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Evolution and Denial: State Sentencing after Blakely and Booker

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Abstract

Justice Louis Brandeis famously described the states as laboratories where individual jurisdictions can experiment with various legal strategies. In the wake of Blakley v. Washington, and United States v. Booker those laboratories have been working overtime. Since June 2004, both state legislatures and state courts have grappled with the significance of the United States Supreme Court's treatment of the Sixth Amendment in sentencing. It is unsurprising, given the extraordinary significance and potential reach of Blakely and Booker, that this Herculean task has produced divergent results.

Although there are many potential ways to sort those results, for the purposes of these observations, we have divided them into states of "evolution" and states of "denial." Evolution states have read Blakely and Booker fairly, accepted that Blakely controls what is permissible within their sentencing regimes, and responded in ways that best fit their circumstances. Still, there are differences in how these jurisdictions have evolved. Many of the states responding to Blakely (particularly those with active sentencing commissions) have retained their more presumptive sentencing systems. Others have followed Booker toward a more advisory system of guiding judicial discretion at sentencing. In contrast, denial states, acting through their state supreme courts, have found ways to repudiate that Blakely even applies to their systems, despite compelling evidence to the contrary. California is probably the most notable of the denial states and, consistent with our views but after these observations went to press, it attracted the Supreme Court's attention in Cunningham v. California.

We conclude with a look toward the future and a plea for states to strengthen their sentencing commissions.

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EDITORS' OBSERVATIONS

Evolution and Denial: State Sentencing after *Blakely* and *Booker*

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Justice Louis Brandeis famously described the states as laboratories[1] where individual jurisdictions can experiment with various legal strategies. In the wake of *Blakley v. Washington*[2] and *United States v. Booker*,[3] those laboratories have been working overtime. Since June 2004, both state legislatures and state courts have grappled with the significance of the United States Supreme Court's treatment of the Sixth Amendment in sentencing. It is unsurprising, given the extraordinary significance and potential reach of *Blakely* and *Booker*,[4] that this Herculean task has produced divergent results.

Although there are many potential ways to sort those results, for the purposes of these observations, we have divided them into states of "evolution" and states of "denial." Evolution states have read *Blakely* and *Booker* fairly, accepted that *Blakely* controls what is permissible within their sentencing regimes, and responded in ways that best fit their circumstances. Still, there are differences in how these jurisdictions have evolved. Many of the states responding to *Blakely* (particularly those with active sentencing commissions) have retained their more presumptive sentencing systems.[5] Others have followed *Booker* toward a more advisory system of guiding judicial discretion at sentencing. In contrast, denial states, acting through their state supreme courts, have found ways to repudiate that *Blakely* even applies to their systems, despite compelling evidence to the contrary. While often roughly tracking this evolution and denial dichotomy, the articles and materials in this Issue provide both a general overview and a thorough study of the individual experiences of eight states.

I. Facing the Challenge

Don Stemen and Daniel F. Wilhelm, both from the Vera Institute of Justice, provide a national perspective and confront Justice O'Connor's dire prediction that *Blakely* would be the end of the experiment in structured sentencing. As they note, a "funny thing has happened . . . on sentencing reform's trip to the dustbin of history. . . . [*Blakely* has not] hastened the eradication of sentencing innovations."[6] In fact, a number of jurisdictions have worked diligently to achieve continuity in their overall philosophies of sentencing, although *Blakely* has certainly required changes. Indeed, many states have recognized that the post-*Blakely* and post-*Booker* world requires modifications to their punishment schemes. The sentencing systems in these jurisdictions are evolving to meet the changed constitutional landscape.

Dale G. Parent and Professor Richard S. Frase, two giants of the modern sentencing reform movement, describe in their article the two basic responses of these states as reflecting either "compliance" or "avoidance."[7] Although other responses to *Blakely* exist,[8] the evolution states seem to have sought compliance primarily by adding extended jury fact-finding to presumptive sentencing systems (sometimes called *Blakely*-ization) and appear to have pursued avoidance mainly through a system of more advisory sentencing guidelines (sometimes called *Booker*-ization).

Each individual state's story is different and eight of them are well-catalogued by the various authors in this Issue. Yet Stemen and Wilhelm point to some larger trends of "practical balancing."[9] In states like Minnesota, North Carolina, Washington, and Oregon, where judges historically had

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imposed comparatively few sentences above the presumptive range, it is perhaps not a shock that *Blakely*-ization is the dominant result. Likewise, in states like Tennessee and Indiana, where judges appear to have imposed a majority of sentences above the presumptive range in the past, the resulting *Booker*-ization may have been expected.[10] This is, of course, just one way to analyze a policy choice and may itself be related to other factors, most notably the existence and vigor of the state's sentencing commission.

Concerning Minnesota, the state courts have forthrightly accepted *Blakely* and applied it to its system of presumptive sentencing guidelines. Parent and Frase describe how Minnesota has responded by following a compliance approach primarily, but also by engaging in some avoidance techniques, including widening the presumptive sentencing range. They posit that Minnesota's resilience in the face of the *Blakely* onslaught stems in large part from four crucial decisions made years ago in the early days of the state's guidelines. "Those decisions were (1) to view guideline development as a policy-making process, (2) to use conviction offenses rather than 'real' offenses to determine presumptive sentences, (3) to define a narrow range of departure criteria, and (4) to promote a low judicial departure rate from the guidelines."[11]

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Professor Ronald Wright, the leading academic authority on North Carolina sentencing, details the debate between the "centralizers" and the trial court actors in the Tar Heel State.[12] Again, there was no real question as to whether *Blakely* applied. The discussion turned quickly to the nature of the response, which ultimately embraced a compliance approach. Wright analyzes the significance of the sentencing commission and other centralizing actors. He concludes that in "states like North Carolina with an active group of players who advocate for predictability and resource planning, an expanded role for juries at sentencing is likely to result."[13]

Turning to *Blakely*'s epicenter, Washington obviously understood that its sentencing system needed refurbishing. Lenell Nussbaum, a member of the Washington Sentencing Guidelines Commission, provides an insider's account of how that state mainly pursued a compliance response. Among other important provisions, Washington chose to make its list of factors that can support an exceptional (more severe) sentence exclusive.[14] (A copy of that legislation appears at the end of this Issue.[15]) Reflecting the importance of the sentencing commission to the ongoing evolution of Washington's sentencing policy, the legislature directed the Commission to keep working on these issues."

Professor Tom Lininger, the Chair of the Oregon Criminal Justice Commission, supplies another firsthand account of the process that resulted in Oregon adopting a mainly compliance response to *Blakely*. He notes the important role that Oregon's governor, a former prosecutor and a former judge, played in reaching this resolution and, as in North Carolina, the value of presumptive guidelines to resource planning.[16] "While some judges may have longed for a return to the days of unfettered judicial discretion, 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."[17]

Recent sentencing developments in New Jersey are reminiscent of the federal experience. Bennett Barlyn, Executive Director of the New Jersey Commission to Review Criminal Sentencing, describes how a unanimous New Jersey Supreme Court provided the Garden State with an avoidance response to *Blakely*. After rejecting the views of the denial states that *Blakely* did not apply (*see* below), "the Court expressed its confidence that by excising the presumptive-term provision from the Code and thereby preserving the remainder of the sentencing provisions in compliance with *Blakely*, uniformity would in no way be sacrificed or otherwise diminished."[18] Barlyn then questions the wisdom of the court's preference for an avoidance, instead of a compliance, remedy—particularly given its stated desire for uniformity. "After repeatedly paying fealty to the assumed intent of the Legislature in crafting its remedy, it is odd that the Court perceived no prospective role the legislative branch or a jury could play in addressing the conspicuous crater left in the Code because of its decision."[19]

II. Judging with Heads in the Sand

Several states have taken a dramatically different tack. Despite a belief by many commentators that the sentencing systems in these states are constitutionally indistinguishable from the one at issue in *Blakely*,[20] the courts in these denial states[21] have somehow concluded that *Blakely* does not apply. Accordingly, at least for now, there is no judicial pressure on these states to modify their systems.

Tennessee straddles the line between an evolution state and a denial state. As David Raybin, a former member of the now-defunct Tennessee Sentencing Commission who served as an advisor to the Governor's post-*Blakely* task force, recounts, nearly everyone except a bare majority of the Tennessee

Supreme Court seems to understand that *Blakely* invalidated key aspects of Tennessee's sentencing system. The Tennessee Supreme Court apparently concluded that *Booker* somehow virtually overruled *Blakely*.[22] Raybin describes the court as believing that "a presumptive sentencing scheme may survive constitutional scrutiny because the enhancements are not as 'mandatory' as were the point increases required under the old federal system examined in *Booker*."[23] Both the defendant and the Tennessee attorney general asked the court to reconsider its views to no avail. That case is now pending certiorari review in the United States Supreme Court. Despite its supreme court's denial that *Blakely* presented a problem, the Tennessee Legislature pressed on and adopted an avoidance response. (A copy of that legislation appears at the end of this Issue.[24]) Other denial states have not been as proactive.

In California, which notably lacks a state sentencing commission, the state supreme court similarly denied that *Blakely* applied to its sentencing system, and no political actors have moved to blunt the impact of that decision. Jonathan Soglin and J. Bradley O'Connell, leading sentencing advocates in California and Staff Attorneys for the First District Appellate Project, report that the California Supreme Court's decision came in the face of an "'emerging majority view' among the California Courts of Appeal . . . that the California scheme suffered from the same constitutional defects as the Washington regime reviewed in *Blakely*."[25] The California Supreme Court read *Booker* not only as a clarification of *Blakely* but also as one that focused on the amount of judicial discretion instead of the need for factual findings. Soglin and O'Connell observe that "perhaps [the] most illuminating"[26] aspect of the court's decision is its conclusion that the United States Supreme Court's "'precedents do not draw a bright line.'"[27] Now, "the state courts of appeal are summarily rejecting *Blakely* claims. And in the trial courts, prosecutors and judges are reverting to pre-*Blakely* procedures."[28] As in Tennessee, Soglin and O'Connell note that the next battle may well be waged in federal district court on habeas review.

"There are many open issues in the wake of *Blakely* and *Booker*, including issues that should capture the attention of the United States Supreme Court."

Finally, New Mexico presents a case study in how a state supreme court ruling can stop legislative sentencing reform in its tracks. Tony Ortiz, the Deputy Director of the New Mexico Sentencing Commission, details how a legislative fix (largely pursuing a compliance approach) worked its way through the New Mexico Commission. Believing that *Blakely* applied to New Mexico, the Commission sought to have post-*Blakely* legislation adopted. Although the legislation was not passed in the 2005 session because of competing legislative demands, the Commission asked the governor to expand the scope of the otherwise subject-matter-limited 2006 legislative session to include the *Blakely* fix legislation. Then, the New Mexico Supreme Court joined the denial crowd; it determined that *Blakely* (as seen after *Booker*) did not apply. (A copy of that opinion is reproduced at the end of the Ortiz article.) The Commission promptly withdrew its 2006 legislative request. As Ortiz notes, "At this point in time, there is no 'constitutional' urgency for the contemplated amendments to the core New Mexico sentencing provisions. . . ."[29]

III. What Is Present May Be Prologue

Predicting the future—particularly in today's sentencing environment—is a risky venture at best. Yet, it seems likely that the current multifaceted development of sentencing in the states may continue. We have painted a picture of "evolution" and "denial." The evolution states have taken a fair reading of *Blakely* and, in the lexicon of Parent and Frase, largely pursued paths that seek either compliance with or avoidance of the pro-jury *spirit* of *Blakely*. Regardless, these states have squarely addressed the *holding* of *Blakely*, which (oddly enough) can reasonably accommodate both compliance and avoidance. We agree with our authors that the denial states—acting through their respective state supreme courts—have pretended that *Blakely* does not say what it plainly says irrespective of its putative spirit. These courts have unfairly read *Booker* as almost overruling *Blakely*.

So what may the future bring? The fate of the denial states may be easier to predict so we start there first. Tennessee, California, and New Mexico are likely to cling to their strained interpretations for as long as possible in an effort to insulate their systems from *Blakely*. It will probably fall to the United States Supreme Court to extract these state courts from their ostrich-like positions. If the Supreme Court does not take up the challenge or, to our surprise, agrees with the deniers' views, there is little hope for rapid systemic change. If the Supreme Court eventually does inform these states that they are in error, at least California and New Mexico[30] will have to start from scratch as if it was June 2004 and the *Blakely* ink was not yet dry.[31] The retroactivity issues will be massive and perhaps will push these jurisdictions toward a more advisory (or avoidance-oriented) remedy in order to more easily facilitate

resentencing. However, these states might also have the benefit of the further refinement of the *Blakely* and *Booker* line of cases to guide their choice—an asset not available to the evolution states.

Indeed, the prospect for the evolution states in the coming months and years could be a bit cloudy. These jurisdictions will probably continue to encourage their sentencing systems to evolve by interpreting the *Blakely* and *Booker* progeny reasonably; they have already staked out their likely paths of either compliance or avoidance. Whether they stay on those paths depends on the costs. The avoidance jurisdictions that opted for more advisory systems are unlikely to revert to a presumptive approach unless the possible resulting sentencing disparity or economic distress resulting from potential increases in prison populations becomes a political liability. The compliance jurisdictions that opted to continue with presumptive guidelines are unlikely to move to a more advisory scheme unless the cost of that choice becomes unbearable, perhaps in terms of perceived inappropriately low sentences for heinous offenders or an expensive push toward higher sentences overall to address those heinous few. Everything else being equal, however, momentum—or perhaps, paradoxically, inertia—may continue to propel these states along their already chosen path.

"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."

But how will these evolution jurisdictions deal with the legal questions that remain unanswered? There are many open issues in the wake of *Blakely* and *Booker*, including issues that should capture the attention of the United States Supreme Court.[32] For example, will the "prior conviction" exception survive at the level of the federal constitution?[33] Will *Blakely* apply to determinations of consecutive versus concurrent sentences? Perhaps most significantly, will *Blakely* apply to such things as judicial juvenile transfer procedures, restitution, or other non-prison sentences? The resolution of these issues can easily alter an evolution state's cost-benefit calculation. No one knows when the Supreme Court will resolve these issues, but it seems inevitable that it will eventually deal with many of them. Compared to the 2004–2005, rapid-fire *Blakely*/*Booker* decisions, the Court may be taking a breather from redrawing the American sentencing map, but it cannot avoid these vital issues forever.

Now is the time for states to strengthen their mechanisms to deal with the impending shifts in the sentencing seas. We continue to believe that accountable yet independent-minded sentencing commissions are the best frontline policy-making tool that any jurisdiction can employ.[34] Sentencing commissions are far from perfect,[35] but they can be important and effective when they are adequately resourced, adept at developing and analyzing the objective data that can depoliticize and most rationally inform sentencing policy, and draw together essential criminal justice actors for debate and consensus building.[36] Moreover, this is a unique opportunity for them to hone their skills. 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. With continued attention and hard work, sentencing commissions can live up to their noblest ideals. And our sentencing systems will be the better for it.

Notes

* Professor Chanenson is also a member of the Pennsylvania Commission on Sentencing. The views expressed here are not necessarily those of the Commission, its other members, or staff.

1 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."); *see also* 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, 1391 (2005) (discussing extent and limitations of laboratory metaphor in sentencing context).

2 124 S.Ct. 2531 (2004).

3 125 S.Ct. 738 (2005). We assume a basic understanding of *Blakely* and *Booker*. For those readers needing a primer on the topic, several of the articles that follow oblige. *See, e.g.*, Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to* Blakely v. Washington, 18 Fed. Sent. Rep. 7 (2005) (in this Issue).

4 *See, e.g.*, Douglas A. Berman, *Supreme Court Cleanup in Aisle 4*, Slate (July 16, 2004), *available at* http://www.slate.com/id/2104014 ("*Blakely* is the biggest criminal decision not just of this past term, not just of this decade, not just of the Rehnquist Court, but perhaps in the history of the Supreme Court.").

5 We recognize that the terms "presumptive" and "advisory" are often "crude labels" that at best approximate the level of discretion afforded the sentencing judge and that "there are an infinite number of stops between a purely advisory approach and a completely mandatory framework." Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 Stan. L. Rev. 155, 157-58 (2005). We use these terms loosely in this Article because our discussion focuses on macro-level trends.

Of course, those jurisdictions that had advisory sentencing guidelines before *Blakely* had no pressing reason to alter their systems. *See United States v. Booker*, 125 S.Ct. 738 (2005).

[6] Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to* Blakely v. Washington, 18 FED. SENT. REP. 7, 7 (2005) (in this Issue).

[7] We adopt these terms from Parent and Frase, *see* Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather* Blakely*'s Blast*, 18 FED. SENT. REP. 12, 16 & n.40 (2005) (in this Issue), who themselves modified them from Professor Kevin Reitz. *See* Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross Purposes*, 105 COLUM. L. REV. 1082, 1108-18 (2005) (identifying *Blakely* "approach" and "avoidance" methods). These are useful terms but it is important to recognize that they flow from a reading of *Blakely* that may reflect a certain predisposition in favor of jury fact-finding that is not required by the language of *Blakely* itself. For instance, despite the *Blakely* majority's impassioned defense of the jury, it seemed to allow the old unguided sentencing systems in which the jury did nothing more than authorize the criminal code's maximum punishment and permit its imposition pursuant to the unfettered discretion of the sentencing judge. *See, e.g.*, *Blakely*, 124 S.Ct. at 2540-41; Jon Wool & Don Stemen, *Aggravated Sentencing:* Blakely v. Washington *Practical Implications for State Sentencing Systems*, 17 FED. SENT. REP. 60, 64 (2004) (noting that "the *Blakely* decision allows for some seemingly perverse effects"). For example, Judge Easterbrook, in his dissent to the Seventh Circuit's *Booker* opinion, approved of open-ended, unguided sentencing and concluded that the Supreme Court "saw this not as an 'evasion' but as a natural application of the Constitution." *United States v. Booker*, 375 F.3d 508, 519 (7th Cir. 2004) (Easterbrook, J., dissenting).

[8] *See, e.g.*, Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L. J. 377, 380 (2005) (discussing options and proposing the concept of "'Indeterminate Structured Sentencing' ('ISS'), an indeterminate sentencing system (that is, a system that includes discretionary parole release authority) in which a Super Commission promulgates two sets of coordinated guidelines that constrain both sentencing and release powers").

[9] Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to* Blakely v. Washington, 18 FED. SENT. REP. 7 (2005) (in this Issue).

[10] *Id.* at 10.

[11] Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather* Blakely*'s Blast*, 18 FED. SENT. REP. 12, 13 (2005) (in this Issue).

[12] Ronald F. Wright, Blakely *and the Centralizers in North Carolina*, 18 FED. SENT. REP. 19, 20-22 (2005) (in this Issue).

[13] *Id*. at 22.

[14] Lenell Nussbaum, *Sentencing in Washington after* Blakely v. Washington, 18 FED. SENT. REP. 23, 25 (2005) (in this Issue). *See also* Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L. J. 377, 426 (2005) (discussing post-*Blakely* concern about viability of nonexclusive factors).

[15] *See Washington Senate Bill 5477*, 18 FED. SENT. REP. 62 (2005) (in this Issue) (presenting Washington statutory language).

[16] Tom Lininger, *Oregon's Response to* Blakely, 18 FED. SENT. REP. 29, 30 & n. 23 (2005) (in this Issue).

[17] *Id*. at 30.

[18] Bennett Barlyn, *Sentencing Law Under the Knife: Judicial Surgery, the New Jersey Supreme Court and* State v. Natale, 18 FED. SENT. REP. 35, 38 (2005) (in this Issue).

[19] *Id*. at 39.

[20] *See* Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to* Blakely v. Washington, 18 FED. SENT. REP. 7, 7 (2005) (in this Issue) (listing Tennessee, California, and New Mexico as having sentencing systems similar to Washington's).

[21] One of the authors has strongly argued that two states, Pennsylvania and Michigan, are not denial states, despite their conclusion that they have dodged the *Blakely* bullet, because the indeterminate nature of their sentencing systems and the fact that their guidelines only constrain the minimum sentence imposed place them truly outside *Blakely*'s grasp. *See, e.g.*, Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L. J. 377, 435-46 (2005). *See also People v. Claypool*, 684 N.W.2d 278, 286 n.14 (Mich. 2004); *Commonwealth v. Smith*, 863 A.2d 1172, 1178–79 (Pa. Super. Ct. 2004). For a discussion, however, of why such systems might be implicated by *Blakley*, see Jon Wool & Don Stemen, *Aggravated Sentencing:* Blakely v. Washington *Practical Implications for State Sentencing Systems,* 17 FED. SENT. REP. 60, 63-64 (2004).

[22] David Louis Raybin, *The Anticipated Resolution of the* Blakely *Split of Authority in the States: Will the United States Supreme Court Dance the Tennessee Waltz*?, 18 FED. SENT. REP. 41 (2005) (in this Issue).

[23] *Id*.

[24] *See Tennessee Senate Bill 2249*, 18 FED. SENT. REP. 72 (2005) (presenting Tennessee statutory language) (in this Issue).

[25] Jonathan D. Soglin & J. Bradley O'Connell, Blakely, Booker, & Black: *Beyond the Bright Line*, 18 FED. SENT. REP. 46, 46 (2005) (in this Issue) (internal citation omitted).

[26] *Id*. at 47.

[27] *Id*. (quoting *People v. Black*, 29 Cal.Rptr.3d 740, 755 (Cal. 2005)).

[28] *Id*.

[29] Tony Ortiz, *The New Mexico Sentencing Commission's Legislative Proposal Subsequent to* Blakely v. Washington, 18 FED. SENT. REP. 54, 55 (2005) (in this Issue).

[30] Tennessee will be spared this carnage because of the prospective legislative move to an advisory guidelines system. *See Tennessee Senate Bill 2249*, 18 FED. SENT. REP. 72 (2005) (in this Issue) (presenting Tennessee statutory language).

[31] Colorado is in a similar situation despite the fact that its supreme court properly interpreted *Blakely* to apply to the Centennial State. *See, e.g.*, Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative*

Responses to Blakely v. Washington, 18 FED. SENT. REP. 7, 9 (2005) (discussing that "neither of the competing bills in the state came to a vote in the general assembly" and that because "the Colorado decision specified no immediate remedy, the state is left without a solution to their *Blakely* problem") (in this Issue).

[32] *See, e.g.*, Douglas A. Berman, *The Waiting Is the Hardest Part . . ., Sentencing Law and Policy*, at http://sentencing.typepad.com/sentencing_law_and_policy/2005/05/the_waiting_in_.html (May 4, 2005) (identifying several "*Blakely/Booker* issues that I think most urgently merit the Supreme Court's attention"); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1093-94 (2005) (discussing unresolved issues); Douglas A. Berman, *Supreme Court Cleanup in Aisle 4*, Slate (July 16, 2004), *available at* http://www.slate.com/id/2104014 ("It is surely going to take decades to sort out what exactly *Blakely* means, and there are going to be a lot of messy periods along the way.").

[33] Tom Lininger notes that it has already fallen with respect to certain prior juvenile adjudications in Oregon. Tom Lininger, *Oregon's Response to* Blakely, 18 FED. SENT. REP. 29, 32 (2005) (citing *State v. Harris*, 339 Or. 157 (2005)) (in this Issue).

[34] *Cf.* Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to* Blakely v. Washington, 18 FED. SENT. REP. 7. 10 (2005) ("With dedicated staff and proficiency in evaluating the impact of case law and legislation, sentencing commissions were well-suited to determine quickly the impact of *Blakely* on states' criminal justice systems. Indeed, states' responses to *Blakely* may be partially identified by the recommendations put forth by these commissions.") (in this Issue); Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather* Blakely*'s Blast*, 18 FED. SENT. REP. 12, 12 (2005) ("In retrospect, *Blakely*'s modest impact in Minnesota resulted from both the context within which the Commission developed its guidelines and key policy decisions it made in 1978 and 1979.") (in this Issue).

[35] *See, e.g.*, 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, 1357 (2005) ("problems generated by limited availability of data are compounded by the scarcity of efforts to link or compare data and sentencing experiences across states. While state commissions have developed good working relationships and there is a national association of state sentencing commissions, there is no indication that, either on their own or as a group, the state sentencing commissions have tried to develop common research projects."); *Id.* at 1351 ("Sentencing reform everywhere can be improved if state actors make sentencing information and sentencing data publicly available and easily accessible and speak to other systems.").

[36] *See, e.g.*, Michael Tonry, SENTENCING MATTERS 59-62 (1996).