

KNOWLEDGE

“THE WISDOM WE HAVE LOST”: SENTENCING INFORMATION AND ITS USES

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Where is the wisdom we have lost in knowledge?
Where is the knowledge we have lost in information?
– T.S. Eliot¹

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INTRODUCTION

In the Sentencing Reform Act of 1984 (SRA) Congress envisioned federal sentencing with a technocratic cast, with policies designed and revised based on “advancement in knowledge of human behavior as it relates to the criminal justice process.”² The value of data and expertise in the sentencing enterprise

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1. T.S. Eliot, *Choruses from “The Rock”* (1934), reprinted in T.S. ELIOT, COLLECTED POEMS 1909-1962, at 148-49 (1963).

2. 28 U.S.C. § 991(b)(1)(C) (2005).

jumps off the pages of the statute.³ Congress directed the U.S. Sentencing Commission to “establish a research and development [R&D] program” and to serve as a “clearinghouse and information center for the collection, preparation, and dissemination of information on Federal sentencing practices.”⁴ One key activity of this sentencing R&D program was to “collect systematically” various forms of sentencing data and to publish those data.⁵

Who would use all of this sentencing information? Most of the statutory provisions and the relevant legislative history point towards one primary user: the Sentencing Commission. Congress did not envision the Commission as the only user of the information, for the statute labeled the Commission as a “clearinghouse” and an “information center” and gave it data publication duties. Nevertheless, the statute includes specific directives to the Commission—and only to the Commission—about how it should use sentencing data. The external uses of the data stored in the “clearinghouse” remain unspecified, and the potential users of the data remain unnamed in the statute.

The last thirty-five years of sentencing reform have generated a lot of data. They have also generated a good bit of knowledge and, perhaps, a measure of wisdom. Both federal and state experiences in sentencing over the last three decades suggest that sentencing data and knowledge have the most impact—and most often lead to wisdom—when they are collected and analyzed with particular uses and users in mind.

Ironically, greater reliance on data and expertise can democratize the making and testing of sentencing policy. When data are collected and published with many different users in mind, they all can contribute as sentencing practices take shape. A variety of participants in the sentencing process can join the Commission as creators of sentencing wisdom, including Congress, state legislatures, state sentencing commissions, sentencing judges, appellate judges, prosecutors, defense attorneys, probation officers, and scholars. One of the central lessons learned from thirty-five years of structured-sentencing law is that input from a broader range of participants makes a system more durable

3. Sentencing Reform Act of 1984, Pub. L. No. 98-472, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in various sections of 18 and 28 U.S.C.). See generally Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CAL. L. REV. 1 (1991).

4. 28 U.S.C. § 995(a)(12)(A) (2005); see also Charles Loeffler, *An Overview of U.S. Sentencing Commission Data*, 16 FED. SENT'G REP. 14 (2003).

5. 28 U.S.C. § 995(a)(13) (2005) (requiring the Commission to collect data obtained from studies, research, and the empirical experience of public and private agencies concerning the sentencing process); *id.* § 995(a)(14) (requiring the Commission to publish data concerning the sentencing process); *id.* § 995(a)(15) (requiring the Commission to collect and disseminate information concerning sentences actually imposed); *id.* § 995(a)(16) (requiring the Commission to collect and disseminate information regarding effectiveness of sentences imposed).

and balanced.⁶

We believe that Congress can improve the federal sentencing system by directing the U.S. Sentencing Commission to provide better and more timely information and to link that information explicitly to a broader range of specified users and uses. Because rulemaking and research may have become incompatible tasks in the federal sentencing context, perhaps Congress should separate these functions and transfer the responsibilities for national data collection, dissemination, and research to a separate National Sentencing Institute, ideally to be located in the judicial branch. Such a separation of functions would parallel the separation of federal prosecution policy and federal crime data collection and distribution into different units within the U.S. Department of Justice.

An expanding range of *uses* for sentencing data also has implications for the *sources* of those data and analyses. The Commission has been too parochial about sentencing data and research. Over the past thirty-five years dozens of structured-sentencing experiments have emerged at the state level throughout the United States. Yet these experiments have been isolated from each other, and from the federal system, so that lessons drawn from the states' experiences have spread too slowly. As in many areas of criminal justice (as with key aspects of public health, the environment, and the economy), there is a critical federal role to play in creating national knowledge. That federal role often takes the form of encouraging the collection of *comparable* data from state actors. Although no single state has the incentive to pay for standardized collection, the widespread benefits to all jurisdictions from such efforts make this an ideal target for modest federal funding.

I. 1984: A KNOWLEDGE-DRIVEN RULEMAKER

The marching orders that Congress gave to the Commission in 1984 were quite detailed and hopeful about the role of knowledge in sentencing. The SRA instructed the Commission to base its new sentencing guidelines and policy statements on specialized knowledge. The statute directed the Commission to ascertain average sentences imposed and served under old federal law and to use these data as a "starting point" in the creation of the Federal Sentencing Guidelines.⁷ Once the Guidelines were drafted, the SRA called for the Commission to "develop means of *measuring* the degree to which the sentencing, penal, and correctional practices are effective in meeting the

6. See Frank O. Bowman, III, *The Failure of the Federal Sentencing System: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211 (2004) [hereinafter Miller, *Domination*]; Franklin R. Zimring, *Making the Punishment Fit the Crime: A Consumer's Guide to Sentencing Reform*, in THE PURSUIT OF CRIMINAL JUSTICE: ESSAYS FROM THE CHICAGO CENTER (Gordon Hawkins & Franklin Zimring eds., 1984).

7. 28 U.S.C. § 994(m) (2005).

purposes of sentencing.”⁸

The Commission never made much headway on this statutory duty to measure the effectiveness of sentences, but it did faithfully carry out its ongoing data reporting chores. The Commission and its staff now create valuable annual statistical reports about federal sentencing practices,⁹ and they regularly deliver more detailed case-level sentencing data sets to an interuniversity data consortium that is nominally accessible to the public, though in practice prohibitively expensive and difficult to use.¹⁰ The Commission staff also evaluates high-profile sentencing practices from time to time.¹¹

The statute goes beyond the collection and publication of data, giving a prominent role to experts and to system participants during the Commission’s periodic review and revision of the existing Guidelines. The Commission is to formulate any needed revisions in light of “comments and data coming to its attention,” after consulting “authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system.”¹²

This vision of a Sentencing Commission that “consults” with authorities to create sentencing rules that reflect knowledge and experience has several distinct components. Some aspects of a genuine consultation have developed well over the last fifteen years, while others have not.

One aspect of a successful consultation is the willingness of an agency to *receive* comments and other input from interested parties, particularly those

8. *Id.* § 991(b)(2) (emphasis added).

9. See U.S. SENTENCING COMM’N, ANNUAL REPORT (2002), <http://www.ussc.gov/ANNRPT/2002/ar02toc.htm> (last visited Aug. 24, 2005). Early in 2005, the Commission released preliminary statistics tracking aspects of federal sentencing after the Supreme Court’s decision in *Booker v. United States*, 125 S. Ct. 738 (2005). See U.S. SENTENCING COMM’N SPECIAL POST-BOOKER CODING PROJECT, CASES SENTENCED SUBSEQUENT TO U.S. V. BOOKER (2005) (reporting data as of Aug. 3, 2005), http://www.ussc.gov/Blakely/PostBooker_082305.pdf (last visited Aug. 25, 2005).

10. The data are housed at the Inter-University Consortium of Political and Social Research, based at the University of Michigan and are available for a substantial institutional access fee. See Website of the Inter-University Consortium of Political and Social Research, <http://www.icpsr.umich.edu/> (last visited Sept. 25, 2005); see also Marc Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Sentencing Reform*, 105 COLUM. L. REV. 1351 (2005) [hereinafter Miller, *Compass*].

11. See U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINE SENTENCING (2004) [hereinafter U.S. SENTENCING COMM’N, FIFTEEN-YEAR REPORT], <http://www.ussc.gov/15year/15year.htm> (last visited Aug. 25, 2005); see also U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY (2002), http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (last visited Aug. 25, 2005); U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991), http://www.ussc.gov/r_congress/manmin.pdf (last visited Aug. 25, 2005).

12. 28 U.S.C. § 994(o) (2005) (calling on the Probation System, the Bureau of Prisons, the Judicial Conference, and the Criminal Division of the Department of Justice to submit “pertinent” observations, comments, or questions and to assess the Commission’s work).

with specialized knowledge.¹³ On this score, the Commission has performed reasonably well. It regularly receives commentary from advisory groups already in existence, including the Judicial Conference of the United States, various lawyer associations, defense organizations, business groups, and other organizations. The Commission also created its own “Practitioners’ Advisory Group” to comment on proposed changes to the Guidelines.¹⁴

It is not enough, however, for an agency merely to receive comments when they are offered. A healthy consultation between an agency and those on the outside also requires the agency to *respond* to the input. It must demonstrate to those who provide comments that their input routinely makes a difference.¹⁵

The Sentencing Commission can claim less success as a listener and respondent, and a leading example is its grudging response to feedback from judges. The Commission surveyed the views of judges about the operation of the Guidelines but then failed to respond concretely to criticisms that appeared in the survey responses. When judges make suggestions to the Commission in dicta of written opinions deciding a single case, they have no assurance that they are heard, for the Commission does not systematically collect or analyze these missives.

Finally, a fruitful consultation between an agency and outside experts requires the agency to *explain* the basis for its decision in enough detail so that an observer can determine whether the agency accounted for the available data and listened to the available expert advice.¹⁶ This is the most disappointing aspect of the Commission’s consulting function over the years. While the Commission has been a busy agency, producing 674 amendments and many reports over the years, it has developed weak habits of explanation and justification.¹⁷ In particular, the Commission has failed to explain rules or amendments in light of research findings.¹⁸

The Commission’s peremptory style made its decisions difficult to accept in a judicial world where legitimacy of a decision depends on the quality of explanation for the decision. When the Commission made it a priority early in

13. Cf. 5 U.S.C. § 553 (2005) (requiring administrative agencies during the rulemaking process to accept comments from interested parties).

14. See Deanell Reece Tacha, *Serving This Time: Examining the Federal Sentencing Guidelines After a Decade of Experience*, 62 MO. L. REV. 471, 482 (1997).

15. Cf. 5 U.S.C. § 553 (2005) (requiring agencies during rulemaking to publish a “concise general statement of basis and purpose” that responds to major comments received).

16. See RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 391-97 (4th ed. 2004). For a discussion of the interaction between data and value judgments in the choices and explanations of a sentencing commission, see Steven L. Chanenson, *Sentencing and Data: The Not-So-Odd Couple*, 16 FED. SENT’G REP. 1 (2003).

17. The explanations from the Sentencing Commission are strikingly terse when compared to the efforts by other federal agencies to explain their major proposed rules. See Wright, *supra* note 3.

18. See Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413 (1992).

its existence to settle “circuit splits” during its amendment process,¹⁹ it acted like a Supreme Court for Sentencing, but without issuing opinions or reasons.²⁰

The Sentencing Commission should go beyond accepting comments on its own proposals. Under a reasonable and good faith reading of the SRA, the Commission should have provided the public with relevant data in a format that makes it possible for outsiders to ask their own questions and to make their own proposals.²¹ The obligation to collect sentencing data and make them available might have encouraged a knowledge-driven Commission through tests of Commission hypotheses, the promulgation of competing theories, and policy and scholarly debate. In this conception of the role of data, the scientific method would be the tool that produced sentencing knowledge over time. The scientific method, however, depends on a decentralized set of investigators who frame the relevant questions for themselves, test theories, and replicate the results of others. A scientific sentencing policy would also need to be decentralized.

Unfortunately, that has not been the case. The Commission has withheld critical data components from outside view, most especially judge identifiers that would allow assessment of the interjudge disparity that helped lead to sentencing reform in the first place.²² The Commission has also released its data too slowly—data files are sometimes provided years after the end of the time period they cover.²³ Even more critically, the data files are provided in a form that not even a social-science maven could love.²⁴

The critical missing pieces from the original data, research, and information duties of the Commission have now come into focus, in light of

19. See U.S. SENTENCING COMM’N, ANNUAL REPORT 14-19 (1992) (discussing circuit splits); Daniel J. Freed & Nora Demleitner, *Varieties of Disparity: Sources and Responses*, 12 FED. SENT’G REP. 127 (1999) (questioning the Commission’s justification for prioritizing circuit splits); John P. Jurden, *United States v. Muschik: An Administrative Law Critique of the Federal Sentencing Guidelines’ Ability To Override Judicial Statutory Interpretations*, 80 MINN. L. REV. 469 (1995).

20. Justice Scalia suggested in *Mistretta v. United States* that the Commission reflected an unconstitutional delegation of power from Congress, and thus acted as a “junior-varsity Congress.” 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). An equally accurate description of the Commission in practice might call it a “junior-varsity Supreme Court.”

21. Cf. 5 U.S.C. § 553(d) (2005) (requiring that an agency must accept and respond to a petition for rulemaking on any topic within the agency’s jurisdiction).

22. See Paul J. Hofer & William P. Adams, *Using Data for Policymaking, Litigation, and Judging*, 16 FED. SENT’G REP. 8, 11-12 (2003); cf. Mark H. Bergstrom & Joseph Sabino Mistick, *The Pennsylvania Experience: Public Release of Judge-Specific Sentencing Data*, 16 FED. SENT’G REP. 57 (2003).

23. As of this writing in mid-2005, the Commission had posted data and issued Annual Reports covering activity through FY 2003. The Commission typically posts its data months (and sometimes more than a year) later than the judiciary or the Department of Justice. See, e.g., Miller, *Domination*, *supra* note 6.

24. See Miller, *Compass*, *supra* note 10, at 1356-58; Marc Miller, *Sentencing Reform: The Sentencing Information System Alternative to Sentencing Guidelines*, in *THE FUTURE OF IMPRISONMENT* (Michael Tonry ed., 2004) [hereinafter Miller, *Reform*].

twenty years of experience at the U.S. Sentencing Commission and more than fifteen years of experience with the Federal Guidelines. The missing concepts can be captured in three words: users, uses, and usability.

The drafters of the SRA had in mind one principal user of data and analysis—the Commission—and one principal use—rule development and revision. The collection and publication of data under the SRA, for example, is not directed to any specific users or to any particular use.²⁵ One lesson from the first generation of federal and state guidelines is that other users, a wider range of uses, and more usable information are possible and preferable.

II. USERS, USES, AND USABILITY OF DATA AND ANALYSIS

Who should use sentencing information, and for what purposes? The Commission should continue as a primary user of sentencing information. In addition, there are potential users of sentencing information *within* the federal and state systems who hold no defined role in using data under the SRA. Congress should take advantage of the experience and interest of these actors by recognizing them as formal users of sentencing information. In particular, judges and attorneys making individual sentencing decisions must be able to access sentencing data in a way that can help them craft arguments for their own cases. Finally, the statute should create an avenue for the Commission to obtain regular analysis from experts working outside the agency and outside government.

A. *The Commission and Congress*

The 1984 legislation instructed the Commission to “consider” advances in knowledge about sentencing. The Commission has been a steady source of sentencing research and reports.²⁶ On occasion the Commission has taken further steps to comply with this SRA mandate by considering its proposed actions in light of sentencing data and knowledge. An illustration of this wise consideration of sentencing information would be the 2001 revisions to the Guidelines for economic crimes.²⁷

More typically, however, it is impossible to tell whether the Commission

25. The one clue in the statute appears in 28 U.S.C. § 995(a)(12)(B) (2005), which directs the Commission to assist and serve “in a consulting capacity to Federal courts, departments, and agencies in the development, maintenance, and coordination of sound sentencing practices.” Even this passage does not suggest what these other entities might do to develop sound sentencing practices, given that the Commission holds the power to draft and revise the Guidelines.

26. See, e.g., Linda Drazga Maxfield, *Measuring Recidivism Under the Federal Sentencing Guidelines*, 17 FED. SENT’G REP. 166 (2005) (discussing various Commission reports about criminal history).

27. See Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5 (2001).

actually formed its policy in light of sentencing data and experience because the Commission introduced its Guidelines amendments, large and small, by diktat. The Commission usually announces the topics for proposed amendments and receives commentary and testimony, but then says little or nothing about how it has assessed the information received. The connection between even the best of the Commission's research reports and the Guidelines amendments it adopts often remains murky. The Commission may indeed have relied on its substantial expertise and research capacity for many amendments, but external reviewers—whether Congress, judges, or scholars—would have no way to tell.

We trace the failure of explanation back to the administrative culture that evolved at the Commission, including its extreme defensiveness to judicial and scholarly criticism in its early years. The SRA itself bears some responsibility for the research and information climate that has unfolded because the statute exempted the Commission from the notice and comment provisions of the Administrative Procedure Act (APA). This choice barred courts from performing the familiar (and highly deferential) review of the basis for Commission rules.²⁸ We believe this decision was an error, and Congress should correct it.²⁹ The familiar and appropriate framework of APA notice and comment rulemaking would give the Commission enough reason to demonstrate when it is, in fact, using sentencing data and experience as Congress expected.³⁰

The APA is not the only path to achieving better and more reasoned rules. In a revised statute Congress could specify more completely the types of uses the Commission should make of the available data. This more targeted duty to explain should include assessment of proposed Guidelines amendments in light of: (1) traditional purposes of sentencing, such as incapacitation, deterrence, rehabilitation, and retribution;³¹ (2) functional purposes of sentencing, such as

28. Courts can still review Commission rules if they exceed the Commission's authority under the SRA. See Joseph W. Luby, *Reining in the "Junior Varsity Congress": A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 WASH. U. L.Q. 1199 (1999).

29. Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 807 (1999) (proposing statutory text that would read as follows: "The actions, findings and conclusions of the United States Sentencing Commission shall be subject to the provisions of title 5, sections 552, 552b, 553, 702 through 706, and app. 1 through 15. Title 28, subsection 994(x) is repealed.").

30. See also Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217 (2005) (in this Issue).

31. Congress expressed sustained interest in the role of traditional sentencing purposes in the SRA, mandating repeated duties for both the Commission and sentencing courts. The history of traditional purposes in the federal system has been disappointing, to say the least. See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005) (in this Issue); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003); Aaron

disparity, proportionality, and resource use (including cost, corrections impact, and prosecutorial resources);³² (3) the role over time of the federal criminal justice system in a federal system;³³ and (4) a comparison to sanctioning policies in the states.³⁴

Congress itself uses sentencing information from time to time. While traditional administrative law doctrines require an agency to explain its choices and to demonstrate its reliance on available data and experience, legislators face no similar duty to explain the factual basis for their votes. Congress can structure a process that will routinely place relevant information in front of the legislators as they deliberate about criminal justice bills. For instance, in some states the sentencing commission must report to legislators its estimate of the prison resources needed to carry out a proposed change to criminal sentences.³⁵

More and better information about the costs and benefits of sentencing proposals would not, of course, limit ultimate congressional choices about what sanctions to impose or what resources to allocate. Rather, the information would keep on the table the important principles that led Congress to support modern sentencing reform in the first place. Some of the implications for “our federalism” and for the operation of the federal system are not part of current sentencing policy discourse, but should be. Commission and legislative decisions to allocate additional prosecutorial and punishment resources towards particular crimes may impinge on the central role of the states in American criminal justice—federal policymakers would do well to keep in mind that only

Rappaport, *Rationalizing the Commission: The Philosophical Premises of the U.S. Sentencing Guidelines*, 52 EMORY L.J. 557 (2003).

32. See NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 54-64 (2004); Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339 (2005) (in this Issue) [hereinafter Demleitner, *Smart Public Policy*]; Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37 (2005) (in this Issue).

33. See Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119 (2005) (in this Issue); Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137 (2005) (in this Issue).

34. See Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155 (2005) (in this Issue). Congress (or the Commission) might even be so bold as to include some reference to the most relevant foreign experience to the extent it could usefully inform U.S. policy. The sentencing and sanctioning policies in Canada, for example, have been strikingly different than in the federal system and the systems in many states over the past thirty-five years.

Congress could decide separately—outside the context of the APA—whether to create a judicial review mechanism to bolster the seriousness of its command, or primarily to expect congressional supervision of the Commission’s work, informed by third-party commentary. Needless to say, Congress has many, many important matters before it. The attention to federal sentencing has been episodic, and we do not believe that any reform which assumes an ongoing oversight role for Congress in this area is realistic.

35. See KAN. STAT. ANN. § 74-9101(b) (West 2005); N.C. GEN. STAT. ANN. § 120-36.7(d) (West 2005).

six percent of all felonies in the United States are prosecuted in the federal system.³⁶ Ill-considered changes to federal criminal penalties could also distort the many policy initiatives (criminal and noncriminal, including national security initiatives) of the U.S. Department of Justice as a whole.³⁷

B. Judges and Attorneys

Judges, prosecutors, and defense attorneys, along with the probation officers who assist judges, log as many hours as anyone working with sentencing rules. In retrospect, it now seems strange that the SRA devoted no attention to the sentencing data that would help these full-time operators of the system. Unfortunately, the current data practices in the federal courts require these actors to operate the system in the dark.

Those who operate a system like the Federal Sentencing Guidelines inevitably shape the practical impact of the rules through their discretionary choices. If more judges and attorneys could see their cases in light of data about the entire system, their influence on the direction of the sentencing system would be better informed and easier to coordinate.³⁸

The current information model in the federal system assumes that sentencing data and information will be largely irrelevant to sentencing judges and to lawyers arguing before them. The categories of crimes and offenders that appear in the Annual Reports, while useful for some purposes, are too gross to inform the choices of a judge sentencing a particular offender for a particular crime. Similarly, the Commission's Fifteen-Year Report, which contains a wealth of observations for the Commission itself, does not speak to the individual case level. It is not surprising, then, that judges rarely refer to the Annual Reports or to special reports such as the Fifteen-Year Report.³⁹ Judges

36. See Miller, *Compass*, *supra* note 10, at 1353 n.4.

37. See Marc L. Miller, *Cells vs. Cops vs. Classrooms*, in *THE CRIME CONUNDRUM* 127 (Lawrence M. Friedman & George Fisher eds., 1997).

38. Cf. Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293 (2005) (in this Issue). For a discussion of the possible uses of case-level sentencing data to inform prosecutorial policies and case-level decisions, see William W. Mercer, *Assessing Compliance with the U.S. Sentencing Guidelines: The Significance of Improved Data Collection and Reporting*, 16 FED. SENT'G REP. 43 (2003).

39. See U.S. SENTENCING COMM'N, FIFTEEN-YEAR REPORT, *supra* note 11. During the first six months after the appearance of the Fifteen-Year Report, fewer than a half-dozen courts cited the report, in each case as a description of Commission activities rather than an analysis of trends in sentencing practices in the courts. See, e.g., *United States v. Smith*, 359 F. Supp. 2d 771, 781 (E.D. Wis. 2005) (citing the report to document efforts by the Commission to address crack-powder differential); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005) (citing the report to document purposes of the Guidelines). Similarly, the few judicial citations to the Annual Reports over the years refer almost entirely to Commission activities, such as its study of the crack cocaine issue. See *United States v. Alton*, 60 F.3d 1065 (3d Cir. 1995).

are not the intended audience for these reports.

Judges who must sentence offenders under the Guidelines with some binding power might want to know about the distribution of sentences within a Guidelines range, or the frequency and impact of different Guidelines adjustments, the reasons given to explain different types of departures, and the subsequent criminal history of offenders who received these sentences.⁴⁰ To do so, however, judges would need to be able to answer a basic question: How have similar cases—with similar offense and offender characteristics and similar applicable Guidelines provisions—been sentenced by other judges?

The idea of a data system that would allow legislators, judges, lawyers, and scholars to assess individual cases is known in the literature as a “sentencing information system.” A sentencing information system also allows users to assess categories of cases and larger issues of disparity, proportionality, and purposes. This concept does not involve just a software program but a term that encompasses the concept of transparent and well-informed sentencing at every level, from the individual case to the entire system. Broad-scale sentencing information systems have been tried in Scotland, in New South Wales, Australia, and in Canada,⁴¹ and more limited systems have been tried in some federal and state courts.

The Sentencing Guidelines in the federal system became more voluntary after *Booker v. United States*.⁴² In more flexible systems the possible uses of well-organized and usable sentencing data are even more obvious. Data and analyses of the patterns and practices of other judges in similar cases and across all cases can help to inform judges about whether the Guidelines are reasonably applied to the case before them and, in any case, what a reasonable sentence might be.

Since most of the information necessary for a functional sentencing information system is already collected in the federal system, a directive from Congress could quickly make such a system a reality. A federal sentencing information system would not need to answer all possible questions about sentencing (an impossibility), but could be constructed initially to answer the handful of recurring questions of greatest interest to Congress and the courts. Once the system has proven its worth, it could expand with additional analytic tools and well-explained interfaces to answer additional questions.

Our proposal is not to collect new information,⁴³ but to provide an easy

40. For an account of a state system that emphasizes information about subsequent criminal convictions, see Michael Marcus, *Archaic Sentencing Liturgy Sacrifices Public Safety: What's Wrong and How We Can Fix It*, 16 FED. SENT'G REP. 76 (2003).

41. See Miller, *Compass*, *supra* note 10, at 1371; Miller, *Reform*, *supra* note 24, at 129-35.

42. 125 S. Ct. 738, 764 (2005) (5-4 remedial opinion) (Breyer, J.) (making the Federal Sentencing Guidelines “advisory”).

43. Specific calls to collect new information are made elsewhere in this Issue. See, e.g., King, *supra* note 38, at 306 (in this Issue) (“In order to anticipate when negotiated

public overlay to the information already collected. That overlay would be structured to answer specific questions. For instance, how have offenders with similar applicable Guidelines, similar offense characteristics, and similar offender characteristics been sentenced? The overlay could include time variables (to show changing sentence norms, including norms that respond to congressional directives) and geographic variables (to show local variation and to ensure reasonable consistency for judges within the same jurisdiction or area).

Deciding on the structure, operation, and interface for a sentencing information system is not a trivial task, even given the current collection of much of the relevant information by the Sentencing Commission and other federal agencies.⁴⁴ Designing such a system to maximize its value to users such as judges and attorneys can make them more informed advisors to the Commission and to Congress in the revision of the Federal Sentencing Guidelines. These practitioners will combine their currently unmatched experience in particular cases with a greater awareness of patterns and the larger context of sentencing practice.

Expanding the accessibility of data allows more actors to play a meaningful part in the future of sentencing policy. The point extends beyond federal judges and attorneys practicing in federal court; sentencing data and information should be available not only to federal users but to all interested users, including state commissions, citizens, and scholars. What has been missing from the first generation of the Guidelines is an appreciation for the range of users with a stake in sentencing data and in the direction of sentencing policy.

C. The Scientific Sentencing Community

Those who design and operate the federal system must do more than read data reports. They must analyze those data to spot trends across time and across jurisdictions. In some instances, the Commission staff, federal judges, and prosecutors can draw on their expertise of the federal system to appreciate a larger context. But at other times, the fresh perspective of an outsider might be useful in recognizing a trend or setting a research agenda.⁴⁵ Private parties can

sentences may be crowding out adjudicated sentences and to promote more informed sentencing policy, the Commission should add two items to the data collected from each case: first, whether the case involved a 'C' plea, and second, whether the presentence report was reviewed by the judge before accepting the plea agreement.")

44. For a discussion of the difficulties in constructing a data set that accurately reflects each offender's prior criminal history, see Nora V. Demleitner, *Constitutional Challenges, Risk-Based Analysis, and Criminal History Databases: More Demands on the U.S. Sentencing Commission*, 17 FED. SENT'G REP. 159 (2005).

45. See, e.g., Cindy R. Alexander et al., *Evaluating Trends in Corporate Sentencing: How Reliable Are the U.S. Sentencing Commission's Data?*, 13 FED. SENT'G REP. 108 (2000).

assess proposed sentencing policies from many different vantage points. They offer a possible source of alternative answers to the hard questions that sentencing systems face. For instance, researchers outside the Commission could explore the connection between public opinion and the ordinary sentence ranges under the Guidelines, or the crime-control effects of the use of criminal history scores under the Guidelines.

Compared to thirty-five years ago, there is now a large and active scholarly community taking an interest in sentencing questions—many of whom have contributed to this Issue of the *Stanford Law Review*. This growth is fueled by the phenomenal increases in government spending on sentencing and corrections, particularly the five-fold increase in the use of prisons over this period.⁴⁶ State sentencing commissions and other full-time governmental bodies offer rich sources of study for scholars and potential applications for scholarly theories. International developments have also helped create a richer scholarly community, as governments in many industrialized countries experiment with rising and falling rates of imprisonment.⁴⁷

The U.S. Sentencing Commission currently obtains input from criminologists and other experts in sentencing informally and inconsistently. It is more likely to rely on analysis from its own capable staff than to draw on the work of outsiders.⁴⁸ This is a lost opportunity and a common problem among government agencies dealing with subjects with a scientific or research component. In many other areas, the law mandates and good professional habits encourage regular interaction between the insider and outsider researchers.

Outside expertise will serve both the interests of the Commission and those with external interests. The analysis of outside experts can improve the Commission's choices for a research agenda and the reliability and usability of its data. Outsiders using federal data will also have their own reasons to use the data, whether those reasons are the prospects of tenure for a university researcher or the chance for an advocacy group to bolster its case for change or stability.

As with so much else in the work of the Sentencing Commission, there is an existing administrative law framework for thinking about the involvement of external experts. Under the Information Quality Act (IQA), government

46. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.22 (2003) (showing rates of 96 per 100,000 in 1970 and 483 per 100,000 in 2003). Alternatives to prison sanctions are explored elsewhere in this Issue. See Demleitner, *Smart Public Policy*, *supra* note 32, at 335 (in this Issue).

47. See BUREAU OF JUSTICE STATISTICS, CROSS-NATIONAL STUDIES IN CRIME AND JUSTICE (2005). While crime trends in Canada have largely tracked those in the United States, Canadian prison use has remained remarkably stable for the last three decades. *Id.* at 140, 155-57.

48. See, e.g., Peter H. Rossi & Richard A. Berk, *The Non-Response of the U.S. Sentencing Commission to Our Study of Public Views on Just Punishments for Federal Felons*, 12 FED. SENT'G REP. 29 (1999).

agencies must submit some of their background research for peer review by the scientific community.⁴⁹ The Office of Management and Budget has created IQA guidelines that strengthen the role of external peer review of government research.⁵⁰ In some settings the requirement is wasteful and cumbersome, but the basic idea is a sound one.⁵¹ In the sentencing arena as in others, the analysis of specialists on the staff of the Sentencing Commission should regularly go through a peer review process by researchers based outside the government.

The role of outside experts must sometimes go beyond the review of existing work to generate the initial analysis for some specialized topics. There are some settings where a government agency deals with such a wide and shifting set of specialized research questions that internal staff cannot possibly hold all the relevant expertise for every relevant question. A classic example is the Food and Drug Administration (FDA), which relies on scientific peer review panels, composed of scientists not on the FDA staff, to review license applications for pharmaceuticals and food additives of different types.⁵² We suggest that the relevant research on sentencing, corrections, and criminal justice has also reached the stage in which the government should seek regular analysis of problems from outsider experts, and regularly submit the work of its own staff to external peer review.

III. THE MISSING NATIONAL SENTENCING REFORM CONTEXT

In the mid-1970s when the Congress began to draft the earliest versions of what later became the SRA, the world of sentencing commissions was a lonely place. No state sentencing commission had created sentencing guidelines at that point.⁵³ Legislators in Minnesota, Pennsylvania, and Washington had just begun to consider a sentencing commission model; by the time the federal law passed in 1984, sentencing commissions were operating only in those three states.⁵⁴

49. Treasury and General Government Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763 (2001).

50. Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54,023 (Sept. 15, 2003).

51. See SHEILA JASANOFF, *THE FIFTH BRANCH: SCIENCE ADVISERS AS POLICYMAKERS* (1990); Lars Noah, *Scientific "Republicanism": Expert Peer Review and the Quest for Regulatory Deliberation*, 49 EMORY L.J. 1033 (2000); Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Rider*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 339 (2004).

52. See 21 U.S.C. §§ 360c(b), 360kk(f)(1)(A), 379e(b)(5)(C) (2005); 21 C.F.R. §§ 14.100, 14.1(b)(2) (2005).

53. This is not surprising as the idea of sentencing commissions appeared in national discourse only with the publication in the early 1970s of Judge Marvin Frankel's book *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

54. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196 & tbl.1 (2005). The Washington guidelines took effect on July 1, 1984. See WASH. STATE SENTENCING GUIDELINES COMM'N,

Over the last twenty years many other states have joined a movement to use sentencing commissions and to rely on sentencing guidelines. While the state commissions and guidelines differ in important ways, they address a similar array of policy questions. Indeed, sentencing systems from every era—extending back to Hammurabi’s Code in Babylon and beyond—have always faced general questions about the definition of crimes, wise punishments, and adequate procedures. But common and ancient as the general problems of criminal justice and sanctioning may be, no common language developed until recently to describe sentencing law and practice.

The modern sentencing revolution reflected in the federal and state guidelines systems attempts to bring law to sentencing.⁵⁵ With law, with rules, with opinions, and with data—with the development of a common language—it should now be possible, when a new sentencing policy is under consideration, to ask what other jurisdictions have done and what results the policy produced elsewhere. Informed comparisons should dominate the thinking about sentencing policy today in each jurisdiction. But to date such informed comparisons have not been the norm, either in federal or state policymaking or in legal scholarship.

Despite the similarity in the challenges all jurisdictions face in constructing a criminal justice system (including criminal sanctions), the habit thus far has been for a system in one place to develop with only the most general awareness of systems elsewhere and to cease most efforts at comparison once a system begins to operate. Instead of a common modern language of sentencing, sentencing commissions move in a world of multiple languages—too close to Babel—with tongues and dialects still difficult to translate and ideas unnecessarily difficult to transfer.

A. The National Goal of Standardized Data

The U.S. Sentencing Commission and its many state counterparts share an appetite for data. The full-time staff members at more than two dozen state sentencing commissions have collected sentencing data for years, in some places for decades. They assemble the case-level data into annual reports that track various sentencing practices. State bodies also produce useful analyses of their sentencing data.⁵⁶ Political attention to crime and information technologies has pushed even non-commission states to gather and publish more sentencing data.

The two structured-sentencing states that best illustrate the collection and

SENTENCING REFORM ACT: HISTORICAL BACKGROUND, <http://www.sgc.wa.gov/Informational/historical.htm> (last visited Aug. 25, 2005).

55. See FRANKEL, *supra* note 53.

56. See Miller, *Compass*, *supra* note 10, at 1366-70.

dissemination of sentencing data are Minnesota and Pennsylvania.⁵⁷ These states hold the place of honor in sentencing knowledge because of their willingness to make available data that include judge identifiers, and to do so in a reasonably timely fashion.⁵⁸ But neither Minnesota nor Pennsylvania nor any of the other states that have well-received guidelines systems provide information that suits the full range of users, uses, and usability. Nor do they account for information from other systems; few state annual reports even recognize that similar experiments are going on around the country.⁵⁹ The U.S. Sentencing Commission has produced reports and amendments with only fleeting acknowledgement that other (and more successful) guidelines exist.

The trouble with the data collected over the years by the U.S. Sentencing Commission and the many state commissions is that they cannot easily cross state lines. The excellent data from Pennsylvania are not collected in categories that have any meaning for next-door commissions in Delaware, Maryland, New Jersey, or Ohio. However similar the patterns of crime might be in these neighboring states, the Pennsylvania sentences are based on convictions under the substantive criminal code of that state. They also reflect the peculiarities of Pennsylvania sentencing law. A person trying to evaluate a potential sentencing policy for New Jersey or Ohio would not find much reason to read the Pennsylvania reports.

The lack of attention to the lessons and needs of other jurisdictions is not surprising. Even states that collect the best sentencing data (like Minnesota and Pennsylvania) have no incentive to make data “outsider friendly.” The residents of Pennsylvania do not benefit if Ohio finds important guidance in the Pennsylvania reports, so Pennsylvania’s commission has no reason to spend taxpayer funds to make the reports more useful outside the state. Making data and knowledge outsider friendly is a classic positive externality, a public good that the federal government is well situated to provide. The federal government is uniquely situated to “norm” the data into consistent categories and to make them available in a single centralized setting. Revised federal sentencing statutes can capitalize on this data opportunity.

It should be possible to analyze the Pennsylvania data in terms that make sense in New Jersey or Ohio. For the benefit of state legislators and rulemakers, sentences might be grouped according to generic descriptions of major crimes, much like the categories used by the Bureau of Justice Statistics of the U.S. Department of Justice.⁶⁰ Similarly, data from each state could be organized to highlight sentencing factors or procedures that have meaning in many states. The reports might also highlight distinctive features of the state’s sentencing

57. *Id.*

58. *Id.*

59. *Id.*

60. BUREAU OF JUSTICE STATISTICS, THE NATION’S TWO CRIME MEASURES (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ntcm.pdf> (last visited Aug. 25, 2005).

structure that hold special interest for other states, such as the innovative effort in Pennsylvania to control the imposition of nonprison punishments.⁶¹ Framed properly, the data from Pennsylvania might be useful for sentencing policy in many states. When state sentencing trends are aggregated to highlight sentencing policies that attract special attention in many places, they can provide invaluable practical testing of ideas as they spread.

There is a long tradition in American criminal justice of exactly such national data norming.⁶² States have their own substantive criminal laws and procedures, yet since 1930 Congress has authorized the Attorney General to gather information about crime from around the country.⁶³ These efforts to create uniform crime categories for crime reporting came not from the federal government but from the International Association of Chiefs of Police (IACP) and the leadership of legendary policing reformer and Berkeley, California, police chief August Vollmer.⁶⁴ The efforts of the IACP led to the creation of standard crime categories, a manual on crime record keeping for police departments, and the first Uniform Crime Report (UCR)—all before Congress took any action.⁶⁵

More modern crime reporting efforts have reflected a desire by federal officials to make some contribution to crime problems that remained primarily a state and local issue.⁶⁶ In 1972 Congress created the National Crime Victim Survey to provide a more complete level of information about criminal victimization.⁶⁷ National data efforts have included information on state sentencing and state criminal courts.⁶⁸

61. See Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 CRIME & JUST. 199, 233-34 (1998) (discussing Pennsylvania); see also Demleitner, *Smart Public Policy*, *supra* note 32, at 353-54 & n.90 (in this Issue) (discussing Pennsylvania's initiative to incorporate intermediate and nonprison sanctions into state guidelines).

62. There is also a long tradition of national efforts to norm and collect data in important policy areas well beyond criminal justice, and especially in areas of active scientific and social-scientific work and experimentation. Consider, for example, the activities of the Centers for Disease Control (CDC) in obtaining standardized data from state health departments. The states collect data about various health conditions, but without the coordinating work of the CDC those collections would remain incompatible and more difficult to combine into national trend analyses.

63. 46 Stat. 554, ch. 455 (1930) (codified at 28 U.S.C. § 534).

64. See DENNIS W. BANAS & ROBERT C. TROJANOWICZ, *UNIFORM CRIME REPORTING AND COMMUNITY POLICING: AN HISTORICAL PERSPECTIVE* 11 n.49 (1985).

65. FED. BUREAU OF INVESTIGATION, *UNIFORM CRIME RECORDS HANDBOOK* 9 (1984).

66. See TED GEST, *CRIME AND POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER* (2001).

67. See BUREAU OF JUSTICE STATISTICS, *supra* note 60.

68. The National Judicial Reporting Program began in 1986. State court criminal justice data, including sentences, have also been reported through the State Court Processing Statistics Program. Through 1994, this program was known as the National Pretrial Reporting Program. Other state- and county-level national criminal justice data programs include the Prosecution of Felony Arrest and the Offender-Based Transaction Statistics. See Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, 22 CRIME & JUST. 201,

While these initial national data collection efforts are useful, they are incomplete. The available sentencing data focus on a few outcomes, such as the percentage of felons sentenced to a prison term. They do not, however, tell a national audience about punishments other than prison or about the process of sentencing, such as the factors that influence the sentence. The destination is important, but to understand the true dynamics of sentencing systems, so is the road. We believe that Congress should put all the states on the same path of collecting data that can be used everywhere to learn from state-level experiments.

While we like to celebrate the metaphor of states as laboratories, scientists have incentives and obligations that lead them to publish their findings and carefully assess the work of others working on similar questions.⁶⁹ States do not act like laboratories nor do Commission staff act like scientists or academics in this respect. But the right organization and funding from the federal government could make the metaphor a reality, as it has in so many critical areas of social policy.

B. A National Sentencing Institute

Should Congress agree that more and better sentencing data are worthwhile for sound sentencing policy, the next question is what agency or group should design and gather that information. Since the U.S. Sentencing Commission already has substantial data and information duties, it might seem that there is an easy answer to this question: any additional national sentencing data duties should go to the Commission and its staff.

While the Commission is one option, we believe the Commission's role as a policymaker and its dominant focus on the federal criminal justice system make it a poor repository of national data responsibilities. In other large agencies that both dictate policy and report on policy successes, different units carry out these two distinct functions. At the U.S. Department of Justice, the state and federal criminal justice data collection and reporting functions reside in the various subunits of the Office of Justice Programs Division; this division functions separately from the Criminal Division and the other policymaking and litigating divisions.

In the field of sentencing, a separate agency would likely be more attuned to the question of users, uses, and usability. A "National Sentencing Institute" with expertise in national data and sentencing research could work with Congress, state legislatures, and the federal and state commissions to answer important policy questions. Such an institute could also focus separately on the data and information needs of sentencing judges and advocates.

We recommend that Congress create a National Sentencing Institute. The

219-20 (1997).

69. See Miller, *Compass*, *supra* note 10, at 1393-94.

Sentencing Institute could function as an independent agency, as a component of the judicial branch, or as a part of the Office of Justice Programs at the Department of Justice, akin to the National Institute of Justice. A separate locus for sentencing data and research would provide all states and the federal government with a source of knowledge. It would also provide Congress with the ability to request data from an agency that would not be institutionally obligated or inclined to defend the policy choices of the U.S. Sentencing Commission. An agency with expertise in data collection and analysis and without policymaking responsibilities should also engender greater trust from the policy and research communities.

The cost of establishing a National Sentencing Institute should be modest—a fraction of the \$10 million budget of the U.S. Sentencing Commission. Much of the relevant federal and state data are already collected, but by myriad agencies in multiple systems using inconsistent standards. A National Sentencing Institute would collect information from agencies other than the Sentencing Commission—including the Administrative Office of the United States Courts, the Executive Office of United States Attorneys, and the Bureau of Prisons.

While there might be some redundancy between a sentencing policymaker and a sentencing data agency, most responsibilities would fall clearly to one agency. In the U.S. Department of Justice, this separation of responsibility between divisions that design and implement policy and those that collect and analyze data has worked well for many years.

We would recommend a National Sentencing Institute even if only the federal system were at stake. But our proposal draws further strength from the centrality of states to a National Sentencing Institute. The Commission has thus far revealed only a tepid interest in state reforms. The Commission makes available a link to state commissions on its website⁷⁰ and has provided funding to support the annual meeting of the National Association of State Sentencing Commissions, but the Commission has otherwise acted as if state data, research, and reports did not exist. At the U.S. Sentencing Commission, the task of national data norming would remain secondary to the massive job of managing the federal system.⁷¹

CONCLUSION

In 1984 Congress made the right start in building a knowledge-driven sentencing system. Because sentences come out of complex systems with

70. See Website of the U.S. Sentencing Commission, <http://www.ussc.gov/states.htm> (last visited Sept. 29, 2005).

71. While the federal system is a small portion of the total United States criminal justice system, *see supra* note 36 and accompanying text, it is still the single largest criminal sentencing system in the country, and the geographic and political variation add additional complexity.

multiple actors, high case volumes, and many below-ground decisions, the ability to use data to find patterns is especially important. If this job is done well, the relevant actors can use those patterns from the data to create wiser sentencing policies.

Twenty-five years of structured-sentencing reforms have produced insights that make it possible now to take the next step in the use of sentencing knowledge. The task is to move beyond a collection of data for the benefit of a single rule-drafting institution. Instead, data that are gathered and analyzed to serve the needs of many different types of users could open up the world of sentencing policy to wisdom from many quarters. Those ideas can come from the judges and attorneys operating the system or from experts outside the system. With some federal support in harmonizing the data from state sentencing systems, a prolific source of insight could become available from the successful state guidelines experiments. Congress can bring us closer to a wiser world if new sentencing statutes expand the users, uses, and usability of sentencing information.