that are not unique or personal to a particular defendant.'"[59] Even after *Rita*, appellate courts continue to come up with legal bases, derived from no statute or Supreme Court decision, for reversing below-guideline sentences.[60] Finally, as Professor Glenn Loury notes, there is "no political movement for getting America out of the mass-incarceration business. The throttle [is] stuck."[61]

Thus, district courts clearly have their work cut out for them. We do not suggest that district judges become a political movement for sentencing reform or for any other issue. What judges can do, however, is provide a human check on the forces of harshness that have driven our sentencing policies over the past twenty years. That is, if they have the discretion to exercise that check. Judges must be free in individual cases to say that the prison term recommended by the Guidelines is too long, that some cases warrant sentences which involve no prison time at all, that policies embedded in the Guidelines are misguided, and that humanity and mercy still have a role to play in sentencing. *Booker* represented the first step in restoring to judges the ability to be fair in individual cases. *Rita* was the second. This fall, the Court will decide *Gall v. United States*[62] and *Kimbrough v. United States*[63] and hopefully complete

57. *See, e.g.*, Brief for the United States Sentencing Commission as Amicus Curiae Supporting Respondent at *5, Rita v. United States, 127 S. Ct. 2456 (2007) (No. 06-5754), 2007 WL 173622.

58. *See, e.g.*, United States v. Eura, 440 F.3d 625, 633-34 (4th Cir. 2006); United States v. Pho, 433 F.3d 53, 63-64 (1st Cir. 2006).

59. United States v. Wallace, 458 F.3d 606, 611 (7th Cir. 2006) (quoting United States v. Rattoballi, 452 F.3d 127, 137 (2d Cir. 2006)).

60. *See, e.g.*, United States v. D'Amico, Nos. 05-1468, 05-1573, 2007 U.S. App. LEXIS 18695, at *28-29 (1st Cir. Aug. 7, 2007) (holding that "it is usually not appropriate to excuse a defendant almost entirely from incarceration because he performed acts that, though in society's interest, also were the defendant's responsibility to perform and stood to benefit the defendant personally and professionally.").

61. Loury, *supra* note 29, at 2.

62. 127 S. Ct. 2933 (2007) (granting certiorari on the issue of whether the strength of the justification needed to sustain a non-guideline sentence varies in proportion to the degree of the variance).

63. 127 S. Ct. 2933 (2007) (granting certiorari on the issue of whether district courts may consider the 100:1 disparity in the guidelines' treatment of crack and powder cocaine).

the triumvirate, returning to judges the discretion essential to a fair and just sentencing system.