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A MAP OF SENTENCING AND A COMPASS FOR JUDGES:[+]

Sentencing Information Systems, Transparency and the Next Generation of Reform

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No modern structured sentencing system provides easily accessible data describing individual sentences or dynamic sentencing patterns and practices. Limited availability of either individual or systemic data (in contrast to annual and other special reports) goes hand-in-hand with paltry efforts by state reformers to compare sentencing law and experience across states or to compare states to the federal system. The limited access to information and lack of visible efforts to craft an active sentencing reform dialogue may help to explain the undue scholarly focus on the failed federal reforms over far more positive state sentencing reform experiments. Sentencing reform everywhere can be improved if state actors make sentencing information and sentencing data publicly available and easily accessible and speak to and acknowledge other systems. One promising approach to improve sentencing systems and sentencing discourse is sentencing information systems ("SIS"). SIS depict decisions within each system and allow observers without technical data skills, including judges, to ask a variety of questions that relate to individual case decisions, assessments of particular sentencing factors, sentencing variation, sentencing process, and even sentencing purposes.

[+] The idea of a compass for judges comes from Norval Morris. Norval R. Morris, Sentencing Convicted Criminals, 27 The Australian Law Journal 186, 189 (1953) ("When a court decides what sentence to impose on a criminal…, it must do so with reference to some purpose or purposes, conscious or unconscious, articulate or inarticulate…. [A] compass is desirable…, even if only for a short distance and over a particular part of the journey."

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CONCLUSION

Many state sentencing reforms appear to be far more successful—more principled, more popular, more consistent, more modest, more useful—than the federal guidelines system. The federal sentencing system, however, has dominated scholarly discussions of sentencing reform.[1] The federal system has also tended to dominate policy discussions throughout the federal system and in states that have not yet adopted modern structured sentencing reforms.[2] Fortunately most of the roughly two dozen states that have adopted modern sentencing reforms after the creation of the federal sentencing guidelines have

[1] The vast majority of noncapital sentencing articles that appear in the Lexis and Westlaw journal databases address the federal system. The number of noncapital sentencing articles in the Westlaw journals and periodicals database was only 63 in 1989. It grew quickly with the implementation of the federal guidelines to the high 100s in 1992-1994, then peaked at 219 in 1995, probably spurred by the impending United States Supreme Court decision in *Koon v. United States*, 518 U.S. 81 (1996). The number of articles dropped back to 159 in 1995, then stayed between 182-196 per year (with one light year at 132 in 2001). The United States Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. __ (2004), probably explain a jump to 221 in 2003 and to a rate that will produce over 260 articles in 2004. Of 368 sentencing articles in 2002 and 2003 (after removing references to guideline manuals) the titles revealed that 203 were on general sentencing topics, 132 explicitly on the federal system, and only 33 explicitly on state systems. Of the articles addressed to state systems, 29 were about one state, and only 4 more generally on state sentencing. There has been some modest growth in the total size of the Westlaw journals database, though less than for some of the other Westlaw and Lexis services, so to the extent the total numbers reflect the relative role of sentencing in legal scholarship, a modest discount should apply. *See* Ronald F. Wright, The Abruptness of Action, 36 Crim. L. Bull. 401, 423-425 (2000) (discussing methodology in using Lexis or Westlaw databases to count "presence" or "impact"). When non-capital sentencing articles do address the states it is often on topics such as alternative sentences and drug courts where there is little or no experience in the federal system.

[2] Kevin Reitz, Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences, 91 Nw. U. L. Rev. 1441, 1442-1443 (1997) (highlighting the importance of analyzing data from more than just the federal system).

explicitly rejected most of the fundamental conceptual and policy decisions made for the federal system.[3]

The academic and policy focus on the federal system is misguided. Federal legal reforms often receive initial scholarly and public attention because of the centrality of federal law to American legal education. Beyond the first year common-law building-block courses (property, contracts, torts, and criminal law), the classroom, casebook, and scholarly attention seems heavily biased towards federal law especially in public law constitutional, statutory and administrative courses. This bias is out of step with American legal practice. While among the largest criminal justice systems in the country, the federal system accounts for only about six percent of all felony offenders prosecuted each year in the United States.[4] Federal sentencing law is interesting, but it is much less interesting than sentencing law in state systems.[5]

Scholarly attention to federal law might come in relatively obscure areas where the federal law and policy are more accessible than analogous state law. But the story of sentencing law and policy offers one of the great legal reform tales of the past fifty years. It is hard to imagine that law and process that apply to a million people each year (many millions if prosecutions of misdemeanors are included) are too obscure for scholars to focus their attention on state-level

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[3] Richard Frase, Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective, 12 Fed. Sentencing Rep. 69, 81 (2000) (noting that "states have adopted guidelines despite the federal example, not because of it"); Michael Tonry, Sentencing Matters, 11–13 (1996); Kevin Reitz, supra note __; Kevin Reitz, The Disassembly and Reassembly of U.S. Sentencing Practices, *in* Sentencing and Sanctions in Western Countries 222 , (Michael Tonry & Richard S. Frase Eds. 2001); Kevin R. Reitz, Model Penal Code: Sentencing: Plan for Revision, 6 Buff. Crim. L Rev. 525 (2002) [See http://www.ali.org/ali/MPC02Revision.htm]; Kay A. Knapp & Denis J. Hauptly, State And Federal Sentencing Guidelines: Apples And Oranges, 25 U.C. Davis L. Rev. 679, 679–80 (1992) ("[S]tates have often overtly rejected guidelines that resemble the federal effort and have relied instead on prior state efforts as a model.").

[4] There are about one million felonies charged in year in the United States. The federal system accounts for around 60,000. *See* Bureau of Justice Statistics, Felony Sentences in State Courts NCJ 198821 (June 2003) (reporting 2000 data). In 2003 there were just under 1,470,045 people in state and federal prison; the federal system accounted for 173,059 (11.7 percent). Bureau of Justice Statistics, Prisoners in the United States NCJ 205335 (November 2004) (the number of incarcerated individuals at the end of the year including state jails was over 2.2 million). Although the federal system was the single largest system, Texas and California were each roughly the size of the federal prison system with around 165,000 people in their prison system.

[5] Criticism of the federal system appeared before the guidelines were implemented, and have continued for the past fifteen years. *See* Marc L. Miller, Rehabilitating the Federal Sentencing Guidelines, 78 Judicature 180, 181 (1995) (documenting early criticism of the federal guidelines before implementation, and in the early years).

reforms. And the focus on the federal system has not been costless: That focus may have harmed national sentencing reform efforts.[6]

Attention to the federal system might also be understandable if there were no interesting alternatives. The modern sentencing reform story, however, includes many interesting state efforts. Moreover state reform reform efforts in places such as Minnesota and Pennsylvania, both of which predate the federal system, and in North Carolina have received praise from actors within those systems[7] and from those few scholars who have taken the state experiences seriously as part of national sentencing reform experiment.[8]

The most plausible explanation for the undue attention to federal sentencing reform might come from the misguided but deeply ingrained habits of most legal scholars to teach and write about the federal system even for areas where states have substantial and sometimes dominant control over the field (consider, for example, criminal procedure other than sentencing and substantive criminal law). While I believe wholeheartedly that an excessive and unwise federal bias exists in American legal education,[9] I do not believe this bias is the primary explanation for the lack of attention to state sentencing reforms. The

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[6] *See* Kevin R. Reitz, Federal Influence in State Sentencing, Prosecution and Procedure: The Federal Role in Sentencing Law and Policy, 543 Annals Am. Acad. Pol. & Soc. Sci. 116 (1996); Reitz (2002), *supra* note __ (ALI sentencing project is intended to speak to states that have not yet reformed).

[7] See, e.g., Adam Lamparello, Introducing The "Heartland Departure, 27 Harv. J.L. & Pub. Pol'y 643, 685 (2004) (noting Minnesota guidelines "have been widely praised as a model for achieving uniformity in sentencing with an evolving, principled, doctrinally-rich sentencing jurisprudence"); Ronald Wright, Counting the Cost of Sentencing in North Carolina, 1980-2000, 29 Crime & Just. 39 (2002) (describing North Carolina successes).

[8] The three scholars who have taken comparative state sentencing reform most seriously are Kevin Reitz, Richard Frase, and Ronald Wright. *See, e.g.*, Frase, *supra* note ___; Richard S. Frase, Panel Remarks: Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines, 44 St. Louis L.J. 425 (2000); Reitz, supra note ___; Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 1980 – 2000, *in* 29 Crime and Justice: a Review of Research 39 (Michael Tonry, Ed. 2002); Ronald F. Wright, Book Review: Rules for Sentencing Revolution, 108 Yale L.J. 1355 (1999); Vicent Schiraldi & Judith Greene, Reducing Correctional Costs in an Era of Tightening Budgets and Shifting Public Opinion, 14 Fed.Sent.R. 332, 335 (2002) (praising North Carolina).

[9] This Article does not try to demonstrate or prove that bias. While I have spent many years and many thousands of pages working against this bias, I would ask readers to treat such as bias in the academy as "common knowledge," familiar to the court. *See* Marc L. Miller & Ronald Wright, Criminal Procedures: Cases, Statutes and Executive Materials (2d Ed. 2003); Nora Demleitner, Douglas Berman, Marc Miller & Ronald Wright, Sentencing Law and Policy: Cases, Statutes and Guidelines (2004); Ronald F. Wright & Marc L. Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29 (2002).

primary culprit, I believe, are state reformers. State legislators, state sentencing commissioners and commission staff have not generally tried to make information about individual sentences or about their sentencing systems reasonably accessible. No state system has tried to make its data transparent or otherwise usable by non-experts. Nor have states tried to assess or influence the rules, processes or sentences in other jurisdictions.[10]

Modern structured state sentencing systems do provide varying amounts of information on their systems. Twenty-three states have (or have had) sentencing commissions, and active commissions generally maintain web sites.[11] Some commissions produce annual reports;[12] most produce occasional reports on specific topics.[13] These occasional reports are sometimes fascinating documents and deserve much wider recognition.[14] Annual and special reports are typically directed to state legislatures and are often built on expert assessment of sentencing

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[10] Only the Maryland and Missouri sentencing commissions provide links to other states. See Maryland sentencing Commission links *at* http://www.msccsp.org/resources/commissions.html; Missouri links *at* http://www.msccsp.org/resources/commissions.html.

[11] *See* http://www.ussc.gov/states/nascaddr.htm (links and contact information for state sentencing commissions) (last visited December 12, 2004); *see also* list of United States guideline systems as of June 1999 (http://www.ussc.gov/states/asgs.pdf) (last visited December 12, 2004). Other states considering sentencing commissions include New Jersey, Hawaii, Montana, New Mexico, and Wisconsin. See Mary Price, Sentencing Reform: Eliminating Mandatory Minimums, Easing Harsh Sentencing Structures and Building "Smart-on-Crime Solutions," 28 Champion 18 (2004).

[12] *See, e.g.*, Minnesota Sentencing Guidelines Commission, Sentencing Practices: Annual Summary Statistics for Felony Offenders Sentenced in 2002 (January 2004) (http://www.msgc.state.mn.us/Data%20Reports/datasum2002.DOC); North Carolina Sentencing and Policy Advisory Commission, Structured Sentencing Statistical Report for Felonies and Misdemeanors, Fiscal Year 2002/03 (July 1, 2002 - June 30, 2003) (December 2003) (http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/2002-03statisticalreport.pdf); Virginia Criminal Sentencing Commission, 2003 Annual Report (December 2003) (http://www.vcsc.state.va.us/2003Annualreport_pdf.pdf); Pennsylvania Commission on Sentencing, Annual Report (2000) (http://pcs.la.psu.edu/).

[13] *See, e.g.*, Minnesota Sentencing Guidelines Commission, Sentencing Practices: Criminal Vehicular Homicide and Injury Offenders Sentenced in 2003 (November 2004) (http://www.msgc.state.mn.us/Data%20Reports/cvh2003.pdf); Washington Sentencing Guidelines Commission, Sex Offender Sentencing (2004) (http://www.sgc.wa.gov/PUBS/SSOSAReport.pdf).

[14] *See, e.g.*, North Carolina Sentencing and Policy Advisory Commission, Sentencing Practices Under North Carolina's Structured Sentencing Laws (March 2002) (http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/disparityreportforweb.pdf); North Carolina Sentencing and Policy Advisory Commission, Correctional Program Evaluation: Offenders Placed On Probation Or Released From Prison In Fiscal Year 1998/99 (April 15, 2004) (http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/2004recidivismreport.pdf); Minnesota Sentencing Commission, Sentencing Departure Data Report (2002) (annual report).

data.[15] But no state or commission provides an easily accessible data set reflecting the operation of its sentencing system. Among modern states, Pennsylvania and Minnesota have gone the farthest towards providing sentencing data, but in each case there are barriers to what data are available and to the accessibility of that data.

There are no model states with regard to sentencing data: in the partial defense of all states, there are no good data models for either the context, form or accessibility of state sentencing data . Some key information, including identifiers for individual judges, is available only from two states—Minnesota and Pennsylvania.[16]

As with so much of modern sentencing reform the federal system also offers no model with regard to sentencing data generally. The federal system collects and the United States Sentencing Commission codes but does not provide access to judge identifiers.[17] Congress required the United States Sentencing Commission to "publish data concerning the sentencing process" among a list of statutory duties related to information-gathering and information-sharing.[18] In

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[15] See, e.g., Minnesota Sentencing Guidelines Commission, Report to the Legislature 43-47 (2005) (reporting on DWI sentencing statistics); Pennsylvania Commission on Sentencing, Sentencing in Pennsylvania 2000, Annual Report 18 (2002) (summary of sentences imposed by offense).

[16] Information with judge identifiers only became available in Pennsylvania in 1999. *See* Mark H. Bergstrom & Joseph Sabino Mistick, The Pennsylvania Experience: Public Release of Judge-Specific Sentencing Data, 16 Fed. Sentencing Rep. 57, 58 (2003) (describing the state's Release of Information Policy). *See infra* note __.

[17] See United States Sentencing Commission, 2004 Guide to Publications & Resources 40 (2003-2004) ("Pursuant to the policy on public access to Sentencing Commission documents and data (54 Fed. Reg. 51279 (12/13/89)), all case and defendant identifiers have been removed from the data."). The Commission placed the responsibility for restricting judge identifiers on the Administrative Office of the United States Courts through an agreement with that institution. Id. This agreement may be illegal given the Congressional mandates to the Comission to collect and release information. See infra note 17. Moreover, the agreement shamefully obfuscates the decision to withhold judge identifiers behind an apparent (but logically distinct) concern for defendant privacy. The 1989 agreement between the Commission and the Administrative Office states that "No information that will identify an individual defendant or other person identified in the sentencing information will be disclosed to persons or entities outside of the Commission without the express permission of the court for which the information was prepared." 54 Fed. Reg. 51279, 51282. Finally, nothing in the agreement prohibits the Comission from using coded identifiers rather than the names of individual judges. It is worth remembering that the name of the judge in each case is public. See infra note [xx].

[18] 28 U.S.C. § 995(14) . Note that Congress did not specify *which* data should be collected or released, or in what form. 28 U.S.C. § 995(12)-(16) provide that the Commission shall:

> (12) establish a research and development program within the Commission for the purpose of
>
> (A) serving as a clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices; and

addition, the United States Sentencing Commission has a budget and staff that dwarfs the state commissions.[19]

Problems generated by limited availability of data are compounded by the scarcity of efforts to link or compare data and sentencing experience across states. State commissions have developed good working relationships and there is a national association of state sentencing commissions.[20] But there is no indication that, either on their own or as a group, the state sentencing commissions have tried to develop common research projects. Their many excellent reports are written for internal (state-specific) audiences.[21] The limited access to information and a paucity of efforts to craft a larger pool of knowledge or an active sentencing reform dialogue best explains the undue focus by scholars and policy makers on

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(B) assisting and serving in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices;
(13) collect systematically the data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process;
(14) publish data concerning the sentencing process;
(15) collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a) of title 18, United States Code;
(16) collect systematically and disseminate information regarding effectiveness of sentences imposed . . . .

Other statutory directives to the Commission in the Sentencing Reform Act concerning research include 28 U.S.C. § 991(b)(2) (2004) ("develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing . . . ."); 18 U.S.C. § 994(g) (2004) (assess the impact of its proposed guidelines on prison capacity, and require the Commission to operate within the principle of "capacity constraint"); 28 U.S.C. § 994(c), (d) & (e) (2004) (assess the relevance of a host of specific offense and offender factors); 18 U.S.C. § 994(m) (2004) (asertain "the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served"). *See* Miller, Domination & Dissatisfaction, supra note __ at 1223-1227.

[19] The 2003 budget for the United States Sentencing Commission was $12 million, and it had a staff of 100 about one half of whom work on "compliance, research or policy." United States Sentencing Commission, 2002 Annual Report 4, 5 (2004). The Minnesota Sentencing Commission had a budget of 530,000 in 2005 with 5.8 FTEs. See http://www.budget.state.mn.us/budget/operating/200607/background2/sentencing_guidlines.pdf (last visited Jan. 29, 2005). For the Pennsylvania Commission on Sentencing the 2004-2005 budget is 992,00 with a total staff of 18 of which 5 people are designated "research specialists." See http://www2.legis.state.pa.us/WU01/LI/BI/BT/2003/0/HB2579P4326.pdf (last visted Jan. 29, 2005).

[20] *See* National Association of State Sentencing Commissions; Robin L. Lubitz, The Formation of the National Association of Sentencing Commissions, 8 Fed. Sentencing Rep. 71 (1995).

[21] At this time, Alabama appears to be the only annual report to mention other states (namely Louisiana, Oklahoma, and Texas) in its annual report. See *See* footnote 1 page 12 at http://sentencingcommission.alacourt.gov/Publications/ASC%202004%20Final%20Report.pdf

the failed federal reforms over far more positive state sentencing reform experience.

If limited access to information has hampered the development, sharing, and larger policy impact of state reforms, then there is a relatively clear path to improving sentencing reform. Sentencing reform can be improved in each state, among the states, and in the federal system if state commissions and their staff develop better habits of making sentencing information and sentencing data publicly available by making it more transparent, and if each state seeks to learn from and to educate other states.

The first part of this Article tries to answer the question why anyone should care about sentencing data.[22] Just reading the words "sentencing data" (more the word "data" than "sentencing"!) might tempt readers who are not social scientists to stop reading (or might prompt their eyes to close, to the same functional effect). But I am not writing for social scientists (though I hope to enlist their aide). Instead, my hope is to explore the most central kinds of information that any scholar, policy analyst, or actor in the system might want to ask. I do not assume that all scholars, or all policy or system actors, would want to ask the same questions. My goal, instead, is to identify a handful of core, illustrative questions that are linked to the various purposes of sentencing systems and efforts at sentencing reform. I also offer several additional questions that have not tended to be a part of sentencing reform debates, but should be.

The second part focuses on one core question: can a judge determine how other judges have sentenced similar offenders when the judge has the ability to define (and redefine) the aspects that make offenders similar or different? It then asks whether that question can be answered based on information currently provided by states that have engaged in sentencing reform. While I survey all modern sentencing reform states, I focus on the leading states of Minnesota, North Carolina, and Pennsylvania, each of which have fairly substantial literatures and active sentencing commissions. I have not interrogated actors and institutions in each state because the goal of this Article is to assess the information that an interested but non-expert observer (in or out of state) can find.[23] I am interested in what sentencing commissions, courts (in decisions and otherwise), and other agencies make generally available, not what a person might ferret out with

[22] See Steven L. Chanenson, Sentencing and Data: The Not-So-Odd Couple, 16 Fed. Sent. R. 1 (2003) (exploring the difficult relationship of sentencing policy and sentencing data).

[23] State commissioners and staff in Minnesota and Pennsylvania have responded to my requests, and staff from those and other jurisdictions responded to requests from my research assistants inquiring as law students.

endless time, resources, special contacts, or the (qualified) help of open records laws. Those states that provide data offer it in a form that only a social scientist could love—but that ultimately would leave even the social scientist's heart cold for lack of key information and lack of timeliness.

The third part of the Article proposes an answer to the inadequate information made available about state systems. I consider the possibility of developing sentencing information systems ("SIS") that model the decisions within each system and allow nontechnical observers including judges to ask a variety of questions that relate to individual case decisions, assessments of particular sentencing factors, sentencing variation, and, depending on the scope of available information, even sentencing purposes. I discuss the potential role of advisory groups in designing data systems, including interfaces that allow for some standard questions to be asked by nontechnical users, especially in support of case-by-case decision-making. Finally, I suggest an important federal role in supporting the development of better and more transparent state and federal sentencing systems.

Of course academics always want more data; I embrace the challenge of suggesting why more data might actually lead to better and more robust reforms.

I. QUESTIONING SENTENCING

What a person might want to know about a sentencing system likely depends on what role that person plays. The questions would likely depend on whether that person is thinking about the system as a whole or sentencing in individual cases, or sentencing in a particular type of case (e.g., drug possession with intent to sell), or for a particular type of offender (e.g., low-level nonviolent drug offenders). One of the purposes of this Article is to ask how reformers and scholars and, especially, judges and other actors in the system would respond if their roles were changed from passive consumers of information to active seekers of empirical information.

> *I encourage readers to stop at this point. Do not proceed until you have answered for yourself what key question (or questions) most interests you about sentencing systems. Ask yourself, as well, what kind of information you would want or need to answer that question (or questions). Do not imagine what information a commission or courts might have; instead ask the question you would like to have answered, and assume that the data design, collection, and analysis or transparent and accessible framework*

will follow. If you build it, they will come. But what do you want to build?

Most people, in my experience, do not find this an easy exercise. Questions tend at first to be framed in general terms: Is there sentencing disparity? Do penalties adequately deter others? What impact does an offender's assistance to authorities have on sentences? The next level—what information would be needed to answer each question—is often harder to assess.

A. *Reformers, Legislators, and Scholars*

Modern sentencing reform emerged from a host of concerns with the prior "indeterminate" sentencing systems. Reformers sometimes pointed to empirical studies, such as studies of sentencing disparity, to support their demands for change, but their primary concerns and goals were conceptual. Modern structured sentencing reform emerged from a mix of concerns and motives althought list and priority of concerns differed across states. Reformers, however, focused on five central goals.[24]

First, compared to the prior "indeterminate" sentencing systems, modern reformers wanted to bring law to sentencing—sentencing rules and sentencing procedures should place the prior unstructured and highly discretionary regimes.

Second, spurred in good part by concerns that prior unbridled discretion had produced substantial sentencing disparities, reformers wanted to reduce sentencing disparity for similarly situated individuals. Reformers identified several sources of disparate treatment, but the primary concern tended to be with sentencing disparities introduced by judges.

Third, reformers believed that sentencers in the indeterminate system relied upon different justifications in sentencing. Any consensus that existed decades earlier that the primary goal of sentencing and punishment was the rehabilitation of offenders had collapsed. Thus, reformers implored policymakers and judges to provide explicit decisions and statements about the justifications for punishment in each system and for each offender.

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[24] *See, e.g.*, Michael Tonry, Sentencing Matters (1996); Andrew von Hirsch, Kay A. Knapp & Michael Tonry, Eds., The Sentencing Commission and Its Guidelines (1987); Minnesota Sentencing Guidelines Commission, Minnesota Sentencing Guidelines Background Information and Summary Statistics (May 2001) (listing purposes as public safety, uniformity, truth and certainty, proportionality and "to coordinate sentencing practices with correctional resources) (*see* http://www.msgc.state.mn.us/Data%20Reports/background.pdf).

Fourth, reformers sought greater control over and prediction of resource use, most especially the very expensive resource of imprisonment. While the concern with resource use was a soft and ultimately trivial factor in federal reform, it has been a central component of many state reforms.

Fifth, reformers hoped to design rational and proportionate rules and penalties that banned or limited reliance on inappropriate factors (such as race), and emphasized reliance on relevant sentencing factors. This call for rational rules and penalties reflected the underlying concerns about unwarranted disparity, the justifications for punishment, and the resource constraints.

Few sentencing reformers started with empirical questions about the sentencing system. However when designing new systems, and to achieve the goal of resource allocation, reformers often included requirements that sentencing commissions collect data and issue reports. In doing so, however, reformers typically asked commissions or researchers to respond collect data and to report on bottom-line conclusions: Is the system more fair? Is there undue reliance on race, gender or wealth? Are resources being used within available constraints?

Reformers, including legislators, are not generally hostile to empirical assessment. However, in the same way that legislators rarely think of their proposals as hypotheses, they rarely think in terms of how their proposals might be tested, or what kinds of questions and data they would like over time to confirm or reject each reform.

When asked, reformers, scholars, and practitioners (including judges) each tend to pose somewhat different basic questions about sentencing. Most reformers and scholars tend to ask questions about the operation and effects of the system as a whole. Given some time to think and proper encouragement, I think most reformers would return to the purposes of reform.[25] Legislators in particular often begin by asking about the *functional* goals of reform—reducing sentencing disparities, limiting reliance on inappropriate factors, and controlling resource use. Thus, they would ask about the degree of sentencing disparity for similarly situated offenders. Concerns with disparity might extend to excessive leniency or severity for particular types of offenses or offenders.

[25] See Honorable Michael Marcus, Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It? 16 Fed. Sent. R. 76 (2003) (describing Multnomah County, Oregon data system designed with Judge Marcus' central participation and aimed at assessing the "success" of prior sentences through evaluation of post-sentence behavior)

Legislators might also ask about the impact of sentences, in line with the purposes articulated by the legislature, or by a sentencing commission in its rules,[26] or by judges in individual cases.[27] Reformers might ask about both utilitarian goals such as deterrence and incapacitation, and nonutilitarian goals like just deserts and social cohesion.[28] Or reformers might ask more abstractly about the relationship of sentencing to crime (or to "crime control").[29]

Similar to reformers (and sometimes acting as reformers themselves), legal scholars concerned with sentencing reform tend to articulate issues, interests, and concerns, but only rarely to rely on empirical assessments. Scholars would likely ask similar questions about sentencing disparities, sentencing factors, and sentencing purposes. What scholars might add beyond legislators and other reformers is attention to a wider set of purposes, including concerns with equality generated by an awareness of the screening and sorting that takes place at earlier stages of the criminal justice process. Asked to frame their questions and concerns in quantitative terms, scholars might ask that the number of offenders be assessed at each stage of the criminal justice process and that the grounds for sorting be measured. Scholars might also ask questions related to the ultimate role of lawyers and the legal system in dealing with the social problem of crime. Scholars would be more likely, in my experience, to link sanctions to crime rates (or to question the link of sanctions and crime rates).

What kind of information would be needed to answer the basic questions of reformers and scholars?

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[26] State guideline systems have typically identified a core justification for punishment. Richard Frase, Sentencing Principles in Theory and Practice, *in* 22 Crime and Justice: A Review of Research ___ (1997); Richard Frase, Limiting Retributivism: the Consensus Model of Criminal Punishment, *in* The Future of Imprisonment ___ (Michael Tonry, ed. 2004). In contrast, the federal commission sidestepped the fundamental question of purposes of punishment. *See* Aaron J. Rappaport, Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment, 6 Buff. Crim. L. Rev. 1043, 1088 (2003) ("[L]acking a clear set of principles, the Commission pursued political objectives rather than undertaking a principled effort to promote the purposes of punishment.").

[27] *See* Marc L. Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 450-63 (1992) (discussing the judicial evaluation of purpose of sentencing).

[28] *See* Frase (1997), *supra* note __; Frase (2004), *supra* note __ . *See also* Michael H. Marcus, Comments on the Model Penal Code: Sentencing Preliminary Draft No. 1, 30 Am. J. Crim. L. 135, 136 (2003) (attacking the centrality of just deserts in the American Law Institute Model Penal Code: Sentencing preliminary draft).

[29] Michael H. Marcus, Sentencing in the Temple of Denunciation: Criminal Justice's Weakest Link, 1 Ohio St. J. Crim. L. 671, 674–76 (2004) (suggesting that sentencing practice and sentencing data and research should be separate).

Warning: the next several paragraphs list a wide range of information. Readers disinclined to empirical studies or already drowsy with this topic or my prose are encouraged to skip to the next heading—The First Question From Judges.

To assess whether a sentencing system (and more generally a criminal justice system) is achieving its goals, a legislator or policy analyst would want to know the overall crime rate and the aggregate (gross) rate of imprisonment and other sanctions over time. Crime rates can be broken into a variety of finer categories including by more specific geography (e.g., congressional districts, cities, counties, police or prosecutorial domains, census tracts, neighborhoods, blocks, addresses) and by shorter and longer chunks of time (monthly, quarterly, annually, etc.). Sanctions can be broken out by offense and offender factors. To assess a variety of purposes legislators will want to know rearrest, reprosecution and reconviction rates, and over what time periods and for which offenses.

Data can also be collected on nonutilitarian objectives. For example public assessments about the appropriate kind and level of sanctions can be obtained. Such information can be far more substantial and informative than simple polls. Nonutilitrian judgments can be informed by utilitarian factors: nonuntilitarian purposes do not assume or require that proponents be uninformed or uneducated. Groups can recommend sanctions in light of the relative costs and benefits of different sanctions, system costs, and goals. Some initial research suggests that public attitudes about appropriate sanctions change in light of such information.[30]

Another set of questions concerns information about the sentencing process. Basic process information will distinguish whether cases charged are resolved by pleas, trials, or dismissals. More detailed process information would explain the relationship between crimes and the activities of police and prosecutors that eventually lead to declination, diversion or charging, and dismissals (both prosecutorial and judicial). Process information must distinguish between the critical dyads of trials or guilty pleas (ideally indicating which pleas

[30] *See* Francis T. Cullen, Bonnie S. Fisher and Brandon K. Applegate, Public Opinion About Punishment And Corrections, 27 Crime & Just. 1, 43 (2000) (discussing informed and uninformed public opinion studies on the severity of punishment, and observing that "There is some evidence, however, that support for prison terms will soften if respondents are presented with detailed information about the cost of prisons and about the nature of alternative sentences"); Loretta J. Stalans & Shari Seidman Diamond, Formation and Change in Lay Evaluations of Criminal Sentencing, 14 Law & Hum. Behav. 199, 211–13 (1990) (sentencing moderation by mock juries); Shari Seidman Diamond & Loretta J. Stalans, The Myth Of Judicial Leniency in Sentencing, 7 Behav. Sci. & L. 73 (1989).

are the result of bargains between prosecutors and the defendant) and conviction or acquittal. And of course where there is a conviction, data must capture the sentence (and, where rules structure the sentencing decision, the application of those rules). Even more detailed analyses would track the movement of cases through the system to see how initial police facts and charge recommendations relate to final outcomes.

Yet another type of information concerns criminal justice budgets and staffing. Punishment is, of course, not free. The costs and benefits of punishment systems and criminal justice systems more generally should include information about expenditures on each aspect of the system, broken down by geographic and time variables similar to crime and sanctioning rates.

The purpose of this Article is not to exhaustively describe the contents for a complete sentencing or criminal justice data system. Such as task is not possible in a short article, nor do I have all of the expertise required, nor will most readers have the interest or patience in exploring the design and inner-workings of good and complete sentencing data systems. Instead, I hope to illuminate the extent to which collection and transparency of sentencing data has not been addressed by states, and why it should be. I also hope to suggest mechanisms and funding sources to achieve the goal of better and more transparent data systems.

To achieve this goal, I focus in the next section on the one core question that judges and other actors in the system have raised both before and after modern sentencing reforms.

B. *The First Question From Judges: What Have Other Judges Done?*

The questions that most judges, prosecutors, and defense lawyers ask about sentencing tend to be different, and more focused, than the questions posed by legislators and scholars.[31] Judges tend to think in terms of the cases that come before them, as do defense lawyers. Prosecutors sometimes pay greater attention to screening and sorting rules, since they have greater control over the entry and exit gates to the adjudicative and sentencing process, but prosecutors too are highly attuned to the issues and arguments in each case.

[31] Other actors may also have a role in individual cases. In some systems probation officers will provide judges with sentencing assessments. *See, e.g.*, Leslie A. Cory, Looking At The Federal Sentencing Process One Judge At A Time, One Probation Officer At A Time, 51 Emory L. J. 379 (2002) (describing the role of probation officers in the federal system and discussing the relevant literature).

> *There is one essential question for judges: "What have other judges done in this situation, and why?" Defense lawyers and prosecutors seek a similar end when they ask, "How have similar offenders been sentenced before, by the judge in the case and by other judges in this jurisdiction?"*

The question "what have other judges done in similar cases" was central before structured sentencing systems, but the mechanisms available to provide answers were limited. Judges could talk with their colleagues or ask for arguments by counsel (but counsel had limited sources of information with which to make arguments). Written precedents did not exist; appellate case law was virtually nonexistent; sentencing data was unavailable. Several reform efforts before the creation of commission and guidelines, including sentencing panels, were aimed at providing some greater counsel and context for decisions in each case.[32]

Complaints from judges about the prior indeterminate system, the lack of guidance, and the difficult and at times painful nature of sentencing decisions helped to drive the structured sentencing movement. It was a federal judge, Marvin Frankel, who wrote the major tract attacking the prior system and proposing a guidelines and commission structure as the model for modern reforms.[33] Judges have often been key proponents of reform in the states.[34]

Judges might well have other concerns, but those other concerns often grow from the basic question. Thus, a judge might ask how the other judges in the same courthouse have sentenced similar cases, or whether sentences in similar cases have changed over time. A judge might also ask whether individual judges

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[32] *See* Shari Seidman Diamond & Hans Zeisel, Sentencing Councils: A Study of Sentencing Disparity and its Reduction, 43 U. Chi. L. Rev. 109 (1975); Zeisel & Shari Seidman Diamond, Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut, 1977 Am. B. Found. Res. J. 883; Pierce O'Donnell, Dennis Curtis & Michael Churgin, Toward a Just and Effective Sentencing System: Agenda for Legislative Reform 16-18 (1977) (critiquing experiments with sentencing institutes and sentencing councils).

[33] Marvin Frankel, Criminal Sentences: Law Without Order (1973).

[34] *See, e.g.*, Ronald F. Wright & Susan P. Ellis, A Progress Report on the North Carolina Sentencing and Policy Advisory Commission, 28 Wake Forest L. Rev. 421, 451 (1993) (describing the role of Judge Thomas Ross in North Carolina's sentencing reform); Wright (2002), *supra* note __ (same after longer time). Judge Ross has also written about the North Carolina experience. Judge Thomas W. Ross & Susan Katzenelson, Crime and Punishment in North Carolina: Severity and Costs Under Structured Sentencing, 2 Fed. Sent. R. 207 (1999); Robin L. Lubitz and Thomas W. Ross, Sentencing Guidelines: Reflections on the Future, *in* Sentencing Guidelines: Issues For The 21st Century, Papers From The Executive Session On Sentencing And Corrections, No 10 (June 2001), available at http://www.ncjrs.org/pdffiles1/nij/186480.pdf.

tend to sentence consistently higher or lower than their peers. Indeed, a judge might ask how she sentenced similar and different offenders in prior cases (with concerns about proportionality), and yet have little more than the tricky data file we call memory to answer her question.

Modern structured sentencing reforms should have made it easier for judges and other system participants to answer this most basic of questions. Structured sentencing produced a rough national language of sentencing, and each state has developed its own dialect. In a structured system judges have a tool for describing the qualities that make an offender similar or dissimilar (offense of conviction, various offense facts, offender facts including criminal history, etc.). The sentencing rules and dialects might not adequately describe all relevant factors, and systems might leave more or less discretion to individual judges, but at least a framework would exist where none existed before. In many states, including for example Minnesota, appellate case law could also help to confirm the grammar and syntax of sentencing, allowing for more consistent and nuanced comparisons. Modern sentencing reforms also typically include some explanation for each sentence and collection of sentencing data by sentencing commissions.

Policymakers and scholars will also likely be interested in information about the factors that affect sentencing, and the distribution of sentences given various offense, offender, and other factors. The distribution of sentences given similar sentencing factors will have something to say about the nature of disparity, especially if the identification of judges and prosecutors are included in the analysis as a possible explanatory factor. When judge and prosecutor identifiers (data that identifiers individual judges and prosecutors, whether by their actual names or through substitute codes) are not part of the system, then one of the core claims about the source of disparity in indeterminate systems (judge bias) are left unexamined, and potentially unaddressed.

Of course judges are aware that formal rules might or might not apply, and that earlier decisions in the process, such as prosecutorial screening, can influence the pool of cases actually sentenced. But whatever the amount and fairness of the prior sorting, judges are aware of judge-induced disparity and most concerned with their immediate challenge: to sentence the offender who has been convicted and is before them, and to do so as fairly as possible.

The next section looks at whether the judges' core, simple question can be answered in modern state systems, with special attention to several leading states.

II. STATE DATA

What kinds of sentencing information do modern sentencing states provide about individual cases, types of cases, and the system as whole? This section focuses on one core type of information, responding to the basic question asked by judges, and of most immediate use in addition by other actors in the system:

> *Is data provided that answers the question of the distribution of sentences for a given offense and offender facts? If so, what other facts are available, including the identification of the individual judge and prosecutor? Can users identify sentencing tends over time, and for different geographic units?*

This section will be short, because the answer is clear. No state provides sufficient information to answer the basic question—what distribution of sentences has been imposed by other judges for similar cases. Only the roughest anwer to this information is possible with those annual reports, like the Pennsylvania report, that report actual sentences produced as a result of the more gross categories of offense and prior record score.[35] But a quick survey of available state material in several leading states is important to reveal the excellent resources that are available in state systems[36] and the first steps towards making data, including the critical element of judge identifiers, more available in the future. Despite my concern that no state now provides the minimal data necessary to follow and critique actual sentences and sentencing patterns, the state materials are sufficiently rich that no sentencing scholar should produce an article on any sentencing question—even an article focused on the federal system—without systematically examining state materials.[37]

Among United States systems, only Minnesota and Pennsylvania have made judge identifiers public. The Pennsylvania guidelines reside more towards the "voluntary" end of the "binding" versus "nonbinding" spectrum than either the Minnesota or the North Carolina guidelines. But sentencing information is equally interesting in states with more and less restrictive systems. In

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[35] See, e.g., Pennsylvania Commision on Sentencing, 2000 Annual Report, 19 (average sentences for drug offenses), 40 (listing sentences within or outside of standard range by offense and drug weight range, but not listing distribution of actual sentences oar combining with criminal history) (2002) (available at http://pcs.la.psu.edu/) (publication not indicated online).

[36] See, e.g., Pennsylvania Commission on Sentencing Research Bulletin, Impact of the 1994 and 1997 Revisions to Pennsylvania's Sentencing Guidelines (2003); Pennsylvania Commission on Sentencing, Pennsylvania's Motivational Boot Camp, 2003 Report to the Legislature (2004).

[37] I call for this standard, though I have by no means lived up to it thus far in my own work.

Pennsylvania appellate courts have started in the last year to engage in more searching review of trial court sentences.[38]

Indeed, sentencing information would be useful for policy work in the remaining indeterminate systems. Interest among scholars in whether there is any "there" there in voluntary guideline systems has increased dramatically since the January 2005 decision in United States v. Booker may have turned the previously tightly bound federal system into something more towards the voluntary end of the spectrum.[39] Pennsylvania, with its presumptive (but relatively less restrictive) guidelines should be a prime source of information on this critical question.

Since 1999, Pennsylvania has provided sentencing data (including judge identifiers) to a national data clearinghouse[40] and in response to specific requests.[41] The sentencing commissioners and judges actively actively debated

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[38] Professor and Pennsylvania Sentencing Commissioner Steve Chanenson illuminated this development in an email sent January 11, 2005:

> Historically, it is true that Pennsylvania's guidelines have not been subject to searching appellate review. However, the Pennsylvania Superior Court, which is functionally the final word on the vast majority of sentencing issues, has demonstrated an increased interest in sentencing. For example, several judges and panels have started to review minimum sentences more rigorously. See, e.g., Commonwealth v. Walls, 846 A.2d 152, 158 (Pa. Super 2004) ("If the sentencing court, under the guise of exercising its discretion, imposes a sentence that deviates significantly from the guideline recommendations without a demonstration that the case under consideration is compellingly different from the 'typical' case of the same offense, or without pointing to other sentencing factors that are germane to the case before the court, including the character of the defendant or the defendant's criminal history, then the court is not, in reality, merely exercising its sentencing discretion. Rather, the court is, in effect, rejecting the assessment of the Sentencing Commission as to what constitutes just punishment for a typical commission of the crime in question."); id., at 159 ("if a sentencing court were able to easily sentence outside of the guideline ranges, the goals of treating like offenders in like fashion would be frustrated and we would be, de facto, in a sentencing environment that existed prior to the passage of the guidelines."); id., at 160 ("the court is not free to reject the Sentencing Commission's assessment of an appropriate sentence and simply interpose its own sense of just punishment"); Commonwealth v. Caraballo, 848 A.2d 1018, 1020 (Pa. Super. 2004) ("It is not enough just to state any reason for deviating from the guidelines. Any judge is able to come up with some rationale for anything that they do. The reason for a deviation must be just that--reasonable."). While it may take time to more fully permeate the Pennsylvania system, this approach seems to be gaining acceptance on the Superior Court.

[39] United States v. Booker,

[40] See The Inter-University Consortium for Political and Social Science Research (ICPSR) (*see* http://www.icpsr.umich.edu/index.html). The data held by ICPSR is available for use by member institutions who pay handsomely for the privilege.

[41] Pennsylvania Commission on Sentencing, Release of Information Policy (adopted Feb. 24, 1999; revised most recently Aug. 20, 2003) [http://pcs.la.psu.edu/releaseofinformationpolicy.pdf].

the decision to provide a more open data policy after twenty years of silence under the modern Pennsylvania system.[42] A short review of the consequences for research in the first few years of public access reached very positive conclusions.

> One positive consequence of the policy has been an increase in the amount of research undertaken using the sentencing data. The most surprising aspect of that research has been the quality and scope of the projects. Since the adoption of the policy, data sets have been obtained in order to study: race and gender differences in sentencing; factors predicting decisions to impose restitution orders; the impact of truth-in-sentencing on length of stay in prison; models of criminal behavior; sentencing patterns of judges in several counties; judicial retention and geographical disparity; and numerous special interest academic and media projects. The Commission would not have had the time or the resources to engage in so many research projects, and may not have identified these particular projects as a high priority for research. Also, the Commission's research tends to focus on statewide analysis, while much of that being done by individuals using the data sets is at a county or regional level. In the end, the policy has made possible expanded research that assists the Commission in fulfilling its duty to collect, prepare and disseminate information on Commonwealth sentencing practices.[43]

By sharing its data so readily and by including judge identifiers the Pennsylvania commission has taken a critical step in a direction that would allow it to design and implement an SIS. The Pennsylvania Commission on Sentencing

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The Pennsylvania decision to release judge identifiers applies to sentences after 1998. The individual judge is informed about the source of each such request. The Pennsylvania Commission on Sentencing provided data with judge identifiers to selected researchers before 1999. *see* Bergstrom & Mistick, *supra* note _.

[42] *See* id. at ___.

[43] Id. at 62. The Pennsylvania Commission on Sentencing has received about 50 requests for sentencing data since 1999. Pennsylvania Commission on Sentencing, PCS Data Set Requests (Jan. 28, 2005) (supplemented by a January 28, 2005 document titled "Data Requests Since Last Commission Meeting"). Most of the requests for data have come from judges, prosecutors and reporters. Some reseach has been published relying on the Pennsylvania data. See, e.g,, Megan C. Kurlycheck & Brian D. Johnson, The Juvenile Penalty: A Comparison of Juvenile and Young Adult Sentencing Outcomes in Criminal Court, 42 Criminology 485 (2004); Brian D. Johnson, Racial and Ethnic Disparities In Sentencing Departures Across Modes of Conviction, 41 Criminology 449 (2003).

has also developed software for collecting sentencing information and assisting judges that could serve as the backbone of an SIS.[44]

The Minnesota guidelines, first implemented in 1980, were the first of the modern sentencing reform experiments, predating the federal Sentencing Reform Act of 1984 by several years and the federal guidelines by almost a decade. The Minnesota experiment has received the most scholarly and policy attention of any of the state sentencing reforms.[45] Minnesota has produced many superb reports including annual reports on the operation of the state system generally and on specific aspects of the system such as sentencing in criminal sexual conduct, dangerous weapons, and vehicular homicide cases.[46]

While none of the reports make it possible to answer the judges' basic question the Minnesota Sentencing Commission website states that monitoring data for felony sentences is available by request, and my research assistants were sent data files for five years when they asked.[47] Judges are identified by a code number in the data, but the Commission will provide a list to translate those codes on request.[48] The Minnesota sentencing commission will also share information about specific judges in response to requests from reporters.[49] Minnesota has been praised for its collection and use of data in policy-making but also criticized for failing to collect some data essential for assessing some of the purposes of sentencing and aspects of the actual operation of the system.[50]

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[44] See infra notes __-__ and accompanying text.
[45] See supra note ___ [Frase, Tonry, Parent, Reitz].
[46] Minnesota Sentencing Guidelines Commission, Sentencing Practices: Offenses Involving Dangerous Weapons and Carrying Mandatory Minimum Prison Terms (M.S.§ 609.11): Offenders Sentenced in 2002 (2004); Minnesota Sentencing Guidelines Commission, Sentencing Practices: Criminal Vehicular Homicide And Injury: Offenders Sentenced In 2002 (2004); Minnesota Sentencing Guidelines Commission, Sentencing Practices: Criminal Sexual Conduct Offenses (CSC) Offenders Sentenced in 2002 (2004).
[47] The Minnesota Sentencing Guidelines Commission web site states: "For additional data requests, contact the Sentencing Guidelines Commission at (651) 296-0144 or via email at sentencing.guidelines@state.mn.us." [http://www.msgc.state.mn.us/commission_reports_and_data.htm]. The Minnesota Commission sent datafiles for the years 1999-2003 in response to a request. Minnesota has also been developing a statewide criminal justice information system (CRIMNET) which focuses on offender information, and appears primarily to be for use by police, prosecutors and prisons and other government officials in processing individuals.
[48] Minnesota data sets 1999-2003. Personal communication from Barbara Tombs, Executive Director, Minnesota Sentencing Guidelines Commission (Jan. 22, 2005).
[49] Conversation with Barbara Tombs, Executive Director Minnesota Sentencing Commission (Jan. 21, 2005) (Columbia Law Review Symposium on state sentencing).
[50] See Richard S. Frase, Sentencing Guidelines in Minnesota 1978-2003, 32 Crime and Justice: A Review of Research __ (2004).

North Carolina has received a relatively large amount of attention in the sentencing literature. Scholars have paid particular attention to the political dynamics of the North Carolina reforms.[51] The North Carolina Sentencing and Policy Commission has produced many excellent reports, and those reports often rely heavily on data. For example, the Sentencing and Policy Commission provides a detailed annual report.[52] However, the Commission does not provide outside researchers direct access to data.

Commissions in many other states release reports that are highly data-intensive,[53] but no other states come close to the Pennsylvania or Minnesota policy on data availability. State specific sentencing literature by legal scholars and reforms often rely heavily on assertions about state sentencing data.[54] The role of empirical study in modern sentencing reform is firm; this Article suggests it should be expanded so that the data become more useful to more people on an ongoing basis and in case-by-case decisions.

> The Minnesota commission has gathered and made effective use of a huge inventory of sentencing and corrections information, one of the most comprehensive and detailed databases ever assembled by any state. But data are sparse or lacking on some important issues, limiting the commission's ability to monitor sentencing practices and formulate policy in these areas. In particular, "real offense" data (to assess the impact and evolution of charging and plea bargaining practices) has only been collected sporadically. Similarly, the commission's database contains very limited information about conditions of nonprison sentences, and no data on important issues such as the actual jail time served, and whether all or most of that time reflected credit for pretrial detention…. A third important topic on which the commission has collected very little information relates to patterns and changes over time in the state's crime rates. Lacking such information, the commission has not been able to assess the impact of guidelines rules on public safety.

[51] *See, e.g*, Wright, *supra* note ___; Lubitz & Ross, *supra* note __; Ross & Katzenelson, *supra* note __; Ronald F. Wright, The Future of Responsive Sentencing in North Carolina, 11 Fed. Sentencing Rep. 215 (1999); Robin L. Lubitz, Offender Characteristics and Departures under North Carolina's Sentencing Guidelines, 9 Fed. Sentencing Rep. 132 (1996).

[52] *See supra* note __.

[53] *See, e.g.*, Richard Kern, Sentencing Reform in Virginia, 8 Fed. Sentencing Rep. 84, 84 (1995) ("Virginia's approach to sentence reform is unique in its reliance on criminological research to fashion guidelines that maximize the incapacitation benefits of incarceration."); Richard Kern & Meredith Farrar-Owens, Sentencing Guidelines with Integrated Offender Risk Assessment, 16 Fed. Sentencing Rep. 165, 165-68 (2004) (discussing empirical analysis of Nonviolent Offender Risk Assessment and Sex Offender Risk Assessment by the Virginia Criminal Sentencing Commission).

[54] David Boerner and Roxanne Lieb, Sentencing Reform in the Other Washington, 28 Crime & Just. 71 (2001).

III. SENTENCING INFORMATION SYSTEMS

Judges want to know how other judges have handled similar cases. What would a system look like that provided that information?

The idea of a sentencing information system is simple: Judges are provided with sufficient information to determine how other offenders like the offender before the judge have been sentenced before. Judges can ask a series of "what if" questions by varying each of the relevant factors to see how that impacts the sentences others have imposed. More complex systems can allow the "what ifs" to vary over specified time periods (or to show trends) and over different political units or groups, such as sentences by the same judge, by other judges in the same courthouse, or by other judges in the same state or country. Unlike sentencing guidelines, sentencing information systems do not tell judges what they must do or should do; they tell judges what others have done, thus allowing a better informed judgment in each case. SIS allow for the development and expression of social norms in ways akin to traditional common law reasoning by analogy.

While no United States jurisdiction has yet undertaken this challenge, several foreign jurisdictions, notably Canada, Scotland and the Australian state of New South Wales, have started down the path towards sentencing information systems. This part describes these SIS. This Part considers whether SIS should be transplanted to the United States and grafted to current structured systems.

This Part also addresses whether there are principled justifications for SIS beyond the desire to answer the most common question judges ask and concludes that SIS relate to a deeper desire for more transparency in sentencing. Transparency, in individual cases and for systems, was not an objective in the last generation of sentencing reforms, but might help define the next generation of sentencing reforms. This Part also considers the kind of processes that might lead to the useful and successful SIS in states. A final section considers whether there is an appropriate federal role and interest in supporting the development of SIS in the states.

A. *Current Sentencing Information Systems*

Sentencing Information Systems were first proposed by Norval Morris in 1953.[55] A functional and substantial SIS would have been difficult in the 1950s,

[55] *See* Morris (1953), *supra* note __, at 200. More information on current sentencing practice and the effects of different punishments is essential, and this should be of two kinds: statistics in each

especially for a system where the sentencing information would be dynamic and constantly updated. United States criminal codes in the middle of the century were hardly models of conceptual or functional purity. In the United States, the Model Penal Code effort to bring greater coherence to American codes had just begun. [56] But the problem was not limited to the United States codes: A coherent and functional sentencing information system requires specification of a reasonable number of reasonably well-defined offense, offender and other categories, and mechanisms for recording information about each case in a reasonably consistent fashion. The problem is not just one of categories—of creating terms and concepts—but of developing a social language among sentencers to understand, apply, and challenge those categories.

SIS have become more plausible in the context of the developing "language" of sentencing and in light of modern information technology. One of the greatest successes of the structured sentencing movement has been to create a language of familiar terms and concepts and to have that language become part of modern legal discourse through the creation and application of guidelines in many systems. Ideas including more nuanced assessment of harms, "role in the offense," "substantial assistance" to government authorities, "vulnerable victims," "relevant conduct," and the like are now part of sentencing discourse across jurisdictions (even where the terms vary and even when some factors are allowed and others rejected in different systems).

While no United States jurisdictions have tried to implement an SIS, in the 1980s and 1990s several other countries began to experiment with SIS. These experiments have received limited evaluation and only modest recognition in the sentencing literature and almost none in sentencing scholarship in the United States.[57] The two most widely reported efforts are in Scotland and New South Wales, Australia, and an earlier and ultimately failed experiment in Canada.[58]

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state regarding the sentences to be imposed by different courts (related at least to the crimes committed, to the ages of the criminals sentenced and to their criminal records), so that individual judges and magistrates may see where they stand in relation to their brethren; and follow-up studies of the later histories of samples of convicted criminals, so that the effectiveness of different punishments for different types of criminals may be gauged and enlightened rather than fortuitous individualization of punishment become possible.

[56] Gerard E. Lynch, Revising the Model Penal Code: Keeping it Real, 1 Ohio State Crim. L.J. 219, 225 (2003) (discussing origins and purposes of the MPC); Herbert Wechsler, The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097 (1952) (explaining the purpose and approach of the Model Penal Code).

[57] *See* Marc L. Miller, Sentencing Reform Through Sentencing Information Systems, *in* The Future Of Imprisonment 121 (Michael Tonry, Ed. 2004).

[58] Anthony Doob, Sentencing Aids: Final Report (unpublished report, December 1989); Anthony Doob, Computerized Sentencing Information for Judges: An Overview of Progress Reports on the

The SIS in all three jurisdictions were designed to operate in lieu of guidelines and were spurred in part by the fear that guidelines might be imposed.[59]

In Scotland, a five year experiment was applied to all 32 judges on the high court in late 2002.[60] Judges participated in the design of the Scottish system, including specification of the relevant offense and offender categories.[61] The explicit goal of the Scottish system was "to provide judges with a form of support which they thought would assist them in their sentencing work. [T]he SIS was conceived as a practical tool for sentencers."[62]

Sentencing Aids Project (unpublished report, January 16, 1990). The Canadian experiment operated for six years in the late 1980s in four provinces. The Canadian system emerged as part of the same efforts and discussions that led to early guideline systems. Doob (1990), at ___; Anthony Doob & Newbury Park, Computerized Sentencing Information for Judges: an Aid to the Sentencing Process, 30 Crim. L. Quarterly , No. 1, p. 54 (1987); John Hogarth, Sentencing As A Human Process (1971). Anthony Doob worked with judges to develop the relevant categories of sentencing information, and ultimately developed a "workable" system where judges first selected an offense (from among 34 offenses), and then added information about six other "dimensions," including criminal record, involvement of the offender in the offense, seriousness of the offense, impact on the victim, and prevalence of the offense in the community. *See* Doob (1989), *supra* note ___. A judge would then be given a distribution of sentences from "like" cases. Contrary to initial expectations by Doob and from judges, judges did not find the system helpful, and the experiment ceased in the early 1990s. *See* Miller (2004), *supra* note ___. The Israeli system has also been described as an SIS. Uri Schild, Statistical Information Systems for Sentencing: The Israeli Approach, 14 Int'l Rev. of Law, Computers & Tech. 317 (2000). There is fragmentary information about an SIS in Holland. J. Van der Vinne, W. van Zwol, and M. Karnekampm, A Sentencing Information System Named 'NOSTRA.' 6 Int'l J. of Law and Information Technology No. 2, 230 (1998). Recently, there has been a call by English senior appeal court judge Robin Auld for development of an SIS in England in a major report, and work has begun on an SIS for magistrates' courts. Robin Auld, Report of the Review of the Criminal Courts of England and Wales (2001).

[59] *See* Miller (2004), *supra* note __ at ___

[60] The system was designed starting in 1993, with a prototype in 1995, and a first stage of implementation, to about half of the 32 judges on the high court, in 1997. As of the end of 2002, the Scottish SIS has been extended to all judges, now operating with a database of 10 years and 10,000 cases (now 13 years and 13,000 cases. It is now continuously updated, data entered by clerks of justiciary (administrative staff)).

[61] Neil, A. Paterson, Cyrus Tata, and J. Wilson, A Sentencing Information System for the Scottish High Court of Justiciary: Report of the Study of Feasibility (1996); Neil Hutton, Cyrus Tata and John Wilson, Sentencing and Information Technology: Incidental Reform, 2 Int'l J. of Law & Information Technology, No. 3, p. 255 (1994).

[62] Neil Hutton and Cyrus Tata,The 'Balance' Between Two Visions of Justice in Sentencing, in The Judicial Role in Criminal Proceedings (S. Doran & J. Jackson, Eds. 2000b). The Scottish SIS was developed for the High Court, which hears serious matters, including the most serious cases where a jury must sit. (not all jury cases, the sheriff court sitting under solemn jurisdiction also uses a jury. The maximum penalty was three years imprisonment. The High Court hears the most serious cases around 1% of all cases brought before the criminal courts, around 1000 convictions per year.

A Scottish judge faced with a new case can specify various offense and offender characteristics. Information is entered through a simple set of forms with dropdown lists for each type of information. For any combination of factors, the system will depict the range of sentences imposed. Results are portrayed for all cases in the system. By adding or removing facts, or making different hypothetical determinations, a judge can compare the outcomes for a set of case scenarios.

> The easiest way to describe how the SIS works is to imagine a sentencer faced with a sentencing decision in a particular case who wishes to use the system to see the range of penalties passed by the High Court for similar cases. For example let us take a case where a 19 year old male offender, with no previous convictions, has been convicted of a robbery from a shop using a knife where there was no injury to the shopkeeper. What counts as a "similar" case in this instance? Is it all robberies using a weapon or just a knife? Does the sentencer only want to look at sentences passed for 19 year old offenders or should older offenders be included? Is the absence of injury important or should the sentencer also look at cases where there was slight injury? There could be many more questions. The point here is that it is impossible to construct an objectively settled definition of similarity. The system is flexible and allows users to vary the set of specified characteristics….
>
> [T]he system can be used to show penalty distributions for bundles of cases which are similar to the one at hand although each definition of similarity is different… The flexibility of the system is a strength: It permits the sentencer to gain a subtle picture of the previous sentencing practices of the courts for broadly similar cases.[63]

In other words, judges can add or subtract facts and see the results. Generally, fewer factors will portray a wider range of outcomes, based on a larger number of cases.

A system could easily include defaults or options for different time periods and different jurisdictional subunits, including prior sentences by the individual judge. In addition, an SIS is not necessarily limited to information that

[63] Neil Hutton & Cyrus Tata, Sentencing Reform by Self-Regulation: Present and Future Prospects of the Sentencing Information System for Scotland's High Court Justiciary, 6 Scottish Journal of Criminology 37 (2000a).

can be quantified.[64] Indeed, judges who participated in the initial implementation of the Scottish SIS requested more case-specific information.[65] The system was modified by allowing judges to enter narrative information about each case.[66]

An SIS has been operating in New South Wales, Australia, since 1988, and the Scottish judge who took the lead in developing the Scottish SIS learned about the concept from New South Wales. Although the New South Wales system has been in operation for almost fifteen years, there is no published evaluation of the system.[67] The New South Wales SIS was designed "to show a sentencer the range of penalties imposed in past cases which are similar along the main legal dimensions of interest."[68] The variables in the New South Wales system were developed from prior appellate decisions, research, and a survey of all judges and magistrates in New South Wales.[69] As in the Scottish high court, the New South Wales system displays the range of prior sentences for judge-specific combinations of offense and offender facts.

The New South Wales system combines sentencing statistics, full text opinions (3500 cases) and factual case summaries (an additional 2500 cases), a database structured around sentencing "principles" (including multiple logical entry points, such as offenses and offender characteristics, and including sentencing trends and changes over time), available punishment facilities

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[64] David Tait, Judges and Jukeboxes: Sentencing Information Systems in the Court Room, 6 Int'l J. of Law & Info. Tech. 167 (1998).

[65] *See* Hutton and Tata, 2000b, *supra* note __.

[66] This development had a parallel in the Canadian experiment, where Doob and Park noted the importance of including textual case summaries and access to trial or appellate decisions. *See* Doob and Park, *supra* note __ at 68. Sentencing narratives may put isolated facts in context; in a complete form with a narrative of all of the relevant law and facts, sentencing narratives might end up looking like more traditional opinions. However, sentencing narratives in conjunction with structured systems are likely to be much shorter and focused on facts and "the story" that makes the narrative coherent and comprehensible.

[67] See Hutton and Tata, 2000a, supra note ___. Indeed, it appears that none of the current sentencing information systems have been "subject to rigorous analysis and evaluation." Austin Lovegrove, Statistical Information Systems as a Means to Consistency and Rationality in Sentencing, 7 Int'l J. of Law and Information Technology 31 (1999). The system has been said to be the product of public reports on wide sentencing variation for drug offenders. J. [Janet?] Chan, A Computerized Sentencing Information System for New South Wales Courts, 7 Computer Law & Practice 137 (1991).

[68] Chan, supra note __.

[69] The designers favored factors which were more objective over those which were more subjective or harder to measure. Experts at the Judicial Commission of New South Wales, created to develop the SIS, claim it is "one of the most sophisticated yet unobtrusive systems of its kind in the world" (Potas, Ash, Sagi, Cumines, and Marsic 1998, p. 100; Auld, supra note ___.

(resources), current and proposed legislation, and access to various publications.[70] Notably, the New South Wales system includes appellate review for reasonableness and proportionality, making the appellate case law important to understanding the system.[71]

The closest public effort in the U.S. to develop a sentencing information system has been a county level system spurred by a Portland, Oregon (Multnomah County) state judge, Michael Marcus.[72] It focuses not on inputs but on information about available sanctions and recidivism. However, many United States jurisdictions collect sentencing information and more general information about the criminal justice system. The data collection is especially visible in modern structured systems where an agency or office exists to handle and evaluate that information. Thus, SIS could be created for structured state systems. The structured SIS systems would be easier to construct than for indeterminate sentencing systems because the guidelines would provide many of the elements around which an information system would be built. Given the limited access to data collected by state commissions and other agencies, it is hard to assess whether additional information would be needed to set up an SIS.

B. *The Virtues of SIS*

An SIS would allow judges to answer the most basic question about sentencing in each case. SIS would have many additional virtues. An SIS would let judges know the distribution of actual sentences in similar cases, not just the "recommended" or guideline sentences, including the distribution of sentences at high or low ends of available ranges, or making use of available nonprison sanctions.

The SIS would serve both to illuminate and act as a counterpoint to the rules themselves, suggesting the extent to which they are being followed and how they are being applied. To the extent that state systems allow for judicial discretion—in factfinding, within guideline ranges, or for departures—an SIS

[70] I. Potas, D. Ash, M. Sagi, S. Cumines, and N. Marsic, Informing the Discretion: The Sentencing Information System of the Judicial Commission of New South Wales 99, 106–11 (1998); see http://www.judcom.nsw.gov.au/).
[71] Potas et. al., supra note ___.
[72] Michael Marcus, Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong, and How We Can Fix It, 16 Fed. Sentencing Rep. 76, 79 (2003) (noting the benefits of including "incarcerative as well as non-incarcerative dispositions"); *see also* http://www.smartsentencing.com .

would help to illuminate that exercise of discretion.[73] An SIS should also help litigants shape sentencing arguments in each case.

Judges could look at their own sentences in similar prior cases, the sentences imposed in similar cases by their immediate fellow judges (perhaps limited to the same courthouse), and at sentences imposed by judges from the entire jurisdiction. An especially rich system could include information about how similar offenders would be sentenced in other jurisdictions, in the same country and abroad. Judges, armed with all of this information, could sentence more thoughtfully in each case.

Judges, armed with SIS information, could better work with sentencing commissions and legislatures to improve sentencing guidelines. From a reformer or scholar's perspective, the information revealed by an SIS could become a powerful basis for arguments for further reforms, including development of sentencing rules and sentencing ranges.

Unlike the rules of a structured sentencing system, an SIS can provide information beyond that which is legally relevant to individual sentences. The legally irrelevant information can be highly policy relevant, such as sentences imposed in similar cases in other jurisdictions or changes in the distribution of sanctions over time. Systems could allow factors and distinctions that should not have any binding weight, but which might nonetheless inform a judge or reformers or scholars. An SIS that created some procedures and presumptions about how the information should be used could more easily distinguish between shaping, informing, and irrelevant information.

One factor that might or not be relevant to an individual sentence (depending on the rules in a particular jurisdiction) but that would be highly relevant to policy discussions is the variation in sentences over space (geographic, political, or jurisdictional boundaries). The Scottish and New South Wales systems do not seem to have considered the relevance of geographic variation. A judge might want to know what her courthouse neighbors did, even if there was no formal jurisdictional line at stake. The jurisdictions that have experimented with SIS are relatively small and cohesive. Local variations could appear in urban, suburban and rural areas, or in different districts or parts of a state.[74] SIS

[73] *See* Daniel J. Freed, Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L. J. 1681 (1992) (critiquing restrictions on discretion in federal guidelines system).

[74] Charles Sifton, Theme and Variations: The Relationship Between National Sentencing Standards and Local Conditions, 5 Fed. Sentencing Rep. 31 (1993); Reena Raggi, Local Concerns,

also offer the possibility of illuminating sentencing variations beyond jurisdictional boundaries—California judges might find what Washington State or North Carolina judges do of interest.[75]

The appeal of an SIS and more generally of principles that allow for expanding and contracting presumptive ranges based on combinations of factors resembles the appeal of markets more generally. A well-designed SIS would allow in effect for market pricing of sanctions, albeit a market constrained—as other markets are often constrained—by legislative and administrative superstructure. The contrast with the commission and guidelines model is revealing: the commission model has the character of an economy designed by "command and control." As with the varying degrees of authority and constraint in different guideline systems, different mixes of ground up and top down rules and case-level decision-making are possible.[76] In unstructured (indeterminate) sentencing systems, it is hard to see how an SIS would respond to many of the core goals of modern sentencing reform including the rational use of resources. The extent to which an SIS system helped to address concerns about unwarranted disparity would depend on the ways in which judges used the information revealed by the system to guide their own sentencing judgments.[77] But in

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Local Insights: Further Reasons for More Flexibility in Guideline Sentencing, 5 Fed. Sentencing Rep. 306 (1993); William Braniff, Local Discretion, Prosecutorial Choices and the Sentencing Guidelines, 5 Fed. Sentencing Rep. 309 (1993); Vincent Broderick, Local Factors in Sentencing, 5 Fed. Sentencing Rep. 314 (1993).

[75] United States judges might find Canadian and English sentences of interest, and judges on the new International Criminal Court might find the sentences of many countries of interest. Judges, including justices on the Supreme Court of the United States, increasingly refer to non-United States sources. This pratice is the subject of debate within courts and in the larger political and legal community. See Marc L. Miller, Sentencing Equality Pathology, 53 Emory L.J. xxx, xxx (2005). High courts in other countries have long had more encompassing habits of discourse and citation, including frequent reference to United States Supreme Court decisions.

[76] While an SIS, at least with some process or principles beyond the mere provision of information, may offer an alternative path to the reduction of unwarranted disparity, and might offer a major alternative to sentencing guidelines, it is not clear, in the absence of some addition rule or process, how an SIS that merely provides information can answer the critique of indeterminate sentencing that called for more legal principle and regulation to guide each sentencing decision. Nor is it clear how SIS can respond to important resource allocation concerns, at least in the absence of some "top down" or centralized guidance, whether from a legislature, the executive branch, or a sentencing commission.

[77] The Canadian, Scottish and New South Wales systems did not try to respond to the full range of modern sentencing reform goals, but focused on the aim of reducing unwarranted disparity. Lovegrove, *supra* note __ at 32. In theory, the Scottish judges believe that if judges saw the range of sentences imposed by other judges, it would lead them to sentence the next offender in a more reasoned fashion, in line with prior sentences. The New South Wales approach did not intend "to curtail discretion, but to better inform it." *See* Potas et. al, *supra* note __ at 99. In theory, the availability alone of sentencing information might produce both more consistent and more

structured systems an SIS can add important dimensions of information, transparency, and therefore justice to the sentencing process and, ultimately, to the success of sentencing policy and reform.

1. *"A Compass for Judges"*. — One substantial puzzle of modern commission and guideline sentencing reforms is the proper role for the sentencing judge. Most guideline systems include statements retaining a central role for the sentencing judge.[78] Most legislatures and commissions have asserted that the opinions and suggestions of judges (formal and informal) will be used as feedback to improve the system, and some states seem to do a much better job at living up to this goal.[79]

SIS offer a dramatically different way of depicting the sentencing judge's role and could perhaps help to achieve the promise of more principled sentencing while maintaining a central role for sentencing judges. SIS respond to the actual decisions of judges. Judges would gain a stronger individual and collective role in such systems than in current commission and guideline systems without SIS. SIS would not rely solely on the input of judge members of commissions,

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principled and visible sentences. However, the literature on nonbinding or voluntary guidelines raises questions about the necessary and sufficient conditions for nonbinding systems to "work" in the sense that they actually shape judicial decisions. *See* Michael Tonry, Sentencing Matters (1998); Douglas A. Berman, Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines, 76 Notre Dame L. Rev. 21, 28 (2000) (noting that such systems "had little impact on sentencing outcomes, and thus they did not significantly reduce disparities"). Twenty years ago scholars and reformers would probably claim that nonbinding or voluntary guidelines could not work. The last several decades of experience in a range of guideline systems, however, suggests that the language of "binding" and "voluntary" are too crude, and that many finer gradations of guidance have emerged in practice, and turn on such things as the kinds of social norms and degree of acceptance among judges. Marc L. Miller & Ronald F. Wright, Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice, 2 Buffalo Crim. L. Rev. 723 (1999). Perhaps the availability of information would have a more powerful shaping power than the availability of rules: The information is the product of the actual decisions of judges, while rules are typically (though not necessarily) the product of a panel or commission. There does not appear to be any direct evidence on the impact of the Scottish SIS, even though the fact that some judges used the system while others did not would offer an unusual opportunity to test the impact of the system.

[78] In the federal system, the judicial role seems largely to be one of either fact-finding (including calculation of sentences, often with the aide of a technical assistant in the form of a probation officer) or of validating bargains (often including fact bargains) reached by the parties. Judges have been forced to this more limited role by narrow sentencing ranges and restrictive departure standards, with many cases especially in the dominant drug category governed by mandatory sentences or by sentences sufficiently severe that the de facto federal system is one of specific sentences, not sentencing ranges.

[79] *See* Reitz (1997), supra note ___; Wright (2001), *supra* note ___ .

surveys, or individual sentencing opinions to capture systematic judicial insights about sentencing.

SIS might echo traditional common law systems in some ways: Indeed an SIS might help to nurture the common law development of sentencing principles. But the common law rides the crest of precedent, while an SIS with some "bite" from the government rules and procedures should ride the crest of group action, but with no strong binding force to the act of any one prior court.

2. *SIS and Sentencing Narratives*. — Guideline systems in the United States do not seem to produce standard narratives about offenses and offenders.[80] Instead, some United States guideline systems focus courts, participants, and critics on particular factors, isolated from a picture of the offender and offense as a whole—For example, was the offender an "organizer" of a group crime? What quantity of drugs was involved? Was a gun used in the offense.[81] SIS offer the possibility of suggesting different narratives that vary by key facts and that may in theory span a range of seriousness as reflected in the distribution of sentences actually imposed.[82]

Potential virtues of a complete SIS compared to sentencing guidelines include the capacity to identify offense and offender mixes requiring a wider range of sanctions to satisfy sentencing purposes, the possibility of gradual explicit and implicit evolution in severity and choice of sanction, and the possibility of constructing relatively coherent sentencing narratives and variations.

C. *Are SIS Duplicative in Structured Sentencing Systems?*

Even if it is possible to set up an SIS with available information in current structured sentencing systems, it will be difficult and costly. Two key arguments against the creation of SIS in structured sentencing systems are that they would be unnecessary in a guideline system where sentencing rules already provide judges

[80] Consider, in contrast, the appellate guideline practice in England, where occasional guideline decisions explain what makes a set of cases more or less serious for the same general type of offense. *See* Demleitner, Berman, Miller & Wright, *supra* note __, at 109-116; Aaron Rappaport, Sentencing In England: The Rise of Populist Punishment, 10 Fed. Sentencing Rep. 247 (1998).
[81] Marc L. Miller, True Grid: Revealing Sentencing Policy, 25 U.C. Davis L. Rev. 587 (1992); Ronald F. Wright, Complexity and Distrust in Guideline Sentencing, 25 U.C. Davis L. Rev. 617 (1992).
[82] In Scotland, the system was designed with the assumption that judges think about sentencing in terms of narratives. *See* Hutton & Tata, 2000b, *supra* note __ at 309 (describing the concept of sentencing narratives in terms of "typical whole case stories").

with information and that creating an SIS would be costly and difficult, and any benefit would not be worth the cost. A skeptic might add that the SIS in Scotland, New South Wales, and Canada were set up in lieu of a guidelines system.[83] There is no illustration of an SIS set up in conjunction with, or on top of, a structured system.

Structured sentencing systems were set up to provide judges with guidance (or, put another way, to restrict their sentencing discretion in a consistent manner). If sentencing guidelines already provide judges with a map, are SIS mere surplusage? What additional information would an SIS provide? If judges are obligated to apply guidelines, could SIS undermine efforts at rule application and undermine the goal of achieving reasonable consistency in sentencing?

Even an SIS designed to mirror existing guidelines would be useful. Systems set up only around the categories defined by current guidelines will test whether those rules are being followed more than what sentences are in fact (and should be) imposed.[84] An SIS should also help to reveal how the rules operate in fact—for example how different guidelines interact. An SIS will also provide information about the distribution of the available sanctions for similar cases.

But an SIS should not be established simply to mirror guideline categories. There is no reason to limit sentencing information systems to the categories defined by existing guidelines, nor even necessarily to limit information to that specified or found by judges. Information systems might keep track of additional information, such as offender information not captured within the current guidelines, but the basic conceptual sentencing framework would already be in place. Indeed, in most systems, much of the information that would serve as the basis for an SIS is already collected and analyzed; it just is not shared, or if shared, is not shared in a form that judges and others without highly technical backgrounds can use to answer the most obvious and basic questions (How did I sentence in similar cases? How have other judges sentenced in similar cases?).

SIS might also seem duplicative of the very efforts that went into designing some structured sentencing systems. Guideline systems are often developed based on conceptual and statistical models of prior sentencing decisions.[85] A set of rules modeled on prior sentencing practice and a statistical

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[83] See supra note __ and accompanying text.

[84] *See* Michael Tonry, GAO Report Confirms Failures of U.S. Guidelines, 5 Fed. Sentencing Rep. 144 (1992).

[85] Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1 (1988). *See also* Dale G. Parent, Structuring Criminal Sentences:

portrait of prior sentencing practice might at first glance seem similar. But on closer examination they are distinct conceptually and practically. A critical factor for any structured system is its language and grammar—the operative concepts involving the offense and offender and their relationships that shape final sentencing choices. Systems that model their rules retrospectively, based on prior practice, must take records designed for one purpose (such as presentence investigation reports prepared by probation officers in the preguidelines federal system) and superimpose (or try to superimpose) the categories that rule designers later choose.

An SIS can continue gradually to take account of changing social norms. Guideline systems can also take account of changing social norms through the promulgation of revised guidelines. Changing norms could come in the form of new legislation or popular movements, such as recent efforts in several states to change presumptive punishments for low-level nonviolent drug offenders.[86] SIS might be slower than commission-driven guidelines systems to respond to legislative changes, such as changing the maxima or minima for particular offenses. But an SIS could both alert policymakers and allow judges to take account of local variation and variation over time more easily than top-down guidelines alone.

What relevance would data have to judges obligated to follow specific sentencing rules? Sentencing guidelines typically leave discretion to judges. Some systems focus on discretion within specified ranges; other systems allow for larger discretion in "departures" outside specific ranges. In both situations, SIS could help to inform and structure the exercise of discretion.[87]

The Evolution of Minnesota's Sentencing Guidelines (1988) (describing creation of the Minnesota guidelines).

[86] Daniel F. Wilhelm and Nicholas Turner, Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?, 15 Fed. Sent. R. 41 (2002); Marc Mauer, State Sentencing Reforms: Is the "Get Tough" Era Coming to a Close?, 15 Fed. Sent. R. 50 (2002).

[87] An SIS alone is not the "answer" to all sentencing problems. If an SIS is intended to be an alternative to guidelines, it should be combined with some process or tradition of decisionmaking. Even as a supplement to guidelines, judges should be encouraged to include narrative explanations of their decisions. Marc L. Miller, Guidelines Are Not Enough: The Need for Written Sentencing Opinions, 7 Behavioral Sciences & the Law 3 (1989). An SIS that encouraged a practice of narrative sentencing decisions would also encourage reflection on the relationship between quantitative data and sentencing narratives. Narrative descriptions might be used to test or question the adequacy of the data categories. An SIS that included both sentencing decisions and appellate sentencing decisions might provide the foundation for an elusive common law of sentencing. Robert Sweet, D. Evan Van Hook & Edward V. Di Lello, Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace, 65 Fordham L. Rev. 927, 946 (1996) (allowing "judges to harmonize a new sentence with previous ones"); Miller, 1989, id. at __.

While there are many technical and substantive challenges in designing and implementing an SIS, the cost of developing an SIS should not be prohibitively expensive. Structured sentencing systems already collect much of the relevant information about sentencing in each case. A good part of the decision to implement an SIS would be the interface between that data and nontechnical users.

For example, Pennsylvania is in the process of developing and implementing a system of "Sentencing Guidelines Software" (or "SGS") for use by judges.[88] The primary purposes of the SGS system are to help judges calculate prior record, to assist in guideline caculations, and to dramatically increase the speed and lower the error rate for entering information about each sentence in Pennsylvania.[89] SGS web also provides judges with information about "conformity," telling them whether based on offender facts, prior record, offense facts, and other information the sentence they propose is in the standard range or in mitigated or aggravated ranges.[90] For some sentences significantly above or below the standard range ("Outside Below" or "Outside Above") the judge must provide reasons; for sentences that are considered "Aggravated" or "Mitigated" the system requests (but does not require) reasons.[91]

The Pennsylvania SGS system does not depict for a judge the array of sentences actually imposed in similar cases. Nor does it allow the kind of dynamic flexibility that an SIS should have. But the Pennsylvania SGS system suggests how modest a step would be required to transform current data systems, whether used within commissions or more widely in court systems, into SIS systems. The cost of developing an SIS could be spread out if the system were developed in

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[88] Pennsylvania Commission on Sentencing, Sentencing Guideline Software Web Version Users' Guide, Revision 2.2 (undated; provided January 15, 2005).

[89] See http://pcs.la.psu.edu/ (last viewed January 31, 2005)

> *The Commission on Sentencing* launched ***SGS Web*** in January, 2002, as a JNET 'agency-hosted' application. Authorized JNET counties are now able to use the secure JNET infrastructure to enter all information required for the Sentencing Guideline Form. Users can calculate prior record and retrieve guideline recommendations, review conformity and total sentence imposed, and submit all information electronically to the Commission.
>
> ***New Features in SGS Web.*** The sentencing component added to ***SGS Web*** is the most notable improvement over the original SGS. Once a judicial proceeding is completed, designated county users will be able to submit the judicial proceeding electronically to the Sentencing Commission. Cases will immediately appear in the Commission database.

[90] SGS Web Users' Guides, suprat note __ at 72.

[91] Id.

stages. This step-by-step development would be especially plausible where all or most of the data that would be needed is already collected, as in Pennsylvania or Minnesota.

The experience in other countries suggests that the cost of implementing and managing an SIS can be reasonable. Administrative costs will depend in part on the size of the system and the caseload. The experience in Canada suggests the cost of developing and implementing a system may be much greater than the cost of administering it.[92] The availability of the World Wide Web and increasingly robust database technology has lowered the cost of information collection, evaluation, and access. The Web and a highly-standardized data interface is used in the current New South Wales system, and Judicial Commission staff noted that "the entire development and implementation" of the web-based system "cost less than the annual hardware and software maintenance budget of the [original] SIS."[93]

The experiences in Scotland and New South Wales and the earlier experiment in Canada confirm that SIS are by no means simply a technical matter, nor are they value neutral.[94] Among the many puzzles for information systems is how to encourage the use of similar definitions within each information category, though this is a problem whether sentencing data is used only by a commission or research agency or made more widely accessible through an SIS.[95]

Designing or enhancing the information system that describes sentencing is only part of the technical and substantive challenge if the goal is an SIS that can in fact be used by judges and others without a background in statistics. The several states that now make some sentencing data available do so in a form that is extremely difficult for all but the most highly trained researchers to use. It is little different than if commissions produced their reports in Greek. An SIS will

[92] *See* Doob (1989), supra note __.
[93] *See* Potas et al, *supra* note ___.
[94] *See* Doob and Park, *supra* note __ at 55–56, 62–63.
[95] One familiar and serious problem is whether judges restrict themselves to offenses which have been proven beyond a reasonable doubt, or also look at various kinds of "real offense" information, which may include unproven aspects of a conviction offense, or facts proven at sentencing by lesser standards of proof, and in some systems information about uncharged, dismissed, and even (shockingly, and not in most guideline systems) information underlying acquittals. Kevin R. Reitz, Sentencing Facts: Travesties of Real-Offense Sentencing, 45 Stanford L. Rev. 523 (1993); David Yellen, Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines, 78 Minn. L. Rev. 403 (1993); Michael Tonry, Salvaging The Sentencing Guidelines in Seven Easy Steps, 10 Fed. Sentencing Rep. 51 (1977). Fortunately this question is easier in many state systems than it would be for the federal guidelines, since states place much stronger restrictions on the use of unproven crimes.

need to have clear and useable overlays, including dropdown lists of sentencing factors and graphical displays of sentences imposed.

Since SIS should be designed to serve multiple constituencies, those constituencies should have a voice in how the system is designed and how it operates. Judges are especially important,[96] but a wide range of users, including policy reformers and legislators, should be asked exactly the question posed in the first part of this Article: What question or questions for use in deciding cases or about the sentencing system would you like to have answered? A commission, court, or legislature considering an SIS should find a way to establish an advisory committee. That advisory committee should include judges, prosecutors and defense lawyers, sentencing and criminal justice scholars, and technical experts on data system design and display. An advisory board could help to prioritize the elements of SIS in light of budgetary and practical limits. An outside advisory board should also contribute to the transparency and confidence in the sentencing system.

Constructing an SIS will take a lot of time and money. What makes us think that if we build it, judges will come? If judges across the country had been hankering for an SIS they would have asked legislatures to mandate one, or convinced sentencing commissions to construct one, or, as with Judge Marcus in Oregon, played a hand in building one.

The short answer is that judges will use an SIS if it answers questions they want answered. The first section of this paper was intended to highlight the kinds of questions judges do ask, but may not realize that a system could in fact answer. The experience in Scotland and New South Wales suggests that judges will use an SIS. But the idea of an SIS is not currently part of the United States Sentencing Reform dialogue. Involving judges in the construction and priorities for an SIS would create a great likelihood that the system would in fact be used.

[96] The experiences in Canada, Scotland and Australia suggest that sentencing information systems are more likely to succeed if judges are actively involved in their creation and implementation. Cyrus Tata, 'Neutrality', 'Choice', and 'Ownership' in the Construction, Use, and Adaptation of Judicial Decision Support Systems, 6 Int'l J. of Law & Info. Tech. No.2, p. 143 (1998). Since none of these systems have evaluated the ability of information systems to shape sentencing behavior, the claim here is modest: judicial involvement may be essential in shaping categories if the system is to work at all. But the larger point may hold as well: judges will be more likely to have their decisions guided by the patterns of decisions by other judges if the information fits with the way that judges assess offenders and offenses.

IV. SIS AND THE IDEA OF TRANSPARENCY

The virtues of SIS are more fundamental than providing judges with more information: They make the sentencing process and each sentencing decision more transparent. Transparency—the ability to follow, recreate, and assess the basis for the sentence in every case—is one of the most important principles missing from the last generation of sentencing reform.[97] One of the common goals of the last generation of structured sentencing reforms was "truth in sentencing," but this somewhat cryptic phrase represented a goal of having the sentence imposed after conviction largely mirror the sentence actually served.[98]

SIS are a tool to increase transparency in the sentencing process as a whole, but each SIS will add different degrees of transparency depending on whether individual sentencing decisions—specific cases—can be reviewed and compared, and whether the judge and prosecutor involved in each case are identified. The extent to which an SIS increases transparency will depend on other factors as well: who has access to the SIS; what information is included in addition to case and actor identifiers; what is the quality (accuracy, consistency, completeness, timeliness) of that information? The identification of the individual judge is essential to evaluate the most basic justification for modern sentencing reform: That individual judges may introduce their own biases across cases, in specific circumstances, or in individual cases.[99]

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[97] Statement of Steven L. Chanenson to the American Bar Association Justice Kennedy Commission (Nov. 13. 2003) (discussing and supporting the concept of "openness" at the policy and case level).

[98] *See* Miller (2004) *supra* note ___ at ___. The goal "truth in sentencing" has also been co-opted and abused by the United States Congress which has required a particular and severe form of "truth in sentencing" from states that wish to receive certain federal monies.

[99] Norval Morris's first criticism of sentencing systems in 1953 was that "The individual personality of the judge or magistrate plays too large a part in the assessment of the punishment. … There is … too great an illogical and fortuitous variation between sentences." *See* Morris, *supra* note __ at __. Consider the similar language from Marvin Frankel:

> [W]e place no burden of explanation upon the judge who decides that the defendant before him must be locked up for ten years rather than five or one or none. The judge thus loosed may be one of the world's most virtuous people. Or he may not…. He may be propelled toward a stern sentence by high moral values or by private quirks of a less elegant nature or by a perceived affront to his dignity in the courtroom…. It is certain beyond question that a power this wild will spawn at least some results that are bizarre and would be promptly condemned as unlawful if the unspoken grounds of decision were known. [E]very criminal lawyer knows cases in which sentencing judges have done crazy and horrible things.

Frankel, *supra* note __ at __.

When a person is arrested for a crime, that fact is public information. When a person is charged with a crime by indictment or information, that fact is public. When a person is convicted, that fact is public. When a person is sentenced, that fact is public. The identity of the prosecutor who files the indictment or information, and the identity of the prosecutor who enters the plea, files papers, tries the case, or argues at sentencing are each public. The identity of the judge or judges who hear each stage of the case, including sentencing decisions, is public. While the government may, in the interests of constitutional and statutory privacy rights, restrict access to the collection of otherwise public information, such as rap sheets[100] or presentence reports, [101] no similar concerns apply to these other facts (granting protection of the identity of defendants in some circumstances).[102]

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[100] *See, e.g.,* United States DOJ v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989)(Freedom of Information Act exemption 7C, 5 U.S.C. § 552(b)(7)(C) permits government to withhold FBI rap sheets as documents and portions of documents "compiled for law enforcement purposes, but only to the extent that the production of such records would ... (C) constitute an unwarranted invasion of personal privacy.")

[101] *See, e.g.,* Cal. Penal Code 1203(d)(West Supp. 2002). There are also a few other limited instances in which a court may, *in its discretion* restrict access to what would otherwise be public information. For example, in Nat'l Archives & Records Admin. v. Favish, the court held that that the photographs of a suicide victim could be sealed from public access. 541 U.S. 157. *See also* United States Dep't of Defense v. Federal Labor Relations Auth., 510 U.S. 487 (1994) (redacting federal employee's home addresses); Maynard v. CIA, 986 F.2d 547 (1993)(sealing information relating to intelligence efforts of the government); Garcia v. United States DOJ, 181 F. Supp. 2d 356 (2002) (withholding information relating to the identity of parties interviewed by the FBI who were only remotely connected to the case); Baltimore Sun v. United States Marshals Serv., 131 F. Supp. 2d 725 (2001) (redacting court case numbers when the case numbers only apply to internal agency personnel rules). Additionally, the Federal Freedom of Information Act itself has a few specific exceptions to disclosure. See e.g., United States DOJ v. Landano, 508 U.S. 165 (1993)(confidential informant's information under §7(c) of FOIA); Providence Journal Co. v. United States Dep't of Army, 981 F.2d 552 (1992).

[102] *See generally* James O. Pearson, What Constitutes "Unwarranted Invasion Of Personal Privacy" For Purposes Of Law Enforcement Investigatory Records Exemption Of Freedom Of Information Act (5 U.S.C.A. § 552(B)(7)(C)), 52 A.L.R. FED. 181; John P. Sellers, Sealed With An Acquittal: When Not Guilty Means Never Having To Say You Were Tried, 32 CAP. U. L. REV. 1 (2003)(;Martin E. Halstuk, Shielding Private Lives From Prying Eyes: The Escalating Conflict Between Constitutional Privacy And The Accountability Principle Of Democracy, 11 COMMLAW CONSPECTUS 71 (2003); Daniel J. Solove, Access And Aggregation: Public Records, Privacy And The Constitution, 86 MINN. L. REV. 1137 (2002); Kristen M. Blankley, Are Public Records Too Public? Why
Personally Identifying Information Should Be Removed From Both Online And Print Versions Of Court Documents, 65 OHIO ST. L.J. 413 (2004); Raya Tahan, Should Criminal Case Filings Be Available Online?, 43 JURIMETRICS J. 43 (2002). Many discussions of privacy and offender rights have focused on long-term registration and notification of sex offenders. See, e.g., G. Scott Rafshoon, Community Notification Of Sex Offenders: Issues Of Punishment, Privacy, And Due Process, 44 EMORY L.J. 1633 (1995). This discussion has now expanded more generally to

Although court documents have traditionally been and remain primarily public records, modern technologies have made court documents more accessible. Some state courts have moved in recent years to place court records on the Internet, accessible by the general public. This new ease of accessibility highlights the limited but important privacy concerns inherent in court files.[103] The response in the court system to these new "privacy problems" run the gamut. Some courts are responding by more liberally redacting private information before the documents go online. Some courts have responded by sealing many more court records than before.[104] Still other courts seem to have embraced the idea that court records are the remain public and accessible to everyone.

Despite the generally public nature of all of this information about the identity of each of the system participants in a criminal matter, most or all of this information remains unavailable even in the few state sentencing data sets that can now be obtained. Accused defendants, convicted offenders, and convicts have a limited voice in setting information policies—even though information about offenders has received varying degrees of protection—but judges appear to be the principal opponents of including judge identifiers in publicly available sentencing databases,[105] and it is likely they would oppose the inclusion of judge identifiers in SIS.

Oddly, judge identifiers have been almost absent from the sentencing literature as a topic of concern, although the availability of judge identifiers is relevant to critical questions about the success or failure of modern sentencing reform even in current guideline systems (without SIS supplementation). Preliminary research in the federal system using hand-collected data—the name of the sentencing judge is, after all, public information—suggests just how important such information would be to robust sentencing debates.[106]

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continuing or "collateral" consequences of conviction. Note, Making Outcasts Out Of Outlaws: The Unconstitutionality Of Sex Offender Registration And Criminal Alien Detention, 117 HARV. L. REV. 2731 (2004). These are all important and difficult issues; the same decrease in the cost of information storage and retrieval that makes the idea of SIS possible allow raises questions of privacy. However, for purposes of sentencing data and research, the defendant's name or other personal identifying information will typically be
irrelevant.

[103] See Blankely, supra note 98.

[104] See Sellers, supra note 98.

[105] See supra note 17 (discussing agreement between United States Sentencing Commission and Administrative Office of the United States Courts to limit information about judges).

[106] Joel Waldfogel, Aggregate Inter-Judge Disparity in Federal Sentencing: Evidence From Three Districts (D.Ct., S.D.N.Y., N.D.Cal), 4 Fed. Sentencing Rep. 151 (1991); Joel Waldfogel, Does

In theory, if only the abstract question of the amount of interjudge variation was at issue, judge identifiers could be anonymous. But anonymous identifiers dramatically limit the kinds of information that an SIS can provide. Anonymous identifiers are probably unworkable except at very high levels of aggregation—in a courthouse or district with one, two or three judges, it will not be hard to figure out which judge is identified by an assigned number.

Most importantly, anonymous identifiers are unprincipled. Sentencing is an awesome power; it is a public power. The identity of the judge in all systems is public information. Both federal and state systems collect judge identifiers.[107] Judges have no principled reason to obscure that information from public view and to hide from the sentences they impose.[108]

To the extent that sentencing information systems might provide judges with greater discretion than in a guideline model (though that is not a logically necessary result), judges should be willing, in turn, to make sentencing information including identifiers available. Early SIS experiments have been motivated by judges. Yet the judges in Scotland, for example, have been stingy with the information.

Judges have many reasons for desiring less transparency, including a concern that the public (and media) will push for more severe sentences and that in systems where judges are elected, those pressures will be hard to resist (this reason carries little weight for federal judges with life tenure). Perhaps judge identifiers will lead to individual judges carrying too much influence, for example with newer judges deferring to senior or especially well-known jurists (after all, it was *Judge* Frankel). But none of these reasons carry the day and, in any case, are at best hypotheses about judicial behavior. Even if true they can be answered by a simple proposition. Sentencing should be among the most transparent of judicial

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Inter-Judge Disparity Justify Empirically Based Sentencing Guidelines?, 18 Int'l Rev. of Law & Econ. 293 (1998).

[107] Judge identifiers are collected by and available to the United States Sentencing Commission—and some federal judges assert in private that the Commission has used the information to badger them about their own sentencing practices. In April, 2003, the U.S. Congress enacted a surprise provision making judge identifiers in the federal system available to the Department of Justice (and to Congress)—but still not to judges, or defendants and their lawyers, or to scholars. Judges, scholars and everyone interested in open government and wise sentencing should call for judge identifiers to be made public.

[108] In the federal system, with life tenure, even the unprincipled position that judges are in part "political" actors who must stand for reelection disappears.

acts.[109]

If judges actually use information in an SIS to inform their sentences then both individual sentences and collective sentencing patterns might come to have some sort of common-law like effect—not exactly precedent, but information that might weigh in at later sentencing decisions nonetheless. As with unpublished decisions and other sources of non-binding law, information can change later decisions even if that result is not compelled by legal reasoning. Indeed, in systems with an SIS but without guidelines the purpose is to regularize sentencing through information. To "regularize" sentences does not mean to average them, but to identify and articulate those factors that justify a higher or lower sentence. An outlier sentence with an unusual factor will not "skew" the SIS system so long as that factor is identified. In guidelines systems the purpose is more complex. In a guideline system an SIS is meant to reveal the actual workings of the guidelines and provide a distinct (though obviously related) source of information, to provide a counterpoint, and in doing so to allow a more complete picture of each case and of the system as a whole.

An SIS might also encourage judges to engage in strategic behavior in individual cases. Judges might find that aggravating facts exist (or do not) to fit the case to prior sentencing patterns. Why, one might ask, should fact-finding in one case ever be informed by fact-finding in another case? The answer to that question is that there are facts and there are facts. Whether or not a drug transaction was within 500 feet of a school or whether a gun was displayed by an offender are facts that should not change based on findings in other cases. But whether "school zone" statutes include either a mental state requirement or some nexus of the draft activity, and whether a gun was "used" in an offense are judgments of both law and fact, and might well be informed by the facts and consequences as revealed by other cases.

Of course the potential for strategic behavior would exist if more information was provided through an SIS. But the potential for strategic behavior often exists: a proper question is whether that potential is greater for guideline systems with an SIS than for guideline systems without an SIS. One answer to that question comes from the ability of third parties—lawyers, scholars, reformers, commission staff—to use the SIS to help uncover such behavior.

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[109] See Statement of Steven L. Chanenson to the American Bar Association Justice Kennedy Commission, supra note __ (in Pennsylvania after the release of judge identifiers "[f]ears of wide-spread abuse and politicization of sentencing have not come true. … Openness may also be messy at times. No one said judging was easy or for the faint of heart.").

In each jurisdiction the information necessary for a functional SIS might be held by one institution (such as a sentencing commission), but it will often be in the hands of multiple institutions, including court and correctional systems. In some systems—including the federal system—the judiciary and its administrative bodies may have sufficient control over information that an SIS could be set up within the judicial branch. Similarly, while far more modest in conception and scope than a system-wide SIS, judges in state and federal subunits might have sufficient information to make at least partial SIS plausible and worthwhile.

Unlike the development of guidelines, an organization outside of government could develop an SIS if it had access to the information. An external and independent SIS could help to shine a light on actual practices under structured sentencing rules and in the context of factors not considered by the existing rules. Indeed, competing sentencing information systems could each try to capture the interplay between rules, social norms, and philosophical ideals. The system that best revealed the nature of sentencing decisions—what matters to judges, what might matter, what *ought* to matter—would come to be used by advocates in their arguments, by judges in their sentences, and by reformers in turn to critique and then improve upon the applicable rules.

This happy, democratic vision of sentencing practice and reform need not be a chimera.[110] To come to life it requires only one thing: full access to current and accurate sentencing information, including "guideline" information (in guideline systems), judge identifiers, and narrative or other records that would allow outsiders to code additional potentially relevant sentencing facts (perhaps from presentence investigation reports).

Far from being an academic fantasy, systems like this are already beginning to emerge in one of the most inhospitable places—the federal sentencing system. The United States Sentencing Commission already makes huge sentencing data files available, albeit in large chunks, late, and with some substantial questions about the quality of the data.[111] Some of the sentencing commission data has been combined with information from other federal agencies and organized in much more accessible, interactive fashion by the Federal Justice Statistics Resource Center, an arm of the Bureau of Justice Statistics in the U.S.

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[110] *See* Tait, *supra* note __ at 175.

[111] Cindy Alexander, Jennifer Arlen, and Mark Cohen, Evaluating Data on Corporate Sentencing: How Reliable Are the U.S. Sentencing Commission's Data?, 13 Fed. Sentencing Rep. 108, 108 (2000) (analyzing corporate sentencing data through ICPRS).

Department of Justice.[112] An even more impressive private effort to organize vast quantities of data about the operation of the federal government, including prosecutorial and sentencing information, is being conducted by the Transactional Records Access Clearinghouse (TRAC) under the name of TRACFED.[113] While neither of these systems yet offers a full federal sentencing information system, they suggest how useful even the restricted current federal sentencing information can be if restructured and made available through a relatively straightforward (if not exactly intuitive) interface.

Pennsylvania and Minnesota make some of their data available to those who make special requests.[114] In these states, depending on the information in those databases, SIS could be set up by nongovernmental entities.

The idea of providing better, more complete, faster information to lawyers, judges, scholars, and reformers may be the most attractive sentencing reform model of all, as it is one that does not ultimately rely on government agencies alone to develop wise sentencing rules and practices. The barriers to good public data are not trivial. But they are also not insurmountable. Wide availability of sentencing data including judge identifiers and detailed offense and offender information offers great promise for further improving the law and practice of what Norval Morris and Herbert Wechsler have both called "the strongest force that we permit official agencies to bring to bear on individuals."[115]

V. A CONSTRUCTIVE FEDERAL SENTENCING ROLE IN NATIONAL SENTENCING REFORM

To the extent that the cost of SIS is a barrier to its implementation, support for state SIS would be a highly appropriate area for federal funding. States may have the financial capacity to develop SIS but may see such a system as, in part, an effort to inform other states. The positive externalities of creating an SIS might be best captured through federal support.

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[112] See http://fjsrc.urban.org/). See WilliamP. Adams & Mark Motivans, Using Data From the Federal Justice Statistics Program (FJSP), 16 Fed. Sent. Rep. 18 (2003).

[113] TRAC Reports, Inc. Transactional Records Access Clearinghouse (Online). available at: http://trac.syr.edu ; TRAC Reports, Inc. TracFed (Online), available at: http://tracfed.syr.edu . See David Burnham & Susan Long, Tracking Judges, 16 Fed. Sent. Rep. 26 (2003); Paul J. Hofer & William P. Adams, Using Data for Policymaking, Litigation and Judging, 16 Fed. Sent. Rep. 8 (2003) (critiquing TRAC and TRACFED data).

[114] See infra notes ___ and accompanying text.

[115] See Morris 1953, suprat note __ at 187 (quoting Herbert Wechsler); Norval Morris, Towards Principled Sentencing, 37 Maryland L. Rev. 267, 269 (1977).

There is a substantial federal interest in promoting wise and efficient criminal justice systems throughout the country. Unlike the federal system, sentencing and punishment are very significant portions of state criminal justice budgets; indeed, they are significant portions of state budgets as a whole.[116]

Many state sentencing commissions have developed good interpersonal relationships and a steady habit of annual meetings and discussions.[117] But state systems vary widely in their rules, processes, and sanctions. The potential for learning across systems about the elements of fair and effective sentencing and criminal justice systems are far greater than have yet been realized. The lack of comparative knowledge to date is evident in the absence of an extended state specific or comparative literature on state sentencing reforms, at least compared to their success relative to the federal system. SIS, if designed with some attention to a national dialogue, could provide one of the mechanisms through which the state lessons could be shared.

It is not surprising that states have focused on their own limited data needs rather than considering information that might help to answer questions in other states. Also data collection and research can be expensive, yet the benefits may apply to other states and may be considered externalities (albeit positive externalities) by each state. For many years researchers have called for additional data and research for criminal justice issues generally and for sentencing in particular, yet the state-specific costs versus the collective benefits help to explain why so little heed has been taken of these calls.[118]

The federal sentencing commission provides links to state commission web pages but otherwise has rarely discussed state experience in any of its many reports or publications.[119] Federal funding could support a national advisory process in support of states with the goal of producing systems that are not only

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[116] *See* Marc L. Miller, Cells vs. Cops vs. Classrooms, *in* The Crime Conundrum 127 (Lawrence Friedman & George Fisher, Eds. 1997).

[117] *See supra* note ___.

[118] Alfred Blumstein & Joan Petersilia, Investing in Criminal Justice Research, *in* Crime 465 (James Q. Wilson & Joan Petersilia, eds., 1995) (arguing for federal criminal justice research initiatives since "[r]esearch is not something the individual states are inclined to pursue, because of the perception that the benefits will accrue broadly."). *See also* Research Priorities in Sentencing, National Center for State Courts, Publication No. R0022 (Sept. 1975).

[119] For example the major fifteen year report of the United States Sentencing Commission makes few and only minor references to state experience and most of those references are to state experience before the federal guidelines while describing the history of the federal system. One could read this report and not know that state structured sentencing systems exist. United States Sentencing Commission, Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (2004).

useful within the state, but also help to answer the larger questions of sentencing and criminal justice policy and to allow some comparison across states. Federal funds could also provide technical support in the development of SIS.

Federal funding could include minimal requirements for data content and data access. Federal standards should focus on maximizing transparency. For example, federal funding could be conditioned on including judge and prosecutor identifiers and individual case identifiers. Funding could also be conditioned on allowing public access and use of the data. Finally, federal funds might include requirements that data be kept reasonably current. While a system with a short lag might be both ideal and possible, many state systems and the federal commission are often several years late in making annual reports and any underlying data available.

Federal support for state SIS should be nonideological. While a member of Congress might oppose the use of federal funds to support state policy more generally, in this area the lessons from SIS are not obviously liberal or conservative. Twenty one years ago Congress revealed an interest in having sentencing reform be guided by knowledge when it enacted the Sentencing Reform Act of 1984.[120] Support for state SIS would continue that theme in a new and fresh form.

The recent history of federal funding for state punishment policies suggests that federal initiatives can significantly shape state behavior. This was true for the years bewteen 1995 and 2002 when federal prison-building funds available to states were conditioned on state punishment systems requiring offenders to remain in prison for at least 85% of the sentences imposed.[121] That federal condition has now abated (through lack of federal funds), and states seeking to moderate their sanctions have responded.[122] Support for SIS would be

[120] Marc L. Miller, Sentencing Equality Pathology, 53 Emory L. J. __ (2004a); Marc L. Miller, Domination and Dissatisfaction: Prosecutors as Sentencers, 56 Stan. L. Rev. 1211, 1218 (2004b).

[121] *See* Reitz (1996), supra note __, at ___. A skeptic might suggest the danger based on long experience of any further suggestion that the federal government support state policy development. Consider Robert L. Wilkins, Federal Influence on Sentencing Policy in the District of Columbia: An Oppressive and Dangerous Experiment, 11 Fed. Sentencing Rep. 143, 147 (1998) (Revitalization Act is a disaster for the District of Columbia because it makes DC "the only jurisdiction in the country where fiscal accountability will no longer be a component of criminal justice policy making.")

[122] The relevant provision in the Violent Crime Control Act of 1994 provided funding for "Truth In Senencing Grants" for 1996-2000. Violent Crime Control Act of 1994, P.L. 103-322 (sec. 20102), codified at 42 U.S.C.A. § 13704. While the 85 percent statutory requirement remains, in 2002 Congress stopped providing money to the states. See http://www.ojp.usdoj.gov/BJA/grant/voitis.html (last viewed February 14, 2005). In light of the

a far more constructive illustration of federal support and would be consistent with the idea of the federal government as an enabler of state programs but with care not to trump the variation that makes the metaphor of states as laboratories so potent.[123]

The scarcity of visible exchange of sentencing reform information across the states raises a fundamental challenge to the idea of states as laboratories so eloquently illuminted by Justice Brandeis in *New State Ice v. Liebmann*.[124] Laboratories are not simply places where people conduct experiments for their own use. Laboratories are where people conduct experiments and report on their findings (or more formally, state hypotheses and then seek to disprove those hypotheses through scientific methods). The goal is to produce information that others can then replicate, challenge and build upon. The whole point of science is that results are shared, not kept quiet.

States will only function like laboratories when they view their experiments as experiments—hypotheses about policy and social responses subject to testing, and with successes and failures reported so that their findings can guide other states. Ironically the federal government may play an essential role in enabling the states to serve as the laboratories Justice Brandeis envisioned. To do so, the federal government will need to tread the tricky line between funding those aspects of state policy-making that can illuminate the operation of laws and government policies for other jurisdictions and dictating substantial federal requirements to the states (which would limit experimentation).[125]

More generally, support for state SIS might help to nourish a new conception of the legislative function. The question this paper asks of legislators and others is a question legislators should ask all of the time, about all of their

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termination of funding, some states, including Mississippi and Iowa, have started to scale back time-served requirements below the 85 percent level required in the statute. Email from Dan Wilhelm to Joshua Shapiro (Feb. 3, 2005).

[123] John P. O'Connell & Mary J. Mande, Criminal Justice Information Systems: The Need for State-Federal Coordination, 8 Fed. Sentencing Rep. 103, 103 (1995) ("the experience of individual states is much more enlightening than aggregated national data"; states "stand to gain from knowledge of a similar sister jurisdiction ... no one at the state or federal level is doing enough to encourage state-based research and analysis, or to ensure the compatibility of information gathered across state lines." .

[124] New States Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting). *see* Marc L. Miller, Wise Masters, 51 Stan. L. Rev. 1751, 1812 (1999) (discussing New State Ice. Co. and the philosophical assumptions about knowledge underling the laboratory metaphor)

[125] See Malcolm Feeley & Austin Sarat, The Policy Dilemma: Federal Crime Policy and the Law Enforcement Assistance Administration (1980).

work. More generally, what assumptions sit behind a legislator's proposal? Are those assumptions testable? If so, will information be collected to test them?

Many businesses by their nature are closely attuned to the costs and benefits of their actions. Increasingly nonprofits and foundation and other funders of research and policy initiatives have added a concern for demonstrated impact and effectiveness to their work.[126] This attitude has not yet spread to the general act of legislation, but it should. The point here is not simply that legislators should think like economists in terms of costs and benefits, which of course they often do (including, perhaps more like political scientists, the political costs and benefits of various actions). The point is that legislators should think like scientists and state the hypotheses that lead them to propose or reject programs or new legislation.

Sentencing reform is a perfect area in which to develop these habits. The modern era of sentencing reform has been driven by a combination of weakly stated or assumed conclusions about the justifications for punishment, the politics of punishment (often unstated, sometimes brutally clear), and explicit support for research-based rules and sanctions. It is my hypothesis that we would see more sound legislation if legislators were encouraged to think like scientists. Support for SIS, with the hypothesis that more transparent sentencing systems will allow for better learning and more efficient policy, would be a great place to start.

CONCLUSION

Congress is very likely to be back in the sentencing law business before too long, given the dramatic and surprising decision by the United States Supreme Court in *United States v. Booker*.[127] When Congress does act, it can do so in the spirit of the Sentencing Reform Act of 1984 and the hope of better law informed by knowledge,[128] or it can do so in the spirit of the Feeney Amendment and the PROTECT Act of 2003 in the pursuit of a harsh and excessively rigid system, knowledge be damned.[129]

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[126] See, e.g., Erin Strout, Internet Entrepreneurs Search for Results Under 'Philanthropy', 51 Chron. Higher Ed., Issue No. 3, A29 (2004).; Erin Strout, It's $300 Million, But Don't Call It A Gift, 50 Chron. Higher Ed., Issue No. 38, A24 (2003).

[127] United States v. Booker, 125 S.Ct. 738 (2005)..

[128] *See* Miller (2004b), *supra* note __ at 1223–26 (discussing role of knowledge in sentencing reform).

[129] Id. at 1238–48.

For the federal system, an SIS might provide the foundation for a better and better-informed system after *Blakely* and *Booker*.[130] This Article has focused on the potential value of introducing sentencing information systems in the states. Those virtues will accrue to the states and to the nation as a whole. The federal leadership in sentencing has not been distinguished these past twenty years. Further federal sentencing reform offers the opportunity for Congress to return to its own principled and thoughtful roots in this area.[131] It could do so by encouraging and supporting the many successful experiments in the states. Funding for development and sharing of state sentencing data would be a modest step, but it should be a wholly constructive step in the larger, longer process of law reform.

Whatever Congress does with its new opportunity, states should consider developing SIS on their own. Federal action is by no means necessary for SIS to be implemented. Developing SIS would be good for state systems, and good for sentencing law more generally. SIS might help encourage transparency both for individual cases and for the process as a whole. Transparency—the ability to recreate, understand and assess sentencing decisions and processes—was not a goal of the last round of sentencing reform in the states or the federal system. It should be the central goal of the next round.

[130] In testimony to Congress after Booker Christopher Wray, the Assistant Attorney General in charge of the Criminal Division at the United States Department of Justice called for "accurate, real-time information on sentencing, which is necessary to play an appropriate and effective role in the public debate. Testimony of Christopher A. Wray, Assistant Attorny General, before the Committee on The Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, "Federal Sentenicng After *Booker*" (Feb. 10, 2005).

[131] Miller & Wright (1999), *supra* note __ at ___.