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Sentencing: Learning From, and Worrying About, the States

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INTRODUCTION

SENTENCING: LEARNING FROM, AND WORRYING ABOUT, THE STATES

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The *Columbia Law Review*'s Symposium on sentencing, which took place less than two weeks after the Supreme Court's dramatic semi-invalidation of the federal sentencing guidelines, was certainly timely. Nevertheless, it is critical to understanding the Symposium's purposes to realize that it was not planned in response to *United States v. Booker*,[1] or even to *Blakely v. Washington*.[2] The Symposium was conceived before either case was decided, as a very conscious attempt to steer the discussion of sentencing away from Congress and the federal guidelines and toward states' experiences. The vast majority of criminals are sentenced in state systems, and those systems are remarkably diverse. So far, the federal guidelines have influenced state sentencing regimes mostly as a negative model and a distraction. Perhaps it is time for Congress to look to what has been happening in the states, and for academics to focus more of their attention on the specifics of state sentencing reforms.

The late twentieth century saw wholesale changes in sentencing philosophy and practice. The conventional wisdom about the primary purpose of sentencing shifted away from rehabilitation as a dominant philosophy and toward retribution or "just deserts." The method of sentencing shifted away from broad judicial discretion to be exercised on a case-by-case basis and toward narrower authority constrained by rules laid down by legislatures or sentencing commissions. The form of sentences changed from indeterminate terms of imprisonment whose actual length would be determined by parole boards long after sentence was passed, to fixed or determinate sentences, with parole often abolished. The length of sentences increased, as the public sought greater security and less mercy, perhaps even less justice. Thus, the law of sentencing changed, from a legal regime that was famously characterized by Marvin Frankel in

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1. 125 S. Ct. 738 (2005).

2. 124 S. Ct. 2531 (2004).

the 1970s as literally lawless,[3] to one in which, in many states and especially in the federal jurisdiction, there is an extraordinarily rich and complicated body of substantive and procedural sentencing law.

The legal academy has been slow in responding to these changes. Since there was, for most of the twentieth century, nothing much that could be called sentencing "law," there were few courses and little academic writing about sentencing practice. Sentencing courses are now springing up,[4] but sentencing is still not covered more than superficially in most first year criminal law or criminal procedure courses or casebooks. Very importantly for this Symposium, both journalistic and legal academic writing have focused heavily on Congress and its Sentencing Reform Act of 1984,[5] which created a system of guideline sentencing in the federal courts, despite the fact that the federal system accounts for only around six percent of felonies charged annually in the United States (even after decades of increase in the size and extent of the federal law enforcement mission).[6] That's a big system compared to Wyoming or Alaska, but it's not so big compared to California or Texas. Compared to the states in the aggregate, the federal jurisdiction is a minuscule part of law enforcement in this country. Furthermore, given its special emphasis on white collar crime, narcotics, and immigration, rather than on street crime, federal criminal law plays a relatively small part in securing the safety that the public craves—a craving that drove much of the sentencing reform of the past twenty-five years.

Professor Marc L. Miller of Emory Law School, who has done so much to direct the attention of criminal procedure scholars to state law,[7] documents and questions the extent to which academics concerned with sentencing have focused on federal law.[8] As Professor Miller writes, this

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3. Marvin E. Frankel, Criminal Sentences: Law Without Order 5–8 (1973) (characterizing discretion of sentencing judges as "terrifying and intolerable," and therefore seemingly "subject to no law at all").

4. Sentencing casebooks are also a recent development. See, e.g., Nora V. Demleitner, Douglas A. Berman, Marc L. Miller, & Ronald F. Wright, Sentencing Law and Policy: Cases, Statutes and Guidelines (2004); Nicholas N. Kittrie et al., Sentencing, Sanctions, and Corrections: Federal and State Law, Policy, and Practice (2d ed. 2002).

5. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 USC § 3551–3742 (2004)).

6. See Matthew R. Durose & Patrick A. Langan, U.S. Dep't of Justice, NCJ 206916, Felony Sentences in State Courts, 2002, at 1 (2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf (on file with the *Columbia Law Review*). Because federal sentences tend to be longer, the federal percentage of incarcerated prisoners is somewhat higher.

7. Professor Miller is the co-editor, along with another of our Symposium participants, Professor Ronald Wright, of a stimulating casebook that redirects the focus of criminal procedure away from the minimum standards set by federal constitutional decisions and toward the wide variety of rules instituted by state legislation, state constitutional law, court rules, and police procedures. See Marc L. Miller & Ronald F. Wright, Criminal Procedures: Cases, Statutes, and Executive Materials (2d ed. 2003).

8. 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, 1351–54 (2005).

concentration is peculiar, given not only the relative insignificance of the federal role in law enforcement, but also the relative unattractiveness of the federal guidelines system, which has been rejected by virtually every state that has undertaken systematic sentencing reform.[9] The national press, particularly the *New York Times* and the *Wall Street Journal*, similarly focus public debate on Congress and the federal government, and rarely do the hard work of reporting what takes place in the statehouses, especially those far from national media centers.

In the area of sentencing, the states have genuinely served as laboratories for experimentation. There is no clear dominant pattern of sentencing law and practice across the United States. The trends I noted a moment ago are just that—trends—which have operated in different ways and to different extents in various states. Only a minority of states has adopted any sort of guidelines system, and those systems vary in critical respects. The states that retain the overall structure of a discretionary sentencing regime have modified that structure in a variety of ad hoc ways, such as instituting parole guidelines, mandatory minimum sentences for particular offenses, enhanced sentences for recidivists, and noncriminal extended detention for sexual predators. Moreover, in recent years, while the federal government has expanded the policies of increased incarceration that dominated the 1980s and 1990s, resulting in the imprisonment of over two million Americans at the present moment, many states have begun to slow the growth of their rates of incarceration.[10] A number of states have repealed mandatory sentences or adopted guidelines designed to reduce, rather than increase, the severity of sentences.

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9. Id. The perverse dominance of federal law in the sentencing debate is so extensive that Barbara Tombs, Executive Director of the Minnesota Sentencing Guidelines Commission and one of the most knowledgeable of the nation's sentencing policy experts, remarked that she has to spend considerable time explaining to members of Minnesota's legislature that Minnesota's sentencing guidelines operate completely differently from the federal guidelines. Barbara Tombs, Remarks at the *Columbia Law Review* Symposium, Sentencing: What's at Stake for the States? (Jan. 21, 2005) (on file with the *Columbia Law Review*). That this is so in Minnesota, a pioneer among states in creating guidelines on a more productive model than the federal system, speaks volumes about the extent to which the overwhelmingly negative discussion of the federal guidelines has interfered with intelligent sentencing debates.

10. See Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum. L. Rev. 1082, 1104–05 (2005) (stating reforming states experienced below-average prison population growth while federal guidelines accelerated prison population growth). Compare Allen J. Beck & Darrell K. Gilliard, U.S. Dep't of Justice, NCJ 151654, Prisoners in 1994, at 3 tbl.2 (Aug. 1995), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pi94.pdf (on file with the *Columbia Law Review*) (reporting 1993–1994 increase in federal prison population as 6.1% and 1993–1994 increase in state prison population as 8.7%), with Paige M. Harrison & Allen J. Beck, U.S. Dep't of Justice, NCJ 200248, Prisoners in 2003, at 2 tbl.2 (Nov. 2004), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p03.pdf (on file with the *Columbia Law Review*) (reporting 2002–2003 increase in federal prison population as 6.6% and 2002–2003 increase in state prison population as 1.4%).

In the context of such varied experimentation among the states, the editors of the *Columbia Law Review* thought it would be useful to explore what those laboratories have come up with. To the extent that *Blakely* and *Booker* are relevant to the Symposium, our primary question is not whether *Blakely* applies to the federal guidelines—the question that dominated the national press after *Blakely* and until its resolution in *Booker*—but what effect these important decisions will have on the far more vibrant, and far more important, movement for sentencing reform in the states.

Thus, the Symposium issue opens with the text of its keynote address, from Judge William H. Pryor Jr.[11] Although Judge Pryor was then, and may again be, a federal appellate judge, he was invited not on account of his recent federal office, but for his former public service as a determined advocate of sentencing reform while he was Attorney General of Alabama. Judge Pryor's account of the ongoing effort to advance sentencing reform in Alabama will surprise those who think in stereotypes, and fittingly introduces the key themes of the conference. Although Judge Pryor's recess appointment by President Bush has been controversial in part because of his conservative politics, the reader will encounter not a plea to "get tough on crime," but a deep concern about excessive, and excessively harsh, incarceration. Moreover, the reader accustomed by the debate over the federal guidelines to associate guideline sentencing with severity will encounter an argument, representative of a growing movement in financially strapped states, to utilize guidelines as a tool of rational policymaking in the interest of controlling burgeoning prison populations.[12] While Congress (with its free-spending budgets of which criminal justice represents a small part) has been posturing about tough sentences, the states, which bear the brunt of the war on crime and its associated costs, have had to be, in Judge Pryor's words, not merely tough on crime, but smart on crime.[13]

The academic contributions to the Symposium pick up on this theme. While most legal academics, particularly at the self-consciously elite "national" law schools, tend to focus on questions of federal law, a handful of scholars have undertaken the hard empirical work of researching the laws of multiple American jurisdictions and analyzing their divergent practices. The Symposium highlights the work of two of the most knowledgeable of these scholars, Professor Richard S. Frase of the University of Minnesota Law School and Professor Kevin R. Reitz of the University of Colorado School of Law. Professor Frase's indispensable scholarship is typified by his contribution to the Symposium, which provides

11. William H. Pryor Jr., Lessons of a Sentencing Reformer from the Deep South, 105 Colum. L. Rev. 943 (2005).

12. Id. at 944, 946–48.

13. Id. at 955.

the basic taxonomy of sentencing reform in the United States.[14] Focusing on sentencing guidelines systems, Professor Frase identifies twenty U.S. jurisdictions (eighteen states plus the federal jurisdiction and the District of Columbia) that have experimented with some form of sentencing guidelines since 1979, and analyzes the remarkable variety of approaches that they have used. The depressing example of the federal guidelines, as several contributors note, has been used as a bogeyman by opponents of sentencing reform. Professor Frase's work shows, however, that guidelines come in a number of flavors and that most states which have completed successful reforms have looked to other states, and not to the federal system, for models.[15] In a similar vein, Professor Reitz, reporter for the American Law Institute's (ALI) project on sentencing reform and a leading authority on state guidelines, addresses the potential impact of the Supreme Court's decisions in *Blakely* and *Booker* on sentencing reform efforts, asking whether the analysis in those cases threatens the advances that have been made in state sentencing systems and in the models being proposed by the American Bar Association and the ALI.[16]

Many of our contributors bring to national attention sentencing innovations that have been instituted among the several states. Noting that the rise of determinate sentencing has often been seen as shifting power and discretion away from courts and toward prosecutors, Professor Ronald F. Wright of Wake Forest University School of Law, whose important scholarship includes an in-depth analysis of North Carolina's experience with sentencing reform which confirms many of Judge Pryor's observations about the Alabama experience,[17] addresses state experiments with guidelines for prosecutorial discretion.[18] Professor Wright's work identifies state innovations that have been little noticed, but that may constitute the beginning of yet another zone of reform.[19] Professor Nancy J. King of Vanderbilt University Law School, noted among other contributions for her work on jury sentencing,[20] introduces with several colleagues a complex empirical study of sentencing differences between defendants convicted after jury trials, bench trials, and guilty pleas in five states.[21]

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14. Richard S. Frase, State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, 105 Colum. L. Rev. 1190 (2005). Professor Frase's other distinguished scholarship includes Sentencing and Sanctions in Western Countries (Richard S. Frase & Michael Tonry eds., 2001).

15. Frase, supra note 14, at 1192.

16. Reitz, supra note 10.

17. See Ronald F. Wright & Susan P. Ellis, A Progress Report on the North Carolina Sentencing and Policy Advisory Commission, 28 Wake Forest L. Rev. 421 (1993).

18. Ronald F. Wright, Sentencing Commissions as Provocateurs of Prosecutor Self-Regulation, 105 Colum. L. Rev. 1010 (2005).

19. Id. at 1022–42.

20. See, e.g., Nancy J. King and Rosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State Study, 57 Vand. L. Rev. 885 (2004).

21. Nancy J. King et al., When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States, 105 Colum. L. Rev. 959 (2005).

The startling results remind us of the power of local practice in law. Although the state systems studied (unlike the federal guidelines) do not offer automatic discounts based on the procedural mode of conviction, Professor King and her coauthors identify systematic sentencing disparities based on mode of trial. Surprisingly, the nature of the disparities is inconsistent from jurisdiction to jurisdiction and from crime to crime, most likely because of local variations in the way in which trial modality and plea bargaining are used by prosecutors and defense lawyers.[22]

The variations among state and federal guideline systems occupy our contributors in other ways as well. Professor Paul H. Robinson of the University of Pennsylvania Law School, whose particular genius for taxonomy and careful analysis is well known,[23] and Professor Barbara A. Spellman of the University of Virginia break down the sentencing decision into a number of discrete judgments, each calling for different types of expertise, and note that sentencing law and policy make the most sense when each of these judgments is assigned to the institution best suited to make it.[24] This theme is similarly addressed by Professor Frank O. Bowman of Indiana University School of Law.[25] Professor Bowman, for many years the leading academic defender of the federal guidelines,[26] has come to the conclusion that the federal guidelines have in practice failed, in large part because they iguore the institutional concerns analyzed by Professor Robinson, and have substituted unconstrained control of sentencing by centralized policymakers in Congress and the Department of

22. Id. at 973–75. The importance of local practice factors in understanding the impact of sentencing rules was also stressed by two prosecutors who addressed the conference. Michele Hirshman, First Deputy Attorney General of New York, emphasized the extent to which New York's more restrictive rules of grand jury practice effectively limit New York prosecutors' ability to dominate sentencing decisions, in contrast witb federal prosecutors. Michele Hirshman, Remarks at the *Columbia Law Review* Symposium, Sentencing: What's at Stake for the States? (Jan. 21, 2005) (on file with tbe *Columbia Law Review*). Martha Coakley, District Attorney of Middlesex County, Massachusetts, emphasized the extent to which prosecutors, like judges, must adapt tbeir approach to sentence severity depending on the nature of the case they are prosecuting. Martha Coakley, Remarks at the *Columbia Law Review* Symposium, Sentencing: What's at Stake for the States? (Jan. 21, 2005) (on file with tbe *Columbia Law Review*).

23. Professor Robinson's bibliography is too extensive and important for even selective citation. However, his expertise as our leading student of state penal codes, see generally, e.g., Paul H. Robinson et al., The Five Worst (and Five Best) American Criminal Codes, 95 Nw. U. L. Rev. 1 (2000); Paul H. Robinson, Structure and Function in Criminal Law (1997), and as a pioneering researcher into popular understanding of the relative severity of different crimes, see generally, e.g., Paul H. Robinson & John M. Darley, Justice, Liability, and Blame (1995), made him a natural invitee to the Symposium.

24. Paul H. Robinson & Barbara A. Spellman, Sentencing Decisions: Matching the Decisionmaker to the Decision Nature, 105 Colum. L. Rev. 1124 (2005).

25. Frank O. Bowman, III, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 Colum. L. Rev. 1315 (2005) [hereinafter Bowman, Failure].

26. See, e.g., Frank O. Bowman, III, Fear of Law: Thoughts on *Fear of Judging* and the State of the Federal Sentencing Guidelines, 44 St. Louis U. L.J. 299 (2000); Frank O. Bowman, III, The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines, 1996 Wis. L. Rev. 679.

Justice for the unconstrained control of judges and parole boards under the previous regime. Professor Bowman calls for a restoration of balance between broad policy decisions made by Congress and individualized adaptation of policy to particular cases by sentencing judges.[27] In yet another important insight, Professor Bowman also notes that the complexity and rigidity of the federal guidelines have created a system in which evasion is unhealthily widespread, although less by judges attempting to impose more reasonable sentences[28] than by front-line prosecutors who have come to see the guidelines as sources of leverage that can be manipulated to obtain cooperation or manage caseloads even when lesser sentences would satisfy any reasonable law enforcement interest.[29]

Professor Rachel E. Barkow of New York University School of Law, one of our leading younger sentencing scholars,[30] also contrasts the federal experience with that of the states.[31] Noting that federal sentences are in general significantly longer than state sentences for similar crimes, she sensibly asks if there is any reason to prefer the judgments of state decisionmakers to those of the United States Congress, and concludes that there is.[32] Like Professor Bowman, she notes that the political posturing to which legislators are prone is unchecked at the federal level (where deficits reign, and where corrections is a minor part of the overall budget) by the fiscal pressures that force state legislators to be realistic about the cost/benefit ratio of reflexively "tough" sentencing.[33] Like Judge Pryor, Professors Barkow and Bowman see fiscal limitations not merely as an unfortunate constraint on state policymaking, but as a stimulus for realism and intelligent setting of priorities.

Professor Kyron Huigens of Benjamin N. Cardozo School of Law is similarly concerned with the proper institutional allocation of sentencing decisionmaking.[34] As he points out in a provocative analysis, legislative

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27. Bowman, Failure, supra note 25, at 1319.

28. Id. at 1330, 1335–36.

29. Id. at 1336–40.

30. See generally, e.g., Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing, 152 U. Pa. L. Rev. 33 (2003).

31. Rachel E. Barkow, Federalism and the Politics of Sentencing, 105 Colum. L. Rev. 1276 (2005).

32. Id. at 1300.

33. Id. at 1302–05. Roxanne Lieb, Director of the Washington State Institute for Public Policy and a former member of the Washington Sentencing Guidelines Commission, echoed this theme in her symposium remarks by characterizing the Washington State legislature as being (usually) attentive to costs as a result of the enormous fiscal pressures on the state. The use of guidelines in Washington, she went on to note, provided fiscal predictability and a mechanism for better legislative control of the state budget; anyone hoping *Blakely* migbt lead to a return of discretionary sentencing vesting increased authority in judges should recognize that such a system could not provide the predictability offered by guidelines, and therefore would be unattractive to the state legislature. Roxanne Lieb, Remarks at the *Columbia Law Review* Symposium, Sentencing: What's at Stake for the States? (Jan. 21, 2005) (on file with the *Columbia Law Review*).

34. Kyron Huigens, Solving the *Williams* Puzzle, 105 Colum. L. Rev. 1048 (2005).

decisionmaking is fundamentally different from judicial imposition of sentences. Sentencing decisions, in his view, must reflect both considerations drawn from the rule of law, which calls for clear rules and resists arbitrary exercises of discretion, and respect for the "fine-grainedness" of application of law to individual cases.[35] While judicial discretion in sentencing is, according to Professor Huigens, unsuitable for the imposition of Sixth Amendment procedural rules, legislative control of sentences, which is closer to the legislative definition of offenses than to the application of law in "fine-grained" decisionmaking, ought to be subject to constitutional procedures.[36] As a consequence, he defends both the Supreme Court's decision in *Apprendi v. New Jersey*[37] and discretionary sentencing.[38]

The dominant theme of the Symposium is the need for legal and empirical research into the actual practices of sentencing in the many diverse jurisdictions that make up the United States. Professor Miller epitomizes this concern by urging state sentencing commissions to make even more data available.[39] In particular, Professor Miller notes that such data is important not only to theorists and policymakers, but also, and especially, to sentencing judges. As Professor Miller points out, judges (contrary to the image sometimes held by members of Congress) are not typically rogue intellectuals looking to impose their idiosyncratic views of criminal justice policy on the world. Rather, the most common question judges ask in thinking about a sentence is, what have other judges done with similar cases?[40] Judges appreciate the importance of horizontal equity in sentencing—in the value, inculcated since their first classes in law school, of treating like cases alike and following precedent. They are thus highly responsive to advisory guidelines and to information about the outcomes of similar cases before other courts. Professor Miller notes, however, that such information is not usually made available to judges.[41] Citing the examples of Scotland and New South Wales, he argues that the adoption of fuller sentencing information systems will permit dialogues among judges and among states that have not taken place to date.[42]

But if the conference primarily emphasized empirical knowledge, it did not neglect theory, and the three final contributions direct our attention to broader perspectives. Professor Antony Duff of the University of Stirling brings a perspective from outside the technical debates of American sentencing experts, speaking as a leading British philosopher and one of the world's preeminent authorities on the philosophy of punish-

35. Id. at 1069–72.
36. Id. at 1079–81.
37. 530 U.S. 466 (2000).
38. Huigens, supra note 34, at 1079–81.
39. Miller, supra note 8, at 1354–57.
40. Id. at 1370–84.
41. Id. at 1366.
42. Id. at 1370–94.

ment.[43] Without questioning the need for providing guidance to sentencing judges, Professor Duff radically questions the American preoccupation with numerical guidelines as the way to do so.[44] Arguing against the Benthamite view that crimes and sentences can be arrayed along a unitary dimension of severity, Professor Duff counterposes the view that sentencing, and criminal justice policy generally, pursues many goals, and as Aristotle knew, those diverse values are incommensurable.[45] Numerical guidelines, Professor Duff argues, reflect an inappropriate "despair" of the possibility of achieving justice, which can and must be pursued by a dialectical process in which legal actors apply discursive or descriptive policy guidelines to particular cases.[46] Professor Duff's Essay is a welcome reminder that the complexity of sentencing judgments cannot be so easily reduced to mechanical formulas.

Professor Michael Tonry of the University of Minnesota Law School, perhaps the leading empirical student of penal policy in the world,[47] similarly asks us to look beyond the technical debates.[48] Noting that the guideline reforms that dominated the latter part of the twentieth century stemmed from particular intellectual and social conditions in the 1960s and 1970s, Professor Tonry asks whether those conditions have not changed in such a way that future sentencing reforms might take an entirely different path.[49] Professor Tonry argues that the reforms of the guideline era have not achieved their goals—for example, racial and other disparities in sentencing are by many measures worse today than they were when Frankel wrote[50]—and newer, community-based sanctioning systems may well be the wave of the future.[51]

Finally, whereas most of our contributors (like the guideline movement and the ALI sentencing reform project) focus on noncapital sentencing, Professor Franklin E. Zimring of the University of California, Berkeley School of Law provocatively reminds us that the apex of punishment in the United States (unlike in most of the rest of the world, and in nearly all of the industrial democracies) is not imprisonment, but death.[52] Sentencing reform that iguores the most striking and unusual

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43. See generally, e.g., R.A. Duff, Trials and Punishments (1986); R.A. Duff, Criminal Attempts (1996); R.A. Duff, Punishment, Communication and Community (2000).

44. R.A. Duff, Guidance and Guidelines, 105 Colum. L. Rev. 1162 (2005).

45. Id. at 1176–81.

46. Id. at 1181.

47. See, e.g., Michael Tonry, Sentencing Matters (1996); Michael Tonry, Punishment Policies and Patterns in Western Countries, *in* Sentencing and Sanctions in Western Countries 3 (Michael Tonry & Richard S. Frase eds., 2001).

48. Michael Tonry, Obsolescence and Immanence in Penal Theory and Policy, 105 Colum. L. Rev. 1233 (2005).

49. Id. at 1260–75.

50. Id. at 1254–59.

51. Id. at 1272–73.

52. Franklin E. Zimring, The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code, 105 Colum. L. Rev. 1396 (2005) [hereinafter Zimring, Unexamined Death Penalty]. Professor Zimring's work, noted for its attention to

characteristic of American justice is intellectually bankrupt, according to Professor Zimring, who traces the history of the Model Penal Code's failure to take a stand against the death penalty in 1959, and argues that the time has come to correct that error.[53]

The contributions to this Symposium remind us that a proper study of American law or legal institutions is inherently an exercise in comparative law, with all the difficulties that such an exercise entails. The United States is not one jurisdiction, but more than fifty related but distinct legal systems. The extent to which these systems diverge varies from subject to subject, and the divergence is at its greatest with respect to sentencing. Our ability to learn from this diversity is hampered by the difficulty of researching so many different legal systems, particularly when a true understanding of each system depends on highly contextualized knowledge of local substantive law, procedure, and practice. It is further hampered by an excessive focus on the one system that operates throughout the country, albeit in a limited way: the federal system. As Professors Miller, Tonry, and Zimring point out, the United States could learn a great deal by examining the legal systems of other countries—a proposition universally endorsed by scholars but surprisingly controversial among legislators. There can be no controversy, however, over whether we could learn a great deal from examining the diverse systems of the several states. In the wake of *Blakely* and *Booker*, federal officials in the executive and legislative branches should broaden their narrowly insular focus and look to the innovations being developed in the states, even as the Justices of the Supreme Court should also question whether they truly understand the impact their constitutional decisions have on the many complex state institutions that are affected by them. We hope that this Symposium will lead to closer attention, on the part of academics, journalists, and policymakers, to the rich materials of state sentencing law.

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empirical research, includes Franklin E. Zimring & Gordon Hawkins, Crime is Not the Problem: Violence in America (1997) and Franklin E. Zimring, The Contradictions of American Capital Punishment (2003).

53. Zimring, Unexamined Death Penalty, supra note 52, at 1400–01, 1412–15.