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The Real (Sentencing) World: State Sentencing in the Post-Blakely Era

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The Real (Sentencing) World: State Sentencing in the Post-*Blakely* Era

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Soon after the Supreme Court in *Blakely v. Washington*[1] declared certain judicial fact-finding within a state sentencing guideline system unconstitutional, Justice O'Connor described the Court's decision as a "Number 10 earthquake."[2] Leading commentator Frank Bowman called *Blakely* a train wreck,[3] and many others recognized the profound potential ramifications of *Blakely* for modern sentencing reforms.[4] *Blakely* engendered such reactions in part because it was something of a throwback to the era of the Warren Court: as in cases like *Gideon v Wainwright*[5] and *Miranda v Arizona*,[6] a group of Justices in *Blakely* announced a bold and dramatic interpretation of the Bill of Rights that would require many states to modify traditional and long-established criminal justice practices.[7]

But two years after the *Blakely* ruling, the case's broader impact and meaning for criminal justice systems around the country has been largely overshadowed by developments in the federal sentencing system. Despite the fact that *Blakely*

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[1] 542 U.S. 296 (2004).

[2] *See Senate, Judges Urge 'Blakely' Redux*, N.Y.L.J., July 26, 2004, at 2 (quoting Justice O'Connor's comment at the Ninth Circuit's annual conference in July 2004 that the *Blakely* case "looks like a Number 10 earthquake").

[3] *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 (2004).

[4] *See generally* Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1; Nancy J. King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT'G REP. 316 (2004).

[5] 372 U.S. 335 (1963).

[6] 384 U.S. 436 (1966).

[7] *See* Robert Weisberg, *A Quiet Bombshell in the Legal World*, L.A. TIMES, Sept. 24, 2006 (describing *Blakely* as a ruling that has taken its place, like *Gideon* and *Miranda*, as a "precedent that would change the course of American criminal justice"). *Cf.* Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493 (2006) (drawing various connections between the work of the Warren Court and the *Blakely* ruling). For a fascinating set of recent articles reflecting on the criminal justice decisions of the Warren Court, see Symposium, *The Warren Court Criminal Justice Revolution: Reflections a Generation Later*, 3 OHIO ST. J. CRIM. L. 1 (2005).

evaluated state sentencing procedures, a great deal of the resulting buzz revolved around how this decision might affect the federal scheme. Indeed, much of the legal world waited with baited breath for the Supreme Court to determine the application of *Blakely* to the U.S. Sentencing Guidelines in *United States v. Booker*,[8] and has subsequently fawned over what *Booker* means and how Congress could or should respond.

The symposium in this issue of the *Ohio State Journal of Criminal Law* seeks to ensure that the broader stories of *Blakely* and modern state sentencing reforms get the attention they merit. Looking ahead to future Supreme Court rulings and looking back on post-*Blakely* developments, contributors to this Symposium enrich our understanding of *Blakely*'s impact and enhance the insights to be drawn from state sentencing reform efforts.

I. SPOTLIGHTING THE STATES

State courts handle many more criminal cases than the federal courts.[9] State sentencing procedures touch the lives of many more defendants, victims and witnesses than the federal sentencing system. Yet, these realities often get lost in all the attention paid to the federal sentencing system in the era of the United States Sentencing Guidelines, perhaps because the federal system is in everyone's backyard whether that backyard is in Manhattan or Montana. Especially in the academic world, there is seemingly endless interest in federal sentencing law and practices, but precious little discussion of state sentencing reforms generally or of developments in particular states.[10]

State sentencing is under-examined in part because state systems are difficult to comprehensively analyze, either individually or collectively. While sharing important similarities, state sentencing systems are diverse and can often be difficult to understand fully.[11] The backdrop for state sentencing is often dynamic: some states have not completed long-needed criminal code revisions or re-codifications, others have relatively modern (though rarely model) penal codes,

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[8] 543 U.S. 220 (2005).

[9] In 2002, less than 65,000 of the 1,114,217 felony convictions in the United States were in the federal criminal justice system, meaning that state court counted for 94% of the adult felony convictions in the United States. *See* MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2002, at 1 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf.

[10] There are a few notable exceptions. At the top of the too short list of those academics who have written extensively about state sentencing systems are Professors Richard Frase, Marc Miller, Kevin Reitz, and Ronald Wright. *Cf.* Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1354 n.8 (2005) (identifying Professors Frase, Reitz and Wright as academics taking state sentencing seriously).

[11] *See, e.g.*, Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1191 (2005).

and every state is regularly adding new offenses and sentencing terms. The impact of state sentencing is often opaque: most states do a poor job of producing accessible crime and sentencing information,[12] thus making state systems hard to examine and assess from a distance.

Nevertheless, in light of popular rhetoric about the virtues of federalism and frequent references to states as laboratories,[13] federal policy-makers and academics ought to care greatly about what states are actually doing in the realm of sentencing. States are doing quite a bit, and have been doing quite a bit for quite a long time. Starting more than twenty-five years ago, states pioneered structured sentencing in the form of guidelines, with Minnesota, Pennsylvania and Washington leading the way.[14] More recently, many states have developed innovative ways to handle a variety of offenders and offenses through drug courts, intermediate and alternative punishments, and re-entry initiatives.[15] Numerous states have long moved past the seemingly binary morass of prison or probation in which much of the federal system continues to languish.[16]

II. SUPREME INTERVENTION

The Supreme Court recently has paid a lot of attention to state sentencing: through *Apprendi v. New Jersey*[17] in 2000 and *Blakely v. Washington*[18] in 2004, the Supreme Court declared certain state sentencing procedures unconstitutional. And yet, these landmark rulings have, in various ways, reflected federal input and a federal imprint. At oral argument in *Blakely*, more time was spent discussing the operation of the federal sentencing guidelines than the guidelines in operation in

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[12] *See* Miller, *supra* note 10, at 1354 ("State legislators, state sentencing commissioners, and state commission staff have generally not tried to make information about individual sentences or about their sentencing systems reasonably accessible.").

[13] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[14] *See* Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENT'G REP. 69, 70 (1999); *see also Appendix: A Summary of the Minnesota, Washington, and Pennsylvania Guidelines*, in THE SENTENCING COMMISSION AND ITS GUIDELINES (Andrew von Hirsch et al. eds., 1987).

[15] *See generally* Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

[16] *See generally* NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990).

[17] 530 U.S. 466 (2000).

[18] 542 U.S. 296 (2004).

Washington.[19] The opinions in *Apprendi* and *Blakely*—especially those of the dissenting Justices—seemed most concerned about what these rulings meant for the federal sentencing guidelines.[20] As noted before, the loudest and most persistent buzz following these decisions concerned their possible impact on the federal sentencing system.

The direct and indirect impact of *Apprendi* and especially *Blakely* in the states is a rich and dynamic story, with many facets and lessons that should not be overlooked. [21] Especially since *Blakely* was decided in June 2004, state legislatures and state courts have, with divergent results, grappled with the Supreme Court's modern sentencing jurisprudence. Though the diverse state reactions to *Blakely* are not easily summarized, it is fair to characterize a division between states of "evolution" and states of "denial."[22] Evolution states have accepted that *Blakely* affects their sentencing regimes, and responded in ways seeking to fit local circumstances. In contrast, denial states, acting through their state supreme courts, have resisted seemingly strong arguments that *Blakely* impacts their structured sentencing systems.

The Supreme Court is partially responsible for some of the post-*Blakely* confusion as a result of its follow-up decision in *Booker*, which engineered an "advisory guidelines" remedy for the federal system to preserve a significant role for judicial fact-finding at sentencing. Relying heavily on *Booker*, several state supreme courts—namely California, New Mexico, and Tennessee—have declared that their structured sentencing systems, which rely significantly on judicial fact-finding, do not need mending after *Blakely*.[23]

By granting review in *California v. Cunningham* this past spring, the Supreme Court brings these issues to the national stage. *Cunningham* explores the constitutionality of California's structured sentencing system after the California Supreme Court decided that *Booker* suggested the state's sentencing procedures are constitutionally sound.[24] California is not a guidelines state, but it has a statutory structured sentencing system that provides for three sentencing tiers (lower, middle and upper). At issue in *Cunningham* is the imposition of "upper term" sentences, which are only available after a trial judge finds the existence of

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[19] *See* Transcript of Oral Argument, *Blakely v. Washington*, 542 U.S. 296 (2004) (No. 02-1632).

[20] *See, e.g.*, *Blakely*, 542 U.S. at 429–41 (Breyer, J., dissenting); *Apprendi*, 530 U.S. at 523–54 (O'Connor, J., dissenting).

[21] *See generally The State of* Blakely *in the States*, FED. SENT'G REP. Vol. 18, No. 1 (2005); Stephanos Bibas, Apprendi *in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J. CRIM. L. & CRIMINOLOGY 1 (2003).

[22] *See* Steven L. Chanenson & Daniel F. Wilhelm, *Evolution and Denial: State Sentencing After* Blakely *and* Booker, 18 FED. SENT'G REP. 1 (2005) (sorting State jurisdictions after *Blakely* into ones of "evolution" or "denial").

[23] *See id.* at 3 (discussing state rulings in California, New Mexico, and Tennessee).

[24] *See* People v. Black, 113 P.3d 534 (Cal. 2005).

an aggravating factor by a preponderance of the evidence. At first blush, the California Supreme Court's preservation of this system seems to disregard *Blakely*'s declaration that the jury must find statutory-maximum-enhancing facts. *Cunningham* could be seen as little more than an opportunity for the Supreme Court to indicate that "[it] meant what [it] said and [it] said what [it] meant"[25] in *Blakely*.

But Professors Douglas Berman and Stephanos Bibas highlight in their article that much more is at stake in *Cunningham*. Writing directly to the Supreme Court, Berman and Bibas catalogue competing principles in play within sentencing systems and they spotlight the broader importance of how the Court approaches *Cunningham*. Berman and Bibas express concern that the Supreme Court's recent formalistic and rigid approach to the Sixth Amendment could "strangl[e] democratic innovation and can disserve procedural justice and defendants' interests."[26] They urge the Court to bring greater flexibility and nuance to its sentencing jurisprudence because states, "which sentence most defendants, serve as laboratories of democratic experimentation and need room to try novel sentencing arrangements."[27]

Yet, *Cunningham* may be another state sentencing case in which a federal subtext looms large. California is defending its sentencing system by arguing that it operates as a state equivalent to the federal sentencing system after *Booker*. Consequently, it will be hard for the Justices to avoid pondering the federal implications of its work in *Cunningham*. Indeed, if the Supreme Court delivers a broad ruling, it may provide a glimpse into the application of advisory guidelines and reasonableness review in the federal system after *Booker*.[28] The Court could also tip its hand in *Cunningham* as to what other issues stemming from the *Apprendi-Blakely-Booker* line are likely to capture its imagination and space on its docket.[29]

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[25] DR. SEUSS, HORTON HATCHES THE EGG 16 (1940).

[26] Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 38 (2006).

[27] *Id.*

[28] *See, e.g.*, Michael M. O'Hear, Cunningham*: Why Federal Practitioners and Policy Makers Should Pay Attention*, 18 FED. SENT'G REP. 260 (2006).

[29] The Supreme Court has also agreed to hear argument this November addressing the retroactivity of *Blakely* to state criminal sentences in *Burton v. Waddington*. It is interesting to note that the Petitioner in *Burton* is stressing the importance of the state, opposed to federal, character of the sentence in that case. Brief for the Petitioner, Burton v. Waddington, 22–23, No. 05-9222 (2006). One is left to wonder whether the strong state sentencing focus of *Burton* is part of the reason that case has not gotten much attention. *See, e.g.*, Douglas A. Berman, *Press Coverage of Cert Grant in* Burton, Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2006/06/press_coverage_.html (noting that the mainstream media "has just a little coverage" of the *Burton* cert. grant).

III. SEEING THE REFORM FOREST AMONG THE DOCTRINAL TREES

The doctrinal uncertainty and confusion produced by *Blakely* and *Booker* makes it dangerously easy for jurisdictions to be concerned primarily with technical problems in particular sentencing laws rather than with broader reform issues. But the Supreme Court's coming work in *Cunningham*, like *Blakely* before it, should motivate state legislatures, courts, and sentencing commissions to re-examine and improve their sentencing systems.[30] The two other contributions to this symposium spotlight the reform stories that should not get lost in any debate about the particularities and peculiarities of the Supreme Court's modern sentencing jurisprudence.

Whatever one thinks about the Supreme Court's modern Sixth Amendment jurisprudence, the Court's efforts merit praise for engendering a robust national dialogue on sentencing law, policy, procedures, and practices. From a practical perspective, such a dialogue is long overdue because federal and state prison populations have swelled in the last two decades, reaching record-highs nearly every year.[31] Is this the result legislatures desired? Is it a wise policy? A conversation at this level is vital. From a conceptual perspective, a national sentencing dialogue is also long overdue because the theories, structures, and procedures for modern sentencing decision-making have not been seriously rethought following the modern rejection of a now seemingly antiquated rehabilitative sentencing philosophy.[32] Particularly at the macro level, our sentencing structures should flow from our punishment purposes. The critical links between sentencing purposes and means also merits serious discussion. States should capitalize on the renewed attention that *Cunningham* brings to muster the political support to examine thoroughly existing sentencing systems and to fix what needs fixing.

Pragmatism, practicalities and politics drive many state sentencing reforms.[33] State policy makers want to follow the Constitution, of course, but many justifiably recognize that the Constitution sets only relatively wide outer boundaries of permissible sentencing structures and laws. Policy makers are often less concerned with constitutional restrictions, especially as they juggle competing goals such as crime control, fiscal limitations, uniformity, and individualization, and confront the long-standing struggle for criminal justice hegemony between the legislature and the judiciary. Professor Michael Tonry has elegantly described one aspect of this perpetual balancing act:

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[30] Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 379 (2005).

[31] *See* PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 1 (May 2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf.

[32] *See* Berman, *supra* note 4, at 2–3 .

[33] *See*, e.g., Berman & Bibas, *supra* note 26 at 62; Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to* Blakely v. Washington, 18 FED. SENT'G REP. 7 (2005).

> Like all calls for just the right amount of anything, not too much and not too little, a proposal for sentencing standards that are constraining enough to assure that like cases are treated alike and flexible enough to assure that different cases are treated differently is a counsel of unattainable perfection. Nonetheless, that is probably what most people would want to see in a just system of sentencing . . . .[34]

In addition to recognizing that sentencing perfection is unattainable, states can and should appreciate that certain structures for developing sentencing law and policy have proven particularly effective in achieving sentencing improvements. Specifically, as the American Law Institute is stressing in its on-going revision of the sentencing part of the Model Penal Code,[35] a vigorous, representative and well-funded sentencing commission offers the best hope for developing and refining a fair and responsive sentencing system.[36]

Creating and empowering a sentencing commission closes few, if any, substantive options for state sentencing systems. The resulting sentences urged by a sentencing commission can be comparatively high and tightly controlled by a central authority. In contrast, sentences can also be set relatively low and sentencing decisions can be left comparatively unencumbered by binding guidance. A pro-commission view is a process-oriented recommendation with few, if any, inherent substantive sentencing consequences.

As Professor Richard Frase's article highlights, a strong commission can assist a state in navigating the turbulent constitutional waters of sentencing in a way that makes sense for a particular locality.[37] The Minnesota Sentencing Commission played a crucial role in guiding its criminal justice system through the shoals of the post-*Blakely* world. It has helped Minnesota maintain and improve its presumptive sentencing guidelines scheme to the general satisfaction of the relevant decision-makers.[38]

States often face more pressing, functional concerns than the occasional constitutional question. One persistent and recurring issue is money. Unlike their federal counterparts, state lawmakers are often very attuned to prison costs. A sentencing commission can allow lawmakers to predict and, to some extent, control corrections costs. In certain jurisdictions, this fiscal role may be a powerful reason why commissions survive politically and earn their seat at the

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[34] MICHAEL TONRY, SENTENCING MATTERS 185–86 (1996).

[35] *See* AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING REPORT (2003).

[36] Chanenson & Wilhelm, *supra* note 22, at 4 (asserting that while not perfect, "accountable yet independent-minded sentencing commissions are the best frontline policy-making tool that any jurisdiction can employ").

[37] Richard S. Frase, Blakely *in Minnesota: Two Years Out: Guidelines Sentencing is Alive and Well*, 4 OHIO ST. J. CRIM. L. 73 (2006); s*ee also* Chanenson & Wilhelm, *supra* note 22, at 1.

[38] Frase, *supra* note 37 at 79.

policy-making table.[39] Other commissions rely mainly on the strength of a powerful supporter, frequently a respected member of the judiciary. However it earns a role in the policy process, the leadership of a sentencing commission can help innovative ideas germinate and then nurture them as they take root.

As spotlighted by Chief Justice Michael Wolf's article, the Missouri Sentencing Advisory Commission offers a shining example of commission leadership tailored to the needs and environment of its jurisdiction. In Missouri's "fully voluntary"[40] sentencing system, the "Commission has embarked on an information-based system to make its wholly discretionary system effective."[41] The initial results of this enormous undertaking have been encouraging. In other states, the presence and actions of the commission have furthered the stability of existing state structured sentencing regimes. Professor Frase's article showcases just such an experience in Minnesota. The resulting systems in Missouri and Minnesota are poles apart, but the central role of the sentencing commission stands out as a unifying feature. Both systems showcase that sentencing commissions bring together experts who can be responsive to the distinctive needs of their jurisdictions while pursuing a level of fairness and rationality that can be particularly elusive in the legislative heat of the moment.[42]

IV. CONCLUSION

This is an exciting time for state sentencing. With yet another state sentencing case before the Supreme Court, state systems might start to get some of the recognition and academic attention they so richly deserve. We hope this Symposium does its small part. There is a reason many commentators refer to Justice Brandeis' description of states as laboratories of democracy;[43] it is often true. In no area of law is that expression more true, more current, and more

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[39] *See* Tom Lininger, *Oregon's Response to* Blakely, 18 FED. SENT'G. REP. 29, 30 (2005) (noting that "the Oregon Legislature had a strong stake in predictable sentencing: accurate forecasting of prison populations is necessary in order to budget money for prison beds."); *cf.* Chanenson & Wilhelm, *supra* note 22, at 4 ("Sentencing commissions can and should demonstrate not only that they deserve a seat at the table but also that the others at the table need them to be there.").

[40] *See* Chanenson, *supra* note 30, at 409 (discussing definition).

[41] Michael A. Wolff, *Missouri's Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 95 (2006); s*ee also id.* at 99 ("By effective, I mean that the sentence is not counterproductive and does not encourage the offender to re-offend, but improves the prospects for avoiding future criminal behavior by the offender.").

[42] Indeed, a few months after the Supreme Court granted review in *Cunningham*, California's Little Hoover Commission started public hearings on sentencing reform with several noted sentencing authorities from across the country advocating in favor of commissions. *See* http://www.lhc.ca.gov/lhcdir/sentencing.html. It would be a fitting testament to state sentencing innovation and resilience if California could have a commission in place by the end of the Supreme Court's term next summer regardless of the result in *Cunningham*.

[43] *See, e.g.*, Chanenson & Wilhelm, *supra* note 22, at 1 & n.1.

relevant than sentencing. The scientists at the heart of those laboratories are sentencing commissions. They are each working with their own unique combination of elements, but they are all striving for real justice.