

Maurer School of Law: Indiana University

Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

2013

The Sceptic's Guide to Information Sharing at Sentencing

Ryan W. Scott

Indiana University Maurer School of Law, ryanscot@indiana.edu

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>



Part of the [Criminal Procedure Commons](#)

Recommended Citation

Scott, Ryan W., "The Sceptic's Guide to Information Sharing at Sentencing" (2013). *Articles by Maurer Faculty*. 781.

<https://www.repository.law.indiana.edu/facpub/781>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington



INDIANA UNIVERSITY

MAURER SCHOOL OF LAW

Bloomington

INDIANA UNIVERSITY MAURER SCHOOL OF LAW-
BLOOMINGTON
LEGAL STUDIES RESEARCH PAPER SERIES

Research Paper Number 215

October 2012

THE SKEPTIC'S GUIDE TO
INFORMATION SHARING AT SENTENCING

Ryan W. Scott

2013 Utah Law Review ____ (Forthcoming)

This paper can be downloaded without charge from the
Social Science Research Network electronic library at:

<http://ssrn.com/abstract=2160484>

THE SKEPTIC'S GUIDE TO INFORMATION SHARING AT SENTENCING

*Ryan W. Scott**

ABSTRACT

The “information sharing model,” a leading method of structuring judicial discretion at the sentencing stage of criminal cases, has attracted broad support from scholars and judges. Under this approach, sentencing judges should have access to a robust body of information, including written opinions and statistics, about previous sentences in similar cases. According to proponents, judges armed with that information can conform their sentences to those of their colleagues or identify principled reasons for distinguishing them, reducing inter-judge disparity and promoting rationality in sentencing law.

This Article takes a skeptical view of the information sharing model, arguing that it suffers from three fundamental weaknesses as an alternative to other structured sentencing reforms. First, there are information collection challenges. To succeed, the model requires sentencing information that is written, comprehensive, and representative. Due to acute time constraints, however, courts cannot routinely generate that kind of information. Second, there are information dissemination challenges. Sharing sentencing information raises concerns about the privacy of offenders and victims. Also, the volume and complexity of sentencing decisions create practical difficulties in making relevant information accessible to sentencing judges. Third, the model's voluntariness is an important drawback. The information sharing model rests on the heroic assumption that judges will respond to information about previous sentences by dutifully following the decisions of their colleagues. That is unrealistic. Judges just as easily can disregard the information, ignore it, or even move in the opposite direction.

Despite those grounds for skepticism, information sharing can play a valuable role as a supplement to other sentencing reforms. In particular, information sharing would benefit from a system of sentencing guidelines, whether mandatory or advisory, and from open access to the information on the part of defense counsel and prosecutors.

* Associate Professor, Indiana University Maurer School of Law, Bloomington. Thanks to Amy Baron-Evans, Craig Bradley, Brian Broughman, Anuj Desai, Richard Frase, Nancy Gertner, Cecilia Klingele, Ion Meyn, Marc Miller, Ellen Podgor, Kevin Reitz, Meghan Ryan, Michelle Spak, Kate Stith, Lua Yuille, and participants in faculty workshops at Yale Law School, SMU Dedman School of Law, the University of Wisconsin Law School, and the University of Cincinnati College of Law for valuable comments on earlier drafts. Thanks as well to Benjamin Hugon and Daniel Bradley for outstanding research assistance, and to Christopher Kozelichki for assistance with the empirical study.

TABLE OF CONTENTS

INTRODUCTION	1
I. THE INFORMATION SHARING MODEL.....	4
A. <i>Two Key Objectives of Sentencing Reform</i>	4
B. <i>The Information Sharing Model in Action</i>	7
II. FUNDAMENTAL WEAKNESSES OF THE INFORMATION SHARING MODEL.....	12
A. <i>Information Collection Challenges</i>	12
1. Written Information About Sentences	13
2. Comprehensive Information About Sentences	15
3. Representative Information About Sentences.....	17
B. <i>Information Dissemination Challenges</i>	18
1. Privacy	18
2. Accessibility and Relevance	20
C. <i>Voluntariness Challenges</i>	22
III. EMPIRICAL RESEARCH ON SENTENCING INFORMATION SHARING	25
A. <i>An Empirical Study of the Collection of Sentencing Information</i>	25
1. Data and Coding	25
2. Results.....	27
3. Implications.....	32
B. <i>Research on Previous Reform Efforts</i>	33
1. Sentencing Information Systems	34
2. Sentencing Councils.....	37
3. Lessons for the Information Sharing Model	39
IV. MAKING INFORMATION SHARING WORK.....	42
A. <i>Sentencing Guidelines</i>	42
B. <i>Open Access</i>	44
CONCLUSION.....	46
APPENDIX	48
A. <i>Case Selection</i>	48
B. <i>Coding</i>	49
C. <i>Regression Results</i>	50

INTRODUCTION

For decades, prominent scholars and judges in the United States have proposed an “information sharing model” for structuring criminal sentencing decisions. In indeterminate sentencing systems, which prevailed throughout the United States until the 1970s, judges enjoyed broad and essentially unchecked discretion to select the appropriate punishment for criminal offenses. With broad statutory ranges, no appellate review, and no obligation to give reasons for their decisions, judges largely were left to their own intuitions in choosing a sentence. One consequence was stark inter-judge disparity. Similarly situated offenders stood to receive widely disparate sentences depending on the values, preferences, and biases of the sentencing judge. Another was that no rational and principled body of sentencing law could develop. To address those weaknesses, reformers in the 1970s and 1980s proposed various methods of structuring sentencing decisions.

One leading approach, which I will describe as the information sharing model, has attracted strong scholarly support and is experiencing something of a renaissance. The idea is that judges should have access to a robust store of information about previous sentences in similar cases. Armed with statistical data, details about past offenses and offenders, and written opinions from similar cases, sentencing judges can achieve better results. Information sharing will promote inter-judge consistency and rationality, the argument goes, because judges who understand the reasons for previous sentences can conform to them or identify principled points of distinction. A distinguished and varied group of scholars and judges has endorsed some form information sharing at sentencing, including Marc Miller,¹ Michael Wolff,² Kate Stith and José Cabranes,³ Nancy Gertner,⁴ and Robert Sweet.⁵

The information sharing model is frequently advanced as an alternative to more intrusive forms of structured sentencing, such as sentencing guidelines. Already “sentencing information systems” and other forms of electronic data sharing form a crucial component of the sentencing process in some U.S. states and in jurisdictions overseas. Missouri, for example, has attracted national attention for its “information-based discretionary sentencing system,” which strives to equip sentencing judges with better data about previous outcomes in similar cases.⁶ And just last year, Ireland’s criminal courts launched an ambitious sentencing information system as a national pilot

¹ Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1381 n.95 (2005); Marc Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & L. 3, 20-21 (1989).

² Michael A. Wolff, *Missouri’s Information-Based Discretionary Sentencing System*, 4 OHIO ST. J. CRIM. L. 95, 101 (2006).

³ KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 168-77(1998).

⁴ Nancy Gertner, *Confronting the Costs of Incarceration: Supporting Advisory Guidelines*, 3 HARV. L. & POL’Y REV. 261, 279-80 (2009).

⁵ Robert W. Sweet et al., *Towards a Common Law of Sentencing: Developing Judicial Precedent in Cyberspace*, 65 FORDHAM L. REV. 927, 938 (1996).

⁶ See Ryan W. Scott, *How (Not) To Implement Cost as a Sentencing Factor*, 24 FED. SENT’G REP. ____ (forthcoming 2012).

project.⁷ Meanwhile, mounting interest in “evidence based” sentencing, using tools like risk assessment instruments, has highlighted the need for better information sharing infrastructure for sentencing judges.⁸

Surprisingly, however, the literature rarely grapples with basic questions about the information sharing model. Is information sharing at sentencing feasible? Can courts and other stakeholders in the criminal justice system effectively collect, disseminate, and make use of a large volume of information about criminal sentences? Can the information sharing model achieve its objectives, reducing inter-judge disparity and promoting rationality?

Count me a skeptic. For structural and practical reasons, voluntary information sharing is a poor stand-alone model for promoting consistency and rationality in sentencing law. Despite considerable enthusiasm among scholars and commentators, there is little evidence that the information sharing model can serve as an effective *alternative* to other structured sentencing models. Nonetheless, information sharing can operate as a valuable *supplement* to other reforms, especially sentencing guidelines. And previous experiments with information sharing at sentencing offer important lessons about what works. Think of this Article as a “skeptic’s guide” to the information sharing model. It advances related three sets of claims.

The first set of claims is conceptual. Information sharing suffers from fundamental weaknesses as a mechanism for promoting inter-judge consistency and rationality. There are daunting *information collection* obstacles. To achieve its objectives, the information sharing model depends on case-level sentencing information that is written, comprehensive with respect to relevant facts, and representative of outcomes in similar cases. But because of the complexity of sentencing decisions, there is reason to doubt that sentencing courts can routinely generate that kind of information. There are also formidable *information sharing* obstacles. Sentencing judges rely on highly sensitive personal information about offenders, raising privacy concerns about any program of data dissemination. Also, as a practical matter, it is difficult to make the large volume of relevant information available to judges in a useful format. The *voluntariness* of the information sharing model is also an important drawback. The model assumes that judges will respond to information about earlier sentences by dutifully aligning their decisions with others. That is unrealistic. Judges can just as easily disregard the information, ignore it, or even move in the opposite direction from their colleagues’ reasoning, at the expense of inter-judge consistency and rationality.

The second set of claims is empirical. To illustrate challenges with information collection, this Article contains an original empirical study of data reporting practices from a federal district court. The study analyzes more than 400 “Statement of Reasons” documents, which federal judges must complete in connection with every criminal sentence. Because the documents are ordinarily nonpublic, the study is the first of its kind in the United States. The results reveal that, despite mandatory reporting requirements, judges rarely provide the kind of written opinions necessary to support an effective information sharing model. In 48.6% of cases in which a written description was required, the sentencing judge did not provide one. Just 6.0% of cases prompted a

⁷ Carol Coulter, *Website on Court Sentencing Launched*, IRISH TIMES, Aug. 3, 2010, at 4.

⁸ See J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329 (2011).

written explanation of approximately one page of discussion or more. And the class of cases in which the judge provided a lengthy explanation differed in important ways from the population of criminal cases as a whole. The study thus confirms some of the challenges that courts face in collecting written, comprehensive, and representative sentencing information.

To illustrate challenges with information sharing and voluntariness, the Article discusses two previous experiments with the information sharing model. Several jurisdictions in the United States and in foreign countries have developed “sentencing information systems” (SISs), interactive computer systems designed to provide judges with statistics and other information about previous sentences in similar cases. Yet no research has shown that SISs contribute to inter-judge consistency and rationality, and most systems have atrophied due to judicial neglect. Similarly, a handful of federal district courts in the 1970s experimented with “sentencing councils,” which are voluntary meetings of sentencing judges to discuss upcoming cases. Research revealed, however, that the councils failed to reduce inter-judge disparity because the sentencing judge retained discretion to disregard the council’s advice. Today they are all but abandoned.

The third set of claims is prescriptive. If the Article’s conceptual and empirical claims are sound, then two features of a sentencing system might make information sharing more effective in promoting inter-judge consistency and rationality. First, information sharing is more likely to succeed as a supplement to a system of sentencing guidelines, rather than a stand-alone mechanism for structuring sentencing discretion. That is because guidelines provide a shared vocabulary about sentencing, operationalize complex sentencing concepts, and channel the attention of sentencing courts. Second, information sharing would have greater impact if defense counsel and prosecutors enjoy open access to the store of sentencing information. Although open access would accentuate privacy concerns, harnessing the adversary process would greatly improve the visibility of sentencing information and help guard against errors.

Thus, although styled as a “skeptic’s guide,” the Article expresses cautious optimism about the information sharing model. A carefully designed information sharing system can improve sentencing outcomes. Nonetheless, it is doubtful that voluntary information sharing, standing alone, can meaningfully reduce inter-judge disparity or promote rationality in sentencing law. Information sharing therefore should be considered a supplement, not an alternative, to other structured sentencing reforms.

The Article proceeds in four parts. Part I describes the information sharing model and the broad support it has attracted among scholars and judges as a mechanism for reducing inter-judge disparity and improving rationality in sentencing outcomes. It also distinguishes the information sharing model from two popular alternatives: the “common law” model the “sentencing guidelines” model.

Part II develops the Article’s conceptual claims, describing the formidable obstacles an information sharing model will face. Information collection will be difficult because the model depends on case-level information that is written, comprehensive, and representative. Information sharing will raise legal concerns about offender privacy and practical concerns about the usefulness of statistics and case information. Voluntariness also can undermine the information sharing model by leaving judges free to ignore or repudiate the reasoning of their colleagues.

Part III develops the Article’s empirical claims. It first reports the results of the empirical study, illustrating the challenges in collecting information using unique data from sentencing documents in a federal district court. It then discusses two analogous reform efforts, sentencing information systems and sentencing councils, and the mostly discouraging research concerning their effectiveness.

Part IV develops the Article’s prescriptive claims. It contends that the information sharing model would be more effective as a supplement, not an alternative, to other reform efforts. In particular, it contends a system of sentencing guidelines and open access to sentencing information would improve the chances of success.

I. THE INFORMATION SHARING MODEL

Among scholars and judges, one frequently discussed method of structuring sentencing decisions is the robust exchange of information among sentencing judges. That approach—call it the “information sharing model”—differs from alternative structured sentencing reforms, such as sentencing guidelines or a judge-made common law of sentencing. Yet proponents believe that it can accomplish many of the same goals, reducing inter-judge sentencing disparity and promoting rationality in sentencing law.

A. *Two Key Objectives of Sentencing Reform*

In “indeterminate” sentencing systems, which prevailed in almost all U.S. jurisdictions until the 1970s, judges enjoyed essentially unfettered discretion in choosing the type and severity of sentences.⁹ Grounded in the once-dominant theory that rehabilitation was the principal goal of criminal punishment, indeterminate sentencing sought to maximize judges’ ability to “individualize” sentences and thereby help offenders to become productive members of society.¹⁰ Legislatures, in defining criminal offenses, often authorized a wide range of punishments. For a single violation, for example, the court might have the option of imposing a fine, or a period of probation, or a term of imprisonment ranging anywhere from a few days to many years.¹¹ Few jurisdictions provided any rules or guidance about how to select an appropriate punishment. The decision of the sentencing court was essentially unchallengeable, with no right to appeal.¹² In fact, judges had no obligation even to give reasons for the sentence selected.¹³ By design, this “black box” gave judges enormous discretion to tailor sentences to the needs of criminals.

In the 1970s and 1980s, however, indeterminate sentencing came under sustained criticism by scholars and policymakers, and in the last 30 years criminal sentencing has undergone radical transformation. Calls for structured sentencing addressed a wide range of concerns, including dissatisfaction with the rehabilitative ideal and a desire for “truth

⁹ STITH & CABRANES, *supra* note 3, at 9-11.

¹⁰ Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 389 (2006); *see* United States v. Mueffelman, 327 F. Supp. 2d 79, 83 (D. Mass. 2004) (Gertner, J.) (judges were expected to choose sentences “almost like a doctor or social worker exercising clinical judgment”).

¹¹ *E.g.* Bank Robbery Act of 1934, Pub. L. No. 73-235, 48 Stat. 783 (codified as amended at 18 U.S.C. § 2113 (2006))

¹² STITH & CABRANES, *supra* note 3, at 9 & 197 n.3.

¹³ Kevin R. Reitz, *Sentencing*, in THE HANDBOOK OF CRIME AND PUNISHMENT 542, 543 (Michael Tonry ed., 1998).

in sentencing” undermined by parole. But two central claims of sentencing reformers are particularly relevant here.

First, indeterminate sentencing produced unacceptable levels of inter-judge sentencing disparity.¹⁴ Vested with enormous discretion and subject to little oversight, judges were largely left to their own intuitions in selecting an appropriate sentence. As a result, the preferences, philosophy, and biases of the judge played an important role in determining the sentence. Similarly situated offenders, convicted of similar crimes, could receive starkly different sentences depending on which judge was assigned to the case.¹⁵ Reformers argued that inter-judge disparity offends fundamental rule-of-law values such as equality, objectivity, and consistency.¹⁶ For those reasons, inter-judge disparity also harms the reputation of the courts.¹⁷ In addition, inter-judge disparity potentially undermines the deterrent effect of criminal law by making punishment less certain and predictable.¹⁸ Hoping to achieve greater consistency between judges, Congress identified the reduction of inter-judge disparity as its primary goal in the Sentencing Reform Act of 1984.¹⁹ Many state legislatures have followed suit.²⁰

Second, indeterminate sentencing resulted in irrational sentencing law. With sentences overwhelmingly unexplained and unreviewable, neither courts nor legislatures had developed well-reasoned, intelligible, and principled sentencing law. Reformers hoped to develop a more rational system in which sentencing courts would thoughtfully develop a body of coherent sentencing rules and principles. Congress cited improved “rationality” in sentencing decisions as an anticipated and desired benefit of the

¹⁴ The term “sentencing disparity” requires clarification, because it is essentially meaningless standing alone. Many “disparities,” or differences, between sentences are entirely justified based on legitimate differences between offenses and offenders. Whether particular differences between sentences are justified is contestable, and depends on some underlying theory of punishment. See Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997). Throughout this Article I refer to “inter-judge disparity,” by which I mean differences in sentences driven not by differences in offense or offender characteristics, but by the preferences, personality, and biases of the sentencing judge. See also Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 6 n.23 (2010).

¹⁵ See Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 274 (1977) (describing the evidence of serious inter-judge sentencing disparity as “overwhelming”); ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FED. JUDICIAL CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 36 (1974); Kevin Clancy et al., *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. CRIM. L. & CRIMINOLOGY 524, 525-26 (1981).

¹⁶ MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5, 10 (1973); Elyce H. Zenoff, *Sentencing Disparity*, at 1449, 1450, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE (Sanford H. Kadish, ed. 1983).

¹⁷ Memorandum from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, U.S. Dep’t of Justice, to Hon. William K. Sessions III, U.S. Sentencing Comm’n 2 (June 28, 2010), available at http://sentencing.typepad.com/files/annual_letter_2010_final_062810.pdf

¹⁸ Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 237 (1989).

¹⁹ See, e.g., S. Rep. No. 98-225, at 45 (1983) (“Sentencing disparities that are not justified by differences among offenses or offenders are unfair both to offenders and to the public.”); U.S. SENTENCING COMM’N, SENTENCING GUIDELINES AND POLICY STATEMENTS, at 1.2 (1987); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

²⁰ See, e.g., Minn. Stat. Ann., § 244 app. § I; KAN. STAT. ANN. § 74-9101.

Sentencing Reform Act of 1984.²¹ Many states too have identified rationality as a key goal of sentencing reform.²²

To be sure, there is lively debate among scholars about whether inter-judge consistency and rationality in sentencing ought to be high-priority goals.²³ Excessive concern about sentencing “disparity,” for example, may distract attention from other important goals in designing a just sentencing system.²⁴ Rather than attempt to resolve that debate, however, this Article accepts for the sake of argument that inter-judge consistency and rationality are desirable. Not only is that premise enshrined in law in many jurisdictions,²⁵ but structured sentencing reforms are often advertised as a way of achieving those objectives.²⁶ It is fair to ask whether they can deliver on their promises.

To reduce inter-judge disparity and promote rationality, reformers have proposed a variety of structured sentencing models. One prominent model is a system of sentencing guidelines. Although there is considerable variety in guidelines systems, sentencing guidelines generally consist of detailed rules promulgated by an independent sentencing commission.²⁷ At sentencing, the judge is required to make factual findings about the offense conduct, the effect on victims, and the offender’s criminal history and personal characteristics. Based on those factors, the guidelines specify a sentence or sentencing range (such as 63-72 months of imprisonment). In some systems, the range is “mandatory” or “presumptive,” binding judges to impose a sentence within the guideline range except in unusual circumstances.²⁸ In others, including federal system, the guideline range is “advisory” and thus allows a greater degree of flexibility and discretion. But the judge nonetheless must make the required findings, accurately calculate the guideline range, and give due consideration to that range when selecting a sentence.²⁹

Another model with broad support among scholars is a “common law of sentencing.” In the common-law model, sentencing decisions are subject to review by appellate courts and may be reversed or altered. Although there is considerable variety in how the common law may operate—the appellate courts’ power to vacate or revise, the standard of review, the prevalence of “guideline judgments”—the essential feature of a common law of sentencing is the regulation of sentencing judges by *other courts* in the

²¹ S. Rep. No. 225, at 120 (1983) (stating that sentencing reforms are intended to provide “enough guidance and control of the exercise of [sentencing] discretion to promote fairness and rationality . . . in sentencing.”).

²² E.g. KAN. STAT. ANN. § 74-9101 (directing the sentencing commission to “establish rational and consistent sentencing standards”); 42 PA. CONS. STAT. § 2153(a) (similar).

²³ Kate Stith and José Cabranes, in particular, disavow those objectives as driving purposes of their proposed reforms. STITH & CABRANES, *supra* note 3, at 172-73 (emphasis removed).

²⁴ See, e.g., *id.* at 106, 121-24 (calling the reduction of inter-judge disparity “a worthwhile goal for sentencing reform,” but also a “complex goal” that should not be the “myopic focus”); Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1337 (1997); Albert Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

²⁵ See *supra* notes 19-22 and accompanying text.

²⁶ See *infra* notes 58-62, 63-65 and accompanying text.

²⁷ Richard F. Sparks, *Sentencing Guidelines*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1457, at 1458 (Sanford H. Kadish ed., 1983).

²⁸ Sentencing guidelines in Minnesota, Washington, and Kansas fit that description.

²⁹ For example, the U.S. Sentencing Guidelines operate in that manner following *United States v. Booker*, 543 U.S. 220 (2005).

judicial hierarchy. As described by Kevin Reitz, the powers of appellate courts in the common-law model include “determinations of the eligible goals of punishment decisions, and the creation of legal doctrine that translates those objectives into rules of decision.”³⁰ Like other bodies of common law, a common law of sentencing evolves incrementally as appellate courts announce rules, carve out exceptions, draw distinctions, and occasionally overrule their prior decisions. But it culminates in a body of binding precedent, and sentencing judges must impose a sentence in conformity with that case law or risk reversal on appeal.

B. *The Information Sharing Model in Action*

Another leading model for structuring sentencing discretion is the information sharing model. A host of prominent judges and scholars has endorsed some form of information sharing as a way to structure judicial discretion in criminal sentencing.³¹ Under this approach, when imposing sentence, judges should have access to a store of information—statistics, written opinions, and other case information—about previous outcomes in similar cases.³² Marc Miller has long urged more thorough judicial opinion writing and data dissemination to facilitate the development of coherent and principled sentencing law.³³ He has also written extensively on “sentencing information systems,” searchable databases of sentencing data, as a possible “reform” for broken structured sentencing regimes.³⁴ Justice Michael Wolff has extolled the advantages of an “information-based discretionary sentencing system” whose centerpiece is voluntary information sharing to assist sentencing judges.³⁵ Kate Stith and Judge José Cabranes, in their influential work criticizing the U.S. Sentencing Guidelines, have argued that the “basic model” for regulating sentencing discretion should be guidance from other judges through written opinions and data about previous cases.³⁶ Judge Nancy Gertner has proposed extensive information sharing among sentencing judges at the federal level, urging federal judges to consult sentencing statistics and written opinions as a way to “make better sentencing decisions in each individual case.”³⁷ Similarly, Judge Robert Sweet has proposed that judges should have access to a store of written opinions and statistics—a combination of “common law principles and modern technology”—that

³⁰ Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1454 (1997).

³¹ Eric Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 102 (2005) (describing the information sharing approach as “embraced by many scholars and jurists”).

³² *Id.* (describing a model in which “today’s courts draw[] upon the analysis and conclusions of prior judicial opinions”). Luna describes this model as a “common law of sentencing.” In this Article, I reserve the term “common law” for a system of binding precedent developed by the courts, rather than one grounded in voluntary information sharing. See *infra* note 30 and accompanying text.

³³ Miller, *Guidelines Are Not Enough*, *supra* note 1, at 20-21.

³⁴ Marc Miller, *Sentencing Reform “Reform” Through Sentencing Information Systems*, in *THE FUTURE OF IMPRISONMENT* (Michael Tonry ed. 2004) at 121.

³⁵ Wolff, *supra* note 2, at 95.

³⁶ STITH & CABRANES, *supra* note 3, at 170-71, 176.

³⁷ Gertner, *supra* note 4, at 277.

would improve sentencing decisions.³⁸ J.C. Oleson, among others, has endorsed sentencing information systems as a method of facilitating evidence-based sentencing.³⁹

Recently, the information sharing model has attracted high-profile attention among policymakers. In February 2012, testifying before the U.S. Sentencing Commission about the future of the federal sentencing guidelines, representatives of the Judicial Conference of the United States stressed the crucial role of information sharing for sentencing judges.⁴⁰ As Judge Paul Barbadoro explained, judges “appreciate knowing whether their sentences are in step with other sentences by other judges for similar cases,” and they need a sentencing system that provides that kind of information.⁴¹ In September 2010, the State of Missouri, which has explicitly embraced the information sharing model, made national headlines for its efforts to shape sentencing outcomes by giving judges access to more information about punishment costs.⁴² Overseas, in August 2010, the criminal courts of Ireland launched a web site designed to share information about sentencing outcomes, the product of an ambitious four-year effort to coordinate the actions of sentencing judges.⁴³

A real-world example can illustrate the operation of the information sharing model. In Missouri, the state legislature and courts have chosen information sharing as the principal method of regulating sentencing discretion. Missouri sentencing law in some ways resembles a traditional indeterminate system: within broad statutory ranges specified by the legislature, judges are free to impose any sentence.⁴⁴ No appellate review of sentences is available, except to the extent that a sentence falls outside the statutory range.⁴⁵ Neither the legislature nor a sentencing commission provides guidance to judges about eligible purposes of punishment, or about factors to consider at sentencing.⁴⁶ And nothing in state law requires that judges issue written opinions—or

³⁸ Sweet et al., *supra* note 5, at 938.

³⁹ Oleson, *supra* note 8, at 1341-42; J.C. Oleson, *Blowing Out All the Candles: A Few Thoughts on the Twenty-Fifth Birthday of the Sentencing Reform Act of 1984*, 45 U. RICH. L. REV. 693, 744 (2011); *see also* Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 DUQUESNE L. REV. 707, 728 (2011).

⁴⁰ Testimony of Judge Paul J. Barbadoro before the U.S. Sentencing Commission, Feb. 16, 2012, at 9-10 & n.27, [available at](http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Barbadoro.pdf) http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_Barbadoro.pdf.

⁴¹ *Id.* at 9; *see also id.* at 9 n.27 (quoting Judge Richard Arcara’s testimony that it is “crucial” for judges to have “information about how the sentence that we are considering compares overall with sentences recommended for this type of conduct”); *id.* at 10 n.27 (quoting Judge Jon McCalla’s testimony that “historical data” on sentencing is “greatly valued” and necessary to allow judges to “to make the difficult decisions required in sentencing on a consistent basis”).

⁴² *See, e.g.,* Monica Davey, *Missouri Tells Judges Cost of Sentences*, N.Y. TIMES, Sept. 18, 2010; Deniz Koray, *New sentencing matrix shows Missouri judges the cost of prison*, COLUMBIA MISSOURIAN, Sept. 29, 2010; Heather Ratcliffe, *Missouri judges get penalty cost before sentencing*, ST. LOUIS POST-DISPATCH, Sept. 14, 2010.

⁴³ Carol Coulter, *Website on Court Sentencing Launched*, IRISH TIMES, Aug. 3, 2010, at 4.

⁴⁴ Scott, *supra* note 6, at ___.

⁴⁵ *See State v. Cook*, 440 S.W.2d 461, 463 (Mo. 1969).

⁴⁶ Wolff, *supra* note 2, at 97 (because “[t]here is no overt guidance in Missouri law as to the purposes for punishment,” judges must “approach sentencing pragmatically and, to a degree, subjectively”).

even statements in open court—giving reasons for the sentence imposed.⁴⁷ By design, “[j]udicial discretion is the cornerstone of sentencing in Missouri courts.”⁴⁸

Yet Missouri strives to lend structure to sentencing decisions by insisting upon “fully informed discretion.”⁴⁹ The Missouri Sentencing Advisory Commission (MSAC), charged by the legislature to make recommendations about sentencing,⁵⁰ has created an interactive web site to share sentencing information.⁵¹ Using the web site, judges and lawyers can fill out a form that captures key offense and offender characteristics. Based on that information, the system reports recommended, aggravated, and mitigated sentencing options.⁵² The recommendations do not reflect the Commission’s own judgments, but “reflect sentencing practices of Missouri’s judges” based on years of historical data.⁵³ The idea is that judges should have access to accurate and up-to-date information about what their colleagues have done in cases that share those characteristics. Importantly, the information is provided on a “purely voluntary” basis.⁵⁴ Judges have no obligation to take the information into account, or even look it up. But the MSAC believes that, by providing useful information, it can win the “hearts and minds” of judges and persuade them to follow its recommendations.⁵⁵ It is the perfect strategy for the “show me” state: Show judges the information, then leave them alone.

As the Missouri example makes clear, the information sharing model differs sharply from other forms of structured sentencing, like sentencing guidelines or a common law of sentencing. It is intended to assist sentencing judges, rather than constrain them.⁵⁶ Information is generated by the judiciary for its own benefit, not imposed by an external regulatory body like a sentencing commission. The information sharing model does not depend on legal rules that block judges from selecting sentences outside a specified range (as in a mandatory guidelines systems) or in conflict with binding precedent (as in a common-law system). To the contrary, judges retain essentially the same wide discretion present in an indeterminate sentencing regime. Nor does the information sharing model compel judges to make any specific determinations or to focus on particular factors (as in an advisory guidelines system). Instead, the information sharing model insists, in Judge Gertner’s words, that “judges need to see what other judges are doing.”⁵⁷ The information sharing model arms judges with better

⁴⁷ See Mo. Rev. Stat. § 558.019; Mo. R. Crim. P. 29.07(b) (requiring only that the court “pronounce [the] sentence”).

⁴⁸ MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING: REPORT AND IMPLEMENTATION UPDATE 11-13 (2005).

⁴⁹ Wolff, *supra* note 2, at 97; MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING: REPORT AND IMPLEMENTATION UPDATE 11-13 (2005), available at <http://www.mosac.mo.gov>.

⁵⁰ Mo. Rev. Stat. § 558.019.6(3).

⁵¹ Michael Wolff, *Missouri Provides Cost of Sentences and Recidivism Data: What Does Cost Have to Do with Justice?*, 24 FED. SENT’G REP. ____ (2012).

⁵² *Id.*

⁵³ Wolff, *supra* note 2, at 98.

⁵⁴ MSAC, *supra* note 49.

⁵⁵ Wolff, *supra* note 2, at 97-98, 101.

⁵⁶ Wolff, *supra* note 2, at 98 (Missouri system is designed to “help” actors in the system to “focus on shared information” about offenses and offenders).

⁵⁷ Gertner, *supra* note 4, at 278-79.

information, but leaves them free to consult and consider that information strictly on a voluntary basis.

Proponents of the information sharing model contend that it can accomplish the same goals as other structured sentencing reforms. Information sharing will reduce inter-judge disparity, the argument goes, because disparity between judges principally results from a lack of information about what other judges have done in similar cases.⁵⁸ Closing the “information gap” will thus close the “disparity gap.” Judge Robert Sweet has predicted that an information sharing model based on written opinions and sentencing statistics “would provide, almost automatically, a firmament of reference points and a body of reasoning developed by the courts,” thereby “alleviating unwarranted disparity” between judges.⁵⁹ Similarly, Judge Gertner argues that making sentencing opinions available to other judges is “critical” to “cabining discretion” because “[i]n order to avoid inter-judge disparities, judges must be able to see the decisions made in the courtroom next door.”⁶⁰ Noting that judges frequently agree about the ordinal ranking of offense severity, even when they disagree about the cardinal severity of sentences, Stith and Cabranes predict that simply requiring written sentencing opinions and disseminating sentencing data—to serve as “quantitative guideposts to judges”—will reduce inter-judge disparity.⁶¹ In recommending Missouri’s approach, Justice Wolff remains “hope[ful]” that voluntary information sharing will “eliminate some of these overall disparities and gross differences.”⁶²

In addition, proponents argue, the information sharing model will produce more rational sentencing law. For one thing, the process of exchanging information will encourage more *thoughtful* decisions. Robust exchange of information, Judge Gertner explains, would encourage judges “to give coherent explanations, to articulate rules of general application” as part of a continuing dialogue among sentencing courts.⁶³ Prompting judges to “think through” every sentence, and to explain their reasons for the benefit of their colleagues, will improve the quality of the resulting decisions.⁶⁴ At the same time, information sharing at sentencing would encourage more *principled* decisions. For Judge Sweet, an important advantage of a robust store of information about previous

⁵⁸ Cf. Zenoff, *supra* note 16, at 1451 (“[Some] observers believe that sentencing disparity would virtually disappear if judges had access to data about their colleagues’ decisions.”).

⁵⁹ Sweet et al., *supra* note 5, at 943, 946.

⁶⁰ Gertner, *supra* note 4, at 279.

⁶¹ STITH & CABRANES, *supra* note 3, at 176; Sara Beth Lewis, *Review: Fear of Judging*, 82 MARQ. L. REV. 901, 912 (1999) (discussing Stith and Cabranes’s proposal “that requiring a reviewable written sentencing order would have sufficiently reduced the amount of unwarranted disparity”). See also, e.g., Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines to Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 148–49 (2008); Christina N. Davilas, Note, *Prosecutorial Sentence Appeals: Reviving the Forgotten Doctrine in State Law as an Alternative to Mandatory Sentencing Laws*, 87 CORNELL L. REV. 1259, 1283 (2002) (sentencing statistics “could assist both trial judges devising sentences and appellate judges reviewing those sentences, thereby reducing disparity”).

⁶² Wolff, *supra* note 2, at 118.

⁶³ Judge Nancy Gertner, *Thoughts on Reasonableness*, 19 FED. SENT’G RPTR. 165, 166 (2007).

⁶⁴ See Berman, *supra* note 3, at 104 (arguing that “[t]he process of articulating rationales for their decisions enables judges,” as part of a “common-law dialogue about sentencing policy and practice,” to “develop a principled jurisprudence of sentencing”).

cases is that it will produce a “coherent and ever-adapting body of law” that helps to intelligently translate “broad sentencing policies to individual cases.”⁶⁵

Importantly, information sharing is not mutually exclusive with other reform efforts, like sentencing guidelines or a common-law model. Indeed, many scholars endorse some combination of approaches. Stith and Cabranes, Judge Sweet, and others endorse information sharing as a supplement to a judge-made “common law of sentencing.”⁶⁶ Judge Gertner and the Judicial Conference of the United States seek to promote information sharing in the federal system to support a system of advisory sentencing guidelines.⁶⁷ They reason that, even in jurisdictions with more formal or intrusive structured sentencing programs, information sharing can serve a valuable function. Sentencing law should assist judges, even as it constrains them.

Nonetheless, for several reasons, it is useful to disentangle the information sharing model from other approaches. First, some jurisdictions (including Missouri and Ireland) have adopted what might be called a “pure” information sharing model, in which the sole mechanism for structuring sentencing decisions is a program of formal information sharing. An assessment of information sharing at sentencing is of crucial relevance to legislators, judges, and other stakeholders in those systems.

Second, proponents of the information sharing model frequently recommend it as an alternative to more intrusive reforms, especially sentencing guidelines. In Missouri, the MSAC describes its information-based discretionary system as the product of a conscious choice between two models: information sharing, designed to assist judges and to win their approval; and a “regulatory,” “rule-driven system” of sentencing guidelines that can hope to command merely “obedience.”⁶⁸ In Ireland, the information sharing model was advertised and embraced as a way “to avoid the proliferation of mandatory sentences with all their flaws.”⁶⁹ The same scenario has played out in other jurisdictions, with the information sharing model positioned as a direct competitor to alternative reforms like sentencing guidelines.⁷⁰

Third, the information sharing model deserves separate attention because it fundamentally differs from “command and control” reforms like sentencing guidelines and judge-made common law. It rests on different assumptions about how legislators and sentencing commissions can influence judges, and faces different challenges in shaping sentencing outcomes. Whether as a stand-alone system or as a supplement to more elaborate regulations, the information sharing model is designed to perform a distinct function, worthy of separate consideration.

⁶⁵ Sweet et al., *supra* note 5, at 945.

⁶⁶ See, e.g., STITH & CABRANES, *supra* note 3, at 170-72; Sweet et al., *supra* note 17, at 928; Reitz, *supra* note 30, at 1454.

⁶⁷ Gertner, *supra* note 7, at 279–80; Barbadoro, *supra* note 40, at 9-10.

⁶⁸ Wolff, *supra* note 2, at 100-01.

⁶⁹ Tom O’Malley, *Creativity and Principled Discretion over Sentencing a Necessity*, IRISH TIMES, Dec. 19, 2011, at 20.

⁷⁰ See Neil Hutton, *A Sentencing Exception? Changing Sentencing Policy in Scotland*, 22 FED. SENT’G RPTR. 272, 275 (2010) (describing how judges in Scotland proposed information sharing at sentencing as a defensive measure, hoping to ward off calls for more intrusive regulation).

II. FUNDAMENTAL WEAKNESSES OF THE INFORMATION SHARING MODEL

There is reason for skepticism that information sharing can meaningfully reduce inter-judge disparity and promote rationality in sentencing law. Conceptually, the information sharing model suffers from three fundamental weaknesses. First, there are challenges in *collecting* sentencing information. To succeed, the information sharing model depends on written, comprehensive, and representative information about sentencing practices, but as a practical matter that information is difficult to assemble. Second, there are challenges in *disseminating* sentencing information. Privacy concerns on the part of offenders, coupled with challenges in making the information accessible and useful for judges, arise even if extensive information is available. Third, *voluntariness* presents serious challenges. By ignoring or disregarding information about how their colleagues have handled similar cases, judges can exacerbate inter-judge disparity and undermine rationality.

Before reviewing the empirical evidence and possible strategies for overcoming them, a description of each set of challenges is in order.

A. Information Collection Challenges

The most daunting challenge to the information sharing model is collecting sufficient information about the reasoning and results of past sentencing decisions. To succeed, the information sharing model requires a store of information about previous cases—for example, written opinions, offense and offender data, or aggregate statistics—made available to judges at sentencing. But two characteristics of sentencing decisions make information sharing particularly difficult in this context.

One is volume. Courts in the United States impose a staggering number of criminal sentences each year. Because plea bargaining has become the dominant method of adjudicating guilt or innocence, only a tiny fraction of cases end in trial.⁷¹ Roughly two-thirds of criminal cases, however, end in a guilty plea, conviction, and sentence.⁷² In state systems, each year more than 1.07 million adults receive a sentence for a felony conviction.⁷³ In the federal system, more than 81,000 criminal sentences are imposed annually.⁷⁴ Those overall figures also mask considerable variability in volume between jurisdictions and courtrooms. In some state courts, judges may impose 50 sentences per week, or more than 2,000 per year.⁷⁵

The other is complexity. Sentencing decisions typically require that judges consider a startling number of factors. Under a typical sentencing statute, the judge must take into account the totality of the circumstances surrounding both the offense and the

⁷¹ BRIAN J. OSTRUM ET AL., EXAMINING THE WORK OF THE STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 53-86 (2003) (noting that just 3% of criminal cases in state courts nationwide are resolved at trial).

⁷² *Id.* (nationally 65% of cases result in a guilty plea, and most trials result in a conviction).

⁷³ See BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2004 (July 2007), at 1 (estimating that 1,079,000 adults were convicted of felonies and sentenced in state courts in 2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf>.

⁷⁴ U.S. SENTENCING COMMISSION, SOURCEBOOK OF SENTENCING STATISTICS 2009, Table 1 (2010).

⁷⁵ *Who Killed Vincent Chin?* (Filmmakers Library 1988), tr. at 14 (quoting Wayne County, Michigan Circuit Court Judge Charles Kaufman), quoted in Paula C. Johnson, *The Social Construction of Identity in Criminal Cases*, 1 MICH. J. RACE & LAW 347, 456 (1996).

personal characteristics of the offender.⁷⁶ The offense may be limited to a single incident, or it may involve a sprawling series of actions over many years. The judge must consider the offender's acts, omissions, and state of mind, as well as the harm caused by the crime. Considering the offender's personal characteristics requires a review of the offender's *entire life*, before and after the offense. The number of moving parts is staggering: criminal history, assistance to the government, educational background, employment history, mental health, good deeds, public service, drug and alcohol addiction, childhood opportunities, family life, prospects for treatment, actions in pretrial detention, and on and on. In the words of one federal probation officer, at sentencing a judge must consider "a narrative of the individual from the day of his birth to the moment of his conviction."⁷⁷ And the inquiry does not end with the defendant, since the court also may consider how the sentence would affect the offender's family, the victims, and the victims' families.⁷⁸

Compounding the complexity, sentencing judges must consider those facts in light of a wide range of purposes of punishment, which may be in tension with one another. Most jurisdictions in the United States have a "laundry list" statute that directs sentencing judges to take into account retribution, general and specific deterrence, incapacitation, rehabilitation, and various and sundry other goals, without assigning priority to any of them.⁷⁹ In many corners of legal doctrine, judges and lawyers complain about the hopeless imprecision of "multi-factor balancing tests." Think of sentencing as the ultimate example: a test with an infinite number of factors and no instructions about how to balance them.

Those features of sentencing decisions make it difficult to generate the kind of robust store of information required to support the information sharing model. Specifically, to reduce inter-judge disparity and promote rationality, the information made available to judges must consist of (1) written information, (2) comprehensive with respect to material facts, and (3) representative of other sentences in similar cases. On each score there is reason for skepticism.

1. Written Information About Sentences

Initially, the information sharing model depends on sentencing information that is *written*. It is not enough that judges identify relevant facts, formulate reasons, choose a sentence, and then enter judgment. Those facts and reasons must be reduced to writing, and collected in some central store of information, if future courts hope to rely upon them for guidance.⁸⁰

⁷⁶ *E.g.* 18 U.S.C. § 3553(a)(1).

⁷⁷ Garry Sturgis, *U.S. v. Barry: They've Only Just Begun*, LEGAL TIMES, Aug. 20, 1990, at 1 (quoting Arthur Carrington of the Probation Office in the U.S. District Court for the District of Columbia); *see also* ADMINISTRATIVE OFFICE OF U.S. COURTS, PROBATION DIVISION, THE PRESENTENCE INVESTIGATION REPORT 1 (2d ed. 1984) (presentence reports are designed, among other things, to "help[] the reader understand the world in which the defendant lives").

⁷⁸ *See, e.g.*, Fed. R. Crim. P. 32(d)(2)(B) (requiring that presentence reports include information about the financial, social, psychological, and medical impact of the offense on victims).

⁷⁹ *E.g. id.* § 3553(a); Model Penal Code § 1.02(2) (1962); KEVIN REITZ, MODEL PENAL CODE: SENTENCING 1, 71 (2003) (describing the "multiple choice" approach adopted by statute in most states).

⁸⁰ Gertner, *supra* note 4, at 278.

At a minimum, that means a lot of data entry. For each case, someone would need to record information about the case, perhaps working from a long checklist of relevant offense and offender characteristics. Given the complexity of sentencing decisions, the amount of information collected in each case could be enormous, and the process correspondingly costly. In the federal system, for example, the U.S. Sentencing Commission employs around 30 full-time staff to review sentencing documents and perform data entry,⁸¹ and many states handle a much higher volume of criminal cases.

The deeper problem, however, is that the information sharing model requires more than raw data. A checklist of facts, standing alone, is a poor substitute for a written sentencing opinion because it does not disclose the judge's reasoning. Although it may suggest possibilities, documenting potential aggravating or mitigating factors, it captures neither the factors the judge deems most relevant nor the judge's process of prioritizing and balancing them. Leaving future judges to guess about the rationale for the sentence would not improve the rationality of sentencing outcomes. The information sharing model strives to foster a thoughtful and continuing dialogue in which judges discern the basis for previous sentences, and then either accept that reasoning or draw principled distinctions. Such a dialogue is impossible without some written account of the judge's reasoning. Thus, as proponents readily acknowledge, written opinions are the lifeblood of the information sharing approach.⁸²

There is reason to doubt, however, that sentencing courts can generate enough written opinions to support effective information sharing. For years, scholars have been urging sentencing judges to issue full-fledged published sentencing decisions more frequently.⁸³ Yet the overwhelming majority of sentencing decisions in the United States remain unpublished—indeed, never written down.⁸⁴

Typically, rather than prepare a written explanation, the judge announces the reasons for the sentence in open court. Although many sentencing hearings are audio-recorded, most are not transcribed because they are never needed.⁸⁵ And even if a written transcript is prepared, only a fraction of those transcripts ever become public or otherwise available to *other* judges in future cases.⁸⁶

Hearing transcripts, moreover, do a poor job of capturing the judge's reasoning. Statements in open court are primarily directed at the offender, lawyers, witnesses, and

⁸¹ Interview with Paul Hofer, the Commission's former Director of Special Projects, June 2009.

⁸² STITH & CABRANES, *supra* note 3, at 170; *see also* Gertner, *supra* note 4, at 279 (“Wider use and availability of formal sentencing opinions is therefore critical . . .”)

⁸³ *See, e.g.*, Sweet et al., *supra* note 5, at 940; Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 147 (2006), <http://www.thepocketpart.org/images/pdfs/1.pdf>; Lynn Adelman & Don Deitrich, Rita, *District Court Discretion, and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 54-55 (2007).

⁸⁴ *See* Uri J. Schild, *Statistical Information Systems for Sentencing: A Cookbook*, 6 INT'L J. L. INFO. TECH. 125, 131 (1998) (noting that “published law reports” contain detailed descriptions of only a tiny fraction of all sentences). By law judges in the United States generally have no obligation to produce a written sentencing opinion, even if they must state the reasons for the sentence in court. *See, e.g.*, 18 U.S.C. § 3553(c).

⁸⁵ Transcription of sentencing hearings, like other proceedings, is not free. Because the government pays such litigation costs both for the prosecution and for indigent offenders, transcripts generally are not prepared unless needed in subsequent proceedings, such as an appeal.

⁸⁶ *See* Sweet et al., *supra* note 5, at 940.

observers in the courtroom—not future judges.⁸⁷ Often cluttered with irrelevant material, jarred by interruptions, and disorganized, a sentencing transcript is a poor substitute for a written opinion explaining the reasons for a sentence.⁸⁸

The vanishingly small rate of written sentencing opinions is not the product of laziness or obstinacy. District court judges operate under acute time constraints. As Frank Bowman has observed in another context, “[t]he coin of the realm, the scarcest resource, in federal district court is *time*,” and many judges understandably “begrudge the time it takes to deal with sentencing issues.”⁸⁹ The sheer volume of sentencing decisions forces judges to forego a written opinion in most cases.

2. Comprehensive Information About Sentences

Second, to accomplish its goals, the information sharing model depends on sentencing information that is *comprehensive*. A written opinion or other record of a case must capture the full range of potentially relevant facts and factors—including, crucially, those that the judge *does not* find especially salient. Otherwise future judges cannot reliably compare new cases to previously decided cases.

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

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

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

The result is stark inter-judge disparity, although the judges did not realize it. Even though the offenses and offenders were in fact identical, the second judge received incomplete—and therefore misleading—information about the earlier case. Without

⁸⁷ For excellent commentary on the task of the judge in announcing a sentence in open court, see D. Brock Hornby, *Speaking in Sentences*, 14 GREEN BAG 2d 147 (2011).

⁸⁸ Indeed, from time to time appellate courts vacate a sentence and remand the case, not because the sentence is necessarily unlawful, but because the sentencing transcript provides an insufficient explanation of the decision.

⁸⁹ Frank O. Bowman, III, *Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS L.J. 299, 356 (2000).

comprehensive written opinions, capturing even factors the judge deems relatively unimportant, the information sharing model can malfunction.⁹⁰

Unfortunately, there is reason to doubt that comprehensive sentencing information can be routinely captured. Every criminal sentence involves a slate of aggravating factors and a slate of mitigating factors. The task of the sentencing judge is to weigh those competing considerations and strike an appropriate balance.⁹¹ Written opinions, however, rarely disclose and detail all potentially relevant factors. They are designed, after all, not merely to announce the sentence but also to persuade the reader that the sentence is reasonable. Judges naturally focus on the facts and factors they find most persuasive while downplaying others.⁹²

Time constraints exacerbate the problem. Even a judge committed to writing a comprehensive opinion would find the task time-consuming. The complexity of sentencing decisions, which require a wide-open inquiry into dozens of competing considerations, makes it difficult to predict, disclose, and discuss all factors that future judges might find relevant. Judges cannot undertake that effort often.

The review structure of sentencing decisions also makes it tempting to write an abbreviated opinion. In any given case, there is little risk that the judgment will be questioned because no other district court judge reviews the case or writes a dissent.⁹³ Although appellate review of sentences is available in most jurisdictions, criminal defendants frequently waive the right to appeal,⁹⁴ and in any event the chances of a successful appeal are very low.⁹⁵

Moreover, when judges anticipate that the parties may appeal from a sentence, they have strategic incentives to provide fewer details. Judges do not like to be reversed on appeal,⁹⁶ and detailed sentencing opinions sometimes increase the risk of reversal. An appellate court might be forced to vacate and remand based on a stray reference to a prohibited factor, or a misstatement of a relatively minor fact, or an inartful phrase that sounds too much like a legal error. Outside of especially complex or controversial cases, writing a long opinion is asking for trouble. A simple announcement from the bench or a terse written order gives the parties little to go on, and therefore little to attack.

⁹⁰ Austin Lovegrove has made a similar observation in evaluating the Scottish Sentencing Information System. See Austin Lovegrove, *Statistical Information Systems as a Means to Consistency and Rationality in Sentencing*, 7 INT'L J.L. & INFO. TECH. 31, 39-40 (1999).

⁹¹ Schild, *supra* note 84, at 125 (“Sentencing consists in trying to reconcile a number of totally irreconcilable facts.”) (internal quotation marks omitted).

⁹² Cf. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 94 (2008) (advising lawyers, in drafting a brief, to persuade the reader by “putting some facts in high relief and some in low relief—and . . . omitting others altogether”).

⁹³ Cf. John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMM. 69, 104-05 (2008) (arguing that judges are less susceptible to confirmation bias than legislators because “[i]f a judge ignores facts in the majority opinion, he will suffer the embarrassment of a strong dissenter (a factual ‘whistleblower’) who points out an opinion’s factual flaws”).

⁹⁴ See Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005) (finding that two-thirds of offenders waive the right to appeal).

⁹⁵ In the federal system, for example, 86.7% of sentencing appeals are affirmed or dismissed. U.S. SENTENCING COMMISSION, 2010 ANNUAL SOURCEBOOK OF SENTENCING STATISTICS, Table 56 (2010).

⁹⁶ Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 37 (1990).

In theory, exhaustive data entry could compensate for gaps in the written explanation. A member of the court staff, for example, could complete a checklist in every burglary case that indicates the presence of a weapon or an encounter with a victim. That way, future judges could see a complete picture of the case even if the written opinion contains omissions. As a practical matter, however, such comprehensive data entry is prohibitively costly. Every sentencing decision involves a theoretically infinite number of facts and factors, especially when including those *not* relevant in the particular case. No court system realistically can code and transmit that kind of hyper-detailed information for every sentence.⁹⁷ Accordingly, the need for comprehensive information forces a choice between keeping data-collection costs manageable and preventing errors that undermine inter-judge consistency and rationality.

3. Representative Information About Sentences

Third, to accomplish its goals, the information sharing model depends on sentencing information that is *representative*. According to proponents, information sharing reduces inter-judge disparity and promotes rationality by giving judges a “context” or “picture” of how each new case compares to previous cases. Judges can then align their sentences to fit that picture.⁹⁸ The trouble is that, in several ways, the picture can be skewed.

One possibility is that the body of sentencing information may disproportionately reflect some kinds of cases. Judges, after all, do not choose at random whether to write a detailed sentencing opinion. Sometimes a judge chooses to issue a published opinion because the sentence presents a novel legal issue, and the bulk of the opinion is dedicated to that issue.⁹⁹ Other times a judge chooses to issue a published opinion because the case is unusual. Because of the extreme facts, or the controversial result, or the unusual degree of public interest, or some otherwise extraordinary aspect of the case, the judge feels the need to provide an extended explanation of the reasons for the sentence.¹⁰⁰ Time constraints not only make it impossible to prepare a written explanation in every case, but also force judges to be selective about which sentences warrant extended discussion. Given the choice, judges often focus on groundbreaking, extreme, or otherwise special cases.

That kind of imbalance, although understandable, presents serious problems for the information sharing model. A store of sentencing information that consists disproportionately of extreme or unusual cases is incomplete, and therefore potentially deceptive, as a guide for judges in ordinary cases. Indeed, it can cause the information sharing model to backfire. Relying on a skewed body of information can undermine

⁹⁷ See Schild, *supra* note 84, at 133-34.

⁹⁸ See *supra* notes 181-182 and accompanying text.

⁹⁹ *E.g.* United States v. Pimental, 367 F. Supp. 2d 143, 149-54 (D. Mass. 2005) (Gertner, J.) (holding that the Sixth Amendment forbids the consideration of acquitted conduct at sentencing, or alternatively that acquitted conduct may be considered only if it is found beyond a reasonable doubt).

¹⁰⁰ *E.g.* United States v. Haynes, 557 F. Supp. 2d 200, (D. Mass. 2008) (Gertner, J.) (extended discussion of the defendant’s life history, employment, training, family responsibilities, good deeds, and other strong mitigating circumstances).

rationality by creating inconsistency with “invisible” sentences that did not warrant a published opinion.¹⁰¹

Another risk is that the body of sentencing information may disproportionately reflect the work of especially prolific judges. It is no insult to the judiciary to recognize that different judges have different levels of enthusiasm for criminal sentencing. Some judges, such as those Doug Berman has inducted to a mock “Sentencing Judges Hall of Fame,”¹⁰² relish the task and would eagerly participate in an inter-judge dialogue about sentencing outcomes. But many others have little patience for sentencing, and little inclination to invest more time in preparing written opinions.¹⁰³ Given the option, some judges may contribute more and better information than their colleagues.

That poses a problem for the information sharing model because a non-representative store of sentencing information, dominated by some voices while others remain silent, can exacerbate inter-judge disparity. Future judges, guided by a skewed sense of previous sentencing patterns, might inadvertently misalign their decisions with those of less prolific judges. The risk is particularly acute if “outlier” judges contribute more opinions and information than their colleagues—a plausible scenario, since judges have a special incentive to write a detailed opinion when they suspect that others may disagree with the outcome.

B. Information Dissemination Challenges

Another set of challenges for the information sharing model relates to the dissemination of sentencing information. Once collected, information about previous cases must somehow be made accessible to sentencing judges. Yet because sentencing often turns on highly sensitive personal information about offenders, information sharing raises privacy concerns. In addition, there are practical hurdles in making relevant sentencing opinions and statistics accessible to judges.

1. Privacy

Sharing sentencing information with far-flung courts raises serious privacy concerns. A written sentencing opinion or case record may disclose personal information about the offender. Sentencing courts frequently rely on the offender’s criminal history, including any juvenile criminal record. Judges may also consider the offender’s medical history, mental health, and physical condition, which may serve as mitigating factors at sentencing. Work history and opportunities for employment may factor into the offender’s prospects for rehabilitation. The court may also discuss the offender’s home and family life, including his performance as a parent, obligation to care for young children, or support from relatives. In some cases, mitigating facts at sentencing include

¹⁰¹ Cf. AUSTIN LOVEGROVE, JUDICIAL DECISION MAKING, SENTENCING POLICY AND NUMERICAL GUIDANCE 42 (1989) (“[I]t is acknowledged that there is disparity in sentencing, and it is important that a few disparate sentences should not appear to be the norm.”).

¹⁰² Douglas Berman, *Imagining a “Sentencing Judges Hall of Fame,”* Sentencing Law and Policy, at http://sentencing.typepad.com/sentencing_law_and_policy/2004/11/a_thoughtful_an.html (Nov. 7, 2004).

¹⁰³ Bowman, *supra* note 89, at 356.

profoundly personal information about the offender, such as a history of sexual or physical abuse.¹⁰⁴

Victims and other third parties also have privacy interests at stake. Sentencing courts often emphasize the harm caused to victims of crime, which may require a discussion of medical, psychological, or economic injuries. Witnesses who testify at sentencing, on behalf of the offender or the government, sometimes provide personal information and seek to keep their testimony confidential. For a host of reasons, evidence at sentencing may be submitted under seal. Yet a written opinion or case record designed to offer future judges a comprehensive picture of the case must, of necessity, disclose that information.

Of particular concern is information about cooperation with the government. Offenders frequently receive a lower sentence because of their assistance to police or prosecutors, and a written sentencing opinion or case record may indicate the nature and extent of that cooperation. Sentencing courts may also rely on the statements of cooperating witnesses who appear at sentencing, at trial, or before a grand jury. That information is potentially explosive because it may expose the offender or family members to violence and retaliation. The risk is chillingly real in the Internet age, when web sites like “Who’s A Rat?” make it easier than ever to identify and locate people who cooperate with the government.¹⁰⁵

Courts’ treatment of presentence reports (PSRs) underscores those privacy concerns. A PSR is a written document, usually prepared by a member of the court staff or probation officer, designed to assist the judge at sentencing. In most jurisdictions, a PSR is prepared as a matter of routine in felony cases.¹⁰⁶ Like a written opinion or case record, the PSR may contain personal information about the offender, victims, family members, or third parties.¹⁰⁷ Recognizing those privacy interests, courts have a longstanding practice of maintaining the confidentiality of PSRs.¹⁰⁸ Indeed, for decades, it was controversial to disclose the report even to the offender.¹⁰⁹ Disclosure to third parties is almost always forbidden. As one federal judge put it, “I guess I feel strongly that such information should not be made accessible to anyone outside the case.”¹¹⁰

¹⁰⁴ Cf. *United States v. Corbitt*, 879 F.2d 224, 230 (7th Cir. 1989) (discussing facts disclosed in a presentence report, and concluding that “[t]he criminal defendant has a strong interest in maintaining the confidentiality of [the] report”).

¹⁰⁵ See *Who’s A Rat – About Us*, at <http://www.whosarat.com/aboutus.php>.

¹⁰⁶ See, e.g., Fed. R. Crim. P. 32(c)(1)(a) (requiring a presentence investigation and report, except in a few circumstances).

¹⁰⁷ See Fed. R. Crim. P. 32(d) (setting forth required contents of federal presentence reports); OFFICE OF PROBATION AND PRETRIAL SERVICES, *THE PRESENTENCE INVESTIGATION REPORT* (2006), ch. III-1 to III-44, available at http://www.fd.org/pdf_lib/publication%20107.pdf (guidance to probation officers responsible for preparing presentence reports).

¹⁰⁸ *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1, 12 (1988) (“[C]ourts have been very reluctant to give third parties access to the presentence investigation report prepared for some other individual or individuals.”) (emphasis removed).

¹⁰⁹ Fed. R. Crim. P. 32(c)(2) (advisory committee notes to 1966 amendments) (collecting sources and describing the “heated controversy” over “[w]hether as a matter of policy the defendant should be accorded some opportunity to see and refute allegations made in such reports”).

¹¹⁰ Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, N.Y. TIMES, Dec. 8, 2003, at B1 (quoting Judge Sterling Johnson, Jr.) (discussing disclosure of sentencing documents to Congress).

2. Accessibility and Relevance

Another challenge in disseminating sentencing information is ensuring that the relevant information is easily accessible. As noted above, the information sharing model depends on a pool of information that is written, comprehensive, and representative.¹¹¹ Beyond that, however, judges also need some way to wade through the available information and zero in on what is useful. For information sharing to reduce inter-judge disparity, sentencing judges need a way to find similar cases, comparing previous sentences with a new set of facts. Only then can they impose a sentence along the same lines. Likewise, for information sharing to promote rationality, sentencing judges need to consult the reasoning of other courts in relevant cases. Only then can they write an opinion accepting that reasoning or distinguishing the case, for the benefit of future judges.

Accordingly, a centerpiece of the information sharing model is some system—an electronic database, a web site, or a set of shared files, for example—that allows sentencing judges to search for previous decisions that are similar and relevant. But because of practical challenges in building such a system, judges may be discouraged from making effective use of the available information.

First, the complexity of sentencing decisions complicates the design of any search system. With a theoretically infinite number of variables in play, no search form or user interface can capture them all. Instead, the designers of the system of necessity must select some search parameters to include, while ignoring others.¹¹² That process is subjective and controversial.

For example, a system might allow judges to search previous sentences based on the offender's criminal history. But that kind of search could take many forms. It may be implemented as a yes/no field (*i.e.* did the offender have any prior criminal history?). Or it might include two yes/no fields, one for juvenile criminal history and another for adult criminal history. Or it might include a single scaled search parameter that captures the total number of prior offenses, or the total number of adult offenses, or the total number violent offenses, or all of the above. Or it might include search parameters based on the offender's age at the time of his first offense, or at the time of the most recent offense, or a hundred other variations. As the designers of one sentencing information system lamented, “[i]t does not take a mathematical wizard to realize that if there are even as few as three or four levels of these [criminal history] variables, there are over 700 combinations of aspects of this one variable—criminal record.”¹¹³ One researcher estimates that the total number of combinations of criminal history parameters alone “would reach into the tens of thousands.”¹¹⁴ Even the massive datafiles created by the U.S. Sentencing Commission, which are breathtaking in their complexity, could not support searches on many of the criminal-history factors described above.¹¹⁵

¹¹¹ See *supra* Part II.A.1 to II.A.3.

¹¹² Schild, *supra* note 84, at 132; Miller, *supra* note 181, at 134.

¹¹³ Anthony N. Doob & N. W. Park, *Computerized Sentencing Information for Judges*, 30 CRIM. L.Q. 54, 61 (1987).

¹¹⁴ Schild, *supra* note 84, at 133.

¹¹⁵ For criminal history, the datafiles include a yes/no variable, criminal history points and category scores that indirectly reflect a host of underlying criminal history facts, a count of “incidents” classified according to level of seriousness, and adjustments for committing the instant offense while under various forms of

Many other factors relevant at sentencing are equally complex and difficult to operationalize. The problem is that there no “right” design. Each variation of those search parameters is potentially relevant, and different judges may prefer different options. By picking some limited number for searching, and excluding others altogether, system designers risk alienating judges. Why bother with a search system that seems focused on all the wrong issues?

Worse, the subjectivity of search parameters can threaten inter-judge consistency. Suppose, for example, a search system allows judges to search for cases in which the offender’s criminal history included any “violent” prior offenses. Although judges might broadly agree that violent criminal history is highly relevant at sentencing, they may disagree about what offenses qualify as violent or nonviolent. The hypothetical case described above, in which an armed burglar confronts a homeowner at night but never fires or even brandishes the firearm, might be a close case. If judges’ differing views about what qualifies as “violent” are embedded into the search parameters, the system may “lock in” inter-judge disparity by concealing the disagreement from future users.¹¹⁶

Nor would full-text searching of written opinions solve the problem. In other contexts, judges (and their law clerks) typically find relevant case law using electronic services like Westlaw and LexisNexis, which offer sophisticated search tools.¹¹⁷ Flexible as they are, however, those services would have significant limitations as a means of reliably identifying similar cases. The language that judges use to describe offense and offender characteristics varies enormously from opinion to opinion, making it easy for factually similar cases to escape notice.¹¹⁸

Second, the volume of sentencing decisions makes the search for similar cases difficult. If the system provides too *few* search parameters, judges may discover that an overwhelming number of cases seem relevant.¹¹⁹ At a high level of generality, each case may be “similar” to hundreds or even thousands of others. Given their time constraints, sentencing judges cannot carefully review so many potentially relevant cases.¹²⁰ Presented with a daunting volume of matches, judges may give up.

court supervision. See U.S. Sentencing Commission, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 7-80 (2010). The Commission’s data do not, however, capture which prior incidents were “violent,” or the age of the offender at the time of each incident, or the time elapsed since each incident, or the name or type of court that adjudicated the prior incident.

¹¹⁶ Uri Schild acknowledges this difficulty, but maintains that it is “not really a problem” because users are interested only in whether the judge *thought* the offense was violent (or serious or aberrant, etc.) and “passed sentence accordingly.” Schild, *supra* note 84, at 133. The nature of the offense “objectively speaking” does not matter. *Id.* He is mistaken. The whole point of reducing inter-judge disparity is to ensure that “objectively” similar offenders receive equivalent sentences.

¹¹⁷ Peter W. Martin, *Reconfiguring Law Reports and the Concept of Precedent for a Digital Age*, 53 VILL. L. REV. 1, 38-39 (2008). Notably, however, not all state trial courts can afford subscriptions to those services, leaving judges to rely on the parties or to conduct research using more traditional and less flexible methods. *Id.* at 27.

¹¹⁸ As a thought experiment, try to devise a search of written opinions that would capture all sentences in which the offender’s criminal history included a violent crime. The terms “violent” or “violence” would not necessarily appear in the opinion, and the possible synonyms are endless: “armed,” “weapon,” “firearm,” “gun,” “knife,” “attack,” “brandish,” and dozens of others. Picking out the relevant results would be time consuming, and could never guarantee that all relevant cases had been discovered.

¹¹⁹ Schild, *supra* note 84, at 134.

¹²⁰ Cf. Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1623 (1995) (discussing the cost advantages of limiting the

If, on the other hand, the system provides too *many* search parameters, then searches frequently will yield no results. In sentencing, no two cases are exactly alike, any more than two human beings are exactly alike. Indeed, a key premise of the information sharing model is that judges can develop more rational sentencing law by offering principled reasons to distinguish between dissimilar cases. As a practical matter, however, judges who search for matching cases and constantly come up empty may conclude that the exercise is a waste of time. This level-of-generality problem should not be overstated, as diligent legal researchers know that if one search returns 10,000 results, and the next returns zero, they should continue to refine their parameters until the results are manageable. Nonetheless, the volume of sentences creates special challenges in making relevant results readily accessible to judges.

The volume of sentencing decisions also can threaten the accuracy and usefulness of the information. The information sharing model anticipates that sentencing judges will serve both as producers and consumers of information. In that sense, all judges are interdependent, relying on one another to make contributions to a central pool of information. For some judges, however, a crushing case load or other time constraints may result in errors or hurried and unhelpful written explanations. In turn, that inaccurate or inadequate information can frustrate others, who will find the system less useful. A vicious cycle is possible, as everyone begins to doubt that painstaking accuracy and thoughtful opinions will actually benefit their colleagues. As computer programmers say, “garbage in, garbage out.”

In short, is naïve to expect, in the words of Judge Sweet, that making sentencing information available to other judges will “almost automatically” provide “a firmament of reference points and a body of reasoning” that can “alleviat[e] unwarranted disparity” between judges.¹²¹ Making relevant sentencing information accessible to judges is anything but “automatic.”

C. *Voluntariness Challenges*

Assuming that written, comprehensive, and representative information has been collected, and the relevant information is accessible, the information sharing model predicts that judges will seek out that information and treat it as persuasive, perhaps even authoritative. By design, the model is voluntary, leaving sentencing judges free to decide whether and how to consult information about previous cases. The idea is not to constrain judges, but to assist them in the exercise of “fully informed discretion.”¹²² Information sharing will reduce inter-judge disparity and promote rationality, the argument goes, because judges who otherwise would have reached a contrary result will instead conform their sentences those of their colleagues.

number of precedents a trial judge must consult); Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 20 (1990) (noting that trial courts cannot engage in the “costly, complex” process of reviewing all relevant appellate precedent on a particular legal issue, and therefore may “reduce its costs by considering only a subset of relevant appellate decisions”).

¹²¹ Sweet et al., *supra* note 5, at 943, 946.

¹²² Wolff, *supra* note 2, at 97; MISSOURI SENTENCING ADVISORY COMMISSION, RECOMMENDED SENTENCING: REPORT AND IMPLEMENTATION UPDATE 11-13 (2005), available at <http://www.mosac.mo.gov>.

The unspoken assumption of the model is that the primary source of inter-judge disparity and irrationality is ignorance. Judges broadly agree about sentencing, on this view, and reach inconsistent results only because they lack information about how other courts have handled similar cases. Accordingly, “sentencing disparity would virtually disappear if judges had access to data about their colleagues’ decisions.”¹²³

That premise is unrealistic. Inter-judge disparity results not merely from a lack of information, but from deep disagreements about sentencing values and priorities. Surveys of judges, for example, have revealed persistent differences of opinion about important sentencing principles and policies.¹²⁴ Judges are particularly divided, for example, on hot-button criminal justice topics like child pornography, drug trafficking, and white-collar fraud.¹²⁵ My own research on sentencing in the federal system has documented a sharp spike in inter-judge disparity following the shift from mandatory to advisory guidelines,¹²⁶ despite the absence of any changes in judges’ access to sentencing information. Other research reveals significant differences in sentencing outcomes between Democratic and Republican appointees.¹²⁷ In light of those basic disagreements, it is unrealistic to expect that sentencing judges in a voluntary system will dutifully fall into line when supplied with information about their colleagues’ decisions.

Instead, when judges disagree in good faith with the actions of their colleagues, there is every reason to believe they will disregard the information and impose a sentence they believe is just and appropriate. The result will be persistent inter-judge disparity. It is possible that, over time, voluntary information sharing could foster a “dialogue” between judges that resolves the disagreement, as courts settle on one view or the other. But it is equally possible that the disagreement will continue, with dueling courts committed to opposing views. A purely voluntary model is powerless to correct that problem.¹²⁸

Disregarding the information, moreover, is not the only alternative to falling in line with other judges’ decisions. Consider three other possibilities. First, judges can avoid discovering the information in the first place. When judges know or suspect that their preferred sentence is out of step with those of their colleagues, nothing in a voluntary system prevents them from simply ignoring the available information. Such a “see no evil, hear no evil” impulse would thwart the information sharing model in precisely those cases where it could be most useful.

Second, judges can keep looking. Upon discovering information about past sentences that run contrary to their own preferences, they can continue to mine the

¹²³ Zenoff, *supra* note 16, at 1451 (describing the view of “[s]ome observers”).

¹²⁴ See, e.g., U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.8 (2010) (reporting disagreements about how well the U.S. Sentencing Guidelines accomplish purposes of punishment set out by Congress); LINDA DRAZGA MAXFIELD, U.S. SENTENCING COMM’N, FINAL REPORT SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES, at ES-1 (2003), available at http://www.ussc.gov/Judge_Survey/execsum.pdf.

¹²⁵ U.S. SENTENCING COMM’N, *supra* note 124, tbl. 8.

¹²⁶ Scott, *supra* note 14, at 30-41.

¹²⁷ Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 431 (2011).

¹²⁸ Cf. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1114 (2005) (arguing that advisory sentencing guidelines, as a form of voluntary advice to sentencing judges, are “by definition unenforceable” and provide “no systemic remedy for outlier sentences”).

available opinions in search of more favorable. Behavioral literature on confirmation bias has documented similar cognitive errors in other contexts.¹²⁹ Confirmation bias describes the tendency to unwittingly select and interpret evidence in a manner that confirms a previously held belief or hypothesis, while minimizing or failing to recognize contrary evidence.¹³⁰ Previous research has documented confirmation bias among prosecutors, police, and jurors,¹³¹ and the same tendency undoubtedly exists among judges.¹³²

Although concerns about cognitive errors like confirmation bias should not be overstated,¹³³ the complexity of sentencing decisions creates conditions that may facilitate confirmation bias. At a high level of generality, many offenses and offenders share common characteristics, providing judges with a wealth of “confirming” data points that may reinforce their intuitions. Yet in the details, sentences are as infinitely variable as human beings,¹³⁴ allowing courts to draw infinite distinctions that minimize the importance of “disconfirming” data points.

Third, judges can become even more polarized. Judges confronted with information about previous sentencing patterns may not only reject their colleagues’ approach, but stake out an even more extreme position. That kind of “attitude polarization” effect finds some support in psychology literature as well.¹³⁵ In a seminal study, for example, test subjects who held opposing views about capital punishment grew more polarized after reading identical information about conflicting research on the deterrent effect of the death penalty.¹³⁶ As Cass Sunstein has explained, at least when

¹²⁹ See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998).

¹³⁰ Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 121 n.26 (2007) (“[C]onfirmation bias . . . refers to the tendency of persons to seek out and assign more weight to evidence that confirms a prior belief or hypothesis than to evidence disconfirming it.” (internal quotation marks omitted)). Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 309, 313 (“[S]tudies show that, in some circumstances, people do not respond to information at variance with their beliefs by simply ignoring it, but rather by working hard to examine it critically so as to undermine it.”).

¹³¹ See, e.g., Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004) (prosecutors); Barbara O’Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCH., PUB. POL’Y & L. 315, 318 (2009) (police); Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 292-94 (2006) (juries).

¹³² See David E. Klein, *Unspoken Questions in the Rule 32.1 Debate: Precedent and Psychology in Judging*, 62 WASH. & LEE L. REV. 1709, 1717-18 (2005) (“[J]udges are human, and it is hard to imagine that they escape all the cognitive pitfalls that other people stumble into.”); McGinnis & Mulaney, *supra* note 93, at 104-05.

¹³³ Judges usually explain their sentencing decisions in public, and in most jurisdictions the parties can challenge the sentence on appeal. That kind of accountability is often effective in counteracting cognitive biases. See Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 259, 263 (1999); Klein, *supra* note 132, at 1718-19 (observing that “the typical judging experience” involves “the conditions under which accountability has the best chance of reducing cognitive errors”).

¹³⁴ See *supra* notes 76-79 and accompanying text.

¹³⁵ Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098 (1979).

¹³⁶ *Id.* at 2100-05. But see Arthur G. Miller et al., *The Attitude Polarization Phenomenon: Role of Response Measure, Attitude Extremity, and Behavioral Consequences of Reported Attitude Change*, 64 J.

people begin with strongly held views, a “balanced presentation[.]” in which “competing arguments or positions are laid out side by side” is likely to increase rather than reduce attitude polarization.¹³⁷ Information sharing, in other words, does not inevitably result in agreement and uniformity. To the contrary, in some circumstances it can harden individuals’ resolve and make disagreements more pronounced.

III. EMPIRICAL RESEARCH ON SENTENCING INFORMATION SHARING

These challenges are not merely speculative. New and existing empirical research tends to confirm the fundamental weaknesses of the information sharing model. This Article first reports the results of an original study of federal sentencing data collection. It then examines the history of two reform efforts grounded in the information sharing model, “sentencing information systems” and “sentencing councils.” Collectively, the research reinforces the serious challenges related to information collection, information dissemination, and voluntariness.

A. *An Empirical Study of the Collection of Sentencing Information*

Virtually no empirical research has examined the collection of sentencing information. As explained above, the information sharing model depends on a store of sentencing information that is written, comprehensive, and representative. Promoting rationality in sentencing decisions requires thoughtful and principled explanations and a continuing dialogue between judges, which is impossible without written sentencing opinions.¹³⁸ Likewise, comprehensive and representative information is crucial, since a skewed body of previous decisions can actually deepen inter-judge disparity.¹³⁹ No study has tested the feasibility of that kind of information collection.

To fill that gap, this Article reports the results of an original study of the collection of sentencing information. Drawing on a unique dataset of sentencing documents from a federal district court, it evaluates the quantity and characteristics of written sentence explanations submitted pursuant to mandatory reporting requirements. Because the documents that form the basis for the analysis are generally nonpublic, the analysis is the first of its kind in the United States.

1. Data and Coding

The study is based on a key federal sentencing document called the “Statement of Reasons.” In federal court, sentencing judges must complete a Statement of Reasons in connection with every criminal sentence.¹⁴⁰ Upon completion, the document is transmitted to the U.S. Sentencing Commission, which extracts and records data about the sentence.¹⁴¹ The Commission then generates massive datafiles, based on the contents

PERSONALITY & SOC. PSYCHOL. 561, 561-69 (1993) (replicating the Lord et al. study and finding no attitude polarization when subjects reported their views immediately before reviewing the dueling studies).

¹³⁷ Cass Sunstein, *Breaking Up the Echo*, N.Y. TIMES, Sept. 18, 2012, at A25.

¹³⁸ See *supra* Part II.A.1.

¹³⁹ See *supra* Parts II.A.2 to II.A.3.

¹⁴⁰ 18 U.S.C. § 3553(c) (“The court shall provide a transcription or other appropriate public record of the court’s statement of reasons, together with the order of judgement and commitment . . . to the Sentencing Commission . . .”).

¹⁴¹ *Id.*

of tens of thousands of documents each year, to serve as the basis for statistical reports about nationwide sentencing practices. To ensure that complete and comprehensive data are available, the Chief Judge of every federal district court is required by statute to “ensure” that in every case a “written statement of the reasons for the sentence imposed” is submitted, in a format specified by the Commission.¹⁴²

To understand how the Statement of Reasons works, a brief summary of federal sentencing practice may be helpful. The U.S. Sentencing Commission has promulgated detailed sentencing guidelines that translate offense and offender characteristics into a sentencing range, expressed as a narrow range of months of imprisonment (such as 52-63 months). The guideline range is “advisory,”¹⁴³ meaning that judges must “consider” the advisory guideline range in every case, but they are free to impose any reasonable sentence consistent with a “laundry list” statute that sets out broad purposes of punishment.¹⁴⁴ Within-range sentences reflect the sentencing court’s judgment that the guideline range that is proper for the “mine run” of similar cases, and that the particular offense and offender are “not different enough to warrant a different sentence.”¹⁴⁵

The Statement of Reasons form is adapted to the guidelines regime. It is four pages long, and requires that judges provide basic information about the sentence imposed.¹⁴⁶ Judges must check a box indicating whether the sentence falls within, above, or below the advisory guideline range. They also have the option of checking boxes that correspond to reasons for an out-of-guidelines sentence.¹⁴⁷ The checkboxes express the reasons for the sentence in very general terms, such as “aggravating or mitigating circumstances” or “the nature and circumstances of the offense.”¹⁴⁸

Most relevant for present purposes, the form provides several spaces in which judges may provide a narrative description of the reasons for the sentence.¹⁴⁹ The form states that a written narrative description is “required” in two categories of cases: (1) all sentences outside the guideline range; and (2) all sentences within the guideline range that carry a term of imprisonment of “greater than 24 months.”¹⁵⁰ Judges sometimes use the back of the form or attach additional pages or documents, such as a written sentencing opinion or a transcript of the sentencing hearing.

The Statement of Reasons form is usually secret and confidential, pursuant to a policy statement issued by the Judicial Conference of the United States.¹⁵¹ But one

¹⁴² 28 U.S.C. § 994(w), (w)(1).

¹⁴³ *United States v. Booker*, 543 U.S. 220, 245 (2005).

¹⁴⁴ *Id.*

¹⁴⁵ *Rita v. United States*, 551 U.S. 338, 359 (2007).

¹⁴⁶ *See, e.g.*, Judgment and Statement of Reasons in *United States v. Karim*, No. 1:05-CR-10264-001 DPW, at 7 [hereinafter Statement of Reasons Form] (on file with author).

¹⁴⁷ *Id.* at 8-9.

¹⁴⁸ Statement of Reasons Form 8-9. The checkboxes correspond to the titles of guideline departures, *see* U.S.S.G. §§ 5K2.0, K52.13, and broad purposes of punishment, *see* § 3553(a)(1). The checkboxes themselves provide no information about the particular case. Judges can check a box marked “Age,” for example, but the checkbox does not indicate whether the offender was young or old.

¹⁴⁹ *Id.* at 8 (“Explain the facts justifying the departure.”); *id.* at 9 (“Explain the facts justifying a sentence outside the advisory guideline system.”); *id.* at 10 (“ADDITIONAL FACTS JUSTIFYING THE SENTENCE IN THIS CASE”).

¹⁵⁰ *See* Statement of Reasons Form 8, 10.

¹⁵¹ *See* Judicial Conference Policy Statement, *Report of the Proceedings of the United States Judicial Conference*, Mar. 14, 2001, at 14.

federal district court, the District of Massachusetts, has voted to make Statements of Reasons available to the public on the PACER system (Public Access to Court Electronic Records).¹⁵² That decision affords a rare opportunity to study sentencing practices that remain hidden in every other federal court. The open-access policy reflects the court's admirable commitment to greater transparency in criminal sentencing.¹⁵³

To assess the kind of information collected using the Statement of Reasons, the study examines a full year (fiscal year 2006¹⁵⁴) of cases from the District of Massachusetts. A total of 411 statements were reviewed and coded, representing approximately 80% of the Statements of Reasons submitted to the Commission that year.¹⁵⁵ Details concerning document selection are set forth in the Appendix.

Of particular interest is whether the Statements of Reasons supply the kind of written, comprehensive, and representative explanations necessary to support an effective information sharing model. Accordingly, the study examines the length of any written statement explaining the judge's reasons, measured by the number of sentences of text contained in the narrative description. Such a "sentence count" admittedly captures only the length, and not the quality, of the written explanation. But the length of the narrative description is a fairly reliable proxy for the level of factual detail and the thoroughness of the judge's reasoning. The study classifies a narrative description of 1-3 sentences as a "short" explanation. It classifies a narrative description of 4-9 sentences, at least a paragraph but less than a page, as a "medium" explanation. It classifies a narrative description of 10 or more sentences of text, roughly one page, as a "long" explanation.

2. Results

The results are discouraging. As shown in Figure 1, even in cases where a written explanation of the reasons for the sentence is mandatory,¹⁵⁶ most Statements of Reasons contain no written explanation at all. Only a small fraction of the documents contain a comprehensive explanation.

Figure 1: Explanation Provided, Where Written Explanation Is Mandatory District of Massachusetts, FY 2006 (n = 317)

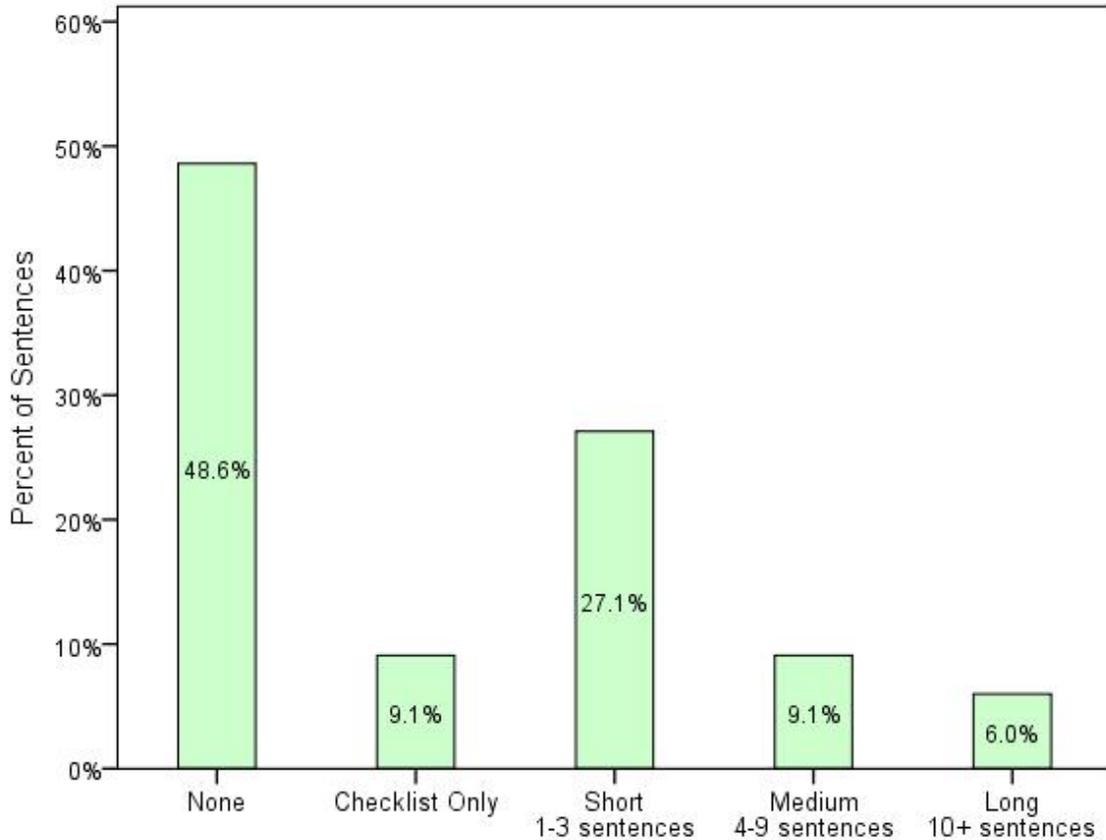
¹⁵² *United States v. Green*, 346 F. Supp. 2d 259, 278 n.66 (D. Mass. 2004) (Young, C.J.) (citing Minutes of the Court Meeting (D. Mass.), Sept. 4, 2001, at 4).

¹⁵³ *United States v. Kandirakis*, 441 F. Supp. 2d 282, 333 n.76 (D. Mass. 2006) (Young, J.).

¹⁵⁴ The analysis includes Statements of Reasons filed in the Commission's 2006 fiscal year, which runs from October 1, 2005 to September 30, 2006.

¹⁵⁵ See *infra* Appendix Part A.1.

¹⁵⁶ See *supra* note 150 and accompanying text.



For cases in which a written narrative description is required, the Statement of Reasons contains no indication whatsoever of the judge’s reasons in 48.6% of cases.¹⁵⁷ In another 9.1% of cases, the only indication of the judge’s reasons is a checkmark in a box corresponding to a broad reason for the decision (such as “aggravating or mitigating factors” or “the circumstances of the offense”). Together, that means that in 57.7% of cases—more than half—the document contains no written narrative description, despite the Commission’s reporting requirements. Such a low rate of written explanations is a major obstacle for the information sharing model, given the importance of written opinions in fostering a “dialogue” between sentencing courts, and thereby promoting rationality in sentencing law.¹⁵⁸

Nor are the available written explanations comprehensive. In 27.1% of cases, the document provides only a short narrative explanation of up to three sentences of text, and in another 9.1% of cases it provides a medium-length explanation of 4-9 sentences. That kind of quick summary represents an improvement over a checklist, but would be of little

¹⁵⁷ As discussed *infra*, the percentage of sentences with no written explanation is much lower for non-guideline sentences (28.6%) than for within-range sentences of more than 24 months (78.7%). But because a written explanation is mandatory in both circumstances, Figure 1 reports the level of explanation for both categories combined.

¹⁵⁸ See *supra* Part II.A.1. Checkmarks indicating only a general topic area are insufficient to promote inter-judge consistency and rationality. See *United States v. Blackie*, 548 F.3d 395, 401 (6th Cir. 2008) (vacating sentence for lack of an adequate explanation because court merely checked boxes indicating reasons for the sentence, without discussing any facts related to the offense or offender).

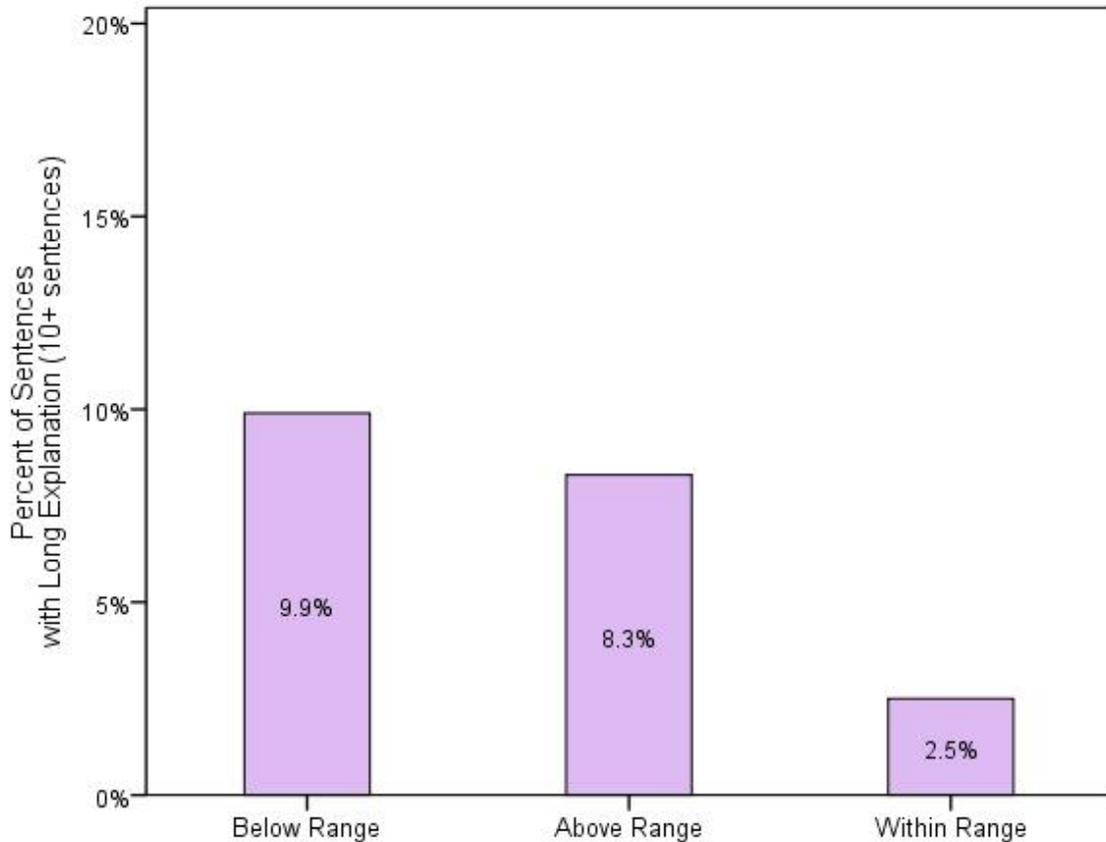
use to future courts drawing upon that information to develop a rational body of sentencing law. The explanation can highlight a few factors that the judge deemed most important, but of necessity many relevant facts must be omitted, and there can be room for only a bare-bones explanation of how the judge weighed the competing facts and considerations. Short-shrift explanations pose a problem for the information sharing model because incomplete opinions may fail to capture facts that future judges deem important, masking important similarities or differences between cases and thereby generating inter-judge disparity and undermining rationality.¹⁵⁹

There is some good news. In a small number of cases (6.0%), the judge provided a long written explanation consisting of at least 10 sentences of text. Indeed, in a handful of cases (1.1%), the judge wrote a formal sentencing opinion or attached a hearing transcript that includes more than 50 sentences of explanation. Those opinions are outstanding, offering future judges not only a full sense of the relevant facts, but also valuable insights into the sentencing judge's reasons and approach.

Unfortunately, those cases tend to be unusual, resulting in a non-representative body of long written opinions. As shown in Figure 2, sentences outside the guideline range are more likely to produce a long explanation than sentences within the guideline range.

¹⁵⁹ See *supra* Part II.A.2.

**Figure 2: Long Explanation Provided, by Guideline Range
District of Massachusetts, FY 2006 (n = 411)**



For sentences within the advisory guideline range, the Statement of Reasons contains a long explanation, consisting of 10 sentences of text or more, in just 2.5% of cases. But for sentences outside that range—those different from the “mine run” of similar cases¹⁶⁰—the likelihood of a long explanation is roughly four times greater. The documents contain a long explanation for 9.9% of below-range sentences and for 8.3% of above-range sentences. The result is a skewed collection of long written descriptions.¹⁶¹ A store of sentencing information that consists disproportionately of unusual or extreme cases poses a real threat to the information sharing model, since a skewed backdrop may mislead judges about sentencing patterns in cases that are ordinary, but effectively invisible.¹⁶²

The pool of long written explanations is non-representative in another way. Some judges were far less likely to provide full explanations than others. Figure 3 shows, for

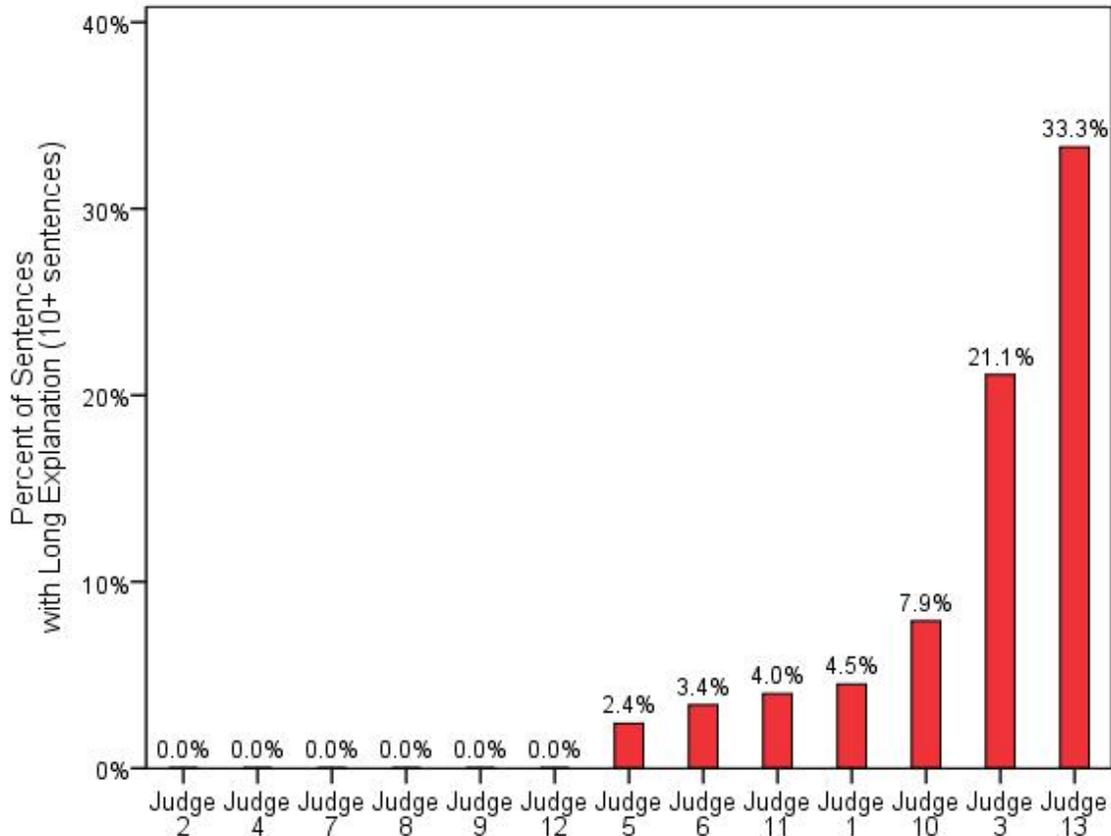
¹⁶⁰ In theory, a judge is free to impose a non-guideline sentence even in an “ordinary” case based on policy-driven disagreement with the guideline range. *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007). That is exceedingly rare, however; sentencing courts overwhelmingly justify their non-guideline sentences based on the special facts of the case.

¹⁶¹ By way of comparison, in the full set of 411 sentences, 67% are within-range sentences. In the subset of 20 sentences with a long explanation, however, just 35% are within-range sentences.

¹⁶² See *supra* note 101 and accompanying text.

each judge with a criminal caseload of at least 15 sentences during the year of the study,¹⁶³ the percentage of cases in which the judge provided a long written explanation.

**Figure 3: Percentage of Cases with Long Explanation, by Judge
Minimum Caseload Required (13 judges total)
District of Massachusetts, FY 2006**



Not all judges wrote long explanations of their sentences at equal rates.¹⁶⁴ Six of the 13 judges who met the minimum-caseload requirement did not submit any long explanations during the year of the study. By contrast, one judge provided a long explanation for 21.1% of sentences, and another provided a long explanation for 33.3% of sentences.

As a result, the pool of sentences with long written explanations is imbalanced, with some judges far better represented than their colleagues. Judge 13 singlehandedly accounts for 45% of long opinions submitted the year of the study. That is more than Judges 1 through 10 combined. Together the court’s three most prolific authors of long opinions account for 80% of the court’s output of long written explanations. A body of sentencing information in which some judges have a dominant voice, while others remain silent, can exacerbate inter-judge disparity and undermine rationality by creating a distorted impression of actual sentencing patterns.¹⁶⁵

¹⁶³ For further discussion of the minimum-caseload requirement, see *infra* Appendix Part B.

¹⁶⁴ In this table and throughout the Article, I use numbers rather than names to identify individual judges. See Scott, *supra* note 14, at 140-41.

¹⁶⁵ See *supra* Part II.A.3.

Those differences are not the product of chance. As set forth in the Appendix, logistic regression models confirm that the pool of written explanations is significantly imbalanced.¹⁶⁶ First, some judges and some kinds of cases are more likely to produce a written explanation than others. Non-guideline sentences are significantly and strongly correlated with written explanations ($b = 3.320, p < .001$). Likewise, longer terms of imprisonment are significantly, although more weakly, correlated with written explanations ($b = 0.007, p = .001$). Categorical variables capturing the identity of the sentencing judge are also a significant predictor of whether a written explanation is provided ($p = .001$). Surprisingly, however, the fact that a written explanation is mandatory is not itself a significant predictor of a written explanation, after controlling for other factors ($b = 0.719, p = .214$).¹⁶⁷

Second, some kinds of cases are more likely than others to produce a *long* written explanation consisting of 10 or more sentences of text. Non-guideline sentences are significantly correlated with long explanations ($b = 1.086, p = .037$). Neither sentence length ($b = -0.003, p = .482$) nor the fact that a written explanation is mandatory ($b = 1.338, p = .234$), however, is a statistically significant predictor of a long explanation.¹⁶⁸

3. Implications

These findings suggest that challenges in collecting written, comprehensive, and representative sentencing information are formidable. Even in a regime of detailed and mandatory reporting requirements, backed by a federal statute, the available pool of written sentencing opinions is limited.

For three reasons, however, these results should be interpreted with caution. First, Statements of Reasons are not designed as a way for judges to share information with one another. At present, their sole audience is the U.S. Sentencing Commission, which uses the documents as inputs for its statistical reports. No one else has access to the judge's statements, no matter how insightful or well-reasoned¹⁶⁹—and judges know it. They therefore have little incentive (aside from the commands of federal law¹⁷⁰) to explain their decisions in detail. Data collection efforts surely would improve if judges believed that their written explanations would reach a wider audience.

Second, the Statement of Reasons form itself is clumsy and cumbersome. Scarcely concealing its intended use as a data-entry tool for the Commission, it consists primarily of a “parade of nearly meaningless check boxes.”¹⁷¹ That format no doubt discourages judges from providing more thorough narrative descriptions of the reasons for a sentence.¹⁷² With a more open-ended form that encouraged judges to set out their reasons, the contents of the statements might be richer and more useful.

¹⁶⁶ For more information about variables used in the regression models, see the Appendix, *infra* Part B.

¹⁶⁷ See Appendix, *infra* Part C & tbl. 1.

¹⁶⁸ See Appendix, *infra* Part C & tbl. 2.

¹⁶⁹ Bruce Green, *Thinking About White-Collar Crime and Punishment*, CRIM. JUSTICE (Fall 2010), at 5.

¹⁷⁰ See 28 U.S.C. § 994(w), (w)(1) (requiring that the Chief Judge of each federal district court “ensure” the completion of a statement of reasons in whatever format the Commission specifies).

¹⁷¹ Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 146 (2006).

¹⁷² *Id.*

Third, this study examines documents from a single federal district court. Data collection practices in one district may not be representative of practices in other federal courts nationwide, or in state courts responsible for the vast majority of criminal sentences. And the District of Massachusetts, admittedly, is far from ordinary when it comes to sentencing issues. Several members of the court are well-respected as sentencing experts. Judges Nancy Gertner and William Young have written scholarly articles on sentencing issues,¹⁷³ and Judge Patti Saris now serves as Chair of the U.S. Sentencing Commission.¹⁷⁴ Moreover, the same commitment to transparency that led the District of Massachusetts to approve its unique disclosure policy might make its data reporting practices materially different from those of other courts.

On the other hand, because of the distinctive features of the District of Massachusetts, this study likely *underestimates* the challenges in collecting high-quality sentencing information. Unlike other courts, the District of Massachusetts has consciously chosen to make its Statements of Reasons widely available. The judges know that their reasons will not simply be filed away in a drawer, but ordinarily will be accessible to the public. If anything, the court's special interest in sentencing likely translates into more frequent and more thorough written opinions, not less. In addition, federal judges enjoy a larger support staff, more law clerks, and a slower criminal docket than their counterparts in state courts.¹⁷⁵ If the collection of sentencing information is inadequate in the District of Massachusetts—widely recognized as one of the best sentencing courts in the country—then it is probably even worse elsewhere.

The study thus reinforces that information collection challenges are substantial. Despite explicit reporting requirements, sentencing courts face time pressures and other constraints that prevent them from routinely providing written, comprehensive, and representative information.

B. *Research on Previous Reform Efforts*

In addition to this original research, insights about the information sharing model can be derived from the experiences of previous sentencing reform efforts grounded in information sharing. Two efforts are particularly salient: (1) “sentencing information systems,” searchable computer databases of sentencing information constructed in a handful of jurisdictions around the world; and (2) “sentencing councils,” periodic roundtable discussions of sentencing judges on the same court. The struggles of those reform efforts, and their occasional successes, underscore serious challenges with information dissemination and voluntariness.

¹⁷³ See, e.g., Gertner, *supra* note 4; William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW 30 (July 2003).

¹⁷⁴ She has written scholarly articles on sentencing as well. See Hon. Patti B. Saris, *Below the Radar Screen: Have the Sentencing Guidelines Eliminated Disparity? One Judge's Perspective*, 30 SUFFOLK U. L. REV. 1027 (1997).

¹⁷⁵ Although some federal courts are deluged with criminal immigration cases, prompting the development of “fast track” disposition programs, the District of Massachusetts had no such program at the time of the study. See U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. MA-06 (2006) (no departures imposed pursuant to an “early disposition program”).

1. Sentencing Information Systems

In the last 25 years, a handful of jurisdictions worldwide has experimented with sentencing information systems (SISs), searchable electronic databases of sentencing information. Although their designs vary, the goal of SISs is to enable judges to look up statistics, case summaries, written opinions, or other information about previous sentences in similar cases.¹⁷⁶ Using interactive search forms, a judge preparing to impose sentence enters some key characteristics of the case. The SIS responds by reporting information about matching cases. Some systems provide only aggregated information about whole categories of cases, such as the distribution of nationwide sentences for aggravated theft. Others provide specific information about individual cases, such as the case summary or full sentencing opinion in a relevant case.¹⁷⁷ Courts in Canada, Scotland, Ireland, and Australia have launched large-scale experiments with SISs.¹⁷⁸ In the United States, Missouri has constructed a web-based system that could be described as an SIS.¹⁷⁹

The primary goals of an SIS, in the jurisdictions that have adopted them, are to reduce inter-judge sentencing disparity and to promote rationality.¹⁸⁰ When a judge sentences an offender, an SIS can provide a statistical picture of how similar offenders have been sentenced before, by other judges in the same court, region, or nation.¹⁸¹ Making better information available to judges, the argument goes, makes it possible for judges to align their decisions with those of their colleagues, and thus produces more consistent and better-reasoned sentences.¹⁸²

Surprisingly, to date no empirical research has examined whether any SIS has succeeded in reducing inter-judge sentencing disparity.¹⁸³ The indirect evidence, however, is disheartening. Many of the most prominent SISs in foreign courts have been abandoned. Further, in jurisdictions where SISs have survived, they have taken on more of a support role following the implementation of other structured sentencing reforms.

¹⁷⁶ Marc Miller, *Sentencing Reform “Reform” Through Sentencing Information Systems*, in *THE FUTURE OF IMPRISONMENT* (Michael Tonry ed. 2004) at 121, 129.

¹⁷⁷ See Ivan Potas et al., *The Sentencing Information System of the Judicial Commission of New South Wales*, 6 *INT’L J. L. & INFO. TECH.* 99, 109-11 (1998) (describing the New South Wales SIS, complete with pictures of the user interface).

¹⁷⁸ Miller, *supra* note 176, at 129; Coulter, *supra* note 7, at 4.

¹⁷⁹ Wolff, *supra* note 51, at __.

¹⁸⁰ Austin Lovegrove, *Statistical Information Systems as a Means to Consistency and Rationality in Sentencing*, 7 *INT’L J. L. & INFO. TECH.* 31, 32 (1999) (“The primary aim of those systems is to promote consistency and rationality—the idea is that cases described by similar relevant characteristics should receive similar sentences.”).

¹⁸¹ Marc Miller, *Sentencing Reform “Reform” Through Sentencing Information Systems*, in *THE FUTURE OF IMPRISONMENT* (Michael Tonry ed. 2004) at 121, 129.

¹⁸² *Id.* at 135; *THE SENTENCING COMMISSION FOR SCOTLAND, THE SCOPE TO IMPROVE CONSISTENCY IN SENTENCING* 36 (2006) (SISs “can be used to inform sentencing decision making and increase consistency within and between sentencers”).

¹⁸³ Miller, *supra* note 181, at 133; Schild, *supra* note 84, at 127. The courts that have experimented with SISs apparently do not capture and publicize the kind of data necessary to support such research. See Arie Freiberg, *Australia: Exercising Discretion in Sentencing Policy and Practice*, 22 *FED. SENT’G RPTR.* 204, 206 (2010). As a result there is no direct evidence that the availability of an SIS improves inter-judge consistency.

In Canada, four provinces experimented with SISs in the late 1980s.¹⁸⁴ A national sentencing commission had concluded that “detailed information on current practices” would prove valuable to sentencing judges,¹⁸⁵ and surveys of judges had revealed a widespread appetite for better information about past sentencing outcomes.¹⁸⁶ Although judges were not required to search the Canadian SIS when imposing sentence, the designers worked closely with judges to design useful and relevant search parameters.¹⁸⁷

It did not work. Within a few years, the Canadian SIS experiment was abandoned because judges declined to use it.¹⁸⁸ The system’s architect attributed its demise to the fact that the reform was strictly voluntary. He was surprised to discover that “[j]udges do not, as a rule, care to know what sentences other judges are handing down in comparable cases.”¹⁸⁹ Judges were especially reluctant to use the system, he reported, “if they knew (or thought) that these other judges have different approaches” than their own.¹⁹⁰

Similarly, in Scotland, an SIS was developed for judges of the High Court of Justiciary, which handles sentencing for some of the nation’s most serious criminal offenses. Following a trial period in 1997, the SIS became available to all of the court’s judges in 2002. Judges themselves proposed developing the system, principally as a defensive measure to head off more intrusive reforms (such as presumptive sentencing guidelines) that would have sharply limited their discretion.¹⁹¹ As in Canada, judges worked closely with designers of the SIS to define the available search parameters.¹⁹² The result, according to its creators, was a highly flexible and valuable resource.¹⁹³

Yet the Scottish SIS collapsed as well. In 2006, just a few years after the system became widely available, the Sentencing Commission of Scotland reported that the system “was not widely used” and had “largely fallen into abeyance.”¹⁹⁴ Judges “rarely” used the system to gather information, and “rarely” took the time to enter narrative information concerning their own sentencing decisions.¹⁹⁵ The data were also incomplete and at times inaccurate.¹⁹⁶ The Commission found that “currently the SIS does not have anything other than the most marginal of impacts on the imposition of sentences.”¹⁹⁷ In

¹⁸⁴ Anthony N. Doob & Norman W. Park, *Computerized Sentencing Information for Judges: An Aid to the Sentencing Process*, 30 CRIM. L.Q. 54 (1987).

¹⁸⁵ CANADIAN SENTENCING COMMISSION, *SENTENCING REFORM: A CANADIAN APPROACH* 61 (1987).

¹⁸⁶ Anthony N. Doob & Norman W. Park, *Computerized Sentencing Information for Judges: An Aid to the Sentencing Process*, 30 CRIM. L. Q. 54, 55 (1987) (noting that 79% of judges responded that better information about past sentences would be helpful).

¹⁸⁷ Miller, *supra* note 181.

¹⁸⁸ *Id.* at 130.

¹⁸⁹ *Id.* (quoting Anthony Doob, *Sentencing Aids: Final Report* (1989) (unpublished manuscript)).

¹⁹⁰ *Id.*

¹⁹¹ Neil Hutton, *A Sentencing Exception? Changing Sentencing Policy in Scotland*, 22 FED. SENT’G RPTR. 272, 275 (2010).

¹⁹² SENTENCING COMMISSION FOR SCOTLAND, *supra* note 182, at 36.

¹⁹³ Neil Hutton & C. Tata, *Sentencing Reform by Self-Regulation: Present and Future Prospects of the Sentencing Information System for Scotland’s High Court Justiciary*, 6 SCOTTISH J. CRIMINOLOGY 37, 44 (2000).

¹⁹⁴ THE SENTENCING COMMISSION FOR SCOTLAND, *THE SCOPE TO IMPROVE CONSISTENCY IN SENTENCING* 14 (2006).

¹⁹⁵ *Id.* at 37.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

2010 one of the designers of the system proclaimed that the SIS is essentially non-operational, having been “allowed to atrophy” following years of judicial neglect.¹⁹⁸

Australia boasts the world’s most successful SIS, at least measured by longevity. The Judicial Commission of New South Wales has maintained a searchable database of sentencing statistics since 1988.¹⁹⁹ Strangely, in the 24 years of its operation, no effort has been undertaken to evaluate its effectiveness. There is evidence that some judges in actually use the system by performing searches,²⁰⁰ but no research concerning its effects on sentencing outcomes.

Over time, however, the New South Wales system has been relegated to a support role. Beginning in 1998, the Supreme Court of New South Wales began to announce “guideline judgments,” which specified an advisory sentencing range for offenses.²⁰¹ In 2003, the New South Wales General Assembly enacted “standard non-parole sentencing periods”²⁰²—essentially a statutory determinate sentencing scheme²⁰³—that set presumptive sentences for many serious offenses. Judges are now permitted to depart from the legislatively-prescribed sentence, but only upon finding facts justifying a departure.²⁰⁴ The General Assembly concluded that, despite the availability of the SIS, inter-judge sentencing disparity had reached unacceptable levels. The primary reason for the new regime, according to its supporters, was to reduce that form of disparity.²⁰⁵

Promising new SISs are underway around the world, and they may provide new insights on the information sharing model. Ireland’s criminal courts launched a new, publicly accessible web-based SIS in 2010.²⁰⁶ Australia recently launched a nationwide SIS, modeled on the New South Wales system, for federal offenses prosecuted throughout the country.²⁰⁷ In the United States, Missouri has rolled out a web-based

¹⁹⁸ Hutton, *supra* note 191, at 275.

¹⁹⁹ Miller, *supra* note 181, at 129, 133. For a detailed description of the system’s origins and functionality, see Ivan Potas et al., *Informing the Discretion : The Sentencing Information System of the Judicial Commission of New South Wales*, 6 INT’L J. L. INFO. TECH. 99, 104-14 (1998)

²⁰⁰ JUDICIAL COMM’N OF NEW SOUTH WALES, ANNUAL REPORT 2008–09, at 24 (2009) (showing some 930,000 pages accessed by judicial officers from 2008 to 2009).

²⁰¹ See, e.g., *R. v. Jurisic*, 45 NSWLR 209, 229 (1998). Such guideline judgments were “intended to be indicative only” and to preserve “flexibility” for sentencing judges, but reflected the Court’s concerns about “[i]nconsistency in sentencing,” which “offends the principle of equality before the law.” *Id.*

²⁰² Arie Frieberg, *Australia: Exercising Discretion in Sentencing Policy and Practice*, 22 FED’L SENT’G R. 204, 207 (2010).

²⁰³ For a description of statutory determinate sentencing, see MICHAEL TONRY, SENTENCING MATTERS 10, 28 (1996).

²⁰⁴ See Frieberg, *supra* note 202, at 207.

²⁰⁵ PATRIZIA POLETTI & HUGH DONNELLY, JUDICIAL COMMISSION OF NEW SOUTH WALES, THE IMPACT OF THE STANDARD NON-PAROLE PERIOD SENTENCING SCHEME ON SENTENCING PATTERNS IN NEW SOUTH WALES 3 (2010), available at <http://www.judcom.nsw.gov.au/publications/research-monographs-1/research-monograph-33/index.html>. Preliminary research by the Judicial Commission of New South Wales indicates that presumptive non-parole sentences have succeeded in improving inter-judge consistency. *Id.* at 59-60. Some observers, however, have suggested that the real motivation was to pander to public criticism that sentences were too lenient. Frieberg, *supra* note 202, at 207.

²⁰⁶ Coulter, *supra* note 7, at 4.

²⁰⁷ Wendy Kukulies-Smith, *The Quest for Sentencing Consistency in the Federal System*, Address Before the National Judicial College of Australia, Feb. 6-7, 2010, available at <http://njca.anu.edu.au%2FProfessional%2520Development%2Fprograms%2520by%2520year%2F2010%2FSentencing%25202010%2FPapers%2FKukulies%2520Smith.pdf>.

system for disseminating statistics and other sentencing information.²⁰⁸ And at least preliminary work has begun on SIS-type efforts in Israel and England and in state courts in Oregon.²⁰⁹ So far, however, those systems have not been the subject of careful research, and their future is uncertain.

2. Sentencing Councils

The experience of “sentencing councils,” another sentencing reform effort grounded in the information sharing model, is also instructive. Sentencing councils were groups of district judges, serving on the same court, who met regularly (typically once per week) to discuss upcoming sentencing decisions.²¹⁰ Four federal district courts, in Brooklyn, Chicago, Detroit, and Oregon, experimented with sentencing councils in the 1960s and 1970s.²¹¹ The councils functioned as roundtable discussions of upcoming cases. In advance of the meeting, all participating judges, including the judge responsible for imposing sentence, would review the presentence report and other materials and make an initial recommendation about the appropriate sentence. As a group, judges would then talk about the evidence, share their views about the most important facts and considerations, and try to persuade one another.²¹² Nancy Gertner has compared sentencing councils to clinical rounds performed by physicians.²¹³

The principal goal of sentencing councils was to reduce inter-judge disparity.²¹⁴ Sentencing councils provided the sentencing judge with detailed, case-specific information about how other judges would respond to each new set of facts. Participating judges saw the work of sentencing councils as an “educational process” in which judges could “pool[] [their] knowledge and experience and learn[] from each other.”²¹⁵ Sharing information about how other judges would handle the case, they predicted, “will likely have the effect of ameliorating the likelihood of sentence disparity.”²¹⁶

Consistent with the information sharing model, sentencing councils were voluntary in two ways. First, the recommendations of other judges at the sentencing council were merely advisory. The sentencing judge retained sole discretion to impose the final sentence.²¹⁷ To goal was to assist, not to restrain: “No attempt is made at these Councils to impose the will of one upon another.”²¹⁸ Second, in some districts,

²⁰⁸ Wolff, *supra* note 51, at ___.

²⁰⁹ Miller, *supra* note 181, at 129.

²¹⁰ Michael H. Tonry, *Sentencing Councils*, at 1483, 1483, in 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* (Sanford H. Kadish, ed. 1983).

²¹¹ Shari S. Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 *U. CHI. L. REV.* 109, 116-17 (1975).

²¹² Talbot Smith, *The Sentencing Council and the Problem of Disproportionate Sentences*, *THE PRACTICAL LAWYER*, Feb. 1965, at 12, 19-20.

²¹³ Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 *J. CRIM. L. & CRIMINOLOGY* 691, 697 (2010).

²¹⁴ Diamond & Zeisel, *supra* note 211, at 124; Tonry, *supra* note 210, at 1483.

²¹⁵ Smith, *supra* note 212, at 20.

²¹⁶ Committee on the Federal Courts, *Sentencing Practices in the Federal Courts in New York City*, 28 *REC. ASS'N BAR CITY OF N.Y.* 876, 881 (1973).

²¹⁷ Diamond & Zeisel, *supra* note 211, at 117; Committee on the Federal Courts, *supra* note 216, at 881.

²¹⁸ Smith, *supra* note 212, at 20.

participation in the sentencing council was itself optional, and not all judges elected to attend the meetings.²¹⁹

Participating judges raved.²²⁰ They found the discussions valuable, reporting that they frequently changed their views about the appropriate sentence in response to their colleagues' advice.²²¹ The discussions, by all accounts, were informal and friendly. Outside observers were uniformly impressed with the seriousness and care with which sentencing councils approached each case.²²²

Yet two major research projects found that sentencing councils did not meaningfully reduce inter-judge sentencing disparity.²²³ Shari Diamond and Hans Zeisel studied the effects of sentencing councils in Brooklyn and Chicago by comparing sentencing judges' initial recommendations with their final sentences. They found strong evidence of inter-judge disparity in the initial recommendations, with judges apart on average by 36.7% in Chicago and 45.5% in Brooklyn.²²⁴ In their evaluation of cases, the data showed, "some judges are clearly more severe than others."²²⁵ But sentencing councils alleviated only a small fraction of that disparity. Diamond and Zeisel found that final sentences imposed, after full discussion with the sentencing council, remained apart on average by 35.4% in Chicago and 41.1% in Brooklyn.²²⁶ They estimated, therefore, that sentencing councils reduced inter-judge disparity by just 4% to 10%.²²⁷

Another study, commissioned by the Federal Judicial Center (FJC), examined the effects of sentencing councils in Detroit, Chicago, and Brooklyn.²²⁸ Focusing on five offense types, the FJC study compared levels of inter-judge disparity in the years before and after the establishment of the sentencing council. The results were discouraging.²²⁹ In every district, inter-judge disparity actually increased for some offenses, even as it decreased for others.²³⁰ Based on the mixed results, the study concluded that "councils may increase disparity as frequently as they decrease it."²³¹

The experiment did not last. By the mid-1980s, sentencing councils in the federal courts were abandoned.

²¹⁹ See Diamond & Zeisel, *supra* note 211, at 139-40 & Table 22.

²²⁰ Committee on the Federal Courts, *supra* note 216, at 881; Charles T. Hosner, *Group Procedures in Sentencing: A Decade of Practice*, 34 FED. PROBATION 18, 20 (1970); Smith, *supra* note 212, at 21; Theodore Levin, *Toward a More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499 (1966).

²²¹ Smith, *supra* note 212, at 19-20.

²²² Hosner, *supra* note 220, at 19.

²²³ Tonry, *supra* note 210, at 1484 (describing and evaluating both studies).

²²⁴ Diamond & Zeisel, *supra* note 211, at 123.

²²⁵ *Id.* at 123-24.

²²⁶ *Id.* at 145.

²²⁷ *Id.* at 147. Michael Tonry has urged caution in interpreting the Diamond and Zeisel study because it measured sentences using an "arbitrary point scale" that treated longer probationary sentences as the equivalent of short prison terms, and "[a] different arbitrary scale would have yielded different results." Tonry, *supra* note 210, at 1484. In a tautological sense, he is correct; of course using a different scale would produce "different results," expressed on the new scale. But neither Tonry nor any other researcher has concluded that a different scale would have altered Diamond and Zeisel's core finding that sentencing councils had a negligible effect on inter-judge sentencing disparity.

²²⁸ CHARLES D. PHILLIPS, SENTENCING COUNCILS IN THE FEDERAL COURTS: AN EVALUATION (1981).

²²⁹ *Id.* at xx.

²³⁰ *Id.* at 86-95.

²³¹ *Id.* at 94.

3. Lessons for the Information Sharing Model

The experiences of SISs and sentencing councils highlight some of the fundamental weaknesses of the information sharing model. Challenges in disseminating sentencing information have resulted in struggles, and even the collapse, of several SISs around the world. Both reform efforts also have suffered from voluntariness problems, with sentencing courts too often disregarding, ignoring, or rejecting the available information.

a. Information Dissemination

Strikingly, in jurisdictions in which SISs have struggled or even collapsed, the most frequently cited reasons have been practical difficulties with disseminating the information in a useful way. No system can survive for long if its users—judges and their court staff—find it cumbersome, confusing, or unhelpful.

Scotland’s SIS offers the clearest example. Judges themselves proposed the development of the system, as a tool to improve inter-judge consistency and rationality. They understood that the success of the project depended on a collective effort, since every narrative description they wrote would be added to a searchable database available to their colleagues. And they had strong practical incentives to make it work because the SIS was launched in part to short-circuit proposals for more intrusive reforms like sentencing guidelines.²³² Yet in just a few years the system fell into disuse, with judges rarely searching for relevant information about past sentencing practice.²³³

Complexity was one part of the problem. Although the system’s designers worked with judges in selecting search parameters, and boasted about the system’s ease of use and flexibility, judges reported that they found the system’s search tools frustrating.²³⁴ As system designers around the world have acknowledged, an SIS cannot remain neutral with respect to the factors that are most relevant at sentencing.²³⁵ Privileging some factors while excluding others inevitably discourages some users from accessing the available information.

Volume was another. In rolling out the Scottish SIS, system designers had to train judges never to enter more than a few parameters at once, because the system almost always returned too few cases.²³⁶ Other systems have encountered the opposite problem. Designers of a fledgling SIS in Israel declined to include “detailed descriptions” or even “summaries” of cases because, given the large number of results, “it was felt that judges would not take the time to read case descriptions.”²³⁷

Those problems can compound one another. Following the launch of the Scottish SIS, judges who found the system cumbersome and unhelpful did not always make time to enter detailed and accurate information about their sentences.²³⁸ Such shortcuts and errors made the system less useful, reinforcing *other* judges’ sense that the effort of

²³² Hutton, *supra* note 191, at 275.

²³³ SENTENCING COMMISSION FOR SCOTLAND, *supra* note 194, at 37.

²³⁴ Hutton & Tata, *supra* note 193.

²³⁵ Schild, *supra* note 84, at 132; Miller, *supra* note 181, at 134.

²³⁶ Lovegrove, *supra* note 90, at 37.

²³⁷ Schild, *supra* note 84, at 131.

²³⁸ SENTENCING COMMISSION FOR SCOTLAND, *supra* note 194, at 37.

producing detailed opinions was a waste of time and energy.²³⁹ The result was a vicious cycle in which the system gradually atrophied and ultimately collapsed.

Privacy concerns also have hampered the success of SISs. With few exceptions, SISs have been made available only to judges and court personnel, with no access to defense counsel, prosecutors, or the public.²⁴⁰ In part, not to the judges' credit, that kind of secrecy was designed to shield sentencing decisions from public scrutiny and criticism.²⁴¹ But in part it also reflected legitimate concerns about disclosing deeply personal information about the lives of offenders, family members, and victims.²⁴² In the handful of systems that are publicly accessible, privacy concerns do not arise either because the information is expressed entirely in the aggregate (as in Missouri), or because records are anonymous and little detailed case-specific information is available (as in Ireland).

b. Voluntariness

The abandonment of sentencing councils and the struggles of SISs also undermine a key assumption of the information sharing model. For information sharing to reduce inter-judge disparity and promote rationality, judges must respond to information about previous sentences in similar cases by conforming their decisions to those of their colleagues. The history of these reform efforts makes clear that judges frequently respond differently, by disregarding the information, ignoring it entirely, or even shifting to a more extreme position.

Researchers cited voluntariness as the principal reason that sentencing councils failed to meaningfully reduce inter-judge disparity. Michael Tonry reasoned that sentencing councils had little effect because “[t]he council recommendations are only advisory,” leaving judges who disagree with their colleagues free to disregard the advice.²⁴³ The FJC study concurred, noting that it should come as no surprise that a strictly voluntary “self-reform” that preserved “broad discretion” for sentencing judges did not meaningfully affect sentencing outcomes.²⁴⁴ Surprisingly, even where judges consciously sought out the advice of their colleagues—in courts where participation in the sentencing council was optional—the effects on inter-judge disparity were negligible.²⁴⁵ As long as the sentencing judge had the final word, sentencing councils had little effect.²⁴⁶

In addition, as the experiences of SISs and sentencing councils make clear, judges may decline to look up the information in the first place. The Canadian SIS fell into

²³⁹ *Id.* at 37.

²⁴⁰ Miller, *Map and Compass*, *supra* note 1, at 1388 (noting that Scottish judges have been “stingy” about disclosing information from the SIS); Frieberg, *supra* note 202, at 127 (noting that the New South Wales SIS “remains inaccessible to a broader audience,” although some data on federal sentencing in Australia recently became available because of “external prodding”).

²⁴¹ Miller, *Map and Compass*, *supra* note 1, at 1388.

²⁴² See *supra* notes 106-110 and accompanying text (discussing the confidentiality of presentence reports).

²⁴³ Tonry, *supra* note 210, at 1484.

²⁴⁴ PHILLIPS, *supra* note 228, at 100.

²⁴⁵ Diamond & Zeisel, *supra* note 211, at 145, 147.

²⁴⁶ PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 18 (1977).

disuse because, in the words of the chief designer, “[j]udges do not, as a rule, care to know what sentences other judges are handing down in comparable cases.”²⁴⁷ Particularly troubling is evidence that Canadian judges were especially unlikely to consult the SIS “if they knew (or thought) that these other judges have different approaches” than their own.²⁴⁸ That kind of reluctance prevents the information sharing model from reducing inter-judge disparity in precisely the category of cases where it holds the most promise. Similarly, participation in sentencing councils was spotty when judges’ attendance was optional. In the Northern District of Illinois, five of the court’s 14 judges regularly participated in the sentencing council, bringing more than 60% of their cases before the sentencing council.²⁴⁹ But six of the court’s judges elected never to participate, and three others participated only occasionally, bringing less than 50% of their cases before the council.²⁵⁰ The result was that only one-third of criminal sentences benefited from the council’s advice.²⁵¹ Some judges resisted the procedure on the ground that it would intrude upon their independent judgment at sentencing, and that it would be a “waste of time.”²⁵²

Experience with SISs also point to the risk of confirmation bias when consulting a large body of sentencing information. Consider the operation of the New South Wales system. Judges can enter a few search parameters and generate a histogram that shows a distribution of prior sentences.²⁵³ For example, for offenders (1) under the age of 21, who (2) plead guilty, (3) to driving while intoxicated, the SIS may report that 29% of offenders received probationary sentences, 24% received sentences of imprisonment, 21% received intermediate sentences, and 15% received compound sentences.²⁵⁴ In theory, judges could review the written opinions in each of the approximately 120 cases summarized in the chart, attentive to factors that may be present in a new case that fits those criteria. Equally likely, however, given the volume of matching cases and limited time, judges could focus on cases that confirm the result they already have in mind.

Attitude polarization is also a risk, according to the research. The FJC study of sentencing councils found troubling evidence that, at least for some offenses, the introduction of the councils coincided with an *increase* in inter-judge disparity.²⁵⁵ The study speculated that when judges at a sentencing council “meet, for the first time, opposition to their ideas” about sentencing, the experience “may result in movement to a more extreme position.”²⁵⁶ Alternatively, judges with more extreme views “may convince moderate judges to follow their more lenient or harsh sentencing patterns.”²⁵⁷ Better information about other judges’ actions, in other words, did not necessarily bring

²⁴⁷ Miller, *supra* note 181, at 130 (quoting Anthony Doob, *Sentencing Aids: Final Report* (1989) (unpublished manuscript)).

²⁴⁸ *Id.*

²⁴⁹ See Diamond & Zeisel, *supra* note 211, at 139-40 & Table 22.

²⁵⁰ See *id.*

²⁵¹ *Id.* at 142-43.

²⁵² Committee on the Federal Courts, *supra* note 216, at 881-82 (describing Judge Marvin Frankel’s hypothesis about the degree of resistance revealed by polls of federal judges).

²⁵³ See Potas et al., *supra* note 199, at 119.

²⁵⁴ *Id.* (showing an actual report from the New South Wales SIS with similar results).

²⁵⁵ See PHILLIPS, *supra* note 228, at 86-95.

²⁵⁶ *Id.* at 94.

²⁵⁷ *Id.*

about consensus and greater inter-judge consistency. It sometimes had the opposite effect, serving as a “catalyst[] for the airing of latent disagreements.”²⁵⁸

The research thus undermines a key assumption of the information sharing model. As Marc Miller has observed, the power of sentencing information to reduce inter-judge disparity “depends on how judges use the information . . . to guide their own sentencing judgments.”²⁵⁹ The experiences of SISs and sentencing councils show that judges do not necessarily respond to better information in ways that promote inter-judge consistency and rationality.

IV. MAKING INFORMATION SHARING WORK

Based on new and existing research, there is ample reason for skepticism about the information sharing model. Fundamental weaknesses related to the collection, dissemination, and voluntariness of sentencing information make information sharing highly unattractive as an *alternative* to other structured sentencing models.

Yet there is also reason for optimism. Information sharing at sentencing may yet perform a valuable function as a *supplement* to other reforms. Despite the mixed track record of previous experiments, it is entirely possible that information sharing can contribute to inter-judge consistency and rationality under the right conditions. In particular, two features of a sentencing system that can improve the effectiveness of information sharing: (1) a system of sentencing guidelines, whether advisory or mandatory; and (2) open access to the store of sentencing information for defense counsel and prosecutors. Each of those features, the preceding discussion suggests, helps to address key weaknesses of the information sharing model.

A. Sentencing Guidelines

In light of its weaknesses, best way to implement the information sharing model may be as an adjunct to a system of sentencing guidelines. As explained above, under a typical set of sentencing guidelines, the judge must make a series of factual determinations about the offense and offender. Based on those facts, the guidelines specify a sentence or a sentencing range. Depending on the jurisdiction, that range may be binding in the absence of extraordinary circumstances, or it may be merely advisory.²⁶⁰ A set of sentencing guidelines, whether mandatory or advisory, can make information sharing more effective in promoting inter-judge consistency and rationality. That is because guidelines perform several functions—defining terms, operationalizing complex factors, and channeling the attention of sentencing courts—that make information sharing easier.

First, sentencing guidelines define terms and create a shared vocabulary for discussions of sentencing. As Marc Miller has explained, sentencing guidelines “create a language of familiar terms and concepts” among sentencing judges, and that kind of “social language” makes it easier for sentencing judges to understand one another.²⁶¹ Guideline systems may define and popularize terms of art like “vulnerable victim,”

²⁵⁸ *Id.* at 100.

²⁵⁹ See Miller, *Map and Compass*, *supra* note 1, at 1377-78.

²⁶⁰ See *supra* notes 28-29 and accompanying text.

²⁶¹ Miller, *Map and Compass*, *supra* note 1, at 1372-73.

“substantial assistance,” or “role in the offense,” for example, that offer sentencing judges a succinct way of describing otherwise imprecise categories and concepts.²⁶²

Second, systems of sentencing guidelines “operationalize” complex sentencing factors like criminal history. Calculating a guideline sentencing range may depend, for example, on whether the offender has a previous criminal record. Or it may depend on the number of prior convictions, or the seriousness of those convictions. Or it may depend on an elaborate scoring system that awards more “criminal history points” for some kinds of offenses (e.g. felonies or violent crimes) than for others (e.g. juvenile offenses or older convictions).²⁶³ In the same manner, guidelines systems operationalize a whole host of other factors, such as the offender’s mental state, role in the offense, and the harm caused to victims. It does not matter, for information sharing purposes, whether the guidelines consider factors in a sensible or principled way. Simply by choosing one method of taking those factors into account, a system of guidelines sets a useful baseline.

Third, sentencing guidelines channel the court’s attention to a standard set of facts and considerations. Some systems, like the U.S. Sentencing Guidelines, attempt to account for a dizzying number of factors, forcing judges to engage in extensive and intricate factfinding.²⁶⁴ Other systems are much simpler, taking into account fewer facts and circumstances and making more general recommendations. But all guidelines systems focus the court’s attention on some set of especially salient offense and offender information. Even if the guideline sentencing range is advisory, the process of determining that range is important.

Those basic functions of a guidelines system help to address some of the major weaknesses of the information sharing model. One set of challenges relates to the collection of sentencing information. The complexity and volume of sentencing decisions makes it difficult to collect written, comprehensive, and representative sentencing information.²⁶⁵ By channeling the efforts of sentencing courts, and requiring that the judge always address some standard set of questions, sentencing guidelines ensure the availability of a basic level of information about every case. That minimum level of information reduces (although it certainly does not eliminate) the risk that non-comprehensive information might mislead future sentencing courts and thereby generate inter-judge disparity. Guidelines also guard against a skewed and non-representative pool of cases because the standard set of findings is required from all judges and in all kinds of cases. It is also possible that routinely answering a standard set of questions may also change sentencing judges’ habits in a way that encourages more written opinions, although overly complex guidelines may have the opposite effect.

Sentencing guidelines also help to address challenges with the dissemination of sentencing information.²⁶⁶ By operationalizing important sentencing factors, sentencing guidelines provide a baseline set of categories and concepts that judges can use when searching for similar and relevant cases. In addition, by supplying a common vocabulary among sentencing judges, guidelines can make search results easier to understand, reduce

²⁶² *Id.* at 1373.

²⁶³ *See, e.g.*, U.S.S.G. §§ 4A1.2 to 4A1.3 (prescribing rules for calculating criminal history category under the federal Sentencing Guidelines).

²⁶⁴ *See* Luna, *supra* note 31, at 12 (joking that the U.S. Sentencing Guidelines “make the federal tax code look like Reader’s Digest”).

²⁶⁵ *See supra* Part II.A.

²⁶⁶ *See supra* Part II.B.2.

errors based on inconsistent terminology, and generally reduce the risk of user frustration. Of course, a sentencing information system need not simply replicate the categories and concepts developed in the guidelines.²⁶⁷ Still, a framework of sentencing guidelines, with its shared language and baseline understanding of key factors, improves the chances that judges can use the information effectively.

Admittedly, to date no research has established that information sharing can reduce inter-judge disparity or promote rationality. At the same time, however, the experiences of SISs and sentencing councils do not foreclose the possibility of successful information sharing within a system of sentencing guidelines. In each of the jurisdictions where SISs have failed, they were “stand-alone” systems in which judges received little guidance about sentencing.²⁶⁸ Similarly, sentencing councils operated in a pre-reform era in federal court, with little external guidance for sentencing judges.²⁶⁹ Perhaps it is no coincidence that the most successful information sharing experiments, such as the SIS developed in New South Wales, have survived alongside other forms of structured sentencing like guideline judgments and standard non-parole periods.²⁷⁰ Because of the basic functions they perform, a system of sentencing guidelines likely would improve the chances that information sharing can succeed.

B. *Open Access*

Another way to improve the information sharing model is to publicize the store of sentencing information. The body of written opinions and statistical information, along with any specialized search tools, could be made available to defense counsel and prosecutors—not just the court. Publicly sharing information about sentencing would have obvious benefits for the criminal justice system as a whole.²⁷¹ But open access would be of particular value in overcoming challenges related to voluntariness and the dissemination of sentencing information.

As discussed above, one major obstacle to effective information sharing at sentencing is time. Sentencing judges cannot afford routinely to sift through mountains of information about previous cases to ensure that their decisions are compatible with those of their colleagues. The experiences of sentencing councils and SISs reveal when judges decline to consult available information, they frequently cite time constraints as a primary reason. The complexity and volume of sentencing decisions, which make it difficult to design user-friendly search tools, can compound the problem by making judges less inclined to track down relevant cases.

Open access would ease the burden on judges by transferring much of the case-matching legwork to the lawyers. In their briefs and at sentencing hearing, the parties could take the lead in identifying potentially relevant cases. That would reduce the risk

²⁶⁷ Cf. *id.* at 143-46 (arguing that SISs need not be merely duplicative of sentencing guidelines).

²⁶⁸ Miller, *supra* note 181, at 131.

²⁶⁹ Tonry, *supra* note 210, at 1484; Steve Y. Koh, Note, *Reestablishing the Federal Judge’s Role in Sentencing*, 101 YALE L.J. 1109, 1129 (1992)

²⁷⁰ See *supra* notes 201-205 and accompanying text.

²⁷¹ Miller, *supra* note 181, at 146-48 (urging the development of “democratic, participatory, transparent” sentencing information systems available to “lawyers, judges, scholars, and reformers” alike).

of errors in identifying relevant cases, thereby promoting inter-judge consistency.²⁷² Although open access would mean more work for counsel, there is reason to think that lawyers would avail themselves of the information. A store of information about previous sentences would be one more weapon in counsel's arsenal in preparation for sentencing. As an example, a decade ago, the Office of the Federal Public Defender in the District of Massachusetts began compiling a publicly available collection of downward departure decisions, sorted by offense type and judge, as a way to improve advocacy on behalf of criminal defendants.²⁷³

At the same time, open access would increase the likelihood that the court will take the information seriously. At sentencing, as in other contexts, judges make a point of responding to the specific contentions raised by the parties. Although the information sharing model by design does not compel judges to give weight to any particular factors at sentencing, even judges who would not independently seek out information about previous sentences might respond to a well-formed argument by the prosecutor or defense counsel.

In addition, open access could promote rationality by improving the quality of the judge's reasoning. Vigorous advocacy is a great asset to a sentencing court. The parties can draw parallels between cases, debate possible points of distinction, and urge the judge to accept or reject the reasoning of their colleagues. It is possible, of course, that the parties might use the store of sentencing information to stake out extreme positions that provide little help to the court.²⁷⁴ Yet adversarial testing of those arguments in principle should help judges to reach more thoughtful and principled outcomes.

The major drawback to open access is the privacy of sentencing information. Written opinions and other sentencing documents may disclose deeply personal information about offenders, victims, family members, and witnesses. For offenders and witnesses who cooperate with the government, open access might even create a risk of violent retaliation.²⁷⁵

It may be possible to ameliorate those privacy concerns by partially withholding or redacting sensitive information made available to others.²⁷⁶ But too much redaction could defeat the purpose, undermining the effectiveness of the information sharing model. Because personal information often plays a critical role in sentencing outcomes, concealing that information may render written opinions unhelpful, or even incomprehensible, to future judges and lawyers.

Although there is no easy way of determining how to withhold or redact information, two strategies might prove useful. First, because most sentencing information does not raise serious privacy concerns, case information could be presumed

²⁷² Cf. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1178-79 (2001) (proposing greater procedural safeguards for disputed facts at sentencing, on the ground that adversarial testing will improve accuracy).

²⁷³ Email message from Amy Baron-Evans, Aug. 15, 2011 (on file with author).

²⁷⁴ In civil actions for punitive damages, for example, plaintiffs and defendants notoriously draw comparisons with cases involving either extremely high awards or no award at all, sometimes leaving trial courts with little discussion of "middle ground" cases that might serve as better comparisons.

²⁷⁵ See *supra* Part II.B.1.

²⁷⁶ See Paul G. Cassell, *Treating Crime Victims Fairly*, 2007 UTAH L. REV. 861, 934, 970 (2007) (discussing methods of protecting privacy while sharing relevant portions of presentence reports with victims).

accessible unless the parties or the court request that it be sealed. Defense attorneys and prosecutors would have incentives not to overuse that power, since they stand to benefit from more complete information in future cases. Second, the system could be designed to withhold private information only from the parties, while allowing judges access to complete information. That way, even if counsel does not fully understand the facts and reasoning of a previous decision, the sentencing judge can take them into account.

Neither a system of sentencing guidelines nor open access to sentencing information can guarantee the success of the information sharing model. Its fundamental weaknesses, along with the poor track record of previous reform efforts, provide ample reason for skepticism. Yet sentencing guidelines and open access would help to address challenges related to the collection, dissemination, and voluntariness of sentencing information. They give the information sharing model its best chance to succeed.

CONCLUSION

The information sharing model is often advertised as a method of reducing inter-judge disparity and promoting rationality in sentencing law. The argument is that by assembling a body of written opinions and other information about past sentences, judges can align their sentences with those of their colleagues.

This Article has identified three fundamental weaknesses in that model. First, there are daunting information collection challenges. Because of the complexity and volume of sentencing decisions, it is difficult for courts to generate sentencing information that is written, comprehensive, and representative. Second, there are challenges in disseminating sentencing information in a useful way. Privacy interests on the part of offenders and others raise serious concerns. In addition, as a practical matter, it is difficult to make the large volume of relevant information available to judges in a useful format. Third, the voluntariness of the information sharing model is an important drawback. Judges retain the discretion to ignore or reject colleagues' reasoning, undermining inter-judge consistency and rationality.

New and existing research reinforces each of those weaknesses. The Article contains an original study of information-collection practices in the only federal court that makes key sentencing documents public. It finds that, despite mandatory reporting requirements, the court rarely provides the kind of written explanation needed to support the information sharing model. The history of two other reform efforts, sentencing information systems and sentencing councils, reveals how voluntariness and challenges with information dissemination can frustrate information sharing at sentencing. As the FJC study of sentencing councils concluded, history is discouraging for "those who see disparity as a problem that can be solved by better communication among judges."²⁷⁷

More than anything, this "skeptic's guide" makes a plea for realism about what the information sharing model can accomplish. But information sharing at sentencing is in its infancy, and the claim here is therefore modest. There is reason for skepticism that information sharing can serve as an *alternative* to other structured sentencing reforms aimed at improving inter-judge consistency and rationality. But information sharing has real potential as a *supplement* to other efforts. In particular, its odds of success would

²⁷⁷ *Id.* at 100.

greatly improve if implemented as part of a system of sentencing guidelines, and with open access to the information for defense counsel and prosecutors.

APPENDIX

This Appendix provides additional details concerning case selection and coding for the empirical study, along with detailed regression results.

A. Case Selection

The study examines Statement of Reasons documents (SORs) for sentences imposed in the United States District Court for the District of Massachusetts in fiscal year 2006, which runs from October 1, 2005 to September 30, 2006. As noted above, the District of Massachusetts is the only federal district court that makes the documents public, by posting them on the PACER (Public Access to Court Electronic Records) system as part of the case docket.²⁷⁸

The SORs were collected as part of a related study of inter-judge sentencing disparity, and the Technical Appendix to that article provides background information.²⁷⁹ PACER supports case searches by filing date and closing date, but not by the date of sentencing.²⁸⁰ To identify cases that may include a sentence imposed in fiscal year 2006, the initial search extended to every criminal case filed in the district between January 1, 2000, and June 30, 2006.²⁸¹ The vast majority of results, including dismissals, jurisdictional transfers, and acquittals, were ignored because they did not produce a sentence during the relevant period.

The result was a body of 411 SORs for sentences imposed in fiscal year 2006. The Sentencing Commission reports that the district as a whole submitted documentation for 512 sentences that year.²⁸² The SORs examined here therefore represent 80.3% of the total. There are several possible explanations for the missing SORs. First, although the District of Massachusetts generally makes SORs available on PACER, in some cases the SOR is unavailable, or the docket indicates that the SOR is sealed. Judges retain the power to seal the SOR for case-specific reasons, such as the protection of offenders or witnesses who have cooperated with the government.²⁸³ Second, cases filed before 2000 with a sentence in 2006—for example, cases extended by appeal and remand or complex conspiracy cases with many defendants—would have escaped the initial search. Thus, although the available set of 411 documents includes more than 80% of the total, it is not complete.

Nor are the available SORs necessarily a random sample of the total. It is possible that SORs that do not appear on PACER differ in important ways, such as the level of written explanation provided, from the SORs that are available. Fortunately, as Table A1 indicates, the SORs available on PACER differ only slightly from the total population of SORs submitted to the Commission:

²⁷⁸ See *supra* notes 151-153 and accompanying text.

²⁷⁹ See Scott, *supra* note 14, at 54-55.

²⁸⁰ The date of sentencing rarely matches the closing date because of multiple-defendant cases, appeals, supervised release hearings, and other postsentence filings.

²⁸¹ PACER's "Reports" tool allows searches by "Case Type," including criminal cases. The search included pending and terminated defendants, but excluded cases involving fugitive defendants.

²⁸² See U.S. SENTENCING COMMISSION, SOURCEBOOK FOR SENTENCING STATISTICS 2006, Table 1 (2006) (reporting a total of 512 Statements of Reasons received from the District of Massachusetts).

²⁸³ *United States v. Green*, 346 F. Supp. 2d 259, 278 n.66 (D. Mass. 2004) (Young, C.J.) (citing Minutes of the Court Meeting (D. Mass.), Sept. 4, 2001, at 4).

**Table A1: Comparison of All SORs and Available SORs
District of Massachusetts, FY 2006²⁸⁴**

	All SORs FY 2006	Available on PACER
Total Cases	512	411
Imprisonment Ordered	87.6%	81.8%
Average Prison Sentence	73.0 months	78.1 months
Within Guideline Range	74.1%	67.4%
Below Guideline Range	24.8%	29.7%
Above Guideline Range	1.2%	2.9%

Although modest, potential differences between the available SORs on PACER and the full pool of SORs submitted to the Commission are a reason for caution.

B. Coding

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

In some cases, the SOR contains only a generic statement with no discussion of the particular offense or offender. As an example, some SORs state: “I have considered the factors set forth in § 3553(a) and I have imposed a sentence sufficient, but not greater than necessary, to achieve those purposes.”²⁸⁵ Because generic statements of that kind merely restate the judge’s task, without providing any explanation of the sentence imposed, they were coded as zero sentences of explanatory text.

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

The study reports the results of two logistic regression models, each based on a different dependent variable. Logistic regression was necessary because both dependent variables are binary rather than normally distributed. The first is whether the SOR contains *any* written explanation of the sentence. If the SOR contains zero sentences of explanatory text, then the dependent variable is coded as zero. If the SOR contains one

²⁸⁴ See U.S. SENTENCING COMMISSION, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, tbl. MA-06 (2006).

²⁸⁵ The statement closely tracks 18 U.S.C. § 3553(a)(1), which sets out factors that a judge must consider at sentencing.

or more sentences of explanatory text, then the dependent variable is coded as one. A mark in a checkbox was not coded as a form of written explanation.

The second is whether the SOR contains a “long” written explanation, consisting of at least 10 sentences of text. That cutoff corresponds to roughly one page of narrative description, and was considered a reasonable proxy for the kind of explanation sufficient to provide meaningful information about the reasons for the sentence to another judge. If the SOR contains 10 or more sentences of explanatory text, then the dependent variable is coded as one. If the SOR contains fewer than nine sentences, then the dependent variable is coded as zero.

Both models include the following independent variables:

(1) Sentence length, in months. Sentence length is coded as length of the term of imprisonment, measured in months. Consistent with the Sentencing Commission’s practice, sentences of probation were coded as zero months of imprisonment.²⁸⁶

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

(3) Within-range sentences of more than 24 months, an indicator. This dummy variable was coded because the SOR form requires a written narrative explanation for that category of sentences, but not for other within-range sentences.

(4) Sentence of time served, and indicator. Sentences of “time served” present special challenges. In the federal system, offenders may receive credit for time served in official detention prior to sentencing.²⁸⁷ It is common for a judge to impose a sentence of time served, allowing the offender to be released immediately. The sentence is not zero months of imprisonment because the offender is credited by statute for serving time. But SOR forms sometimes list the sentence simply as “time served,” with no indication of the length of presentence detention for which the offender has been credited. Lacking more precise information, sentences of time served were coded as zero months of imprisonment, but an additional dummy indicator was added to permit analysis of those cases.

In addition, one model uses dummy variables that capture the identity of the sentencing judge. To avoid the distorting effects of judges with low caseloads, such as those in senior status, those models exclude sentences by judges with fewer than 15 sentences during the fiscal year.²⁸⁸ Following standard practice for categorical variables, one judge was omitted as a reference category. The second model, based on long explanations, does not include judge dummy variables because too many judges submitted no long explanations during the year of the study.

C. Regression Results

The first model describes factors that predict whether the Statement of Reasons contains *any* written explanation. Table 1 reports the results:

²⁸⁶ See STITH & CABRANES, *supra* note 3, at 62 (same convention).

²⁸⁷ See 18 U.S.C. § 3585(b).

²⁸⁸ Cf. James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 288 (1999) (limiting analysis of inter-judge disparity to judges who imposed at least 30 cases in a two-year period).

**Table 1: Logistic Regression Model
Written Explanation Provided**

Variable	Coefficient	Standard Error	Significance
(Constant)	-1.153	0.676	.088
Sentence Length	0.007	0.002	.001*
Sentence of Time Served	0.409	0.900	.649
Non-Guideline Sentence	3.320	0.392	<.001*
Within-Range Over 24 Months	0.719	0.579	.214
Judge Identity (categorical)			.001*

Model significance: <.001*
Chi-square: 183.866

* Significant at the .05 level
n = 398

The model indicates that some kinds of sentences are more likely to produce a written explanation than others. Non-guideline sentences, longer terms of imprisonment, and the identity of the judge are significantly correlated with written explanations. A within-range sentence of more than 24 months, however, is not a significant predictor of a written explanation, after controlling for other factors. That casts doubt on the effectiveness of SOR form's instructions, which require a written explanation in those circumstances.

The second model describes factors that predict whether the Statement of Reasons contains a *long* written explanation of 10 or more sentences. Table 2 reports the results:

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

Variable	Coefficient	Standard Error	Significance
(Constant)	-4.495	1.006	<.001*
Sentence Length	-0.003	0.004	.482
Non-Guideline Sentence	1.086	0.519	.037*
Within-Range Over 24 Months	1.338	1.124	.234

Model significance: <.001*
Chi-square: 11.185

* Significant at the .05 level
n = 408

Non-guideline sentences are significantly correlated with long explanations. Neither sentence length nor within-range sentences above 24 months, however, is a statistically significant predictor of a long explanation.