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Robert W. Sweet

D. Evan van Hook

Edward V. Di Lello

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Cover Page Footnote

Sweet is a United States District Judge, Southern District of New York. Hook is a Member of the Bar of the State of New York; associate Sidley & Austin; former law clerk to Judge Sweet. Di Lello is a Member of the Bar of the State of New York; associate, Debevoise & Plimpton; former law clerk to Judge Sweet.

TOWARDS A COMMON LAW OF SENTENCING: DEVELOPING JUDICIAL PRECEDENT IN CYBERSPACE

Robert W. Sweet,* D. Evan van Hook,**
and Edward V. Di Lello***

INTRODUCTION

THE Violent Crime Control and Law Enforcement Act of 1994 (the "1994 Crime Bill") became law on September 13, 1994.¹ Several features of the 1994 Crime Bill combine with the existing regime of criminal sentencing in the federal system to place even greater importance on the process of federal sentencing, which was radically altered in the last decade by the passage of the Federal Sentencing Reform Act of 1984 (the "FSRA").² In passing the FSRA, Congress changed the sentencing process by, among other things, abolishing the United States Parole Commission, creating the United States Sentencing Commission (the "Commission"),³ and directing the Commission to draft sentencing guidelines (the "Guidelines")⁴ for the federal courts.⁵ The Commission's initial guidelines were submitted to Congress on April 13, 1987, and took effect on November 1, 1987.⁶ The combinate effect of the 1994 Crime Bill, the FSRA, and the Guidelines is a shift of discretion from judges, whose exercise of discretion is public and subject to appellate review, to prosecutors, whose discretion is more removed from public view. As a result, these statutes require reconsideration and a return to the common law of sentencing, taking into account the appropriate policy goals these statutes

* United States District Judge, Southern District of New York.

** Member of the Bar of the State of New York; associate, Sidley & Austin (New York); former law clerk to Judge Sweet.

*** Member of the Bar of the State of New York; associate, Debevoise & Plimpton (New York); former law clerk to Judge Sweet.

1. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

2. The Sentencing Reform Act was passed as Chapter II of the Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984), and is codified at 18 U.S.C. §§ 3551-3673 (1994) and 28 U.S.C. §§ 991-998 (1994).

3. U.S. Sentencing Commission, Guidelines Manual ch. 1, pt. A, at 1 (1995) [hereinafter Guidelines Manual].

4. The guidelines and policy statements promulgated by the Commission are issued pursuant to 28 U.S.C. § 994(a) (1994).

5. See Guidelines Manual, *supra* note 3, ch. 1, pt. A, at 1. The Guidelines state: The United States Sentencing Commission . . . is an independent agency in the judicial branch composed of seven voting and two non-voting, *ex officio* members. Its principal purpose is to establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes.

Id.

6. *Id.*

sought to achieve and thus resulting in a system of guided judicial discretion. Such a system could be facilitated by written sentencing opinions that are accessible through fact-specific searches on an electronic database.

Part I of this Article traces the historical development of criminal sentencing from indeterminate sentencing to the enactment of the Guidelines. Part II discusses the need for change in criminal sentencing, noting that the system should eliminate only unwarranted disparity and should emphasize both case-level and systemic accountability. Finally, part III sets forth proposals for effecting the necessary changes in criminal sentencing. Specifically, part III proposes a return to judicial sentencing of defendants, with several requirements designed to guide judicial discretion. In particular, written, disseminated sentencing opinions subject to appellate review would be required, with an emphasis on adherence to the principles of sentencing as articulated by the Commission. Furthermore, an online database of sentencing opinions should be developed, allowing judges to formulate fact and defendant-specific searches to guide judges in the sentencing process and develop a common law of sentencing. This Article concludes that the Guidelines effectively have shifted discretion from the judiciary to the prosecution, resulting in a different source of disparity rather than eliminating it. A return to a guided form of judicial sentencing, relying on common law principles and modern technology, would result in a more just and individualized form of sentencing.

I. BACKGROUND

By passing the 1994 Crime Bill, Congress created a host of new crimes,⁷ raised permissible maximum penalties for numerous existing

7. Pub. L. No. 103-322, § 40221, 108 Stat. 1796 (1994) (codified at 18 U.S.C. §§ 2261-2266 (1994)) (creating new crimes for interstate travel with the purpose of, or in connection with, abuse of a spouse or intimate partner); *id.* § 60003 (codified at 18 U.S.C. §§ 1201(a), 1958, 1959(a), 2113(e) (1994)) (authorizing death penalty if death of victim results from kidnapping, murder for hire, racketeering, or bank robbery); *id.* § 60019 (codified at 18 U.S.C. §§ 2280-2281 (1994)) (creating a new capital offense when death results against maritime navigation); *id.* § 60020 (codified as amended at 18 U.S.C. § 2340A(a) (1994)) (making torture a capital offense); *id.* § 60021 (codified as amended at 18 U.S.C. § 37 (1994)) (creating a new capital offense when death results from violence at international airports); *id.* § 110201 (codified at 18 U.S.C. § 922 (1994)) (creating federal misdemeanors for transfer of handguns or ammunition to minors); *id.* § 160001 (codified at 18 U.S.C. § 2258 (1994)) (manufacturing child pornography with intent to import it into the United States); *id.* § 250007 (codified as amended at 18 U.S.C. § 1029 (1994)) (creating new offenses involving credit card fraud); *id.* § 300002 (codified at 18 U.S.C. §§ 2721-2725 (1994)) (criminalizing unauthorized disclosure of state motor vehicle records); *id.* § 320601 (codified at 18 U.S.C. § 880 (1994)) (receiving proceeds from extortion); *id.* §§ 320603-320604 (codified at 18 U.S.C. §§ 1033-1034 (1994)) (engaging in insurance regulatory crimes); *id.* § 320901 (codified as amended at 18 U.S.C. § 2511(1) (1994)) (criminalizing the unauthorized disclosure of contents of court-ordered wiretap with the purpose of obstructing a

offenses,⁸ and increased statutory minimum sentences for numerous other offenses,⁹ all of which have the effect of requiring federal judges to sentence more offenders to more incarceration, fines, restitution, and terms of supervised release.

Prior to the promulgation of the Guidelines, judges enjoyed wide-ranging sentencing discretion in federal and state systems,¹⁰ which

criminal investigation); *id.* § 320902 (codified at 18 U.S.C. §§ 668, 3294 (1994)) (committing theft of major artworks); *id.* § 320903 (codified at 18 U.S.C. §§ 545, 1201(d), 1361, 1362, 1366, 2112, 2114 (1994)) (adding an "attempt" crime to various federal robbery and smuggling statutes).

8. Pub. L. No. 103-322, §§ 40111-40112, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 2247 (1994), *reprinted in* 28 U.S.C. § 994 note (1994) (Enhanced Penalties for Repeat Sex Offenders)) (authorizing punishment of repeat sexual offenders with up to two times the normal punishment and mandating review and amendment of the sentencing guidelines relating to aggravated sexual abuse or sexual abuse); *id.* § 60005 (codified at 18 U.S.C. § 1118 (1994)) (authorizing death penalty for murder by a federal prisoner); *id.* § 60008 (codified at 18 U.S.C. § 36(b)(2)(A) (1994)) (instituting death penalty for drive-by shooting in the course of certain drug offenses); *id.* § 60009 (codified at 18 U.S.C. § 1119 (1994)) (providing death penalty for murder of a U.S. official by a foreign national); *id.* § 60012 (codified at 18 U.S.C. § 1120 (1994)) (permitting death penalty for murder by an escaped prisoner); *id.* § 60015 (codified at 18 U.S.C. § 1121 (1994)) (instituting death penalty for murder of a state or local official who was in the process of assisting federal law enforcement); *id.* § 60002 (codified at 18 U.S.C. § 3591(b) (1994)) (permitting death penalty for (i) offenders convicted of continuing criminal enterprise when the offense involved at least twice the quantity of drugs or monetary amount of receipts that previously resulted in a mandatory life sentence, and (ii) a principal administrator, organizer, or leader of an enterprise that attempts to kill a public officer, juror, or witness with the purpose of obstructing prosecution of the enterprise); *id.* § 280003, *reprinted in* 28 U.S.C. § 994 note (1994) (Enhanced Penalty for Hate Crimes) (mandating sentence enhancements for hate crimes); *id.* §§ 320101-320102 (codified at 18 U.S.C. §§ 111, 112(a), 113, 351(e), 1751(e), 1112 (1994)) (increasing maximums for assault and manslaughter); *id.* § 320103 (codified at 18 U.S.C. §§ 241, 242, 245(b), 247; 42 U.S.C. § 3631 (1994)) (increasing penalties for civil rights violations); *id.* § 320104 (codified at 18 U.S.C. §§ 1956(c)(7)(D), 2320(a) (1994)) (trafficking in counterfeit goods).

9. *See, e.g.*, Pub. L. No. 103-322, § 70001, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 3559 (1994)) (requiring an automatic minimum sentence of life imprisonment for a violent felony or serious drug offense after two prior felony convictions, known as the "three strikes" provision); *id.* §§ 110102-110103 (codified at 18 U.S.C. § 924(c)(1) (1994)) (imposing ten-year mandatory minimum for the use of one of a defined group of assault weapons); *id.* § 130001 (codified as amended at 8 U.S.C. §§ 1252(e), 1326(b) (1994)) (increasing minimum penalty for failing to depart or reentering the United States after an order of deportation); *id.* § 150001 (codified at 18 U.S.C. § 521 (1994)) (imposing mandatory sentence enhancement if certain controlled-substance felonies also meet enumerated criteria qualifying them as gang-related); *id.* § 250002 (codified at 18 U.S.C. §§ 2325-2327 (1994)) (mandating a sentence enhancement of up to five years in wire fraud convictions if the offense was connected with telemarketing and up to 10 years if the fraudulent telemarketing victimized 10 or more victims over the age of 55); *id.* § 320105 (codified as amended at 18 U.S.C. § 1958(a) (1994)) (imposing maximum sentence of 10 years for conspiracy to commit murder for hire).

10. *See, e.g.*, *United States v. Tucker*, 404 U.S. 443, 446 (1972) (noting that the sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come"); *Williams v. New York*, 337 U.S. 241, 246 (1949) (stating that prior to and throughout American history, "courts in this country and in England practiced a

combined with the discretion of prosecutors, defense attorneys, probation officers, and parole commissioners to determine the actual prison time that inmates served.¹¹ This discretion was necessitated by the then-prevailing practice of indeterminate sentencing, under which judges decided who went to prison and generally set minimum and/or maximum sentences, but parole boards determined the actual time an inmate remained behind bars.¹²

Indeterminate sentencing was predicated on concepts of rehabilitation and individualized justice and, thus, required substantial delegation of discretion to the judiciary in order to tailor sentences that maximized the chances of rehabilitation in light of the defendant's unique circumstances.¹³ Prison sentences were to be determined by the period of time necessary to achieve rehabilitation, which, it was believed, was impossible to determine in advance.¹⁴ By the 1960s, every state and the federal government had some form of indeterminate sentencing system.¹⁵

The Model Penal Code (the "MPC"), promulgated by the American Law Institute in 1962, incorporated the concepts of indeterminate sentencing and broad delegation of discretion to the judiciary. The MPC was primarily a response to the state-to-state inconsistencies and anomalies in both the definitions of offenses and the authorized sanctions associated with various crimes. The MPC sought to bring rationality to these inconsistent systems through standardized, simplified offense definitions and, thus, the MPC distributed offenses into a small number of broad categories.¹⁶ As corollaries to its broad, generic offense definitions, the MPC endorsed the rehabilitative purpose of sentencing¹⁷ and the effectuation of this purpose through indeter-

policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law"); Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv. L. Rev. 1938, 1941-42 (1988) (noting that judicial discretion "seemed almost infinite"); Steve Y. Koh, Note, *Reestablishing the Federal Judge's Role in Sentencing*, 101 Yale L.J. 1109, 1115 (1992) ("[J]udges exercised perhaps the least guided discretion.").

11. See Koh, *supra* note 10, at 1112.

12. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 894-95 (1990); Michael Tonry, *Sentencing Guidelines and the Model Penal Code*, 19 Rutgers L.J. 823, 823 (1988).

13. Nagel, *supra* note 12, at 893-94; Paul W. Tappan, *Sentencing Under the Model Penal Code*, 23 Law & Contemp. Probs. 528, 538-39 (1958); Tonry, *supra* note 12, at 823-24.

14. Nagel, *supra* note 12, at 893-94.

15. *Id.* at 894; Tonry, *supra* note 12, at 823-24. The United States Supreme Court endorsed indeterminate sentencing as well. See *Williams v. New York*, 337 U.S. 241, 247-48 (1949).

16. Tonry, *supra* note 12, at 844.

17. Tappan, *supra* note 13, at 538-39; Tonry, *supra* note 12, at 840-41. Consistent with this purpose, Model Penal Code § 1.02(2) refers to "[t]he general purposes of the provisions governing the sentencing and treatment of offenders," rather than sentencing and punishment. Model Penal Code § 1.02(2) (1985). Additionally, § 7.01(1)(b)

minate sentencing.¹⁸ The mechanics by which the MPC sought to effectuate this purpose contrast with those of the Guidelines and therefore warrant consideration.

The MPC, by relying on judges to determine the specific culpability of the defendant to be sentenced under the MPC's generic offense categories, both facilitated the implementation of indeterminate sentencing and increased judicial discretion.¹⁹ The MPC's broad offense definitions also favored judicial over prosecutorial discretion. When crimes are narrowly defined, a prosecutor is free to charge a defendant with different offenses for the same behavior under different offense-defining statutes which carry different penalties, thereby increasing the prosecutor's ability to affect the defendant's sentence. Conversely, when offense definitions are broad enough to encompass a wide spectrum of proscribed activities, prosecutors have limited options in the charges brought, and discretion is left to the sentencing judge to determine the precise penalty of the defendant.²⁰ Furthermore, when offenses are narrowly defined, the field of similar cases, i.e., offenders who have been sentenced for the same statutory offense, is smaller than it would be under broad offense definitions. This restricted range of defendants diminishes the judge's ability to determine the appropriate sentence by comparison with the sentences given to other offenders who were guilty of the same crime.²¹

Beginning in the mid-1970s, various jurisdictions began to reject indeterminate sentencing, the rehabilitative rationale underlying it, and the perceived disparity among sentences that were tailored to individual defendants.²² Much of the criticism focused on the fact that judges, enabled by their grant of broad discretion in sentencing, sentenced offenders in accordance with their own arbitrary and discriminatory purposes.²³ On the federal level, the national reaction against

authorizes imprisonment when "the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution." Model Penal Code § 7.01(1)(b).

18. Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 Geo. L.J. 225, 226 n.8 (1984); Tappan, *supra* note 13, at 539. Under the MPC, judges set the minimum sentences, but generally had no discretion with regard to maximum sentences. See Model Penal Code § 6.06 cmt. 6. The judge may suspend the imposition of any sentence, Model Penal Code § 6.02(3), may impose probation in any case, Model Penal Code § 6.02(3)(b), and may reduce the level of any conviction offense if "it would be unduly harsh to sentence the offender in accordance with the Code." Model Penal Code § 6.12. The parole board may release the prisoner at any time after he becomes eligible for release. Model Penal Code § 6.10(1) & explanatory note.

19. See Norval Morris, *Sentencing Under the Model Penal Code: Balancing the Concerns*, 19 Rutgers L.J. 811, 816 (1988); Tonry, *supra* note 12, at 829, 844.

20. Kay A. Knapp, *Allocation of Discretion and Accountability Within Sentencing Structures*, 64 U. Colo. L. Rev. 679, 694 (1993).

21. *Id.*

22. Tonry, *supra* note 12, at 824, 833.

23. *Id.* at 833.

indeterminate sentencing culminated in the passage of the FSRA, the formation of the Commission, and the promulgation of the Guidelines.²⁴

A central theme of the critics of indeterminate sentencing was that judicial discretion produced unwarranted disparity in sentencing.²⁵ This concern is recognizable in the Guidelines.²⁶ The purposes of sentencing stated in the FSRA are condemnation, punishment, deterrence, incapacitation, and rehabilitation.²⁷ The FSRA required the Commission to specify a range of sentences for "each category of offense involving each category of defendant."²⁸ The Commission therefore rejected the broad offense definitions prevalent under systems of indeterminate sentencing and adopted tightly defined sub-categories of offenses in order to reduce sentencing disparity.²⁹

24. Nagel, *supra* note 12, at 886-87; Leonard Orland & Kevin R. Reitz, *Epilogue: A Gathering of State Sentencing Commissions*, 64 U. Colo. L. Rev. 837, 844 (1993). Section 994(k) of the FSRA provides, in fact, that "[t]he Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." 28 U.S.C. § 994(k) (1994).

25. Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1689 & n.31 (1992); Nagel, *supra* note 12, at 895, 897.

26. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. Chi. L. Rev. 901, 908 (1991) (arguing that "[t]he federal sentencing guidelines reflect a more ambitious effort to confine discretion than any current state guidelines"); Nagel, *supra* note 12, at 899-903; Koh, *supra* note 10, at 1119. As Daniel Freed notes:

For most of the last century, our criminal justice system has relied on indeterminate sentencing. In the last two decades, however, growing dissatisfaction with the disparity and uncertainty of indeterminate sentencing has led to broad support for the idea of structured sentencing to reduce unwarranted disparity. The Sentencing Reform Act of 1984 . . . symbolized the emerging consensus in the federal system and many states.

Freed, *supra* note 25, at 1685 (footnotes omitted).

27. See 18 U.S.C. § 3553(a)(2) (1994); 28 U.S.C. § 991(b)(1)(A) (1994). These purposes, as articulated in the statutory language, partially contrast with Congress's intent, as articulated in legislative history, to be guided by the more classical statement of the goals of criminal sentencing: rehabilitation, retribution, incapacitation, and restitution. See S. Rep. No. 225, 98th Cong., 1st Sess., at 75 (1983); *infra* note 77.

28. 28 U.S.C. § 994(b)(1) (1994).

29. See Guidelines Manual, *supra* note 3, ch. 1, pt. A, at 3; see also Nagel, *supra* note 12, at 900 (noting that prior to the enactment of the Guidelines, the Senate Judiciary Committee determined that "indeterminate sentencing led to widespread sentencing disparity"). Ilene Nagel notes that one purpose of the Guidelines "was to reduce unwarranted disparity among defendants with similar records convicted of similar criminal conduct." Nagel, *supra* note 12, at 932. Therefore, the Commission "group[ed] offenders into like categories according to the offense for which they were convicted and their criminal history, and . . . prescribe[d] like sentences for these allegedly like groups." *Id.* at 933. Under the Commission's approach, the maximum difference within a range is 25%, thus bounding judicial discretion and reducing sentence disparity. *Id.*

In addition to insisting upon a narrow sentencing range for every guidelines category,³⁰ the FSRA constrained judges' authority to depart from the guidelines unless "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."³¹

The Guidelines' sub-classification of offense definitions limits the discretion of sentencing judges while enhancing the discretion of prosecutors. Prosecutors and defense counsel can dictate the sentence within a very narrow range by manipulating charges in the course of bargaining for a plea. In addition, by making sentences turn, in part, on the presence or absence of specific factual elements,³² the Guidelines heighten the importance of these facts in sentencing. Prosecutors and defense counsel can bargain over stipulated facts in criminal cases, limiting sentencing ranges and furthering the shift of discretion from the judiciary to the prosecution.³³ Moreover, the prosecutor's power to influence sentences is enhanced by a Guidelines provision permitting downward departures upon the prosecution's discretionary motion on the basis of assistance to law enforcement officials.³⁴ The result of this enhanced prosecutorial discretion is that, rather than sentences being dependent on the chance assignment of a sentencing judge, they depend on the chance assignment of a prosecutor.³⁵

30. See Guidelines Manual, *supra* note 3, ch. 1, pt. A, at 1. Where the Guidelines call for imprisonment, narrow ranges of duration are required. Generally, the maximum range cannot exceed the minimum by more than the greater of 25% or six months. 28 U.S.C. § 994(b)(2). If the minimum sentence is greater than 30 years, the maximum sentence can be life. *Id.*

31. 18 U.S.C. § 3553(b).

32. The Guidelines require increases or decreases in a sentence based upon certain factual offense characteristics. See, e.g., Guidelines Manual, *supra* note 3, § 2A2.2(b)(2)(C) (brandishing "dangerous weapon" during aggravated assault raises defendant's base score by three levels).

33. See Koh, *supra* note 10, at 1119-23. Daniel Freed describes the constrictive effect of the Guidelines on the judiciary:

Guidelines are administrative handcuffs that are applied to judges and no one else. When an AUSA negotiates a disposition by setting or reducing charges and identifying relevant facts, she effectively restricts the judge's sentencing range and, consequently, the ambit within which upward and downward adjustments can make a difference. The judge in this sense becomes a handcuffed decisionmaker, rather than the "black box" sentencer of the past who was free to roam at will throughout the statutory range. The judge's sentencing range is now tethered to the prosecutor's choice of charges and facts, unless the probation officer's independent inquiry brings some facts into question.

Freed, *supra* note 25, at 1697-98 (footnotes omitted).

34. Koh, *supra* note 10, at 1119-20; see Guidelines Manual, *supra* note 3, § 5K1.1.

35. See Freed, *supra* note 25, at 1697-98 (suggesting that the disparity that once may have been present due to judicial discretion has not been diminished, but rather merely flows from a different source, that of prosecutorial discretion); Koh, *supra* note 10, at 1124.

The Commission's greatest error in approaching the task set for it in the FSRA was identifying judicial discretion, rather than the prevailing unguided exercise of that discretion, as the cause of the perceived problems in federal sentencing. This focus on judicial discretion caused the Commission to adopt the position that, in order to cure the perceived defects in sentencing, it would be necessary to sacrifice the benefits of individualized sentencing by a responsible judiciary.³⁶

II. THE NEED FOR CHANGE

A system of justice, and society generally, benefit greatly when an identifiable and responsible party exercises discretion to fashion sentences that are appropriate to individual defendants. When discretion is transferred from judges to prosecutors or other actors in the sentencing process, the exercise of discretion is largely removed from public view. Judges, however, exercise their discretion publicly and, in general, their decisions are subject to appellate review. Moreover, judges, as opposed to legislators and commissioners, are experienced in applying legislative policies to specific fact situations.³⁷

Attempting to eliminate inter-judicial sentencing disparity by eliminating judicial discretion results in similar treatment of truly different defendants.³⁸ Disparity among sentences often reflects no more than a proper recognition of differences among offenders.³⁹ In addition to uniformity in sentencing, the FSRA instructed the Commission to seek proportionality to insure that different levels of culpability are reflected in different sentences.⁴⁰ The statute sought to eliminate *unwarranted* disparity in sentencing, not all disparity, and recognized that the task of distinguishing truly different cases is as difficult and as important as the task of properly grouping cases that should be treated similarly.⁴¹ The Commission has acknowledged that these

36. See Alschuler, *supra* note 26, at 949-51.

37. Knapp, *supra* note 20, at 689.

38. Testimony of Robert W. Sweet to the Subcommittee on Crime and Criminal Justice, Committee on the Judiciary, United States House of Representatives (July 15, 1987), at 246-50 (on file with the *Fordham Law Review*) [hereinafter Sweet Statement] (noting that disparity in sentencing is not necessarily harmful to society; instead, disparity that reflects the unique circumstances of individual defendants is beneficial); see Alschuler, *supra* note 26, at 944-45; Marc Miller, *Purposes at Sentencing*, 66 S. Cal. L. Rev. 413, 465 (1992) [hereinafter Miller, *Purposes*].

39. See *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("[A] consistency produced by ignoring individual differences is a false consistency."), *cert. denied*, 470 U.S. 1051 (1985); Miller, *Purposes*, *supra* note 38, at 424.

40. See Guidelines Manual, *supra* note 3, ch. 1, pt. A, at 2.

41. See Alschuler, *supra* note 26, at 916 & n.52; see also Freed, *supra* note 25, at 1705 (criticizing the Commission for failing to adequately distinguish between persons of varying culpability); Miller, *Purposes*, *supra* note 38, at 424 ("Congress meant to reduce only *unwarranted* variation.").

goals are often in conflict and that the Guidelines failed adequately to resolve this conflict.⁴²

Determining the appropriate sentence for the individual defendant before the court is an agonizing and *ad hominem* process, and no guidelines can capture the shades of distinction which make different sentences appropriate.⁴³ Judges with experience in sentencing develop an irreplaceable context within which to evaluate defendants and criminal behavior in general.⁴⁴ The translation of this sentencing experience to sentencing grids inevitably leads to unjust results.⁴⁵ The use of sentencing grids deprives individual defendants of their right to have their circumstances individually considered and deprives society of its right to have appropriate sentences imposed.⁴⁶

The Guidelines have caused dissatisfaction within the judiciary—the branch of government traditionally most responsible for ensuring that sentences were imposed in a just and effective manner—because they circumscribe the judiciary's role in sentencing.⁴⁷ This dissatisfaction is compounded by the conviction among many judges that they are participating in an unjust procedure.⁴⁸ The Guidelines disperse responsibility for sentencing among the judiciary, the legislature, and the Commission, leaving no actor visibly accountable for the awesome responsibility of restricting the liberty of an individual.⁴⁹ As judges understand the new order of interplay of discretionary decisionmaking under the Guidelines, judges may learn to manipulate the Guidelines to achieve, as nearly as possible, sentencing results that they feel justice indicates in given cases.⁵⁰ The resulting inter-judge disparity in

42. See Freed, *supra* note 25, at 1704 & n.126.

43. See Terence Dunworth & Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience*, 66 S. Cal. L. Rev. 99, 104 & n.14 (1992).

44. See Freed, *supra* note 25, at 1704; see also Miller, *Purposes*, *supra* note 38, at 465 (summarizing Alschuler's attack on the Guidelines for their failure to take individual circumstances into account).

45. See, e.g., *United States v. Rodriguez*, 724 F. Supp. 1118, 1122 (S.D.N.Y. 1989) (constructing a hypothetical that demonstrates how cases with widely divergent circumstances may require comparable sentences under the Guidelines).

46. See Alschuler, *supra* note 26, at 905-06.

47. See Mary P. Flaherty & Joan Biskupic, *Justice by Numbers: Federal Sentencing Guidelines Are Yielding Unequal, Unfair Results*, Wash. Post, Oct. 14-20, 1996, at 6 (citing Judge Jose Cabranes of the Second Circuit Court of Appeals as describing the Guidelines as "a Rube Goldberg-like system" and Judge Harold H. Greene of the United States District Court for the District of Columbia as noting that prosecutorial impact "strikes at the very heart of our system").

48. See Freed, *supra* note 25, at 1686-87; Koh, *supra* note 10, at 1125.

49. Sweet Statement, *supra* note 38, at 235; see Knapp, *supra* note 20, at 687; Koh, *supra* note 10, at 1111.

50. A Washington Post study of approximately 79,000 cases decided under the Guidelines between October 1, 1993, and September 30, 1995, found that "[i]n almost half, the final sentence imposed by the court differed from the sentence originally calculated by the probation officer. Most of the differences were the result of differing interpretations of the facts of the case or of the sentencing rules." Flaherty & Biskupic, *supra* note 47, at 6.

sentencing is potentially as great as the inter-defendant disparity that existed before the advent of the Guidelines.⁵¹

Undoubtedly, the "regime of unreasoned, unconsidered caprice for exercising the most awful power of organized society,"⁵² by sentencing judges was a weakness of the pre-Guidelines system.⁵³ The pre-Guidelines system of federal sentencing thwarted the proper functioning of the judiciary in the context of sentencing because judges were given insufficient information: "Judges do not make decisions on the basis of the individuals before them—rather they make decisions on the basis of information they have regarding the individuals before them."⁵⁴ It was not judicial discretion *per se* that plagued the former system, but the fact that judges received no information from either trial or appellate courts on what sentences were appropriate or where to begin the sentencing process.⁵⁵

There was generally no requirement of published sentencing opinions under the pre-Guidelines system,⁵⁶ and so judges with little or no training in sentencing⁵⁷ were left largely to "apply [their] own notions of the purposes of sentencing" when determining sentences.⁵⁸ In addition, there was virtually no appellate review of pre-Guideline sentences.⁵⁹ The nearly absolute autonomy of sentencing judges created an inequitable situation in which a defendant's sentence depended largely on his or her sentencing judge.⁶⁰

The FSRA's replacement of judicial discretion with mechanical, Guidelines-based, largely unreviewed sentencing, for the purpose of

51. See *United States v. Harrington*, 947 F.2d 956, 965 (D.C. Cir. 1991) (Edwards, J., concurring) ("[W]hether the [Guidelines] actually get bent may depend upon the luck of the draw in judicial assignment: if the trial judge is willing to look the other way, the facts can be manipulated and the Guidelines ignored"); Freed, *supra* note 25, at 1684 & n.5; Koh, *supra* note 10, at 1124.

52. Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. Cin. L. Rev. 1, 2 (1972) (criticizing disparity in pre-Guidelines discretionary sentencing).

53. *Id.* at 4.

54. See Knapp, *supra* note 26, at 695.

55. See Freed, *supra* note 25, at 1687-88.

56. See Miller, *Purposes*, *supra* note 38, at 451-52; Koh, *supra* note 10, at 1113.

57. Several commentators have pointed out that legal education largely ignores the topic of sentencing. See Ogletree, *supra* note 10, at 1942; Koh, *supra* note 10, at 1115.

58. Miller, *Purposes*, *supra* note 38, at 452; see Alschuler, *supra* note 26, at 944-45; Ogletree, *supra* note 10, at 1942-43 ("The absence of a requirement to enunciate reasons for a particular sentence made it difficult, if not impossible, to know whether judges imposed sentences as a result of careful deliberation and objective factors, or of whim and caprice."); Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. Cal. L. Rev. 621, 622 (1992) (noting that judges had broad discretion to "impose [virtually] any sentence they desired"); Koh, *supra* note 10, at 1113-15 (noting that under indeterminate sentencing, a "judge could freely draw upon any information in the [Presentence Investigation Report] as well as virtually any other evidence found to be instructive").

59. See Marc Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 Behav. Sci. & L. 3, 5 (1989) [hereinafter Miller, *Not Enough*].

60. See Alschuler, *supra* note 26, at 901.

achieving uniformity, has jeopardized proportionality—a goal of sentencing both prior to and under the Guidelines.⁶¹ In addition, the accountability of judges to all of those who play a part in the sentencing process leaves much to be desired.

It would be hard to find disagreement with the proposition that judges must be accountable for the penalties they mete out to offenders. But the concept of accountability is relevant to the sentencing process at two levels—the case level and the systemic level. The traditional processes of the common law can and should be combined with contemporary electronic tools to ensure both case-level and systemic accountability in sentencing. Case-level accountability refers to the requirement that a judge provide reasons for his or her decisions so that those who are directly affected by a decision are informed of its basis and so that the decision can be appealed. Systemic accountability refers to the extent to which individual sentences are harmonized with other decisions throughout the relevant jurisdiction which apply the same law to the same offense.⁶²

III. PROPOSALS

In light of the widespread criticism of the Guidelines,⁶³ it is not too late to suggest that the Guidelines' attack on judicial discretion was ill-conceived and that the Guidelines should be substantially modified, converted to use as a set of advisory rules, or abandoned. Steps are required to achieve the following goals: reinstate and guide judicial discretion; bring the traditional information-sharing practices of common law case reporting to the sentencing process; provide the correc-

61. See Guidelines Manual, *supra* note 3, ch. 1, pt. A, at 2; Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L. Rev. 1, 9 (1988) ("The principle difficulty with a presumptive sentencing system is that it tends to overlook the fact that particular crimes may be committed in different ways, which in the past have made, and still should make, an important difference in terms of the punishment imposed."); Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 Am. Crim. L. Rev. 771, 773-74 (1992) (arguing that sentencing guidelines have neither eliminated disparity nor achieved proportionality in sentencing); Nagel, *supra* note 12, at 935 (recognizing that "over-reaching uniformity" may compromise proportionality); Gary Swearingen, *Proportionality and Punishment: Double Counting Under the Federal Sentencing Guidelines*, 68 Wash. L. Rev. 715, 734 (1993) (noting ambiguity in the Guidelines regarding the double counting of certain offenses, thereby violating proportionality, and suggesting that the ambiguity should be resolved in favor of criminal defendants); David Yellen, *Illusion, Illogic, and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 Minn. L. Rev. 403, 413-14 (1993) (noting that the uniformity of charge-offense sentencing may sacrifice proportionality); Koh, *supra* note 10, at 1134.

62. See Knapp, *supra* note 21, at 689.

63. See Dunworth & Weisselberg, *supra* note 43, at 103 n.12 (discussing criticisms of the Guidelines); Knapp, *supra* note 21, at 680 (noting that the Guidelines are so poorly regarded that the only attention states pay to them is to avoid their becoming a political obstacle to developing state guidelines); Koh, *supra* note 10, at 1109 (noting that the Guidelines had drawn much criticism and virtually no praise).

tive, clarifying, and explanatory benefits of appellate review; and provide comparative information to sentencing judges to prevent wide sentencing disparity.⁶⁴ Mechanisms that have been suggested include requiring the Commission to create "normal case" precedents which would bind sentencing judges in the manner of appellate court cases;⁶⁵ establishing a system of guided discretion modeled on the Supreme Court's death penalty jurisprudence;⁶⁶ and establishing three-judge sentencing panels subject to enhanced appellate review.⁶⁷ All of these proposals adopt as their starting point the abandonment of the Guidelines in their present form.

Experience with the sentencing process before and during the Guidelines period and an assessment of available and emerging governmental resources together indicate the desirability and the feasibility of certain modest reform measures. Assuming a modification of the present Guidelines in the light of empirical experience, these measures could be implemented at relatively low cost and could function in tandem with or as an alternative to other suggestions for reform of federal sentencing procedures. In view of the needs articulated above, this Article proposes: (i) replacing the mechanical approach of Guidelines sentencing with a dynamic approach based on guided judicial discretion, which itself is guided by a simplified statement of a Guideline range for a statistical norm with an obligation to depart from the norm for cause; (ii) informing the sentencing process with the inter-judicial flow of information provided by written, disseminated sentencing opinions subject to appellate review; and (iii) expanding the existing computerized database currently maintained by the Commission through the Integrated Case Management System ("ICMS")⁶⁸ and making it available online to all district judges, enabling them to cull from the database, using standardized searching software, a case-specific report yielding a statistical norm applicable to the offense and the offender in question. The Commission would formulate the factors to be considered and the applicable initial range for sentencing.

64. See Alschuler, *supra* note 26, at 941-47 (focusing on the use of precedents to develop "normal cases" that judges could utilize or distinguish, as well as appellate review of sentencing decisions, to achieve individualized, fact-specific, uniform sentencing).

65. *Id.* at 941-42.

66. Ogletree, *supra* note 10, at 1959-60.

67. Koh, *supra* note 10, at 1127-32.

68. In all of the district courts, electronic as well as physical dockets are maintained for both criminal and civil cases. Eighty-eight districts use ICMS, and six districts—the Southern District of Indiana, the Western District of Wisconsin, and the Districts of Guam, Nevada, the Northern Marianas Islands, and the Virgin Islands—use systems different in construction but similar in effect. Interview with Frank Dozier, Chief, Systems Technology Division, Administrative Office of the United States Courts (Apr. 24, 1996).

A. *Return to Discretion, with Greater Guidance*

The Guidelines have removed needed discretion, resulting in different disparities, and have severely reduced accountability in the sentencing process. Therefore, this Article recommends that Congress should modify the Commission's responsibilities and require the Commission to provide the factors to be considered in sentencing and to modify the initial Guidelines offense categories by the movement of a statistical norm. The Commission should continue to formulate the principles and factors to be considered in sentences and to implement the online dissemination of statistical data to sentencing judges in response to online user queries from chambers.

In place of the Guidelines, there should be a return to the tradition of commending the task of imposing a just sentence to the discretion of the sentencing judge. In combination with this discretion, however, there should be a moving statistical band developed by judges and the Commission, thus removing the sentencing process from the precedential and informational vacuum in which it has operated for so many years.

B. *Requirement of Disseminated, Written Opinions*

As has already been noted, in order to have a common law of sentencing, there must be written, published sentencing opinions subject to appellate review.⁶⁹ Under the Guidelines, judges are required to state, in open court, reasons for each sentence, including a "specific reason" for sentences outside the applicable guideline range.⁷⁰ A sentencing court is required to provide a transcription of its statement to the U.S. Probation Department, but there is no requirement that the statement be published.⁷¹ The FSRA's requirement of a statement in open court and a provision of a transcript of that statement to the Probation Department does not accomplish the beneficial effects of written, published opinions for two reasons: incompleteness and unavailability.

Transcripts of sentencing reasons generally lack completeness, clarity, and organization,⁷² which deficiency discourages their use and review by other judges and practitioners. Pursuant to 28 U.S.C. § 994(w), all sentences other than those for petty offenses are reported to the Sentencing Commission.⁷³ These reports are made on a form which seeks short answers to a limited set of questions.

69. See Miller, *Not Enough*, *supra* note 59, at 11.

70. 18 U.S.C. § 3553(c) (1994).

71. *Id.*

72. See *United States v. Smith*, 767 F.2d 521, 523-24 (8th Cir. 1985) (finding that a transcript of a hearing at which the court revoked probation did not contain a sufficient statement of the reasons for the revocation); Miller, *Not Enough*, *supra* note 59, at 14.

73. 28 U.S.C. § 994(w) (1994).

Although a useful source of statistical data, these forms cannot by themselves, due to their essentially abstractive purpose, serve any legal precedential or persuasive value.⁷⁴ Their most crucial deficiency is an adequate statement of the facts of the case which would give another judge a clear sense of the applicability of the reasoning of the sentence to a subsequent case.⁷⁵ Finally, whatever value these forms might have to sentencing judges in practice is moot due to the fact that the information contained in them is made available by the Commission only in printed, abstracted form on a yearly basis in the Commission's Annual Report.⁷⁶

To enhance accountability, judges should be required to provide written opinions stating the reasons underlying each sentence and its relationship to the statistical band developed for the particular offense, other than those for petty offenses. The reasons would not be stated in terms of adherence to the Guidelines, but in terms of the sentencing purposes and factors formulated by the Commission.⁷⁷ Written sentencing opinions would be required to state factual information about the offense and the offender as specified by the Commission and to make reference to the purposes of sentencing and how the sentence in question advances those purposes. Such opinions would provide a basis to subsequent judges for applying the basic principles that underlie criminal sanctions to the specific facts of a case. Factual information would include the offense, the surrounding circumstances, and the characteristics of the offender as specified by the Commission. The controlling statute would be applied to the facts of the offense, and a Guidelines range, initially published by the Commission, would be applied, although not necessarily followed.

Currently, transcripts of sentencing statements are generally unavailable both to the public and sentencing judges. Written sentences

74. See Miller, *Not Enough*, *supra* note 59, at 15.

75. *Id.*

76. See U.S. Sentencing Commission, Annual Report 29-30 (1994) [hereinafter "1994 Annual Report"] (listing the types of information collected by the Commission).

77. See Miller, *Purposes*, *supra* note 38, at 463-76; Ogletree, *supra* note 10, at 1952. Prior to the Guidelines, there were several basic purposes of sentencing: rehabilitation, retribution, incapacitation, and restitution. See Model Penal Code § 1.02(2) (1985) (listing among the general purposes of the sentencing and treatment of offenders: preventing offenses; promoting correction and rehabilitation; preventing excessive, disproportionate, or arbitrary punishment; providing fair warning of sentences; and treating offenders in an individualized manner). Similar, if not identical, goals are reflected in the FSRRA and its legislative history. 18 U.S.C. § 3553(a)(2); S. Rep. No. 225, 98th Cong., 1st Sess., at 75-76 (1983). The Guidelines themselves, however, do not reflect the overarching purposes of sentencing. See *Should Congress Adopt Sentencing Guidelines?*, A.B.A. J., July 1, 1987, at 36, 37 (interviewing Sentencing Commissioner Paul H. Robinson, who stated that the Guidelines fail to do "what the act requires—that is, to set sentences based on essentially a policy analysis of how to achieve certain statutory goals: punishment, deterrence, incapacitation, rehabilitation").

could, with no additional governmental expenditure of money or labor, become immediately available if added to the electronic docket as well as to LEXIS and Westlaw. Representatives of both of these database companies have expressed eagerness to publish all federal sentencing opinions without expense to the federal government.⁷⁸ At present, nearly all written opinions filed in federal district court are made available by these online services, within days of their issuance, regardless of whether they are slated for publication in the Federal Supplement.⁷⁹ Every judge in the federal system at present has access to Westlaw in his or her chambers, and judges and their staffs are familiar with these research tools; hence, no additional training or equipment would be required.

In April of 1995, in the Southern District of New York, a defendant who had pleaded guilty to one count of failure to file income tax returns, an offense categorized as a Class A Misdemeanor, was scheduled to be sentenced.⁸⁰ The applicable Guidelines range called for a term of imprisonment of between four and ten months.⁸¹ The presentence report was perused along with accompanying letters from the defendant's supporters and from the office of the U.S. Attorney. The case presented some difficulty, because the defendant was a distinguished member of the bar and a partner in a preeminent firm. His failure to file tax returns was glaringly inconsistent with an otherwise upstanding life and career, marked more by excessive preoccupation with the practice of law than by any criminal traits or behavior.⁸² Given these circumstances, online databases were searched for any sentencing opinions which might have guided the court in pronounc-

78. Telephone interview with Kimberly Angel, LEXIS Source Acquisition Analyst (Aug. 30, 1994) [hereinafter "Angel Interview 1"]; telephone interview with Donna Bergsgaard, Manager, National Reporter System, West Publishing Co. (Aug. 30, 1994) [hereinafter "Bergsgaard Interview"].

79. Westlaw publishes all opinions of national or local importance and questions of first impression. Telephone interview with Jennifer Moore, Media Relations, Westlaw (May 13, 1996). LEXIS publishes all trial opinions and opinions on dispositive pretrial motions, as well as noteworthy opinions on other pretrial motions. Telephone interview with Kimberly Angel, LEXIS Source Acquisition Analyst (May 6, 1996).

80. See *United States v. Minkel*, No. 94 Cr. 910 (RWS), 1995 WL 230352 (S.D.N.Y. Apr. 17, 1995) (opinion issued subject to hearing on Apr. 17, 1995, and subsequently modified in part by Judgment of Apr. 24, 1995).

81. Due to an upward revision of the applicable Guidelines range after the date of Minkel's offense, the Guidelines in effect at the time of the offense were applied. See *Minkel*, 1995 WL 230352, at *1; see also *Miller v. Florida*, 482 U.S. 423, 429-35 (1987) (following the principle of *ex post facto*, the Court held that the original, not revised, sentencing guidelines applied); Guidelines Manual, *supra* note 3, § 1B1.1(a), (b)(1) (stating that the "court shall use the Guidelines Manual in effect on the date that the defendant is sentenced," unless such use "would violate the *ex post facto* clause of the United States Constitution," in which case, "the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed").

82. See *Minkel*, 1995 WL 230352, at *2.

ing sentence in this difficult case. None was found which was sufficiently similar to the matter at hand to be of any guidance.

The sentencing judge's standard practice in criminal sentencing is to issue a written sentencing opinion to the parties at least one day prior to the scheduled sentencing hearing. The sentence articulated in the opinion is provisional, subject to the hearing. This practice allows the parties to anticipate what sentence the court is intending to impose and to prepare argument accordingly. At the sentencing hearing, counsel for both sides made reference in oral argument not to one but to three sentences imposed upon attorneys for closely related offenses in the Southern District all within the past year. None of these sentences had been recorded in written sentencing opinions. The court postponed the sentence and requested letter briefing on the comparison between the three preceding sentences and the sentence imposed in the case in question. Counsel responded with a detailed description of the offense and offender characteristics in the other three cases as well as descriptions of those judges' reasoning and results.⁸³ Minkel's sentence was then modified. The modification was guided by both the reasoning and the arithmetic of the precedents.

If sentencing opinions are committed to print, these opinions, in the vast majority of cases, will be available online through LEXIS and Westlaw⁸⁴ and thus will enter the body of available precedent, yielding an almost automatic improvement over the current system.⁸⁵ "Hardcover" publishing of sentencing opinions would be left, as it is with all other judicial opinions at the district court level, to the discretion of the individual judge. Concededly, some sentencing opinions will be unremarkable applications of the law to offenses and offenders whose salient characteristics resemble those from past cases. Opinions in such cases can be short, as long as they provide the required information as required by the Commission. When a new question of law or a new factual circumstance is addressed, or when a traditional conclusion is challenged or reevaluated, however, longer opinions will undoubtedly be issued, just as they are now in other fields of law. All such opinions, long and short, will be available through the online databases.⁸⁶

83. See Letter from Kerri Martin Bartlett, Assistant United States Attorney, S.D.N.Y., to Hon. Robert W. Sweet, U.S.D.J. (Apr. 18, 1995) (on file with the Clerk of the Court, S.D.N.Y., 94 Cr. 910 (RWS)).

84. Angel Interview 1, *supra* note 78; Bergsgaard Interview, *supra* note 78.

85. See Knapp, *supra* note 20, at 690 ("[J]udges often think their job is done when they state their reasons for departure at the case level. However, unless they forward those reasons to some central analytical group so that they can be used for policy and planning purposes, much of the value of articulating reasons is lost.").

86. Coauthor Judge Sweet has issued 91 sentencing opinions between August 20, 1989 and August 30, 1995, all of which are available on LEXIS and Westlaw. He observes that this has caused no noticeable hardship in his chambers.

Thus, the proposed requirement that judges issue written opinions stating the reasons underlying every criminal sentence other than those for petty offenses would provide, almost automatically, a firmament of reference points and a body of reasoning developed by the courts, but would be subject to certain procedures to minimize disparity.

C. *The Empirical Guideline*

Initially, the Commission would issue preliminary guidelines, presumably based on the present Guideline calculations. Judges would be required to sentence within the prescribed bands and to enunciate the salient facts as determined by the Commission. Judges would be permitted to depart from the Guidelines based upon the principles as set forth in the present statute: condemnation, punishment, deterrence, incapacitation, and rehabilitation, or upon any modification of those principles adopted by Congress or the Commission.

By reference to the salient considerations in the sentencing opinions, a sentencing bell curve for a particular offense committed by a defendant with particular characteristics could be obtained electronically. The judges would be required to impose sentences within standards to be developed by the Commission as to the width of the sentencing band. Departure would be permitted upon the statement of the principles of sentencing.

D. *Appellate Review*

Prior to passage of the FSRA, appellate review of sentences was unavailable unless a sentence exceeded statutory limits, resulted from material misinformation, or was based upon constitutionally impermissible considerations.⁸⁷ The FSRA expanded the availability of appellate review, but limited it to certain categories of claims.⁸⁸ On appeal, a defendant may not raise a sentencing court's failure to depart downward, *per se*,⁸⁹ although failure to depart downward may arise as an issue in one of the contexts set out in 18 U.S.C. § 3742(a).

A defendant may appeal on a claim of error that falls within one of four categories tightly circumscribed by subsection (a) of § 3742. Briefly stated, these categories are: (1) the sentence was in violation

87. See, e.g., *United States v. Dazzo*, 672 F.2d 284, 289 (2d Cir.) (noting that the scope of review of sentencing decisions is quite narrow), *cert. denied*, 459 U.S. 836 (1982); *United States v. Vasquez*, 638 F.2d 507, 533 (2d Cir. 1980) ("[A] sentence imposed by a federal judge is not subject to review if it is within the statutory limitations."), *cert. denied*, 454 U.S. 975 (1981).

88. See 18 U.S.C. § 3742(a) (1994).

89. See *United States v. Fossett*, 881 F.2d 976, 979 (11th Cir. 1989) (holding that the FSRA prohibits a defendant from appealing the sentencing judge's refusal to make a downward departure); *United States v. Davis*, 878 F.2d 1299, 1301 (11th Cir. (per curiam) (same), *cert. denied*, 493 U.S. 941 (1989).

of law; (2) the sentence was based on an incorrect application of the Guidelines; (3) the sentence was outside the Guidelines range and was greater than the maximum set by the Guidelines—i.e., an upward departure; and (4) the sentence was imposed for an offense for which no guideline has been promulgated and was plainly unreasonable.⁹⁰

The Government may appeal a sentence when the claim of error falls within one of four categories defined in subsection (b) of § 3742. Subsections (b)(1), (b)(2), and (b)(4) are identical to the corresponding subsections of § 3742(a), described above. Subsection (b)(3), however, provides that the Government may appeal when the sentence is outside the Guidelines range and less than the minimum set by the Guidelines—i.e., a downward departure.⁹¹

Congress should discard this mechanical approach to appellate review and, instead, permit appellate review of sentencing decisions for faulty application of the empirical guideline or acknowledged purposes of sentencing—rehabilitation, retribution, deterrence, and inca-

90. 18 U.S.C. § 3742(a).

91. 18 U.S.C. § 3742(b). The pertinent provisions of 18 U.S.C. § 3742 read in relevant part:

(a) APPEAL BY A DEFENDANT.—

A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
- (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
- (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) APPEAL BY THE GOVERNMENT.—

The Government [with the personal approval of the Attorney General or Solicitor General] may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines;
- (3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or
- (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

18 U.S.C. § 3742.

pacitation⁹²—rather than on the basis of compliance or noncompliance with the Guidelines.⁹³

As has often been pointed out, appellate review of sentences by the courts of England has succeeded in increasing uniformity in sentencing in that country,⁹⁴ and has prompted the growth of a full complement of reference resources usually associated with an established field of law: treatises, reporters, and specialized periodicals.⁹⁵ Sentencing decisions in accordance with this proposed procedure would develop the application of broad sentencing policies to individual cases while preserving the traditional and appropriate role of the courts, resulting in a coherent and ever-adapting body of law created by common law decisions.

E. Two-Way Flow of Statistical Information

The most laudable function of the Commission since its inception has been that of a clearinghouse for data. Every criminal sentence other than those for petty offenses is required to be reported in writing by the trial court to the Commission, and the Commission is required to submit an "analysis" of this information to Congress annually.⁹⁶ The Commission is specifically mandated by Congress to

92. See 18 U.S.C. § 3553(a)(1)-(2); Miller, *Purposes*, *supra* note 38, at 414, 427; see also Koh, *supra* note 10, at 1132-33 (noting that "[t]he British have long recognized the ability of appellate courts to harmonize the views of judges and to reduce [sentencing] disparity," but that appellate review of Guidelines opinions tend to address only adherence to the Guidelines rather than the acknowledged purposes of sentencing, and are therefore of little benefit in formulating a common law of purpose-based sentencing).

93. Professor Albert Alschuler has made the useful suggestion that the Guidelines should remain in place and be binding, rather than advisory, but only in the way that the rulings of higher courts bind district courts in the common law scheme. Alschuler, *supra* note 26, at 945. Judges, he suggests, should be permitted to distinguish individual cases which come before them from "normal cases" treated in the Guidelines. *Id.* When judges so distinguish a case, a different sentence is permissible, without any extraordinary reasoning beyond that required in other circumstances in which a trial court departs from prior precedent. *Id.*

94. See *id.* at 947; Koh, *supra* note 10, at 1132.

95. See Sweet Statement, *supra* note 38, at 267.

96. The Commission is required to issue the sentencing analysis pursuant to 28 U.S.C. § 994(w):

The appropriate judge or officer shall submit to the Commission in connection with each sentence imposed (other than a sentence imposed for a petty offense, as defined in title 18, for which there is no applicable sentencing guideline) a written report of the sentence, the offense for which it is imposed, the age, race, and sex of the offender, information regarding factors made relevant by the guidelines, and such other information as the Commission finds appropriate. The Commission shall submit to Congress at least annually an analysis of these reports and any recommendations for legislation that the Commission concludes is warranted by that analysis.

28 U.S.C. § 994(w) (1994).

collect, prepare, and disseminate information on federal sentencing practices.⁹⁷

The Commission maintains these data in a centralized database, with a master data file corresponding to each Commission Fiscal Year.⁹⁸ The data is remarkably comprehensive as to both offense and offender characteristics.⁹⁹ Furthermore, data can be broken down chronologically and geographically.¹⁰⁰

At present, these data are used to present a historical picture to Congress and to the Commission to aid these bodies in making law and policy. In keeping with this Article's call for a return to judicial discretion with a new effort to guide that discretion, these data initially should be put to use in the form of an online service made available to federal trial judges—a Judicial Statistical Inquiry System ("JSIS").

Just as reference to written opinions would enable sentencing judges to apply reasoning from prior decisions in similar cases, reference to the actual statistics on prior sentences issued to similar offenders for the same offense would enable judges to harmonize a new sentence with previous ones, thus alleviating unwarranted disparity. Ideally, the Commission could bring JSIS into existence without undue commitment of money and resources.

An interesting parallel is provided by a project of the National Fine Center ("NFC") which has, within the past year, undertaken to computerize the collection of data from all district courts concerning the imposition of criminal fines.¹⁰¹ The NFC is a branch of the Accounting and Financial Systems Division of the Office of Finance and Budget of the Administrative Office of the United States Courts. At

97. 28 U.S.C. § 995(a)(13)-(15) (1994).

98. The file for the Commission's Fiscal Year 1994 (Oct. 1, 1993 through Sept. 30, 1994) is called MONFY94. MONFY94 contains data on each of the 39,971 Guidelines sentences imposed in that year in the entire federal system. See 1994 Annual Report, *supra* note 76, app. A, at A-1.

99. MONFY94 records information on sentences in 35 fields, also called variables. The variables include offense characteristics such as drug amount, drug type, and primary offense category, all of which include broad offense types such as violent, drug-related, firearms, property, etc. and then are broken down into particular offenses such as murder, larceny, extortion, etc. See *id.* at app. A.

Other variables concern offender characteristics such as age, citizenship, education, gender, income, race, and criminal history category. *Id.* Still other variables record aspects of the sentence imposed, such as type of sentence, e.g., prison, probation, prison/community split, etc.; fines/restitution; and length of imprisonment. *Id.*

This database also records information specifically related to the Guidelines, such as whether the sentencing court departed from the Guidelines, which Guidelines range the sentence was based on, and where in the Range a particular sentence fell. See 1994 Annual Report, *supra* note 76, app. A.

100. MONFY94 contains variables for year of sentence and for judicial circuit and district.

101. See Telephone Interview with Kim M. Whatley, Probation Administrator of the National Fine Center, Washington, D.C. (July 26, 1995).

present, information concerning every criminal fine imposed in the federal system is electronically submitted via modem to the NFC and collated into a district-by-district database. Of particular interest is the fact that the information is periodically transmitted back to each district courthouse for use by court administrators and U.S. marshals.¹⁰² It is anticipated that in the next few years, nationwide fines-related data will be available to each courthouse online.¹⁰³

Presently, the Commission has a staff of computer programmers and data technicians employed in its Office of Monitoring.¹⁰⁴ The Commission has already ventured into the computer software field with the introduction of ASSYST. ASSYST is a type of personal computer software that the Commission is disseminating to assist judges, probation officers, and law clerks in calculating Guidelines sentences and tracking historical sentences of a single judge.¹⁰⁵ The authors propose that this effort be redirected into JSIS.

Since personal computers equipped with modems or connected to modem pools are now installed in all chambers in the federal system, one end of the JSIS hook-up is already in place. Just as judges and their staffs dial in to LEXIS and Westlaw, they would dial in to JSIS. Access to the data contained in the Commission's files could be accomplished in either one of two ways. In district courthouses which have their own centralized computer facility, the necessary data file(s) could be downloaded periodically (probably weekly) from the Commission to a central computer in each district court. Access would then be provided to chambers either via intra-courthouse network or via modem. Alternatively, the Commission's computer facility in Washington would make a dial-in gateway available to all district court judges. This would require a significant but not prohibitive allocation of new data communication resources.

Much as the Commission staff has developed ASSYST, which is a "Windows-like" user software that aids judges, law clerks, and probation officers in calculating a Guidelines sentence,¹⁰⁶ the Commission would develop JSIS user software, which would enable judicial staff to formulate queries to glean relevant statistics from the database.

For example, imagine that a judge receives a presentence report indicating that the defendant has pleaded guilty to selling 600 grams of cocaine. The defendant has a high school diploma, is unemployed, earned \$12,000 in the last year, is married, and has no prior criminal history. The judge or a staff member could dial in to the JSIS system, and using a menu of choices, build a query to extract data on all

102. *Id.*

103. *Id.*

104. See U.S. Sentencing Comm'n, Organizational Directory 40-43 (1995) (on file with the *Fordham Law Review*).

105. See 1994 Annual Report, *supra* note 76, at 28.

106. *Id.*

sentences for the offense in question issued to offenders of the same characteristics. The question could be posed at the nationwide level, the circuit level, or the district level. The time-frame could be set to six months, one year, or the beginning of Guidelines sentencing. Elements of the profile such as gender or age could be added or removed from the query.¹⁰⁷ But unlike ASSYST or consultation with the Guidelines manual, JSIS would reveal, in tabular form, graphic form, or both, *the actual range of sentences that have been imposed.*

In other words, a JSIS query would provide the sentencing judge with the statistical norm of sentences, a "bell curve" of sentences that actually have been imposed, including those sentences that are now classified as "departures." At present, reference to the Guidelines themselves tells the judge what the Commission has decided the sentence *should be*, but not how many times defendants may have received more or less than the range. Adherence to the Guidelines rather than the actual statistical norm leaves a door open to continued disparity. JSIS would be a tool for judges to close that door.

Through JSIS, trial judges would have a range from which to begin consideration of a specific sentence. Such a measure was anticipated by one commentator whose work was a starting point of the Guidelines movement, although there technology was viewed as a way to restrict, rather than guide, judicial discretion.¹⁰⁸ JSIS data used in arriving at an actual sentence would be briefly included in the written opinion. If the court has given the offender a sentence outside the "bell curve," the reasons for that departure would be articulated in the opinion.

Since the MONFY94 database contains only data regarding actual district court sentencing decisions, a statistical norm derived from those data would have some persuasive weight before an appellate court. This is analogous to the consideration a federal Court of Appeals gives in a common law appeal to an aggregation of district court opinions on a question which it has never decided itself.

At present, the Commission derives most of the data included in MONFY94 from Judgment and Commitment forms ("J&C Forms") which are completed by court personnel for each criminal sentence. Whether data-gathering continues via these forms or becomes an electronic process in the future, a key focus must be on what data are gathered via these forms at the time of sentencing. It is recommended that judges have input into the variables that are recorded for each sentence and ultimately entered into the Commission's database. Sentencing judges will be best situated to know what characteristics of

107. It might be of interest to a judge in sentencing a particularly youthful adult offender to see how other offenders of the same age, as opposed to an age range, have been treated.

108. See Marvin E. Frankel, *Criminal Sentences* 115 (1973) (anticipating the use of computers "as an aid toward orderly thought in sentencing").

the offender and the offense are relevant to the future determination of appropriate sentences in similar circumstances. Whether these questions are answered on paper or electronically, flexibility and judicial input as to their content are critical.

Those criteria which Congress urged the Commission to consider in formulating the Guidelines, such as the defendant's age, education, vocational skills, mental and emotional condition, physical condition, employment record, family ties and responsibilities, community ties, role in the offense, criminal history, and dependence upon criminal activity for a livelihood,¹⁰⁹ are all obviously necessary pieces of information. To the extent that they are not adequately reflected in the Commission's existing data files, the J&C Form, or other data-gathering tool must include those criteria, and the database designs—structures used to record the different variables—must be revised and expanded to include them. Other factors might be derived from public opinion data on crime seriousness and appropriate sentences, criminal career data, recidivism data, deterrence data, data on alternatives to incarceration, and others.¹¹⁰ Fortunately, this proposal does not face the formidable problem of establishing a sufficient quantum of data.¹¹¹

The benefits of the proposed JSIS are that the analysis of sentencing data would be multivariate, allowing the judge to examine the range of sentences given to defendants very similar to the defendant under consideration, thus reducing the problem of excessive aggregation of offenses and defendants. Consideration could also be given to the relevant geographical scope of sentencing norms; it may be determined, for example, that it is preferable to have circuit-wide rather than nationwide consistency in sentencing for certain crimes.¹¹² As mentioned, JSIS queries could be executed for the district, circuit, or national levels.

The system would also be self-correcting in response to the ongoing development of sentencing practices. When a statistically significant number of sentences diverged from the previously established norm for a particular class of defendant and offense, the norm itself would change, unless and until those sentences were reversed on appeal. Alternatively, if an aberrant sentence failed to convince enough other judges that sentencing for a particular class of defendant and offense should be altered, those sentences would not affect the norm of sentences for that class. Thus, the norm of appropriate sentences

109. See 28 U.S.C. § 994(d)(1)-(11) (1994); Guidelines Manual, *supra* note 3, § 5H1.1-9.

110. See Nagel, *supra* note 12, at 932.

111. MONFY94 alone, which is limited to the data for the Commission's Fiscal Year 1994, contains data from over 39,000 sentences. See 1994 Annual Report, *supra* note 76, app. A, at A-1.

112. See Koh, *supra* note 10, at 1130.

would respond organically to changes in application by the judiciary, rather than waiting for change to come from Congress or the Commission.

CONCLUSION

The broad offense definitions established by the Model Penal Code required judges to structure sentences that responded to the culpability of the defendant through discretionary decisionmaking. The lack of information available to the judiciary in carrying out this task has created unwarranted sentencing disparity.

The sub-classification of offenses effected by the United States Sentencing Commission Guidelines largely eliminated judicial discretion, and with it many of the benefits of individualized sentencing. The challenge for federal sentencing in the future is to combine available technology with common law practices, thus providing the judiciary with the necessary information to perform its traditional task of applying congressional sentencing policies to the circumstances of the defendants who appear in federal court.