
Ryan W. Scott
INFORMATION SHARING
IN A COMMON LAW OF SENTENCING:
A SKEPTIC’S GUIDE

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ABSTRACT

For decades, prominent scholars and judges have called for the development of a “common law of sentencing” in the United States. One strand of scholarship stresses the information sharing function of the common law: sentencing judges need access to a body of written opinions that reveals how other courts have handled similar cases. The idea is that, fueled by better information, case-by-case common law reasoning will promote inter-judge consistency and rationality in sentencing law.

This Article takes a skeptical view, identifying three sets of challenges for an information-sharing approach. First, there are daunting information-collection challenges. A healthy common law depends on written sentencing opinions that are comprehensive and representative of outcomes in similar cases. Yet because of high volume and acute time constraints, sentencing opinions overwhelmingly are unpublished, and written opinions are skewed toward unusual cases and prolific judges. Second, sentencing opinions must be not merely available, but also useful to judges, and experiments with sentencing information systems in foreign jurisdictions have confronted subjectivity, level-of-generality, and “garbage in, garbage out” problems. Third, there are voluntariness challenges. The experience of “sentencing councils” in the 1970s tends to undermine the assumption that judges will respond to information about previous sentences by aligning their decisions with past precedent. To the contrary, judges may simply disregard advice from previous cases, or may be vulnerable to confirmation bias and attitude polarization.

To illustrate those obstacles, the Article contains an original empirical study of sentencing information collection, using documents from a federal district court. Because the documents ordinarily are nonpublic, the study is the first of its kind in the United States. The study finds that judges seldom provide the kind of explanation necessary to support a common law of sentencing.

An information-sharing approach to sentencing reform is largely untested in the United States, and it may carry collateral advantages. But it is doubtful that voluntary information sharing can meaningfully reduce inter-judge disparity or promote rationality in sentencing law.

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INTRODUCTION

For decades, prominent scholars and judges have called for the development of a “common law of sentencing” in the United States. Historically, criminal sentences in this country were not appealable and judges had no obligation to give reasons for their decisions, making it impossible for a body of common law to develop. Extensive reform, however, has dramatically reshaped the landscape of American sentencing. Today more than twenty states and the federal government have some form of sentencing guidelines promulgated by a sentencing commission. In virtually all jurisdictions, judges now must articulate reasons for the sentence imposed, and sentences may be challenged on appeal.

That shift has prompted calls for a common law of sentencing. The idea is that judges, using ordinary case-by-case common-law reasoning, can draw upon previous sentencing decisions to generate a robust and principled body of sentencing case law, just as they do in other legal contexts. An impressive and varied group of scholars has written on the importance of developing a common law of sentencing, including Norval Morris, Kate Stith and José Cabranes, Douglas Berman, Kevin Reitz, Marc Miller, Bruce Green, and Judge Nancy Gertner. Enthusiasm runs so deep that the American Bar Association (ABA) has embraced a common-law model for sentencing appeals in its Criminal Justice Sentencing Standards, and the American Law Institute (ALI) is poised to make a common law of sentencing a cornerstone of the latest revision of its influential Model Penal Code.

The broad support for a common law of sentencing masks important differences in approach. Two models have emerged in the literature. The first model treats the common law as a method of information sharing by district courts. Sentencing judges should have access to better information about outcomes and reasoning in similar cases, and a common-law model would generate a body of written opinions to guide judges at sentencing. The second model treats the common law as a mechanism for generating binding precedent at the appellate level. In this model, appellate judges perform a creative lawmaking function, developing sentencing doctrine that translates general

6 Bruce Green, Thinking About White-Collar Crime and Punishment, CRIM. JUSTICE (Fall 2010), at 5.
8 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE: SENTENCING §§ 18-3.12(e)(iii), 18-8.2(b) (3d ed. 1994).
9 AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING, TENTATIVE DRAFT NO. 1 (Apr. 9, 2007) [hereinafter MPC: SENTENCING DRAFT], § 7.ZZ(1) & cmt. b, at 318, 323.
10 See infra Part I.A.
purposes of punishment into specific decision rules, thereby constraining and coordinating the actions of sentencing courts.\footnote{See infra Part I.B.}

Although the operational details differ, proponents of a common law of sentencing share a belief that a body of case law can advance key objectives of modern sentencing reform. Common-law reasoning at sentencing, the argument goes, will reduce inter-judge sentencing disparity in the same way that the common law operates to harmonize the actions of trial courts in other contexts. At the same time, it will promote greater rationality at sentencing by supplying principled rules of decision that reflect the collective wisdom and experience of the judiciary.

Surprisingly, however, virtually none of the literature grapples with basic questions about the common-law approach. Can a common law of sentencing work? Does the incremental case-by-case process, successful in other legal settings, translate well to criminal sentencing? Can a common law of sentencing achieve its objectives, reducing inter-judge disparity and promoting rationality in sentencing law?

Count me a skeptic. Despite nearly universal enthusiasm among scholars and commentators, there is little evidence that the common-law sentencing model can operate as intended. To the contrary, it is largely untested in the United States, and the available evidence suggests that it will face formidable challenges.

This Article serves as a “skeptic’s guide” to the information-sharing model.\footnote{A follow-up article will discuss challenges for the precedent model.} Drawing on original empirical research, as well as experiences with comparable reforms in the United States and abroad, it offers a critical—but by no means dismissive—assessment of information sharing as a strategy for reducing inter-judge disparity and promoting rationality at sentencing. It identifies and explains three sets of challenges for the information-sharing approach.

First, there are daunting information-collection challenges. To achieve its objectives, a common law of sentencing depends on sentencing opinions that are written, comprehensive with respect to relevant facts, and representative of outcomes in similar cases. Yet there is reason to doubt that courts can generate that kind of common law. Due to acute time constraints, the overwhelming majority of sentencing decisions in the United States produce no written opinion.\footnote{See infra notes 72-74 and accompanying text.} The complexity of sentencing decisions makes it difficult and costly to construct comprehensive opinions that capture all relevant facts, including those that the judge considers relatively unimportant. Also, some kinds of cases—especially unusual cases with extreme facts—are more likely to prompt a written sentencing opinion. A skewed and non-representative body of cases can exacerbate inter-judge disparity and undermine rationality.

Second, information use by judges poses challenges for the information-sharing model. To make use of the common law, judges will need some method of searching for relevant opinions. Subjectivity, level-of-generality, and “garbage in, garbage out” problems can frustrate that process. It is not enough to make a body of sentencing opinions available to judges. It must also be useful, or judges will be disinclined to consult it.

Third, the information-sharing model assumes that judges will respond to information about previous sentences by dutifully aligning their decisions with past
precedent. That is unrealistic. As long as the “common law” remains voluntary, with sentencing opinions serving merely as optional guidance, judges can simply disregard previous sentences, at the expense of inter-judge consistency and rationality. Judges consulting the common law also may be vulnerable to confirmation bias and attitude polarization, seeking previous decisions that tend to confirm their pre-existing views or even adopting a more extreme position.

To illustrate some of those obstacles, this Article contains an original empirical study of a full year of sentencing documents from a federal district court. The study examines the “Statement of Reasons,” which federal judges must complete in connection with every criminal sentence. Because the documents are ordinarily nonpublic, the study is the first of its kind in the United States. The results reveal that, despite formal requirements to submit a written explanation, judges seldom provide the kind of written opinions necessary to support a common law of sentencing. In 48.6% of cases in which a written description was required, the sentencing judge did not provide one. Just 6.0% of cases prompted a written explanation of approximately one page of discussion or more. The study also finds that cases with lengthy explanations are not representative of criminal cases as a whole. Cases outside the advisory guideline range, which tend to have unusual or extreme facts, are more likely to prompt a long explanation.

History suggests that other obstacles are formidable as well. Two similar reform efforts, “sentencing information systems” and “sentencing councils,” were founded on similar assumptions about the benefits of information sharing at sentencing. Sentencing information systems (SISs), interactive databases designed to provide sentencing judges with a statistical picture of previous outcomes in similar cases, have been constructed in a handful of jurisdictions overseas. Yet no research has shown that they contribute to inter-judge consistency and rationality, and most SISs have atrophied due to judicial neglect. Sentencing councils, voluntary meetings of judges to share opinions on pending cases, flourished in several federal district courts in the 1970s. Research revealed, however, that sentencing councils failed to reduce inter-judge disparity because the judge retained discretion to disregard the council’s advice. Today both reforms are all but abandoned.

None of these reasons for skepticism should be understood as opposition of an information-driven common law of sentencing. The Article makes suggestions, where possible, about how each set of obstacles might be overcome. Some proponents also stress collateral advantages of the information-sharing model: providing valuable feedback to legislatures and sentencing commissions, and producing more lenient sentences to drive down incarceration rates. Yet it is doubtful that voluntary common-law information sharing, standing alone, will meaningfully reduce inter-judge disparity or promote rationality in sentencing law.

This Article proceeds in four parts. Part I surveys the literature on a common law of sentencing and disentangles two major proposals: an information-sharing model focused on district courts, and a precedent model focused on appellate courts. In both variations common-law reasoning is advanced as a means of promoting inter-judge consistency and rationality in sentencing decisions. This Article focuses on obstacles to the information-sharing model.

Part II describes information-collection challenges. To succeed, a common law of sentencing depends on sentencing information that is written, comprehensive, and

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14 See infra Part V.B.
representative. Yet there is reason to doubt that a body of common law can satisfy those criteria. Part II also reports the results of the original empirical study of federal sentencing data collection.

Part III describes information-use challenges. It first describes the experience of foreign jurisdictions with sentencing information systems, highlighting the difficulties they have encountered. Drawing on that experience, it discusses three challenges in providing information in a manner that judges find useful: the subjectivity of search parameters, difficulties with the level of abstraction in case matching, and “garbage in, garbage out” problems.

Part IV describes voluntariness challenges. It begins by describing research on sentencing councils, which revealed that despite judicial enthusiasm, voluntary information-sharing did not succeed in reducing inter-judge sentencing disparity. Based on that research, Part IV expresses skepticism about the assumption that judges will voluntarily bring their sentences into alignment with those of their colleagues. Other responses—disregarding contrary opinions, confirmation bias, and polarization—appear just as likely.

The conclusion, “Skepticism and Optimism,” notes that skepticism about the information-sharing model depends on what it is supposed to accomplish. It also stresses the value of experimenting with the common-law approach, despite the formidable challenges it will face.

I. VARIATIONS ON A COMMON LAW OF SENTENCING

Champions of a “common law of sentencing” in the United States include a host of prominent scholars and judges. Norval Morris, one of the most influential reformers of the 1970s, deplored the fact that “we lack a common law of sentencing” and argued that sentencing “requires reasons given, critical public consideration of those reasons, critical appellate review of those reasons: in short, a system of precedent leading to principled justice under law.” Kevin Reitz has provisionally embraced Morris’s “reformist vision,” urging that judges “should be encouraged to contribute in thoughtful, precedential, and policy-informed ways to the growth of a substantive common law of sentencing.”

Kate Stith and José Cabranes, in their work criticizing the federal sentencing guidelines, proposed that the “basic model” for managing judicial discretion at sentencing should consist of traditional common-law reasoning by district and appellate courts, such that “[s]lowly but surely, a federal common law of sentencing would be created.” Douglas Berman likewise has written about the need for judicial lawmaking at sentencing, calling it “critically important” for federal judges to “embrace their opportunities to actively cultivate a common law of sentencing.”

Federal judges including Nancy Gertner and Robert Sweet repeatedly have called on their colleagues in the judiciary to take steps to “foster a common law of sentencing.” Marc Miller has

15 Morris, supra note 1, at 267, 275-76.
16 Reitz, supra note 4, at 1500.
17 STITH & CABRANES, supra note 2, at 170.
18 Berman, supra note 3, at 94.
long urged judicial opinion-writing and data-dissemination practices that would facilitate the “common-law-like” development of sentencing principles.20

And the list goes on.21 In a field marked by deep and enduring disputes, the broad support for a common law of sentencing stands as a rare point of agreement.

What do scholars and judges mean when they endorse a “common law of sentencing”? Two different common-law models, overlapping but distinct, have emerged in the literature. One focuses on the information-sharing function of the common law, stressing the need for well-informed and well-reasoned decisions by sentencing judges. The other focuses on the precedential function of the common law, stressing the role of appellate courts in generating common-law constraints in a system of binding precedent. Despite important differences in approach, however, proponents of each variation express optimism that a common law of sentencing will help to accomplish key goals of modern sentencing reform: reducing inter-judge disparity and promoting rationality in sentencing law.

A. The Information Sharing Model

One strand of scholarship describes an information-sharing model focused on district courts. When imposing sentence, judges should consult and draw guidance from previous sentencing decisions in similar cases. To do so, they need access to a body of written sentencing opinions, generated on a case-by-case basis. As Stith and Cabranes explain, “[t]he hallmark of judging in the common law tradition is the judge’s application of general principles to specific facts.”22 Written sentencing opinions, they propose, can articulate common-law principles that guide sentencing courts in the exercise of their discretion.23 In addition, judges can rely on statistical information about previous sentences. Judge Gertner argues that district courts can “look to [sentencing] statistics to better understand where a given offender fits in the larger national or regional picture and thus can make better sentencing decisions in each individual case.”24 Collectively, those sources—a combination of “common law principles and modern technology”—would form a common law of sentencing.25

On this view, the major function of a common law of sentencing is informational. As described by Eric Luna, the “common law model” for sentencing, “embraced by many scholars and jurists,” calls for “today’s courts [to] draw[] upon the analysis and

20 Miller, Guidelines Are Not Enough, supra note 5, at 20-21.
22 Stith & Cabranes, supra note 2, at 83.
23 See id. at 170-71.
24 Gertner, supra note 7, at 277.
25 Sweet et al., supra note 21, at 938.
conclusions of prior judicial opinions." The argument is that simply making sentencing results and reasoning transparent, as part of a public common-law dialogue, carries significant advantages. Judge Gertner puts it succinctly: “judges need to see what other judges are doing.”

District courts, in this model, bear primary responsibility for generating the common law of sentencing because the sentencing judge alone can properly exercise discretion to select an appropriate punishment in a particular case. Thus, in Stith and Cabranes’s view, appellate review should be available, but only under a highly deferential standard, with district courts serving as the primary engines of doctrinal development. Discussing the possibilities of a common law of sentencing in the federal system, Judge Gertner predicts that common law developed at the district and appellate levels “will be mutually reinforcing,” but concludes that district courts must bear principal responsibility for the content of the common law, with appellate courts making corrections only “at the margins”—for example by “monitoring outlier sentences implemented wholly without support.”

B. The Precedent Model

A different strand of scholarship describes a common-law model focused on appellate courts. Courts of appeals should have the power to affirm, vacate, or (perhaps) modify sentences based on a principled, substantive review of whether the sentence is of the wrong kind, too severe, or too lenient by reference to appropriate purposes of criminal punishment. That kind of common-law review necessarily involves a “creative lawmaking component.” As described by Reitz, the powers of appellate courts in the common-law model should include “determinations of the eligible goals of punishment decisions, and the creation of legal doctrine that translates those objectives into rules of decision.”

In this model, “common law” rules might take a variety of forms. Appellate courts might vacate sentences as excessive or insufficient or “manifestly unjust.” They might declare that some factors must not be considered at sentencing, such as an offender’s sex, age, juvenile criminal record, or responsibility to care for young children. At one extreme, appellate courts might have authority to issue “guideline

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27 Gertner, supra note 7, at 278-79.
28 STITH & CABRANES, supra note 2, at 170-72 (calling for the repeal of the federal sentencing guidelines, to be replaced by a requirement that judges explain their decisions and appellate courts conduct review under an “abuse of discretion” standard).
29 Gertner, supra note 7, at 278.
30 Reitz, supra note 4, at 1454.
31 Id.
judgments,” announcing the ordinary sentence in a whole category of cases (for example, three years of imprisonment for drunk driving that causes death) and requiring district courts to justify any deviation from that sentence.\(^{33}\) At the opposite extreme, appellate courts might have a narrower charge, developing common law as a supplement to sentencing guidelines promulgated by a sentencing commission. Courts of appeals would bear primary responsibility for identifying the circumstances in which a non-guideline sentence is permissible.\(^{34}\)

On this view, the major function of a common law of sentencing is *precedential*. The idea is that appellate courts will harmonize the opinions of sentencing courts by announcing rules, exceptions, and guiding principles that constrain the exercise of judicial discretion at sentencing. As in other common-law contexts, district judges in each new case will be free to distinguish past appellate decisions based on material factual or legal differences. Also, on occasion, appellate courts may reconsider and overrule their prior decisions. But over time, a robust body of precedent will emerge to supply a doctrinal framework for sentencing courts’ decisions.

Appellate courts, in this variation, bear primary responsibility for articulating and developing the common law of sentencing. Although district courts can engage in creative lawmaking as well, Reitz observes that appellate courts have “pronounced importance” because “appellate courts enjoy power to announce definitive rulings meant to coordinate the actions of many lower courts, and hold a veto over trial court innovations.”\(^{35}\) Presumably for that reason, the Model Penal Code: Sentencing draft explicitly provides that “appellate courts” must participate in the creation of a “common law of sentencing,” but contains no comparable provision for district courts.\(^{36}\)

**C. Objectives of a Common Law of Sentencing**

Differences between the information-sharing and precedent models of a common law of sentencing should not be overstated. Although they have different points of emphasis, they are complementary rather than antagonistic. Most scholars endorse some combination of the two approaches,\(^{37}\) or refer generally to a “common law” model without elaborating.\(^{38}\) Nonetheless, it is useful to differentiate between the two models because the informational and precedential functions of a common-law system rest on different assumptions and will face different obstacles in the sentencing context.

What they share is a set of ambitions. Proponents of a common law of sentencing have identified two major objectives that a common-law model can help to achieve: (1) reducing inter-judge sentencing disparity by ensuring consistent results in similar

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\(^{33}\) For example, in *R. v. Jurisic*, 45 NSWLR 209 (1998), the Supreme Court of New South Wales, Australia, issued a guideline judgment for dangerous driving causing death. The court set out a list of nine aggravating factors, such as the degree of intoxication and the escape from police pursuit, and held that “whenever there is present to a material degree any aggravating factor,” a custodial sentence “of less than three years . . . should be exceptional.” *Id.* at 229.

\(^{34}\) That is the approach tentatively embraced by the American Law Institute in its forthcoming Model Penal Code: Sentencing revisions. See MPC: SENTENCING DRAFT, supra note 9, § 7.ZZ(1) & cmt. b, at 318, 323.

\(^{35}\) Reitz, supra note 4, at 1454.

\(^{36}\) MPC: SENTENCING DRAFT, supra note 9, § 7.ZZ(1) & cmt. b, at 318, 323.

\(^{37}\) See, e.g., STITH & CABRANES, supra note 2, at 170-72; Gertner, supra note 7, at 279–80; Reitz, supra note 4, at 1454; Sweet et al., supra note 17, at 928.

\(^{38}\) See, e.g., Berman, supra note 3, at 110; Green, supra note 6, at 5.
cases; and (2) promoting greater rationality in sentencing law. In addition, as collateral benefits, a common law of sentencing can provide valuable feedback to other institutions and officials. For some proponents, a common law of sentencing is also desirable because it will produce more lenient sentences, especially fewer and shorter prison sentences.

1. Reducing Inter-Judge Sentencing Disparity

The most frequently cited advantage of a common law of sentencing is its power to reduce inter-judge sentencing disparity. In “indeterminate” sentencing systems, which prevailed in almost all U.S. jurisdictions until the early 1980s, judges enjoyed essentially unfettered discretion in choosing the type and severity of sentences. With wide statutory sentencing ranges and no meaningful oversight, judges were left to consult their own values and priorities about criminal punishment. The result was inter-judge disparity: similarly situated offenders convicted of similar crimes could receive starkly different sentences depending on which judge was assigned to the case. Reformers argued that inter-judge disparity offends fundamental rule-of-law values such as equality, objectivity, and consistency, breeds disrespect for the courts, and undermines the deterrent effect of criminal law by making punishment less certain and predictable. Reasoning that the preferences, philosophy, and biases of the sentencing judge should have no effect on sentencing outcomes, reformers urged that inter-judge sentencing disparity should be reduced or eliminated. Over the years, Congress and many state legislatures have explicitly endorsed the goal of reducing inter-judge disparity.

Proponents of a common law of sentencing contend that a common-law process can accomplish that goal. Common law generated at the district court level will reduce

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39 The term “sentencing disparity” requires clarification, because it is essentially meaningless standing alone. Whether a difference between sentences is justified is always contestable, and depends on some underlying theory of punishment. See Kevin Cole, The Empty Idea of Sentencing Disparity, 91 NW. U. L. REV. 1336, 1336 (1997). Throughout this Article I refer to “inter-judge disparity,” by which I mean differences in sentences driven not by differences in offense or offender characteristics, but by the preferences, personality, and biases of the sentencing judge. See also Ryan W. Scott, Inter-Judge Sentencing Disparity After Booker: A First Look, 63 STAN. L. REV. 1, 6 n.23 (2010).


41 MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5, 10 (1973); Elyce H. Zenoff, Sentencing Disparity, at 1449, 1450, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE (Sanford H. Kadish, ed. 1983).


inter-judge disparity, the argument goes, because disparity between judges principally results from a lack of information about what other judges have done in similar cases.\textsuperscript{45} Closing the “information gap” will thus close the “disparity gap.” Judge Robert Sweet has predicted that a common-law model based on written sentencing opinions and sentencing statistics “would provide, almost automatically, a firmament of reference points and a body of reasoning developed by the courts,” thereby “alleviating unwarranted disparity” between judges.\textsuperscript{46} Similarly, Judge Gertner argues that making sentencing opinions available to other judges is “critical to developing a common law of sentencing and to cabining discretion” because “[i]n order to avoid inter-judge disparities, judges must be able to see the decisions made in the courtroom next door.”\textsuperscript{47} Noting that judges frequently agree about the ordinal ranking of offense severity, even when they disagree about the cardinal severity of sentences, Stith and Cabranes predict that simply requiring written sentencing opinions and disseminating sentencing data (to serve as “quantitative guideposts to judges”) will reduce inter-judge disparity.\textsuperscript{48}

Common law generated at the appellate level also will reduce inter-judge disparity, proponents argue, by announcing sentencing rules that are uniformly binding upon all district court judges. Norval Morris suggested that a common law of sentencing, like all common law, should take the form of “precedent” legally binding on subsequent courts.\textsuperscript{49} The “traditional process of the common law,” Judge Sweet explains, can and should ensure that “individual sentences are harmonized with other decisions throughout the relevant jurisdiction which apply the same law to the same offense.”\textsuperscript{50} The same reasoning prompted drafters of the Model Sentencing and Corrections Act in 1979 to provide for appellate review of sentences such that “new situations will be uniformly handled throughout a state.”\textsuperscript{51} Appellate courts, atop the judicial hierarchy, are well-

\textsuperscript{45} Cf. Zenoff, supra note 41, at 1451 (“[Some] observers believe that sentencing disparity would virtually disappear if judges had access to data about their colleagues’ decisions.”).

\textsuperscript{46} Sweet et al., supra note 21, at 943, 946.

\textsuperscript{47} Gertner, supra note 7, at 279.


\textsuperscript{49} Morris, supra note 1, at 275-76. See also Amy K. Tchao, Comment, One Step Forward, One Step Back: Emergency Reform and Appellate Sentencing Review in Maine, 44 ME. L. REV. 345, 349 (1992) (“By examining the propriety of the sentence and correcting improper sentences, appellate review can provide a remedy for the problem of sentencing disparity.”).

\textsuperscript{50} Sweet et al., supra note 21, at 937; see also Nora V. Demleitner, Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative, 84 MINN. L. REV. 753, 803 (2000) (arguing that “judicial creation of sentencing rules” at the appellate level “would decrease disparity in sentencing” by coordinating the actions of lower courts).

\textsuperscript{51} NATIONAL CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT § 3-208 cmt. at 166 (1979).
positioned to detect and minimize inter-judge sentencing disparity by reviewing sentences.

There is lively debate among scholars about whether the reduction of inter-judge disparity is a worthy goal. Stith and Cabranes, in particular, contest that objective and disavow it as a driving purpose of their proposed common law of sentencing. Rather than attempt to resolve the issue, however, this Article accepts for the sake of argument that inter-judge disparity ought to be minimized. The common-law approach is often advertised as a method of reducing inter-judge disparity, and it is fair to ask whether it can deliver on those promises.

2. Promoting Rationality in Sentencing Law

Another potential advantage of the common-law model is greater rationality in sentencing law. Congress cited increased rationality in sentencing decisions as an anticipated and desired benefit of the Sentencing Reform Act of 1984. Many states too have identified rationality as a goal of sentencing reform. Although the intended meaning of “rational” sentencing law is sometimes unclear, it generally refers to sentencing law that is well-reasoned, principled, and consistent.

According to proponents, a common law of sentencing would produce more rational sentencing law in two ways. First, the common-law process would encourage more thoughtful decisions. At the district court level, Judge Gertner explains, the common-law model would require district courts “to give coherent explanations, to articulate rules of general application.” Simply requiring judges to “think through” every sentence, and to formally explain the basis for the decision, will improve the quality of the resulting body of case law.

Second, the common-law process would encourage more principled decisions. For Judge Sweet, a principal advantage of the traditional common-law method is that it will produce a “coherent and ever-adapting body of law” that intelligently translates “broad sentencing policies to individual cases.” Appellate courts are central to creating that effort. As Reitz explains, appellate courts can generate “principled common law of sentencing” by explicitly “test[ing] the sufficiency of reasons given by trial courts.” The common law of sentencing, on this view, can evaluate sentences in light of eligible purposes of punishment, ensuring that they are principled and coherent.

52 STITH & CABRANES, supra note 2, at 172-73 (emphasis removed).
53 See supra notes 45-51 and accompanying text.
54 S. Rep. No. 225, at 120 (1983) (stating that sentencing reforms are intended to provide “enough guidance and control of the exercise of [sentencing] discretion to promote fairness and rationality . . . in sentencing.”).
55 E.g. KAN. STAT. ANN. § 74-9101 (directing the sentencing commission to “establish rational and consistent sentencing standards”); 42 PA. CONS. STAT. § 2153(a) (similar).
56 Judge Nancy Gertner, Thoughts on Reasonableness, 19 FED. SENT’G RPRTR. 165, 166 (2007).
57 See Berman, supra note 3, at 104 (arguing that “[t]he process of articulating rationales for their decisions enables judges,” as part of a “common-law dialogue about sentencing policy and practice,” to “develop a principled jurisprudence of sentencing”).
58 Sweet et al., supra note 21, at 945.
60 See Reitz, supra note 4, at 1500.
3. Collateral Benefits

Some proponents of a common law of sentencing have identified other advantages as well. One is that common-law decisions can provide feedback to other officials. Sentencing reformers in the 1970s and 1980s proposed “a partnership model of shared institutional powers” between courts and sentencing commissions.  The architects of structured sentencing programs like sentencing guidelines envisioned that, far from being excluded from the process of generating sentencing law, judges would contribute to its evolution by routinely explaining and reviewing sentencing decisions.

Proponents contend that a common law of sentencing would foster exactly that sort of collaboration. Michael O’Hear argues that the kind of thoughtful opinion-writing required to fuel a common law of sentencing will simultaneously “provide a robust feedback loop to the [Sentencing] Commission consistent with the vision of evolutionary sentencing guidelines.” A common law of sentencing predicated upon well-reasoned and policy-driven sentencing opinions can assist the sentencing commission in assessing the legitimacy of existing guidelines and making revisions based on the judiciary’s feedback.

In addition, a few scholars cast their support for a common law of sentencing in terms of its likely content. Berman urges the development of a common law of sentencing because legislatures and sentencing commissions are too punitive, and a judge-made common law will result in more lenient sentences. That is because judges, insulated from political pressures, are “institutionally well suited to counterbalance [the] punitive tendencies” of other officials. Similarly, Stith and Cabranes support a common law of sentencing because it “would ensure sentencing outcomes that are more reasonable and just” compared with the severe and rigid federal sentencing guidelines. In an era of mass incarceration and exploding prison budgets, there are forceful arguments that criminal sentences should be less severe. Some scholars contend that the common-law model is the best method of achieving that outcome.

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61 Reitz, supra note 4, at 1455.
63 Michael M. O’Hear, Explaining Sentences, 36 FLA. ST. U.L. REV. 459, 485 (2009); see also Constitution Project Sentencing Initiative, Recommendations for Federal Criminal Sentencing in a Post-Booker World, 18 FED. SENT’G RPRTR. 310, 318 (2006) (describing written sentencing opinions as “an important component of the feedback to sentencing rulemakers” and essential to public confidence in the federal sentencing system); David Yellen, Reforming the Federal Sentencing Guidelines’ Misguided Approach to Real-Offense Sentencing, 58 STAN. L. REV. 267, 275 (2005) (compelling district judges to explain their sentences, and inviting appellate courts to develop a common law of sentencing, judges can “provide feedback to [sentencing] commissions that will be useful in refining guidelines); Steven L. Chanenson, Guidance From Above and Beyond, 58 STAN. L. REV. 175, 177–78 (2005).
64 Adam Lamparello, Introducing the “Heartland Departure”, 27 HARV. J.L. & PUB. POL’Y 643, 646–47 (2004);
65 Berman, supra note 3, at 109-10.
66 Id. at 110.
67 STITH & CABRANES, supra note 2, at 172.
There is reason for skepticism that a common law of sentencing can achieve its ambitious goals. This Article focuses on the information-sharing model. An important function of the common law, on this view, is to supply sentencing judges with written opinions and other information about past sentences in similar cases. Case by case, a body of knowledge about past sentencing practice will develop, promoting greater inter-judge consistency and rationality.

That approach would encounter three sets of challenges: (1) challenges with information collection, given the need for written, comprehensive, and representative sentencing opinions; (2) challenges with information use by judges; and (3) voluntariness challenges, including the risk of disregarding sentencing information, confirmation bias, and polarization.

II. INFORMATION COLLECTION CHALLENGES

The most daunting practical challenge is collecting sufficient information about the reasoning and results of past sentencing decisions to support a successful common law. To reduce inter-judge sentencing disparity and to make sentencing law more rational, a body of sentencing law must consist of written opinions, comprehensive with respect to material facts, and representative of other sentences in similar cases. On each score there is reason for skepticism.

A. Obstacles to Sentencing Information Collection

1. Written Information About Sentences

First, and most fundamentally, the information-sharing model depends on sentencing decisions that are written. It is not enough that judges formulate and announce reasons for their decisions. Those reasons must be reduced to writing, and made available to other judges, if future courts can rely upon them for guidance. Likewise, unless someone captures accurate statistical information about sentencing outcomes, the data cannot be used by future sentencing courts. As proponents readily acknowledge, written opinions are the lifeblood of a common law of sentencing.

There is reason to doubt, however, that sentencing courts can generate enough recorded decisions to support a functional common law. For years, scholars have been urging sentencing judges to issue full-fledged published sentencing decisions more frequently. Yet the overwhelming majority of sentencing decisions in the United States

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68 A subsequent article will discuss obstacles to the precedent model.

69 STITH & CABRANES, supra note 2, at 170; see also Gertner, supra note 7, at 279 (“Wider use and availability of formal sentencing opinions is therefore critical to developing a common law of sentencing . . . .”)

70 Gertner, supra note 7, at 278.

remain unpublished—indeed, never written down.\textsuperscript{72} Typically, rather than prepare a written order, the judge simply announces the reasons for the sentence in open court. Many sentencing hearings are audio-recorded, but not transcribed.\textsuperscript{73} Even if a written transcript is prepared, only a fraction of those transcripts ever become public or otherwise available to other judges.\textsuperscript{74}

Hearing transcripts, moreover, do a poor job of capturing the judge’s reasoning. Statements in open court are primarily directed at the offender, lawyers, witnesses, and observers in the courtroom—not future judges.\textsuperscript{75} Often cluttered with irrelevant material, jarred by interruptions, and disorganized, a sentencing transcript is a poor substitute for a written opinion.\textsuperscript{76}

None of this suggests that judges are being lazy or obstinate. Sentencing judges operate under acute time constraints. Today, because of plea bargaining, only a tiny fraction of criminal cases in the United States go to trial.\textsuperscript{77} But roughly two-thirds of criminal cases end in a guilty plea, conviction, and sentence.\textsuperscript{78} More than 81,000 criminal sentences are imposed by federal courts annually.\textsuperscript{79} In some state jurisdictions, judges may impose 50 sentences per week, or more than 2,000 per year.\textsuperscript{80} As Frank Bowman has observed in another context, “[t]he coin of the realm, the scarcest resource, in federal district court is time,” and many judges understandably “begrudge the time it takes to deal with sentencing issues.”\textsuperscript{81} The sheer volume of sentencing decisions forces judges to forego a written opinion in most cases.

2. Comprehensive Information About Sentences

Second, to accomplish its goals, the common-law model depends on sentencing decisions that are \textit{comprehensive}. A written opinion must capture the full range of

\textsuperscript{72} See Uri J. Schild, \textit{Statistical Information Systems for Sentencing: A Cookbook}, 6 INT’L J. L. INFO. TECH. 125, 131 (1998) (noting that “published law reports” contain detailed descriptions of only a tiny fraction of all sentences). By law judges in the United States generally have no obligation to produce a written sentencing opinion, even if they must state the reasons for the sentence in court. See, e.g., 18 U.S.C. § 3553(c) (requiring that the sentencing judge “shall state in open court the reasons for its imposition of the particular sentence,” but imposing no requirement of a written opinion).

\textsuperscript{73} Transcription of sentencing hearings, like other proceedings, is not free. Because the government pays such litigation costs both for the prosecution and for indigent offenders, transcripts usually are not prepared unless needed in subsequent proceedings, such as an appeal.

\textsuperscript{74} See Sweet et al., supra note 21, at 940.

\textsuperscript{75} For excellent commentary on the task of the judge in announcing a sentence in open court, see D. Brock Hornby, \textit{Speaking in Sentences}, 14 GREEN BAG 2d 147 (2011).

\textsuperscript{76} Indeed, from time to time appellate courts vacate a sentence and remand the case, not because the sentence is necessarily unlawful, but because the sentencing transcript provides an insufficient explanation of the decision.

\textsuperscript{77} Brian J. Ostrum et al., \textit{Examining the Work of the State Courts, 2002: A National Perspective from the Court Statistics Project} 53-86 (2003) (noting that 3% of criminal cases in state courts nationwide are resolved at trial).

\textsuperscript{78} Id. (nationally 65% of cases result in a guilty plea, and most trials result in a conviction).

\textsuperscript{79} U.S. SENTENCING COMMISSION, \textit{SOURCEBOOK OF SENTENCING STATISTICS} 2009, Table 1 (2010).


potentially relevant facts and factors—including, crucially, those that the judge does not find especially salient. Otherwise future judges cannot reliably compare new cases to previously decided cases.

To illustrate the need for comprehensive opinions, suppose that two judges impose sentence in identical burglary cases. Both offenders violently broke into a private residence at night, armed with a loaded handgun, and stole personal property worth $5,000 before being confronted by the terrified homeowner. Both offenders also pleaded guilty, expressed remorse, have identical criminal histories consisting of a single petty juvenile conviction five years ago, and enjoy strong support from loving families.

The first judge imposes a sentence of two years of probation. In a written opinion, the judge explains that there is no need for a prison sentence in light of the offender’s spotless criminal record, prospects for rehabilitation, and low risk of recidivism. But the opinion is not comprehensive. It notes the dollar amount of the theft, but does not specifically mention the handgun or the fact that the homeowner confronted the burglar.

The second judge reads the written opinion and mistakenly believes that the cases are very different. The second judge imposes a sentence of three years of imprisonment. Unlike the first case, the judge reasons, this case involved an in-person confrontation with a homeowner startled by a burglar in the middle of the night. That encounter, along with the loaded handgun, made this offense extremely dangerous, and the offender surely appreciated the danger. Those factors, in the second judge’s view, outweigh the others.

The result is stark inter-judge disparity, although the judges did not realize it. Even though the offenses and offenders were in fact identical, the second judge received incomplete—and therefore misleading—information about the earlier case. Without comprehensive written opinions, capturing even factors the judge deems relatively unimportant, the common law of sentencing can malfunction.

Unfortunately, there is reason to doubt that comprehensive sentencing opinions can be routinely generated. Every criminal sentence involves a slate of aggravating factors and a slate of mitigating factors. The task of the sentencing judge is to weigh those competing considerations and strike an appropriate balance. Written opinions, however, frequently do not disclose and detail all potentially relevant factors. They are designed, after all, not merely to announce the sentence but also to persuade the reader that the sentence is reasonable. Judges naturally focus on the facts and factors stressed by the parties, and on those which they find most persuasive, while downplaying others. That lack of comprehensiveness can interfere with the common-law model.

To be sure, a common law of anything depends on written opinions that set out the relevant facts. But a common law of sentencing is particularly vulnerable to comprehensiveness problems because of the complexity and review structure of sentencing decisions.

83 Schild, supra note 72, at 125 (“Sentencing consists in trying to reconcile a number of totally irreconcilable facts.”) (internal quotation marks omitted).
84 Cf. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 94 (2008) (advising lawyers, in drafting a statement of facts for a brief, to persuade the reader by “putting some facts in high relief and some in low relief—and . . . omitting others altogether”).
Sentencing decisions are dizzyingly complex. Under a typical sentencing statute, the judge must take into account the nature and circumstances of the offense, which includes the totality of the circumstances surrounding the offender’s actions and state of mind. The offense conduct may consist of a single incident, or in complex fraud or conspiracy cases it may involve a sprawling series of actions over many years. In addition, the judge must consider the offender’s personal characteristics. That inquiry requires a review of the offender’s entire life, before and after the offense. Criminal history, educational background, employment history, mental health, good deeds, public service, drug and alcohol addiction, childhood, family life, prospects for treatment, actions in pretrial detention, assistance to the government—the number of moving parts is staggering. In the words of one federal probation officer, at sentencing a judge considers “a narrative of the individual from the day of his birth to the moment of his conviction.” And the court often must conduct a similar inquiry for the offender’s family members, for victims, and for victims’ families.

Compounding the complexity, sentencing judges must consider those facts in light of a wide range of purposes of punishment, which may be in tension with one another. Most jurisdictions in the United States have a “laundry list” statute that directs sentencing judges to take into account retribution, general and specific deterrence, incapacitation, rehabilitation, and various and sundry other goals, without assigning priority to any of them. In addition, in making judgments at sentencing, courts sometimes must wrestle with difficult criminal policy questions, such as the proper ratio between crack and powder cocaine offenses, the severity of sentencing ranges for receiving child pornography, or apparent injustice in the exercise of discretion by prosecutors.

The wide-open inquiry at sentencing makes it difficult for a judge to predict, disclose, and discuss all factors that future judges might find relevant. It requires substantial effort to draft even one comprehensive opinion. Judges cannot undertake that effort often.

The review structure of sentencing decisions also makes it tempting to write an abbreviated opinion. In any given case, there is little risk that the judgment will be questioned because no other district court judge reviews the case or writes a dissent. Although appellate review is theoretically available, criminal defendants frequently

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85 E.g. 18 U.S.C. § 3553(a)(1).
86 Garry Sturgis, U.S. v. Barry: They’ve Only Just Begun, LEGAL TIMES, Aug. 20, 1990, at 1 (quoting Arthur Carrington of the Probation Office in the U.S. District Court for the District of Columbia); see also ADMINISTRATIVE OFFICE OF U.S. COURTS, PROBATION DIVISION, THE PRESENTENCE INVESTIGATION REPORT 1 (2d ed. 1984) (presentence reports are designed, among other things, to “help[] the reader understand the world in which the defendant lives”).
87 See, e.g., Fed. R. Crim. P. 32(d)(2)(B) (requiring that presentence reports include information about the financial, social, psychological, and medical impact of the offense on victims).
88 E.g. id. § 3553(a); Model Penal Code § 1.02(2) (1962); KEVIN REITZ, MODEL PENAL CODE: SENTENCING 1, 71 (2003) (describing the “multiple choice” approach adopted by statute in most states).
89 Cf. John O. McGinnis & Charles W. Mulaney, Judging Facts Like Law, 25 CONST. COMM. 69, 104-05 (2008) (arguing that judges are less susceptible to confirmation bias than legislators because “[i]f a judge ignores facts in the majority opinion, he will suffer the embarrassment of a strong dissenter (a factual ‘whistleblower’) who points out an opinion’s factual flaws”).
waive the right to appeal—two-thirds of defendants who plead guilty, according to one study—\(^{90}\) and in any event the chances of a successful appeal are very low.\(^ {91}\)

Moreover, when judges anticipate that the parties may appeal from a sentence, they have strategic incentives to provide fewer details. Judges do not like to be reversed on appeal,\(^ {92}\) and detailed sentencing opinions sometimes increase the risk of reversal. An appellate court might be forced to vacate and remand based on a stray reference to a prohibited factor, or a misstatement of a relatively minor fact, or an inartful phrase that sounds too much like a legal error. In especially complex or controversial cases, a detailed opinion might be necessary to shield a sentence from reversal on appeal. But in ordinary cases, writing a long opinion is asking for trouble. A simple announcement from the bench or a terse written order gives the parties little to go on, and therefore little to attack. Sometimes less is more.

3. Representative Information About Sentences

Third, to accomplish its goals, the common-law model depends on sentencing decisions that are representative. Information sharing reduces inter-judge disparity, according to proponents, by giving judges a “context” or “picture” of how each new case compares to previous cases. Judges can then align their sentences to fit that picture.\(^ {93}\) The trouble is that the picture can be skewed. The body of common law might reflect some kinds of cases more than others, and some judges more than others.

To begin, some kinds of cases generate sentencing opinions more often than others. Sometimes a judge chooses to write a published opinion because the sentence presents a novel legal issue, and the bulk of the opinion is dedicated to that issue.\(^ {94}\) At other times a judge chooses to issue a published opinion because the case is unusual. Because of the extreme facts, or the controversial result, or some otherwise extraordinary aspect of the case, the judge feels the need to provide an extended explanation of the reasons for the sentence.\(^ {95}\)

An imbalance of cases presents similar problems for the common-law model. A common law consisting disproportionately of extreme cases is incomplete, and therefore potentially deceptive, as a guide for judges in ordinary cases. Imposing sentences against a skewed common-law backdrop can actually undermine rationality, rather than enhance

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\(^ {91}\) In the federal system, for example, 86.7% of sentencing appeals are affirmed or dismissed. U.S. SENTENCING COMMISSION, 2010 ANNUAL SOURCEBOOK OF SENTENCING STATISTICS, Table 56 (2010). Many reversals and remands are on procedural rather than substantive grounds.


\(^ {93}\) See supra notes 154-155 and accompanying text.

\(^ {94}\) E.g. United States v. Pimental, 367 F. Supp. 2d 143, 149-54 (D. Mass. 2005) (Gertner, J.) (holding that the Sixth Amendment forbids the consideration of acquitted conduct at sentencing, or alternatively that acquitted conduct may be considered only if it is found beyond a reasonable doubt).

it, by creating inconsistency with sentences in ordinary cases that are “invisible” because they did not warrant a published opinion.\textsuperscript{96}

In addition, some judges publish far fewer sentencing opinions than their colleagues. As an example, during the three-year period from fiscal year 2006 to 2008, the judges of the U.S. District Court for the District of Massachusetts issued a total of 28 sentencing opinions made available on the Westlaw database. But not all judges wrote a similar number of reported sentencing opinions. One judge singlehandedly accounted for 12 of those opinions (43% of the total). Seven other judges did not write any.\textsuperscript{97}

That imbalance can pose a serious problem because a non-representative common law, dominated by some voices while others remain silent, can actually exacerbate inter-judge disparity. Future judges, guided by an incomplete and skewed sense of their colleagues’ sentencing patterns, might inadvertently misalign their decisions with those of less prolific judges. If the court’s most dedicated opinion-writers happen to be representative of the court as a whole, then the body of precedent can indeed serve to minimize inter-judge disparity. But if “outlier” judges contribute more opinions than their colleagues, the common law of sentencing can have the opposite effect. And that scenario is plausible because judges have a special incentive to write a thorough opinion when they suspect their colleagues may disagree with the outcome.

\textbf{B. An Empirical Analysis of Sentencing Information Collection}

The challenges in collecting written, comprehensive, and representative sentencing opinions are not merely speculative. This Article reports the results of an original empirical study of federal sentencing data collection, designed to test whether the information is sufficient to support an effective common law of sentencing. Because the documents that serve as the basis for the analysis are generally nonpublic, the analysis is the first of its kind in the United States. Although a common-law model certainly could do more than the current federal system to encourage the collection of useful sentencing information, the current practices of federal judges suggest that the other obstacles are formidable.

\textbf{1. Data and Methods}

In federal court, sentencing judges must comply with detailed mandatory reporting requirements. This study examines the contents of a document called the “Statement of Reasons.” Federal judges are required to file a Statement of Reasons for every criminal sentence.\textsuperscript{98} Upon completion, the document is transmitted to the United States Sentencing Commission, which extracts and records data about the sentence. The Commission then generates datafiles, based on the contents of tens of thousands of sentences annually, which serve as the basis for statistical reports about nationwide

\textsuperscript{96} Cf. \textsc{Austin Lovegrove}, \textsc{Judicial Decision Making, Sentencing Policy and Numerical Guidance} 42 (1989) (“[I]t is acknowledged that there is disparity in sentencing, and it is important that a few disparate sentences should not appear to be the norm.”).

\textsuperscript{97} For purposes of this tally, the total number of judges includes all judges who served during at least part of fiscal years 2006-2008.

\textsuperscript{98} 18 U.S.C. § 3553(c) (“The court shall provide a transcription or other appropriate public record of the court’s statement of reasons, together with the order of judgement and commitment . . . to the Sentencing Commission . . . .”).
sentencing practices. To ensure that complete and comprehensive data are available, the Chief Judge of every federal district court is required by statute to “ensure” that in every case a “written statement of the reasons for the sentence imposed” is submitted, in a format specified by the Commission.99

A brief summary of federal sentencing practice may be helpful. The U.S. Sentencing Commission has promulgated sentencing guidelines that use an elaborate “grid” to translate offense and offender characteristics into a sentencing range. The sentencing range is expressed as a narrow range of months of imprisonment, such as 52-63 months. Although the guidelines originally were mandatory, and judges had limited authority to depart from the specified range, the Supreme Court’s decision in United States v. Booker100 resolved a constitutional defect in the design of the guidelines by rendering them “effectively advisory.”101 Judges now must “consider” the advisory guideline range in every case, but they are free to impose any reasonable sentence consistent with a “laundry list” statute that sets out broad purposes of punishment.102 Even after Booker, most federal sentences fall within the guideline range.103 Within-range sentences reflect the sentencing court’s judgment that the guideline range that is proper in the “mine run” of roughly similar cases, and that the particular offense and offender are “simply not different enough to warrant a different sentence.”104

The Statement of Reasons form is adapted to the guidelines regime. It is four pages long, and requires that judges provide basic information about the sentence imposed.105 Judges must check a box indicating whether the sentence falls within, above, or below the advisory guideline range. They also have the option of checking boxes that correspond to reasons for an out-of-guidelines sentence.106 The checkboxes express the reasons for the sentence in very general terms, such as “aggravating or mitigating circumstances” or “diminished capacity” or “the nature and circumstances of the offense.”107

In addition, the form provides several spaces in which judges may provide a narrative description of the reasons for the sentence.108 The form states that a written narrative description is “required” in two categories of cases: (1) all sentences outside the guideline range; and (2) all sentences within the guideline range with a prison sentence “greater than 24 months.”109 Judges sometimes use the back of the form or attach

101 Id. at 245 (Breyer, J., writing for the Court).
102 Id.
103 See Scott, supra note 39, at 14-18.
106 Id. at 8-9.
107 Statement of Reasons Form 8-9. The checkboxes correspond to the titles of guideline departures, see U.S.S.G. §§ 5K2.0, K52.13, and broad purposes of punishment, see § 3553(a)(1). The checkboxes themselves provide no information about the facts of the case. Judges can check a box marked “Age,” for example, but the checkbox does not indicate whether the offender was especially young or old.
108 Id. at 8 (“Explain the facts justifying the departure.”); id. at 9 (“Explain the facts justifying a sentence outside the advisory guideline system.”); id. at 10 (“ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE”).
109 See Statement of Reasons Form 8, 10.
additional pages or documents, such as a written sentencing opinion or a transcript of the sentencing hearing.

The Statement of Reasons form is not designed to serve as the basis for a common law of sentencing, or even as the official record of the court’s reasons for purposes of appeal. The sole audience is the Sentencing Commission, which uses the forms to extract information about sentencing outcomes and (in theory) to learn how judges are sentencing under the advisory guidelines. For other purposes, the Judicial Conference of the United States has issued a policy statement making Statements of Reasons secret and confidential.\footnote{See Judicial Conference Policy Statement, \textit{Report of the Proceedings of the United States Judicial Conference}, Mar. 14, 2001, at 14.}

But one federal district court, the District of Massachusetts, has voted to make Statements of Reasons available to the public on the PACER system (Public Access to Court Electronic Records) unless the presiding judge orders it sealed.\footnote{United States v. Green, 346 F. Supp. 2d 259, 278 n.66 (D. Mass. 2004) (Young, C.J.) (citing Minutes of the Court Meeting (D. Mass.), Sept. 4, 2001, at 4).} That decision affords researchers a rare opportunity to study sentencing practices that remain hidden in every other federal court. The open-access policy in the District of Massachusetts reflects an admirable commitment to greater transparency in criminal sentencing.\footnote{United States v. Kandirakis, 441 F. Supp. 2d 282, 333 n.76 (D. Mass. 2006) (Young, J.).}

To assess the written statements of reasons being collected by the Commission, the analysis examines a full year (fiscal year 2006\footnote{The analysis includes Statements of Reasons filed in the Commission’s 2006 fiscal year, which runs from October 1, 2005 to September 30, 2006.}) of Statements of Reasons in the District of Massachusetts. A total of 411 statements were reviewed and coded, representing approximately 80\% of the Statements of Reasons submitted to the Commission that year.\footnote{See infra Appendix Part A.1.} Details concerning document selection are set forth in the Appendix.

To evaluate whether the documents supply the kind of written, comprehensive, and representative explanations that would be needed to support a common law of sentencing, the study measures the degree of explanation contained in each Statement of Reasons. It does so by counting the total number of sentences of text in the written narrative description. Such a “sentence count” admittedly captures only the length, and not the quality, of the written explanation. But the length of the narrative explanation is a fairly reliable proxy for the level of factual detail and the thoroughness of the judge’s reasoning. The study classifies a narrative description of 1-3 sentences as a “short” explanation. It classifies a narrative description of 4-9 sentences, at least a paragraph of text but less than a page, as a “medium” explanation. It classifies a narrative description of 10 or more sentences of text, roughly one page, as a “long” explanation.

2. Results

The results of the study are discouraging. Very few Statements of Reasons contain a comprehensive explanation of the sentence, and the subset of well-explained sentences is not representative of the population as a whole.
a. Comprehensiveness

As shown in Figure 1, most Statements of Reasons provide no written explanation of the reasons for the sentence, and only a small fraction contain a substantial explanation.

Figure 1: Explanation Provided, All Statements of Reasons
District of Massachusetts, FY 2006 (n = 411)

In 58.4% of cases, the Statement of Reasons contains no indication whatsoever of the judge’s reasons for the sentence. In 7.5% of cases, the only indication of the judge’s reasons is a checkmark in a box corresponding to a broad reason for the decision (such as “criminal history”). In another 21.9% of cases, the Statements of Reasons provides only a short narrative explanation of up to three sentences of text, and in another 7.3% of cases it provides a medium-length explanation of 4-9 sentences. The document contains a long explanation of 10 or more sentences or more in just 4.9% of cases.\(^{115}\)

As noted above, the Statement of Reasons form does not require a narrative description in all cases. For sentences of 24 months of imprisonment or fewer that fall within the advisory guideline range, approximately 21% of cases in the study, the form

\(^{115}\) Percentages may not total 100% due to rounding.
permits (but does not require) judges to forego a written description and simply check a box.\textsuperscript{116}

Yet the results are not attributable to the form’s instructions. As shown in Figure 2, the degree of explanation is only slightly better for the subset of cases in which the form explicitly requires a written narrative description:

\textbf{Figure 2: Explanation Provided, Where Narrative Description Is Required}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{Figure2.png}
\caption{District of Massachusetts, FY 2006 (n = 317)}
\end{figure}

For cases in which the Statement of Reasons form explicitly requires a written narrative description, judges provide no explanation in 48.6\% of cases.\textsuperscript{117} In another 9.1\% of cases, the only indication of the judge’s reasons is a checkmark in at least one box. In another 27.1\% of cases, a short narrative explanation of 1-3 sentences is provided, and in another 9.1\% of cases, a medium-length explanation of 4-9 sentences is provided. A long explanation of 10 or more sentences is present in just 6.0\% of cases in which a written explanation is required.

\textsuperscript{116} See supra note 109 and accompanying text.

\textsuperscript{117} The percentage of sentences with no written explanation is lower for non-guideline sentences (28.6\%) than for within-range sentences of more than 24 months (78.7\%). Figure 2 shows the combined percentage for both categories of cases.
b. Representativeness

In addition, the pool of cases in which the Statement of Reasons includes a full explanation of the sentence is not representative of cases as a whole. Figure 3 shows that sentences outside the advisory guideline range are much more likely to produce a full explanation than sentences within the guideline range.

**Figure 3: Long Explanation Provided, by Guideline Range**
District of Massachusetts, FY 2006

For sentences within the advisory guideline range, the Statement of Reasons contains a long explanation in just 2.5% of cases. For sentences outside that range, however, the Statement of Reasons is roughly four times as likely to contain a full explanation. The document contains a full explanation for 9.9% of below-range sentences, and for 8.3% of above-range sentences. The result is a skewed collection of long written descriptions.\(^\text{118}\)

The pool of long written explanations is non-representative in another way. Some judges are far less likely to provide full explanations of their sentences than others. Figure 4 shows, for each judge whose criminal caseload resulted in at least 15 sentences

\(^\text{118}\) For example, in the full set of 411 sentences, 67.4% are within-range sentences. In the subset of sentences with a long explanation of roughly a page or more, just 35.0% are within-range sentences.
during the year of the study, the percentage of cases in which the judge provided a long written explanation of at least 10 sentences of text.

Figure 4: Percentage of Cases with Long Explanation, by Judge Minimum Caseload Required (13 judges total) District of Massachusetts, FY 2006

Not all judges wrote long explanations of their sentences at equal rates. Six of the 13 judges who met the minimum-caseload requirement did not submit any long explanations during the year of the study. By contrast, one judge provided a long explanation for 21.1% of sentences, and another provided a long explanation for 33.3% of sentences.

As a result, the pool of sentences with long written explanations is imbalanced. As shown in Figure 5, some judges are far better represented than their colleagues.

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119 For further discussion of the minimum-caseload requirement, see infra Appendix Part B.

120 In this table and throughout the Article, I use numbers rather than names to identify individual judges. Because the point of the analysis is simply that some judges provide less explanation than others, it is unnecessary—and perhaps counterproductive—to name names. The Sentencing Commission, acting at the insistence of the judiciary, removes judge-identifying information from all of the statistics it releases to the public. That impedes important research into criminal sentencing. I hope to encourage other courts and the Commission, to follow the lead of the District of Massachusetts in promoting greater transparency.
Figure 5: Pool of Cases with Long Explanation, by Judge
Minimum Caseload Required (13 judges total)
District of Massachusetts, FY 2006

One judge singlehandedly accounts for 45% of long opinions during the year of the study. Together the court’s three most prolific authors of long opinions account for 80% of the court’s output.

Those differences are not the product of chance. Regression models confirm that the differences between guideline and non-guideline sentences and between judges are statistically significant. First, a logistic regression model can evaluate factors that predict whether the Statement of Reasons contains any written explanation. Independent variables include the length of the sentence, as well as dummy variables that describe whether the sentence was outside the guideline range, whether the sentence was within the guideline range and longer than 24 months of imprisonment (the other category of sentences for which the Statement of Reasons form requires a narrative description), whether the court imposed a sentence of time served, and the identity of the sentencing judge (for judges with a minimum caseload of 15 sentences during the fiscal year). Table 1 reports the results:

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121 Logistic regression is necessary because the dependent variable, whether any explanation was provided, is binary rather than normally distributed.
122 See supra note 109 and accompanying text.
123 For a discussion of the variables, see the Appendix, infra Part B.
Table 1: Logistic Regression Model
Written Explanation Provided

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Constant)</td>
<td>-1.153</td>
<td>0.676</td>
<td>.088</td>
</tr>
<tr>
<td>Sentence Length</td>
<td>0.007</td>
<td>0.002</td>
<td>.001*</td>
</tr>
<tr>
<td>Sentence of Time Served</td>
<td>0.409</td>
<td>0.900</td>
<td>.649</td>
</tr>
<tr>
<td>Non-Guideline Sentence</td>
<td>3.320</td>
<td>0.392</td>
<td>&lt;.001*</td>
</tr>
<tr>
<td>Within-Range Over 24 Months</td>
<td>0.719</td>
<td>0.579</td>
<td>.214</td>
</tr>
<tr>
<td>Judge Identity (categorical)</td>
<td></td>
<td></td>
<td>.001*</td>
</tr>
</tbody>
</table>

Model significance: <.001*
Chi-square: 183.866
n = 398

The model confirms that some kinds of sentences are more likely to produce a written explanation than others. Non-guideline sentences are significantly and strongly correlated with written explanations. Likewise, longer terms of imprisonment are significantly, although more weakly, correlated with written explanations. Collectively, the dummy variables capturing the identity of the sentencing judge are also significant predictors of whether a written explanation is provided. Surprisingly, however, despite the form’s instructions, a within-range sentence of more than 24 months is not a significant predictor of a written explanation, after controlling for other factors.

Second, logistic regression modeling can evaluate factors that predict whether the Statement of Reasons contains a long written explanation of 10 or more sentences. The same independent variables are used as predictors, except that judge identity is excluded because too few judges submitted long explanations. Table 2 reports the results:

Table 2: Logistic Regression Model
Long Explanation (10+ sentences) Provided

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Standard Error</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Constant)</td>
<td>-4.495</td>
<td>1.006</td>
<td>&lt;.001*</td>
</tr>
<tr>
<td>Sentence Length</td>
<td>-0.003</td>
<td>0.004</td>
<td>.482</td>
</tr>
<tr>
<td>Non-Guideline Sentence</td>
<td>1.086</td>
<td>0.519</td>
<td>.037*</td>
</tr>
<tr>
<td>Within-Range Over 24 Months</td>
<td>1.338</td>
<td>1.124</td>
<td>.234</td>
</tr>
</tbody>
</table>

Model significance: <.001*
Chi-square: 11.185
n = 408

The model confirms that some kinds of sentences are more likely than others to prompt a long written explanation. Non-guideline sentences are significantly correlated with long explanations of 10 or more sentences of text. Neither sentence length nor within-range sentences above 24 months, however, are statistically significant predictors of a long explanation.
3. Implications

These findings concerning the number, length, and representativeness of written sentencing opinions suggest that a common law of sentencing would confront substantial information-collection challenges. Despite detailed and mandatory reporting requirements backed by a federal statute, the available pool of written sentencing opinions is limited.

In almost half (48.6%) of cases in which a written explanation is required, there is no indication whatsoever of the judge’s reasons. Needless to say, those cases cannot serve as the basis for a common law of sentencing. With no description of facts about the offense and offender that justify the sentence, there is no way to follow the judge’s reasoning or to draw distinctions in future cases. In another segment of cases (9.1%), the judge made a check mark in a box corresponding to a general basis for the decision, but did not provide any further explanation. A general indication of a topic area—such as “mental state” or “criminal history”—with neither a description of the facts nor the judge’s reasoning is also plainly insufficient to promote greater consistency and rationality in sentencing. Together, those categories of cases, in which the judge provided no written explanation of the sentence, account for approximately two-thirds of Statements of Reasons. That is a discouraging rate of written opinions.

In a substantial minority of cases (27.1%), the judge provided a written explanation, but the explanation consisted of just 1-3 sentences of text. That kind of quick summary would be of little use to future courts consulting a body of common law for guidance. At best such a description can highlight a few factors that the judge deemed most important, with no explanation and no discussion of other considerations. In another segment of cases (9.1%), the judge provided a written explanation of 4-9 sentences of text—essentially a paragraph or two. That level of explanation marks an improvement, but is insufficient to support a healthy common law of sentencing. Of necessity many relevant facts must be omitted, and there can be room for only a bare-bones explanation of how the judge weighed the competing facts and considerations. Incomplete opinions of this kind may fail to capture facts that future judges deem important, masking important similarities or differences between cases and thereby generating inter-judge disparity and undermining rationality.

There is some good news. In a small number of cases (6.0%), the judge provided a lengthy written explanation consisting of at least 10 sentences of text. Indeed, in a handful of cases (1.1%), the judge wrote a formal sentencing opinion or attached a hearing transcript that includes more than 50 sentences of explanation. The longer opinions are outstanding, offering future judges not only a full sense of the relevant facts, but also valuable insights into the sentencing judge’s reasons and approach. The challenge, it seems, is that judges do not have time to produce such comprehensive opinions very often.

Unsurprisingly, the kinds of cases that produce lengthy written opinions tend to be atypical, resulting in a non-representative body of case law. As explained above,

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124 See United States v. Blackie, 548 F.3d 395, 401 (6th Cir. 2008) (vacating sentence for lack of an adequate explanation because court merely checked boxes indicating reasons for the sentence, without discussing any facts related to the offense or offender).
125 See supra note 82 and accompanying text.
judges in the federal system must consider an advisory guideline range when imposing sentence, but are free to impose a sentence outside that range in cases “different enough” from the “mine run” of similar cases. In deciding whether to provide a written explanation, and in determining how much explanation is warranted, judges understandably dedicate more time and attention to those cases—cases they find “different”—than to other cases.

A body of common law that consists disproportionately of cases that the judge finds unusual can be misleading, even counterproductive. An important form of inter-judge disparity arises when different judges reach different conclusions about whether a particular set of offense and offender facts is “ordinary.” If, as the data indicate, judges are more likely to write a thorough opinion in cases they deem unusual, the body of written opinions might create the misleading impression that all judges would treat the case as unusual, undermining inter-judge uniformity and rationality. The study suggests that non-representativeness poses a real risk. Rather than providing written explanations in a random or representative cross-section of cases, judges tend to write opinions in cases that they find exceptional.

In addition, the data suggest that some sentencing judges are seriously underrepresented in writing sentencing opinions. During the timeframe of the study, some judges wrote long explanations of at least 10 sentences of text in 20% or even 33% of their cases. But almost half of the court’s judges did not write any. As a result, three of the court’s judges accounted for 80% of its lengthy sentencing opinions. A common law of sentencing in which some judges have a dominant voice, while others remain silent, can exacerbate inter-judge disparity and undermine rationality by creating a distorted impression of actual sentencing patterns.

For three reasons, these results should be interpreted with caution. First, Statements of Reasons are not designed to serve as the basis for a common law of sentencing. At present, their sole audience is the U.S. Sentencing Commission, which uses the documents as inputs for its statistical reports. No one else has access to the judge’s statements, no matter how insightful or well-reasoned—and judges know it. They therefore have little incentive (aside from the commands of federal law) to explain their decisions in detail. Data collection efforts surely would improve if judges believed that their written explanations would reach a wider audience.

Second, the Statement of Reasons form itself is clumsy, mechanistic and cumbersome. Scarcely concealing its intended use as a data-entry tool for the Commission, it consists primarily of a “parade of nearly meaningless check boxes.”

See supra notes 100-104 and accompanying text.

Formally, a judge is free to impose a non-guideline sentence even in an “ordinary” or “typical” case, if the judge concludes that the guideline range fails to achieve the broad purposes of punishment set forth in 18 U.S.C. § 3553(a). Kimbrough v. United States, 552 U.S. 85, 108-09 (2007). Except in rare cases, however, sentencing courts choose a non-guideline sentences because of the special facts of the case, rather than a categorical rejection of the guideline range.

See supra note 96 and accompanying text.

See supra note 97 and accompanying text.

Green, supra note 6, at 58.

See 28 U.S.C. § 994(w), (w)(1) (requiring that the Chief Judge of each federal district court “ensure” the completion of a statement of reasons in whatever format the Commission specifies).

That format no doubt discourages judges from providing more thorough narrative descriptions of the reasons for a sentence. With a more open-ended form that encouraged judges to set out their reasons, the contents of the statements might be richer and more useful.

Third, this study examines documents from a single federal district court. Data collection practices in one district may not be representative of practices in other federal courts nationwide, or in state courts responsible for the vast majority of criminal sentences. And the District of Massachusetts, admittedly, is far from ordinary when it comes to sentencing issues. Several members of the court are well-respected as sentencing experts. Judges Nancy Gertner and William Young have written scholarly articles on sentencing issues, and Judge Patti Saris recently was confirmed as Chair of the United States Sentencing Commission. Moreover, the same commitment to transparency that led the District of Massachusetts to approve its unique disclosure policy might make its data reporting practices materially different from those of other courts.

Nonetheless, the findings of the study suggest that information-collection challenges are formidable. It appears that, despite explicit statutory requirements, time constraints and other obstacles can prevent sentencing courts from routinely providing the kind of information a common law would require.

Indeed, because of the distinctive features of the District of Massachusetts, if anything this study overstates the level of explanation judges can afford to provide. Unlike their peers around the country, the judges of the District of Massachusetts have consciously chosen to make their Statements of Reasons widely available. They know that these documents will not simply be filed away in a drawer at the Sentencing Commission, but ordinarily will be accessible to the public. The court’s special interest in sentencing issues likely translates into more frequent and thorough written opinions, not less. In addition, federal judges enjoy a larger support staff, more law clerks, and a slower criminal docket than their counterparts in state courts. If the level of explanation is limited in the District of Massachusetts—widely recognized as one of the best sentencing courts in the country—then it probably is even more limited in other courts.

C. Overcoming Information-Collection Obstacles

None of these information-collection obstacles is insuperable, and the current practices of federal judges certainly are not the product of the best possible information-collection system. Lawmakers, sentencing commissions, or courts could take steps to facilitate the development of a comprehensive and representative store of sentencing opinions. One option is to impose more strict writing and reporting requirements on

133 Id.
136 Although some federal district courts are deluged with criminal immigration cases, prompting the development of “fast track” disposition programs, the District of Massachusetts is not one of them. See U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. MA-06 (2006) (noting that no departures were imposed pursuant to an “early disposition program”).
judges. Another is to make case documents such as the presentence report available to future judges. Each of those approaches, however, creates complications of its own.

Information-collection obstacles might be addressed by imposing additional reporting requirements. Today even the most demanding sentencing statutes leave judges almost entirely free to announce the reasons for a sentence “in open court” and to forego a written sentencing opinion. To secure more substantial written opinions, a statute could require that in every case the judge must provide a “formal written opinion stating with particularity the reasons for the sentence imposed.” If such a requirement proved too onerous, the statute could require a lengthy written opinion in a manageable portion of cases, such as 5% (the average among the federal judges in the study reported above), or 10% (a rough average among judges in the study who submitted at least one long explanation), or even 25% (a rough average among the most prolific judges in the study).

New reporting requirements also could be calibrated to promote representativeness. For example, they could operate on a random basis by requiring not only that judges write a detailed opinion in at least 10% of cases, but that they do so in every tenth case to which they are randomly assigned. Although judges undoubtedly would continue to write lengthy opinions in unusual or extreme cases, even when not compelled by statute, such a requirement would generate more opinions in “ordinary” cases and thus make the body of case law more representative.

The major challenge with such a “command and control” approach is convincing judges to comply. In the study described above, even when federal law expressly requires a written narrative description, in 58.4% of cases the judge submitted no explanation for the sentence imposed. In fact, after controlling for other factors, the requirement of a narrative description for within-range sentences of more than 24 months of imprisonment is not a significant predictor of a written explanation, or of a long written explanation of roughly a page or more. If a lack of motivation is the major obstacle, then perhaps all that is needed is more inviting paperwork and a sense of confidence that someone will actually read the explanation. But if time constraints are the major obstacle, then reporting requirements might handcuff courts facing other pressing matters, and some judges may be unable to comply even if they earnestly wish to contribute to the common law.

Alternatively, rather than insist upon a written opinion from the judge, court staff could make the entire presentence report available for reference in future cases. Distributing the document would be simple, since in most cases a presentence report is prepared as a matter of routine. Presentence reports also would provide future judges with exhaustive details concerning the offense conduct, the offender’s criminal history and personal life, and information about family members and victims. Indeed, because

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137 See, e.g., 18 U.S.C. § 3553(c).
138 See supra Figure 2 and accompanying text.
139 See supra Tables 1-2 and accompanying text.
140 Judge Gertner has proposed making s presentence reports available to other judges “with appropriate protections.” Honorable Nancy Gertner, Sentencing Reform: When Everyone Behaves Badly, 57 Me. L. Rev. 569, 582 (2005).
141 See, e.g., Fed. R. Crim. P. 32(c)(1)(a) (requiring a presentence investigation and report, with a few narrow exceptions).
142 See Fed. R. Crim. P. 32(d) (setting forth required contents of federal presentence reports); OFFICE OF PROBATION AND PRETRIAL SERVICES, THE PRESENTENCE INVESTIGATION REPORT (2006), ch. III-1 to III-
written sentencing opinions sometimes omit facts that a future judge may deem relevant, the presentence report might provide a more comprehensive—and thus more reliable—guide to future judges.

Yet a presentence report, standing alone, is a poor substitute for a written sentencing opinion because it does not disclose the judge’s reasoning. Although the report may suggest possibilities, cataloguing possible aggravating or mitigating factors, it captures neither the factors the judge deems most relevant nor the judge’s process of prioritizing and balancing them. Leaving future judges to guess about the rationale for the sentence would not improve the rationality and coherence of sentencing outcomes. Also, as a practical matter, presentence reports (like sentencing transcripts) would be unwieldy for a future judge to consult. Because they guide not only judges but also corrections officials and parole and probation officers, they often contain extensive details of limited relevance at sentencing. Sifting through the document to extract relevant details is possible, but would take time. Presentence reports therefore would function poorly as the building blocks of a common law of sentencing.

Sharing presentence reports with far-flung courts also would raise serious privacy concerns for offenders, victims, and witnesses. The reports often contain deeply personal information concerning the offender’s mental health, physical condition, adult and juvenile criminal record, history of sexual or physical abuse, and family life. They may also recount the testimony of grand jury witnesses, provide personal information about victims, and disclose the terms of cooperation agreements with the government. For decades, out of concern about a chilling effect on the willingness of individuals to assist the presentence investigation, it was controversial to disclose the report even to the offender. With few exceptions, therefore, presentence reports today remain confidential. To be sure, disclosing the presentence report to judges and court staff poses fewer risks than disclosing it to the public. Excerpting or partially redacting the reports for consumption by other judges, although costly, might further ameliorate privacy concerns. Nonetheless, making every presentence report available to the entire judiciary would meet considerable resistance. As one federal judge put it, “I guess I feel

144 See Fed. R. Crim. P. 32(i)(3)(B) (authorizing courts to decline to resolve disputes that “will not affect sentencing” or will not be considered at sentencing).
145 See United States v. Corbitt, 879 F.2d 224, 230 (7th Cir. 1989) (stressing that “[t]he criminal defendant has a strong interest in maintaining the confidentiality of his or her presentence report” and holding that the news media have no right of access to the reports).
146 Id. at 230-31.
147 Fed. R. Crim. P. 32(c)(2) (advisory committee notes to 1966 amendments) (collecting sources and describing the “heated controversy” over “[w]hether as a matter of policy the defendant should be accorded some opportunity to see and refute allegations made in such reports”).
148 U.S. Dep’t of Justice v. Julian, 486 U.S. 1, 12 (1988) (“[C]ourts have been very reluctant to give third parties access to the presentence investigation report prepared for some other individual or individuals.”) (emphasis removed).
Thus, although the architects of a common-law model have options, it will be exceedingly difficult to collect the kind of written, comprehensive, and representative information on which a common law of sentencing depends.

III. INFORMATION USE CHALLENGES

Even assuming the existence of a robust body of comprehensive sentencing opinions, a common law of sentencing will face formidable obstacles. To reduce inter-judge disparity and promote rationality, the body of common-law opinions must also be disseminated to judges in a manner that is accessible and useful.

That task is more difficult than it sounds. As an introduction to the topic, it is helpful to consider a brief history of Sentencing Information Systems (SISs) designed to provide judges with statistical information about previous sentences. SISs have encountered serious information-use challenges, with most experiments ultimately being abandoned. An information-driven common law of sentencing in the United States likely would encounter similar difficulties.

A. Sentencing Information Systems

In the last 25 years, a handful of jurisdictions worldwide have experimented with Sentencing Information Systems (SISs), searchable electronic databases of sentencing statistics and (in some cases) opinions and summaries. Using interactive forms consisting of drop-down menus, radio buttons, and search strings, judges preparing to impose sentence can look up past sentences in similar cases. They can access aggregated information about whole categories of cases, such as the distribution of nationwide sentences for aggravated theft. Or they can access specific information about individual cases, such as the case summary and full sentencing opinion in a particularly relevant case. Courts in Canada, Scotland, and Australia have launched large-scale experiments with SISs, but to date no comparable systems have been developed in the United States.

The primary goals of an SIS, in the jurisdictions that have adopted them, are to reduce inter-judge sentencing disparity and to promote rationality. When a judge sentences an offender, an SIS can provide a statistical picture of how similar offenders have been sentenced before, by other judges in the same court, region, or nation.

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152 Marc Miller, *Sentencing Reform “Reform” Through Sentencing Information Systems, in THE FUTURE OF IMPRISONMENT* (Michael Tonry ed. 2004) at 121, 129. A few other jurisdictions overseas reportedly have developed SISs, but very little has been written about them. Id.

153 Austin Lovegrove, *Statistical Information Systems as a Means to Consistency and Rationality in Sentencing*, 7 INT’L J. L. & INFO. TECH. 31, 32 (1999) (“The primary aim of those systems is to promote consistency and rationality—the idea is that cases described by similar relevant characteristics should receive similar sentences.”).

Making better information available to judges, the argument goes, makes it possible for judges to align their decisions with those of their colleagues, and thus produces more consistent and better-reasoned sentences.\(^\text{155}\)

To date, no empirical research has examined whether any SIS has succeeded in reducing inter-judge sentencing disparity.\(^\text{156}\) The indirect evidence, however, is disheartening. Each of the most prominent SISs in foreign courts has encountered major difficulties.

In Canada, four provinces experimented with SISs in the late 1980s.\(^\text{157}\) A national sentencing commission had concluded that “detailed information on current practices” would prove valuable to sentencing judges,\(^\text{158}\) and surveys of judges had revealed a widespread appetite for better information about past sentencing outcomes.\(^\text{159}\) Although judges were not required to search the Canadian SIS when imposing sentence, the designers worked closely with judges to design useful and relevant search parameters.\(^\text{160}\)

It did not work. Within a few years, the Canadian SIS experiment was abandoned because judges declined to use it.\(^\text{161}\) The system’s architect attributed its demise to the fact that the reform was strictly voluntary. He was surprised to discover that “[j]udges do not, as a rule, care to know what sentences other judges are handing down in comparable cases.”\(^\text{162}\) Judges were especially reluctant to use the system, he reported, “if they knew (or thought) that these other judges have different approaches” than their own.\(^\text{163}\)

Similarly, in Scotland, an SIS was developed for judges of the High Court of Justiciary, which handles sentencing for some of the nation’s most serious criminal offenses. Following a trial period in 1997, the SIS became available to all of the court’s judges in 2002. Judges themselves proposed developing the system, principally as a defensive measure to head off more intrusive reforms (such as presumptive sentencing guidelines) that would have sharply limited their discretion.\(^\text{164}\) As in Canada, judges worked closely with designers of the SIS to define the available search parameters.\(^\text{165}\)

\(^{155}\) \textit{Id.} at 135; \textit{The Sentencing Commission for Scotland, The Scope to Improve Consistency in Sentencing} 36 (2006) (SISs “can be used to inform sentencing decision making and increase consistency within and between sentencers”).

\(^{156}\) Miller, \textit{supra} note 154, at 133; Schild, \textit{supra} note 72, at 127. The courts that have experimented with SISs apparently do not capture and publicize the kind of data necessary to support such research. \textit{See} Arie Freiberg, \textit{Australia: Exercising Discretion in Sentencing Policy and Practice}, 22 \textit{Fed. Sent’g Rptr.} 204, 206 (2010). As a result there is no direct evidence that the availability of an SIS improves inter-judge consistency.


\(^{160}\) Miller, \textit{supra} note 154.

\(^{161}\) \textit{Id.} at 130.


\(^{163}\) \textit{Id.}


\(^{165}\) \textit{Sentencing Commission for Scotland, supra} note 155, at 36.
The result, according to its creators, was a highly flexible and valuable resource for judges.\footnote{Neil Hutton & C. Tata, Sentencing Reform by Self-Regulation: Present and Future Prospects of the Sentencing Information System for Scotland’s High Court Justiciary, 6 SCOTTISH J. CRIMINOLOGY 37, 44 (2000).}

Yet the Scottish SIS has now collapsed as well. In 2006, just a few years after the system became widely available, the Sentencing Commission of Scotland reported that the system “was not widely used” and had “largely fallen into abeyance.”\footnote{The Sentencing Commission for Scotland, The Scope to Improve Consistency in Sentencing 14 (2006).} Judges “rarely” used the system to gather information, and “rarely” took the time to enter narrative information concerning their own sentencing decisions.\footnote{Id. at 37.} The data were also incomplete and at times inaccurate.\footnote{Id.} The Commission found that “currently the SIS does not have anything other than the most marginal of impacts on the imposition of sentences.”\footnote{Id.}

In 2010 one of the designers of the system proclaimed that the SIS is essentially non-operational, having been “allowed to atrophy” following years of judicial neglect.\footnote{Hutton, supra note 164, at 275.}

New South Wales, Australia, boasts the world’s most successful SIS, at least measured by longevity. The Judicial Commission of New South Wales has maintained a searchable database of sentencing statistics since 1988.\footnote{Miller, supra note 154, at 129, 133. For a detailed description of the system’s origins and functionality, see Ivan Potas et al., Informing the Discretion : The Sentencing Information System of the Judicial Commission of New South Wales, 6 INT’L J. L. INFO. TECH. 99, 104-14 (1998).} Strangely, in the 23 years of its operation, no effort has been undertaken to evaluate its effectiveness. There is evidence that judges in New South Wales actually use the system by performing searches,\footnote{Judicial Comm’n of New South Wales, Annual Report 2008–09, at 24 (2009) (showing over 930,000 pages accessed by judicial officers from 2008 to 2009).} but no research concerning its effects on sentencing outcomes.

Legal changes in the last decade suggest, however, that the SIS alone has proved inadequate to address concerns about inter-judge disparity. Beginning in 1998, the Supreme Court of New South Wales began to announce “guideline judgments,” which specified an advisory sentencing range for offenses.\footnote{See, e.g., R. v. Jurisic, 45 NSWLR 209, 229 (1998). Such guideline judgments were “intended to be indicative only” and to preserve “flexibility” for sentencing judges, but reflected the Court’s concerns about “[i]nconsistency in sentencing,” which “offends the principle of equality before the law.” Id.} In 2003, the New South Wales General Assembly enacted “standard non-parole sentencing periods”\footnote{Arie Frieberg, Australia: Exercising Discretion in Sentencing Policy and Practice, 22 FED’L SENT’G R. 204, 207 (2010).}—essentially a statutory determinate sentencing scheme\footnote{For a description of statutory determinate sentencing, see Michael Tonry, Sentencing Matters 10, 28 (1996).}—that set presumptive sentences for many serious offenses. Judges are now permitted to depart from the legislatively-prescribed sentence, but only upon finding facts justifying a departure.\footnote{See Frieberg, supra note 175, at 207.} The General Assembly concluded that inter-judge sentencing disparity had reached unacceptable levels in New

\begin{itemize}
  \item \footnote{Neil Hutton & C. Tata, Sentencing Reform by Self-Regulation: Present and Future Prospects of the Sentencing Information System for Scotland’s High Court Justiciary, 6 SCOTTISH J. CRIMINOLOGY 37, 44 (2000).}
  \item \footnote{The Sentencing Commission for Scotland, The Scope to Improve Consistency in Sentencing 14 (2006).}
  \item \footnote{Id. at 37.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Hutton, supra note 164, at 275.}
  \item \footnote{Miller, supra note 154, at 129, 133. For a detailed description of the system’s origins and functionality, see Ivan Potas et al., Informing the Discretion : The Sentencing Information System of the Judicial Commission of New South Wales, 6 INT’L J. L. INFO. TECH. 99, 104-14 (1998).}
  \item \footnote{Judicial Comm’n of New South Wales, Annual Report 2008–09, at 24 (2009) (showing over 930,000 pages accessed by judicial officers from 2008 to 2009).}
  \item \footnote{See, e.g., R. v. Jurisic, 45 NSWLR 209, 229 (1998). Such guideline judgments were “intended to be indicative only” and to preserve “flexibility” for sentencing judges, but reflected the Court’s concerns about “[i]nconsistency in sentencing,” which “offends the principle of equality before the law.” Id.}
  \item \footnote{Arie Frieberg, Australia: Exercising Discretion in Sentencing Policy and Practice, 22 FED’L SENT’G R. 204, 207 (2010).}
  \item \footnote{For a description of statutory determinate sentencing, see Michael Tonry, Sentencing Matters 10, 28 (1996).}
  \item \footnote{See Frieberg, supra note 175, at 207.}
\end{itemize}
South Wales, despite the availability of the SIS. The new regime was designed principally to reduce that form of disparity, although some observers have suggested that the General Assembly was responding to a public perception that sentences were too lenient.

B. Obstacles to Sentencing Information Use

The designers of SISs have written extensively about their experiences, and in particular about the challenges they confronted in building systems that judges actually use. As Marc Miller has observed, the power of an SIS to reduce inter-judge disparity “depends on how judges use the information revealed by the system to guide their own sentencing judgments.” The troubled history of SISs suggests three formidable obstacles: the subjectivity of search parameters, the level of generality in matching cases, and the quality of information (“garbage in, garbage out”). Similar challenges no doubt would confront an information-based common law of sentencing.

1. Search Parameters and Subjectivity

First, the selection of search parameters is subjective and controversial, and can undermine the effectiveness of any system that depends on sentencing information-sharing. International experiences with SISs make clear that system designers cannot remain neutral with respect to the factors that are most relevant at sentencing. Inevitably the selection of some parameters privileges some factors and disfavors others.

For example, an SIS might permit judges to search thousands of previous cases based on the offender’s criminal history. But that kind of search could take many forms. It may be implemented as a yes/no field (i.e. did the offender have any prior criminal history?). Or it might include two yes/no fields, one for juvenile criminal history and another for adult criminal history. Or it might include a single scaled search parameter that captures the total number of prior offenses, or the total number of adult offenses, or the total number violent offenses, or all of the above. Or it might include search parameters based on the offender’s age at the time of his first offense, or at the time of the most recent offense, or a hundred other variations. As the designers of the Canadian SIS lamented, “[i]t does not take a mathematical wizard to realize that if there are even as few as three or four levels of these [criminal history] variables, there are over 700 combinations of aspects of this one variable—criminal record.” One researcher

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179 Frieberg, supra note 175, at 207.

180 See Miller, Map and Compass, supra note 5, at 1377-78.

181 Schild, supra note 72, at 132; Miller, supra note 154, at 134.

estimates that the total number of combinations of criminal history parameters alone “would reach into the tens of thousands.”

All of those variations are potentially relevant at sentencing, and different judges might reasonably prefer different options. By selecting some for inclusion while excluding others, system designers risk alienating judges who find that the system seems focused on the wrong issues.

Attempting to please everyone by capturing almost all potentially relevant parameters for every case would require staggering administrative work and data entry, if it is even possible. Court staff cannot realistically code and transmit the kind of hyper-detailed sentencing information necessary to support such a comprehensive search engine. Today the U.S. Sentencing Commission captures an enormous amount of data about each federal sentence, but its datafiles (which are not readily accessible to judges) do not permit searches on many of the criminal-history factors described above. This despite an enormous investment of time and money; the Commission employs around 30 full-time staff to review sentencing documents and perform data entry.

2. Level of Generality

Second, SISs have confronted difficulties with the level of generality in matching cases. On one hand, if a system provides many search parameters, judges may attempt to find cases that correspond exactly to the case at hand, and become frustrated with the limited results. In rolling out the Scottish SIS, for example, system designers had to train judges never to enter more than a few parameters at once, because the system almost always returned too few cases. Because of the infinite variability of sentencing decisions, which must take into account countless dimensions of the offense and offender, judges might discover that no cases are a perfect match, and find that the exercise was a waste of time.

On the other hand, if the system provides too few search parameters, matching cases only at a high level of generality, judges may discover that an overwhelming number of cases seem relevant. Given their time constraints, sentencing judges cannot review hundreds of potentially relevant cases in detail. Of necessity, judges in any case can closely review only a small subset of cases. Indeed, designers of a fledgling SIS in

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183 Schild, supra note 72, at 133.
184 Id. at 133-34.
185 For criminal history, the datafiles include a yes/no variable, criminal history points and category scores that indirectly reflects a host of underlying criminal history facts, a count of “incidents” classified according to level of seriousness, and adjustments for committing the instant offense while under various forms of court supervision. See U.S. Sentencing Commission, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 7-80 (2010). The Commission’s data do not, however, capture which prior incidents were “violent,” or the age of the offender at the time of each incident, or the time elapsed since each incident, or the court that adjudicated the prior incident.
186 Interview with Paul Hofer, the Commission’s former Director of Special Projects, June 2009.
187 Lovegrove, supra note 82, at 37.
188 See supra notes 85-88 and accompanying text.
189 Schild, supra note 72, at 134.
190 Cf. Lewis A. Kornhauser, Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System, 68 S. Cal. L. Rev. 1605, 1623 (1995) (discussing the cost advantages of limiting the number of precedents a trial judge must consult); Kate Stith, The Risk of Legal Error in Criminal Cases:
Israel declined to include “detailed descriptions” or even “summaries” of cases included in the database of prior decisions because “it was felt that judges would not take the time to read case descriptions.” 191 Presented with a daunting volume of cases and outcomes, and with no practical ability to review them, judges may give up.

The problem should not be overstated, as similar level-of-generality concerns arise in other contexts. Most legal researchers, for example, know too well the frustration of running a Westlaw or Lexis search that returns 10,000 results, followed by a more detailed search that returns zero results. Diligent searchers continue to refine, adding and subtracting parameters until the results are manageable. Judges (or law clerks, in some courts) undoubtedly could learn to work with an SIS in the same way.

Nonetheless, the experiences in Scotland and Canada suggest that the challenges are nontrivial. In Scotland, judges knew that every narrative description they wrote would be added to a searchable database, expressly intended to assist other judges in making better-informed decisions. Designers boasted about the system’s ease of use and flexibility. 192 Judges even had strong practical incentives to make the system work, since they voluntarily proposed the SIS to short-circuit calls for more intrusive reforms. 193 Yet in just a few years the system fell into disuse, with judges rarely searching for relevant information about past sentencing practice. 194 Even the best information-sharing efforts, launched by judges with the best intentions, can be undermined by information-use problems.

3. Garbage In, Garbage Out

Third, SISs have suffered from data quality (“garbage in, garbage out”) problems. Challenges in collecting sufficient information, discussed above, 195 can become amplified when judges begin in earnest to access the information. Inadequate, inaccurate, or unhelpful information can cause judges to sour on the system and stop using it. That seems to have occurred in Scotland. Following the launch of the SIS, judges did not always make time to enter detailed and accurate information about their sentences. 196 Such shortcuts and errors made the system less useful, reinforcing judges’ sense that the effort of producing detailed opinions was a waste of time and energy. 197 The collapse of the Scottish SIS, following a vicious cycle of neglect, suggests that successful information sharing depends on the continuous and committed participation of a critical mass of sentencing judges. Given the volume of sentencing decisions and judges’ time constraints, there is reason for skepticism. 198

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191 Schild, supra note 72, at 131.
192 Hutton & Tata, supra note 166.
193 Hutton, supra note 164, at 275.
194 SENTENCING COMMISSION FOR SCOTLAND, supra note 167, at 37.
195 See supra Part II.A.
196 SENTENCING COMMISSION FOR SCOTLAND, supra note 167, at 37.
197 Id. at 37.
198 See supra notes 77-81 and accompanying text.
The subjectivity of search parameters can create further garbage in, garbage out problems. Suppose the criminal history search parameters include an option to filter out offenders with “violent” prior offenses. Although judges might broadly agree that a violent criminal history is relevant at sentencing, different judges might disagree about what offenses qualify as violent or nonviolent. The hypothetical case described above, of an armed burglar who confronts a homeowner at night but never fires or even brandishes the firearm, might be a close case. If judges’ differing views on what qualifies as “violent” are embedded into the SIS search parameters, the system may “lock in” inter-judge disparity by concealing the disagreement from future users.  

4. Lessons for a Common Law of Sentencing

Based on the experiences of SISs in foreign courts, it is naïve to expect, in the words of Judge Sweet, that making sentencing opinions available to other judges will “almost automatically” provide “a firmament of reference points and a body of reasoning” that can “alleviat[e] unwarranted disparity” between judges. Making a body of sentencing decisions not only available, but actually useful, is anything but automatic. To promote inter-judge consistency and rationality, the common-law model asks sentencing judges to determine what other judges have done in similar cases. The challenge lies in enabling judges to track down “similar” cases and recognize “dissimilar” cases.

In other contexts, judges typically find relevant case law using electronic services like Westlaw and LexisNexis, which offer sophisticated search tools including full-text searches of opinions. Flexible as they are, however, those services would have significant limitations as the basis for a common law of sentencing. The terminology used to describe offense and offender characteristics varies enormously from opinion to opinion, making it easy for factually similar cases to escape notice. As a thought experiment, try to devise a Westlaw or LexisNexis search of written sentencing opinions that would capture all sentences in which the offender’s criminal history included a violent crime. Although electronic services track extensive information beyond the

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199 Schild acknowledges this difficulty, but maintains that it is “not really a problem” because users are interested only in whether the judge thought the offense was violent (or serious or aberrant, etc.) and “passed sentence accordingly.” Schild, supra note 72, at 133. The nature of the offense “objectively speaking” does not matter. Id. He is mistaken. The whole point of reducing inter-judge disparity is to ensure that “objectively” similar offenders receive equivalent sentences.

200 Sweet et al., supra note 21, at 943, 946.

201 See supra notes 44-48 and accompanying text; Miller, Map and Compass, supra note 5, at 1364 (describing “What have other judges done in this situation, and why?” as “one essential question for judges”).

202 Peter W. Martin, Reconfiguring Law Reports and the Concept of Precedent for a Digital Age, 53 VILL. L. REV. 1, 38-39 (2008). Notably, however, not all state trial courts can afford subscriptions to those services, leaving judges to rely on the parties or to conduct research using more traditional and less flexible methods. Id. at 27.

203 The term “violent” of “violence” would not necessarily appear in the opinion, and the possible synonyms are endless: “armed,” “weapon,” “firearm,” “gun,” “knife,” “attack,” “brandish,” and dozens of others. Full-text searching also makes it difficult to differentiate between cases in which violence occurred in a prior offense, rather than the current offense. Picking out the relevant results would be time-consuming, and a judge still could never be confident that she has discovered all relevant cases.
text of the opinion—summaries, headnotes, citations, and metadata—they do not code offense facts, criminal history, offender characteristics, and other case data at the level of detail sentencing judges would require.

To succeed, the common-law model would require either that existing services add specialized sentencing data and search tools, or that courts develop searchable stand-alone repositories of sentencing case law. In either case, system designers would undertake essentially the same task as designers of SISs: developing search parameters calibrated to sentencing, and inducing judges to use the system. Architects of a common law of sentencing therefore would confront the same kinds of subjectivity, level-of-genericity, and “garbage in, garbage out” problems that have frustrated SISs overseas.

Certainly the struggles of SISs do not foreclose the possibility of useful common-law information sharing in the United States. To date, SISs have been attempted only in a handful of courts, all outside the United States, and principally in jurisdictions that provide little external guidance to judges at sentencing.\textsuperscript{204} A system of sentencing guidelines, for example, might help to structure the body of common law by supplying a basic framework for decisions, widely understood categories, and shared terminology.\textsuperscript{205} Still, experiments with SISs overseas provide ample reason for skepticism.

\textbf{C. Overcoming Information-Use Obstacles}

Designers of a common law of sentencing have several options for meeting these information-use challenges. As a “command and control” option, a statute or court rule could compel judges to consider previous decisions whenever they impose sentence. The designer of the Canadian SIS has speculated that the project might have succeeded if judges had been required, not merely encouraged, to use the system.\textsuperscript{206} Monitoring compliance and enforcing such a requirement would be difficult, however, without arbitrary benchmarks like a minimum number of searches (or parameters or minutes) per case. Regardless, if judges find it frustrating to consult the body of common-law decisions, the exercise likely will have little effect.

A more effective method, in my view, would be to publicize the common law of sentencing. Any specialized search tools, as well as the full body of opinions and any statistical information, should be available to defense counsel and prosecutors—not just the court.\textsuperscript{207} That would ease the burden on judges by transferring much of the case-matching legwork to the lawyers. In the briefs and at the sentencing hearing, the parties would take the lead in identifying potentially relevant precedent and debating possible points of distinction. Lawyers would eagerly avail themselves of the information. A decade ago, for example, the Office of the Federal Public Defender in the District of Massachusetts began compiling a publicly-available collection of downward departures, sorted by offense type and judge, to improve advocacy on behalf of criminal defendants.\textsuperscript{208} As an additional benefit, adversarial testing would assist the judge in

\textsuperscript{204} Miller, \textit{supra} note 154, at 131.
\textsuperscript{205} Cf. id. at 143-46 (arguing that SISs need not be merely duplicative of sentencing guidelines, but can serve as a useful supplement).
\textsuperscript{206} Miller, \textit{supra} note 154.
\textsuperscript{207} Miller, \textit{supra} note 154, at 146-48 (urging the development of “democratic, participatory, transparent” sentencing information systems available to “lawyers, judges, scholars, and reformers” alike).
\textsuperscript{208} Email message from Amy Baron-Evans, Aug. 15, 2011 (on file with author).
applying the common law, reducing the risk of error and thereby promoting inter-judge consistency and rationality.\footnote{Cf. Stephanos Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 YALE L.J. 1097, 1178-79 (2001) (proposing greater procedural safeguards for disputed facts at sentencing, on the ground that adversarial testing will improve accuracy).}

If history is any guide, however, making sentencing opinions and information public would meet stiff resistance. In jurisdictions that have experimented with SISs, judges almost invariably have insisted that the system remain available only to courts, with no access to the parties or the public.\footnote{Miller, Map and Compass, supra note 5, at 1388 (noting that Scottish judges have been “stingy” about disclosing information from the SIS); Frieberg, supra note 175, at 127 (noting that the New South Wales SIS “remains inaccessible to a broader audience,” although some data on federal sentencing in Australia recently became available because of “external prodding”).} In part, the secrecy is designed simply to shield sentencing decisions from scrutiny and criticism.\footnote{Miller, Map and Compass, supra note 5, at 1388.} But as noted above, there are also legitimate privacy concerns about publicizing opinions that may discuss deeply personal information about the lives of offenders, family members, and victims.\footnote{See supra notes 145-150 and accompanying text (discussing the confidentiality of presentence reports).} Redacting or withholding that information from judges and lawyers, although feasible, would undermine the effectiveness of the common-law model. Because personal information often plays a critical role in sentencing outcomes, concealing that information may render written opinions useless, or even incomprehensible, to future judges and counsel.

In short, the struggles of SISs overseas provide reasons for skepticism, but not hopelessness. Although most systems have fizzled, the New South Wales system has endured for more than 20 years and has inspired further experimentation, both in Australia and elsewhere. Requiring judges to consult previous decisions, or enlisting the parties as allies, may improve the odds that judges can make use of a common law of sentencing.

IV. VOLUNTARINESS

Assume for the sake of argument that written, comprehensive, and representative sentencing information has been collected. Further assume that a sentencing judge can readily access that information, including written opinions and relevant statistics, in a simple and useful form. The basic premise of the information-sharing model is that judges will respond to that information by treating the previous decisions as persuasive, perhaps even authoritative. A common law of sentencing will reduce inter-judge disparity and promote rationality, on this view, because future judges who otherwise would have reached a different result will instead conform their sentences to the body of existing common law.

That premise is unrealistic. Judges have at least three other options: (1) they can reject or ignore the previous sentences (“disregard”); (2) they can selectively mine the common law for other cases that reinforce their preferred outcome (“confirmation bias”); or (3) they can double down, moving in the opposite direction and creating even more stark inter-judge disparity (“polarization”). When judges disagree in good faith with the actions of their colleagues, there is every reason to believe they will elect one those alternative courses of action.
By way of introduction, a bit more sentencing-reform history is instructive. Roundtable discussion groups of judges called “sentencing councils” flourished in a few federal district courts in the 1960s and 1970s. But today the sentencing council experiment is abandoned, and the experience tends to undercut the assumption that judges will respond to better sentencing information by dutifully falling into line.

A. Sentencing Councils

Sentencing councils were groups of district judges, serving on the same court, who met regularly (typically once per week) to discuss upcoming sentencing decisions. Four federal district courts, in Brooklyn, Chicago, Detroit, and Oregon, experimented with sentencing councils in the 1960s and 1970s. The councils functioned as a roundtable discussion of upcoming cases. In advance of the meeting, all participating judges, including the judge responsible for imposing sentence, would review the presentence report and other materials and make an initial recommendation about the appropriate sentence. As a group, judges would then talk about the evidence, share their views about the most important facts and considerations, and try to persuade one another.

The principal goal of sentencing councils was to reduce inter-judge sentencing disparity. Sentencing councils provided the sentencing judge with detailed, case-specific information about how other judges would respond to each new set of facts. Participating judges saw the work of sentencing councils as an “educational process” in which judges could “pool[ ] [their] knowledge and experience and learn[ ] from each other.” Sharing information about how other judges would handle the case, they predicted, “will likely have the effect of ameliorating the likelihood of sentence disparity.”

Sentencing councils were voluntary in two ways. First, the recommendations of other judges at the sentencing council were purely advisory. The sentencing judge retained sole discretion to impose the final sentence. Rather than constraining judges’ discretion, the goal of sentencing councils was sharing information: “No attempt is made at these Councils to impose the will of one upon another.”

Second, in some districts participation in the sentencing council was itself optional, and not all judges elected to participate. In the Northern District of Illinois, for example, five of the court’s 14 judges regularly participated, bringing more than 60% of their cases before the sentencing council. But six judges elected never to participate, and three other judges participated only occasionally, bringing less than half of their cases before the council.

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216 Diamond & Zeisel, supra note 214, at 124; Tonry, supra note 213, at 1483.
217 Smith, supra note 215, at 20.
219 Diamond & Zeisel, supra note 214, at 117; Committee on the Federal Courts, supra note 218, at 881.
220 Smith, supra note 215, at 20.
221 See Diamond & Zeisel, supra note 214, at 139-40 & Table 22.
cases before the council. The result was that just one-third of criminal sentences benefited from the council’s advice. Many judges resisted the procedure on the ground that it would intrude upon their independent judgment at sentencing, and that it would be a “waste of time.”

Participating judges raved. They found the discussions valuable, reporting that they frequently changed their views about the appropriate sentence in response to their colleagues’ advice. The discussions, by all accounts, were informal and friendly. Outside observers were uniformly impressed with the seriousness and care with which sentencing councils approached each case.

Yet two major research projects found that sentencing councils did not meaningfully reduce inter-judge sentencing disparity. Shari Diamond and Hans Zeisel studied the effects of sentencing councils in Brooklyn and Chicago by comparing sentencing judges’ initial recommendations with their final sentences. They found strong evidence of inter-judge disparity in the initial recommendations, with judges apart on average by 36.7% in Chicago and 45.5% in Brooklyn. In their evaluation of cases, the data showed, “some judges are clearly more severe than others.” But sentencing councils alleviated only a small fraction of that disparity. Diamond and Zeisel found that final sentences, imposed following the sentencing council, remained apart on average by 35.4% in Chicago and 41.1% in Brooklyn. They estimated, therefore, that sentencing councils reduced inter-judge disparity by just 4% to 10%.

Another study, commissioned by the Federal Judicial Center (FJC), examined the effects of sentencing councils in Detroit, Chicago, and Brooklyn. Focusing on five offense types, the FJC study compared levels of inter-judge disparity in the years before and after the establishment of the sentencing council. The results were discouraging. In every district, inter-judge disparity actually increased for some offenses, even as it

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222 See id.
223 Id. at 142-43.
224 Committee on the Federal Courts, supra note 218, at 881-82 (describing Judge Marvin Frankel’s hypothesis about the degree of resistance revealed by polls of federal judges).
226 Smith, supra note 215, at 19-20.
227 Hosner, supra note 225, at 19.
228 Tonry, supra note 213, at 1484 (describing and evaluating both studies).
229 Diamond & Zeisel, supra note 214, at 123.
230 Id. at 123-24.
231 Id. at 145.
232 Id. at 147. Michael Tonry has urged caution in interpreting the study because it measured sentences using an “arbitrary point scale” that treated longer probationary sentences as the equivalent of short prison terms, and “[a] different arbitrary scale would have yielded different results.” Tonry, supra note 213, at 1484. In a tautological sense, he is correct; of course using a different scale would produce “different results,” expressed on the new scale. But neither Tonry nor any other researcher has shown that a different scale would have altered Diamond and Zeisel’s core finding that sentencing councils had a minimal effect on inter-judge sentencing disparity.
234 Id. at xx.
decreased for others. Based on the mixed results, the study concluded that “councils may increase disparity as frequently as they decrease it.”

Scholars and policymakers offered two explanations for the failure of sentencing councils to reduce inter-judge disparity. The first explanation was voluntariness. Michael Tonry attributed the results to the fact that “[t]he council recommendations are only advisory” and judges “understandably value their independence” at sentencing. The FJC study concurred, noting that it should come as no surprise that a strictly voluntary “self-reform” that preserved “broad discretion” for sentencing judges did not meaningfully affect sentencing outcomes. Strikingly, even where judges consciously sought out the advice of their colleagues, in courts where participation in the sentencing council was optional, the effects on inter-judge disparity were negligible. As long as the sentencing judge had the final word, sentencing councils did not make much of a difference.

The second explanation was retrenchment. The FJC study found troubling evidence that, at least for some offenses, the introduction of sentencing councils coincided with an increase in inter-judge disparity. The study speculated that when judges at a sentencing council “meet, for the first time, opposition to their ideas” about sentencing, the experience “may result in movement to a more extreme position.” Alternatively, judges with more extreme views “may convince moderate judges to follow their more lenient or harsh sentencing patterns.” Better information about other judges’ actions, in other words, did not necessarily bring about consensus and greater inter-judge consistency. It sometimes had the opposite effect, serving as a “catalyst[] for the airing of latent disagreements.”

Notably, sentencing councils operated in a pre-reform era in federal court, with little external guidance for sentencing judges. In light of sweeping legal reform and changes in judicial culture, it is possible that a roundtable approach would enjoy more success today. Sentencing guidelines, for example, might provide judges with common benchmarks and a shared language about sentencing, making group discussion more appealing. But for now, sentencing councils offer some of the best available evidence about the operation and effects of voluntary information-sharing at sentencing.

### B. Counterproductive Responses to Sentencing Information

As the experience with sentencing councils suggests, judges will not necessarily respond to previous sentencing decisions by aligning their decisions with those of their colleagues. Judges have the option, instead, to disregard their colleagues’ decisions, to

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235 Id. at 86-95.
236 Id. at 94.
237 Tonry, supra note 213, at 1484.
238 PHILLIPS, supra note 233, at 100.
239 Diamond & Zeisel, supra note 214, at 145, 147.
241 See PHILLIPS, supra note 233, at 86-95.
242 Id. at 94.
243 Id.
244 Id. at 100.
245 Tonry, supra note 213, at 1484; Steve Y. Koh, Note, Reestablishing the Federal Judge’s Role in Sentencing, 101 YALE L.J. 1109, 1129 (1992)
hunt for other decisions more compatible with their preferred outcome, or to stake out an even more extreme position. All three courses of action would undermine inter-judge uniformity and rationality.

1. Disregard

In a common-law system focused on information-sharing by district courts, a sentencing court is free to ignore or explicitly reject prior decisions with which it disagrees. As a matter of law, sentencing opinions issued by a district court are not binding—on other courts, on other judges of the same court, or even on the same judge in future cases. For a sentencing judge who deems the sentence in a previous case unduly severe or lenient, the simplest lawful course of action is to disregard it. Research on sentencing councils suggests that judges frequently find that option attractive when confronted with the purely advisory recommendations of other judges.

At least in the short term, that course of action generates inter-judge disparity. By rejecting the reasoning of a previous decision, a sentencing court forthrightly acknowledges that similarly situated offenders will receive different sentences. Over time, a “common-law dialogue” might correct that difference, as other courts settle on one view or the other. But it is equally possible that the disagreement will persist, with different sentencing courts committed to opposing views. Although the precedent model of a common law of sentencing can resolve that kind of entrenched inter-judge disparity, by resolving the dispute at the appellate level, information sharing alone cannot.

Moreover, in a voluntary common-law model, sentencing courts need not explicitly reject previous opinions with which they disagree. They can avoid discovering them in the first place. Most judges in the Northern District of Illinois, for example, declined to bring the majority of their cases before the sentencing council, even when their colleagues had expressed a willingness to share their views at a sentencing roundtable. Likewise, the Canadian SIS fell into disuse because, in the words of the chief designer, “[j]udges do not, as a rule, care to know what sentences other judges are handing down in comparable cases,” especially “if they knew (or thought) that these other judges have different approaches” than their own. That possibility underscores a fundamental weakness of a strictly voluntary information-sharing approach.

2. Confirmation Bias

Alternatively, judges who discover a previous sentencing opinion with which they disagree can keep looking. Behavioral literature on confirmation bias has documented

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246 Many scholars and judges endorse a precedent-driven model of a common law of sentencing, either as an alternative or a supplement to the information-sharing model discussed here. See supra Part I.B. The strengths and weaknesses of that model is the subject of a follow-up article.


similar cognitive errors in other contexts.\textsuperscript{249} Confirmation bias describes the tendency to unwittingly select and interpret evidence in a manner that confirms a previously held belief or hypothesis, while minimizing or failing to recognize contrary evidence.\textsuperscript{250} Studies have documented confirmation bias among prosecutors,\textsuperscript{251} police,\textsuperscript{252} and jurors,\textsuperscript{253} and the same tendency undoubtedly exists among judges.\textsuperscript{254}

Criminal sentencing creates conditions that may facilitate confirmation bias. As noted above, a comprehensive common law of sentencing may provide judges with extensive—even overwhelming—information about previous sentencing outcomes.\textsuperscript{255} At a high level of generality, many criminal cases share common characteristics, providing judges with a wealth of data points that confirm their intuitions. Yet in the details, sentences are as infinitely variable as human beings,\textsuperscript{256} allowing courts to draw infinite distinctions that minimize the importance of “disconfirming” data points.

Consider the operation of the New South Wales SIS. Judges can enter a few search parameters and generate a histogram that shows a distribution of prior sentences.\textsuperscript{257} For example, for offenders under the age of 21 who plead guilty to driving while intoxicated, the SIS may report that 29% of offenders received probationary sentences, 24% received sentences of imprisonment, 21% received intermediate sentences, and 15% received compound sentences.\textsuperscript{258} In theory, a sentencing judge could review the written opinions in each of the approximately 120 cases summarized in the chart, attentive to factors that may be present in a new case that fits those criteria. Given the time required to perform that kind of inquiry, however, the judge instead might understandably focus on cases that reach the result he already has in mind.

Confirmation bias of this kind can undermine efforts to reduce inter-judge disparity and promote rationality. If disagreements between judges already exist, and are reflected in the body of common-law opinions, then confirmation bias can prevent judges

\begin{itemize}
  \item See generally Raymond S. Nickerson, \textit{Confirmation Bias: A Ubiquitous Phenomenon in Many Guises}, 2 REV. GEN. PSYCH. 175 (1998).
  \item Dan M. Kahan, \textit{The Cognitively Illiberal State}, 60 STAN. L. REV. 115, 121 n.26 (2007) (“[C]onfirmation bias . . . refers to the tendency of persons to seek out and assign more weight to evidence that confirms a prior belief or hypothesis than to evidence disconfirming it.” (internal quotation marks omitted)).
  \item Keith A. Findley & Michael S. Scott, \textit{The Multiple Dimensions of Tunnel Vision in Criminal Cases}, 2006 WIS. L. REV. 291, 309, 313 (“[S]tudies show that, in some circumstances, people do not respond to information at variance with their beliefs by simply ignoring it, but rather by working hard to examine it critically so as to undermine it.”).
  \item See David E. Klein, \textit{Unspoken Questions in the Rule 32.1 Debate: Precedent and Psychology in Judging}, 62 WASH. & LEE L. REV. 1709, 1717-18 (2005) (despite their training and experience, because “judges are human, and it is hard to imagine that they escape all the cognitive pitfalls that other people stumble into”); McGinnis & Mulaney, \textit{supra} note 89, at 104-05.
  \item See \textit{supra} notes 187-191 and accompanying text.
  \item See \textit{supra} notes 85-88 and accompanying text.
  \item See Potas et al., \textit{supra} note 172, at 119.
  \item \textit{Id.} (showing an actual chart with similar results).
\end{itemize}
from recognizing and correcting them. And even if no such disagreements have crept into the common law, confirmation bias can create new inter-judge disparity by preventing judges from appreciating how new sentences may conflict with prior cases.

3. Polarization

The most disquieting finding of the FJC study of sentencing councils is that, at least for some offenses, better information sharing coincided with an *increase* in inter-judge sentencing disparity. The study speculated that judges who meet resistance to their views about an appropriate sentence sometimes “double down,” either by staking out a more extreme position themselves, or by persuading some of their colleagues to shift to more extreme positions.²⁵⁹

That kind of “attitude polarization” effect finds some support in psychology literature as well.²⁶⁰ In a seminal study, for example, test subjects who held opposing views about capital punishment grew more polarized after reading identical information about conflicting research on the deterrent effect of the death penalty.²⁶¹ The basic point is that information sharing does not always result in agreement and uniformity. To the contrary, in some circumstances it can harden our resolve and make disagreements more pronounced.

Concerns about cognitive errors like confirmation bias and attitude polarization should not be overstated. Reforms in sentencing practice since the 1970s have increased judges’ accountability at sentencing and thereby reduced the risk of bias. In indeterminate sentencing systems, judges had no obligation to give reasons for their sentences, and appellate review was essentially nonexistent.²⁶² Today, by contrast, judges know that they must offer public justification for their sentencing decisions, with the possibility of appeal. According to a substantial body of psychology research, that kind accountability is often effective in counteracting cognitive biases.²⁶³

C. Overcoming Voluntariness Challenges

For the information-sharing model of a common law of sentencing,²⁶⁴ voluntariness challenges are unavoidable. The basic premise is that inter-judge disparity and irrationality result principally from sentencing courts’ lack of information about previous decisions in similar cases. Thus, generating and disseminating written opinions, strictly as guidance, over time will promote inter-judge consistency and coherence in

²⁵⁹ PHILLIPS, *supra* note 233, at 94.
²⁶¹ *Id.* at 2100-05. *But see* Arthur G. Miller et al., *The Attitude Polarization Phenomenon: Role of Response Measure, Attitude Extremity, and Behavioral Consequences of Reported Attitude Change*, 64 J. PERSONALITY & SOC. PSYCHOL. 561, 561-69 (1993) (replicating the Lord et al. study and finding no attitude polarization when subjects reported their views immediately before reviewing the dueling studies).
²⁶³ See Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 259, 263 (1999); Klein, *supra* note 254, at 1718-19 (observing that “the typical judging experience” involves “the conditions under which accountability has the best chance of reducing cognitive errors”).
²⁶⁴ See *supra* Part I.A.
sentencing law. Voluntariness is a feature, not a bug. The information-sharing model has no systematic way of correcting disregard of previous decisions, confirmation bias, or polarization.

The precedent model, by contrast, is well-suited to address those concerns. The strengths and challenges of the precedent model are beyond the scope of this Article, but appellate courts in theory can detect conflicts, resolve them through binding precedent, correct outlier sentences, and coordinate the actions of sentencing courts. Because most supporters of a common law of sentencing would assign a crucial role to appellate courts and binding precedent, this “skeptic’s guide” to the common-law approach is by no means complete.

Thus, the claim here is modest. There is reason to doubt that the information-sharing model, standing alone, can meaningfully reduce inter-judge disparity or promote rationality in sentencing law. The experience of sentencing councils underscores all three sets of challenges explained above. Judges’ selectivity in bringing cases before the council reveals how time constraints can interfere with efforts to collect comprehensive and representative information. The uneven participation rate in districts where attendance was optional underscores the challenges in making information useful and worthwhile to judges, even when it is readily available. And the underwhelming performance of sentencing councils in reducing inter-judge disparity suggests some counterproductive ways in which judges may respond to voluntary sentencing information. As the FJC study concluded, research on sentencing councils is discouraging for “those who see disparity as a problem that can be solved by better communication among judges.”

CONCLUSION

Prominent scholars and judges have proposed a “common law of sentencing” as a strategy for reducing inter-judge disparity and promoting rationality at sentencing. One major strand of the literature stresses the information sharing function of the common law. The argument is that by assembling a body of written opinions and other information about past sentences, judges can align their sentences with those of their colleagues.

This Article has identified three sets of challenges for that model. First, there are daunting challenges in collecting written, comprehensive, and representative sentencing opinions. In an original empirical study, the Article reports on information-collection practices in the only federal court that makes key sentencing documents public. The study finds that, despite detailed reporting requirements, few explanations contain the level of detail necessary to support a common law of sentencing. In addition, the body of written opinions is skewed toward unusual cases, and some judges contribute far fewer opinions than others. Acute time constraints, driven by the high volume of sentencing decisions, make information collection especially difficult in the sentencing context.

265 See supra Part I.B.
266 See Diamond & Zeisel, supra note 214, at 139-40 & Table 22 (noting that some participants brought fewer than half of their cases before the council).
267 Id. (indicating that many judges declined to participate altogether).
268 Id. at 100.
Second, the struggles of sentencing information systems (SISs) in foreign jurisdictions suggest challenges in making sentencing opinions not merely available, but also useful to judges. Subjectivity, level-of-generality, and “garbage in, garbage out” problems have frustrated past efforts to encourage judges to consult a body sentencing information.

Third, the experience of “sentencing councils” underscores basic weaknesses in any voluntary information-sharing model. The assumption that judges will respond to information about previous sentences by dutifully following suit is unwarranted. Judges may disregard advice from previous cases, or may be vulnerable to confirmation bias and attitude polarization.

None of these grounds for skepticism should be understood as opposition to the project of information sharing by sentencing courts. Any assessment of the information-sharing model depends in part on what it is supposed to accomplish. Some proponents stress collateral advantages of the common-law approach, such as providing feedback to legislatures and sentencing commissions, or making sentencing outcomes less punitive to reduce incarceration rates. Because it may advance those objectives, and because it is essentially untested in the United States, the information-sharing model deserves further attention.

Instead, this Article makes a plea for realism about what it can accomplish. Information sharing at sentencing is frequently advertised as a method of reducing inter-judge disparity and promoting rationality in sentencing law. Based on current practices and the struggles of similar reform efforts, there is ample reason for skepticism.
APPENDIX

This Appendix provides additional details concerning case selection and coding for the empirical study.

A. Case Selection

The study examines Statement of Reasons documents (SORs) for sentences imposed in the United States District Court for the District of Massachusetts in fiscal year 2006, which runs from October 1, 2005 to September 30, 2006. As noted above, the District of Massachusetts is the only federal district court that makes the documents public, by posting them on the PACER (Public Access to Court Electronic Records) system as part of the case docket.269

The SORs were collected as part of a related study of inter-judge sentencing disparity, and the Technical Appendix to that article provides background information.270 PACER supports case searches by filing date and closing date, but not by the date of sentencing.271 To identify cases that may include a sentence imposed in fiscal year 2006, the initial search extended to every criminal case filed in the district between January 1, 2000, and June 30, 2006.272 The vast majority of matches, including dismissals, jurisdictional transfers, and acquittals, were ignored because they did not produce a sentence during the relevant period.

The result was a body of 411 SORs for sentences imposed in fiscal year 2006. The Sentencing Commission reports that the district as a whole submitted documentation for 512 sentences that year.273 The SORs examined here therefore represent 80.3% of the total. There are several possible explanations for the missing SORs. First, although the District of Massachusetts generally makes SORs available on PACER, in some cases the SOR is unavailable, or the docket indicates that the SOR is sealed. Judges retain the power to seal the SOR for case-specific reasons, such as the protection of offenders or witnesses who have cooperated with the government.274 Second, cases filed before 2000 with a sentence in 2006—for example, cases extended by appeal and remand or complex conspiracy cases with many defendants—would have escaped the initial search. Thus, although the available set of 411 documents includes more than 80% of the total, it is neither complete nor a random sample.

It is possible that SORs that do not appear on PACER differ in important ways, such as the level of written explanation provided, from the SORs that are available. As Table A1 indicates, however, the SORs available on PACER differ only slightly from the total population of SORs submitted to the Commission:

269 See supra notes 110-112 and accompanying text.
270 See Scott, supra note 39, at 54-55.
271 The date of sentencing rarely matches the closing date because of multiple-defendant cases, appeals, supervised release hearings, and other post-sentence filings.
272 PACER’s “Reports” tool allows searches by “Case Type,” including criminal cases. The search included pending and terminated defendants, but excluded cases involving fugitive defendants.
273 See U.S. SENTENCING COMMISSION, SOURCEBOOK FOR SENTENCING STATISTICS 2006, Table 1 (2006) (reporting a total of 512 Statements of Reasons received from the District of Massachusetts).
Table A1: Comparison of All SORs and Available SORs
District of Massachusetts, FY 2006

<table>
<thead>
<tr>
<th></th>
<th>All SORs FY 2006</th>
<th>Available on PACER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Cases</td>
<td>512</td>
<td>411</td>
</tr>
<tr>
<td>Imprisonment Ordered</td>
<td>87.6%</td>
<td>81.8%</td>
</tr>
<tr>
<td>Average Prison Sentence</td>
<td>73.0 months</td>
<td>78.1 months</td>
</tr>
<tr>
<td>Within Range</td>
<td>74.1%</td>
<td>67.4%</td>
</tr>
<tr>
<td>Below Range</td>
<td>24.8%</td>
<td>29.7%</td>
</tr>
<tr>
<td>Above Range</td>
<td>1.2%</td>
<td>2.9%</td>
</tr>
</tbody>
</table>

Although the differences are modest, they are a reason for caution.

B. Coding

To measure the level of written explanation contained in each SOR, a research assistant counted the total number of sentences of text provided. The count included written explanations from all three of the SOR form’s narrative description fields. It also included written explanations contained in any attachments, such as formal sentencing opinions and hearing transcripts. In those cases, however, the count included only portions of the opinion or proceeding in which the judge provided reasons for the sentence imposed. It excluded, for example, discussion of guideline calculations, constitutional challenges, and procedural requirements.

In some cases, the SOR contains only a generic statement with no discussion of the particular offense or offender. As an example, some SORs state: “I have considered the factors set forth in § 3553(a) and I have imposed a sentence sufficient, but not greater than necessary, to achieve those purposes.” Because generic statements of that kind merely restate the judge’s task, without providing any explanation of the sentence imposed, they were coded as zero sentences of text.

In addition, SOR forms were coded for whether any checkboxes were marked to explain the sentence. The “checkbox” condition was considered satisfied if any checkbox was marked in any section of the SOR form that lists reasons for the sentence. Checkboxes unrelated to the reasons for the sentence, such as those describing whether a fine was imposed or the presentence report was adopted, did not satisfy the checkbox condition.

The study separately analyzes two dependent variables. The first is whether the SOR contains any written explanation of the sentence. If the SOR contains zero sentences of explanatory text, then the dependent variable is coded as zero. If the SOR contains one or more sentences of explanatory text, then the dependent variable is coded as one. A mark in a checkbox was not coded as a form of written explanation.

The second is whether the SOR contains a “long” written explanation, consisting of at least 10 sentences of text. That cutoff corresponds to roughly one page of narrative.

276 The statement closely tracks 18 U.S.C. § 3553(a)(1), which sets out factors that a judge must consider at sentencing.
description, and is considered a reasonable proxy for the kind of explanation sufficient to support a common law of sentencing. If the SOR contains 10 or more sentences of explanatory text, then the dependent variable is coded as one. If the SOR contains fewer than nine sentences, then the dependent variable is coded as zero.

All models include the following independent variables: (1) sentence length, in months; (2) an indicator for non-guideline sentences; (3) an indicator for within-range sentences of more than 24 months; and (4) an indicator for sentences of time served. In addition, the one model includes dummy indicators for (5) the identity of the sentencing judge.

Sentence length is coded as length of the term of imprisonment, measured in months. Consistent with the Sentencing Commission’s practice, sentences of probation were coded as zero months of imprisonment.277

Non-guideline sentences include sentences above or below the guideline sentencing range, whether styled as a “departure,” a post-Booker “variance,” or using another term. Following the Commission’s conventions, government-sponsored below-range sentences were coded as within range.

In addition, a dummy variable was coded to capture within-range sentences of more than 24 months of imprisonment. That is because the SOR form requires a written narrative explanation for that category of sentences.

Sentences of “time served” present special challenges. In the federal system, offenders may receive credit for time served in official detention prior to sentencing.278 It is common for a judge to impose a sentence of time served, allowing the offender to be released immediately. The sentence is not zero months of imprisonment because the offender is credited by statute for serving time. But SOR forms sometimes list the sentence simply as “time served,” with no indication of the length of presentence detention for which the offender has been credited. For lack of more precise information, sentences of time served were coded as zero months of imprisonment, but an additional dummy indicator was added to permit analysis of those cases.

One model also uses dummy variables that capture the identity of the sentencing judge. To avoid the distorting effects of judges with low caseloads, such as those in senior status, those models exclude sentences by judges with fewer than 15 sentences during the fiscal year.279 Following standard practice for categorical variables, one judge was omitted as a reference category.

277 See STITH & CABRANES, supra note 2, at 62 (same convention).