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Federal PROBATION

*a journal of correctional
philosophy and practice*

SPECIAL FOCUS ON: 30 YEARS WITH FEDERAL SENTENCING GUIDELINES

Federal Sentencing Policy: Role of the Judicial Conference of the United States and the Administrative Office of the U.S. Courts

By Hon. Ricardo S. Martinez

The Integral Role of Federal Probation Officers in the Guidelines System

By Hon. William H. Pryor Jr.

Reflecting on Parole's Abolition in the Federal Sentencing System

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Five Questions for the Next Thirty Years of Federal Sentencing

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State Sentencing Guidelines: A Garden Full of Variety

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THIS ISSUE IN BRIEF

This September's issue of *Federal Probation* features a special section looking at "30 Years with Federal Sentencing Guidelines." The Sentencing Reform Act of 1984, which established sentencing guidelines for the federal courts, went into effect in November 1987, marking great changes for federal judges (and other court staff, including the U.S. probation officers who prepare presentence reports for the judges). The five articles in this issue's special section look at the 30-year history of Sentencing Guidelines from a variety of perspectives, including the perspective of state sentencing commissions.

This issue also marks the end of Nancy Beatty Gregoire's tenure as executive editor of this journal, as she retires from the federal judiciary after 26 years in the federal probation and pretrial services system. As deputy chief of the Probation and Pretrial Services Office of the Administrative Office of the U.S. Courts, Nancy has been a passionate proponent of the evidence-based supervision initiatives in our system and an engaged and appreciative participant in the federal probation and pretrial services system. We wish her well in the next chapter of her life.

—*Ellen Wilson Fielding*
Editor, *Federal Probation*

SPECIAL FOCUS ON: 30 Years with Federal Sentencing Guidelines

Federal Sentencing Policy: Role of the Judicial Conference of the United States and the Administrative Office of the U.S. Courts

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While the Sentencing Commission has been the primary agency charged with establishing sentencing policies and practices for the federal courts over the past 30 years, the Judicial Conference of the United States (the national policy-making body for the federal courts) and the Administrative Office of the U.S. Courts (AO) have also played important roles in developing and implementing sentencing policy. The author, the current chair of the Judicial Conference Committee on Criminal Law, describes the role of both these entities during this era of sentencing guidelines.

Ricardo S. Martinez

The Integral Role of Federal Probation Officers in the Guidelines System

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The author, who is acting chair of the United States Sentencing Commission, discusses the integral role that probation officers have played in the federal guidelines system. He highlights their role in helping create the initial guidelines as well as in implementing the guidelines since 1987, including the process of frequently amending them over the years.

William H. Pryor Jr.

Reflecting on Parole's Abolition in the Federal Sentencing System

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The author suggests how the Sentencing Reform Act's complete elimination of parole may have, at least indirectly, exacerbated some of the most problematic aspects of modern federal sentencing. He then highlights a few notable recent federal sentencing developments that have functioned as a kind of "parole light," and closes by suggesting that advocates for federal sentencing reform consider recreating a modest, modern form of parole as an efficient and effective means of improving the federal sentencing system.

Douglas A. Berman

Five Questions for the Next Thirty Years of Federal Sentencing

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The author poses five questions in the context of one of the federal system's state predecessors, the Pennsylvania Sentencing Guidelines, in hopes that the answers may offer possible opportunities for federal improvement over the next thirty years.

Steven L. Chanenson

State Sentencing Guidelines: A Garden Full of Variety

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Over forty years ago, sentencing in the U.S. was primarily "indeterminate," with judges pronouncing long sentence terms consisting of minimum and maximum times to serve, and parole boards exercising their discretion in reviewing individual cases for release from prison. Since 1980, multiple states, the federal government, and the District of Columbia have enacted sentencing guidelines. The author describes some of the major features of sentencing guidelines in the states and relates them, where possible, to the federal sentencing guidelines.

Kelly Lyn Mitchell

Removal of the Non-scored Items from the Post-Conviction Risk Assessment Instrument: An Evaluation of Data-driven Risk Assessment Research within the Federal System

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In 2009, the Administrative Office of the U.S. Courts developed a dynamic risk assessment instrument, the Post Conviction Risk Assessment (PCRA), consisting of 15 scored items and 15 non-scored items that prior research had suggested should predict recidivism but that, at the time of the instrument's development, were unavailable for analytical purposes in the case management system. The authors examined whether these 15 non-scored items improve the PCRA's predictive accuracy or whether these non-scored items warrant removal from the instrument.

Thomas H. Cohen, Kristin Bechtel

The Presumption for Detention Statute's Relationship to Release Rates

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Since 1984, the federal pretrial detention rate has been increasing. The presumption for detention statute, which assumes that defendants charged with certain offenses should be detained, has been identified as one potential factor contributing to the rising detention rate. The author examines the relationship between the presence of the presumption and release rates and the effect, if any, of the presumption on the release recommendations made by pretrial services officers, and compares outcomes for presumption and non-presumption cases.

Amaryllis Austin

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The articles and reviews that appear in *Federal Probation* express the points of view of the persons who wrote them and not necessarily the points of view of the agencies and organizations with which these persons are affiliated. Moreover, *Federal Probation's* publication of the articles and reviews is not to be taken as an endorsement of the material by the editors, the Administrative Office of the U.S. Courts, or the Federal Probation and Pretrial Services System.

INTRODUCTION TO THE UNITED STATES SENTENCING GUIDELINES ANNIVERSARY SPECIAL SECTION

IN NOVEMBER 1987, the United States Sentencing Guidelines went into effect, dramatically changing sentencing in the federal criminal justice system. In this special issue commemorating the 30-year anniversary of the guidelines, a group of prominent judges and scholars reflect on the past and future of federal sentencing in the guidelines era.

In the first article, the Honorable Ricardo S. Martinez, chief judge of the United States District Court for the Western District of Washington and chair of the Committee on Criminal Law of the Judicial Conference of the United States, describes the role of the Judicial Conference and the Administrative Office in recommending, developing, and implementing federal sentencing policy both before and after the guidelines. Although there are numerous examples of how these entities inform and implement sentencing policy, he focuses on three areas. First, Judge Martinez describes their roles in creating national policy guidance for the development of presentence investigation reports by U.S. probation officers. Next, he describes the collaboration of the Judicial Conference and Administrative Office with the Sentencing Commission to develop a series of national judgment forms to facilitate guideline sentencing and meet the courts' legal obligations to provide information to the Sentencing Commission and assist the Commission in its data collection requirements.

Judge Martinez then describes the role of the Judicial Conference and Administrative Office in providing judiciary feedback on proposed changes to sentencing legislation and the guidelines and in implementing

retroactive application of guideline amendments. As he explains, the Judicial Conference, through the Committee on Criminal Law, has regularly provided feedback to Congress and the Sentencing Commission on laws and guidelines that would limit judicial discretion to impose individualized sentences. Finally, the Committee on Criminal Law has had an active role in the retroactive application of guidelines, particularly for drug offenses. It has recommended that guideline amendments be applied retroactively when necessary to achieve fundamental fairness, and it has worked collaboratively with the Sentencing Commission, the Bureau of Prisons, and other stakeholders to successfully manage the influx of inmates released to the community. As Judge Martinez concludes, the federal judiciary, through development of policies and judgment forms, feedback on changes to the guidelines and legislation, and assistance with retroactivity of guideline amendments, will continue to work collaboratively with the Sentencing Commission and other branches of government to pursue a just, fair, and effective sentencing system.

In the next article, the Honorable William H. Pryor, Circuit Judge of the United States Court of Appeals for the Eleventh Circuit and Acting Chair of the United States Sentencing Commission, describes the integral role that probation officers have played in the guidelines system. Judge Pryor first discusses their role in helping the Commission develop the initial guidelines by collecting empirical data about offense and offender characteristics and by advising the original Commissioners and Commission staff. Next, he discusses the role of

probation officers in implementing the guidelines over the past three decades by assisting with providing education and training about the guidelines; developing presentence reports that provide data to the Commission, which is necessary for its evaluation of the guidelines and sentencing statutes; advising the Commission about guideline amendments; and assisting with implementing retroactive application of guideline amendments.

Next, Professor Douglas A. Berman of the Moritz College of Law at The Ohio State University reflects on the abolition of parole in the federal sentencing system and its effect on the guidelines. After reviewing the history of parole, he suggests how its complete elimination may have, at least indirectly, exacerbated some of the most problematic aspects of modern federal sentencing, such as the enactment of mandatory minimum sentencing statutes and the guidelines' intricate and rigid structure. Professor Berman then highlights recent federal sentencing developments related to the early release of inmates from prison—what he refers to as “parole light”—such as reductions in guideline sentences for drug offenses made retroactively applicable to current inmates, a U.S. Department of Justice initiative to encourage the submission of clemency applications, and proposed corrections reform legislation. Professor Berman concludes by suggesting that advocates for federal sentencing reform consider whether recreating a modest form of parole might be an efficient and effective means to improve the sentencing system.

Steven L. Chanenson, Professor at the Villanova University Charles Widger School of

Law and former member of the Pennsylvania Sentencing Commission, reflects on the modern federal sentencing system and asks a series of questions in the context of one of the federal system's state predecessors, the Pennsylvania Sentencing Guidelines. He discusses whether discretionary parole release should be restored in the federal system and operate alongside sentencing guidelines, what the institutional composition of sentencing commissions should be, the role of data and transparency in sentencing commissions, whether guidelines are asking the right policy questions, and the role of guidelines and commissions in a well-functioning criminal

justice system. While he acknowledges there are no irrefutable answers to the questions he poses, he concludes that thinking about them can help us more effectively navigate our path forward for the next 30 years.

The essays by Professors Berman and Chanenson each contain a discussion of sentencing guidelines systems in the states. In order to put their perspectives into context and to stimulate broader discussions, Kelly Lyn Mitchell, Executive Director of the Robina Institute of Criminal Law and Criminal Justice at the University of Minnesota Law School, describes some of the major features of sentencing commissions and guideline

systems in the states and relates them, where possible, to the federal system.

While all of the views presented in these articles may not necessarily represent the official views of the Judicial Conference, we hope this special issue will spur thought and discussion and assist all stakeholders in their continuing efforts to assess and improve the federal sentencing system.

Matthew G. Rowland
Chief

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Federal Sentencing Policy: Role of the Judicial Conference of the United States and the Administrative Office of the U.S. Courts

Ricardo S. Martinez

*Chief Judge, U.S. District Court, Western District of Washington
Chair, Judicial Conference Committee on Criminal Law*

I. Introduction

In November 1987, the Sentencing Reform Act of 1984 (“SRA”) and the United States Sentencing Guidelines went into effect, dramatically changing how defendants are sentenced in the federal courts. Congress eliminated a model where defendants were sentenced to an indeterminate period with parole release, and instead created a determinate model where defendants knew at sentencing approximately how long they would serve. With the SRA, Congress also created the United States Sentencing Commission and required it to develop guidelines to structure judges’ sentencing decisions. Prior to the SRA, judges were generally free to sentence defendants within wide statutory parameters. The Senate report accompanying the SRA emphasized the need for guidelines to curtail judicial sentencing discretion and reduce sentencing disparities among similar defendants convicted of the same crime.¹ At the same time, it stressed that guidelines are not intended to be imposed “in a mechanistic fashion” and that their purpose “is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate thoughtful imposition of individualized sentences.”²

¹ S. Rep. No. 98-225, at 38 (1983).

² *Id.* at 52. Indeed, under 18 U.S.C. § 3553, courts are required to impose sentences sufficient, but not greater than necessary, to comply with the purposes of sentencing, and in determining the particular sentence to be imposed, must consider the nature and circumstances of the specific offense and the history and characteristics of the individual

While the Sentencing Commission has been the primary agency charged with establishing sentencing policies and practices for the federal courts over the past 30 years, there are other national entities within the federal judiciary that play important roles in the development and implementation of sentencing policy. These include the Judicial Conference of the United States (“the Judicial Conference”) and the Administrative Office of the U.S. Courts (“the Administrative Office”). The Judicial Conference, which was established by Congress in 1922, is the national policy-making body for the federal courts. Among other statutory obligations, it is required by statute to comprehensively survey business conditions in the courts and submit suggestions to the courts that promote uniform management procedures and the expeditious conduct of court business.³

The Judicial Conference operates through a network of committees that make policy recommendations to the Conference. One of the committees, the Committee on Criminal Law, has numerous responsibilities relevant to federal sentencing policy, including monitoring and analyzing for Judicial Conference consideration legislation affecting the administration of criminal justice; providing oversight of the implementation of the Sentencing Guidelines and making recommendations to the Judicial defendant.

³ 28 U.S.C. § 331. The Chief Justice of the United States is the presiding officer of the Judicial Conference. Membership comprises the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each regional judicial circuit.

Conference on proposed amendments to the Guidelines, including proposals that would increase their flexibility; ensuring that working relationships are maintained and developed with the Sentencing Commission, Department of Justice, Bureau of Prisons, and United States Parole Commission; overseeing the federal probation and pretrial services system; and proposing policies and standards on issues affecting the probation system, presentence investigation procedures, disclosure of presentence reports, sentencing and Sentencing Guidelines, and the supervision of offenders released on probation, parole, and supervised release.

The Administrative Office, which was established in 1939, supports the constitutional and statutory mission of the federal judiciary to provide equal justice under the law as an independent and equal branch of government. Its responsibilities include providing counsel and support to the Judicial Conference and its committees and implementing Conference policies and decisions.⁴ The Director of the Administrative Office, serving as secretary to the Judicial Conference, coordinates the activities of Administrative Office staff to support the Conference and its committees.⁵

⁴ Other responsibilities of the Administrative Office include delivering financial, human resource, legal, statistical, technological, and other administrative and program services to the judiciary; addressing the needs of courts, judges, court executives, and other judiciary employees and organizations, and providing guidance and assistance to facilitate successful performance of their functions; and serving as liaison between the judiciary and legislative and executive branches of the federal government.

⁵ See 18 U.S.C. § 3672. The Federal Judicial Center

Working with the chairs of the committees, Administrative Office staff prepare and assemble agendas and supporting material, conduct analyses and studies, identify cost implications of issues before the committees, accompany the committee chairs (or other designees) when called upon to testify before Congress or the Sentencing Commission, and visit with or work with members of the executive and legislative branches and other key policy-related entities.

This article describes the responsibilities of the Judicial Conference, the Committee on Criminal Law, and the Administrative Office in recommending, developing, and implementing federal sentencing policy. Although there are numerous examples of how these entities inform and implement sentencing policy, this article focuses on three areas. Specifically, it describes their role in: (1) creating and approving national policy guidance regarding the development of presentence investigation reports; (2) developing national judgment and statement of reasons forms for use by courts; and (3) providing judiciary feedback on proposed changes to sentencing legislation and the Sentencing Guidelines and implementing retroactive application of Guideline amendments.

II. National Policy Guidance on Presentence Investigation Reports

The selection of an appropriate sentence is one of the most important and difficult decisions made by federal judges, and the primary vehicle to assist them in fulfilling this responsibility is the presentence investigation report. The task of conducting presentence investigations and preparing presentence investigation reports is assigned to U.S. probation officers under 18 U.S.C. § 3552. These dedicated professionals use skills from various disciplines to investigate relevant facts about defendants; assess those facts in light of the purposes of sentencing; apply the appropriate Sentencing Guidelines, statutes, and rules to the available facts; and provide clear, concise, and objective reports that will assist the sentencing judges in determining appropriate sentences, aid the Bureau of Prisons in making classification, designation, and programming decisions, and assist the probation officer during supervision of the

offender in the community.

Since the 1940s, the Administrative Office has developed, and the Judicial Conference has approved, national policies to assist local probation offices in preparing presentence investigation reports.⁶ For most of the twentieth century, probation officers were guided in their presentence investigations by a philosophy that put a premium on understanding the causes of antisocial behavior and evaluating the possibilities of change. The national policy in effect prior to the SRA, for instance, explained that the presentence investigation report “describes the defendant’s character and personality, evaluates his or her problems, helps the reader understand the world in which the defendant lives, reveals the nature of his or her relationships with people, and discloses those factors that underlie the defendant’s specific offense and conduct in general.”⁷

⁶ In 1943, the Administrative Office issued Publication 101, *The Presentence Investigation Report*, which was revised in 1965 as Publication 103. In 1974, Publication 104, *The Selective Presentence Investigation Report*, was produced. Those publications were prepared by committees of special consultants under the guidance of the Committee on Criminal Law and represented state-of-the-art professional judgment regarding the critical contents of the presentence investigation report. Subsequent developments in statutory and case law redefined the contents and use of the report, leading to development of the 1978 monograph titled Publication 105, *The Presentence Investigation Report*, subsequently updated in 1984.

⁷ Publication 105, *supra* note 6, at 1. See also Publication No. 101, *supra* note 6, at 1 (“The presentence investigation [is] also known as the ‘social investigation,’ ‘social diagnosis,’ or ‘preliminary investigation.’ . . . Its primary object is to focus light on the character and personality of the defendant, to offer insight into his personality needs, to discover those factors underlying the specific offense and his conduct in general, and to aid the court in deciding whether probation or some other form of treatment is for the best interests of both the offender and society. In addition to the help they render the court in shaping sentence, the findings of the presentence investigation assist the probation officer in his rehabilitative efforts, and in the event of commitment, are helpful to the reformatories and penitentiaries in their institutional classification and treatment programs. The findings also aid the institutional authorities in parole selection and planning and are of assistance to the Federal probation officer when the parolee is returned to him under parole supervision.”); Publication No. 103, *supra* note 6, at 2-3 (“In conducting the investigation and in writing the presentence report, the probation officer should be primarily concerned with how the defendant thinks, feels, and reacts. . . . A presentence report is more than a compilation of tangible facts. Facts about family composition,

When the SRA went into effect, radical changes in the content and format of the presentence investigation report were necessary to accommodate the new sentencing model and process. The dominant task became applying a set of legal rules—the Sentencing Guidelines—to the facts of the case. The presentence investigation became guided largely by the need to resolve those factual questions that the Sentencing Guidelines treat as relevant. Soon after the SRA was enacted, a task force was convened under the auspices of the Committee on Criminal Law to examine the structure and content of the presentence investigation report. Membership consisted of staff from the Administrative Office, probation offices in 13 districts, the Federal Judicial Center, the Sentencing Commission, the Parole Commission, and the Bureau of Prisons. The task force undertook an examination of the efficiency and effectiveness of the presentence investigation report format in order to recommend improvements to the Committee on Criminal Law. In September 1987, a revised policy titled Publication 107, *Presentence Investigation Reports under the Sentencing Reform Act of 1984*, was issued based on the task force recommendations, which set forth guidance regarding the presentence investigation process and the format and content of the presentence investigation report.⁸

employment, health, and so on, have relatively little value unless they are interpreted in relation to the defendant and how he thinks, feels, and behaves. . . . How the defendant feels about those with whom he comes in daily contact, what he thinks about his family, his peers, and his coworkers—and what he believes they think about him—are essential to an understanding of his relationship with people. Also significant are his feelings about baffling problems in his life, including his offense and his reaction to opportunities, accomplishments, disappointments, and frustrations. His moral values, his beliefs and his convictions, his fears, prejudices, and hostilities explain the ‘whys’ and ‘wherefores’ of the more tangible elements in his life history. . . . Each [fact] should be interpreted in terms of the defendant’s family, background, culture, and environment, and in relation to the groups with whom he has associated and is closely identified”); Publication No. 104, *supra* note 6, at 1 (“The objectives of the presentence report are to focus light on the character and personality of the defendant, to offer insight into his problems and needs, to help understand the world in which he lives, to learn about his relationships with people and to discover those salient factors that underlie his specific offense and his conduct in general and to suggest alternatives in the rehabilitative process.”).

⁸ Rule 32 of the Federal Rules of Criminal Procedure also requires that the presentence investigation

also provides research and other assistance to Conference committees. 28 U.S.C. § 620(a)(4).

In January 2005, the Supreme Court held in *United States v. Booker*, 543 U.S. 220 (2005), that the Sentencing Guidelines were subject to the jury trial requirements of the Sixth Amendment of the U.S. Constitution and that the remedy was to sever the provisions of the SRA making the Guidelines mandatory. The Court's decision rendered the Sentencing Guidelines "effectively advisory."⁹ After consulting with a working group of probation officers and representatives from the Bureau of Prisons, the Sentencing Commission, and the Federal Judicial Center, the Administrative Office proposed policy revisions to address the *Booker* decision. In March 2006, the Judicial Conference approved revisions to *Publication 107*, including a new section to reflect the courts' authority to impose a sentence outside the advisory guidelines system.

This year, at the request of the Committee on Criminal Law, the Administrative Office initiated a study of presentence investigation reports to assess the strengths and weaknesses of the report and suggest potential improvements. The study will involve focus groups and surveys of judges and probation officers to evaluate and recommend modifications to the investigation process and the format and content of the presentence investigation report. The Committee on Criminal Law and the Administrative Office will consider the stakeholder feedback to determine whether further changes to national policy should be made.

III. National Judgment and Statement of Reasons Forms

In 1988, the Judicial Conference recommended that sentencing courts use a series of national judgment forms to facilitate sentencing within a guideline system.¹⁰ The same year, the Judicial Conference and the Sentencing Commission jointly introduced a separate statement of reasons form to alleviate the need to obtain and review sentencing transcripts to determine the reasons for sentences, which the court was required to provide pursuant to 18 U.S.C. § 3553(c); help meet the courts' obligation to report information to the Sentencing Commission under 28 U.S.C. § 994(w); aid the Sentencing Commission in exercising its authority under 28 U.S.C. §

995(a)(8) regarding sentencing data collection requirements; and assist the Bureau of Prisons in making inmate classification, designation, and programming decisions.

Over the years, the Committee on Criminal Law, in consultation with the Sentencing Commission and other stakeholders, has proposed revisions to the content and structure of the judgment forms and statement of reasons form to incorporate statutory changes and make improvements suggested by form users. In March 2001, for instance, the Judicial Conference approved the Committee's recommendation to attach the then-separate statement of reasons form to the judgment form; the Judicial Conference also designated the statement of reasons form as not for routine public disclosure, recognizing the need to protect sensitive information about whether a defendant's cooperation with the government in its efforts to prosecute others served as the basis for a reduced sentence.¹¹

In April 2003, the importance of the statement of reasons form was further highlighted with the passage of the "Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003" ("PROTECT Act"), Pub. L. No. 108-21, which amended 18 U.S.C. § 3553(c) to require the court to describe with specificity on the written judgment the reasons relied on when departing from the applicable range in the Sentencing Guidelines. The PROTECT Act also amended 28 U.S.C. § 994(w) to require courts to submit the statement of reasons to the Sentencing Commission and to direct the Commission to report submission rates for these documents to Congress. Subsequently, at the recommendation of the Committee on Criminal Law, the Judicial Conference revised the statement of reasons form to provide a clearer description of the reasons for the sentence imposed; the Judicial Conference also designated the statement of reasons form as the mechanism by which courts would comply with the PROTECT Act's reporting requirements.¹² Additionally, at the request of the Committee on Criminal Law, the Federal Judicial Center, the education and research agency of the federal judiciary, developed educational programs and information for

judges and court staff to assist them with using the revised statement of reasons form.

After the *Booker* decision in January 2005, the Committee on Criminal Law recognized that accurate data collection, analysis, and reporting would be even more critical to address congressional concerns and to meet the needs of the judiciary, the Sentencing Commission, and other stakeholders. It therefore recommended to the Judicial Conference that the Committee facilitate the reporting in the statement of reasons form of the detailed and specific facts relied upon in determining sentences that are outside the advisory sentencing guideline system. In March of 2005, the Judicial Conference delegated to the Committee on Criminal Law the authority to: develop educational programs, forms, and other similar guidance for judges and probation officers; work with the Sentencing Commission to improve the statement of reasons form and evaluate additional methods to ensure accurate and complete reporting of sentencing decisions; work with the Sentencing Commission to improve the Commission's data collection, analyses, and reporting to ensure that sentencing data meet the needs of the Commission, Congress, and the judiciary; and develop various strategies to pursue and promote the above-described Conference positions regarding post-*Booker* sentencing in discussion with the Sentencing Commission, Department of Justice, and Congress.¹³ In September 2005 the Conference approved revisions to the statement of reasons form that were recommended by the Committee based on suggestions from the Sentencing Commission, judges, and court staff.¹⁴ The revisions were designed to incorporate changes in the law as a result of *Booker*, make it easier for courts to report on sentencing decisions, and facilitate the Sentencing Commission's data collection, analysis, and reporting.¹⁵

In March 2006, the "USA PATRIOT Improvement and Reauthorization Act," Pub. L. No. 109-177, amended 28 U.S.C. § 994(w)

report include certain elements. The format of the presentence report is designed to satisfy the rule's requirements.

⁹ *Booker*, 543 U.S. at 245.

¹⁰ JCUS-MAR 88, p. 12.

¹¹ JCUS-MAR 01, p. 17. The complete judgment form, including the statement of reasons, continued to be forwarded to appropriate entities, such as the Sentencing Commission, the Bureau of Prisons, defense counsel, government attorneys, and the appellate courts.

¹² JCUS-SEP 03, p. 18.

¹³ JCUS-MAR 05, p. 15.

¹⁴ *Id.* at 20.

¹⁵ For example, the revised form allowed courts to fully document (1) findings on statutory mandatory minimum penalties; (2) reasons for imposing sentences within the advisory sentencing guideline system, including any departure authorized by the Sentencing Guidelines; and (3) reasons for imposing sentences outside the advisory guideline system based on other sentencing factors in 18 U.S.C. § 3553(a).

to require that the statement of reasons be “stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission.” As a result of this legislation, the statement of reasons form, which was neither available to the public nor locally modifiable, became a required part of the judgment form, which was generally available to the public and could be modified locally. To address concerns about making the sensitive information in the statement of reasons form public, the Judicial Conference sought legislation that would authorize the recording of the statement of reasons in a document separate from the judgment form.¹⁶ Congress subsequently enacted the Conference’s proposal as part of the “Federal Judiciary Administrative Improvements Act of 2010,” Pub. L. No. 111-174.

In September 2015, upon the Committee on Criminal Law’s recommendation, the Judicial Conference issued a revised statement of reasons form, subject to the approval of the Sentencing Commission, pursuant to 28 U.S.C. § 994(w)(1)(B). The revisions were intended to provide the Commission with additional information about why courts impose sentences outside the advisory sentencing guidelines system.¹⁷ The changes responded to feedback from judges, probation officers, court clerks, and others regarding sections that were confusing or difficult to apply. Among other changes, the revised form includes more checkboxes for sentencing outside the advisory guideline system that are explicitly associated with factors related to those listed in 18 U.S.C. § 3553(a).

Finally, in September 2016, on recommendation of the Committee on Criminal Law, the Judicial Conference approved revisions to the national judgment forms, including amendments to the standard conditions of probation and supervised release that were endorsed by the Criminal Law Committee and approved by the Sentencing Commission.¹⁸ The Committee on Criminal Law and Administrative Office staff, with the assistance of a group of probation officers from throughout the country, collaborated closely with the Sentencing Commission and its staff and other stakeholders with the intent of harmonizing the standard conditions listed on the national judgment forms with those in

the Sentencing Guidelines.¹⁹

IV. Feedback on Proposed Amendments to Sentencing Legislation and Sentencing Guidelines and Implementation of Retroactive Application of Amendments

The Judicial Conference, through the Committee on Criminal Law, has been active in providing feedback on behalf of the federal judiciary regarding proposed changes to sentencing legislation and the Sentencing Guidelines. The Conference and the Committee have also played a key role in recommending and implementing the retroactive application of amendments to the Sentencing Guidelines. Some examples of the Conference’s involvement in these areas are highlighted below.

Feedback on Proposed Sentencing Legislation

The Judicial Conference, through the Committee, has regularly provided feedback to Congress on proposed sentencing legislation, particularly legislation that would limit judicial discretion and affect the court’s ability to impose sentences that are individualized and satisfy the statutory purposes of sentencing. For over sixty years, the Conference has opposed statutory mandatory minimum sentences and has supported measures for their repeal or to ameliorate their effects.²⁰ It has criticized mandatory minimums on numerous grounds, including that they impair the efforts of the Sentencing Commission to fashion guidelines according to the principles of the SRA, that they are inherently rigid and often lead to sentences that are inconsistent and disproportionate, and that they unnecessarily increase the cost of prison and community supervision.²¹

¹⁹ The revisions were prompted in large part by recent circuit decisions striking down several of the standard conditions of supervision. For an overview of the developments that led to the revisions and the specific revisions, see Stephen E. Vance, *Conditions of Supervision in Federal Criminal Sentencing: A Review of Recent Changes*, 81 Fed. Probation 1, 3 (June 2017).

²⁰ JCUS-SEP 53, p. 28; JCUS-SEP 61, p. 98; JCUS-MAR 62, p. 22; JCUS-MAR 65, p. 20; JCUS-SEP 67, p. 79; JCUS-OCT 71, p. 40; JCUS-APR 76, p. 10; JCUS-SEP 81, p. 90; JCUS-MAR 90, p. 16; JCUS-SEP 90, p. 62; JCUS-SEP 91, pp. 45, 56; JCUS-MAR 93, p. 13; JCUS-SEP 93, p. 46; JCUS-SEP 95, p. 47; JCUS-MAR 09, pp. 16-17; JCUS-SEP 13, p. 17.

²¹ See, e.g., “Agency Perspectives”: *Hearing Before the*

In September 2003, in response to the PROTECT Act, the Judicial Conference “oppose[d] legislation that would eliminate the court’s authority to depart downward in appropriate situations unless the grounds relied upon are specifically identified by the Sentencing Commission as permissible for departure.”²² In November 2003, in a letter from the Chief Justice to Congress, the Conference again opposed the “troubling” provisions of the PROTECT Act limiting the ability of judges to downwardly depart from the guideline range, arguing that the act would “undermine the basic structure of the sentencing system,” “severely restrict the authority of the Sentencing Commission,” and hamper judges’ ability to impose “just and responsible sentences as individual circumstances and the facts of the case may warrant.”²³ Moreover, “[s]tripping federal judges of needed flexibility through some of the sentencing provisions of the PROTECT Act often requires judges to give harsher sentences to the least culpable defendants resulting in the very disparity the Sentencing Reform Act was intended to eliminate.”²⁴

In March 2005, in the wake of *Booker*, the Judicial Conference resolved “that the federal judiciary is committed to a sentencing guideline system that is fair, workable, transparent, predictable, and flexible.”²⁵ It further urged Congress “to take no immediate legislative action and instead to maintain an advisory sentencing guideline system.”²⁶ In 2006, the Conference opposed the then-existing difference between mandatory minimum sentences for crack and powder cocaine and supported the reduction of that

Over-Criminalization Task Force of 2014 of the H. Comm. On the Judiciary (July 11, 2014) (statement of Chief Judge Irene M. Keeley, Chair, Committee on Criminal Law, Judicial Conference of the United States); Letter from John D. Bates, Secretary, Judicial Conference of the United States, to Honorable F. James Sensenbrenner, Jr., Chairman, Over-Criminalization Task Force of 2014, Committee on the Judiciary, U.S. House of Representatives (May 27, 2014); Letter from Judge Robert Holmes Bell, Chair, Committee on Criminal Law, to Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate (September 17, 2013).

²² JCUS-SEP 03, p. 5.

²³ Letter from Chief Justice William Rehnquist, U.S. Supreme Court, to Senator Orrin Hatch, Chairman, Committee on the Judiciary, U.S. Senate (November 7, 2003).

²⁴ *Id.*

²⁵ JCUS-MAR 05, p. 15.

²⁶ *Id.*

¹⁶ JCUS-MAR 07, p. 14.

¹⁷ JCUS-SEP 15, pp. 14-15.

¹⁸ JCUS-SEP 16, p. 13.

difference.²⁷ The Conference's position was based in part on the recognition, cited by the Commission and others, that the severity of the 100-1 ratio greatly impacted minority defendants and that the penalties needed to be reformed in order to preserve the public's confidence in the courts. Congress subsequently enacted the "Fair Sentencing Act of 2010," Public Law No. 111-220, which reduced the disparity between sentences for crack and powder cocaine offenses. Since 2013, the Judicial Conference has sought legislation such as the "Justice Safety Valve Act of 2013" (S. 619, 113th Cong)²⁸ and the "Smarter Sentencing Act of 2013" (S. 1675, 113th Cong),²⁹ which are designed to restore judges' sentencing discretion and avoid the costs associated with mandatory minimum sentences.

Feedback on Proposed Changes Related to Sentencing Guidelines

The Judicial Conference has also had an active role in providing feedback to the Sentencing Commission about proposed changes related to the Sentencing Guidelines. In 1990, it authorized the Committee on Criminal Law to act with regard to submission from time to time to the Sentencing Commission of proposed amendments to the Sentencing Guidelines, including proposals that would increase their flexibility.³⁰ Some of the most significant examples of the positions of the Conference and the Committee are highlighted below.

The *Long Range Plan for the Federal Courts* (1995), for instance, recommended that the Sentencing Commission afford judges the ability to impose more alternatives to

imprisonment, encourage judges to depart from guideline levels where appropriate in light of factual circumstances, and enable them to consider a greater number of offender characteristics.³¹ Additionally, the Conference and the Committee have repeatedly expressed the view that the sentencing ranges for drug offenses should be set irrespective of statutory mandatory minimum penalties so that the full array of aggravating and mitigating circumstances can be taken into account.³²

In February 2012, Chief Circuit Judge Theodore McKee, United States District Judge Paul J. Barbadoro, and Chief United States District Judge M. Casey Rodgers testified on behalf of the Committee on Criminal Law

before the Commission.³³ Their testimony addressed numerous issues relevant to the state of federal sentencing during the advisory guidelines era and proposals for legislative changes.³⁴ The Committee reiterated the Judicial Conference's longstanding and consistent support for flexibility in guidelines sentencing. Additionally, it discussed the Conference's position on various post-*Booker* sentencing options. In particular, the Conference has considered and rejected a number of potential legislative responses and concluded that there were no readily available

³¹ Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, Recommendation 30 (Dec. 1995). The *Long Range Plan* was the first comprehensive long-range strategic plan for the federal judiciary.

³² See e.g., Letter from Chief Judge Irene B. Keeley, Chair, Committee on Criminal Law, to Judge Patti B. Saris, Chair, U.S. Sentencing Commission (March 11, 2014) (supporting a proposed amendment to lower the drug offense levels in the Sentencing Guidelines based on the Committee's longstanding position that the Guidelines should be de-linked from mandatory minimums); Letter from Judge Robert Holmes Bell, Chair, Committee on Criminal Law, to Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate (September 17, 2013). ("Consideration of mandatory minimums in setting Guidelines' base offense levels normally eliminates any relevance of the aggravating and mitigating factors that the Commission has determined should be considered."); Letter from Judge Paul Cassell, Chair, Committee on Criminal Law to Judge Ricardo Hinojosa (March 16, 2007) ("If the Commission were to independently set the base offense level to reflect the seriousness of the offense, in its own expert opinion and irrespective of the mandatory minimum term of imprisonment, then the courts would have some benchmark to use when the mandatory minimum would not apply."); Letter from Judge Sim Lake, Chair, Committee on Criminal Law to members of the U.S. Sentencing Commission (March 8, 2004) ("The Judicial Conference has repeatedly expressed concern with the subversion of the sentencing guideline scheme caused by mandatory minimum sentences, which skew the calibration and continuum of the guidelines and prevent the Commission from maintaining system-wide proportionality."); *Federal Mandatory Minimum Sentencing: Hearing Before the Subcomm. on Crime and Criminal Justice of the H. Comm. on the Judiciary*, 103rd Cong. 66, 108 (July 28, 1993) (statement of former Criminal Law Committee Chair Vincent L. Broderick) ("[M]andatory minimum penalties have hindered the development of proportionality in the Guidelines, and are unfair not only with respect to offenders who are subject to them, but with respect to others as well.").

³³ Judge McKee and Judge Barbadoro testified at a hearing on February 16, 2012, titled "Federal Sentencing Options after *Booker*." Judge McKee testified as part of a panel on "Restoring Mandatory Guidelines." Judge Barbadoro testified as part of a panel on the "Current State of Federal Sentencing." The purpose of the public hearing was for the Commission to gather testimony from invited witnesses on federal sentencing options pursuant to *United States v. Booker*. Judge Rodgers testified at a hearing on February 15, 2012, titled "Federal Child Pornography Crimes" as part of a panel on "Policy Perspectives from the Courts, the Executive, and the Defense Bar." The purpose of the public hearing was for the Commission to gather testimony from invited witnesses regarding the issue of penalties for child pornography offenses in federal sentencing.

³⁴ In October, 2011, Judge Patti B. Saris, then-Chair of the Sentencing Commission, testified before the U.S. House of Representatives regarding the state of federal sentencing since *Booker* and the Sentencing Commission's role in sentencing. *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years after U.S. v. Booker. Hearing before the S. Comm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Congress (2011) (statement of Hon. Patti Saris). The Commission proposed five statutory suggestions to "improve sentencing in light of *Booker* and its progeny." Specifically, it proposed that Congress enact a more robust appellate review standard; require that the greater the variance from the guideline range, the greater should be the sentencing court's justification; require a heightened standard of review of sentences imposed as a result of policy disagreements with the guidelines; clarify statutory directives regarding offender characteristics to sentencing courts (in 18 U.S.C. §3553(a) and the Commission (in 28 U.S.C. § 994) that are "in tension"; and require that sentencing courts give "substantial weight" to the guidelines at sentencing, and codify the "three-step sentencing process," which requires the courts to: (1) calculate the appropriate guideline sentence; (2) consider any available departure provisions set forth in the Sentencing Guidelines; and (3) consider whether the sentence reached after steps one and two results in a sentence that is sufficient but not greater than necessary as mandated by 18 U.S.C. § 3553 (a) (2). These recommendations were subsequently included in the Commission's December 2012 report to Congress, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*.

²⁷ JCUS-SEP 06, p. 18. Under the "Anti-Drug Abuse Act of 1986," Pub. L. No. 99-570, 100 times as much powder cocaine as crack cocaine was needed to trigger the same statutory mandatory minimum sentences.

²⁸ JCUS-SEP 13, p. 17. This proposed legislation would amend 18 U.S.C. § 3553 to permit a sentencing judge to impose a sentence below a statutory minimum "if the court finds that it is necessary to do so in order to avoid violating the requirements" of section 3553(a) (namely, the statutorily enumerated purposes of sentencing).

²⁹ JCUS-MAR 14, p. 16. This proposed legislation would expand the safety valve mechanism in 18 U.S.C. § 3553(f) to authorize more defendants to be sentenced below an applicable mandatory minimum penalty, lower mandatory minimum penalties in certain drug offenses, and make the "Fair Sentencing Act of 2010" applicable to inmates who were sentenced before the Act was passed.

³⁰ JCUS-SEP 90, p. 69.

superior alternatives to an advisory guideline system.³⁵

Finally, the Committee's testimony included an empirical assessment of the advisory system and concluded that it is working well, particularly when compared to available alternatives. It noted that the vast majority of district judges believe that the advisory guidelines system is the best available alternative because it provides judges with a starting place and initial benchmark to determine the sentence, but allows sufficient flexibility to deviate from the guideline recommendation to account for individual circumstances. As the committee members testified, the partnership between district judges (subject to appellate review) and the Sentencing Commission in an advisory guidelines system appears to be the most effective structure for achieving the statutory purposes of sentencing and maintaining the appropriate balance of discretion.

In November 2015, Chief Judge Irene M. Keeley, then-Chair of the Committee on Criminal Law, testified before the Sentencing Commission regarding proposed amendments to revise the Sentencing Guidelines' definition of "crime of violence" that is used to determine whether a defendant is subject to a longer sentence for a prior violent criminal history.³⁶

³⁵ These potential responses include the "topless guidelines" proposal that would raise the top of sentencing guideline ranges to be coterminous with the statutory maximum, the expanded use of mandatory minimum sentences, and the "Blakelyization" of mandatory sentencing guidelines, which would incorporate the right to jury fact-finding in the sentencing guidelines system.

³⁶ The Commission held this hearing on November 5, 2015. Judge Keeley testified on a panel titled "Views from the Judiciary." Under the Armed Career Criminal Act (ACCA), a defendant with three prior convictions for a "violent felony" is subject to an increased prison term (18 U.S.C. § 924(e)(1)). The term "violent felony" is defined in 18 U.S.C. § 924(e)(2)(B), and the so-called "residual clause" found in subparagraph (ii) includes any felony that "involves conduct that presents a serious potential risk of physical injury to another." In its June 26, 2015, opinion in *Johnson v. United States*, 135 S.Ct. 2551 (2015), the Supreme Court held that the ACCA's residual clause was unconstitutionally vague and that an increased sentence under that provision violated the Constitution's guarantee of due process. On August 7, 2015, the Commission voted to publish for public comment proposed amendments to the Sentencing Guidelines. The proposed amendment, among other things, revised the definition of "crime of violence" that is found in the section of the Guidelines used in determining whether a defendant is a "career offender." Specifically, the amendment deleted from that

Judge Keeley testified that the Committee favored the proposed amendment because it would make the Guidelines more clear and workable. Finally, in February 2016 I testified before the Commission on behalf of the Committee on Criminal Law regarding proposed amendments to the Sentencing Guidelines concerning the conditions of probation and supervised release.³⁷ At the hearing, I expressed the Committee's support for the Commission's proposed amendments to revise, clarify, and re-arrange the conditions. These amendments were consistent with changes endorsed by the Committee after an exhaustive review by the Committee and Administrative Office staff with the assistance of a group of probation officers from throughout the country.³⁸ Additionally, they were the product of close collaboration between the Committee and the Sentencing Commission and were informed by the feedback of other stakeholders, including the Department of Justice, the Federal Defenders, and courts and probation offices in individual districts.

Implementation of Retroactive Guideline Amendments

The Committee on Criminal Law has provided feedback on, and assisted with the implementation of, retroactive application of amendments to the Sentencing Guidelines several times over the past 25 years.³⁹ Most recently, it has had an active role in the retroactive application of Sentencing Guidelines for drug offenses. In November 2007, the Committee recommended that amendments that lowered the guideline ranges in crack cocaine offenses should be applied retroactively by the Sentencing Commission. As explained in a letter to the Commission by former United States District Judge Paul G. Cassell, then-Chair of the Committee, the Committee was concerned about the "corrosive effect" of the disparity between crack and powder sentences, and it stated

section the same language in the ACCA's residual clause that the Supreme Court found to be unconstitutionally vague.

³⁷ The Commission held this hearing on February 16, 2016. I testified on a panel titled "Conditions of Supervision: Views from the Judiciary."

³⁸ See Stephen E. Vance, *supra* note 19.

³⁹ For a comprehensive overview of the Committee's past positions on retroactivity, see June 10, 2014 Public Hearing of the U.S. Sentencing Commission (statement of Chief Judge Irene M. Keeley, Chair, Committee on Criminal Law).

that "[w]hile concerned about the impact that retroactivity may have on the safety of communities, a majority of the Committee believes that the Commission's precedents, and a general sense of fairness, dictate retroactive application."⁴⁰ The Committee also noted that significant workload would result from the retroactive application of the amendment and should be addressed.⁴¹ In the letter to the Commission, Judge Cassell summarized the Committee's approach to balancing the burdens on the courts with the benefits of making amendments retroactive:

One possible countervailing consideration to . . . making the crack amendment retroactive . . . is the administrative burden upon the courts that would be associated with resentencing crack offenders whose sentences have previously been determined. The Criminal Law Committee believes that, in evaluating such considerations, an extremely serious administrative problem would have to exist to justify *not* applying the amendment retroactively. After all, some offenders are spending several additional years in prison because of the now-disavowed guideline level. Presumably this is why the Commission has frequently made its amendments to drug quantity guidelines retroactive in the past rather than have an offender spend substantial time in prison on a discredited guideline. More important, we believe that steps can be taken to reduce the amount of court time that will be required to resentence crack offenders who qualify for the reduction.⁴²

⁴⁰ Letter from Judge Paul Cassell, Chair, Committee on Criminal Law, to Judge Ricardo Hinojosa, Chair, U.S. Sentencing Commission (November 2, 2007).

⁴¹ Reviewing each retroactivity petition consumes the resources of judges, clerks office staff, federal public defenders, and probation officers. If a reduction in the sentence is granted, Bureau of Prisons staff and probation officers must also begin the process of developing and implementing a release plan.

⁴² See also November 13, 2007 Public Hearing of the U.S. Sentencing Commission (statement of Reggie B. Walton, Member, Committee on Criminal Law) ("[I]n my own deliberations on this matter, I was gravely concerned about the potential adverse impact that retroactivity could have on the courts, the probation and pretrial services system, and the communities into which offenders will return upon their release. Only after considering the procedures that can be implemented to mitigate the impact, and only after weighing the representation [of a chief

The Sentencing Commission ultimately voted to make the amendment retroactive, and the successful management of inmates released to the community was due to several factors. First, in many districts there was close coordination between probation officers, Bureau of Prisons staff, assistant U.S. attorneys, assistant federal public defenders, and the courts, which helped streamline procedures, prioritize cases, and allow for careful evaluation of inmates' petitions. Second, lists containing the names of inmates thought to be eligible were prepared and disseminated by the Sentencing Commission and others, making it easier for probation staff and others to pull case files, screen and prioritize cases, and track workload. Third, the Commission's decision to delay the effective date of the retroactive amendment gave the courts and the BOP time to develop plans and train staff in new procedures. Fourth, two national "summits" were conducted, led by the Committee on Criminal Law and in partnership with the Commission and Bureau of Prisons. The summits allowed districts to send a small group to hear from national agency representatives and share ideas on best practices. Finally, a new national judgment form was created by the Committee on Criminal Law in cooperation with the Sentencing Commission, which facilitated the reporting of the court's decision as well as the Commission's analysis of the outcomes. The lessons learned from the 2007 amendment proved to be helpful in managing the workload from subsequent retroactive applications of Sentencing Guideline amendments.

In February 2011, the Committee on Criminal Law again recommended to the Sentencing Commission that amendments that lowered the guideline ranges in crack

probation officer] that probation offices can handle the anticipated increased workload, did I determine that under the circumstances, fundamental fairness compels retroactivity. . . . Fundamental fairness *does* compel retroactive application of the guideline amendment. . . . Therefore, if . . . the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act. . . . then the same logic applies to those who were sentenced last year, or five years ago, as to those who will be sentenced for crack tomorrow. . . . The legislative history of the Commission's retroactivity authority suggests that Congress conferred this authority to the Commission in order to cope with *precisely* this kind of situation. Retroactivity was not intended as an instrument to make isolated or minor adjustments; rather, it was meant as a means to make sweeping and serious changes: changes precisely like those associated with crack retroactivity." (emphasis in original).

cocaine offenses should be applied retroactively. In his testimony before the Commission on behalf of the Committee, Judge Reggie Walton noted that, while the workload associated with considering sentencing reductions in 2007 was well managed, steep reductions to discretionary spending in 2011 were expected to place a great deal of strain on the courts, including federal defenders, probation officers, and court staff.⁴³ The Committee reiterated, however, that "an extremely serious administrative problem would have to exist to justify *not* applying the amendment retroactively," and that such a problem did not exist.⁴⁴ Judge Walton concluded:

[A]mendments that reduce . . . disparity should equally apply to offenders who were sentenced in the past as well as offenders who will be sentenced in the future . . . If the guideline is faulty and has been fixed for future cases, then we also need to undo past errors as well. Put another way, a crack offender's sentence should not turn on the happenstance of the date on which he or she was sentenced. Equity and fundamental fairness suggest that a crack offender who committed a crime in 2009 should be treated the same under the guidelines as a crack offender who committed exactly the same crime in 2011.⁴⁵

Finally, in June 2014, the Committee on Criminal Law recommended that the Sentencing Commission apply an amendment reducing sentences for all drug types retroactively. As then-Chair of the Committee Judge Irene M. Keeley explained in her testimony before the Commission:

The driving factor for the Committee's decision was fundamental fairness. We do not believe that the date a sentence was imposed should dictate the length of imprisonment; rather, it should be the defendant's conduct and characteristics that drive the sentence whenever possible. The retroactive application of the amendment in this case will put

previously sentenced defendants on the same footing as defendants who commit the same crimes in the future. Another important consideration for the Committee's position is that the retroactive application of the amendment will further reduce the influence of mandatory minimums on the Sentencing Guidelines and, in turn, reduce the disproportionate effect of drug quantity on the sentence length.⁴⁶

Judge Keeley noted, however, the diminishing resources of the probation and pretrial services system, the significant workload demands that flow from retroactivity of Guideline amendments, and the fact that there was no guarantee that sufficient resources would be available on the date the new amendment went into effect on November 1, 2014. She expressed the Committee's view, therefore, that there should be a delay in the date an inmate can be eligible for release.⁴⁷ The Sentencing Commission ultimately voted to make the amendment retroactive, but delay the release of any inmate whose sentence is reduced until November 1, 2015. As in past retroactivity efforts, the Sentencing Commission and the Committee—together with the Bureau of Prisons, the Department of Justice, the Federal Judicial Center, and other stakeholders—worked collaboratively to streamline procedures and prioritize cases in order to successfully manage the influx of inmates released to the community.

V. Conclusion

Beginning in the early part of the twentieth century, the Judicial Conference of the United States, its Committee on Criminal Law, and the Administrative Office of the U.S. Courts played a significant role in recommending, developing, and implementing sentencing policy in the federal courts. Since the implementation of the SRA thirty years ago, these entities have worked collaboratively with the United States Sentencing Commission and other stakeholders in numerous ways

⁴⁶ See statement of Chief Judge Irene M. Keeley, Chair, Committee on Criminal Law, *supra* note 39.

⁴⁷ This delay, Judge Keeley explained, would allow the courts and probation offices across the country to first manage the influx of petitions and then, once the surge of petitions has been addressed, pivot available resources to deal with the increase in the number of offenders received for supervision to minimize the threat to community safety stemming from too many inmates being released without adequate planning and supervision.

⁴³ June 1, 2011, Public Hearing of the U.S. Sentencing Commission (statement of Reggie B. Walton, Member, Committee on Criminal Law)

⁴⁴ *Id.*

⁴⁵ *Id.*

to inform and implement sentencing policy. This article has highlighted several examples, including creating and approving national policy guidance regarding the development of presentence investigation reports; developing national judgment and statement of reasons forms for use by courts; and providing judiciary feedback on proposed changes

to sentencing legislation and the Sentencing Guidelines and implementing retroactive application of Guideline amendments. In the future, the federal judiciary will continue to work collaboratively with the Sentencing Commission and other branches of government to pursue a just, fair, and effective sentencing system.

The Integral Role of Federal Probation Officers in the Guidelines System

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WHEN THE ORIGINAL United States Sentencing Commission (the Commission) began the daunting task of creating the initial *Guidelines Manual* in the mid-1980s, the first commissioners quickly realized the critically important role that federal probation officers would play in the development and implementation of the sentencing guidelines. Indeed, as discussed below, one of the first Commission staff members, Rusty Burress, was a federal probation officer brought to the Commission on what was supposed to be a temporary detail but which blossomed into an ongoing, 32-year distinguished career at the Commission. Furthermore, during the three decades that followed the promulgation of the initial manual in 1987, the Commission has relied heavily on the federal probation officer community in several important ways in the implementation of the guidelines system.

This article discusses the integral role that probation officers have played in the federal guidelines system. Part I highlights their role in helping create the initial guidelines. Part II discusses their role in the implementation of the guidelines since 1987, including in the process of frequently amending the guidelines over the years. Part III offers some concluding thoughts.

I. Probation Officers' Critical Role in Helping the Commission Develop the Sentencing Guidelines

Federal probation officers were integral in the development of the guidelines in two main ways. First, they collected the vast amount of empirical data about offense and offender characteristics on which the original Commission would model a majority of the guidelines. Second, probation officers served as close advisors to the original Commissioners and Commission staff as they drafted the initial set of guidelines.

Building an Empirical Basis for the Guidelines

In the Sentencing Reform Act of 1984 (SRA), which created the Commission and directed it to promulgate sentencing guidelines,² Congress instructed the Commission that it should begin the process of creating guidelines by examining existing sentencing data:

The Commission shall insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense. This will require that, as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission, and

in cases involving sentences to terms of imprisonment, the length of such terms actually served. The Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.³

The original Commission implemented this directive by collecting and analyzing data about sentences imposed in nearly 100,000 federal felony and Class A misdemeanor cases from 1983 to 1985, which was contained on a large computer file provided to the Commission by the Administrative Office of the United States Courts.⁴ After receiving that dataset, the Commission then decided to closely analyze a representative sample of 10,500 of those cases from 1984 and 1985.⁵ Because the sentencing data concerning the cases provided by the Administrative Office was somewhat limited, the Commission decided to engage in a special coding project to collect additional, detailed information about those 10,500 cases from presentence reports and other documents in the cases. The Commission's staff at that point was small, so

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² See 28 U.S.C. § 991 et seq.

³ 28 U.S.C. § 994(m).

⁴ U.S. Sent. Comm., Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 21 (1987). The data concerning those nearly 100,000 cases was obtained from the Federal Probation Sentencing and Supervision Information System (FPSIS). *Id.* at 16, 21.

⁵ *Id.* at 21.

the Commission asked federal probation officers to code their own presentence reports and related documents (e.g., judgments) for the additional data. The probation officers enthusiastically obliged and, using a set of coding instructions provided by the Commission, the probation officers collected a large amount of extra data that the Commission needed to create a sophisticated sentencing dataset.⁶ That dataset was then merged with corresponding data from the Federal Bureau of Prisons and the United States Parole Commission, which allowed the Sentencing Commission to determine (or, in cases where offenders were still serving prison sentences, estimate) the actual amount of imprisonment served by those offenders for whom the district court imposed a sentence of imprisonment.⁷

That robust dataset allowed the Commission to identify a wide variety of aggravating, mitigating, and other factors that appeared to have influenced sentencing decisions of federal district judges in the pre-guidelines era.⁸ The Commission used that data in creating guidelines for most offense types. Judge William W. Wilkins, Jr., the first chair of the Commission, observed that the guidelines were thus designed to “appl[y] in a manner similar to the thought process of a judge determining an appropriate sentence.”⁹ Using the dataset, the Commission also was able to set penalty levels—in the form of guideline ranges—for a wide variety of federal offense types, including for various gradations of the same offense types with different combinations of aggravating and mitigating factors.¹⁰ Except for drug-trafficking cases and certain white-collar and violent offenses—for which Congress had expressed its intent for higher penalties than in the pre-guidelines

era¹¹—the Commission generally set penalty levels in the 1987 sentencing guidelines based on the pre-guidelines average sentences for the different federal offense types.¹²

This important work of the original Commission could not have been accomplished without the dedicated service of federal probation officers. That work continues to have major significance three decades later, in the post-Booker era.¹³ In holding that the now-advisory guidelines still play a key role in the federal sentencing process, the Supreme Court stressed that, “even though the Guidelines are advisory rather than mandatory, they [must be given serious consideration by sentencing judges because they] are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”¹⁴ That extensive empirical evidence was primarily the product of federal probation officers.

Key Advisors to the Original Commission

Not only did federal probation officers help the Commission build an empirical basis for the guidelines, they also provided important real-world policy advice to the original Commissioners during the 18-month period

¹¹ See U.S. Sent. Comm., 2 *The Federal Sentencing Guidelines: A Report on the Operation of the Guideline System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 365 (1991) (“Congress ensured incarceration rates would increase under the guidelines as a result of specific and general directives to the Commission in the [SRA] to increase the use of imprisonment for certain classes of offenses and offenders.”); *id.* at 384 (“Congress sent a strong message that sentences for certain types of offenses and offenders would be increased”).

¹² See Supplementary Report, *supra* note 4, at 16-19.

¹³ See *United States v. Booker*, 543 U.S. 220 (2005) (holding that the former “mandatory” guidelines were unconstitutional and, as a remedy, declaring that the guidelines were to be “advisory” in the future).

¹⁴ *Gall v. United States*, 552 U.S. 38, 46 (2007) (“It is also clear that a district judge must give serious consideration to the extent of any departure [or variance] from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”).

from October 1985 to April 1987, when they created the guidelines. In the summer and fall of 1986, when the Commissioners were hammering out the original drafts of the Guidelines Manual, the Commission convened a “working group” of 14 federal probation officers from all parts of the country to offer advice about the drafts. The working group met with the Commissioners in Washington, D.C., in the summer of 1986, but maintained regular communication during the next year with the Commission’s in-house probation officer, Rusty Burrell, who conveyed the group’s input about the guidelines drafts to the Commissioners.¹⁵ Among their advice to the original Commission, the working group of probation officers stressed the need to avoid overly complex guidelines¹⁶—a recurring theme during the ensuing three decades.¹⁷

In addition to having the working group serve as a sounding board, the Commissioners also elicited formal testimony about the draft guidelines from individual probation officers, the director of the Probation Division of the Administrative Office, and a representative from the Federal Probation Officers Association at the multiple public hearings held by the original Commission in 1986 and 1987.¹⁸ Federal probation officers also “field-tested” different iterations of draft guidelines, which provided valuable feedback to the original Commission.¹⁹ Fully realizing that federal probation officers would be perhaps the most important “guidelines constituency”—besides judges themselves—the original Commission listened carefully to what probation officers had to say.

¹⁵ See, e.g., Memorandum from Rusty Burrell to Commissioners, Oct. 14, 1986 (entitled, “Responses from the U.S. Probation Officer Working Group to the Preliminary Draft”).

¹⁶ See *id.* at 1 (“[E]ach of these officers . . . expressed concern over the complexity and workability of” an initial draft of the guidelines).

¹⁷ See, e.g., William H. Pryor, Jr., *Returning to Marvin Frankel’s First Principles in Federal Sentencing*, 29 Fed. Sent’g Rptr. 95 (Dec. 2016/Jan. 2017) (arguing for simplification in the federal sentencing guideline system).

¹⁸ See Supplementary Report, *supra* note 4, Appendix A, at 1-10.

¹⁹ See, e.g., Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,121, 18125 n.44 (May 18, 1987) (noting field testing of guidelines by federal probation officers).

⁶ *Id.* (“The Probation Division’s response was overwhelming. It provided the Commission with 10,500 responses, complete with corresponding [PSRs]. As a result, the Commission has had ready access to qualitative and quantitative information in the form of 10,500 computer records and even more detailed information in the form of 10,500 [PSRs].”).

⁷ *Id.* That dataset and the code-book used by the federal probation officers is available at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/9664>.

⁸ *Id.* At 22-24, 35-39 tbl.1(b).

⁹ William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 Wake Forest L. Rev. 181, 185 (1988).

¹⁰ See Supplementary Report, *supra* note 4, at 27-34 tbl.1(a).

II. Probation Officers' Critical Role in the Implementation of the Sentencing Guidelines During the Past Three Decades

After the initial Guidelines Manual was promulgated by the Commission and went into effect on November 1, 1987, the Commission had its work cut out for it. Federal judges all around the country decried the new guidelines' curtailment of what previously had been virtually unbridled sentencing discretion, and over 200 district judges declared that the guidelines were unconstitutional before the Supreme Court eventually upheld their constitutionality in 1989.²⁰ The Commission sought to get buy-in from the federal judiciary in two main ways: first, through education and training about the guidelines; and, second, in a series of amendments to the Guidelines Manual seeking to improve them based on feedback from the field. Federal probation officers proved to be an important ally to the Commission in both areas.

Education and Training

The original Commission knew that its first task after promulgating the new guidelines was to educate the federal judiciary about them. And the best way to educate district judges was to educate their federal probation officers,²¹ who have always been deemed "arms of the court" in the federal sentencing process.²² For that task, the original Commission turned to Rusty Burress and other Commission training staff.²³ They not only trained probation officers about the new guidelines but also trained federal judges and have continued to do so for three decades. Virtually every federal district judge since 1987 who has attended the Federal Judicial Center's Seminar for Newly Appointed District Judges (which judges affectionately call "baby judges school") has been trained about the guidelines by Burress. Although he had come to the Commission in 1985 on a temporary detail from his job as a federal

probation officer in South Carolina, Burress eventually was hired as the Commission's Principal Training Advisor. Several former federal probation officers likewise have joined the Commission's training staff over the years.

Although having Commission staff train judges and other stakeholders in the federal criminal justice system was considered important, the Commission understood that probation officers themselves would be the best source of education about the new guidelines. As Judge Wilkins, the original chair of the Commission, recounted:

[W]e figured we'd try to train judges . . . but kn[ew] full well that if the probation officers knew how the system worked then they would be a nucleus in the courthouse for the prosecutors, defense attorneys, and the judges, to learn the guidelines. So we had this extensive training program, training probation officers. Train-the-trainers is what we called it. We brought them in and we'd train them [in D.C.] and there would [be] regional training and they would go out and train and[,] those trainers would go out and teach [other probation officers] and so it was kind of an inverted pyramid of training. You start off with a small nucleus, they'd train a few more, then they would train a few more until finally we got it throughout the country.²⁴

Presentence Reports

Presentence reports were an important part of the federal sentencing process before the advent of the sentencing guidelines but became even more important afterwards. In enacting the Sentencing Reform Act, Congress envisioned the integral role of federal probation officers in preparing presentence reports in the guidelines system.²⁵ In response to the creation of the sentencing guidelines, Federal Rule of Criminal Procedure 32(c)—which

required a presentence investigation by a probation officer, culminating with a presentence report—was amended in 1987 to require the presentence report to set forth all offense and offender factors relevant to the guidelines calculation as well as the guideline sentencing range.²⁶ Presentence reports thus became the epicenter of the guidelines sentencing process. Presentence reports after the guidelines were created became very different documents from pre-guidelines presentence reports, which had been more of a "diagnostic tool" than a "legal document" in the former "indeterminate" federal sentencing system.²⁷

During the guidelines' three decades, federal probation officers—often called "presentence investigators"²⁸—have written presentence reports in over 1.7 million cases in which the guidelines have been applied.²⁹ In the process, they have developed a remarkable expertise in the guidelines and the case law interpreting it. Those presentence reports have provided the Commission with a rich source of data from which to evaluate the manner in which the guidelines and federal sentencing statutes³⁰ have been applied and on which to amend the guidelines.³¹ The data

²⁶ Fed. R. Crim. P. 32(c)(2) (1988) (eff. Nov. 1, 1987).

²⁷ Jerry D. Denzlinger & David E. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, 55 Fed. Prob. 49, 51 (1991).

²⁸ See, e.g., *id.* at 49-50.

²⁹ As of March 31, 2017, over 1.7 million federal offenders had been sentenced under the federal sentencing guidelines. U.S. Sentencing Comm'n, 1995 Annual Report 41 (1995) (including caseload data from 1989 through 1995); U.S. Sentencing Comm'n, Annual Report 21 (1988) (including caseload data from 1987 through 1988); U.S. Sentencing Comm'n, Sourcebooks of Federal Sentencing Statistics 2 (1996-2016) (listing annual caseload data); U.S. Sentencing Comm'n, *2nd Quarter Release Preliminary Fiscal Year 2017 Data Through March 31, 2017*, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_2nd_FY17.pdf (listing caseload data through first two quarters of FY17).

³⁰ See, e.g., U.S. Sent. Comm., *Illegal Reentry Offenses* (2015), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf; U.S. Sent. Comm., *Report on the Continuing Impact of United States v. Booker on Federal Sentencing* (2012), available at <http://www.ussc.gov/research/congressional-reports/2012-report-congress-continuing-impact-united-states-v-booker-federal-sentencing>.

³¹ Virtually all significant amendments to the *Guidelines Manual* not required by statute have been significantly informed by Commission data.

²⁰ Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 906 (1990); see also *Mistretta v. United States*, 488 U.S. 361 (1989).

²¹ See Interview with William W. Wilkins, Jr., Judge, at 30 (Sept. 20, 1994) (on file with author) (stating that he "was firmly convinced that education [about how the guidelines worked] was the key to success" in getting courts to buy into the new guidelines).

²² See, e.g., *United States v. Gonzalez*, 765 F.2d 1393, 1398 (9th Cir. 1985).

²³ See Wilkins Interview, *supra* note 21, at 30-31 (praising Rusty Burress for his role in educating probation officers as part of that process).

²⁴ Wilkins Interview, *supra* note 21, at 31.

²⁵ See S. Rep. No. 98-225, at 53 (1983) ("Under a sentencing guidelines system, the judge is directed to impose a sentence after a comprehensive examination of the characteristics of the particular offense and the particular offender. This examination is made on the basis of a presentence report that notes the presence or absence of each relevant offense and offender characteristic. This will assure that the probation officer and the sentencing judge will be able to make informed comparisons between the case at hand and others of a similar nature.")

derived from presentence reports and other sentencing documents (such as the Statement of Reasons form) also has been used in other important ways, such as in the Commission's recidivism studies³² and reports recommending statutory changes to Congress.³³

Just as does the federal sentencing process, the Commission's massive database of federal guidelines cases revolves around the presentence report. Although the Act requires district courts to send five sentencing documents to the Commission within 30 days of entry of judgment,³⁴ the Commission garners the majority of its sentencing data in each case from presentence reports.³⁵ Suffice it to say

See, e.g., USSG, App. C, amend. 802 (Nov. 1, 2016) (amendment to §2L1.2, the illegal reentry guideline, which "reflects extensive data collection and analysis relating to immigration offenses and offenders") & amend. 798 (amendment to definition of "crime of violence" in §4B1.2, which reflected the Commission's analysis of "a range of sentencing data, including a study of the sentences relative to the guidelines [range] for the career offender guidelines").

³² *See, e.g.,* U.S. Sent. Comm., A Comparison of the Federal Sentencing Guidelines Criminal History Category and the U.S. Parole Commission Salient Factor Score (2005), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2005/20050104_Recidivism_Salient_Factor_Computation.pdf; U.S. Sent. Comm., Recidivism Among Federal Offenders: A Comprehensive Overview (2016), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

³³ *See, e.g.,* U.S. Sent. Comm., Report to Congress: Career Offender Enhancements (2016), available at <http://www.ussc.gov/research/congressional-reports/2016-report-congress-career-offender-enhancements>; U.S. Sent. Comm., A Report to Congress: Child Pornography Offenses (2012), available at <http://www.ussc.gov/research/congressional-reports/2012-report-congress-federal-child-pornography-offenses>; U.S. Sent. Comm., A Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011), available at <http://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

³⁴ Pursuant to 28 U.S.C. § 994(w), federal district courts must send to the Commission the following five documents in all felony and Class A misdemeanor cases: the indictment or other charging instrument, the judgment, the statement of reasons form, the presentence report, and the plea agreement (if applicable).

³⁵ *See* Christine Kitchens, *Introduction to the Collection of Individual Offender Data by the United States Sentencing Commission*, at 2 (USSC May 2009) (discussing how the Commission extracts data from PSRs), available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/200905_Research_Notes.pdf.

that the Commission's statutory mission could not be fulfilled without presentence reports written by federal probation officers.

Continuous Sounding Board for the Commission

Many in the federal probation officer community have continued to be important advisors to the Commission as it has amended the guidelines several hundreds of times since 1987. The Commission's own Probation Officers Advisory Group³⁶ as well as the Chief Probation Officers Advisory Group and the Probation and Pretrial Services Office of the Administrative Office have proved to be invaluable sources of information about how the guidelines have worked in practice and how they could be improved. The Commission also regularly has a visiting probation officer on a detail, who provides the Commission with an important real-world perspective.

During the Commission's annual guidelines "amendment cycle"—which runs from May through April of each year³⁷—the Commission receives significant input from the federal probation officer community. Initially, at the Commission's annual planning session in the early summer, the Commissioners hear from Commission staff about issues to consider addressing in guideline amendments and reports. Often staff convey ideas coming from federal probation officers in the field as well as from the Probation and Pretrial Services Office. After the Commission has published its tentative priorities for the amendment cycle, the Commission often receives important feedback from the Criminal Law Committee of the Judicial Conference (which is staffed by the Probation and Pretrial Services Office), as well as from the Commission's Probation Officer Advisory Group. The same is true when the Commission publishes proposed guidelines amendments for public comment.

Finally, without the assistance of federal

www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/200905_Research_Notes.pdf.

³⁶ The Probation Officers Advisory Group's charter, current members, and its comment about the Commission's annual priorities and proposed guideline amendments are available at <http://www.ussc.gov/new/probation-officers-advisory-group>. The group's members also regularly testify before the Commission.

³⁷ *See* U.S. Sent. Comm., Federal Sentencing: The Basics 25 (2015) (describing the Commission's annual amendment cycle).

probation officers, some of the most significant retroactive amendments³⁸—most notably, the amendments to the drug-trafficking guidelines known as "crack -2"³⁹ and "drugs -2"⁴⁰—would not have been implemented so successfully. Both of those retroactive amendments affected several thousands of federal prisoners and required the careful coordination of courts, attorneys, and the Federal Bureau of Prisons. The Commission relied heavily on federal probation officers to help implement those amendments in the 94 federal districts. A critical part of coordinating the efforts of the various stakeholders in the implementation of the retroactive amendments involved regional "summits" organized by probation offices at which stakeholder representatives from around the country brainstormed about how to effectively and efficiently implement the retroactive amendments.⁴¹ The planning paid off. The retroactive implementation of those amendments has been widely praised as an effective use of government resources.⁴²

³⁸ Under 28 U.S.C. § 994(u), when the Commission reduces a guideline range, it must specify whether, and in what circumstances, the reduction should apply to offenders who had been sentenced under the previous, higher version of the guideline.

³⁹ *See* USSG App. C, amend. 713 (effective March 3, 2008) (retroactively applying the Commission's 2007 amendment to the guideline for cocaine base ("crack" cocaine), which reduced the guideline ranges for most offenders by two levels).

⁴⁰ *See* USSG App. C, amend. 788 (effective Nov. 1, 2014) (retroactively applying the Commission's 2014 amendment to the Drug Quantity Table at USSG §2D1.1 so as to reduce most drug defendants' guidelines by two levels).

⁴¹ *See* Transcript of Testimony of Deputy Chief U.S. Probation Officer Quincy Avinger (D. S.C.) Before the Sentencing Commission, at 81 (June 10, 2014), http://www.ussc.gov/sites/default/files/transcript_1.pdf.

⁴² *See, e.g.,* Written Statement of Hon. Reggie B. Walton Submitted to the U.S. Sentencing Commission, at 3 (June 1, 2011) ("While the concerns about the workload associated with considering sentencing reductions for nearly 20,000 inmates were real and justified, this workload was managed surprisingly well. This would not have been the case without the tremendous efforts of our judges, attorneys, probation officers, and court staff. In the months leading up to the March 2008 effective date of the ['crack -2'] amendment, two national summits were hosted, new national forms were created, information technology systems were updated, and local policies and procedures were developed—all of which allowed for the smooth implementation of the amendment."), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20110601/Testimony_Reggie_Walton.pdf.

III. Conclusion

Federal probation officers have sometimes been called the “guardians of the guidelines”⁴³ based on their neutral, unbiased role in implementing the guidelines sentencing regime in

⁴³ See, e.g., Douglas A. Berman, *Is Fact Bargaining Undermining the Sentencing Guidelines?*, 8 Fed. Sent. Rptr. 300, 301 (1996) (“Probation officers are often called guardians of the guidelines, in part because they set the framework for sentencing disputes with their findings and calculations in presentence reports.”).

our adversarial system. I believe that it is an appropriate appellation, with the important qualifier that probation officers should not be considered “blindly allegiant” guardians.⁴⁴

⁴⁴ Charles E. Varnon, a former chief federal probation officer and original member of the Commission’s “working group” of federal probation officers, once commented that, “[p]robation officers do not think they are blindly allegiant guardians of the guidelines.” Charles E. Varnon, *The Role of the Probation Officer in the Guideline System*, 4 Fed. Sent. Rptr. 63, 64 (1991). He correctly

Their involvement with the Commission—from its first days through the present time—has been critically important to the Commission’s three-decade mission of carrying out the directives of the Sentencing Reform Act of 1984 through the promulgation of and regular amendments to the sentencing guidelines.

pointed out that, when federal probation officers perceive an error or injustice in the guidelines, they call it to the Commission’s attention and seek a correction. See *id.*

Reflecting on Parole's Abolition in the Federal Sentencing System

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NEARLY ALL DISCUSSIONS of the Sentencing Reform Act of 1984 (SRA) focus on what the landmark legislation created, and rightly so, because the SRA created so much that has come to define the modern federal criminal justice system. The SRA created the U.S. Sentencing Commission, which then created U.S. Sentencing Guidelines, which thereafter engendered an elaborate federal sentencing jurisprudence. But in this essay, I wish to reflect on what the SRA abolished, namely parole.

With ever-growing concerns about prison growth and about prisoner recidivism and reentry, parole and related "back-end" sentencing mechanisms are garnering renewed attention. My modest goal here is to bring some of that attention to the federal system, even though parole was formally abolished in this system three decades ago. After briefly reviewing parole's history, I will suggest how the SRA's complete elimination of parole may have, at least indirectly, exacerbated some of the most problematic aspects of modern federal sentencing. I will then highlight a few notable recent federal sentencing developments that have functioned as a kind of "parole light." Against that backdrop, this essay closes by suggesting that advocates for federal sentencing reform consider whether recreating a modest, modern form of parole might now prove an especially efficient and effective means to improve the federal sentencing system.

Revisiting the Rise and Fall of Parole

Through the latter half of the nineteenth

century, progressive criminal justice reformers championed a move away from capital and corporal punishments toward the use of imprisonment as a primary punishment for all offenders.¹ As new prisons were constructed from coast to coast, American criminal justice systems embraced rehabilitation as the central punishment concern and transformed sentencing policies and practices in numerous ways. Most fundamentally, prison sentences became indeterminate: sentencing judges were now to impose imprisonment terms in ranges with prison and parole officials subsequently deciding exactly how long an offender would remain incarcerated.² Through a system pioneered by penologist Zebulon Brockway, offenders sentenced to prison terms of whatever duration could, through good behavior and other means of demonstrating rehabilitation, earn early release on parole.³ While on parole, offenders would then be closely supervised in the community and violations of the terms of parole could result in a return to prison.

Indeterminate sentencing with broad

¹ See generally David Rothman, *Perfecting the Prison: United States, 1789-1865*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 100, 111-29 (Norval Morris & David Rothman eds., 1995); Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in *THE OXFORD HISTORY OF THE PRISON*, *supra*, at 169.

² See generally JEREMY TRAVIS & SARAH LAWRENCE, *BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA* (2002).

³ See Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 9, 20-40 (1925).

parole authority was intended to serve, as the Supreme Court would put it, the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."⁴ This model of sentencing and corrections was embraced by nearly every state in the early 1900s,⁵ and parole officially became a part of the federal sentencing system in June 1910.⁶ While the forms and functioning of federal parole decision-making evolved over time,⁷ nearly all federal prisoners throughout most of the twentieth century received sentences that included parole eligibility after serving just one-third of the prison term imposed by federal judges. Just before the SRA's passage, the average federal prisoner was being released on parole after serving less than half of the prison sentence that a federal judge had imposed.⁸

But the 1970s ushered in, as one leading commentator explained, a "wide and

⁴ *Williams v. New York*, 337 U.S. 241, 247 (1949).

⁵ See Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 489 (1999) ("By 1927, only three states (Florida, Mississippi, and Virginia) were without a parole system, and by 1942, all states and the federal government had such systems.").

⁶ See Parole Act, ch. 387, § 1, 36 Stat. 819 (1910).

⁷ See generally U.S. DEP'T OF JUSTICE, U.S. PAROLE COMMISSION, *HISTORY OF THE FEDERAL PAROLE SYSTEM* (May 2003).

⁸ See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984*, Table 6-17 (December 1986) (reporting that federal prisoners in 1979 served on average 48% of their prison sentences, and in 1983 served on average 45% of their prison sentences).

precipitous decline of penal rehabilitationism” as a foundational theory for sentencing systems and practices.⁹ Judges, politicians, academics, and advocates became increasingly suspicious of the efficacy of efforts to rehabilitate offenders and increasingly concerned about discretionary sentencing procedures giving short shrift to defendants’ individual rights and to the value of equal treatment across cases.¹⁰ Researchers highlighted and criticized the unpredictable and disparate sentences that often resulted from discretionary sentencing systems focused on offender rehabilitation; reformers urged the development of structured sentencing laws requiring judges to impose sentences that were more fixed, certain, and consistent.¹¹

Indeterminate prison sentences and parole review, often the most tangible manifestation of the rehabilitative model of sentencing and corrections, were among the first targets of sentencing reform efforts. Maine eliminated parole in 1976, and many other states in subsequent years followed suit by abolishing parole for all or many offenses and offenders.¹² During this same period, as criticisms of discretionary sentencing practices dovetailed with concerns about increasing crime rates, “tough on crime” policies and politics began to draw adherents to the view that only fixed mandatory sentencing terms could help deter criminal offenses and that lengthy prison terms were needed to incapacitate offenders and promote public safety.¹³

⁹ See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 7–20 (1981).

¹⁰ See, e.g., AMERICAN FRIENDS SERVICE COMMITTEE, *STRUGGLE FOR JUSTICE* (1971); KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1971); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

¹¹ See DAVID FOGEL, *WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS* (1975); TWENTIETH CENTURY FUND TASK FORCE ON CRIM. SENTENCING, *FAIR AND CERTAIN PUNISHMENT* (1976); ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* (1975); ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); JAMES Q. WILSON, *THINKING ABOUT CRIME* (1975).

¹² See JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 65–67 (2003).

¹³ See generally Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61 (1993); Marc Mauer, *Why are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL’Y REV. 9 (1999).

Through the enactment of the SRA and mandatory minimum sentencing statutes in the 1980s, Congress joined the ranks of many state legislatures embracing determinate sentencing laws that eliminated parole and called for fixed and lengthy prison terms for many offenses and offenders. At the time the SRA was being developed—a time of diminished faith in any rehabilitative programming and growing “get tough” sentiments—the vices of parole were especially salient. The Senate Report supporting the SRA stressed that parole was premised on an “outmoded” and “failed” rehabilitation model for criminal sentencing and contributed to uncertainty and inconsistencies in federal sentencing outcomes.¹⁴ To the drafters of the SRA, abolition of parole seemed a sensible and simple way to help create clearer and more certain and consistent federal sentencing decision-making. Without parole officials deciding when to release prisoners early, the sentencing judge, the defendant, victims, lawyers, and the community could all know that any prison term announced in court at sentencing was the prison term that a defendant was going to serve.

As explored in the next section, the SRA’s elimination of parole altered the institutional dynamics of sentencing decision-making in ways that have long echoed through modern federal sentencing policies and practices. Determinate schemes, by firmly fixing prison terms at initial sentencing, necessarily increase the power and impact of all “front-end” sentencing decision-makers—i.e., the policymakers who write and revise sentencing rules, the lawyers who advocate in the application of these rules, and the judges who make individual sentencing decisions. Moreover, not only does the elimination of parole inherently “raise the stakes” for all the actors involved in front-end sentencing decisions, it also tends to calcify the consequences of—and compound any problems resulting from—the sentencing decisions made by these front-end actors.

Federal Sentencing’s Modern Struggles, Untempered by Parole

With the benefit of hindsight and three decades of federal sentencing developments after the passage of the SRA—a period defined by extraordinary controversy over the operation of the federal criminal justice system and enormous growth in the federal

prison population—one can reasonably wonder if federal sentencing has ultimately been disserved by the complete abolition of parole. The front-end actors shaping the modern federal system have produced sentencing laws and related jurisprudence marked by considerable and problematic complexity, rigidity, and severity. If parole had persevered in some form through the enactment of the SRA, perhaps some of the most controversial and criticized aspects of the modern federal sentencing system would have developed differently or at least had their most harmful consequences tempered.

Consider, for example, Congress’s disconcerting enactment of a series of severe and rigid mandatory minimum sentencing statutes after the passage of the SRA.¹⁵ Researchers and practitioners have documented that mandatory sentencing laws regularly produce unjust outcomes and functionally shift undue sentencing power to prosecutors when selecting charges and plea terms.¹⁶ The U.S. Sentencing Commission has detailed in multiple reports that federal mandatory minimum sentencing statutes have not achieve their purported goals and that statutes linking lengthy prison terms to certain drug quantities have had a disproportionate and unduly severe impact on minority defendants.¹⁷

Congress likely would have enacted an array of mandatory minimum sentencing statutes even if parole had been preserved in the SRA. But the import and impact of these statutes would not have been quite so problematic if federal parole officials could and did regularly

¹⁵ See *Federal Mandatory Minimums*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf> (last visited July 2, 2017).

¹⁶ See BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS* (1994); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 65–66 (2009) (“Experienced practitioners, policy analysts, and researchers have long agreed that mandatory penalties in all their forms . . . are a bad idea . . . It is why nearly every authoritative nonpartisan law reform organization that has considered the subject . . . have opposed enactment, and favored repeal, of mandatory penalties.”)

¹⁷ See U.S. SENTENCING COMM’N, *SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM* (1991); U.S. SENTENCING COMM’N, *SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY* (1995).

¹⁴ See S. Rep. No. 98-225 (1983).

release early lower-level offenders based on their prospects for reentering society safely. Advocating against the abolition of parole in this very publication back in 1975, Maurice Sigler, then the chairman of the U.S. Board of Parole, warned of the modern “legislative temper” while explaining how parole helps ameliorate problematic sentences resulting from “penal codes [that] are typically a mish-mash of conflicting penalties, some of them savage in their severity.”¹⁸ Sigler’s words seem prophetic four decades later as the federal system continues to struggle with a modern mish-mash of conflicting and severe mandatory minimum sentencing provisions enacted by Congress since the SRA.

Turning to the sentencing guidelines, one can also imagine how the preservation of parole might have influenced the work of the U.S. Sentencing Commission for the better. The Sentencing Commission, doggedly pursuing consistency and uniformity, produced intricate guidelines designed to limit judicial discretion through a focus on quantifiable offense harms and by precluding consideration of mitigating offender characteristics like past employment and family ties.¹⁹ And while the Supreme Court’s landmark *Booker* decision made the guidelines advisory and thereby softened their rigidity,²⁰ the current guidelines still incorporate problematic facets of Congress’s mandatory minimum statutes and still require judges to adjudicate offense conduct never formally charged or proven. These problematic elements of guideline sentencing reflect continuing efforts to moderate the significance and impact of prosecutorial charging and plea choices at sentencing.

Had some form of parole remained in place after the SRA, perhaps the Sentencing Commission would not have been so inclined, either conceptually or practically, to produce an intricate and rigid sentencing guidelines structure. Conceptually, if parole persevered, the Commission might have been drawn to a guideline framework that better reflected the

reality that sentencing uniformity was only one of a number of competing goals the SRA sought to advance in a reformed federal sentencing system.²¹ Practically, if parole persevered, the Commission would have known its guidelines could not possibly dictate final sentencing outcomes through rules seeking to micromanage judicial decision-making and mute prosecutorial decision-making. In other words, parole’s preservation in the SRA might have altered the Sentencing Commission’s entire approach to developing sentencing guidelines and might have ultimately led to a federal guideline structure that, like many state guideline systems, proved less controversial by being more modest in ambition and implementation.²²

Rounding out this reflection of what might have been, consider finally the last three decades of guideline development and resulting jurisprudence. The size, structure, and substance of the initial guidelines prompted many federal sentencing judges to complain about “a mechanistic administrative formula” that converted them into “judicial accountants” in the sentencing process.²³ But the initial guidelines now look modest compared to their current iteration: After nearly 800 amendments, the Guidelines Manual has grown to more than 500 pages of sentencing instructions.²⁴ And the size and scope of the Commission’s official rules are modest still when compared to the tens of thousands of federal court opinions which have interpreted and expounded upon the meaning and application of the guidelines—a jurisprudence compelled not only by complicated, often-changing guideline provisions, but also by thousands of federal defendants each and every year choosing to appeal guideline calculations and resulting sentences.

Because sentencing judges had such

unfettered discretion before the SRA, some jurists surely would have complained about new guidelines no matter their initial form. But the severity of the guidelines has been an enduring judicial concern, no doubt in part because there is no possibility for parole to “soften the blow” of mandated or suggested prison terms. Moreover, the determinate nature of sentences has surely contributed to the Commission repeatedly revising the guidelines and to federal defendants regularly appealing every adverse sentencing determination. In a system with parole, smaller problems with general sentencing rules or individual sentencings can be at least partially remedied through the usual work of parole boards; in a system without parole, sentencing rules must be ever modified through guidelines amendments and claims of sentencing error must be ever addressed through appeals.

This extensive imagining of a modern federal sentencing world significantly recast by the preservation of parole is meant to be more of a thought experiment than a serious prediction of an alternative federal sentencing history. I do not wish to claim that parole would have been a magic elixir that miraculously remedied all of modern federal sentencing’s ills. Most critically, I do not believe the increase in the severity of federal sentences and the growth in the federal prison population could or should be attributed wholly or even in large part to the abolition of parole. Many state sentencing systems that preserved parole as they reformed their sentencing systems in modern times also experienced significant prison population growth; it is not a given that preservation of parole ensures a more moderate sentencing scale or a more moderated prison population.²⁵

While not meaning to portray parole as a panacea, this section of my article has sought to spotlight an all-too-often forgotten reality about parole—namely that, conceptually and institutionally, parole mechanisms and parole boards can serve as an important bulwark against the kind of impersonalized severity that has come to define much of the modern federal sentencing experience. Put another way, I do not think it mere coincidence that the entire federal sentencing system became problematically complex, rigid, and severe

¹⁸ Maurice H. Sigler, *Abolish Parole?*, FEDERAL PROBATION, June 1975, at 42, 47.

¹⁹ See generally Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reform*, 58 STAN. L. REV. 277 (2005); Ronald F. Wright, *Complexity and Distrust in Sentencing Guidelines*, 25 U.C. DAVIS L. REV. 617, 632 (1992) (noting that “the way that the Sentencing Commission read its statute and defined its task . . . made uniformity the key objective of the guidelines”).

²⁰ *United States v. Booker*, 543 U.S. 220 (2005).

²¹ See generally Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587 (1992).

²² See generally Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190 (2005).

²³ See, e.g., *United States v. Bogle*, 689 F. Supp. 1121, 1163 (S.D. Fla. 1988) (Aronovitz, J., concurring); *United States v. Russell*, 685 F. Supp. 1245, 1249 (N.D. Ga. 1988); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 99-100 (1988) (calling guidelines “a complex parlor game”).

²⁴ See U.S. SENTENCING COMM’N, GUIDELINES MANUAL (2016) (Appendix C).

²⁵ See generally NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 79-83 (2014) (discussing research on the relationship between abolition of parole and prison growth).

right after parole was abolished in the SRA. In turn, I suggest that policymakers and advocates who would like to see a federal sentencing system that is less complex, rigid, and severe now consider whether parole could and should be returned to this system. And in making this suggestion, I note that in recent years federal sentencing policymakers have ushered in an array of recent federal sentencing reforms and proposals that can be viewed as a kind of “parole light.”

Noticing Forms of “Parole Light” and Considering Advocacy for Parole’s Return

Though parole has never been designed to serve as a remedy to problems elsewhere within a sentencing system, parole mechanisms historically have and institutionally can serve as a kind of “back-end safety valve” in the operation and administration of a sentencing system. Once parole was abolished in the federal sentencing system, this “back-end” safety valve role would have to be filled in other ways, and the last decade has seen this void filled in a variety of notable ways in the federal system. Specifically, in recent years there have been (1) repeated reductions in guideline sentences for drug offenses made retroactively applicable to current prisoners, (2) an unprecedented U.S. Department of Justice initiative to encourage the submission of clemency applications by certain federal prisoners, and (3) a landmark corrections reform bill proposing various means for certain prisoners to secure early release. As explained below, these notable recent sentencing developments all can be viewed as a kind of “parole light.”

Three significant reductions in guideline sentences for drug offenses over the last decade have been implemented to benefit federal prisoners in parole-like manner. In 2007, the United States Sentencing Commission amended the guidelines for offenses involving crack cocaine to reduce by two offense levels the recommended sentencing ranges associated with particular amounts of crack; in 2011, the Commission amended the guidelines to implement the Fair Sentencing Act’s further reduction of sentences tied to particular crack amounts; in 2014, the Commission voted to reduce offense levels for all drug amounts by two levels.²⁶ The Sentencing Commission ultimately voted to give retroactive effect

to all of these drug guideline amendments, which authorized judges to review motions to reduce sentences for all those serving prison terms based on the previous guidelines. Demonstrating the parole-like import and impact of these retroactive guideline changes, the Commission made plain that its vote for guideline retroactivity authorized only a “discretionary reduction” to which the defendant had no right or entitlement, and the Commission instructed judges to “consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant’s term of imprisonment.”²⁷

Another parole-like sentencing development recently emerged in the form of unique clemency activity during the final years of the presidential term of Barack Obama. In April 2014, the deputy attorney general announced an initiative to “encourage qualified federal inmates to petition to have their sentences commuted”: the Department of Justice would prioritize clemency applications from inmates who meet a series of criteria including having been “non-violent, low-level offenders” who had “served at least 10 years of their prison sentence” and did “not have a significant criminal history” and had “demonstrated good conduct in prison.”²⁸ Unsurprisingly, the announcement of this “Clemency Initiative” resulted in a huge influx of clemency petitions. The Department of Justice ultimately made recommendations to the White House on tens of thousands of petitions, and President Obama ultimately reduced the prison sentence of 1,715 federal offenders.²⁹ The criteria used by the Justice Department to screen and prioritize clemency petitions plainly reflected parole-like concerns and decision-making, and one leading official stressed the role that prison behavior and related public-safety concerns played in the Justice Department’s clemency petition review process.³⁰

Last but not least, Congress has recently considered what would be landmark legislation involving correctional reforms that have

an array of parole-like features. The proposed Sentencing Reform and Corrections Act of 2015 (SRCA) would have enabled prisoners to earn credits for completing rehabilitative programs in prison, allowing for earlier release to a halfway house or home confinement or community supervision.³¹ Under the SRCA, the amount of available “earned time” would be determined by prison officials using modern risk assessment tools designed to gauge each prisoner’s risk of reoffending as part of plans for prisoner involvement in “recidivism-reducing programming” and “productive activities.” Under this bill, prisoners who commit new offenses or violate prerelease conditions can be sent back to prison, just as parolees historically can get sent back to prison for violating the term of parole. The SRCA also includes provisions that would allow some elderly and terminally ill prisoners to be released from prison early to serve the remainder of their sentences through home confinement if prison officials decided their release would not endanger the public and they meet other (parole-like) criteria.

My description of these recent notable federal sentencing developments as a kind of “parole light” is not meant as a criticism, nor do I wish to demean or minimize their significance. My goal, rather, is to note and highlight how many of the most consequential reforms and proposals in the federal sentencing system over the last decade are, in ways both subtle and obvious, echoing much of the essential philosophy and practical decision-making that defines the mission and work of parole. In so doing, I am drawn back again to the prophetic words of Maurice Sigler, then-chairman of the U.S. Board of Parole, in this very publication back in 1975. He closed his commentary with these final sentences:

To those who say “let’s abolish parole,” I say that as long as we use imprisonment in this country, we will have to have someone, somewhere with the authority to release people from imprisonment. Call it parole—call it what you will. It’s one of those jobs that has to be done.³²

Recent federal sentencing developments highlight and reinforce Sigler’s point that a sentencing system always “will have to have

²⁶ See U.S. SENTENCING COMM’N, GUIDELINES MANUAL, Appendix C, Amendments 706, 750 & 782 (2016).

²⁷ See U.S. SENTENCING COMM’N, GUIDELINES MANUAL, Appendix C, Amendments 713, 759 & 788 (2016).

²⁸ See U.S. Dep’t of Justice, Office of Pardon Attorney, *Clemency Initiative* (Feb 2017), available at <https://www.justice.gov/pardon/clemency-initiative>.

²⁹ See *id.*

³⁰ See Sari Horwitz, *Obama to Commute Hundreds of Federal Drug Sentences in Final Grants of Clemency*, WASH. POST, Jan. 16, 2017.

³¹ See The Sentencing Reform and Corrections Act of 2015, S. 2123.

³² Maurice H. Sigler, *Abolish Parole?*, FEDERAL PROBATION, June 1975, at 42, 48.

someone, somewhere with the authority to release people from imprisonment.” With the federal prison population growing from roughly 35,000 in 1984 when parole was abolished to 220,000 prisoners in 2014, it is hardly surprising that recent years have led to reforms and proposals that, in varied ways, expand federal prisoner release authority and function as a kind of “parole light.” But what I find a bit surprising is the absence of any major advocates for federal sentencing reform making any full calls for recreating at least a modest, modern form of parole.

Though a full-throated case to restore parole in the federal system is beyond the scope of this essay, the discussion above should highlight ways parole might serve as an efficient and effective means to at least partially ameliorate long-standing concerns about mandatory minimum statutes and dysfunctional guidelines. In addition, though terms like “parole” and “rehabilitation” may still carry political baggage three decades after the SRA’s passage, the recent political

discourse around federal statutory sentencing reform has suggested that parole-like corrections reforms may be among the SRCA’s least controversial elements—in part because many SRCA provisions are modeled on state reform efforts that have succeeded in reducing crime rates and prison populations through enhanced prison-based rehabilitation-oriented programming, expanded geriatric and medical parole, and use of risk assessment tools to inform release decisions. The correctional reform provisions of the SRCA show that many federal policymakers not only respect, but are eager to replicate in some form, the parole reform activity in many states. In light of that reality, federal sentencing reform advocates can and should consider whether the time has come to make bringing back parole an integral part of their advocacy efforts.

In a recent article on “The Future of Parole Release,” three leading scholars have noted that “paroling authorities are well positioned to play crucial roles in engineering

new approaches” to the modern problems of mass incarceration and enduring sentencing severity.³³ Building on the wisdom of state experiences in recent decades, these scholars have set forth an astute blueprint in the form of a “a 10-point program for the improvement of discretionary parole release systems in America.”³⁴ In so doing, they note that jurisdictions will be required to “develop new or expanded release capacities to help unwind the punitive policies of the past.”³⁵ The goal of this essay has been to highlight reasons why I think reformers who have been troubled by the punitive policies that the SRA helped usher into the federal system ought to think about talking up the concept of federal parole anew.

³³ See Edward Rhine, Joan Petersilia, & Kevin Reitz, *The Future of Parole Release*, 46 *CRIME AND JUSTICE* 279 (2017).

³⁴ *Id.* at 279.

³⁵ *Id.* at 338.

Five Questions for the Next Thirty Years of Federal Sentencing

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CONGRESS EMBRACED A more systematic approach to punishment in the Sentencing Reform Act of 1984. It abolished discretionary parole release and determined that sentencing guidelines crafted by a sentencing commission were a wise approach to public policy.²

Like many milestones, both personal and professional, the impending 30th anniversary of the United States Sentencing Guidelines presents a useful opportunity to reflect on the modern federal sentencing scheme and to contemplate what should happen going forward. One way to do that is by asking questions in the context of one of the federal system's state predecessors, the Pennsylvania Sentencing Guidelines. Like anything else, the Pennsylvania approach has strengths and weaknesses, but it can show that the federal model is not the only option.

This short and modest essay will pose five questions, the answers to which may offer possible opportunities for federal improvement over the next thirty years.

Introduction

Sentencing is hard.³ In 1960, Judge Irving

¹ Professor of Law, Villanova University Charles Widger School of Law. Many thanks to Mark Bergstrom, Doug Berman, and Jordan Hyatt for their wise advice and counsel.

² See, e.g., Robert Weisberg, *How Sentencing Commissions Turned Out to be a Good Idea*, 12 BERKELEY J. OF CRIM. L. 179 (2007).

³ See, e.g., Irving R. Kaufman, *Sentencing: The Judge's Problem*, THE ATLANTIC MONTHLY 40 (Jan. 1960) ("If the hundreds of American judges who sit on criminal cases were polled as to what was the most trying facet of their

Kaufman wrote, "[i]n no other judicial function is the judge more alone; no other act of his carries greater potentialities for good or evil than the determination of how society will treat its transgressors."⁴ Four leading sentencing scholars have framed the modern sentencing balancing act this way:

One could summarize the entire guideline sentencing movement as just another chapter in an endless struggle to calibrate the unavoidable tension between efforts to achieve equal justice across cases and those to achieve individual justice in specific cases.⁵

As a society, we are always looking for the "Goldilocks" solution. We want the sentencing porridge to be just right—not too hot or too cold, too severe or too lenient, too rigid or too flexible.⁶ Fortunately, sentencing guidelines can provide a compass of sorts to help the various actors in the criminal justice system find their way over difficult terrain.⁷

jobs, the vast majority would almost certainly answer 'Sentencing.'")

⁴ *Id.*

⁵ NORA V. DEMLEITNER, ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 185 (3d ed 2013).

⁶ Cf. MICHAEL TONRY, SENTENCING MATTERS 185-186 (1996) (describing the desire for a "just system of sentencing" as "a counsel of unattainable perfection.").

⁷ See, e.g., Norval R. Morris, *Sentencing Convicted Criminals*, 27 AUSTR. L.J. 186, 189 (1953) ("When a court decides what sentence to impose on a criminal ..., it must do so with reference to some purpose or purposes,

After serving as a Chicago Assistant U.S. Attorney (AUSA) in the Criminal Division, I became a law professor and spent almost 14 years as a gubernatorial appointee to the Pennsylvania Commission on Sentencing (PCS) while simultaneously teaching, speaking, and writing (often in the *Federal Sentencing Reporter*, where I continue to serve as an editor) about the federal system. Many years ago, during one particularly heated meeting of the PCS, a judicial member with decades of experience observed that our children and grandchildren would likely be debating similar issues one day. At first, that prediction left me disheartened and comparing our task to that of Sisyphus. Yet, upon reflection, I concluded that even if he was right (and he probably was),⁸ we could help our progeny by setting up the best structures possible—ideally creating a framework that could accommodate evolving understandings of, and preferences about, matters like judicial discretion, the severity and effectiveness of sentences, and punishment options.

conscious or unconscious, articulate or inarticulate. ... [A] compass is desirable ... even if only for a short distance and over a particular part of the journey."); Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351 (2005) (citing Morris and expanding on the sentencing compass theme).

⁸ See MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 118-19 (1973) ("There must be recognition that the subject will never be definitively 'closed,' that the process is a continuous cycle of exploration and experimental change.").

The five questions that follow are informed and inspired by that broad background. Congress must answer most of them, but the U.S. Sentencing Commission (USSC) has a pivotal role to play. These questions are designed to help us think about what we are leaving the next generation of judges, probation officers, lawyers, defendants, victims, and citizens.

Question #1: Should discretionary parole release be restored in the federal system?

As evidenced by the Pennsylvania experience, it is possible to create a system that has both sentencing guidelines and discretionary parole release. Elsewhere in this issue, Professor Doug Berman makes the case for why some federal form of parole makes good sense.⁹ That larger question is beyond the scope of this essay. Rather, I will simply comment on some of the challenges, benefits, and opportunities in this area.

Discretionary parole release has long been the subject of criticism because of its historically opaque decision-making processes, unfettered discretionary power, and lack of due process.¹⁰ There is a vigorous debate over whether parole release results in longer or shorter periods of actual imprisonment. The American Law Institute's (ALI) recently adopted Model Penal Code: Sentencing project endorses a system without traditional discretionary parole release not only because of concerns that parole boards are "failed institutions" that are "highly susceptible to political pressure," but also because many view them as an ineffective "check on prison population growth."¹¹ Of course, the size of a jurisdiction's prison population stems from numerous features, including intentional legislative choices.

Furthermore, as Professor Berman highlights and the ALI states, every system allows for some form of "later-in-time official

decisions—some of them after judicial imposition of sentence—that may alter the durations of prison stays."¹² Congress has considered expanding some of those federal tools in ways that are recognizable echoes of traditional discretionary parole release—what Professor Berman calls "parole light." Making that work well, however, requires sustained coordination between agencies.

In 1981, the PCS promulgated its initial sentencing guidelines in an environment that had—and still has—discretionary parole release for most offenders. The sentencing judge is the paroling authority for some inmates, while the state Board of Probation and Parole has that power in other, typically more serious, cases. For decades, there was no formal, systemic cross-pollination between sentencing and parole. Indeed, the PCS, the paroling judge, and the Board all acted independently. Consistent with Professor Berman's musings about what the federal guidelines might have looked like had discretionary parole release been preserved,¹³ however, each actor in the Pennsylvania system knew that the other existed and had its role to play.

The Pennsylvania General Assembly took a step toward greater coherence and consistency in 2008 when it tasked the PCS with creating guidelines for parole release by both the Board and the sentencing judge, as well as for the revocation and recommitment of parole violators.¹⁴ From my perspective, the legislature directed the PCS to "act[] as the central coordinator of the jurisdiction's sentencing and punishment policy," with the goal of "harmoniz[ing] otherwise potentially conflicting sentencing and parole release principles."¹⁵ The PCS continues to grow into its new role, and these post-sentencing guidelines are still being tested in the field, but the initial results are promising.

If Congress wants to bring some form of

discretionary parole release back to the federal system, it should do so in a coordinated way that explicitly includes a monitoring and harmonizing role for the USSC.

Question #2: What should be the institutional composition of the Commission?

There are many different ways to assemble a sentencing commission. It can be big—like Ohio's 31-member commission—or it can be small—like the seven-member USSC.¹⁶ It can focus on the adjudicative arena and limit its membership to judges and lawyers, or it can think more comprehensively and include members of the public, sitting legislators, or officials from such entities as police, probation, corrections, local government, reentry service providers, etc. The ALI's new Model Penal Code: Sentencing project provides smaller and larger alternative models.¹⁷ There is no perfect size or makeup of a sentencing commission, but balanced institutional perspectives represented by competent and devoted individuals should be the goal.

The USSC has undergone some statutory changes over the years, although it has always had seven voting members.¹⁸ Initially—and again now—at least three of those members had to be federal judges. However, for about five years in the mid-2000s, Congress required that no more than three members could be federal judges. The President appoints all of the voting members by and with the advice and consent of the Senate, and no more than four of the voting members can be of the same political party. The Attorney General and the Chair of the U.S. Parole Commission, a component of the Department of Justice, serve as *ex officio*, non-voting members of the USSC. As former USSC Chair Sessions has written, "the executive branch ... is given a 'seat at the table' at the Commission—literally and figuratively. As a non-voting *ex officio* commissioner, the Attorney General

⁹ Douglas A. Berman, *Reflecting on Parole's Abolition in the Federal Sentencing System*, FEDERAL PROBATION (Sept. 2017).

¹⁰ See, e.g., Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175 (2005); Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 449 (2005).

¹¹ AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING §6.06, cmt. a at 147 (Proposed Final Draft, April 10, 2017); see also Kevin R. Reitz, *Don't Blame Determinacy: US Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787 (2006).

¹² AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING §6.06, cmt. a at 148 (Proposed Final Draft, April 10, 2017); see also *id.*, at §§ 305.6 - 305.8.

¹³ Douglas A. Berman, *Reflecting on Parole's Abolition in the Federal Sentencing System*, FEDERAL PROBATION (forthcoming 2017) (noting that "parole's preservation in the SRA might have altered the Sentencing Commission's entire approach to developing sentencing guidelines").

¹⁴ 42 Pa.C.S. §§ 2154.5 & 2154.6.

¹⁵ Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 434 (2005).

¹⁶ Alexis Lee Watts, *The Composition of Sentencing Commissions*, Robina Institute, available at <https://sentencing.umn.edu/content/composition-sentencing-commissions> (last visited July 30, 2017).

¹⁷ AMERICAN LAW INSTITUTE, MODEL PENAL CODE: SENTENCING §6A.02 at 268-270 (Proposed Final Draft, April 10, 2017). The role of the appointing authority, the selection of the Chair, and the need for experienced and thoughtful members and staff are also important points discussed by the ALI, but they are beyond the scope of this essay.

¹⁸ 28 U.S.C. §991(a).

(or his designate) is privy to the Commission's internal deliberative processes.¹⁹

The voting composition of the PCS has been stable at 11 since its creation in 1979.²⁰ The chief justice appoints four judges of courts of record. To date, all of them have been trial judges, but nothing prevents the chief justice from appointing an appellate judge or justice. The leaders of each chamber of the General Assembly appoint two of their members, with no more than one per party. Functionally, that means that there is one Democratic and one Republican member from the House of Representatives and the same from the Senate. Pennsylvania's governor appoints a district attorney, a defense attorney, and a law professor or criminologist. No legislative confirmation is necessary for any of the 11 appointees. In 2008, legislation created three *ex officio* nonvoting members: the secretary of Corrections, the chair of the Board of Probation and Parole, and the state victim advocate.²¹

The Pennsylvania approach has worked reasonably well, and the voting members of the PCS typically reflect the full array of mainstream positions on most issues. Including sitting legislators may seem to be an odd choice, especially from the federal perspective. Although doing so is not without challenges, this decision has helped the legislature to trust and rely on the PCS—for example, by directing the use of certain guideline enhancements instead of enacting more mandatory sentences—and keeps the PCS grounded in political reality.

One could argue that the PCS defense attorney position (which the governor has filled with various highly qualified defense attorneys in private practice) should be reserved for a sitting public defender (or chief public defender to mirror the elected district attorney), because public defenders represent most of the sentenced defendants. Furthermore, there is arguably an imbalance, because no *ex officio* spot exists for the Pennsylvania Prison Society or some other group that represents inmates or former offenders, while there is an *ex officio* victim advocate.²²

To answer our question about institutional commission composition, the differences between the federal and Pennsylvania approaches are striking. Disturbingly, the federal system formally shuts out defense voices. Although the attorney general has only an *ex officio*, non-voting seat (or seats if one counts the chairman of the Parole Commission) at the table, the Department of Justice is still at the table. Defense attorneys—public and private—do not even have that. It is difficult to fathom a logical explanation for this inequity. Although quantifying the impact of this structural decision is challenging—especially given the vigorous advocacy provided by the federal defense bar before the USSC—by excluding them from any presence on the Sentencing Commission, Congress sent a clear and troubling message that defense voices are less important at the policy level.

Regardless of the size of the USSC, Congress should act to balance the structural, institutional perspectives of the Commission's members by either adding an *ex officio* federal defender or making both a prosecutor and a federal defender full voting members. A legal system that prides itself on fairness and strives to reflect checks and balances deserves no less.

Question #3: What role should data and transparency play in the modern Commission?

The faithful collection and stewardship of sentencing data are two of any sentencing commission's most important tasks. I have written previously that:

There is so much that sentencing practitioners (including judges, prosecutors, defense attorneys, probation officers, etc.) and policymakers can do to harness the power of data in the service of rationality, fairness and justice. ... For example, data can help legislatures and sentencing commissions more intelligently address such crucial issues as setting or revising mandatory minimums and molding the contours of criminal history categories.²³

LAW WITHOUT ORDER 120 (1973) (recommending the inclusion of "former or present prison inmates" on commissions). Interestingly, Michigan mandates the inclusion of an "individual who represents advocates of alternatives to incarceration." Mich. Comp. Laws § 769.32a(j) (2016).

²³ Steven L. Chanenson, *Sentencing and Data: The Not-So-Odd Couple*, 16 FED. SENT'G REP. 1, 1 (2003).

High-quality sentencing data can be a powerful tool for criminal justice planning. What will be the impact—both human and financial—of potential legislative or guideline changes? A data-focused commission can offer an informed prediction.

The USSC and the PCS both do an excellent job of providing much of that kind of sentencing data. The USSC's recent performance in this regard is particularly noteworthy. For example, its July 2017 report on mandatory minimum sentences provides a rich portrait of many facets of federal mandatories; in doing so it reminds Congress of the importance of guidelines and that "Congress should request prison impact analyses from the Commission as early as possible in its legislative process whenever it considers enacting or amending criminal penalties."²⁴

In Pennsylvania, the PCS is the go-to resource for what is happening in sentencing across the state. Policymakers across the political spectrum rely on and trust the numbers from PCS. This was vividly on display during a recent debate over reinstating mandatory minimum sentences. Both lawmakers who favored and those who opposed new mandatory minimum legislation cited a 2009 PCS report on mandatories to support their views.²⁵

A meaningful point of departure for comparing the federal and Pennsylvania approaches is the transparency of judicial data. Basic data about the sentencing patterns of individual judges—all of which is nominally available to the public—is readily available in Pennsylvania but functionally hidden in the federal system. This information could help litigants, trial judges, and legislatures make important tactical or strategic decisions at the case or statutory level.

²⁴ U.S. SENTENCING COMM'N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 3 (2017), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf.

²⁵ PENNSYLVANIA COMM'N ON SENTENCING, A STUDY ON THE USE AND IMPACT OF MANDATORY MINIMUM SENTENCES (2009) available at <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/special-reports/house-resolution-12-of-2007-use-and-impact-of-mandatory-minimum-sentences/report-to-the-legislature-the-use-and-impact-of-mandatory-minimum-sentences.-hr-12-of-2007/view>.

¹⁹ William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission's Attempts to Achieve Sentencing Reform in the Midst of Inter-branch Power Struggles*, 26 J.L. & POL. 305, 323 (2011).

²⁰ 42 Pa.C.S. §2152(a).

²¹ 42 Pa.C.S. §2152(a.1).

²² Cf. MARVIN FRANKEL, CRIMINAL SENTENCES:

Since 1999, the PCS has provided judge-specific sentencing data to the public.²⁶ Several customizable judge-specific sentencing reports are now available online for free.²⁷ This policy was controversial when the PCS adopted it, in part because judges in Pennsylvania run for office in partisan elections and are later subject to retention votes. Nevertheless, the Commonwealth is still standing almost 20 years later, and the easy access to judge-specific data is rarely a cause for concern.

The federal system is a different story entirely. Despite the fact that federal judges enjoy the protection of lifetime appointments, the USSC is formally precluded from releasing judge-specific information. Back in 1988, when the USSC was young, politically weak, and facing a hostile judiciary, the USSC and the Administrative Office of the United States Courts (AO) entered into a Memorandum of Understanding that prevents it from releasing judge-specific information.²⁸ In fact, the federal courts, acting through the AO, have refused to release judge-specific statistics nationally since at least 1974, although the Judicial Conference of the United States afforded local courts the discretion to release that information starting in 1995.²⁹ Admirably, the District of Nebraska (and, to my knowledge, only that district) has released judge-specific USSC sentencing data since 2007.³⁰ Nebraska's noble effort is no substitute for detailed information about all judges around the country. A national solution is needed.

²⁶ PENNSYLVANIA COMM'N ON SENTENCING, *RELEASE OF INFORMATION POLICY* (2013), available at <http://pcs.la.psu.edu/about-the-commission/governance/release-of-information-policy/view>.

²⁷ <http://pcsdata.psu.edu/SASPortal/main.do>.

²⁸ U.S. Sentencing Comm'n, *Public Access to Sentencing Commission Documents and Data*, 54 FED. REG. 51279 (Dec. 13, 1989), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/topical-index-publications/19891213_Public_Access_Documents_Data.pdf.

²⁹ JUDICIAL CONFERENCE OF THE UNITED STATES, *REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 21-22* (March 1995); JUDICIAL CONFERENCE OF THE UNITED STATES, *REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 87-88* (Sept. 1995).

³⁰ See, e.g., Richard G. Kopf, *Judge-Specific Sentencing Data for the District of Nebraska*, 25 FED. SENT'G REP. 50 (2012); <http://www.ned.uscourts.gov/attorney/judges-information/judges-sentencing-data>.

Congress should mandate the release of judge-specific sentencing data,³¹ and direct the USSC to look deeply into the kind of information it collects and reports with the goal of understanding as much as possible about what is happening and why.³² After all, “[s]entencing data involve public records created with public funds reflecting the exercise of a public trust.”³³

Question #4: Are the guidelines asking the right questions?

This could be the trickiest question of the bunch. Sentencing guidelines are designed, in part, to help judges sort cases into groups with reasonably similar levels of moral culpability. But, as in other areas of life, it may be that the guidelines do not direct us to measure certain things because they are important. Rather, they may become important because we are told to measure them. As Justice Breyer once said, “[r]anking offenders through the use of fine distinctions is like ranking colleges or the ‘liveableness’ of cities with numerical scores that reach ten places past a decimal point. The precision is false.”³⁴

Determining the moral culpability of a particular drug dealer or fraudster can be challenging, but we can easily weigh the drugs

transported and count the money swindled from the victim. So we weigh, and we count. The problem is not so much about the number of questions the guidelines ask, but rather about the nature of the information sought and how the guidelines urge the judge to use those answers.³⁵

Both Pennsylvania and the federal system suffer from problems of false precision, although the issue is exacerbated by the more prescriptive federal approach. For example (and without getting too far into the weeds), the PCS deploys a smaller number of fraud-related categories designed to get at issues of culpability (e.g., seven groupings of pecuniary loss ranging from less than \$50 to more than \$100,000) than the USSC (e.g., 16 groupings of pecuniary loss ranging from less than \$6,500 to more than \$550,000,000). One reason for this distinction is a different case mix, but another reason is simply a different approach.

Federal critics often identify false precision concerns in the areas of drugs, child pornography, and fraud sentencing.³⁶ Fraud is a particularly interesting topic and one that has generated a robust discussion on how effectively—or not—the guidelines track moral culpability.³⁷ It may be that the

³¹ Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 183 (2005); see also *id.*, at 183 n. 47 (“In order to reap the benefits of better aggregate sentencing data, Congress need not—and should not—release sensitive, personal information about victims, witnesses, or defendants.”).

³² The nature and depth of information requested and collected by AO and the USSC is far from optimal. See, e.g., Nancy Gertner, *Judge Identifiers, TRAC, and a Perfect World*, 25 FED. SENT'G REP. 46, 48 (2012) (“Nothing about the Commission’s data collection practices suggests that they cared about the real reasons for the sentencing variances.”); Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 147 (2006), <http://yalelawjournal.org/forum/write-on> (criticizing AO’s “anemic” Statement of Reasons form); cf. J.C. Oleson, *Blowing Out the Candles: A Few Thoughts on the 25th Anniversary of the Sentencing Reform Act*, 45 U. RICH. L. REV. 693, 750 (2011) (“Imagine how much more effective judges could be if they were equipped with meaningful information about desert and recidivism....”).

³³ *Id.*, at 184 (quoting testimony of Steven L. Chanenson before ABA Justice Kennedy Commission in 2003).

³⁴ Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT'G REP. 180, 186 (1999).

³⁵ Cf. R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 775 (2001) (discussing complexity and noting that “more precision leads to lower validity”); Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 21 (1987) (“If an objective fact is an unreliable or invalid indicator, then the system should adopt a more conceptual and subjective standard for the factor categories or for the factor itself....”); cf. *id.*, at 38 (advocating the use of overlapping ranges “to avoid false precision in valuing offense components or adjustment factors”).

³⁶ See, e.g., *United States v. Matos*, 589 F.Supp.2d 121, 139-140 (D. Mass. 2008) (“[A]ll too often the Guidelines’ over-emphasis on the quantity of drugs involved in an offense fails as a reliable measure of the defendant’s culpability.”) (Gertner, J.); Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G REP. 108 (2011) (proposing a “more rational system for identifying and differentiating offenders”); Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds after Booker*, 20 FED. SENT'G REP. 167, 172 (2008) (describing the federal guidelines as “out of whack for high-loss corporate frauds”).

³⁷ See, e.g., Frank O. Bowman, III, *Damp Squib: The Disappointing Denouement of the*

real concern is whether, by asking the wrong questions, particular guidelines are misleading us and lulling us into an unjustified sense of certainty.

One solution is to incorporate more standards into an otherwise-rule-focused set of guidelines. “A standard-based approach to measuring culpability would give judges the flexibility to determine which factors are most relevant and important to evaluating blameworthiness in any given case.”³⁸ An American Bar Association (ABA) task force made just such a proposal for economic crimes in 2014.

[The ABA] introduce[d] the concept of “culpability” as a measure of offense severity working in conjunction with loss. Through the culpability factor, the [ABA] proposal would permit consideration of numerous matters ignored by the current [federal] guideline, including the defendant’s motive, the nature of the offense, the correlation between the amount of the loss and the amount of the defendant’s gain, the duration of the offense and the defendant’s participation in it, extenuating circumstances in connection with the offense, whether the defendant initiated the offense or merely joined in criminal conduct initiated by others, and whether the defendant took steps (such as voluntary reporting or cessation, or payment of restitution) to mitigate the harm from the offense.³⁹

The idea is for the culpability score to “channel and guide judicial decision-making”⁴⁰

Sentencing Commission’s Economic Crime Project (and What They Should Do Now), 27 FED. SENT’G REP. 270 (2015); 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, 77 (2003) (“Loss is a proxy for offense seriousness and when it mismeasures seriousness judges should depart.”).

³⁸ Daniel S. Guarnera, *A Fatally Flawed Proxy: The Role of “Intended Loss” in the U.S. Sentencing Guidelines for Fraud*, 81 MO. L. REV. 715, 762 (2016).

³⁹ James E. Felman, *Reflections on the United States Sentencing Commission’s 2015 Amendments to the Economic Crimes Guideline*, 27 FED. SENT’G REP. 288, 291 (2015).

⁴⁰ Daniel S. Guarnera, *A Fatally Flawed Proxy: The Role of “Intended Loss” in the U.S. Sentencing Guidelines for Fraud*, 81

without forcing judges to mechanically count factors that may not always bear on moral culpability. The USSC did not embrace the ABA proposal, but a handful of sentencing courts have considered it.

Sentencing scholar Paul Hofer summed up the challenge nicely:

To be useful in practical decision making, a sentencing philosophy for a guidelines system must articulate the purposes the rules are meant to achieve. The purposes must be prioritized so that conflicts among them can be resolved. Importantly, how the rules are meant to accomplish their purposes should be explained. For example, how is pecuniary loss or drug quantity relevant to the seriousness of a crime? Such explanations are especially needed when the rules are not direct measures of the morally relevant dimensions, but are instead “proxies” or “rules-of-thumb” that usually work, for example, to identify the most dangerous offenders, but that may go wrong in some circumstances.⁴¹

Regardless of how they respond, commissions would be wise to think about the big picture of what they are trying to accomplish.

Question #5: What role should sentencing guidelines and commissions play in a well-functioning criminal justice system?

Sentencing is at the center, and thus sentencing commissions should be at the core of the criminal justice system.⁴² Jurisdictions can implement this in different ways, but the key observations are that almost everything in this arena—from bail and prosecutorial discretion to probation supervision and collateral consequences—is a sentencing issue, and coordination helps. Commissions are the logical—and, frankly, the only viable—choreographers for this complex dance.

In recent years, more governors and

MO. L. REV. 715, 764 (2016).

⁴¹ Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 451 (2006).

⁴² Steven L. Chanenson, *Commissions at the Core* 30 FED. SENT’G REP. __ (forthcoming 2017).

members of the Pennsylvania legislature have recognized the central, coordinating role of the PCS. As noted earlier, the PCS is crafting parole release guidelines designed to coordinate the sentencing and parole systems. At the legislature’s direction, it is also transparently crafting at-sentencing risk assessment instruments.⁴³ More and more, the political actors recognize that the PCS is a trusted source of data and policy analysis, and a hub of information about criminal justice that can offer policymakers expertise and options. There are, of course, appropriate practical and political limits to the role of any sentencing commission. The PCS is certainly not the only—or even the loudest—voice on criminal justice issues in Pennsylvania. It is, however, often a key part of the conversations.

In contrast, I fear that the Congress—for many reasons that are beyond the scope of this essay and that are not the fault of the USSC’s members or excellent staff—does not rely on or respect the USSC as it should. At times, it appears as though its data and reports, discussed above, go unread by far too many. We may not be back in the dark days of 2003 when Congress bypassed the USSC and directly rewrote some sections of the federal guidelines, but things could be better. For a time in early 2017, the USSC did not have a quorum of voting members, and as of this writing, there are still three vacancies.

Congress needs to respect the USSC both as an institution (of Congress’s making!) and a source of expertise whose views should be fully considered.

Conclusion

There are no precise, irrefutable, and permanent answers to these five questions, let alone to the myriad of other important sentencing puzzles that could not be raised in this brief essay. Each generation, as my Pennsylvania colleague predicted long ago, must find its own responses that work best for its time. But thinking about these questions now—three decades into the federal experiment with sentencing guidelines—can help us more effectively navigate our path forward for the next 30 years.

⁴³ See, e.g., JORDAN M. HYATT & STEVEN L. CHANENSON, *THE USE OF RISK ASSESSMENT AT SENTENCING: IMPLICATIONS FOR RESEARCH AND POLICY* (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2961288.

State Sentencing Guidelines: A Garden Full of Variety

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OVER 40 YEARS AGO, sentencing in the U.S. was primarily “indeterminate.” Judges would pronounce long sentence terms consisting of minimum and maximum times to serve, and parole boards would exercise their discretion in reviewing individual cases for release from prison. But in the late 1970s a movement began towards the development of sentencing guidelines, which were standards put in place to establish rational and consistent sentencing practices with the goal of producing more uniformity and proportionality in sentencing. At the same time, there was a “truth in sentencing” movement, which sought to bring more certainty to actual time served by abolishing parole and establishing benchmarks for the minimum time to be served before release from prison. The Federal Sentencing Guidelines were enacted in 1987, so 2017 marks their 30th anniversary. But as others reflect on the strength and weaknesses of the federal system and the overall impact of the guidelines, it is important also to recognize that the federal guidelines are just one system among many.

Minnesota was the first state to enact sentencing guidelines, in 1980. Since then, multiple states, the federal government, and Washington, D.C., have followed suit. But no state went the route of the Federal Sentencing Guidelines. Just as no two states or jurisdictions are the same, no two sets of sentencing guidelines are the same. But neither is there another set of sentencing guidelines that is as

detailed and complex in construction as the federal guidelines. In order to achieve greater uniformity and proportionality in sentencing against a backdrop of overlapping and duplicative federal statutes, the U.S. Sentencing Commission chose to construct a guidelines system that started with the charged offense and then layered on real offense elements to arrive at the recommended sentence. This system has in turn drawn sharp criticism as being too rigid and formulaic and depriving the court of the exercise of discretion. In contrast, state systems were able to take advantage of more modern statutes and rely more heavily on the charged offense to differentiate between crimes and to assign appropriate sentences; they could also allocate more discretion to the court to make adjustments for atypical cases. Nevertheless, the states also managed to enact a wide variety of systems. Some are mandatory, requiring strict adherence, whereas others are advisory, representing a starting point for the court. Some are enforced by appeal; others are not. And the rules that make up the core of sentencing guidelines—e.g., how the criminal history score is calculated, availability of departures, whether consecutive sentencing is permitted—vary substantially from jurisdiction to jurisdiction. In this article, I will describe some of the major features of sentencing guidelines systems in the states and relate them, where possible, to the Federal Sentencing Guidelines.

The Robina Institute of Criminal Law and Criminal Justice has been cataloging the attributes of sentencing guidelines systems in the Sentencing Guidelines Resource Center

(sentencing.umn.edu), a website dedicated to providing information and analysis about sentencing guidelines systems in the United States (Figure 1). Though the Resource Center highlights information for 26 jurisdictions, including the federal government, not all of these jurisdictions have sentencing guidelines. Neither do all of the jurisdictions have sentencing commissions. And over time, jurisdictions have moved back and forth between classifications as sentencing commissions have been formed and sunsetted and as guidelines systems have developed and then been undercut by various factors, creating an even larger potential pool for study. In this article, I will focus on the 15 non-federal systems that we have found exhibit the strongest characteristics of sentencing guidelines: Alabama, Arkansas, Delaware, Kansas, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Oregon, Pennsylvania, Utah, Virginia, Washington, and Washington, D.C.²

² Five systems that exhibit characteristics of sentencing guidelines but are not included in the analysis throughout this article are Alaska, Florida, Missouri, Ohio, and Tennessee. The guidelines in Missouri were considerably weakened in 2012 when the legislature stripped the commission of its power. The remaining jurisdictions have sentencing systems that were developed by a sentencing commission and enacted into law, but each might be more aptly described as a statutory determinate sentencing system than a guidelines system. Alaska and Ohio have active commissions that address criminal justice issues broadly; the commissions in Florida and Tennessee no longer exist. Four additional systems—Connecticut, Illinois, Louisiana, and New York—are not included in the analysis because they have sentencing commissions with

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FIGURE 1.
Categorizing Sentencing
Non-Federal Sentencing Systems

Sentencing Commissions						
AK	MO	AL	KS	MN	PA	FL
CT	NY	AR	MA	NC	UT	TN
IL	NM	DE	MD	OH	VA	
LA		DC	MI	OR	WA	
Sentencing Guidelines						

Source: *Sentencing Guidelines Resource Center, Key Elements of Guidelines Systems*, sentencing.umn.edu

How Sentencing Guidelines Work

Prior to the development of sentencing guidelines, judges were largely on their own in determining an appropriate sentence. A statute might define a crime as “punishable by up to 25 years in prison,” for example, and it was up to the judge to determine whether a prison or non-prison sanction was appropriate, and if prison, how much time to impose within the possible 25-year span. Guidelines presented an alternative by establishing a routinized process for deriving an appropriate sentence. Guidelines were enacted to bring uniformity and proportionality to sentencing, meaning that defendants with similar criminal histories who committed similar crimes would receive similar sentences.

The two primary determinants of the sentence under sentencing guidelines systems are offense severity and criminal history. Most systems arrange these attributes on a sentencing grid with offense severity representing one axis on the grid and criminal history the other.³ The grid cell at the intersection of these two points determines the recommended sentence under the guidelines. Two of the fifteen states highlighted in this article—Alabama and Virginia—do not use a grid format at all. Instead, presumptive sentences are determined by completing worksheets that take into account factors reflecting both offense severity and criminal history.⁴ The

no mandate to develop sentencing guidelines. And the final system—New Mexico—just established a commission with a mandate to develop sentencing guidelines in 2017.

³ See e.g., Wash. State Adult Sentencing Guidelines Manual 49 (2016).

⁴ See Alabama Sentencing Commission Worksheets, http://sentencingcommission.alacourt.gov/sent_standards.html; Virginia Sentencing Commission Worksheets, <http://www.vsc.virginia.gov/worksheets.html>.

final state—Delaware—utilizes a more narrative structure to communicate recommended sentences.⁵

Nearly every state guidelines system conveys the choice of disposition, which is whether the imposed sentence should consist of confinement to prison, intermediate sanctions, probation, or other non-incarceration sanctions. For sentences that result in some sort of confinement (local jail or state prison), the guidelines will express the sentence as either a fixed term or a range of time from which a term must be selected. From there, every system permits the court to exercise some degree of discretion to adjust the recommended sentence. Sentencing guidelines generally recommend a sentence for the “typical” case. Thus, the sentence recommended by the guidelines should be appropriate in most instances; that is, for all similar offenses committed in the typical manner, and for all offenders with similar criminal histories. On the other hand, if the crime or the offender is truly “atypical,” meaning there is something about the way the crime was committed or about the particular offender that is different enough from a typical case of this type, then a departure may be more appropriate than the recommended sentence.

Sentencing Commissions by the Numbers

Before examining the sentencing guidelines themselves, it is important to recognize that the strength of sentencing guidelines systems comes from the existence of active sentencing commissions. Sentencing guidelines, like the laws that govern any sentencing system, need to be dynamic and responsive to the environment in which they operate. A sentencing commission can ensure that this happens by regularly revising and updating the guidelines and by monitoring actual sentencing practices. At the same time, a sentencing commission can serve the legislature as a source of sentencing and criminal justice expertise, and can work to ensure that the jurisdiction remains true to the principles that underpin the guidelines, or at the very least, that if the jurisdiction chooses to pursue different aims, it does so with full knowledge and understanding. In states like Tennessee and Florida where guidelines exist in statute, because a sentencing commission no longer

⁵ See generally, Del. Sentencing Comm’n Benchbook (2017).

exists, the guidelines are subject to erosion and amendment and lose their ability to achieve the purposes for which they were originally created.

Commission Composition

Sentencing commissions vary greatly in size and composition as illustrated in Table 1. The 15 commissions highlighted in this article range in size from 9 to 28 members, though the average size is 16 to 17 members. Nearly every commission includes members who are judges, prosecutors, and defense attorneys. A majority of commissions also have members who are legislators, victims or victims’ advocates, and members of the public. Just four commissions are specifically required to have a community supervision representative among their members. From there, commission membership varies a great deal, including members such as juvenile justice practitioners and advocates, court administrators, county commissioners, business leaders, and former inmates.

In comparison to the states, the U.S. Sentencing Commission is one of the smaller commissions, and the required membership is less representative of the criminal justice system. For most state systems, the required membership is detailed in statute. But at the federal level, the appointing authority (the President of the United States) has broad discretion to determine the ultimate composition of the commission. The only limitation is that at least three members must be federal judges and no more than four may be from the same political party.⁶ Only Oregon has taken a similar approach, granting broad discretion to the governor to determine the membership, limited only by the requirement of geographic and political diversity.⁷ Though the U.S. Sentencing Commission includes representation from the Attorney General’s Office, there is no similar requirement for defense representation. Only Virginia similarly omits the defense representation that could counterbalance the prosecutorial representation on the commission. Finally, the U.S. Sentencing Commission is just one of four sentencing commissions to include non-voting members. The other jurisdictions are Arkansas, Massachusetts, and Washington, D.C. In Arkansas, the nonvoting members are the legislative appointees. In Massachusetts and Washington, D.C., the nonvoting members

⁶ 28 U. S. C. § 991(a) (2016).

⁷ Or. Rev. Stat. § 137.654(1) (2017).

TABLE 1.
Commission Membership: State to Federal Comparison

	AL	AR	DC	DE	KS	MA	MD	MI	MN	NC	OR*	PA	UT	VA	WA	US
Judge(s)	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Defense Attorney	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Prosecutor	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•
Dept. of Corrections	•		•	•	•	•	•	•	•			•	•		•	
Legislators	•				•		•	•		•	•	•	•	•	•	
Victims/Advocates		•	•		•		•	•	•	•			•		•	
Public		•	•		•		•	•	•	•			•		•	
Law Enforcement	•		•			•	•	•	•	•			•		•	
Parole	•		•		•	•				•		•	•		•	•
Academics/Experts	•		•				•			•		•				
Comm. Sup.			•		•			•	•							
Other	•		•			•	•	•		•			•		•	•
Total Members	21	11	17	11	17	15	19	16	11	28	9	11	27	17	20	9

* Oregon law requires that the commission comprise 9 members, 2 of whom are non-voting and legislators, and 7 of whom are appointed by the Governor. The law does not specify the role or representation of the gubernatorial appointees. Or. Rev. Stat. § 137.654(1) (2017).

include officials, such as the commissioner of corrections and the parole board chair, who are generally appointed by virtue of their office.

Commission Purpose

Sentencing commissions are established for many different purposes. Some are established primarily to develop and maintain sentencing guidelines. For example, the Minnesota Sentencing Guidelines Commission's mandate is to monitor and update the sentencing guidelines, serve as a clearinghouse of information for sentencing issues and practices, conduct ongoing sentencing guidelines research, and make related recommendations to the legislature.⁸ In contrast, other sentencing commissions are established with broader mandates relative to the state's criminal justice system. The Oregon Criminal Justice Commission, for example, has a mandate "to improve the effectiveness and efficiency of state and local criminal justice systems by providing a centralized and impartial forum for statewide policy development and planning."⁹ Looking across jurisdictions, the top six purposes articulated for sentencing commissions in statute are:

1. Recommend or establish sentencing policies and practices (to uphold stated goals);

⁸ Minn. Stat. § 244.09, subs. 5-7 (2016).

⁹ Or. Rev. Stat. § 137.656(1) (2017).

TABLE 2.
Commission Placement in Government

Executive	AR, DE, DC, KS, MD, MN, OR, UT, WA
Judicial	AL, MA, NC, US, VA
Legislative	PA, MI

Source: Sentencing Guidelines Resource Center, Jurisdictions Profiles, Sentencing Commission Section, sentencing.umn.edu

2. Protect public safety;
3. Manage correctional resources;
4. Maintain judicial discretion in sentencing;
5. Avoid disparity/increase equity and fairness in sentencing; and
6. Achieve certainty in sentencing.

Place in Government

Sentencing commissions can be situated in any branch of government. The placement of a sentencing commission within a specific branch may be a function of administration, politics, or other concerns. For example, if the primary purpose of the sentencing commission is to change sentencing practice, then placement in the judicial branch may help facilitate buy-in from the court. Alternatively, placement in the executive branch may facilitate the provision of administrative support such as staffing, office space, and IT services. By far the most common placement is within the Executive Branch as an independent and separate agency (Table 2). But successful and independent commissions exist in every branch of government.

Authority to Modify the Sentencing Guidelines

Defining crimes and establishing punishments is a function of the legislature. But with few commissions residing in the legislative branch, the commission's authority to modify the guidelines raises potential separation of powers issues.¹⁰ To address this concern, the authority of most commissions is checked by some form of legislative oversight. Table 3 sets forth these variations.

In six jurisdictions, modifications must go through the legislative process, either because the guidelines are in statute and must be amended, or because legislative approval is required before the guidelines can take effect.

¹⁰ See *Mistretta v. United States*, 488 U.S. 361 (1989) (finding the federal sentencing guidelines constitutional, amounting to neither excessive delegation of legislative power nor violation of separation of powers principle); *State v. Davilla*, 230 P.3d 22 (2010) (finding the Oregon Legislature's delegation of authority to develop the guidelines was constitutional because the legislature reserved the power to disapprove the guidelines before they would go into effect and then in fact affirmatively approved them).

TABLE 3.
Authority to Modify the Sentencing Guidelines

Method	Jurisdiction				
Modifications subject to legislative override	AL*	MN	PA	US	VA
Modifications must be enacted into law	KS	MI	NC	OH	WA
Modifications subject to legislative approval	AL*	OR			
Modifications are made through the administrative rulemaking process	AR	MD			
Other or unclear	DC	DE	UT	MA	

Source: Sentencing Guidelines Resource Center, *Jurisdiction Profiles*, Sentencing Guidelines Section, sentencing.umn.edu.

* Alabama falls into two categories because it has two sets of guidelines: one set that is voluntary and subject to legislative override, and one set that is presumptive and subject to legislative approval.

Like the federal guidelines, in four state-level jurisdictions, the guidelines can be modified by the commission directly, subject to legislative override, which generally means that the legislature must enact a law or resolution to prevent the modifications from going into effect. It should be noted, however, that in each of these jurisdictions the commission is also required to comply with the notice and comment and public hearing requirements of administrative rulemaking. Alabama falls into two categories because it has two sets of guidelines: one set of voluntary guidelines subject to legislative override, and one set of presumptive guidelines, modifications of which must be approved by an act of the legislature.

The remaining six jurisdictions appear to have avoided the separation of powers issues altogether, likely because the guidelines are advisory. Two jurisdictions simply follow the administrative rulemaking process. The remaining four present unique variations. In the District of Columbia, the D.C. Council must be notified of changes to the guidelines, but there appears to be no process for the Council's approval or rejection. In Delaware, the guidelines were initially enacted by an administrative order of the Delaware Supreme Court. Though it is unclear how modifications are approved, the commission has confirmed that legislative approval is not required. The Utah statute is silent as to the requirements for modification, but many of the recent changes seem to have been initiated by legislative directive. Finally, the Massachusetts guidelines have never been formally adopted, so there is no process in place for modification; the commission has nevertheless updated certain portions of the guidelines such as the master crimes list (establishing offense severity).

Prison Population Control

All sentencing guidelines jurisdictions articulate correctional resource management as a goal, but the commissions implement this goal in different ways. Looking across the statutes governing the establishment of the sentencing commissions, two-thirds of the commissions highlighted in this article are tasked with taking existing correctional capacity into account and avoiding prison overcrowding when developing and modifying the guidelines. Just a few commissions are tasked with the more proactive role of setting correctional resource priorities: Kansas, Massachusetts, and Oregon. Only about half of the sentencing commissions are directly tasked with providing fiscal impact statements for pending legislation or proposed modifications to the sentencing guidelines; in practice, however, many commissions perform this function. In fact, the statutes governing the powers and duties of the commissions often bear little relation to the actual role that commissions perform with regard to correctional resource management. In Minnesota, for example, though the governing statute merely directs the commission to consider existing correctional capacity when developing the guidelines, the commission also works with the Department of Corrections to forecast the prison population and provides fiscal impact notes to the Legislature on all bills that create or amend crimes.

The key to effective correctional resource management is data. When sentencing is implemented uniformly, as under sentencing guidelines, the resulting sentences are fairly predictable, thereby presenting a starting point for analysis. But in order to forecast correctional populations accurately, a jurisdiction must also track actual sentencing data. This permits the jurisdiction to confirm sentencing

patterns, which may deviate from the recommended guidelines at a predictable rate. The combination of the expected guidelines sentence and the actual sentence provides the commission with a rich data set from which it can develop a long-term forecasting model or gauge the impact of pending legislation or guidelines modifications. In the states where the collection of such data has been made a priority, the commission is able to discern how many prison or jail beds will be needed for any given piece of legislation. Unlike the federal government, state legislatures must balance their budgets (most cannot carry a deficit), so for every bill that results in an increase in prison beds, the legislature must either fund the projected number of additional beds or alter sentencing policy elsewhere to offset the need. Kansas is the only state that is affirmatively tasked with reducing the prison population. When the prison population exceeds 90 percent of capacity, the commission must then propose modifications to the guidelines or other laws in order to lower the total prison population and avoid overcrowding. But this method of prison population control is only as strong as is the will of the legislature to enact such changes.

Structural Variations in Sentencing Guidelines

The development of sentencing guidelines involves multiple decisions that impact the jurisdiction's sentencing policy and its use of correctional resources. This section details several decisions relating to the structure and operation of sentencing guidelines.

Sentencing Grids

As mentioned in the overview, the two primary determinants of recommended sentences in guidelines systems are offense severity and criminal history, and most states (12 of 15) arrange these attributes into a grid format. Like the federal guidelines, three states use a single grid to cover all sentencing decisions.¹¹ Nine of the fifteen states use multiple grids so that they can differentiate the sentence ranges for different types of offenses. For example, Minnesota has a grid for drug offenses, a grid for sex offenses, and a grid for all other offenses,¹² and each grid is structured with slightly different rules. The statutory maximum sentence for any offense rarely appears

¹¹ Arkansas, Massachusetts, and Oregon.

¹² See Minn. Sentencing Guidelines §§ 4.A. – 4.C. (Aug. 1, 2016).

FIGURE 2.
Excerpt from Minnesota Sentencing Guidelines Grid

SEVERITY LEVEL OF CONVICTION OFFENSE (Example offenses listed in italics)	Criminal History Score							
	0	1	2	3	4	5	6 or more	
<i>Agg. Robbery; 1st Degree; Burglary, 1st Degree (w/ Weapon or Assault)</i>	8	48 41-57	58 50-69	68 58-81	78 67-93	88 75-105	98 84-117	108 92-129
<i>Felony DWI; Financial Exploitation of a Vulnerable Adult</i>	7	36	42	48	54 46-64	60 51-72	66 57-79	72 62-84

on the standard grid, but the statutory maximums for all sex offenses are achieved for those with the highest criminal history scores on the sex offender grid. Other states that have multiple grids include Michigan, where each of the nine grids corresponds to one of the felony offense classifications in Michigan’s criminal code,¹³ and Pennsylvania, which has grids to handle specialized issues such as sentencing enhancements and differentiated sentencing for juvenile offenders.¹⁴

A key policy decision in constructing a grid is where to place the dispositional line or lines, which is the demarcation between non-incarceration sentences and prison. In some cases, the sentencing grid may simply mirror statutory eligibility for particular dispositions, such as the notations on the Pennsylvania grid that a defendant can be sentenced to “BC” or boot camp. In other cases, the differentiation in sentencing options is a policy

decision made by the sentencing commission, such as the dispositional line between probation and prison on the Minnesota grid.¹⁵ State guidelines systems communicate these dispositional options through the use of shading or acronyms on the sentencing grids, and this visualization may encourage greater use of non-prison sanctions. In contrast, at the federal level, although probation is permissible for offenses that fall into Zones A and B, one would have to read the applicable guideline to know this; the only information communicated on the grid directly is the length of incarceration.

To demonstrate how dispositional options are included on state grids, compare for example, the excerpts from the Minnesota Sentencing Guidelines Grid and Pennsylvania Basic Sentencing Matrix at Figures 2 and 3.

¹⁵ See Dale G. Parent, *Structuring Criminal Sentences* ch. 6 (Butterworth Legal Publishers 1988) (describing the process used by the Minnesota Sentencing Guidelines Commission to establish the dispositional line).

¹³ See Mich. Sentencing Guidelines Manual Sentencing Grids (May 1, 2017).

¹⁴ 204 Pa. Code §§ 303.16–.18 (2016).

FIGURE 3.
Excerpt from Pennsylvania Basic Sentencing Matrix

Level	OGS	Example Offenses	Prior Record Score							RFEL	REVOC	Agg/Mit
			0	1	2	3	4	5				
Level 5 State Incar	9	Sexual Exploitation of Children Robbery-Commit/Threat F1/F2 Burglary-Home/Person Present Arson-No Person in Building	12-24 BC	18-30 BC	24-36 BC	30-42 BC	36-48 BC	48-60	60-72	120	+/- 12	
Level 4 State Incar/ RIP Trade	8(F1)	Agg Assault-Cause BI w/DW Theft (Firearm) Identity theft (3rd/+ & Vic>60 yrs) Home by Veh-DUI or Work Zone Theft (>\$100,000) PWID Cocaine (10<50 g)	9-16 BC	12-18 BC	15-21 BC	18-24 BC	21-27 BC	27-33 BC	40-52	NA	+/- 9	
Level 3 State/ Cnty Incar RIP trade	7	Robbery-Inflicts/Threatens BI Burglary-Home/No Person Present Statutory Sexual Assault Theft (>\$50,000-\$100,000) Identify Theft 3rd/subq) PWID Cocaine (5-<10 g)	6-14 BC	9-16 BC	12-18 BC	15-21 BC	18-24 BC	24-30 BC	35-45 BC	NA	+/- 6	

On the Minnesota grid, shaded cells indicate that probation is the appropriate disposition and non-shaded cells indicate that prison is the appropriate disposition. The dark bolded line around the shaded cells represents the dispositional line, and this runs through the rest of the grid, establishing the boundary between presumptive probation and presumptive prison sentences. In the non-shaded cells, the numbers indicate the length of the presumptive prison term (top number), and a range within which the judge can impose a sentence without it being considered a departure. Though intermediate sanctions are available in Minnesota, the sentencing guidelines do not provide any guidance as to their use. In contrast, Pennsylvania’s Basic Sentencing Matrix dives into the weeds to visually depict a variety of sentencing options, including prison (state incarceration), county level incarceration, restrictive intermediate punishments (RIP), restorative sanctions, and boot camp. The darkest shading indicates that incarceration in the state prison is appropriate. Starting at Offense Gravity Score (OGS) 9, all sentences fall into this region, but at OGS 8, only those who fall into the repeat felony 1 and felony 2 offender criminal history category (RFEL) are recommended for prison. The next darkest shading, which fills out the majority of OGS 8 and a good portion of OGS 7, indicates that either prison or restrictive intermediate punishment (RIP) may be appropriate. Finally, in this excerpt, the second lightest shade indicates that incarceration at the state or county level may be appropriate, as well as restrictive intermediate punishment.

Note: Though shown here on a gray scale, the PA grid is actually multi-colored, making these dispositional options stand out even more clearly.

The Offense Severity Dimension

The starting point for determining the sentence under any guidelines system is the offense of conviction. In 11 of the 15 jurisdictions highlighted in this article, offense severity is a static factor. The severity level might be referred to by many names—offense seriousness, offense gravity score—but regardless of what it is called, the concept simply refers to a ranking system that places each offense in context with all other offenses. In developing the ranking system, the sentencing commission generally places crimes with similar offense elements, levels of harm, and statutory maximum sentences at the same severity level.¹⁶ Unlike the federal system, which has over 40 categories, 10 state systems arrange all offenses into just 10 to 15 categories, and one additional state uses 18 categories.¹⁷ And unlike the federal system, where the offense level is a starting point (base offense level) from which the offense level can increase or decrease when other facts related to the offense are considered, in these eleven state systems, the severity level is fixed. For example, in Kansas, where each row on the grid represents a severity level, the crime determines which row is used to find the presumptive sentence. Once the severity level is established, the only further movement on the grid is along the opposite dimension in accord with the defendant's criminal history.

There are just four state sentencing guidelines systems where additional facts impact the offense severity dimension: Alabama, Maryland, Michigan, and Virginia. Alabama and Virginia use sentencing worksheets, and each worksheet takes into account a number of factors relating to the offense and the offender's criminal history. The combined scoring of these factors establishes the guidelines sentence. In Alabama, in addition to scoring the offense of conviction, the worksheets assess weapons use and victim injury. In Virginia, the worksheets assess weapons use, victim injury, victim age, drug quantity, and embezzlement amount. Maryland, which has three sentencing grids, has established fixed severity levels for use on the drug and property grids, but has also established a composite offense score for use on its person offense grid. The composite score starts with

the commission's seriousness category, and then adds to it additional points for victim injury, weapons use, and the particular vulnerability of certain victims. Michigan is the state that is likely closest to the federal system in approach. There, the guidelines include 20 separate offense variables; the guidelines direct which variables to score for different offense types. The offense variables take into account such factors as weapons use, the number of victims, psychological and physical harm to the victim, intent, the defendant's role in the offense, and pattern of criminal behavior. But scoring offense variables in this manner made the guidelines vulnerable to attack following the *Blakely* to *Alleyne* line of cases, and the Michigan Supreme Court was forced to render the once mandatory guidelines advisory in order to save them.¹⁸

Thus, for the majority of state jurisdictions, the offense of conviction is the primary determinant of the offense severity dimension in the guidelines. It is not a blend of the charged offense and relevant conduct, as in the federal system. That is not to say that factors such as weapons use, drug quantity, role in the offense, and victim injury are not considered in state jurisdictions. Instead, such facts may already be included in the elements of the charged offense or in a contemporaneously charged sentencing enhancement or may be considered as grounds for departure.

The Criminal History Dimension

Criminal history is the other main determinant of the recommended sentence. But criminal history is more than a simple accounting of prior convictions. It is instead a composite of multiple measures of prior offending. At its core, criminal history almost always accounts for prior felonies, misdemeanors, and juvenile adjudications. Felonies are typically weighted more heavily and result in a higher criminal history score or category than misdemeanors, and more serious felonies will result in a higher criminal history score or category than less serious felonies. In contrast, it may take several misdemeanors to reach the equivalent criminal history value of one less serious felony.¹⁹ Some jurisdictions also incorporate "patterning" rules wherein similar priors are weighted even more heavily, thereby

further enhancing the criminal history for repeat offenders.²⁰ Additionally, criminal history often includes other factors that are tangentially related to prior offending, such as custody status (whether the offender was under some type of supervision status such as probation when the offense was committed),²¹ prior probation violations,²² and prior incarcerations.²³ From there, additional rules may exist that further enhance or lessen the value of the offender's criminal history. For example, some jurisdictions broadly define prior offenses so that when multiple current offenses are sentenced, each is included in the criminal history on the next offense to be sentenced.²⁴ In contrast, some jurisdictions incorporate decay or gap rules which serve to wash out or eliminate prior offenses from the criminal history if they are very old or if the individual achieved a crime-free existence for a specified number of years.²⁵ All of the

²⁰ For example, in North Carolina, one point is added to the criminal history score if all of the elements of the present offense are included in any prior offense. North Carolina Structured Sentencing Training and Reference Manual 11 (2014), available at http://nccourts.org/Courts/CRS/Councils/spac/Documents/ssstrainingmanual_14.pdf.

²¹ See, e.g., Wash. Stat. Adult Sentencing Guidelines Manual 22 (2016), available at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2016.pdf.

²² See, e.g., Utah Adult Sentencing & Release Guidelines 14, Form 1 (2016), available at <https://justice.utah.gov/Sentencing/Guidelines/Adult/2016%20Adult%20Sentencing%20Guidelines.pdf>.

²³ See, e.g., Va. Sentencing Guidelines Manual, Gen'l Instructions 28 (2014).

²⁴ Minn. Sentencing Guidelines §§ 1.B.10, 2.B.1.e (2016). *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981). Note that the Minnesota rule is limited to cases in which the multiple offenses arise from separate behavioral incidents. Multiple offenses arising from a single course of conduct cannot be sentenced in this manner. Minn. Sentencing Guidelines § 2.B.1.e (2016).

²⁵ The Federal Sentencing Guidelines offer an example of a decay rule. Prior convictions are no longer counted in the criminal history score calculation after 10 or 15 years, depending on the length of sentence for the prior offense. U.S. Sentencing Guidelines Manual § 4A1.2(e) (2016). The Washington Sentencing Guidelines offer an example of a gap rule. Prior Class B felony convictions are not counted in the criminal history score if, since the last date of release from confinement, the offender has spent 10 consecutive years in the community without committing any crime. Wash. Stat. Adult Sentencing Guidelines Manual 18 (2016), available at http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2016.pdf.

¹⁶ See e.g., Ark. Sentencing Standards Grid Offense Seriousness Rankings & Related Material 15-90 (Oct. 2015).

¹⁷ Delaware divides offenses by offense class and whether the offenses are violent or nonviolent, resulting in 18 offense levels.

¹⁸ *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015).

¹⁹ See, e.g., Minn. Sentencing Guidelines § 2.B (2016) (setting forth the weighting scheme and rules for counting prior felony, gross misdemeanor, and misdemeanor convictions).

factors described above come together to determine the appropriate criminal history score or category.

In deciding how to represent criminal history within the guidelines, two main approaches have emerged. Like the federal guidelines, 11 of the 15 highlighted state jurisdictions use a point-based system in which the total criminal history score is determined by adding up points for the various measures of criminal history described above. The remaining four state jurisdictions²⁶ take a categorical approach in which the applicable criminal history category is determined by the number and severity of prior offenses. As an example, Table 4 shows the criminal history categories used in Oregon.

Both approaches to criminal history are methods of accounting for the seriousness of prior offenses. When a point-based system is used, the guidelines usually also weight prior offenses so that more serious priors add more points to the score and push the defendant into higher criminal history categories more quickly than less serious offenses. Very lengthy criminal histories will also result in higher criminal history scores. When a categorical system is used, the defendant's progression through the criminal history categories is nonlinear. A first-time defendant will always be placed in the lowest criminal history category; Category I in the Oregon example. But a second-time offender could be placed in any number of categories, depending on the severity of the prior offense. In the Oregon example, if the defendant's prior offense was a Class A misdemeanor, the defendant's criminal history would increase from Category I to H, a one-step move. If the prior was a non-person felony, the defendant would move from I to G, a two-step move. But if the prior was a felony person offense, the defendant would move from Category I to D—a full five-step move—even if the current offense is much less serious than the prior. Both methods of structuring criminal history present pros and cons.

Under the point-based approach, the defendant's criminal history builds gradually as the individual develops a criminal record until the highest criminal history point value is reached. Progression across the point-based

TABLE 4.
Oregon Criminal History Categories

A	The criminal history includes three or more person felonies in any combination of adult convictions or juvenile adjudications.
B	The criminal history includes two person felonies in any combination of adult convictions or juvenile adjudications.
C	The criminal history includes one adult conviction or juvenile adjudication for a person felony; and one or more adult conviction or juvenile adjudication for a non-person felony.
D	The criminal history includes one adult conviction or juvenile adjudication for a person felony but no adult conviction or juvenile adjudications for a non-person felony.
E	The criminal history includes four or more adult convictions for non-person felonies but no adult conviction or juvenile adjudication for a person felony.
F	The criminal history includes two or three adult convictions for non-person felonies but no adult conviction or juvenile adjudication for a person felony.
G	The criminal history includes four or more adult convictions for Class A misdemeanors; one adult conviction for a non-person felony; or three or more juvenile adjudications for non-person felonies; but no adult conviction or juvenile adjudication for a person felony.
H	The criminal history includes no adult felony conviction or juvenile adjudication for a person felony; no more than two juvenile adjudications for non-person felonies; and no more than three adult convictions for Class A misdemeanors.
I	The criminal history does not include any juvenile adjudication for a felony or any adult conviction for a felony or Class A misdemeanor.

Source: *Or. Admin. R. 213-04-007 (2015)*.

criminal history categories is relatively modest, generally increasing by one to two categories at a time, depending upon the weighted value of the prior crimes. However, a long record of very low-level offenses can accrue a significant criminal history score, resulting in sentences of confinement for crimes that might ordinarily garner probation sentences.

The categorical approach divides criminal history categories between person and non-person, or less serious and very serious offenses. Movement across the categories is sporadic. Punishment is significantly increased for individuals with the more serious offenses in their past. Thus, although the progression of sentences on the grid may appear to increase incrementally, because an offender who commits a person or very serious offense will leapfrog over several criminal history categories, the resulting sentence will represent a significant—and one might argue, disproportional—increase from the punishment received by the first-time offender. On the other hand, the categorical approach also prevents a low-level repeat offender from attaining the highest criminal history categories. Offenders who never commit a person offense (or a more serious offense, depending on the criteria for establishing the categories) will remain in the lower three or four criminal history categories indefinitely, regardless of the number of offenses on their criminal records. In this way, the categorical approach serves to cap the sentence for low-level offenders.

Parole Release Discretion

One might assume that a shift to sentencing guidelines also requires a shift to determinate sentencing (a fixed term rather than a range) and abolishment of parole as a release mechanism. But in fact, 7 of the 15 states highlighted in this article have retained parole release discretion: Alabama, Arkansas, Maryland, Massachusetts, Michigan, Pennsylvania, and Utah. In these states, the guidelines are generally utilized to establish one end of the sentencing range—either the minimum time to serve or the maximum sentence—and the parole board determines the actual time served within that range. The guidelines are used to set the minimum term in Michigan and Pennsylvania and the maximum term in Alabama, Arkansas, and Massachusetts. The guidelines set both ends of the range in Maryland. And in Utah, the guidelines are merely a guide to the parole board as to the typical time served.

Operating on the Advisory to Mandatory Continuum

An important characteristic of sentencing guidelines is whether they are considered advisory or mandatory. The term “advisory” connotes that the guidelines are a starting point or suggestion for sentencing while the term “mandatory” connotes that the sentences established by the guidelines are required. In truth, no system is fully advisory or mandatory. Though just 5½ jurisdictions would classify themselves as mandatory (with one

²⁶ The jurisdictions that use point-based criminal history are Alabama, Arkansas, Maryland, Michigan, Minnesota, North Carolina, Pennsylvania, Utah, Virginia, Washington, and Washington, D.C. Delaware, Kansas, Massachusetts, and Oregon take the categorical approach.

of Alabama's two sets of guidelines constituting the ½), all guidelines systems exist on a continuum of enforceability, and some jurisdictions that label their guidelines advisory are in application further along the continuum towards the mandatory end. Two key factors that impact the advisory or mandatory nature of the guidelines are departures and appeals.

Departures

A departure is a sentence other than that recommended in the sentencing guidelines. Every state guidelines system permits judges to pronounce sentences that are harsher than (aggravated) or less severe than (mitigated) the recommended guidelines sentences. But while some systems place no limits on these actions, others place greater restraint on the exercise on judicial discretion. The degree of restraint relates somewhat to whether the system deems its guidelines to be advisory or mandatory, but in reality, this restraint is actually a factor that may push the system along the advisory to mandatory continuum.

One measure of restraint on judicial discretion is to require that a specific standard be met in order for the court to pronounce a departure sentence. Six jurisdictions do not articulate such a standard: Arkansas, Michigan, Maryland, Pennsylvania, Utah, and Virginia. But oddly, with all the variation in the states as to every other aspect of sentencing guidelines, the other nine states articulate variations on just two standards. Either the court must have substantial and compelling reasons for ordering a sentence that deviates from the guidelines,²⁷ or the court must specify or make findings about aggravating or mitigating factors that support a departure sentence.²⁸

A second measure of restraint is to require, or at least request, the court to state on the record or in writing its reasons for sentencing outside of the guidelines. Here, every state except Michigan imposes such a requirement, including those that did not articulate a standard for departure in the first place. The only reason that Michigan differs from the other jurisdictions is that the statute originally containing this requirement was struck by the Michigan Supreme Court when the court rendered the Michigan Sentencing Guidelines advisory in a *Booker*-type fix.²⁹

Having required or requested the court to state the reasons for departure, most sentencing commissions collect and track the departure reasons, and this can operate as a third restraint on departures. There are two primary reasons that a state might choose to collect and track departure data. The first is to establish the rate of compliance with the guidelines. If the goal of sentencing guidelines is to bring greater uniformity and proportionality to sentencing, then that can only be achieved when the majority of cases are sentenced in accord with the guidelines. Monitoring and regularly reporting on compliance provides feedback to the criminal justice system about whether it is meeting that goal. In some jurisdictions, data is reported by county or judicial district; in others, it is reported even by judge, and thus can serve as a type of peer pressure to conform. The second reason to collect and report on departure data is so that it can serve as a feedback loop for the commission and state legislature. When the sentencing commission regularly collects and analyzes sentencing data, the commission will be able to discern patterns and trends in sentencing practices over time. This might reveal offenses for which the courts regularly impose departures, and such information is a signal that the criminal justice system is dissatisfied with the recommended sentences under the guidelines, or the laws for which the sentences are recommended, or both.

It should be noted, however, that a few jurisdictions undercut the value of the measures described above by defining departures in such a way that many sentences outside of the guidelines are not deemed to be departures. For example, in Washington D.C., where the guidelines are purely advisory, there are three ways to sentence outside the presumptive range within a given cell. The first is to follow the departure procedure, which includes the requirement to state reasons for the departure. But the second and third methods fall wholly outside of the guidelines. The court can impose a non-guidelines sentence that is the result of a plea agreement or the court can simply choose not to follow the guidelines altogether. Neither of these situations is considered a departure.³⁰

unconstitutional when in *Alleyn v. U.S.*, decided in 2013, the U.S. Supreme Court extended the rule in *Blakely* to sentencing systems in which judges could impose mandatory minimum sentences based on facts not found by a jury. *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015).

³⁰ D.C. R. Crim. P. 11(c)(1)(C); D.C. Voluntary

Appeals

Another factor that impacts the strength of sentencing guidelines within a system is whether the parties can appeal guidelines and non-guidelines sentences. When parties can appeal sentences that are within the scope of the guidelines, the parties may be able to seek redress when the guidelines are calculated incorrectly or when a legitimate argument arises as to the application of a certain provision (e.g., deciding how an out-of-state offense should be counted in criminal history). This serves as a check on the court's accuracy in applying the guidelines, and ensures that there are common understandings and interpretations of the various sentencing guidelines provisions.³¹ When parties can appeal sentences that are outside of the guidelines, the appellate courts have the ability to establish the outer boundaries of the trial court's discretion by accepting or rejecting departure reasons and by considering whether limits should be placed on the extent of the departure sentence.³² Of the fifteen jurisdictions highlighted in this article, six permit appellate review of sentences that are within the recommended guidelines range, primarily for error correction purposes, while eight permit review of departure sentences.³³

Just as the federal guidelines must be the starting point for sentencing in federal court, three state systems that are self-described as advisory also require the court to consider the jurisdiction's sentencing guidelines: Maryland, Michigan, and Pennsylvania. However, this requirement is hollow in Maryland, where there is no right to appeal either a within-guidelines sentence or a departure. In contrast, the requirement is more meaningful in Michigan, where one can appeal a departure sentence, and the requirement pushes the jurisdiction significantly towards the mandatory end of the continuum in Pennsylvania, where sentences can be appealed in both situations.³⁴

Sentencing Guidelines Manual § 5 (2015).

³¹ See, e.g., *Commonwealth v. Kopp*, 591 A.2d 1122, 1127 (Pa. Super. Ct. 1991) (court applied an incorrect offense gravity score).

³² See, e.g., *State v. Evans*, 311 N.W. 2d 481 (Minn. 1981) (holding upward departures may not exceed twice the presumptive prison term except in rare cases of extremely aggravated circumstances).

³³ Alabama has two sets of guidelines: one set that is voluntary, and one set that is presumptive. Only sentences that deviate from the presumptive guidelines may be appealed. Ala. Code §§ 12-25-34.2(c), 12-25-35(c) (2017).

³⁴ The Pennsylvania guidelines have strong characteristics of a mandatory system, despite the fact that

²⁷ See, e.g., Or. Admin. R. 213-008-0001 (2017).

²⁸ See, e.g., N.C. Gen. Stat. § 15A-1340.16(b) (2017).

²⁹ The Michigan guidelines were deemed to be

TABLE 5.
Placing Jurisdictions on the Advisory to Mandatory Continuum Based on Appeal and Departure Standards

Jurisdiction	Advisory or Mandatory (Self-Described)	W/In Guidelines Appeal Permitted	Appeals of Departures Permitted	Departure Standard Articulated	Departure Reasons Required	Advisory or Mandatory In Application
Arkansas	Advisory	No	No	No	Yes	Advisory
Maryland	Advisory	No	No	No	Yes	
Utah	Advisory	No	No	No	Yes	
Virginia	Advisory	No	No	No	Yes	
District of Columbia	Advisory	No	No	Yes	Yes	Mandatory Elements, but Advisory in Application
Delaware	Advisory	No	No	Yes	Yes	
Massachusetts	Advisory	No	No	Yes	Yes	
Federal	Advisory	Yes	Yes	Yes	Yes	Leans Mandatory
Michigan	Advisory	Yes	Yes	No	No	
Pennsylvania	Advisory	Yes	Yes	No	Yes	
Alabama*	Both	No	Yes	Yes	Yes	Mandatory
Kansas	Mandatory	No	Yes	Yes	Yes	
Minnesota	Mandatory	Yes	Yes	Yes	Yes	
North Carolina	Mandatory	Yes	Yes	Yes	Yes	
Oregon	Mandatory	Yes	Yes	Yes	Yes	
Washington	Mandatory	Yes	Yes	Yes	Yes	

Source: Sentencing Guidelines Resource Center, *Jurisdiction Profiles and Case Law Summaries*, sentencing.umn.edu

* Alabama has two sets of guidelines; only the presumptive guidelines, which would be characterized as mandatory, are featured here.

Looking at departures and appeals together, one can see that a further relationship underlies the more mandatory systems (Table 5). All of the jurisdictions that would label themselves as mandatory permit appeals of departure sentences, and all articulate a departure standard, thereby establishing a parameter to govern the appeal (e.g., whether the court's reason for the departure was substantial and compelling). These are the jurisdictions that are firmly on the mandatory end of the continuum, because the guidelines must be followed unless the court meets a specified standard for departure, and even then, appeal is permitted, thereby creating a mechanism to enforce the use of the guidelines. Pennsylvania and Michigan, which would self-identify as advisory, lean more towards the mandatory end of the continuum by requiring that the guidelines be considered and by permitting appeal based upon errors in application of the guidelines and departure

the Pennsylvania Supreme Court has deemed them to be advisory. *Commonwealth v. Yuhasz*, 923 A.2d 1111, 1119 (Pa. 2007).

sentences. Moreover, a robust case law has developed to fill in the lack of a departure standard in Pennsylvania, and case law is developing in Michigan. But here, jurisdictions like the District of Columbia, Delaware, and Massachusetts stand out: although they articulate a standard for departure, with no right of appeal to enforce that standard, the requirement is somewhat meaningless. The remaining jurisdictions are firmly on the advisory end of the system, relying only on the potential for peer pressure to enforce the application of the guidelines.

Conclusion

The state sentencing guidelines described in this article present a variety of structures and variations, as one would expect in the laboratory of the states. Some variations, such as the choice between a point-based and categorical criminal history system, raise policy questions. Further, variations—such as the District of Columbia's policy to define departures so as to exclude a multitude of non-guidelines

sentences—serve to weaken the impact of the guidelines. And others, such as Pennsylvania's requirement to articulate departure standards and enforcement by appeal, serve to strengthen the ability of the guidelines to deliver on the twin promises of uniformity and proportionality or to contribute to the management of the state's prison population. All systems need constant monitoring and adjustment, and for that, the retention of an active sentencing commission is essential. This article just begins to scratch the surface of the full range of variation and policy issues that comprise state sentencing guidelines. For more information, visit the Sentencing Guidelines Resource Center (sentencing.umn.edu), where the Robina Institute is frequently adding content and cross-jurisdictional analysis about additional sentencing guidelines topics.

Removal of the Non-scored Items from the Post-Conviction Risk Assessment Instrument: An Evaluation of Data-driven Risk Assessment Research within the Federal System

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BEYOND THE GENERATIONAL improvements observed with risk assessments, agencies have devoted a substantial amount of focused effort to develop, implement, and revise their own instruments. The preference to develop rather than adopt is often attributed to several factors, including the agency's target population, existing data, agency research capacity, staff needs, and costs. It is certainly a benefit to have a tool created specifically for an agency's population, but one potential limitation is that the instrument is developed using existing data, which may not include risk factors that research would suggest also be examined for possible inclusion in the assessment. To address this limitation, additional risk factor items can be collected but not scored; when sufficient data are available, these factors can be analyzed and, if substantial improvements in prediction are found, a revised risk assessment can be introduced.

In 2009, the Administrative Office of the U.S. Courts (AOUSC) sought to develop a dynamic risk assessment instrument comprising both risk and needs factors using existing

data from the federal supervision data systems. There were several historical reasons for this shift. First, the initial risk assessments used by federal probation officers in the 1980s, the Risk Prediction Scale - 80 (RPS-80) and the United States Parole Commission's Salient Factor Score (SFS), were found to have limited predictive validity. In response to this issue, the Federal Judicial Center created and deployed the Risk Prediction Index (RPI) in the late 1990s. Although the RPI outperformed the RPS-80 and the SFS, this tool had two primary limitations. The RPI was static, which limited the federal probation officer's ability to reassess risk, and the instrument could not be used for case planning, since it lacked dynamic risk factors to target for change (AOUSC, 2011; Johnson, Lowenkamp, VanBenschoten, & Robinson, 2011; VanBenschoten, 2008). As a result, multiple commercially available instruments were considered and vetted, including the Level of Service Inventory-Revised and NorthPointe's COMPAS. Ultimately, however, the decision was made to develop the Post Conviction Risk Assessment (PCRA), using readily available federal probation data. A primary benefit of this decision was the AOUSC's ability to continuously evaluate the performance of the PCRA and, when appropriate, use the data to improve upon the assessment tool's predictive validity.

The PCRA risk score is calculated through the scoring of 15 items (located in the Officer Section of the PCRA) that have been empirically shown to be correlated with recidivism (AOUSC, 2011). The Officer Section of the PCRA also contains 15 non-scored items that prior research has suggested should predict recidivism but that, at the time of instrument development, were unavailable for analytical purposes in the AOUSC's case management systems (AOUSC, 2011). The current study seeks to examine if these 15 non-scored items improve the predictive accuracy of the instrument or if they can be removed without affecting its predictive accuracy.

Literature review

Risk prediction has undergone extensive improvements within the criminal justice field. Starting in 1954, Meehl's meta-analysis found that when reviewing multiple studies comparing actuarial and professionally derived instruments, the actuarial assessments had stronger predictive accuracy than instruments derived from professional judgment alone. Multiple subsequent studies produced similar results, leaving a lasting conclusion that risk prediction is most accurately done with actuarial risk assessment instruments rather than relying solely on professional judgment (Ægisdóttier, White, Spengler, Maugherman, Anderson, & Cook, 2006; Andrews, Bonta, &

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Wormith, 2006; Grove, Zald, Lebow, Snitz, & Nelson, 2000; Latessa & Lovins, 2010; Meehl, 1954).

Four generations of risk assessment have emerged over the past 60 years. The first generation, which was guided by professional judgment, involved both correctional practitioners and clinicians making decisions about offender risk based on a review of official records, unstructured client interviews, and their professional and educational experience (Andrews & Bonta, 1998; Bonta, 1996; VanVoorhis & Brown, 1996). This first-generation risk assessment had several limitations, including lack of standardization, the potential for bias, and the inability to demonstrate inter-rater agreement among practitioners in assessing offender risk (Bonta & Andrews, 2007; Monahan, 1981; VanVoorhis & Brown, 1996). Although the first generation of risk prediction was unstandardized and often considered subjective, the process for gathering and reviewing information through interviews and a review of official records has been retained even with advances in risk assessment. What is evident in the evolution of risk assessments is that each generation of risk assessment has improved upon the previous generations' tools (Bonta, 1996).

Recognizing that one of the strongest predictors of future behavior is past behavior, formulators of the second generation of risk assessments achieved a substantial improvement by focusing on evaluating an offender's risk based on criminal history records and other official sources within a standardized and objective instrument (Bonta & Andrews, 2007). Second-generation tools incorporate primarily static risk factors, such as prior convictions, prior incarcerations, history of violence, and history of substance abuse, which are often found to be predictive of recidivism but are not necessarily derived from criminological theory (Bonta & Andrews, 2007). A well-known second-generation risk assessment, the Salient Factor Score (SFS), has been shown to be predictive of recidivism, and a primary benefit of the SFS and other second-generation tools is that the criminal history items and other static risk factors are often readily accessible within the criminal justice data systems. Further, these static risk factors have face validity, so the challenges with buy-in and professionals supporting the implementation of such instruments is often minimal, since the review of criminal history records was a common approach to decision-making within first-generation

tools. However, since the second-generation instruments are composed of static items, they have limited potential for reassessment and targeting risk factors for interventions and programming (Bonta & Andrews, 2007).

Third-generation risk assessments, such as the Level of Service Inventory (LSI) and Level of Service Inventory-Revised (LSI-R), were developed in response to the inability of second-generation risk assessments to identify dynamic risk factors that could be targeted for change through programming and interventions and to reassess offenders' risk to recidivate (Andrews & Bonta, 1995; Bonta & Andrews, 2007). Since research has shown that both static and dynamic risk factors are predictive of recidivism, third-generation risk assessments continue to collect information about an offender's criminal history and other static risk factors, but also incorporate theoretically-based dynamic risk factors, or criminogenic needs, into the tools (Andrews & Bonta, 1998; Andrews & Robinson, 1984; Bonta & Wormith, 2007). With this advancement in risk assessment, offender reassessment is possible; in addition, the risk assessment can inform supervision practices and interventions based on an offender's risk and needs (Bonta & Andrews, 2007).

Although third-generation risk assessments mark a substantial gain in managing risk and identifying and targeting needs, the ability to collectively use this information to reduce risk within a formal and individualized process was not readily apparent to the field. Fourth-generation risk assessments were developed in response to this issue. Instruments such as the Level of Service/Case Management Inventory (LS/CMI) integrate the static and dynamic risk factors found within third-generation instruments, but also incorporate a formal case management process and include a systematic method for collecting information regarding responsivity factors and specific individual characteristics, such as patterns of domestic violence and incidents of institutional violence (Andrews, Bonta, & Wormith, 2006; Bonta & Andrews, 2007; Kane, Bechtel, Revicki, McLaughlin, & McCall, 2011). Fourth-generation tools are considered more comprehensive than their predecessors, since they add to the benefits of third-generation assessments a process by which this information can be thoroughly reviewed, addressed through individualized case management, and then subsequently reassessed.

The evolution of risk assessment has

continuously drawn upon the benefits of prior generations and incorporated more rigorous methods to advance risk prediction (Bonta & Wormith, 2007). With more recent research, the field continues to stress the value of improving upon risk assessment instruments and practices (VanBenschoten, 2008). A fundamental objective within the federal system has been to continuously examine the use and predictive validity of its risk assessments. Empirical evaluations of prior second- and third-generation instruments within the federal system led to the most recent advancement, the development and validation of the fourth-generation PCRA.

The PCRA was initially developed and validated using three samples and comprised both scored and unscored items based on existing data and prior research (AOUSC, 2011). The original construction sample (N=51,428) and validation sample (N=51,643) contained individuals on supervised release or probation starting in October 2005. The second validation sample included 193,586 probation clients (AOUSC, 2011; Johnson et al., 2011) who started supervision between October 2005 and August 2009. The predictive accuracy of these three samples produced initial AUC-ROC values of .709 (construction), .712 (initial validation), .734 (second validation) and .783 (for long-term follow-up), suggesting that the PCRA's overall performance was good in terms of predicting recidivism (Desmarais & Singh, 2013; Doyle & Dolan, 2002; Rice & Harris, 2005). Subsequent reviews of the PCRA have demonstrated the consistent predictive accuracy of the instrument, with AUC-ROC values ranging from .70 to .77 (Lowenkamp, Johnson, Holsinger, VanBenschoten, & Robinson, 2013; Lowenkamp, Holsinger, & Cohen, 2015).

The PCRA is administered through the scoring of two sections. The first section (the Officer Section) is scored by probation officers, while offenders under supervision are responsible for completing the Offender Section of the PCRA. Since scores from the Officer Section of the PCRA are used to assess an offender's risk classification and encompass the primary items of concern for this study, we detail this section of the PCRA below.

Officer Section of the PCRA

At present, there are 15 scored items on the PCRA that measure an offender's risk characteristics on the following domains: criminal history, education/employment, substance abuse, social networks, and

cognitions (e.g., supervision attitudes).² The criminal history domain contains six predictors that measure the number of prior felony and misdemeanor arrests, prior violent offense activity, prior varied (e.g., more than one offense type) offending pattern, prior revocations for new criminal behavior while under supervision, prior institutional adjustment while incarcerated, and offender's age at the time of supervision. The education/employment domain includes three predictors officers use to assess an offender's educational attainment, current employment status, and work history over the past 12 months. In regards to the substance abuse domain, officers score offenders on two predictors that measure whether an offender has a current alcohol or drug problem. The social network domain includes three predictors that measure an offender's marital status, presence of an unstable family situation, and the lack of any positive prosocial support networks. Last, cognitions scores an offender on one predictor that assesses an offender's attitude towards supervision and change (AOUSC, 2011).

Officers are responsible for scoring each of the 15 PCRA risk categories by interviewing offenders, reviewing relevant documents, and examining the presentence reports at the beginning of the supervision period. The PCRA scoring process uses a Burgess approach, in which each of the 15 scored predictors is assigned a value of 1 if present and 0 if absent. The exceptions include number of prior arrests (3 potential points) and age at intake (2 potential points).³ In theory, offenders can receive a combined PCRA score ranging from 0 to 18, and these continuous scores translate into the following four risk categories: low (0-5), low/moderate (6-9), moderate (10-12), or high (13 or above). These risk categories inform officers about an offender's probability of reoffending and provide guidance on the intensity of supervision that should be imposed on a particular offender (AOUSC, 2011; Johnson et al., 2011; Lowenkamp et al., 2013).

The Officer Section of the PCRA also contains 15 additional items that are rated

² See Appendix Table 1 for an overview of the scored and non-scored risk factors.

³ Assigning scores ranging from 0 to 3 may seem counterintuitive to current trends that involve the development of weighted risk assessments; however, there is significant evidence to support the argument that this method still outperforms clinical approaches and is more robust across time and sample variations (Gottfredson & Snyder, 2005; McEwan, Mullen, & Mackenzie, 2009).

but not currently scored by the officer. These rated but non-scored items were included in the instrument because other empirical research—and officer input—suggested that they should be correlated with offender recidivism activity and assist officers in their case management efforts. However, at the time of instrument deployment, the AOUSC did not have the data to substantively assess whether these factors contributed to the PCRA's risk prediction accuracy outside the scored factors (AOUSC, 2011).

The non-scored factors were integrated into the PCRA domains of criminal history (1 unscored item measuring prior juvenile arrest history), education/employment (2 unscored items measuring the number of employers over the last 12 months and whether the offender was employed over 50 percent of the time during the previous two years), substance abuse (4 unscored items measuring whether drug or alcohol abuse resulted in disruptions at work, school, or home; whether the offender used drugs or alcohol in physically hazardous conditions; whether drug use continued despite social or interpersonal problems; or whether legal problems have occurred because of drug or alcohol abuse), and social networks (3 unscored items measuring whether the offender lives with a spouse or children; whether the offender has any family support; and whether the offender associates with positive or negative peers). For the cognitions domain, there was one unscored item assessing whether the offender had antisocial attitudes. Other unscored factors include four items measuring an offender's residential stability, criminal risks at home, financial situation, and level of engagement in prosocial activities (AOUSC, 2011).

It should be noted that the cognitions domain also extracts information from the Offender Section of the PCRA on the different types of criminal thinking styles that an offender might manifest. Since this study focuses solely on the scored and non-scored items contained in the Officer Section of the PCRA, we omit discussing the contribution to assessment made by the Offender Section of the PCRA. Further details on the PCRA's assessment of an offender's criminal thinking styles appear in studies published by Walters and Lowenkamp (2016) and Walters and Cohen (2016).

When the PCRA was initially implemented, it was decided to empirically explore whether these non-scored factors should eventually be incorporated into the

instrument's scoring mechanism by testing whether they contributed to risk prediction above that of the scored factors (Lowenkamp et al., 2013). As we will discuss below, most of these non-scored items did not contribute to the PCRA's risk prediction effectiveness and hence will be removed from the instrument, making room for a new trailer to assess the probability of an offender being involved in a violent crime (Serin, Lowenkamp, Johnson, & Trevino, 2016).

Method

Research Agenda

In the current study we sought to explore whether the non-scored items could be removed from the Officer Section of the PCRA without compromising the instrument's risk prediction effectiveness. Specifically, we examined whether combining the 15 scored and 15 non-scored items in the PCRA's risk prediction algorithm resulted in an instrument capable of predicting offender recidivism behavior to a greater extent than the current algorithm containing only the 15 scored items. Results showing either no or negligible improvements provide empirical support for the decision to remove these non-scored items. Conversely, findings demonstrating substantial improvements in risk prediction from use of the non-scored items would indicate that the AOUSC should consider integrating these non-scored items into the risk calculation.

Our analysis of the non-scored items proceeded through several stages. Initially, we examined whether the non-scored items were more likely to be found among the high- compared to the low-risk offenders.⁴ Next, we explored the bivariate correlation between the non-scored items and offender recidivism outcomes involving any or violent offenses. Afterwards, we investigated whether combining the 15 scored and 15 non-scored items into a new prediction score resulted in an improvement in recidivism prediction over that already achieved by the actual scores currently generated by federal probation officers. Finally, we evaluated whether the presence of any of the factors measured by the individual non-scored items were significantly correlated with offender rearrest activity (e.g., any or violent) while simultaneously controlling for all scored PCRA items, and

⁴ Prior research (Cohen & VanBenschoten, 2014) has shown the factors measured by the scored items being present to a greater extent among high-risk compared to low-risk offenders.

(if any significant associations were found) whether the inclusion of these specific non-scored items significantly improved the instrument's overall predictive efficacy.

Study Population

The study population includes all PCRA assessments that occurred during an offender's first term of post-conviction supervision⁵ whose recidivism outcomes could be tracked for a minimum of 12 months (N=196,460). These initial assessments occurred during the period spanning November 2009 through January 2015. Recidivism is defined as the arrest of an offender for either a felony or misdemeanor offense (excluding arrests for technical violations) within one year after the PCRA assessment date. In addition to measuring any arrests, we also identified arrests for violent offenses committed within one year after the initial PCRA assessment. For violent arrests we used the definitions from the National Crime Information Center (NCIC), which includes homicide and related offenses, kidnapping, rape and sexual assault, robbery, and assault (Lowenkamp et al., 2015). The recidivism data were gathered through the NCIC and Access to Law Enforcement System databases (ATLAS).⁶

As stated previously, the study population included offenders with initial PCRA assessments whose recidivism outcomes could be followed for a minimum of 12 months (N = 196,460). The 12-month follow-up period allows us to track whether offenders were arrested for any or violent offenses within 12 months of receiving their first PCRA assessment. We also included follow-up periods encompassing 24 months (N = 157,169) and 36 months (N = 116,014). Examining the non-scored PCRA items for different follow-up periods allowed us to

⁵ Post-conviction supervision encompasses offenders sentenced to either supervised release or probation. Supervised release refers to offenders sentenced to a term of community supervision following a period of imprisonment within the Federal Bureau of Prisons (18 U.S.C. §3583), while probation refers to offenders sentenced to a period of supervision without any imposed incarceration sentence (18 U.S.C. §3561).

⁶ ATLAS is a software program used by the Administrative Office of the U.S. Courts that provides an interface for performing criminal record checks through a systematic search of official state and federal rap sheets. It is widely used by probation and pretrial services officers to perform criminal record checks on defendants and offenders for supervision and investigation purposes (Baber, 2010).

assess whether any predictive enhancements from the non-scored items might be obtained for offenders whose recidivism outcomes could be tracked for multiple-year time periods.⁷

Measuring the Unscored PCRA Items

To reiterate, the PCRA's non-scored items are the items that are rated but not scored on the PCRA worksheet. These non-scored items were integrated into the PCRA domains of criminal history (1 unscored item), education/employment (2 unscored items), substance abuse (4 unscored items), social networks (3 unscored items), and cognitions (1 unscored item). Other unscored items include 4 items measuring an offender's residential stability, criminal risks at home, financial situation, and level of engagement in prosocial activities (AOUSC, 2011; Johnson et al., 2011). The prior section discussing the Officer Section of the PCRA and Appendix Table 1 provides a fuller description of the values assigned to both the non-scored and scored items on the PCRA worksheet.⁸ With the exception of the items associated with positive/negative peers item, which has four values,⁹ all the non-scored items are measured using dichotomous scales.

In addition to examining whether these non-scored items individually improved risk prediction, we transformed the scored and non-scored items into predicted risk scales to investigate whether including the non-scored items in the risk algorithm could significantly enhance recidivism prediction. The PCRA scoring process generates a raw risk score ranging from zero to 18 that is then used to classify offenders into one of four risk categories (i.e., low, low/moderate, moderate, or high) (AOUSC, 2011; Johnson et al., 2011). We compared the predictive effectiveness of these raw scores with risk scores generated by using all 30 scored and non-scored items that were also scaled to range from zero to 18. This method, which will be more fully explicated

⁷ But see Flores, Holsinger, Lowenkamp, and Cohen (2016) for a discussion of the methodological usefulness of following offenders for time periods exceeding one year.

⁸ The non-scored measures shown in Appendix Table 1 were recoded into numeric values for analytical purposes.

⁹ It should be noted that we recoded the associates with negative peers or no friends item from four values to three as the recidivism rates for the "no friends" score (11 percent) was relatively similar to the recidivism rates for the "occasional association with negative peers" score (13 percent).

in the findings section, allowed us to analyze whether integrating the non-scored items into the risk calculation resulted in a demonstrably superior risk prediction scale.

Analysis Plan

We assessed whether the non-scored items improved the PCRA's risk prediction effectiveness through several stages. First, we used bivariate statistics (including means, cross tabulations, and chi-square statistics) to examine these non-scored items by risk level and determine whether the non-scored items were correlated with offender recidivism outcomes. Next, we employed multivariate approaches, specifically logistic regression, to investigate whether combining the 15 scored and 15 non-scored items into a revised risk scale enhanced the PCRA's risk prediction capabilities above those already achieved by the officer-calculated raw risk scores. Finally, we used stepwise logistic regression methods to assess which of the individual non-scored items were significantly correlated with offender recidivism outcomes. We also calculated zero-order correlations and area under the receiver curve operating characteristics (AUC-ROC) scores to evaluate whether the non-scored items significantly enhanced this instrument's risk-scoring capabilities or whether these items could be removed without compromising the PCRA's predictive effectiveness.

Results

Study Cohorts

Table 1 (next page) shows the raw PCRA risk distributions of offenders followed for different time periods in the study cohort, including 12 months, 24 months, and 36 months. We show the raw risk scores rather than the risk categories because these scores will be used as the primary means for assessing risk prediction in the extant study.¹⁰ Although the raw PCRA score can reach a maximum value of 18, these values were recoded into a score of 17, as relatively few offenders (N=10) received the maximum score. In general, there were relatively negligible differences in the risk scores for the different follow-up groups. The

¹⁰ It should be noted that since the study's sole focus was to assess whether the non-scored items increased the PCRA's predictive efficacy, we omitted variables on offender race/ethnicity/gender that have been included in other PCRA validation studies. For a discussion of the PCRA's capacity to predict recidivism across various offender demographic categories see Lowenkamp et al., 2015; Skeem & Lowenkamp, 2016; and Skeem, Monahan, & Lowenkamp, 2016.

overall mean PCRA scores decreased slightly from 6.5 for the 12-month follow-up to 6.4 for the follow-up groups in the 24- and 36-month range. The percentages of offenders classified in the moderate- or high-risk categories (i.e., who received scores of 10 points or more) were also similar across the three follow-up groups, spanning from 21 percent for the 12-month follow-up to 19 percent for the 36-month follow-up.

Table 2 explores the presence of the non-scored PCRA risk items by an offender's initial risk classification. Average scores for each of the non-scored items, with standard deviations in parentheses, are shown. With the exception of the "associates with negative peers or no friends" variable, all these mean scores could be converted into percentages, as they are binary values with scores of 0/1. Not surprisingly, this table shows that the non-scored risk items are more likely to be present among offenders initially classified into the higher risk categories by the PCRA. According to these non-scored items, offenders classified as higher risk by the PCRA are more likely to manifest juvenile criminal histories, job instability, substance abuse problems, weak social networks, and negative antisocial attitudes/values than lower risk offenders. Moreover, the non-scored items showed that higher risk offenders were more likely to lack any permanent residence, have criminal risks present at home, deal with financial stressors, and fail to engage in prosocial activities to a greater extent than their lower risk counterparts. Overall, the distribution of these non-scored items provides empirical evidence supporting the proposition that the PCRA can distinguish even among risk factors that are currently not included in the actual PCRA risk calculations.

Relationship Between Non-scored Factors and Recidivism Outcomes

Tables 3 and 4 examine the relationship between the non-scored risk items and rearrest activity for any or violent offenses at the bivariate level. The 12-month follow-up group was used, as this group had the largest number of offenders (N=196,460) among the three study cohorts, and chi-square tests were employed to assess whether the recidivism rates significantly increased for offenders with any of these non-scored risk characteristics. The bivariate analysis shows all the 15 non-scored items being significantly associated with increases in offender recidivism rates involving arrests for any felony or misdemeanor offenses at the .001

TABLE 1.
Distribution of Post Conviction Risk Assessment (PCRA) categories, by offender follow-up period

Raw PCRA scores	12 months		24 months		36 months	
	Number	Percent	Number	Percent	Number	Percent
0	5,011	2.6%	3,907	2.5%	2,881	2.5%
1	10,160	5.2%	8,119	5.2%	6,073	5.2%
2	14,187	7.2%	11,361	7.2%	8,467	7.3%
3	16,027	8.2%	13,038	8.3%	9,734	8.4%
4	16,662	8.5%	13,489	8.6%	10,067	8.7%
5	17,615	9.0%	14,442	9.2%	10,838	9.3%
6	19,270	9.8%	15,747	10.0%	11,894	10.3%
7	20,034	10.2%	16,358	10.4%	12,395	10.7%
8	19,409	9.9%	15,570	9.9%	11,600	10.0%
9	17,417	8.9%	13,820	8.8%	10,156	8.8%
10	14,035	7.1%	11,009	7.0%	7,940	6.8%
11	10,269	5.2%	8,001	5.1%	5,612	4.8%
12	7,281	3.7%	5,527	3.5%	3,799	3.3%
13	4,610	2.4%	3,485	2.2%	2,443	2.1%
14	2,577	1.3%	1,895	1.2%	1,244	1.1%
15	1,229	0.6%	905	0.6%	564	0.5%
16	506	0.3%	375	0.2%	246	0.2%
17	161	0.1%	121	0.1%	61	0.1%
Mean score	6.49		6.44		6.36	
	(3.50)		(3.46)		(3.41)	
Number of offenders	196,460		157,169		116,014	

Note: Percentages may not sum to totals due to rounding error. The PCRA 18s have been recoded into 17s because relatively few offenders (N=10) obtained scores of 18. Standard deviations in parentheses.

level. For example, the percent of offenders rearrested within 12 months of their initial assessment increases from 7 percent for those with good support networks to 19 percent for offenders with more than occasional association with negative peers. All the non-scored items were also significantly correlated with violent recidivism. This analysis showing that offenders characterized by issues measured by the non-scored items (including serious criminal histories, job instability, substance abuse issues, poor social networks, negative social attitudes or other issues associated with residential or financial instability) were more likely to recidivate should not be too surprising given the extensive literature showing the correlation between these factors and criminal conduct (Andrews & Bonta, 2010). The large study population of almost 200,000 offenders also makes probable findings of statistical significance. Whether these non-scored factors contributed to the PCRA's overall predictive

capacities above that currently achieved by the 15 scored factors is an issue further explored in the next section.

Contribution of Non-scored Factors to Risk Prediction

The remaining tables and figures investigate whether inclusion of the non-scored items both substantially and significantly improved the PCRA's risk prediction accuracy. Basically, this analysis tests whether the PCRA's predictive accuracy can be improved by using both the 15 scored and 15 non-scored items to redistribute offenders by their probability of recidivism (any or violent). We conducted this analysis by employing logistic regression models to calculate a predictive probability of any or violent recidivism for offenders in the different population follow-up groups (e.g., 12 months, 24 months, or 36 months).¹¹ Using

¹¹ Logistic regression is a commonly used statistical technique applied when examining the effects of

TABLE 2.
Mean scores for non-scored Post Conviction Risk Assessment (PCRA) items, by initial risk classification

Non-scored PCRA items	All offenders	Offenders by initial risk classification			
		Low	Low/Moderate	Moderate	High
Criminal history					
Juvenile arrest	0.27 (0.45)	0.08 (0.27)	0.32 (0.47)	0.53 (0.50)	0.66 (0.47)
Education & employment					
Multiple jobs past year	0.51 (0.50)	0.38 (0.49)	0.53 (0.50)	0.70 (0.46)	0.83 (0.38)
Employed less than 50% over past two years	0.50 (0.50)	0.32 (0.47)	0.53 (0.50)	0.77 (0.42)	0.91 (0.29)
Drugs & alcohol					
Drug use related to disruption at work, school, or home	0.27 (0.44)	0.11 (0.31)	0.30 (0.46)	0.47 (0.50)	0.65 (0.48)
Drug use in physically hazardous conditions	0.21 (0.41)	0.10 (0.30)	0.24 (0.43)	0.33 (0.47)	0.44 (0.50)
Drug use led to legal problems	0.40 (0.49)	0.19 (0.40)	0.46 (0.50)	0.65 (0.48)	0.79 (0.41)
Drug use continued despite social problems	0.30 (0.46)	0.12 (0.32)	0.35 (0.48)	0.54 (0.50)	0.71 (0.45)
Social networks					
Lives with spouse and/or children	0.65 (0.48)	0.53 (0.50)	0.69 (0.46)	0.79 (0.41)	0.84 (0.36)
Lacks family support	0.09 (0.29)	0.05 (0.22)	0.09 (0.28)	0.16 (0.37)	0.31 (0.46)
Associates with negative peers or no friends	0.66 (0.90)	0.34 (0.72)	0.69 (0.89)	1.12 (0.95)	1.61 (0.82)
Cognitions					
Harbors antisocial attitude/values	0.13 (0.34)	0.05 (0.22)	0.11 (0.32)	0.27 (0.44)	0.56 (0.50)
Other factors					
Lacks permanent residence	0.37 (0.48)	0.25 (0.43)	0.39 (0.49)	0.52 (0.50)	0.66 (0.47)
Criminal risks present in home	0.11 (0.32)	0.06 (0.24)	0.11 (0.31)	0.20 (0.40)	0.36 (0.48)
Financial stressors present	0.32 (0.47)	0.18 (0.38)	0.31 (0.46)	0.57 (0.50)	0.82 (0.38)
Does not engage in pro-social activities	0.26 (0.44)	0.15 (0.36)	0.26 (0.44)	0.43 (0.50)	0.68 (0.47)
Number of offenders	196,460	79,662	76,130	31,585	9,083

Note: Includes offenders followed for a period of 12 months. Standard errors shown in parentheses.

a model-driven approach entails generating a predicted probability for each offender in the study population being arrested that can theoretically range from 0 to 1. A 0 means that the offender has no predicted chance of being arrested, while a 1 would imply a 100 percent chance of recidivating. These predicted arrest probabilities contrast with the original officer-generated PCRA scores, which range from 0 to

multiple independent variables on a dichotomous dependent variable (Hilbe, 2009).

18. Although the arrest probabilities produced by the logistic regressions differ from the raw PCRA risk scores, these predicted probabilities can be re-scaled through a ranking process into a scoring distribution mirroring that of the PCRA scales. Specifically, we compared the logistic regression-predicted arrest probabilities to those using the natural PCRA risk scale by dividing the ranked predictions into revised risk scores of the same size as the natural risk scores for each estimated follow-up group.

As an example, suppose that for a given sample, the following percentage of offenders received PCRA raw scores of 0 (2.6 percent), 1 (5.2 percent), and 2 (7.2 percent). In this case, we ranked offenders by their predicted recidivism values—least to most risky—and selected the bottom 2.6 percent to have predicted PCRA risk scores of 0, the next 5.2 percent to have predicted PCRA risk scores of 1, and the following 7.2 percent of offenders to have predicted PCRA risk scores of 2. This procedure was followed until all offenders were redistributed by their predicted PCRA risk scores, which could range from 0 to 18. To the extent that offenders with predicted PCRA risk scores of 0, 1, or 2 comprise different groupings than offenders with original PCRA risk scores of 0, 1, or 2, rearrest rates may differ across the two groups. Moreover, the revised PCRA risk groupings might manifest higher AUC-ROC values and correlations than the original PCRA risk distributions.

Results from this analysis are presented in Table 5 and Figure 1 (any recidivism) and Table 6 and Figure 2 (violent recidivism). In general, these results show that the PCRA's risk prediction capabilities were only marginally improved by incorporating the 15 non-scored items into a revised prediction index. These marginal improvements can be viewed through an analysis of the AUC-ROC scores. The AUC-ROC score is frequently used to assess risk assessment instruments and is often preferred over a correlational analysis because it is not impacted by low base rates (Lowenkamp et al., 2013). Essentially, the AUC-ROC measures the probability that a score drawn at random from one sample or population (e.g., offenders with a rearrest) will be higher than that drawn at random from a second sample or population (e.g., offenders with no rearrest) (Lowenkamp et al., 2013; Rice & Harris, 2005). Values for the AUC-ROC range from .0 to 1.0, with values of .70 or greater indicating that the actuarial instrument does fairly well at prediction (Andrews & Bonta, 2010).

For the 12-month follow-up group, the AUC-ROC scores were higher for the rescaled prediction score (AUC-ROC = 0.73), but only slightly so, compared to the originally calculated PCRA score (AUC-ROC = 0.72). Though the confidence intervals show significant differences between the rescaled and actual PCRA scores, a 0.01 increase in the AUC-ROC score indicates that the rescaled scores were not substantively different in terms of their risk prediction capacities than

TABLE 3.
Percent of offenders arrested within 12 months of initial assessment for any offense for the non-scored Post Conviction Risk Assessment (PCRA) items

Non-scored PCRA items	12 month rearrest rates by recorded score			Chi-square
	0	1	2	
Criminal history				
Juvenile arrest	7.6%	17.0%		3800.0***
Education & employment				
Multiple jobs past year	8.2%	12.0%		796.1***
Employed less than 50% over past two years	7.3%	12.9%		1700.0***
Drugs & alcohol				
Drug use related to disruption at work, school, or home	8.5%	14.6%		1500.0***
Drug use in physically hazardous conditions	9.2%	13.8%		747.0***
Drug use led to legal problems	7.6%	13.9%		2100.0***
Drug use continued despite social problems	8.1%	14.7%		2000.0***
Social networks				
Lives with spouse and/or children	7.1%	11.7%		1000.0***
Lacks family support	9.7%	13.9%		325.5***
Associates with negative peers or no friends	7.0%	13.0%	19.3%	3400.0***
Cognitions				
Harbors antisocial attitude/values	9.1%	16.7%		1500.0***
Other factors				
Lacks permanent residence	8.6%	12.8%		875.7***
Criminal risks present in home	9.5%	14.6%		568.2***
Financial stressors present	8.0%	14.5%		2000.0***
Does not engage in prosocial activities	8.7%	14.2%		1300.0***

*Note: Includes offenders followed for a period of 12 months. For the associates with negative peers item, the values for no friends were recoded into occasional association with negative friends as the rearrest rates for the no friends (11%) was similar to the occasional association with negative peers (13%). * $p < .05$; ** $p < .01$; *** $p < .001$*

scores actually generated by federal probation officers. These patterns in AUC-ROC scores held across the 24- and 36-month follow-up groups. For example, the actual PCRA scores produced AUC-ROC values that were relatively stable at the 24-month (0.72) and 36-(0.72) month follow-ups, while the rescaled PCRA indices showed improvements in risk prediction, with the AUC-ROC scores increasing to 0.74 at the 36-month follow-up. The divergence in the AUC-ROC scores between the actual (0.72) and rescaled (0.74) PCRA scores at the 36-month follow-up nevertheless reveals only negligible improvements resulting from the inclusion of all 15 non-scored items in the risk score calculation. In addition to the AUC-ROC scores, an analysis of the zero-order correlations reveals relatively small improvements when moving from the actual to rescaled PCRA scores.

Another way of examining whether the

non-scored items could enhance risk prediction is to analyze the relationship between the recidivism rates for the actual and rescaled PCRA scores. While this analysis is provided in Table 5, Figure 1 presents a clearer picture, visualizing the functional form associated with the recidivism rates for the actual and rescaled PCRA scores. An examination of the functional form between recidivism and the PCRA scores shows the rearrest rates being essentially the same for both the actual and rescaled PCRA indices from values 0 through 11; afterwards, the rearrest rates diverge, with the rescaled PCRA scores manifesting higher arrest rates than the actual PCRA scores. The rearrest rates then begin re-converging at the highest PCRA values. This pattern shows the rescaled PCRA scores providing a better metric for identifying offender recidivism events, but only for those PCRA values at the higher end of the risk distribution. There were relatively negligible

differences in the capacity to detect rearrest activity for the lower PCRA scores.

A similar pattern of marginal improvements in prediction using the rescaled PCRA scores held when examining violent recidivism outcomes at the 12-, 24-, and 36-month follow-up intervals. Specifically, the AUC-ROC scores manifested some improvements in recidivism prediction for violent offenses; moreover, the violent rearrest rates for the actual and rescaled PCRA scores were relatively similar for the PCRA values ranging from 0 through 13, after which they diverge, with the rescaled PCRA scores evidencing improved capacities to detect violent rearrests compared to the officer-generated scores.

Although improvements in recidivism prediction demonstrated in the previous analyses might be seen as a rationale for including the 15 non-scored items in the risk prediction calculation, it is important to note that in part these findings result from comparing predictions between actual and model-generated PCRA scores. Some recent research has suggested that risk scores generated through a Burgess scoring approach of the type used by the PCRA could produce inferior prediction scales compared to model-generated scores (Kim & Duwe, 2017). Hence, the modest improvements in prediction might be the result of using model-based approaches in addition to including the 15 non-scored risk items in the rescaled PCRA score. One way around this issue involves comparing the predictive indices produced from logistic regression models containing only the 15 scored PCRA risk items with those of models containing both the scored and non-scored PCRA items. This approach also allows us to assess which of the non-scored PCRA items might be correlated with recidivism when the scored PCRA items are statistically controlled and whether inclusion of any of these non-scored PCRA items significantly improves the model's capacity to predict recidivism.

In the analysis presented in Tables 7 and 8, we used backward stepwise logistic regression models to examine which of the non-scored items were significantly correlated with recidivism outcomes involving any or violent offenses, while controlling for the scored PCRA items using the 12-month follow-up group. The backward stepwise approach uses an iterative process that systematically identifies and removes variables that do not improve the model's overall fit (Field, 2013). This method works by initially placing all 15 non-scored items in the model and then

TABLE 4.
Percent of offenders arrested within 12 months of initial assessment for violent offenses for the non-scored Post Conviction Risk Assessment (PCRA) items

Non-scored PCRA items	12 month violent rearrest rates by recorded score			Chi-square
	0	1	2	
Criminal history				
Juvenile arrest	1.3%	3.9%		1400.0***
Education & employment				
Multiple jobs past year	1.5%	2.5%		227.7***
Employed less than 50% over past two years	1.3%	2.7%		455.2***
Drugs & alcohol				
Drug use related to disruption at work, school, or home	1.6%	3.0%		392.3***
Drug use in physically hazardous conditions	1.8%	2.8%		172.2***
Drug use led to legal problems	1.5%	2.8%		426.9***
Drug use continued despite social problems	1.6%	3.0%		448.1***
Social networks				
Lives with spouse and/or children	1.4%	2.3%		186.8***
Lacks family support	1.9%	2.8%		72.6***
Associates with negative peers or no friends	1.3%	2.7%	4.0%	766.4***
Cognitions				
Harbors antisocial attitude/values	1.8%	3.6%		396.5***
Other factors				
Lacks permanent residence	1.7%	2.6%		210.2***
Criminal risks present in home	1.9%	3.0%		134.1***
Financial stressors present	1.5%	3.0%		437.7***
Does not engage in prosocial activities	1.7%	2.9%		265.5***

*Note: Includes offenders followed for a period of 12 months. For the associates with negative peers item, the values for no friends were recoded into occasional association with negative friends as the violent arrest rates for both values were similar. * $p < .05$; ** $p < .01$; *** $p < .001$*

calculating the contribution of each item by analyzing whether it meets criteria for inclusion specified by the user. The variable with the weakest explanatory power per the user's criteria is removed and the model is then re-estimated. This iterative process repeats itself until all the remaining covariates in the model meeting the user-specified criteria remain (Field, 2013).

For this analysis, the user-specified criteria involved retaining all non-scored items with p-values of 0.01. We selected this p-value by using the Bonferroni criterion, which entailed dividing the p-value of 0.05 into the number of non-scored variables being tested ($N=15$) (Allison, 2015). It is important to note that we employed stepwise deletion approaches only on the non-scored PCRA items. In other words, the 15 scored PCRA items were forced into the model, while the remaining non-scored items were subjected to exclusion

through the backward stepwise regression models. This approach provides a parsimonious method for ascertaining which of the non-scored items were significantly correlated with recidivism when the PCRA factors were statistically controlled. We also provide AUC-ROC scores and sensitivity statistics to ascertain whether inclusion of the significant non-scored factors enhanced the model's overall predictive accuracy.¹² The sensitivity statistics were based on the 12-month rearrest

¹² While there is extensive literature cautioning against the use of stepwise methods because of their reliance on computer algorithms over theory, we employed this approach because our models use variables that have been both theoretically and empirically shown to predict recidivism (Andrews & Bonta, 2010). Moreover, we attempted to minimize the problem of suppressor effects and type II errors associated with these approaches by using backward as opposed to forward stepwise regression methods (Field, 2013).

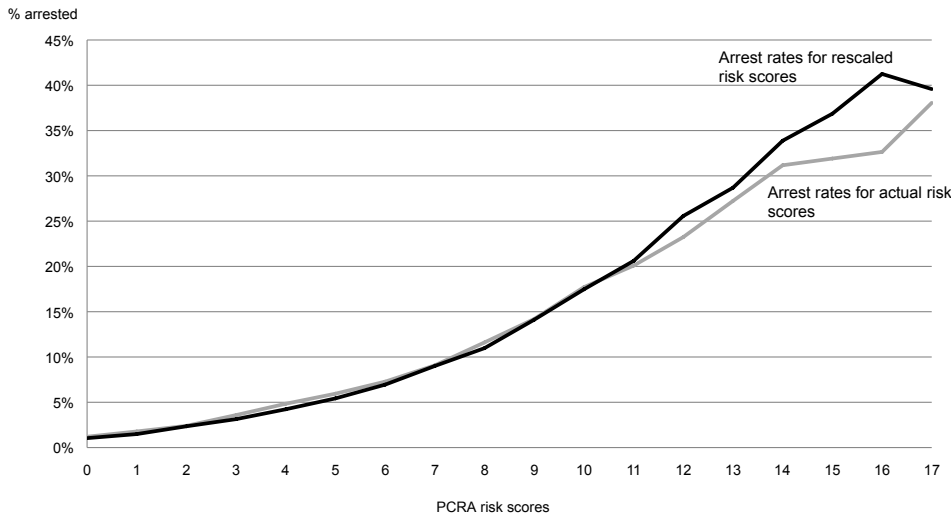
rate for any (10.1 percent) or violent (2.0 percent) offenses. Finally, recidivism outcomes were modeled for the 12-month follow-up group, as that cohort had the largest number of offenders.

Results show several non-scored items being significantly correlated with recidivism outcomes involving any or violent offenses. The variables that were significantly correlated with any or violent rearrest behavior at the 0.01 level, net of the PCRA controls, include prior juvenile arrest, employed less than 50 percent over the past two years, does not live with spouse or children, associates with negative peers, and financial stressors. In addition, the non-scored PCRA item of drug use led to legal problems was significantly correlated with general but not violent recidivism. Interestingly, while the model containing only the scored items shows all 15 of these factors being significantly associated with general rearrests when the non-scored items were included in the regression model, some of the scored items—including prior varied offending pattern, good work assessment, current alcohol problem, and unstable family situation—witness a weakening or loss of their significant association with the any recidivism outcome. This finding should not be too surprising, as bringing the non-scored variables into the model should result in some of the original scored items becoming less significantly associated with the dependent variable.¹³

The key issue, however, involves whether adding these non-scored items significantly improves the model's efficacy at predicting any forms of recidivism. An analysis from the model-generated AUC-ROC and sensitivity statistics shows no significant improvement in prediction resulting from inclusion of the non-scored items. For example, the AUC-ROC values increased from 0.731 to 0.734 when the six non-scored items significantly associated with any recidivism were added to the logistic regression model. Because the confidence intervals associated with the AUC-ROC scores for both models overlapped, these differences were not statistically significant. Moreover, a sensitivity analysis showed no discernible improvement in the identification

¹³ We examined the variance inflation factors (VIFs) to check for the possibility of multicollinearity, as some of the non-scored PCRA items measured characteristics similar to the scored items. None of the variables—scored or unscored—in the model manifested VIFs in the range (3 or above) that would evidence serious problems with multicollinearity.

FIGURE 1.
Arrest distributions (any offense) for actual and predicted Post Conviction Risk Assessment (PCRA) risk scores

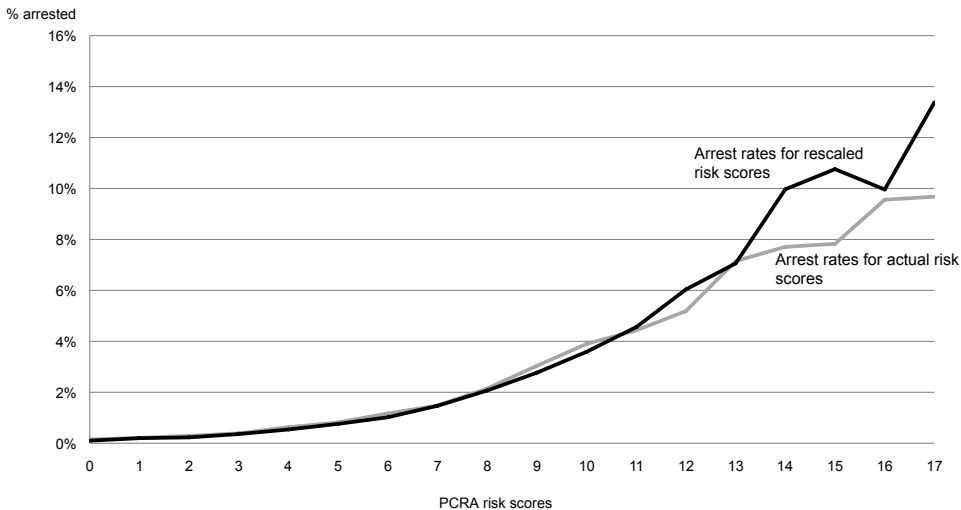


Note: Arrest rates shown include offenders followed for 12 month follow-up period.

TABLE 5.
Comparing offender recidivism rates (any offense) between actual and predicted Post Conviction Risk Assessment (PCRA) risk scores, by different follow-up periods

Raw PCRA scores	12 month follow-up		24 month follow-up		36 month follow-up	
	Actual PCRA scores	Rescaled PCRA scores	Actual PCRA scores	Rescaled PCRA scores	Actual PCRA scores	Rescaled PCRA scores
0	1.2%	1.0%	2.0%	1.7%	3.0%	2.6%
1	1.8%	1.5%	3.2%	2.7%	4.7%	4.1%
2	2.4%	2.4%	4.6%	4.3%	6.5%	6.2%
3	3.6%	3.1%	6.9%	6.0%	9.5%	8.5%
4	4.8%	4.2%	9.1%	8.2%	13.2%	12.0%
5	6.0%	5.4%	11.5%	10.2%	15.7%	14.4%
6	7.3%	7.0%	13.9%	14.2%	19.2%	19.1%
7	9.1%	9.0%	17.4%	17.1%	23.6%	23.7%
8	11.6%	11.0%	21.6%	20.7%	29.7%	28.5%
9	14.2%	14.1%	25.1%	25.2%	33.8%	34.3%
10	17.7%	17.5%	29.8%	30.1%	39.3%	40.3%
11	20.1%	20.6%	33.8%	36.0%	43.8%	46.1%
12	23.2%	25.6%	37.5%	41.1%	48.2%	53.3%
13	27.2%	28.7%	43.7%	45.1%	54.2%	55.8%
14	31.2%	33.9%	47.5%	50.2%	57.2%	60.2%
15	31.9%	36.9%	50.4%	55.5%	64.8%	66.2%
16	32.6%	41.3%	52.7%	58.5%	61.6%	71.9%
17	38.1%	39.6%	53.9%	60.5%	64.3%	69.2%
AUC-ROC	0.718 (0.714-0.721)	0.733 (0.729-0.736)	0.719 (0.715-0.722)	0.734 (0.730-0.737)	0.722 (0.718-0.725)	0.737 (0.733-0.740)
r	0.23	0.25	0.29	0.32	0.33	0.35
Number	188,542		150,405		110,240	

Note: The PCRA 18s have been recoded into 17s because relatively few offenders (N=10) obtained scores of 18. The percentage of offenders included in regression models by follow-up cohort ranges from 95%-96% of total sample. About 4%-5% of offenders omitted from analysis because they were missing values for either the scored or non-scored items.

FIGURE 2.**Arrest distributions (violent offenses) for actual and predicted Post Conviction Risk Assessment (PCRA) risk scores**

Note: Arrest rates shown include offenders followed for 12 month follow-up period.

TABLE 6.**Comparing offender violent recidivism rates between actual and predicted Post Conviction Risk Assessment (PCRA) risk scores, by different follow-up periods**

Raw PCRA scores	12 month follow-up		24 month follow-up		36 month follow-up	
	Actual PCRA scores	Rescaled PCRA scores	Actual PCRA scores	Rescaled PCRA scores	Actual PCRA scores	Rescaled PCRA scores
0	0.2%	0.1%	0.3%	0.2%	0.4%	0.4%
1	0.2%	0.2%	0.4%	0.3%	0.6%	0.5%
2	0.3%	0.2%	0.5%	0.5%	0.8%	0.8%
3	0.4%	0.4%	0.9%	0.8%	1.5%	1.1%
4	0.6%	0.5%	1.2%	1.0%	1.8%	1.6%
5	0.8%	0.8%	1.7%	1.7%	2.7%	2.4%
6	1.2%	1.0%	2.4%	2.2%	3.6%	3.4%
7	1.5%	1.5%	3.5%	3.2%	4.9%	4.5%
8	2.2%	2.1%	4.3%	4.0%	6.4%	6.0%
9	3.0%	2.8%	5.6%	5.3%	7.7%	7.9%
10	3.9%	3.6%	7.0%	6.9%	9.6%	9.5%
11	4.4%	4.6%	8.2%	8.6%	11.1%	12.4%
12	5.2%	6.0%	9.1%	10.9%	12.2%	14.0%
13	7.2%	7.1%	12.1%	12.6%	16.4%	16.7%
14	7.7%	10.0%	12.6%	14.7%	16.2%	18.3%
15	7.8%	10.8%	13.5%	15.2%	18.9%	22.1%
16	9.6%	10.0%	13.5%	17.1%	15.7%	22.0%
17	9.7%	13.4%	13.0%	17.5%	12.5%	18.0%
AUC-ROC	0.750 (0.743-0.757)	0.767 (0.760-0.774)	0.738 (0.732-0.744)	0.755 (0.749-0.761)	0.729 (0.723-0.735)	0.747 (0.741-0.753)
r	0.13	0.14	0.16	0.17	0.18	0.19
Number	188,542		150,405		110,240	

Note: The PCRA 18s have been recoded into 17s because relatively few offenders (N=10) obtained scores of 18. The percentage of offenders included in regression models by follow-up cohort ranges from 95%-96% of total sample. About 4%-5% of offenders omitted from analysis because they were missing values for either the scored or non-scored items.

TABLE 7.
Stepwise logistic regression analysis of non-scored factors on odds of any arrest within 12 months of Post Conviction Risk Assessment (PCRA)

PCRA factors	Model 1 - Scored items only			Model 2 - Scored & non-scored items		
	Odds Ratio	Confidence interval		Odds Ratio	Confidence interval	
Lower		Upper	Lower		Upper	
Scored items						
Number of prior arrests	1.47***	1.42	1.51	1.43***	1.38	1.47
Prior violent offense	1.18***	1.13	1.23	1.15***	1.11	1.20
Prior varied offending pattern	1.06*	1.00	1.13	1.05	0.99	1.11
Prior revocation/arrest while on supervision	1.32***	1.26	1.38	1.28***	1.22	1.34
Prior institutional adjustment	1.27***	1.21	1.33	1.22***	1.17	1.28
Age at intake to supervision	1.96***	1.89	2.03	1.88***	1.82	1.95
Less than high school or has only GED	1.18***	1.13	1.23	1.14***	1.09	1.19
Currently unemployed	1.23***	1.18	1.28	1.12***	1.07	1.17
Good work assessment over past 12 months	1.12***	1.08	1.16	1.05*	1.01	1.09
Current alcohol problem	1.09**	1.03	1.16	1.07*	1.00	1.13
Current drug problem	1.18***	1.12	1.24	1.11***	1.06	1.17
Single, divorced, separated	1.22***	1.16	1.29	1.09**	1.03	1.15
Unstable family situation	1.10***	1.05	1.15	1.05*	1.01	1.11
Lacks positive pro-social support	1.20***	1.14	1.26	1.11***	1.06	1.17
Attitude toward supervision and change	1.23***	1.17	1.30	1.19***	1.13	1.26
Non-scored items						
Juvenile arrest				1.17***	1.13	1.22
Employed less than 50% over past two years				1.10***	1.06	1.15
Drug use led to legal problems				1.09***	1.05	1.13
Lives with spouse and/or children				1.21***	1.16	1.27
Associates with negative peers or no friends				1.08***	1.06	1.11
Financial stressors present				1.16***	1.11	1.20
Constant	0.01	0.01	0.02	0.01	0.01	0.01
AUC-ROC	0.731	0.727	0.734	0.734	0.730	0.737
Sensitivity	69.9%			69.6%		
Log pseudolikelihood	-55774.5			-55598.8		
Number of offenders	188,542			188,542		

Note: Backward stepwise logistic regression used to assess which non-scored risk items to include in second model. Only non-scored items associated with arrest outcomes at the .01 level were included in final model. Variable ordering coincides with that of appendix table 1. About 4% of offenders omitted from analysis because they were missing values for either the scored or non-scored items. * $p < .05$; ** $p < .01$; *** $p < .001$

TABLE 8.
Stepwise logistic regression analysis of non-scored factors on odds of violent arrest within 12 months of Post Conviction Risk Assessment (PCRA)

PCRA factors	Model 1 - Scored items only			Model 2 - Scored & non-scored items		
	Odds Ratio	Confidence interval		Odds Ratio	Confidence interval	
		Lower	Upper		Lower	Upper
Scored items						
Number of prior arrests	1.49***	1.40	1.59	1.44***	1.35	1.54
Prior violent offense	2.00***	1.84	2.18	1.94***	1.79	2.10
Prior varied offending pattern	1.06	0.94	1.20	1.04	0.93	1.17
Prior revocation/arrest while on supervision	1.29***	1.16	1.43	1.24***	1.12	1.38
Prior institutional adjustment	1.40***	1.29	1.52	1.34***	1.23	1.46
Age at intake to supervision	2.00***	1.87	2.14	1.89***	1.76	2.03
Less than high school or has only GED	1.26***	1.17	1.35	1.21***	1.12	1.30
Currently unemployed	1.17***	1.08	1.26	1.07	0.98	1.16
Good work assessment over past 12 months	1.14***	1.07	1.22	1.06	0.99	1.14
Current alcohol problem	1.26***	1.14	1.40	1.26***	1.13	1.39
Current drug problem	1.05	0.94	1.16	1.01	0.91	1.12
Single, divorced, separated	1.08	0.97	1.20	0.99	0.89	1.10
Unstable family situation	1.07	0.99	1.17	1.04	0.96	1.13
Lacks positive prosocial support	1.16**	1.06	1.28	1.09*	1.00	1.20
Attitude toward supervision and change	1.10	0.96	1.25	1.06	0.93	1.21
Non-scored items						
Juvenile arrest				1.27***	1.19	1.37
Employed less than 50% over past two years				1.14**	1.03	1.25
Lives with spouse and/or children				1.15**	1.04	1.26
Associates with negative peers or no friends				1.09**	1.03	1.15
Financial stressors present				1.14**	1.05	1.25
Constant	0.00	0.00	0.00	0.00	0.00	0.00
AUC-ROC	0.766	0.759	0.773	0.769	0.762	0.776
Sensitivity	73.9%			73.8%		
Log pseudolikelihood	-16669.5			-16626.5		
Number of offenders	188,542			188,542		

Note: Backward stepwise logistic regression used to assess which non-scored risk items to include in second model. Only non-scored items associated with violent arrest outcomes at the .01 level were included in final model. Variable ordering coincides with that of appendix table 1. About 4% of offenders omitted from analysis because they were missing values for either the scored or non-scored items.

of recidivists; both models correctly identified 70 percent of offender recidivists. In addition to these findings, the regression models examining arrests for violent offenses showed similar patterns of negligible differences in the predictive statistics between the models with the scored and non-scored PCRA risk items.

Discussion and Conclusion

Summary of Findings

In this study we sought to investigate whether incorporation of the 15 non-scored items currently rated by officers into the PCRA's risk algorithm could significantly enhance the instrument's predictive accuracy. In general, findings show that inclusion of the non-scored items results in relatively small improvements in the PCRA's capacity to predict recidivism. Specifically, the AUC-ROC values and correlations were somewhat higher for the rescaled rather than original risk scores, but the differences were not substantive enough that the AOUSC should definitely consider integrating the non-scored items into the risk prediction tool. Moreover, the actual and rescaled risk scores essentially manifested similar rearrest rates, with the exception that the rescaled scores at the upper end of the risk spectrum captured rearrest activity to a slightly greater extent than the original scores. Finally, a comparison of logistic regression models shows essentially no differences in the predictive indices (i.e., AUC-ROC, sensitivity scores) between the models using only the 15 scored PCRA items and the models using both the scored and the non-scored PCRA items. These findings provide further support that the non-scored items can be removed from the instrument's worksheet without compromising the tool's predictive effectiveness.

Implications for the Field

As a result of this research, the AOUSC decided to remove several of these non-scored items from the Officer Section of the PCRA. These include prior juvenile arrest history, number of employers in the last 12 months, offender employed less than 50 percent of the time during the previous two years, legal problems related to drug use during the past 12 months, lives with spouse and/or children, current lack of family support, anti-social attitudes, offender's residential stability, criminal risks at home, financial situation, and level of engagement in prosocial activities (AOUSC, 2016). Some of the non-scored items, however, will continue to be rated but not scored, as they could be very helpful for

research purposes. These include several of the substance abuse items assessing disruption at work, school, or home resulting from substance abuse; drug use in physically hazardous conditions; and continued drug use despite social/interpersonal problems. Also, the negative companions item will remain because of its strong correlation with recidivism. While officers will continue to rate these non-scored items, they will not be incorporated into the PCRA risk algorithm. Although these items will not impact the overall score and risk level, they may inform case planning and elicit opportunities to teach the offender coping skills and problem-solving techniques.

Removal of the non-scored items has allowed the AOUSC to develop and implement a violence trailer (Serin et al., 2016). While the PCRA has been shown to be a strong predictor of general recidivism (Johnson et al., 2011; Lowenkamp et al., 2013; Lowenkamp et al., 2015), the instrument was not originally developed to predict violent recidivism. To address this, the AOUSC conducted additional research and found that there are 14 violence flags predictive of violent rearrest. These flags comprise scales from the Psychological Inventory of Criminal Thinking Styles (PICTS), which are measured in the Offender Section of the PCRA, and existing data related to violence. In addition to the PCRA score and the four PICTS scales (Power Orientation, Denial of Harm, Entitlement, Self Assertion), the violence flags include prior violent arrests, current violence offense, plans violence, age at first arrest, prior stalking, history of treatment noncompliance, gang membership, weapon use ever, prior or current domestic violence and stranger victimization. In terms of predicting violent and domestic violence rearrest, the construction sample (N=1,154) produced an AUC-ROC value of .79 when examining both the PCRA and violence flags, and the validation sample (N=1,154) had a slightly higher AUC-ROC value of .82 (Serin et al., 2016). This multi-level risk assessment process of conducting the PCRA 2.0, administering the violence trailer, and directing case management efforts and interventions to address the needs of probation clients will be the next stage of implementation and continuous improvement to the risk assessment process within the federal system.

Conclusion

This study sought to explore whether the non-scored items could be removed from the PCRA

without hindering the instrument's predictive effectiveness and hence free up space for the incorporation of a trailer capable of assessing whether an offender will become involved in a catastrophically violent event. Through this research, we show that incorporating the 15 non-scored items into the PCRA's risk prediction algorithm resulted in negligible improvements in this tool's risk prediction capacities and that the AOUSC need not consider retaining these items while enhancing this tool through adoption of a violence trailer. As a result of adherence to a data-driven approach, the PCRA has witnessed two substantive improvements. First, the AOUSC has been able to field an updated risk assessment tool—PCRA 2.0—while retaining only a few select non-scored items for further research and case planning. These results ensure that officers are focusing on the strongest predictors of general and violent recidivism for their target population. Second, with the removal of these non-scored items and the integration of the violence flags, the risk assessment process within the federal supervision system will now have the capacity to alert officers about an offender's proclivity towards violence and allow officers to take actions to protect the community and safeguard the public.

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APPENDIX TABLE 1.
Descriptions of Items in the officer assessment of the Post Conviction Risk Assessment (PCRA)

PCRA items	Item Description	Answers	Scored
Criminal history			
1.1	Juvenile arrest	A = No; B = Yes	N
1.2	Number of prior arrests	0 = None; 1 = One or two; 2 = Three through seven; 3 = Eight or more	Y
1.3	Prior violent offense	0 = No; 1 = Yes	Y
1.4	Prior varied offending pattern	0 = 1 offense type; 1 = 2 or more	Y
1.5	Prior revocation/arrest while on supervision	0 = No; 1 = Yes	Y
1.6	Prior institutional adjustment	0 = No or NA; 1 = Yes	Y
1.7	Age at intake to supervision	0 = 41+; 1 = 26 to 40; 2 = 25 or less	Y
Education & employment			
2.1	Less than high school or has only GED	0 = High school or higher; 1 = Less than high school or GED only	Y
2.2	Currently unemployed	0 = Employed PT/FT, disabled and receiving benefits; 1 = Student, homemaker, unemployed, or retired but able to work	Y
2.3	Multiple jobs past year	A = 1; B = None or more than 1	N
2.4	Employed less than 50% over past two years	A = Employed 12 months or more; B = Employed less than 12 months	N
2.5	Good work assessment over past 12 months	0 = Yes; 1 = No	Y
Drugs & alcohol			
3.1	Drug use related to disruption at work, school, or home	A = No; B = Yes	N
3.2	Drug use in physically hazardous conditions	A = No; B = Yes	N
3.3	Drug use led to legal problems	A = No; B = Yes	N
3.4	Drug use continued despite social problems	A = No; B = Yes	N
3.5	Current alcohol problem	0 = No; 1 = Yes	Y
3.6	Current drug problem	0 = No; 1 = Yes	Y
Social networks			
4.1	Single, divorced, separated	0 = Married; 1 = Not Married	Y
4.2	Lives with spouse and/or children	A = No; B = Yes	N
4.3	Lacks family support	A = Support Present; B = No Support	N
4.4	Unstable family situation	0 = No; 1 = Yes	Y
4.5	Associates with negative peers or no friends	A = Good support; B = Occasional association with negative peers; C = More than occasional association with negative peers; D = No friends	N
4.6	Lacks positive prosocial support	0 = No; 1 = Yes	Y
Cognitions			
5.1	Harbors antisocial attitude/values	A = No; B = Yes	N
5.2	Attitude toward supervision and change	0 = Motivated; 1 = Not motivated	Y
Other factors			
6.1	Lacks permanent residence	A = 1 address in last 12 months; B = > 1 address last 12 months; no permanent address	N
6.2	Criminal risks present in home	A = No risks at home; B = Risks at home	N
6.3	Financial stressors present	A = Adequate income to manage debts; concrete financial plans; B = No plan in place; expenses exceed income	N
6.4	Does not engage in prosocial activities	A = Engages in prosocial activities; B = Has no interests; does not; or recreation presents criminal risk	N

The Presumption for Detention Statute's Relationship to Release Rates

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SINCE 1984, THE pretrial detention rate for federal defendants has been steadily increasing. Recent work has aimed to address why the detention rate continues to rise and if there may be alternatives that could slow or reverse this trend. The presumption for detention statute, which assumes that defendants charged with certain offenses should be detained, has been identified as one potential factor contributing to the rising detention rate. Therefore, in this article I examine the relationship between the presence of the presumption and release rates. I will also examine the effect, if any, of the presumption on the release recommendations made by pretrial services officers. Finally, I will compare outcomes—defined as rates of failures to appear, rearrests, or technical violations resulting in revocation of bond—for presumption and non-presumption cases.

Historical Background

For almost 200 years, the federal bail system was premised on a defendant's right to bail for all non-capital offenses if the defendant could post sufficient sureties (Schnacke, Jones, & Brooker, 2010). In other words, all defendants were entitled to release, but release was based on a defendant's financial resources, leaving indigent defendants with few alternatives. Eventually, this disparity led to the passage of the Bail Reform Act of 1966 [18 U.S.C. § 4141-51 (repealed)]. The purpose of the act was "to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention

serves neither the ends of justice nor the public interest." [18 U.S.C. § 4141-51 (repealed)] To accomplish this goal, the act restricted the use of financial bonds in favor of pretrial release conditions (Lotze et al., 1999). Furthermore, the Bail Reform Act of 1966 limited a judicial officer's determination to the question of non-appearance for court hearings—and not other issues such as danger to the community—stating that "any person charged with an offense [...] be ordered released pending trial [...] unless the officer determines [...] that such a release will not reasonably assure the appearance of the person as required." [18 U.S.C. § 4141-51 (repealed)].

The movement for bail reform continued throughout the 1960s and 1970s, with special interest in how judicial officers could obtain the information they needed about defendants prior to making release recommendations (GAO, 1978). In response, Congress passed the Speedy Trial Act of 1974, which among other things allowed for the creation of 10 pretrial "demonstration" districts (Hughes & Henkel, 2015). The mission of these districts was twofold: They were to increase the number of defendants released on bail while also reducing crime in the community (Hughes & Henkel, 2015). To fulfill this mandate, pretrial agencies were charged with interviewing newly arrested defendants for background and biographical information, verifying this information by contacting family or friends, and preparing a report for the court with a recommendation regarding bail (Hughes & Henkel, 2015). Should the defendant be released during the pretrial period, a pretrial services

officer (PSO) would be responsible for supervising them in the community (Schnacke, Jones, & Brooker, 2010).

During this time, there was also growing concern about judicial officers' lack of discretion to consider a defendant's dangerousness when making a release decision. In response, the Attorney General's Office (OAG) established a Task Force on Violent Crime that produced a final report on August 17, 1981 (US DOJ, 1981). The report made a number of sweeping recommendations for many aspects of the criminal justice system, including the existing bail system. In their report, the task force recommended that the Bail Reform Act of 1966 be amended to include the following (not exhaustive) recommendations:

Permit courts to deny bail to persons who are found by clear and convincing evidence to present a danger to particular persons or the community.

Deny bail to a person accused of a serious crime who had previously, while in a pretrial release status, committed a serious crime for which he or she was convicted.

Abandon, in the case of serious crimes, the current standard presumptively favoring release of convicted persons awaiting imposition or execution of sentence or appealing their convictions.

While these recommendations were being made, Congress was receiving testimony from judicial officers that the information received from federal public defenders and prosecutors was insufficient to make an informed bail decision, and that they valued the investigations and reports that had been prepared by

the 10 demonstration districts. Therefore, in 1982, Congress expanded the Pretrial Services Agency to each of the 94 districts in the United States (Schnacke, Jones, & Brooker, 2010).

Following the expansion of pretrial services and the recommendations by the AGO in 1981, a 1984 Senate report stated, “Considerable criticism has been leveled at the Bail Reform Act [of 1966] in the years since its enactment because of its failure to recognize the problem of crimes committed by those on Pretrial release. In just the past year, both the President and the Chief Justice have urged amendment of federal bail laws to address this deficiency.”¹ This same year, federal legislation was enacted under the Comprehensive Crime Control Act of 1984, which included the Bail Reform Act of 1984 (US DOJ, 1981).

The Bail Reform Act of 1984 stated that all defendants charged in federal court were to be released on their own recognizance unless the “judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community” (18 U.S.C. § 3142(b)). If the judicial officer determined that a defendant posed a risk of nonappearance or danger, he or she could still order release on a condition or combination of conditions that would mitigate the established risk (18 U.S.C. § 3142(c)(1)(A) & (B)). Finally, if the judicial officer found “that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.” (18 U.S.C. § 3142(e)(1)). Therefore, the presumption was that all defendants would be ordered released, save for those determined to pose too great a risk of nonappearance or danger to the community.

Additionally, the Bail Reform Act of 1984 established two circumstances under which this presumption for release is reversed. Defendants falling into either of these two categories (commonly referred to as “presumption cases”) are presumed to be detained unless they can demonstrate by clear and convincing evidence that they do not pose a risk of nonappearance or danger to the community.

Presumptions

The first such presumption is often referred to as the “Previous Violator Presumption”

(18 U.S.C. § 3142(e)(2)). This presumption applies to a defendant charged with *any* crime of violence or act of terrorism with a statutory maximum term of imprisonment of 10 years or more, *any* drug offense with a statutory maximum term of imprisonment of 10 years or more, *any* felony involving a minor victim, *any* felony involving the use or possession of a firearm or destructive device, a charge for Failure to Register as a Sex Offender, *any* felony with a statutory maximum sentence of life or death, or *any* felony if the defendant has at least two prior felony convictions for one of the above-noted offenses at the federal, state, or local level (18 U.S.C. § 3142(e)(2)).

Despite this seemingly broad qualification, the Previous Violator Presumption has three “qualifiers” that must be met before the presumption can apply. These qualifiers are:

Does the defendant have a prior conviction that would trigger this presumption? If yes,

Was that prior offense committed while the defendant was out on bail for an unrelated matter? If yes,

Has less than five years passed from the date of conviction or from the defendant’s release for that conviction (whichever is later)?

If the answer is yes to all of these questions, the defendant is subject to the Previous Violator Presumption (18 U.S.C. § 3142(e)(2)).

The other presumption established in the Bail Reform Act of 1984, often referred to as the “Drug and Firearm Offender Presumption,” is much more straightforward—a defendant qualifies based exclusively on the charge and statutory maximum term of imprisonment (18 U.S.C. § 3142(e)(3)). The charges included in this presumption are: *any* drug charge with a statutory maximum term of imprisonment of 10 years or more; *any* firearms case where the firearm was used or possessed in furtherance of a drug crime or crime of violence; a conspiracy to kill, kidnap, maim, or injure persons in a foreign country; an attempt or conspiracy to commit murder; an act of terrorism transcending national boundaries with a statutory maximum term of imprisonment of 10 years or more; a charge of peonage, slavery, or trafficking in persons with a statutory maximum term of imprisonment of 20 years or more, or *any* sex offense under the Adam Walsh Act where a minor victim is involved (18 U.S.C. § 3142(e)(3)).

Since the enactment of these presumptions in the Bail Reform Act of 1984, there has been no known research into the effect of the presumptions on pretrial detention rates. As

such, the focus of this study was to examine the relationship between the presumption and the pretrial release decision.

Rising Detention Rates and Consequences

Since the passing of the Bail Reform Act of 1984, pretrial detention rates in the federal system have been steadily increasing. Including defendants charged with immigration charges, the federal pretrial detention rate increased from 59 percent in 1995 to 76 percent in 2010 (Bureau of Justice Statistics, 2013). During the same time period, the percentage of defendants charged with drug offenses who were detained pretrial increased from 76 percent to 84 percent, and defendants charged with weapons offenses who were detained pretrial increased from 66 percent to 86 percent (Bureau of Justice Statistics, 2013). Even after excluding immigration cases, from 2006 to 2016, the pretrial detention rate increased from 53 percent to 59 percent.

The rising pretrial detention rates have generated a number of social and fiscal concerns. Significantly, when the 1981 task force report recommended the addition of dangerousness as a consideration, it was with the understanding that defendants ordered detained as a risk of danger would only be detained for a brief period of time under the Speedy Trial Act. The task force specifically stated that this recommendation would not be favorable for systems where defendants may wait one to two years before their trials (US DOJ, 1981).

As of 2016, the average period of detention for a pretrial defendant had reached 255 days, although several districts average over 400 days in pretrial detention (H-9A Table). At an average cost of \$73 per day, 255 days of pretrial detention costs taxpayers an average of \$18,615 per detainee (Supervision, 2013). In contrast, one day of pretrial supervision costs an average of \$7 per day, for an average cost of \$1,785 per defendant across the same 255 days (Supervision, 2013).

There are also significant social costs to the defendant as the result of pretrial detention. Every day that a defendant remains in custody, he or she may lose employment, which in turn may lead to a loss of housing. These financial pressures may create a loss of community ties, and ultimately push a defendant towards relapse and/or new criminal activity (if he was guilty of the charged criminal activity) (Stevenson & Mayson, 2017). Pretrial detention has also been found to correlate with

¹ Senate Report No. 98-225, at 3.

a greater likelihood of receiving a custodial sentence, and one of greater length, than for defendants released on pretrial (Lowenkamp, VanNostrand, & Holsinger, 2013a). This study found that defendants who were detained for the entire pretrial period were 4.44 times more likely to receive a jail sentence and 3.32 times more likely to receive a prison sentence (Lowenkamp, VanNostrand, & Holsinger, 2013a). In addition to making it more likely that a custodial term would be received, never being released pretrial was associated with significantly longer sentences. For those defendants not released pretrial who were later sentenced to jail, their sentences were 2.78 times longer than those of defendants who had been out on bond, and, for defendants sent to prison, sentences were 2.36 times longer (Lowenkamp, VanNostrand, & Holsinger, 2013a).

Another recent study found a relationship between the pretrial detention of low-risk defendants and an increase in their recidivism rates, both during the pretrial phase as well as in the years following case disposition (Lowenkamp, VanNostrand, & Holsinger, 2013b). In this study, low-risk defendants who were held pretrial for two to three days were almost 40 percent more likely to recidivate before trial compared to similarly situated low-risk defendants who were detained for 24 hours or less (Lowenkamp, VanNostrand, & Holsinger, 2013b). When held for 8 to 14 days, low-risk defendants became 51 percent more likely to recidivate within two years of their cases' resolution, and when held for 30 or more days, defendants were 1.74 times more likely to commit a new criminal offense than those detained for 24 hours or less.

The increasing rate of pretrial detention, along with the effects noted above, have prompted growing interest in what factors may be contributing to the detention of low-risk defendants, with a special focus on what has been deemed "unnecessary" detention. In federal bail statute, unnecessary detention occurs when a defendant with a high predicted probability of success is nonetheless detained as a potential risk of danger to the community or nonappearance.²

Among other factors, the statutory presumptions for detention were identified as a potential factor influencing the pretrial release decision. Therefore, the focus of this study was to examine the relationship between the presumption and the pretrial

release decision. Furthermore, the dataset was used to compile descriptive statistics on presumption cases, identify the average risk levels of presumption cases, and determine their release rates compared to release rates for non-presumption cases. Finally, the outcomes of presumption cases were compared to those of non-presumption cases for failures to appear, rearrests, violent rearrests, and technical violations leading to revocations.

Methods

The first step in the three-pronged study was to distinguish presumption cases from non-presumption cases. This process was complicated by the fact that presumption cases are not identified in any existing source, because the U.S. Code does not provide a specific list of citations that would be subject to the presumptions (18 U.S.C. § 3142(e)(2) & (3)). Instead, pretrial services officers have identified presumption cases by experience and the general guidance provided in the statute (e.g., any drug offense with a statutory maximum term of imprisonment of ten years or more).

In order to identify as many presumption cases as possible, a dataset was created containing every pretrial case received from fiscal year 2005 through fiscal year 2015 (N=1,012,874). Next, cases where the defendant was categorized as being in the United States without legal status were excluded from the sample (N lost= 437,022). Defendants without legal status in the United States were removed from the sample, because they are detained in such high numbers based on their lack of legal immigration status that it would not have been clear whether the lack of immigration status or the presumption led to the detention. The resulting dataset consisted of 575,412 defendants. At this point, a manual inspection of the citations was conducted to ascertain exactly which citations were subject to which presumption.

As described above, the Previous Violator Presumption is subject to a number of criteria that must be met before the presumption can apply. In addition, there is significant overlap between the two presumptions, most notably among drug and sex offenses. After I excluded any citation that triggered both presumptions, only 6 percent of all the cases met the initial criteria for the Previous Violator Presumption. Unfortunately, the data needed to identify the exact number of cases under this presumption does not exist, as officers do not record the nature of previous convictions or the specific

dates of any prior convictions. Therefore, it was impossible to determine exactly how many cases may be subject to this presumption, but a conservative estimate is less than 3 percent of all cases. Given the limited number of cases subject to this presumption and the lack of needed data, I focused the rest of the study on the Drug and Firearm Offender Presumption, which is triggered solely by the charge and potential statutory maximums. The manual inspection of the data produced a comprehensive list of citations subject to each presumption, listed in Appendix A.

This process also led to the creation of a sub-category of cases, designated as "wobblers." The wobbler category was created to address an ambiguity in the statute that includes any crime of violence if a firearm was used in the commission of the crime or any sex offense where the victim was a minor (18 U.S.C. § 3142(e)(3)(B) & (E)). Unfortunately, the details of the weapon used or the age of the victim are rarely specified in the citation for the offense. For instance, the citation for assault (18 U.S.C. § 113) does not specify whether the assault was committed with a firearm, vehicle, or a knife. Therefore, the citation itself is not sufficient to know if an assault case is subject to this presumption. As a result, wobblers represent cases, mostly crimes of violence or sex offenses, that may or may not be subject to the presumption, depending on the specific details of the offense.

Once the list of citations that triggered the Drug and Firearm Offender presumption and wobblers had been identified, it was coded into statistical analysis software, creating "presumption" and "wobbler" variables and allowing for the direct comparison of presumption cases to non-presumption cases. After excluding illegal defendants, the final dataset consisted of 568,195 defendants.

The PTRAs and Risk Categories

The Pretrial Risk Assessment Tool (PTRAs) was used to identify defendants' risk level. The PTRAs was developed in 2010 by Christopher Lowenkamp, Ph.D., a nationally recognized expert in risk assessment and community corrections research who was hired by the AO for his extensive experience with actuarial risk assessment. He has presented on the subject of risk assessment at many forums and training events and routinely consults with government agencies and programs.

The primary purpose of the PTRAs tool was to aid officers in making pretrial release recommendations by providing an

² *Guide to Judiciary Policy*, Vol. 8C, § 140.30.

actuarially-based risk category for defendants (Lowenkamp & Whetzel, 2009). Since its implementation in 2010, it has been found to effectively predict pretrial outcomes, specifically defined as failure to appear, suffering a new criminal arrest, and/or engaging in technical violations substantive enough to result in revocation of bond (Cadigan, Johnson, & Lowenkamp, 2012). Additionally, the PTRAs have been validated in all 94 federal districts and found to be valid and predictive in every one (Cadigan, Johnson, & Lowenkamp, 2012).

The PTRAs tool places defendants into one of five categories based on a total score obtained from responses to 11 questions. The total score can range from one to fifteen points. This score, known as the raw score, then corresponds to a risk category with a predicted risk of failure as follows: category 1 defendants are predicted to fail while on pretrial release 3 percent of the time, category 2 defendants have failure rates of 10 percent of the time, category 3 defendants have failure rates of 19 percent, category 4 defendants have failure rates of 29, and category 5 defendants have failure rates of 35 percent. For the purposes of this study, those falling into categories 1 and 2 are considered low-risk defendants, category 3 defendants are considered moderate risk, and categories 4 and 5 defendants are considered high-risk.

Composition of Presumption Cases

As can be seen in Figure 1, between fiscal years 2006 and 2015, the Drug and Firearm presumption was found to have applied to between 42 and 45 percent of cases every year.

When analyzed by risk category, there was a higher proportion of presumption cases among categories 3 to 5 (Figure 2).

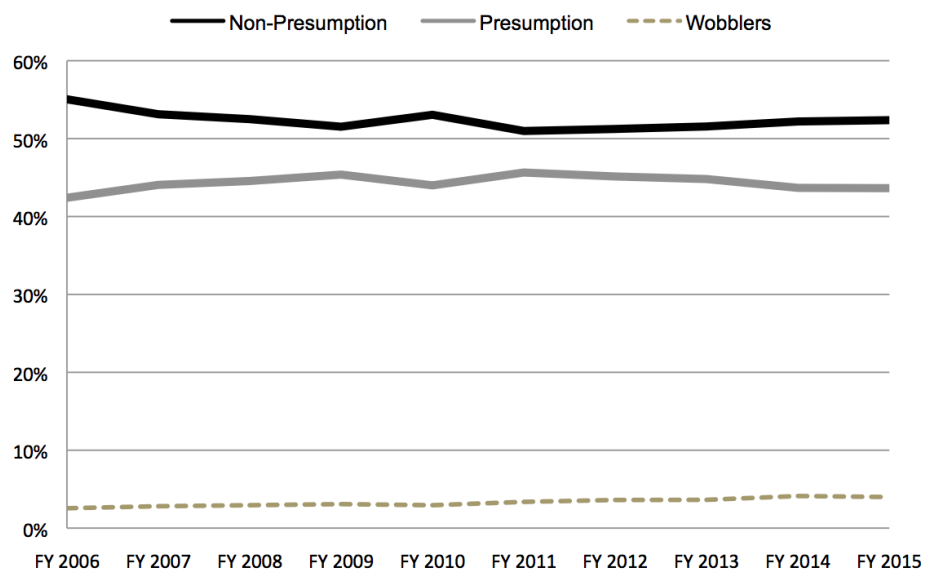
Presumption cases were also compared to non-presumption cases by offense type and PTRAs category (Table 1). Presumption cases accounted for 93 percent of drug offenses; 77 percent of sex offenses, 17 percent of all weapons offenses, and only 2 percent of all violence charges (however, an additional 44 percent of violent offenses were categorized as wobblers).

Interestingly, for weapons and sex offenses, as risk levels increase, fewer and fewer cases are subject to the presumption, indicating that for these charges, the presumption may be targeting lower-risk defendants rather than higher-risk defendants. One potential explanation may be that while all sex offenses

TABLE 1.
Percent of defendants with presumption charge, by offense type and PTRAs category

PTRAs category	Number	Percent of defendants with		
		Non-Presumption	Presumption	Wobblers
Drugs				
One	4,761	14.56%	85.44%	0.00%
Two	15,425	5.90%	94.10%	0.00%
Three	25,449	3.19%	96.81%	0.00%
Four	19,201	2.32%	97.68%	0.00%
Five	8,215	1.83%	98.17%	0.00%
Property				
One	24,996	99.85%	0.09%	0.06%
Two	10,927	99.43%	0.14%	0.43%
Three	6,234	97.53%	0.32%	2.15%
Four	3,106	96.97%	0.32%	2.70%
Five	807	97.15%	0.25%	2.60%
Weapons				
One	978	80.27%	18.71%	1.02%
Two	2,611	76.02%	23.67%	0.31%
Three	6,036	77.62%	22.23%	0.15%
Four	8,140	83.14%	16.72%	0.14%
Five	5,932	87.42%	12.53%	0.05%
Sex				
One	4,394	6.78%	91.94%	1.27%
Two	3,680	16.63%	81.41%	1.96%
Three	2,035	37.15%	60.10%	2.75%
Four	995	53.47%	44.02%	2.51%
Five	203	55.67%	42.36%	1.97%

FIGURE 1.
Percent of defendants charged with presumption or non-presumption case, 2006–2015



against minors (known as Adam Walsh cases) are presumption cases, many defendants charged with these offenses do not have significant prior criminal histories and are usually categorized as low-risk defendants (Cohen & Spidell, 2016). By contrast, a defendant charged with a violent sexual assault is more likely to have a substantial criminal history and a higher risk level, yet, because the victim is an adult, this violent sexual assault may not be categorized as a presumption case (Cohen & Spidell, 2016).

Results

Pretrial Services Recommendations

By statute, a judicial officer (judge) may only consider certain factors in making a release decision. These factors are 1) the nature and circumstances of the offense charged, including whether the offense is violent in nature, a federal crime of terrorism, involves a minor victim, controlled substance, firearm, explosive, or destructive device; 2) the weight of the evidence against the defendant; 3) the history and personal characteristics of the defendant, including his or her character, physical and mental condition, family ties, employment

history, financial condition, community ties, past criminal history, and behavior; and 4) the nature and seriousness of the danger to any person or the community posed by the defendant (18 U.S.C. § 3142(g)).

However, because pretrial services officers are not trained in the rules of evidence, local policy outlined in the *Guide to Judiciary Policy* mandates that they consider all of the above factors except the weight of the evidence and the presence of the presumption.³ Despite pretrial services officers being trained not to consider these factors, anecdotal experience suggests that they are being considered. In order to determine if the presumption was having an effect on pretrial services officers' release recommendations, the recommendations for presumption and non-presumption cases were compared, controlling for risk. If the presumption was not being considered, then the release rates should not differ significantly between the two types of cases. The results, seen in Figure 4, demonstrate that this is not the case.

For category 1 defendants, pretrial services officers recommended release on 93 percent of non-presumption cases, compared to 68 percent of presumption cases. For category 2 defendants, release was recommended on 78 percent of non-presumption cases and 64 percent of presumption cases. By category 3, the differences are reduced, with pretrial services officers recommending release on 53 percent of cases, 30 percent of category 4 defendants and 14 percent of category 5 non-presumption cases, compared to 50 percent, 29 percent, and 13 percent of presumption cases, respectively.

Notably, the largest difference in release recommendations was for category 1 defendants, with a differential of 25 percent. As risk levels increase, the lines converge, until there is virtually no difference between moderate and high-risk defendants. Given pretrial services officers' mandate to recommend alternatives to detention and the fact that they, in theory, consider fewer factors than the judicial officers, it is unclear why their recommendations would be comparable to or lower than the actual release rates ordered by the courts for any of the case types.

Release Rates

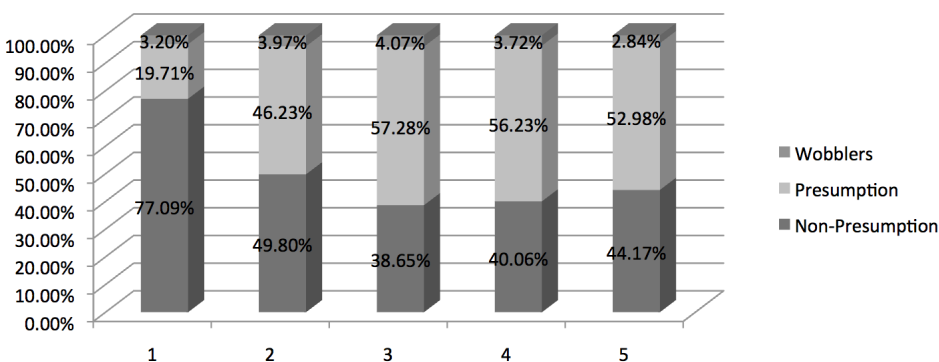
The intended purpose of the presumption was to detain high-risk defendants who were likely to pose a significant risk of danger to the

TABLE 2.
Relationship between presumption case and pretrial violations for all released defendants, by PTR A category

Presumption and PTR A category	Number on release	Percent of released defendants with:			
		Any rearrest	Violent rearrest	FTA	Revocation
One					
Non-presumption	22,879	2.8%	0.4%	0.7%	1.7%
Presumption	4,251	3.7%**	0.5%	0.8%	4.3%***
Two					
Non-presumption	14,211	5.9%	0.9%	1.5%	5.2%
Presumption	8,952	5.3%*	0.7%	1.6%	6.5%***
Three					
Non-presumption	9,116	10.2%	1.8%	2.7%	12.6%
Presumption	11,098	8.7%***	1.2%***	2.5%	12.9%
Four					
Non-presumption	4,029	16.8%	2.7%	3.9%	20.0%
Presumption	5,535	12.2%***	2.0%*	3.1%*	18.1%*
Five					
Non-presumption	1,076	20.8%	4.8%	5.5%	24.1%
Presumption	1,355	16.4%**	3.0%*	4.5%	22.2%

Note: Includes subset of 82,502 defendants with PTR A assessments with cases closed prior to fiscal year 2015. *p<.05; **p<.01; ***p<.001

FIGURE 2.
Composition of risk categories



³ *Guide to Judiciary Policy*, Vol. 8A, § 170.

community if they were released pending trial.⁴ If this purpose were fulfilled, release rates would be higher for low-risk presumption defendants than for high-risk presumption defendants. Additionally, because the presumption can be rebutted if sufficient evidence is presented that the defendant does not pose a risk of nonappearance or danger to the community, we wanted to investigate whether low-risk presumption cases were released at rates similar to low-risk non-presumption cases.

The results can be seen in Figure 3. At the lowest risk level (category 1), non-presumption cases are released 94 percent of the time, while the release rate for presumption cases was only 68 percent. For category 2 defendants, 80 percent of non-presumption cases are released, as opposed to 63 percent of presumption cases. For category 3 defendants, the release rates drop to 57 percent and 50 percent. At the high-risk categories 4 and 5, basically there was no difference in the release rates between presumption and non-presumption cases. For example, the percentage of non-presumption PTR A 4 cases released was 33 percent, while the percentage of PTR A 4 presumption cases released was 32 percent.

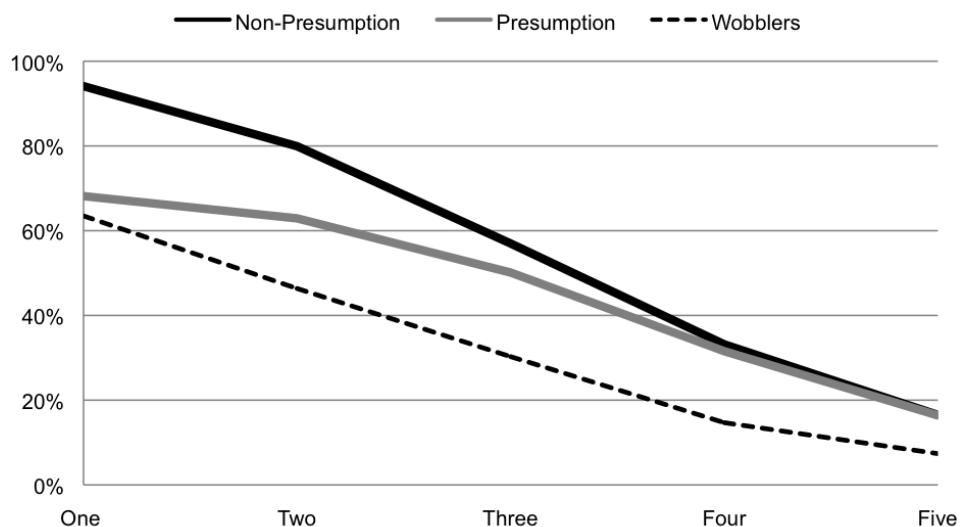
These results were illuminating for several reasons. The most surprising result was that the largest difference in release rates was among the lowest risk defendants, with the differential in release rates disappearing as the risk increases. Notwithstanding the presumption, a PTR A category 1 case represents a defendant with a minimal, if any, criminal history and a stable personal background in terms of employment, residence, education, and substance abuse history. Given the lack of substantive risk factors in these defendants, it seems possible that the presumption is accounting for this difference in release rates. Stated differently, were it not for the existence of the presumption, these defendants might be released at higher rates.

Interestingly, the difference in release rates gets smaller as the risk level increases, until it is virtually identical for high-risk defendants. A category 5 defendant, presumption or non-presumption, will most likely have multiple felony convictions, a history of failures to appear, unstable residence, little or no employment history, and a significant history of substance abuse. These are all legitimate risk factors, and their combined presence makes

TABLE 3.
Presence of pretrial special conditions for presumption and non-presumption cases, by PTR A category

PTR A categories	Number	Percent with conditions	Average number special conditions
All defendants			
Non-presumption	42,601	89.2%	8.5
Presumption	24,412	98.3%***	11.1***
Wobbler	2,325	97.0%***	10.5***
PTR A ones			
Non-presumption	18,648	83.7%	7.5
Presumption	3,204	98.1%***	11.5***
Wobbler	713	96.1%***	9.3***
PTR A twos			
Non-presumption	11,918	90.4%	8.6
Presumption	6,882	98.2%***	10.9***
Wobbler	687	97.5%***	10.5***
PTR A threes			
Non-presumption	7,756	96.4%	9.7
Presumption	8,779	98.4%***	11.1***
Wobbler	651	97.9%	11.3***
PTR A fours			
Non-presumption	3,396	97.0%	10.4
Presumption	4,464	98.4%***	11.2***
Wobbler	219	96.8%	12.1***
PTR A fives			
Non-presumption	883	96.0%	10.4
Presumption	1,083	97.8%*	11.1***
Wobbler	55	94.6%	11.5*

FIGURE 3.
Percent of defendants charged with presumption cases recommended for release pretrial, by PTR A category

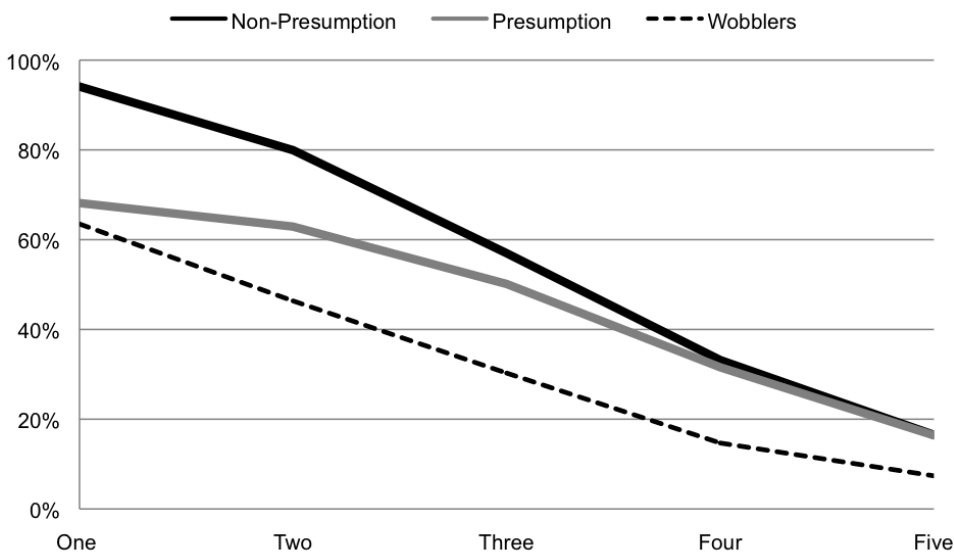


⁴ S. REP. No. 225, *supra* note 2, at 3.

TABLE 4.
Types of pretrial special conditions for presumption and non-presumption cases, by PTRA category

PTRA categories	Types of pretrial special conditions				
	Restriction condition	Monitoring condition	Treatment condition	Education/training or employment condition	Other party guarantees condition
All defendants					
Non-presumption	83.6%	64.6%	39.9%	32.3%	13.6%
Presumption	96.8%	90.5%	68.0%	43.7%	23.3%
Wobbler	95.1%	81.6%	61.9%	32.9%	26.5%
PTRA ones					
Non-presumption	77.4%	50.0%	25.3%	24.2%	9.2%
Presumption	96.6%	86.6%	55.7%	33.3%	18.7%
Wobbler	94.1%	65.1%	41.4%	26.7%	18.8%
PTRA twos					
Non-presumption	84.2%	67.4%	40.3%	34.1%	14.1%
Presumption	96.9%	87.6%	60.8%	43.3%	22.2%
Wobbler	95.9%	83.6%	62.6%	31.2%	25.2%
PTRA threes					
Non-presumption	92.2%	81.6%	57.2%	42.9%	19.2%
Presumption	97.0%	91.7%	71.2%	47.4%	25.0%
Wobbler	95.2%	92.0%	76.8%	38.4%	34.0%
PTRA fours					
Non-presumption	94.0%	89.8%	70.6%	44.0%	21.6%
Presumption	96.5%	94.4%	78.5%	44.8%	24.6%
Wobbler	96.4%	95.9%	80.4%	42.9%	30.6%
PTRA fives					
Non-presumption	92.8%	90.0%	73.5%	42.0%	21.4%
Presumption	95.8%	95.0%	81.4%	41.7%	25.1%
Wobbler	92.7%	89.1%	70.9%	29.1%	38.2%

FIGURE 4.
Percent of defendants released pretrial, by presumption charge



release difficult, with or without the presumption. As such, it appears the presumption is influencing the release decision for the lowest-risk defendants, while having a negligible influence on higher risk defendants.

Outcomes on Pretrial Release

The wide variations in release rates may be justified if presumption cases have substantially worse outcomes than non-presumption cases with regard to failure to appear, rates of rearrest, rates of violent rearrest, and/or technical violations resulting in revocations. In order to accurately measure outcomes, the data for this part of the analysis was limited to cases opened after the implementation of PTRA in 2010 and whose cases had been closed prior to fiscal year 2015, for a total value of 82,502 defendants.

Rates of Rearrest

When analyzing rates of rearrest, I found that category 1 presumption cases were rearrested at slightly higher rates than non-presumption cases; however, presumption rearrest rates were lower than non-presumption rearrest rates for every other risk level⁵ (Table 2). This finding would seem to confirm the belief that the presumption does a poor job of assessing risk, especially compared to the results produced by actuarial risk assessment instruments such as the PTRA.

The risk principle could explain the slightly higher rearrest rates found for lower risk presumption defendants. In essence, the risk principle states that supervision conditions and strategies should be commensurate to a defendant's actual risk. Studies based on the risk principle have found that when low-risk cases are placed on intensive supervision strategies, such as placement in a halfway house, residential drug treatment, or participation in location monitoring, they are more likely to fail (Andrews, Bonta, & Hoge, 1990; Lowenkamp & Latessa, 2004; Lowenkamp, Holsinger, & Latessa, 2006; Lowenkamp, Flores, Holsinger, Makarios, & Latessa, 2010). Existing literature on the risk principle has explained this increased failure rate as the result of intermixing low- and high-risk defendants in the same programs and exposing low-risk defendants to high-risk thought processes and influences (Cohen, Cook, & Lowenkamp, 2016).

In support of this theory, I compared the average number of special conditions for

⁵ The results were all found to be statistically significant at the .05 level.

defendants charged with presumption cases to those not charged with presumption cases, controlling for risk (Table 3). Low-risk cases (Categories 1 & 2) charged with a presumption case received an average of 12 and 11 special conditions, respectively. In contrast, low-risk cases not charged with a presumption averaged 8 and 9 special conditions respectively.

Additionally, the special conditions imposed on presumption cases were substantively more restrictive than those imposed on non-presumption cases (Table 4). Specifically, while only 50 percent of category 1 non-presumption cases were placed on a monitoring condition (such as location monitoring), 87 percent of PTR A 1 presumption cases received a monitoring condition. Furthermore, for

Categories 1 and 2, presumption cases were much more likely to have a third-party guarantee condition (third-party custodian and/or co-signer) compared to low-risk non-presumption cases.

Rates of Violent Rearrest

Since presumption cases are assumed to pose a greater than average risk of danger to the community, their rates for violent rearrest while on supervision were also compared. For low-risk defendants, there was no statistical difference in rates of violent rearrest between presumption and non-presumption cases (see Table 2). However, for moderate and high-risk categories, presumption cases had fewer violent rearrests than non-presumption cases. Again, a possible explanation for this result

is that pretrial officers supervised according to the risk principle, with higher risk presumption cases being adequately placed on intensive supervision strategies.

Technical Revocations

The risk principle also provides an explanation for the rates of revocation for presumption and non-presumption cases. For this study, the revocation rate was defined as a technical violation or series of technical violations that ultimately led to the revocation of bond. For category 1 and 2 defendants, non-presumption cases were revoked at lower rates than presumption cases (1.7 percent compared to 4.3 percent for category 1, and 5.2 percent compared to 6.5 percent for category 2). However, there was no difference in revocation rates for

TABLE 5.
Cost of Pretrial Detention versus Supervision for PTR A Categories 1 and 2 (Excluding Sex Offenses and Illegal Immigration)

Fiscal Year	PTR A 1-2 Presumption Cases	Daily Cost of Incarceration	Daily Cost of Supervision	Average Days Incarcerated	Total Cost of Incarceration	Total Cost of Supervision	Net Savings
2005	1485	62.09	5.7	213	\$19,639,377	\$1,802,939	\$17,836,439
2006	1843	62.73	5.65	222	\$25,665,728	\$2,311,675	\$23,354,054
2007	1853	64.4	5.85	224	\$26,730,637	\$2,428,171	\$24,302,466
2008	1847	66.27	6.09	228	\$27,907,357	\$2,564,596	\$25,342,761
2009	1336	67.79	6.38	231	\$20,921,079	\$1,968,970	\$18,952,109
2010	1161	70.56	6.62	232	\$19,005,477	\$1,783,110	\$17,222,367
2011	1603	72.88	7.35	233	\$27,220,607	\$2,745,218	\$24,475,390
2012	1639	73.03	7.24	237	\$28,367,992	\$2,812,327	\$25,555,665
2013	1499	74.61	7.17	243	\$27,177,215	\$2,611,723	\$24,565,492
2014	1255	76.25	8.98	250	\$23,923,438	\$2,817,475	\$21,105,963
2015	1330	78.77	10.08	255	\$26,714,846	\$3,418,632	\$23,296,214
Totals					\$273,273,753	\$27,264,836	\$246,008,917

TABLE 6.
Cost of Pretrial Detention versus Supervision, PTR A Categories 1-3 (Excluding Sex Offenses and Illegal Immigration)

Fiscal Year	PTR A 1-3 Presumption Cases	Daily Cost of Incarceration	Daily Cost of Supervision	Average Days Incarcerated	Total Cost of Incarceration	Total Cost of Supervision	Net Savings
2005	5051	62.09	5.7	213	\$66,800,334	\$6,132,419	\$60,667,915
2006	6296	62.73	5.65	222	\$87,678,474	\$7,897,073	\$79,781,401
2007	6381	64.4	5.85	224	\$92,049,754	\$8,361,662	\$83,688,091
2008	6250	66.27	6.09	228	\$94,434,750	\$8,678,250	\$85,756,500
2009	6060	67.79	6.38	231	\$94,896,509	\$8,931,107	\$85,965,403
2010	5822	70.56	6.62	232	\$95,305,674	\$8,941,660	\$86,364,014
2011	6024	72.88	7.35	233	\$102,293,785	\$10,316,401	\$91,977,384
2012	5605	73.03	7.24	237	\$97,011,957	\$9,617,507	\$87,394,449
2013	5415	74.61	7.17	243	\$98,175,195	\$9,434,609	\$88,740,587
2014	4521	76.25	8.98	250	\$86,181,563	\$10,149,645	\$76,031,918
2015	4587	78.77	10.08	255	\$92,136,087	\$11,790,425	\$80,345,663
Totals					\$1,006,964,082	\$100,250,759	\$906,713,323

category 3 defendants; for categories 4 and 5, non-presumption cases were *more* likely to be revoked than presumption cases.

Failure to Appear

Finally, rates of failure to appear were compared for presumption and non-presumption cases. Across all of the risk categories, there was no significant difference in rates of failure to appear between presumption and non-presumption cases. For instance, category 1 non-presumption cases failed to appear in 0.7 percent of instances compared to 0.08 percent for category 1 presumption cases. The same trend was found at the highest risk category, where non-presumption cases failed to appear in 5.5 percent of instances, compared to 4.5 percent for presumption cases.

In sum, high-risk presumption cases were found to pose no greater risk (or in some cases, less risk) than high-risk non-presumption cases of being rearrested for any offense, rearrested for a violent offense, failing to appear, or being revoked for technical violations. At the lower risk categories, presumption cases were more likely than non-presumption cases to be rearrested for any offense or be revoked for a technical violation, both of which are likely the result of the misapplication of the risk principle in supervision. Even for categories where presumption cases fared worse than non-presumption cases, the outcomes did not vary significantly enough to justify a presumption for detention.

Discussion

The presumption was instituted by Congress to address the perceived risk of danger to the community posed by defendants charged with certain serious offenses and only after a judicial officer makes a finding of dangerousness by the “clear and convincing” standard (US DOJ, 1981). Additionally, it was clear that defendants detained as a potential danger should only be detained for the relatively short period of time—70 days—defined by the Speedy Trial Act (US DOJ, 1981).

Despite these caveats and precautions, there has been little research into whether these goals have been met. This study represents an initial attempt to do so by first defining the citations subject to the presumption as comprehensively as possible. This study found that, when clearly defined, the presumption focuses primarily on drug offenses and excludes the majority of violent, sex, or weapons-related offenses. The rise in federal drug prosecutions in the last decade

means that at least 42 percent of all federal cases in any given year are now subject to the presumption. This has led to a drastic rise in the number of defendants detained in federal court, reaching as high as 59 percent in the latest fiscal year, after excluding immigration cases (Table H-14A). Compounding the matter is the lengthening average term of pretrial detention, which currently ranges from 111 days to as high as 852 days, with a national average of 255 days. Even the lowest average, 111 days, is significantly above the threshold set by the Speedy Trial Act and is counter to the intended purpose of the 1981 Task Force.

Furthermore, the effect of the presumption on actual release rates and on the recommendations of pretrial services officers was most significant for low-risk defendants (meaning there may be some level of unnecessary detention), while having a negligible effect on the highest risk defendants. Additionally, the presumption has failed to correctly identify defendants who are most likely to be rearrested for any offense, rearrested for a violent offense, fail to appear, or be revoked for technical violations. In the limited instances where defendants charged with a presumption demonstrated worse outcomes than non-presumption cases, the differences were not significant and were most likely caused by the system’s failure to address these defendants appropriately under the risk principle.

These results lead to the conclusion that the presumption was a poorly defined attempt to identify high-risk defendants based primarily on their charge, relying on the belief that a defendant’s charge was a good proxy for that defendant’s risk. In the years since the passage of the Bail Reform Act of 1984, there have been huge advances in the creation of scientifically-based risk assessment methods and tools, such as the PTRR. This study finds that these tools are much more nuanced and effective at identifying high-risk defendants.

Cost of the Presumption

According to our estimates, after excluding defendants charged with a sex offense and those without legal status in the United States, the detention of low-risk defendants charged in a presumption case has cost taxpayers an estimated \$246 million dollars in the last 10 years alone (Table 5).

When moderate risk defendants are added to these calculations, the number rises to \$1 billion in costs across the last ten years (Table 6).

Aside from the fiscal cost of pretrial detention, one should not lose sight of the high social costs of pretrial detention on an entire community. Recent research has demonstrated that for low-risk defendants, as defined by actuarial risk assessment and not charge, every day in pretrial detention is correlated with an increased risk of recidivism (Lowenkamp, VanNostrand, & Holsinger, 2013). Low-risk defendants experiencing even a two- to three-day period of pretrial detention are 1.39 times more likely to recidivate than low-risk defendants released at their initial appearance ((Lowenkamp, VanNostrand, & Holsinger, 2013). When held for 31 days or longer, they are 1.74 times more likely to recidivate than similarly situated defendants who are not detained pretrial.

The first finding is especially concerning when considering that the federal bail statute allows the government to move for a formal detention hearing up to three days after the initial appearance in any case involving a serious risk that the defendant will flee, a crime of violence, a charge under the Adam Walsh Act, any charge where the statutory maximum term of imprisonment is life or death, any offense where the statutory maximum term of imprisonment is 10 years or more, any felony if the defendant has two prior felony convictions in the above-noted categories, any felony that involves a minor victim or the possession a weapon, or a charge for failing to register as a sex offender (18 U.S.C. § 3142(f)). Given the wide array of charges that qualify for a detention hearing, it is not unusual for a low-risk defendant to be detained for at least three days, which in and of itself is associated with a substantial increase in the odds of recidivating.

The second finding is equally serious when viewed from the context of low-risk presumption cases. As noted above, thousands of low-risk presumption cases are detained every year for an average of 255 days, making them almost twice as likely to recidivate as defendants who are released pretrial. Once a defendant recidivates, the cycle of incarceration begins all over again, with the defendant being even less likely to be released on bond.

Recommendations

The presumption was written into federal statute to address the potential risk of danger and nonappearance posed by certain defendants, particularly defendants charged with drug offenses. Nonetheless, this study suggests the presumption is overly broad. Therefore,

my primary recommendation is to ask the Judicial Conference, through its Committee on Criminal Law, to consider whether to seek a legislative change tailoring the presumption to those defendants who truly should be presumed to be a danger or risk of nonappearance. This can be accomplished by adding qualifiers to the existing statute, limiting the application of the presumption to those defendants who have a demonstrated history of violence and who research suggests pose the greatest risk.

Additionally, the Administrative Office of the U.S. Courts (AO) could explore means of educating all pretrial services and probation officers to 1) identify the effect the presumption is having on their recommendations and 2) address ways to limit this effect.

One such way to limit the unintended effect of the presumption on pretrial services officers' recommendations could be to expand the AO's Detention Outreach Reduction Program (DROP). The DROP program, created in February 2015, is a two-day, in-district program in which a representative from the Administrative Office visits a district working to reduce unnecessary detention. It includes a full-day training session for pretrial services officers and their management team on the PTRA and its role in guiding pretrial services officers' recommendations prior to the judicial decision. It also includes a briefer presentation to any interested stakeholders, such as magistrate and district judges, assistant United States attorneys, and federal public defenders.

In addition, more information regarding the effect of the presumption could be shared with pretrial services offices and judges through official notifications, communications, and trainings held for new unit executives and new judges.

Finally, districts that currently demonstrate the highest release rates for presumption cases could be encouraged to share with other districts the approaches to modifying their court culture that they have found successful.

In sum, the presumption was created with the best intentions: detaining the "worst of the worst" defendants who clearly posed a significant risk of danger to the community by clear and convincing evidence. Unfortunately, it has become an almost de facto detention order for almost half of all federal cases. Hence, the presumption has contributed to a massive increase in the federal pretrial detention rate, with all of the social and economic costs associated with high rates of incarceration. Clearly, the time has arrived for a significant

assessment of the federal pretrial system, followed by modifications to reduce the overdetention of low-risk defendants, the impact of pretrial incarceration on the community, and the significant burden of pretrial detention on taxpayers, while ensuring that released defendants appear in court as required and do not pose a danger to the community while released.

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Appendix A

Drug and Firearm

Presumption Fact Sheet:

ANY drug case charged as an A, B, or C

Felony, most often:

21:841

21:846

21:849

21:856

21:858

21:859

21:860

21:952

21:953

21:959

21:960

21:962

21:963

Any firearms case where the firearm was possessed or used in furtherance of a drug crime or a crime of violence:

18:924c

Conspiracy to Kill, Kidnap, Maim, or Injure Persons in a foreign country

Conspiracy must have taken place in the jurisdiction of the United States but the act is to be committed in any place outside the United States

18:956(a)

Attempt or Conspiracy to Commit Murder:

18:2332(b)

Acts of Terrorism Transcending National Boundaries charged as an A, B, or C Felony:

18:2332b(g)(5)(B)

18:1030(a)(1)

18:1030(a)(5)(A)

18:1114

18:1116

18:1203

18:1361

18:1362

18:1363

18:1366(a)

18:1751(a), (b), (c), (d)

18:175b

18:175c

18:1992

18:2155

18:2156

18:2280

18:2280a

18:2281

18:2281a

18:229

18:2332

18:2332(a), (b), (f), (g), (h), (i)

18:2339

18:2339(a), (b), (c), (d)

18:2340A

18:32

18:351(a), (b), (c), (d)

18:37

18:81

18:831

18:832

18:842(m), (n)

18:844(f)(2), (f)(3)

18:844(i)

18:930(c),

18:956(a)(1)

21:1010A

42:2122

42:2284

49:46502

49:46504

49:46505(b)(3)

49:46505(c),

49:46506

49:60123(b)

Peonage, Slavery, and Trafficking in Persons with a potential maximum of 20 years or more:

18:1581

18:1583

18:1584

18:1589

18:1590

18:1591

18:1594

Any of the following offenses only if a **minor** victim is involved:

18:1201

18:1591

18:2241

18:2242

18:2244(a)(1)

18:2245

18:2251

18: 2251A

18: 2252(a)(1)

18: 2252(a)(2)

18:2252(a)(3)

18:2252A(a)(1)

18: 2252A(a)(2)

18:2252A(a)(4)

18:2260

18:2421

18:2422b

18:2423

18:2425

Disclosures:

List is **not** mutually exclusive, but includes the most frequently charged citations that trigger this presumption.

Most crimes of violence only trigger this presumption if a firearm was used in the commission of the crime. Otherwise, this presumption does NOT apply (see the Previous Violator Presumption).

Previous Violator Presumption Fact Sheet:

This presumption is triggered only after numerous qualifiers have been met. See the attached flow chart to determine if a defendant qualifies under this presumption.

Many of the charges that fall under this presumption also fall under the Drug and Firearm Offender Presumption, which does not require any additional qualification. These charges have been **bolded**.

Citations for initial qualification:

Any Crime of Violence charged as an A, B, or C Felony including :

8:1324 (if results in death or serious bodily injury)

18:111(b)

18:1111

18:112(a)

18:1112

18:113(a)(1), (a)(2), (a)(3), (a)(6), (a)(8)

18:1113

18:114

18:1114

18:115

18:1116

18:117

18:1117

18:1118

18:1153

18:1201

18:1203

18:1503

18:1512

18:1513

18:1581

18:1583

18:1584

18:1589

18:1590

18:1591

18:1594(c)

18:1791(d)(1)(C)

18:1791(d)(1)(A)

18:1792

18:1841

18:1951

18:1952	18:2339	Failure to Register as a Sex Offender
18:1958	18:2339(a), (b), (c), (d)	18:2250
18:1959	18:2340A	
18:2111	18:32	ANY felony with a potential sentence of life or death
18:2113	18:351(a), (b), (c), (d)	
18:2114(a)	18:37	
18:2118	18:81	ANY felony if the defendant has at least two prior felony convictions for one of the above-noted offenses, at the federal, state, or local level.
18:2119	18:831	
18:2241	18:832	
18:2242	18:842(m), (n)	
18:2243	18:844(f)(2), (f)(3)	
18:2244	18:844(i)	
18:2261	18:930(c),	
18:2262	18:956(a)(1)	
18:241	21:1010A	
18:242	42:2111	
18:2422	42:2284	
18:2426	49:46502	
18:245 (b)	49:46504	
18:247(a)(2)	49:46505(b)(3)	
18:249	49:46505(c),	
18:36	49:46506	
18:372	49:60123(b)	
18:373		
18:871		ANY drug case charged as an A, B, or C
18:872		Felony, most often:
18:875	21:841	
18:876	21:846	
18:892	21:849	
18:894	21:856	
21:675	21:858	
42:3631	21:859	
	21:860	
Acts of Terrorism Transcending National Boundaries charged as an A, B, or C Felony:	21:952	
18:2332b(g)(5)(B)	21:953	
18:1030(a)(1)	21:959	
18:1030(a)(5)(A)	21:960	
18:1114	21:962	
18:1116	21:963	
18:1203		Any felony involving a minor victim not previously mentioned:
18:1361		18:1461
18:1362		18:1462
18:1363		18:1465
18:1366(a)		18:1466
18:1751(a), (b), (c), (d)		18:1470
18:175b		
18:175c		
18:1992		Any felony involving the possession or use of a firearm or destructive device:
18:2155		18:844
18:2156		18:921
18:2280		18:922
18:2280a		18:924
18:2281		18:930
18:2281a		26:5845
18:229		26:5861
18:2332		
18:2332(a), (b), (f), (g), (h), (i)		

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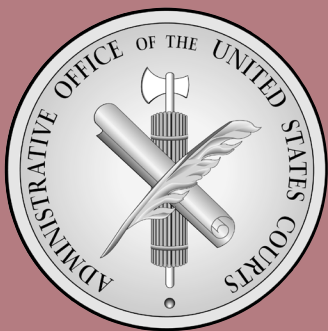
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