

## LESSONS FROM THIRTY YEARS AGO

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On October 29, 1985, seven members of a newly established federal agency met to do what had never been done before: to create a set of national sentencing policies and practices that would apply to federal criminal cases throughout the country.<sup>1</sup> Their task was enormous and their time limited—with only eighteen months to develop what became known as the Federal Sentencing Guidelines.<sup>2</sup> On April 13, 1987, the United States Sentencing Commission, by a vote of six to one, promulgated the first Guidelines Manual.<sup>3</sup> What was the decision-making process? What ideas failed and which ones carried the day? Which Commissioners and Commission staff can be credited for particular aspects of the Guidelines Manual? In short, how did the original Commission develop the original Federal Sentencing Guidelines?

The Article that follows offers detailed responses to these questions.<sup>4</sup> Its authors, two members of the Commission's staff—Brent

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1. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 5-6 (1988).

2. *Id.*

3. *Id.* at 6; U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 1987, amended 2016); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 922 (1990).

4. See generally Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United*

E. Newton and Dawinder (“Dave”) S. Sidhu—have engaged in extensive research about the deliberative process and key policy decisions of the original Commission.<sup>5</sup> Their Article does not purport to offer a definitive historical account of the original Commission, but it does expand substantially upon the existing scholarship and offers new insights into the groundbreaking work of the original Commission.<sup>6</sup> It does so by drawing on a wide variety of historical sources, many of them not publicly available.<sup>7</sup> They have reviewed thousands of pages of records, including the original Commission’s meeting minutes, transcripts of its public hearings, its correspondence with outside parties, its internal memoranda, and data analyses.<sup>8</sup> They also have compared the different iterations of draft guidelines prepared during the first eighteen months of the Commission’s existence, which culminated in the promulgation of the original Guidelines Manual in 1987.<sup>9</sup> Finally, their Article has the benefit of oral histories of some of the original Commissioners (Judge William Wilkins, Justice Stephen Breyer, Judge George MacKinnon, and Commissioner Ilene Nagel) and a key original staff member (General Counsel and future Commissioner John Steer), which were recorded in the 1990s.<sup>10</sup>

Examining the original Commission’s work is not simply a matter of academic historical interest. Both the current Commission and some members of Congress recently have shown a desire to achieve a new round of “sentencing reform” at the federal level<sup>11</sup>—in part in response to the fact that the federal incarceration rate (in relation to the general

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*States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167 (2017) (discussing the ideas and the process behind the creation of the original Federal Sentencing Guidelines).

5. *Id.* at 1221-1300.

6. *See generally id.* (discussing the importance and groundbreaking effects of the work of the original Commission). Although some of the original Commissioners and staff members have written about the early years of the Commission, there is no single historical account of all of the key policy decisions of the original Commission. *See, e.g.*, Breyer, *supra* note 1, at 2-31; Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 FED. SENT’G REP. 192, 193-96 (1997); Nagel, *supra* note 3, at 913-32; Paul H. Robinson, *A Sentencing System for the 21st Century?*, 66 TEX. L. REV. 1, 14-41 (1987); William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 573-83 (1992).

7. *See generally* Newton & Sidhu, *supra* note 4.

8. *See generally id.*

9. *Id.* at 1199-1209.

10. *See id.* at 1188-91.

11. *See, e.g.*, Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (proposing significantly lower statutory mandatory minimums for federal drug-trafficking offenses); Proposed Priorities for Amendment Cycle, 81 Fed. Reg. 37,241, 37,241 (June 9, 2016) (noting the Commission’s intent to “continu[e] . . . its multi-year examination of the overall structure of the guidelines post-Booker, possibly including recommendations to Congress on any statutory changes and development of any guideline amendments that may be appropriate”).

population) has tripled since the mid-1980s,<sup>12</sup> while the crime rate has declined during the same period.<sup>13</sup> As the guidelines have grown increasingly complex,<sup>14</sup> and sentences more severe, there has been bipartisan interest in structural reform and simplification.<sup>15</sup> Finally, there is a renewed focus on rehabilitation and promoting alternatives to incarceration.<sup>16</sup> All of these trends may lead to revamping a guidelines system that was designed before the Supreme Court, in 2005, rendered the formerly “mandatory” guidelines as “advisory” only.<sup>17</sup> Charting the

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12. In 1987, the federal prison population was around 50,000 and the total population in the United States was around 242 million—meaning .02% of the U.S. population was incarcerated in federal prison. See *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, U.S. CENSUS BUREAU, (June 28, 2000) <https://www.census.gov/population/estimates/nation/popclockest.txt>; *Statistics*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) (last updated July 27, 2017, 12:00 AM). By the end of 2016, the federal prison population was around 190,000, and the total U.S. population was around 325 million—meaning .06% of the U.S. population was incarcerated in federal prison. See *Statistics, supra*; *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <https://www.census.gov/popclock/> (last visited Aug. 1, 2017).

13. See JUSTICE RESEARCH & STATISTICS ASS’N, U.S. DEP’T OF JUSTICE, CRIME AND JUSTICE ATLAS 2000, at 36-37 (2000), [http://www.jrsa.org/projects/Crime\\_Atlas\\_2000.pdf](http://www.jrsa.org/projects/Crime_Atlas_2000.pdf) (showing the declining crime rate during the 1990s); *2014 Crime in the United States: Table 1*, FED. BUREAU OF INVESTIGATION: UNIFORM CRIME REPORTING, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1> (last visited Aug. 1, 2017) (showing declining crime rates from 1996 through 2014).

14. See William H. Pryor, Jr., U.S. Court of Appeals & U.S. Sentencing Comm’n, Returning to Marvin Frankel’s First Principles in Federal Sentencing 8 (2016), [https://www.ali.org/media/filer\\_public/9a/e3/9ae3b6aa-3d91-41ae-84a1-b23cf3d05d30/pryor-remarks.pdf](https://www.ali.org/media/filer_public/9a/e3/9ae3b6aa-3d91-41ae-84a1-b23cf3d05d30/pryor-remarks.pdf) (“The 1987 [Guidelines] Manual was 268 pages (without appendices). By 1992, . . . the Manual was 393 pages. By 2005, . . . the Manual had grown to 514 pages. It’s currently 542 pages—twice as long as in 1987.”).

15. See, e.g., Proposed Priorities for Amendment Cycle, 81 Fed. Reg. at 37,241 (“[T]he Commission intends to study possible approaches to (A) simplify the operation of the guidelines, promote proportionality, and reduce sentencing disparities; and (B) appropriately account for the defendant’s role, culpability, and relevant conduct.”); Constitution Project Sentencing Initiative, *The Constitution Project Sentencing Initiative Recommendations for Federal Criminal Sentencing in a Post-Booker World*, 18 FED. SENT’G REP. 310, 312-17 (2006) (advocating for a simpler Federal Sentencing Guidelines system); Pryor, *supra* note 14, at 14-21 (same); 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, 337-56 (2011) (same).

16. See, e.g., Proposed Priorities for Amendment Cycle, 81 Fed. Reg. at 37,241 (noting the Commission’s intent to “[c]ontinu[e] . . . its study of approaches to encourage the use of alternatives to incarceration”); U.S. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 4 (2013), <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> (“Incarceration is not the answer in every criminal case. Across the nation, no fewer than 17 states have shifted resources away from prison construction in favor of treatment and supervision as a better means of reducing recidivism. . . . Federal law enforcement should encourage this approach. In appropriate instances involving non-violent offenses, prosecutors ought to consider alternatives to incarceration, such as drug courts, specialty courts, or other diversion programs.”).

17. *United States v. Booker*, 543 U.S. 220, 245-49 (2005).

course for the future is best accomplished by having a sufficient understanding of the past.

Accordingly, on the thirtieth anniversary of the Federal Sentencing Guidelines—under which 1.7 million offenders have been sentenced since 1987<sup>18</sup>—it is an appropriate time to look back at the work of the original Commission that created the first Guidelines Manual. This review will aid not only those seeking to understand the key policy decisions of the Commission, which are still largely intact today, but those who seek to improve upon those decisions and tailor federal sentencing to evolving legal and social circumstances. Simply put, this Article is a must-read for anyone who works, or has an interest, in federal sentencing policy.

A note on the relationship between the Commission and the authors concerning their Article: The Commission supported the authors' inquiries into the original Commission's work, but the authors proceeded with their project unconstrained by any institutional preferences, expectations, or specific directions from Commissioners. In other words, they exercised independence in preparing this Article. While the authors have endeavored to develop a descriptive, objective treatment of the original Commission's efforts, choices as to form and substance necessarily had to be made and certain inferences necessarily had to be drawn from the historical materials. These choices were made by, and should be attributed solely to, the authors.

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18. As of September 30, 2016, 1,696,962 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, QUARTERLY DATA REPORT: 4TH QUARTER RELEASE 2 (2016), [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC\\_Quarter\\_Report\\_4th\\_16\\_Final.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/quarterly-sentencing-updates/USSC_Quarter_Report_4th_16_Final.pdf) (including caseload data from October 1, 2015, through September 30, 2016). The authors reached that figure upon compiling the data provided in the United States Sentencing Commission's 1996 to 2015 editions of the *Sourcebook of Federal Sentencing Statistics*, as well as *Annual Reports* and *Quarterly Data Reports*.