The History of the Original United States Sentencing Commission, 1985-1987

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I. INTRODUCTION

An eighteen-month period from the fall of 1985 to the spring of 1987 witnessed the most significant change to the federal criminal justice system in American history. In those eighteen months, the United States Sentencing Commission ("Commission"), a new and novel independent agency in the federal judicial branch, developed sentencing guidelines for all federal judges during the same period when Congress

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was enacting new mandatory minimum statutory penalties that dramatically increased existing penalties for drug trafficking and firearms offenses. This Article describes this founding era of structured federal sentencing, beginning with the Commission’s first meeting and ending with the transmittal of the initial Guidelines Manual to Congress on April 13, 1987, for its 180-day review period. As the guidelines remain the “lodestone” of federal sentencing thirty years later, and as improving the criminal justice system continues to be an important national bipartisan aspiration, a thorough exploration of the history of the original Commission is both timely and important.

Parts II and III of this Article discuss the historical context in which the Commission was created, the key players (Commissioners and staff) during the Commission’s first eighteen months, and the initial challenges facing the Commission. Part IV examines several of the key policy decisions of the original Commission that are reflected in the Guidelines Manual and that still largely govern federal sentencing today, albeit in an “advisory” rather than a “mandatory” guidelines system. Finally, Part V offers some conclusions about the work of the original Commission.

2. See infra notes 91-93, 698-700 and accompanying text (discussing the Anti-Drug Abuse Act of 1986 and other federal penal statutes enacted by Congress in the 1980s).


6. See infra Parts II–III.

7. See infra Part IV. Although Congress created a “mandatory” guidelines system in the Sentencing Reform Act of 1984, the Supreme Court in 2005 held that such a system was unconstitutional and, as a remedy, rendered the guidelines “advisory.” United States v. Booker, 543 U.S. 220, 246-47 (2005); see infra note 116 and accompanying text. The advisory guidelines nevertheless continue to anchor federal sentencing determinations. See Peugh, 133 S. Ct. at 2087-88.

8. See infra Part V.
II. HISTORICAL CONTEXT

As discussed below, the Sentencing Reform Act of 1984 ("SRA")\(^9\) ushered in the profound changes to the federal criminal justice system implemented by the Commission from October 1985 through April 1987.\(^{10}\) A basic understanding of the federal sentencing system before the SRA is necessary to appreciate the dramatic changes in the legal landscape resulting from the original Commission’s policy decisions that implemented the many directives in the SRA. To put the original Commission’s work into perspective, it is also important to understand both the crime and recidivism rates, and the prevailing negative attitude toward rehabilitation, in the mid-1980s. Finally, an appreciation of the SRA—including its extremely detailed legislative history—is necessary to understand the history of the original Commission, insofar as it compelled many of the original Commission’s policy decisions.

A. Federal Sentencing Before the Sentencing Reform Act of 1984

1. Unregulated State of Federal Sentencing

At the time that the SRA was enacted, the federal sentencing system was almost entirely unregulated: judges sentenced without any legal constraints other than broad statutory penalty ranges (e.g., from probation to twenty years of imprisonment for bank robbery),\(^{11}\) and there was virtually no appellate review of the sentences imposed.\(^{12}\) Federal prosecutors also had broad discretion to bring whatever criminal charges that they saw fit, and frequently entered into lenient plea bargains with defendants that did not reflect the seriousness of their offenses.\(^{13}\) At


\(^{10}\) See infra Part II.D.


\(^{12}\) See, e.g., Dorszynski v. United States, 418 U.S. 424, 431 (1974) ("[T]he general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.").

\(^{13}\) See, e.g., ELMER B. STAATS, U.S. ATTORNEYS DO NOT PROSECUTE MANY SUSPECTED VIOLATORS OF FEDERAL LAWS 13-14 (G.A.O. 1978) (noting that "U.S. attorneys have considerable latitude in determining their prosecutive priorities through the exercise of prosecutive discretion," that the "Department of Justice does not exercise control over this discretion" and "has not provided prosecutors with policy or guidelines to be used as a framework to mold prosecutive discretion," and that as a result, "[p]rosecutive priorities and guidelines are established by individual U.S. attorneys"); Stephen J. Schulhofer & Ilene H. Nagel, Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 AM. CRIM. L. REV. 231, 252-53 (1989) (observing that the DOJ’s handbook on prosecutorial plea practices, issued the same day as the initial Guidelines, "may have stemmed more from a desire to curb undue leniency than from a fervor for equal treatment").
sentencing hearings, there were no limitations on what evidence was relevant to the court’s sentencing decision.\footnote{14} Once federal district judges decided upon a sentence, they were not required to give any reasons for the particular sentences that they imposed.\footnote{15}

In addition to the broad prosecutorial and judicial discretion that characterized federal sentencing at the “front-end” of the process, defendants’ sentencing exposure was, at the “back-end,” subject to the intervening actions of two executive branch agencies: the United States Parole Commission, which typically released prisoners early on parole; and the Federal Bureau of Prisons (“BOP”), which applied a complex set of rules concerning “good time allowance.”\footnote{16} The two agencies acted independently from federal prosecutors and district judges. As the result of parole and good time allowances, many federal prisoners were released well before the expiration of the sentences of imprisonment imposed by federal district courts.\footnote{17}

a. Good Time Allowances Awarded by the Federal Bureau of Prisons

Before the SRA, federal prisoners were able to earn good time allowances that significantly reduced the length of time served relative to the terms of imprisonment imposed by federal district courts. The reductions depended not only on an inmate’s good behavior, but also on the length of the sentence imposed—ranging from reductions of up to five days per month (or \(17\%\)) for sentences less than one year to ten days per month (or \(33\%\)) for sentences of ten years or more.\footnote{18} In addition to such regular good time allowances, prisoners could earn additional good time allowances—of up to five days per month or even more for “exceptionally meritorious service”—by working in a prison industry or camp.\footnote{19} As a result, for some prisoners, good time allowances resulted in their service of less than half of the sentences imposed by the district.

\footnote{14} See, e.g., Wasman v. United States, 468 U.S. 559, 563-64 (1984) (citing Williams v. New York, 337 U.S. 241 (1949)) (“It is now well established that a judge . . . is to be accorded very wide discretion in determining an appropriate sentence. The sentencing court or jury must be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed.”).

\footnote{15} See United States v. Bazzano, 570 F.2d 1120, 1133-37 (3d Cir. 1977) (Adams, J., concurring) (contending that a federal district court should disclose its reasons for imposing a particular sentence but recognizing that there was no such requirement in the federal system).

\footnote{16} See infra Part II.A.1.a.

\footnote{17} See infra Part II.A.1.a.


\footnote{19} Id. § 4162.
In 1983, Congress found that the good time allowances resulted in unpredictable and disparate sentences, and subsequently, in the SRA, Congress restricted good time allowances to only 15% of a federal prisoner’s sentence of more than one year while providing no good time credit for sentences of less than one year.

b. Early Release on Parole

Parole operated independently from early release based on good time allowances. In the decades before the SRA, the Parole Commission reviewed prison sentences of federal offenders that exceeded one year and decided whether to exercise its discretion to release them from prison at some point before the expiration of the sentences imposed by federal district courts. By statute, most federal prisoners became eligible to be paroled after they had served one-third of the prison sentence imposed by a federal district court. Such early release on parole was an integral part of the former “indeterminate” sentencing system based on the theory that prison rehabilitated offenders, thus allowing their reentry into the community well before the expiration of the term of imprisonment imposed by a sentencing judge.

In 1976, in order to reduce arbitrariness and disparities in the granting of parole, Congress directed the Parole Commission to create its own set of guidelines to follow in deciding whether to release eligible prisoners on parole. The parole guidelines, which were drafted by

20. See James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 218 (1982) ("[P]rison officials ... typically hold the discretionary authority to award ‘good time’ credits which can reduce a sentence by one-third to one-half and sometimes more.").

21. S. REP. NO. 98-225, at 49 (1983) ("Even in those cases where the [Parole] Commission can adjust court-imposed sentences in order to bring the actual prison terms in line with those for similarly situated offenders across the country, the actual terms to be served are subject continually to the ‘good time’ adjustments by the BOP and to counter-adjustments by the Parole Commission. Thus, prisoners often do not really know how long they will spend in prison until the very day they are released."). The Senate Report has been referred to as “the central document in the legislative history of the Sentencing Reform Act.” Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 425 (1992).


future Sentencing Commission staff member Peter Hoffman, then-Research Director at the Parole Commission, were relatively simple in nature compared to the federal sentencing guidelines that would be created later. Similar to the eventual sentencing guidelines, the parole release guidelines had a sentencing grid with two axes—a vertical axis, with eight categories, accounting for “severity of offense behavior”; and a horizontal axis, with four categories, accounting for an offender’s “parole prognosis” that was focused primarily on the offender’s criminal history. The parole guidelines’ thirty-two-cell grid, which appears as Appendix A, contained different sentencing ranges (in months) based on the intersection of the offense severity category and the “Salient Factor Score” (“SFS”).

In four-fifths—about 80%—of all cases, the Parole Commission’s decision about when to release a prisoner on parole was ordinarily based on the applicable range in the grid. In the rest of the cases, the Parole Commission determined that there was a case-specific reason to depart from the applicable range. Prisoners also could serve longer sentences if they had engaged in misconduct in prison, or if the top end of the parole guideline range was below the minimum one-third of the district court’s sentence imposed. Although sentencing judges were free to recommend to the Parole Commission when it should release prisoners on parole, the Parole Commission was not bound by those recommendations and typically followed its own guidelines—even if it meant that the actual sentence served was well below what a sentencing court intended.
The parole guidelines addressed all federal offense types that were then common and, based on various aggravating and mitigating factors associated with the different offense types, assigned different offense severity categories. In determining which offense severity category applied to a federal prisoner, the Parole Commission considered an offender’s “‘real offense’ conduct”—as set forth in the presentence report—and not simply the elements of his offense of conviction. For example, under the parole guidelines, a federal offender who was convicted of theft of government property exceeding $100, potentially could fall into categories one through six of the guidelines’ grid depending on the value of the stolen property, which was not an element of the offense (other than being in excess of $100).

Despite Congress’s intent to reduce disparities through the creation of parole guidelines, the interplay between a district judge’s original sentencing decision and the Parole Commission’s application of its guidelines injected arbitrariness into the sentencing process. At the forefront of the mind of a district judge at a typical sentencing hearing was the knowledge that the Parole Commission would very likely release the defendant well before the expiration of the term of imprisonment imposed by the judge—usually after the defendant had served only one-third of his sentence. As a result, some judges would

36. See 28 C.F.R. § 2.20 (1986). For instance, murder was always in Category Eight, assault ranged from categories two through seven depending on the circumstances, and theft ranged from categories one through six depending on the circumstances. Id. § 2.20, ch. 2.

37. Id. § 2.19(c) (“The Commission may take into account any substantial information available to it in establishing the prisoner’s offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability.”); see also U.S. SENT. COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 25 (1987) [hereinafter SUPPLEMENTARY REPORT] (noting that the parole guidelines adopt the “‘real offense’ conduct” approach).

38. 18 U.S.C. § 641 (1982), amended by 18 U.S.C. § 641 (2000). Theft of property not more than $100 carried a maximum sentence of imprisonment of one year, while theft of property exceeding $100 carried a maximum sentence of ten years of imprisonment. Id.

39. See 28 C.F.R. § 2.20, ch. 3 (for example offenses involving stolen property exceeding $500,000 in value fell within category six, while offenses involving stolen property of a value less than $2000 fell within category one, with other gradations for loss amounts in between).

40. S. REP. No. 98-225, at 46 & n.155 (1983) (“The presentence report informs the sentencing judge as to probable application of the parole guidelines in each case. . . . It is probable that some judges, believing that the parole date specified in the [parole] guidelines is reasonable, impose sentences to imprisonment that assure the parole eligibility during the guideline range applicable in
adjust the length of the prison sentence that they otherwise were inclined to impose in order to account for the Parole Commission’s application of its guidelines.\textsuperscript{41} However, such predictions by district judges could be inaccurate and, as a result, offenders sometimes served significantly less or more time than what the district judges had intended.\textsuperscript{42} As explained in 1988 by original Commissioner, and later Supreme Court Justice, Stephen Breyer in giving an example of how the existence of dual sentencing authorities in the pre-SRA era operated:

\begin{quote}
[T]he judge says twelve years [in one case]... [b]ut the parole commission [later] says... [f]our years [in paroling the offender after only one-third of his term of imprisonment]. Well [in a future case] the judge knowing [the next defendant is] going to really only get four [years when the judge wants] to give twelve [years] gives him thirty six [years]. But this time the parole commission [fools him and gives the offender] thirty [years].... [T]his goes back and forth [in the dual sentencing system] and benefits nobody.\textsuperscript{43}
\end{quote}

Commissioner Breyer noted that this system was “confusing” to the public and did not bestow confidence in the federal criminal justice system.\textsuperscript{44} This situation was particularly problematic for victims.\textsuperscript{45} In addressing the need for certainty or truth in sentencing, the original Commission received testimony from a “series of victims,” including a

\begin{quote}
a particular case, while other judges may deliberately impose a sentence below the parole guideline believing that it is too harsh or set a high sentence with parole eligibility above the guideline if it is believed to be too low.”).
\end{quote}

\textsuperscript{41} Id. at 38-39, 46-47 (“[S]entencing judges and parole officials are constantly second-guessing each other, and, as a result, prisoners and the public are seldom certain about the real sentence a defendant will serve.”).

\textsuperscript{42} Id. at 46-47.


\textsuperscript{44} See Breyer, supra note 43; Nagel et al., supra note 43, at 1820.

\textsuperscript{45} See infra notes 46-48 and accompanying text.
“woman who had been brutally raped [and whose] . . . husband had been murdered,” who “thought the offender was going to be in for 20 years, and 6 years later he’s out stalking her.”46 Victims, in other words, “thought that they were being duped.”47 The back-and-forth between judges and the Parole Commission amounted to a “systematic sham” according to another one of the original Commissioners, Ilene Nagel.48

As part of the SRA, Congress abolished parole for offenders sentenced for offenses committed on or after November 1, 1987, and also provided that the Parole Commission itself would be abolished in 1992.49 The only potential early-release for federal prisoners sentenced under the sentencing guidelines would be limited good time credit.50


Compounding the problems of unfettered prosecutorial and judicial sentencing discretion, coupled with the prospective operation of the parole guidelines and good time allowances, was the haphazard nature of federal penal laws in the mid-1980s. As a leading scholar of federal criminal law observed in 2006 (which was equally true in the mid-1980s): “There actually is no federal criminal ‘code’ worthy of the name. . . . What the federal government has is a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law.”51 During
the 1970s and early 1980s, "federal code reform was a hot issue" pushed by Democrats and Republicans in the legislative and executive branches. Yet federal code reform efforts died by the mid-1980s. The only part of the "code reform" effort that succeeded was "the attempted rationalization of sentencing" through the creation of the Sentencing Commission.

In essence, the politics and circumstances in the early 1980s meant that, although Congress did not have the political will to reform the criminal code at the front end—by sorting out crimes and statutory maximums—it decided to let an expert, specialized agency attempt to rationalize it through the back door—by attempting to make sentencing more uniform and proportional.

As discussed in Part IV below, the Commission was forced to construct a guideline system around the existing crazy quilt of federal penal statutes. After the original Guidelines Manual was promulgated in 1987, Commissioner Breyer commented that the initial Commission's job would have been much easier if Congress had enacted federal code reform legislation along with the SRA.

3. The Nature of the Pre-Guidelines Federal Criminal Caseload

An appreciation of both the task faced by the original Commission and the guideline system it ultimately produced is aided by a basic understanding of the nature of cases being prosecuted in federal court in the years before the guidelines went into effect. In the year before the Commission promulgated the initial Guidelines Manual, the federal

52. O'Sullivan, supra note 51, at 720.
53. See id. As discussed below in Part IV.F.1.d, the federal criminal law landscape did have one enormous change made to it between the time that President Reagan signed the SRA into law in October 1984 and the time that the Commission was required to submit the original Guidelines Manual to Congress in April 1987—Congress's enactment of a series of new statutory "mandatory minimum" sentencing provisions. See infra Part IV.F.1.d.
54. O'Sullivan, supra note 51, at 720.
55. Id.
56. See infra Part IV.A.
57. Stephen Breyer, The Sentencing Guidelines and Substantive Criminal Code Revision, Address at the Soc'y for Reform of the Criminal Law, 1-2, 57 (Jan. 24, 1990) (on file with authors) ("In my view, code revision would have helped a great deal."). As early as 1979, Senator Kennedy, the primary sponsor of the SRA, envisioned a close coordination between "sentencing reform" and "federal code reform"—and, at least in 1979, envisioned an overall reduction in federal prison sentences if the two were to occur simultaneously. See Edward M. Kennedy, Toward a New System of Criminal Sentencing: Law with Order, 16 AM. CRIM. L. REV. 353, 378-79 & nn.123-28, 380-81 (1979).
caseload (excluding petty cases handled by magistrate judges) looked as follows:

**FIGURE 1: FISCAL YEAR 1986 CRIMINAL CASELOAD**

- DWI/Traffic: 12.4%
- Violent Crimes: 6.1%
- Immigration: 6.0%
- Firearms: 4.0%
- Sex Offenses: 0.6%
- Non-Fraud White Collar: 13.5%
- Other: 8.5%
- Larceny: 9.3%
- Drug Offenses: 26.4%
- Fraud: 13.3%

Notably, the drug offenses that year were all prosecuted before the effective date of the Anti-Drug Abuse Act of 1986 ("ADAAA"), which introduced five- and ten-year mandatory minimum penalties for most drug trafficking offenses. There were no mandatory minimum penalties for federal drug offenses committed in fiscal year 1986.

Approximately one-half of the sentences imposed in the 1986 cases had a term of incarceration and approximately one-half had non-incarceration sentences, which was typically probation. Of those cases in which defendants received a term of incarceration, the average sentence was 64.6 months, although, as noted above, most offenders served only between one-third and one-half of the sentences imposed by the sentencing courts as a result of parole or good time allowances.

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60. See infra note 757 and accompanying text; see also Gozlon-Peretz, 498 U.S. at 406 (pointing out that, while Congress was silent as to the effective date of the ADAA, Congress indicated through subsequent action that the effective date of the ADAA's mandatory minimum provisions was October 27, 1986).

61. See L. RALPH MECHAM, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 261-62 tbl.D-5 (1986) (noting that about 50.6% of cases received some term of imprisonment; 37.4% received probation; and 12.0% received fines-only or other sentences).

62. See supra notes 17-25 and accompanying text.
By comparison, the modern federal criminal caseload looks very different:

**FIGURE 2: FISCAL YEAR 2015 CRIMINAL CASELOAD**

- Child Pornography: 2.7%
- Drug Offenses: 31.8%
- Immigration: 29.3%
- Firearms: 10.0%
- Non-Fraud White Collar: 3.2%
- Fraud: 10.5%
- Other: 11.3%
- Larceny: 1.3%

Particularly notable are the significant decreases in property and economic offenses and traffic or DUI offenses and the significant increases in immigration and firearms offenses. Furthermore, a majority of the federal drug offenses in the guidelines era have carried statutory mandatory minimum penalties created by the ADAA. In 2015, only one in ten federal offenders received a non-incarceration sentence, and the average term of imprisonment was fifty-three months.

4. Sentencing Disparities

In addition to the “back-end” disparities resulting from parole and good time allowances—discussed above—more fundamental disparities existed at the “front-end” of the sentencing process. First, and most evident, an offender in one courtroom could receive a particular sentence, and an offender with a similar offense of conviction and

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63. The pie chart of 2015 cases appears as Figure A in the Sourcebook of Federal Sentencing, U.S. SENTENCING COMM., SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.A (2015). The category “[o]ther” is not defined in the Sourcebook but appears to include a wide variety of different federal offense types not falling into the other listed categories. See id.  
64. Id.  
65. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 153 (2011) (“Approximately two-thirds of drug offenders in fiscal year 2010 were convicted of an offense carrying a mandatory minimum penalty.”).  
similar criminal record could, in the very next courtroom, receive a much different sentence. This inter-judge disparity was highlighted in a 1974 study published by the Federal Judicial Center. In the study, twenty presentence investigation reports ("PSRs") based on actual cases were presented to fifty federal judges within the United States Court of Appeals for the Second Circuit, who were then asked, without any guidelines and using their traditional sentencing discretion, to impose hypothetical sentences in these twenty cases. The results revealed significant sentencing disparities. For example, in the very first case, the sentences ranged from three to twenty years imprisonment, with a median sentence of ten years. The U.S. Senators who drafted the SRA cited the Second Circuit study, stating that the "variations in the judges' proposed sentences in each case were astounding." The Senate Judiciary Committee's report also referenced a 1981 Department of Justice ("DOJ" or "the Department") study in which 208 judges were asked to impose hypothetical sentences in sixteen cases. The Committee observed that there was "substantial variation" in the recommended sentences. In one case, for example, one judge would have imposed a sentence of just over one year in prison, while another would have imposed fifteen years, with a mean sentence of eight-and-one-half years. The DOJ study "reconfirmed" the sentencing disparities identified in the Second Circuit study. The Senate Report concluded by stating that "every day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances."

Second, further analysis uncovered geographic differences in sentencing outcomes. Despite the common expectation that "two persons with similar criminal records should receive the same sentence if convicted of any particular federal offense" regardless of where the

69. Id. at 5, 9-10.
70. See id. at 6-7 tbl.1.
71. See id. at A-4 app. A (describing the first case).
72. See id. at 5.
73. S. REP. NO. 98-225, at 41.
74. Id. at 41 n.18, 44 (citing INSUIT, INC. ET AL., FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS, III-4 (1981)).
75. Id. at 41-44, 44 exhibit III.8, 45 tbl.1, 46.
76. Id. at 44 exhibit III.8.
77. Id. at 44.
78. Id. at 38.
sentencing was held, a DOJ study analyzed sentences for six offenses in five federal districts, and found inter-district disparities for some offense types. For example, in bank embezzlement cases, judges in the Northern District of California and the Middle District of Florida were more likely to impose a term of imprisonment, whereas judges in the District of New Jersey and the Northern District of Ohio were less likely to impose a prison term for the same degree of offense. Even among the harsher sentencing judges in the Northern District of California and the Middle District of Florida, the former would impose a term of imprisonment only if the amount involved was at least $100,000, whereas the threshold for the latter judges was only $10,000.

Finally, it was widely acknowledged by researchers in the early 1980s that demographic factors, particularly race and gender, also contributed to sentencing disparities in the United States. As discussed more fully below, the original Commission conducted its own multiple regression study of a sample of federal criminal cases from 1984 to 1985, which showed racial and gender disparities in sentence length.

As stated by the original chair of the Commission, Judge William W.

79. INSLAW, INC. ET AL., supra note 74, at III-19.
80. Id. at III-20.
81. Id. at III-21 exhibit III.9.
82. Id.
83. See, e.g., JOAN PETERSILIA, RACIAL DISPARITIES IN THE CRIMINAL JUSTICE SYSTEM 3, 27-28 tbl.3.5, 30-31, 63-66 tbl.5.1, 67-72 (1983) ("[T]here is evidence that, in sentencing and length of time served, minorities are treated more severely. For the same crime and with similar criminal records, whites are more likely to get probation, to go to jail instead of prison, to receive shorter sentences, and to serve less time behind bars than minority offenders."); Gary Kleck, Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty, 46 AM. SOC. REV. 783, 784-85 (1981); Cassia Spohn et al., The Effect of Race on Sentencing: A Re-Examination of an Unsettled Question, 16 LAW & SOC'Y REV. 71, 78, 82-83, 86 (1981) (finding that "blacks are 20 percent more likely than [similarly situated] whites to be incarcerated" as opposed to receiving a non-incarceration sentence).
84. See, e.g., Ilene H. Nagel & John Hagan, Gender and Crime: Offense Patterns and Criminal Court Sanctions, in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 129, 131, 133-34 (Michael Tonry & Norval Morris eds., 1983) (concluding that "women receive preferential treatment" in sentence type (probation versus incarceration) and sentence severity (shorter versus longer prison terms)).
85. See Dean J. Champion, The U.S. Sentencing Guidelines: A Summary of Selected Problems and Prospects, in THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE 232 (Dean J. Champion ed., 1989) ("We must remember that prior to the implementation of these guidelines, considerable research existed to show evidence of unfairness, discrimination, and general sentencing disparities attributable to racial, ethnic, gender, and socioeconomic factors under the previous federal indeterminate sentencing scheme."); Marvin E. Frankel & Leonard Orland, Sentencing Commissions and Guidelines, 73 GEO. L.J. 225, 231 (1984) ("When the statistical and experimental smoke clears, the disparities are confirmed by a multitude of years in court and in prison. No lawyer who practices criminal law has any doubt on this score.").
86. See infra Part III.D.
Wilkins, Jr., and two leading original staff members in 1991: "Suffice it to say it was against this backdrop of such unfair sentencing practices that the most recent attempt at sentencing reform was conceived and developed, culminating in legislation that created the . . . Commission and the federal sentencing guidelines."\(^\text{87}\)

**B. The Sense of Congress: Undue Leniency**

Related to sentencing disparities was Congress's strong concern that, for some classes of federal offenders, the sentences being imposed were too lenient.\(^\text{88}\) In enacting the SRA, Congress made it clear—in both the language of the statute and its extensive legislative history—its general belief that existing federal sentences were often too lenient for certain types of offenders, including violent offenders, drug trafficking offenders, and major white-collar offenders.\(^\text{89}\) The SRA directed the Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."\(^\text{90}\)

In the three-year period between the enactment of the SRA and the original Commission's promulgation of the first set of sentencing guidelines, Congress went further by enacting a series of federal penal statutes that carried severe mandatory minimum penalties, including: (1) five-year, ten-year, twenty-year, and life in prison sentences for many types of federal drug offenders;\(^\text{91}\) (2) five-year and ten-year prison sentences for using or carrying a firearm (depending on the type) during a federal drug trafficking offense or crime of violence;\(^\text{92}\) and (3) a fifteen-year mandatory minimum prison sentence for a felon who possessed a firearm after having been convicted of three or more

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\(^{88}\) Interview with Ilene H. Nagel, *supra* note 46, at 4.

\(^{89}\) See *infra* Part IV.F.1.c.


predicate violent offenses and/or drug-trafficking crimes.\textsuperscript{93} Other statutory changes in the late 1980s sent a clear message that Congress generally believed that significantly more severe federal sentences should be imposed.\textsuperscript{94}

As a brand new agency to which Congress had delegated substantial legislative powers concerning federal sentencing,\textsuperscript{95} the original Commission, as both a practical and legal matter, was obliged to act in a manner consistent with such congressional intent.

\textbf{C. Crime and Recidivism Rates in the Mid-1980s}

A final aspect of the historical context in which the original Sentencing Commission operated concerned the crime rate and recidivism rate in the mid-1980s. The overall crime rate in the United States had risen dramatically in the 1960s and 1970s, initially peaking in 1980. The rate then declined slightly, but continued to rise and eventually peaked again in 1991 before beginning a steady decline over the next two decades.\textsuperscript{96} Therefore, at the very time that the original Commissioners were drafting the guidelines, the country was facing the highest crime rate in its entire history, which looked to only be climbing even higher. The original Commission "was likely influenced by contemporaneous reports of crime" in the mid-1980s.\textsuperscript{97}

It was not merely the crime rate that was a serious concern. Data from the 1980s showed that offenders throughout the country were recidivating at high levels after being released from prison.\textsuperscript{98} In the

\begin{itemize}
\item\textsuperscript{95} Mistretta v. United States, 488 U.S. 361, 379 (1989) ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.").
\item\textsuperscript{97} Ilene Nagel, Writing the Federal Sentencing Guidelines, in PETER H. ROSSI & RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED 32 (James D. Wright ed., 1997).
\item\textsuperscript{98} See, e.g., ALLEN J. BECK & BERNARD E. SHIPLEY, BUREAU OF JUSTICE STATISTICS, U.S.
\end{itemize}
decade before the original sentencing guidelines were promulgated, between 38.0% and 51.4% of federal offenders were rearrested within three years of their release from federal prison. 99

Just as significant, many in the social science research community in the 1970s and 1980s were of the opinion that “nothing worked” in rehabilitating offenders, an opinion generally shared by the members of Congress who enacted the SRA. 100 Although the crime rate fell significantly in the three decades after 1987 101 and there currently is a near consensus among leading social scientists that modern “evidence-based” correctional interventions can reduce recidivism and promote meaningful rehabilitation, 102 such developments were not foreseeable to most policy-makers and researchers in the mid-1980s.

D. The Sentencing Reform Act of 1984

Sentencing disparities, coupled with the belief that the existing sentencing and correctional regimes were not effective in light of rising crime rates and high recidivism rates, gave rise to the SRA, which created the Commission and paved the way for the federal sentencing

 DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 , at 1-2 (1989), https://www.bjs.gov/content/pub/pdf/rpr83.pdf (finding that 62.5% of state prisoners released in 1983 were rearrested for felony or serious misdemeanor offenses within a period of three years).


100. Robert Martinson, What Works? Questions and Answers About Prison Reform, PUB. INT., Spring 1974, at 22, 48-50. The most influential claim that correctional research showed that “nothing works” appeared in Robert Martinson’s article. Id. That sentiment was echoed by the Congress that enacted the Sentencing Reform Act of 1984. See Mistretta, 488 U.S. at 366 (noting that the Senate Judiciary Committee’s Report accompanying the SRA “referred to the ‘outmoded rehabilitation model’ for federal criminal sentencing, and recognized that the efforts of the criminal justice system to achieve rehabilitation of offenders had failed”) (citing S. REP. NO. 98-225, at 40 (1983)); see also Sharon M. Bunzel, Note, The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows, 104 YALE L.J. 933, 951 (1995) (“The legislative history of the Sentencing Reform Act ... reveals the abandonment of the rehabilitative model in favor of the just deserts philosophy.”). Despite Congress’s general skepticism about rehabilitation evident in the Senate Judiciary Committee’s report, there are passages in the report indicating that rehabilitation might be an appropriate consideration for certain types of defendants. See, e.g., S. REP. NO. 98-225, supra note 31, at 172-73 (recognizing that in some cases, the sentencing guidelines could provide for “probation instead of imprisonment ... if conditions of probation can be fashioned that will provide a needed program to the defendant and assure the safety of the community”).


guidelines. Judge Marvin E. Frankel, who served as a federal district judge in the Southern District of New York, is most credited for calling sentencing disparities to the attention of Congress and also for suggesting the remedy of a federal sentencing commission. In the early 1970s, Judge Frankel, the “father of sentencing reform,” observed that judges’ “substantially unbounded discretion” combined with the varying backgrounds and perspectives of judges to produce “arbitrary, random, [and] inconsistent” sentencing decisions. His solution was for Congress to establish a “National Commission” that would study sentencing and develop sentencing criteria—a “checklist of factors,” including “some form of numerical or other objective grading”—to be used by each federal judge at sentencing. Judge Frankel proposed a set of “binding” guidelines. Judge Frankel’s advocacy was particularly influential on Senator Edward Kennedy, who began introducing “sentencing reform” (together with “federal code reform”) bills in the 1970s.

Such congressional efforts spanned nearly a decade. With a bipartisan group of Senators, including Republicans Strom Thurmond and Orrin Hatch and Democrats Joseph R. Biden, Jr. and Gary Hart, joining forces with Senator Kennedy—Congress, in a lopsided vote in both houses, ultimately enacted the SRA, which President Reagan signed into law on October 12, 1984.

In doing so, Congress followed Judge Frankel’s suggestion, creating a bipartisan Commission of seven full-time voting Commissioners and two nonvoting members and directing it to develop sentencing policies to “avoid[] unwarranted sentencing

105. Id. at 46.
106. Id. at 51.
107. FRANKEL, supra note 67, at 114.
108. Id. at 122-23.
109. SUPPLEMENTARY REPORT, supra note 37, at 3-6.
110. See id. at 4-7 (noting that the Senate forwarded two measures, passed by votes of 95 to 1 and 85 to 3, to the House, which by motion approved the Senate’s comprehensive crime bill by vote of 243 to 166).
112. 28 U.S.C. § 991(a) (1988) (“Not more than four of the members of the Commission shall be members of the same political party.”); see § 992(c) (providing that the initial seven voting Commissioners were to serve full-time until six years had passed following the promulgation of the initial guidelines). The two non-voting, ex officio members of the Commission were the Attorney General (or his or her designee) and the Chair of the United States Parole Commission. See 28 U.S.C. § 991(a); Pub. L. No.98-473, § 235(b) (5), 98 Stat. 1837, 2033 (1984).
disparities among defendants with similar records who have been found
guilty of similar criminal conduct.

To help ensure uniformity in sentencing, Congress directed the Commission to decide what offense
and offender characteristics were relevant for sentencing (with several
limitations imposed by the statute) and also to establish corresponding
sentencing ranges. The guidelines were to be "mandatory," insofar
as a sentencing judge could not "depart" from the applicable sentencing
range unless either the Commission had explicitly authorized a departure
for a particular reason or the sentencing court found the existence of an
aggravating or mitigating circumstance that was "not adequately taken
into consideration by the Sentencing Commission in formulating the
guidelines and that should result in a sentence different from that
described" in the guidelines.

The SRA provided numerous general and specific directives to the
Commission, including:

- The Commission was directed to draft guidelines that
"assure[d] the meeting of" the primary purposes of
sentencing—retribution, deterrence, incapacitation, and
rehabilitation—and, in particular, "provide[d] certainty and
fairness in meeting the purposes of sentencing."

- The Commission was directed to draft guidelines that
"avoided unwarranted disparities among defendants with
similar records who have been found guilty of similar
criminal conduct while maintaining sufficient flexibility to
permit individualized sentences when warranted
by mitigating or aggravating factors not taken into account in
the establishment of the guidelines."

113. 28 U.S.C. § 991(b)(1)(B); see id. § 994(f) (1988) (directing the Commission to
promulgate guidelines "with particular attention to the requirements of subsection 991(b)(1)(B)
for . . . reducing unwarranted sentence disparities").

114. Id. § 994(b)(1), (d), (e).

115. The term "mandatory" does not appear in the text of the Sentencing Reform Act of 1984
but does appear in the Senate Judiciary Committee's report, and the Supreme Court has also
characterized the original guidelines as "mandatory." See S. REP. No. 98-225, at 79 (1983)
("The Committee has resisted making this attempt [through an amendment] to make the sentencing
guidelines more voluntary than mandatory, because of the poor record of States . . . which have
experimented with 'voluntary' guidelines."); see also Mistretta v. United States, 488 U.S. 361, 367
(1989) ("Before settling on a mandatory-guideline system, Congress considered other competing
proposals for sentencing reform.").

116. 18 U.S.C. § 3553(b). As noted above, two decades later, the Supreme Court in Booker
held that mandatory guidelines were unconstitutional and, as a remedy, rendered the guidelines


118. Id. § 991(b)(1)(B). The SRA specifically directed the Commission to give "particular
attention" to providing certainty and fairness and avoiding unwarranted sentencing disparities. Id.
§ 994(f).
• The guidelines had to be "entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders," and the Commission was further instructed that the guidelines should make it generally inappropriate for sentencing judges to consider several specific offender characteristics associated with socio-economic status, including "education, vocational skills, employment record, family ties and responsibilities, and community ties."119

• Guideline sentencing ranges had to be narrow, with the maximum of any guideline range being no more than 25% of the minimum of such range (or six months, whichever was greater), except for ranges with a minimum of 360 months or more, which could have life imprisonment as the maximum.120

• The guidelines had to provide that it was generally appropriate to impose non-incarceration sentences for "first offenders" not "convicted of a crime of violence or otherwise serious offense."121

• The guidelines had to provide for sentences "at or near the maximum term" for offenders sequentially convicted of three or more felony crimes of violence or drug trafficking offenses (offenders who the Commission characterized as "career offenders").122

• The Commission had to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."123

• Before creating guideline sentencing ranges, the Commission had to "ascertain the average sentences imposed in [different] 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."124 This directive noted, however, that "[t]he Commission shall not be bound by such average sentences, and shall independently develop a sentencing range that is consistent with the purposes of sentencing."125

• In drafting guidelines, the Commission had to "take into account the nature and capacity of the penal, correctional, and other facilities and services available" and seek "to

119. Id. § 994(d)-(e).
120. Id. § 994(b)(2).
121. Id. § 994(j).
122. Id. § 994(h).
123. Id. § 994(m).
124. Id.
125. Id.
minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons."126

In addition to the many directives set forth in the SRA itself, the extensive legislative history—in particular, as set forth in the Senate Judiciary Committee’s lengthy 1983 report that accompanied the bill that eventually was enacted in 1984127—contained a great deal of additional direction and guidance to the Commission.128 Although in the modern era resort to a federal statute’s legislative history is increasingly disfavored,129 in the mid-1980s it was considered appropriate, even necessary, to rely on legislative history, particularly a committee report from the chamber in Congress in which the bill that ultimately became law originated.130 Even today, a federal agency’s use of legislative history to interpret its organic statute is considered more acceptable than a court’s use of legislative history to interpret a statute.131

III. THE COMMISSION’S FIRST EIGHTEEN MONTHS

The Commission’s first eighteen months involved inordinate administrative and substantive challenges. This Part introduces the original Commissioners and senior staff members; describes the difficulties that the Commission faced in operationalizing a new agency;

126. Id. § 994(g).
128. See Mistretta v. United States, 488 U.S. 361, 374-77, 376 n.10 (1989) ("[T]he legislative history provides additional guidance for the Commission’s consideration of the statutory factors. . . . This legislative history [with the statutory language] provide a factual background and statutory context that give content to the mandate of the Commission.").
129. See, e.g., WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 226-28 (1994) (noting the Supreme Court’s shift away from legislative history after Justice Scalia joined the Court in 1986).
130. See Charles Tiefer, The Reconceptualization of Legislative History in the Supreme Court, 2000 WIS. L. REV. 205, 214-15 (2000) ("[I]n the 1980s, [Supreme Court] opinions from all points on the ideological spectrum cited legislative history freely and generously, both as support for the controversial proposition of how to implement a mix of broad congressional purposes absent specific intent, and as routinely cited support for noncontroversial propositions."); Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 195, 203-06, 216 (1983) (observing that "[l]anguage never seems plain enough in its meaning to forestall the hunt for enlightenment in the legislative context" and that the Supreme Court has "increasingly" used legislative history); see also Garcia v. United States, 469 U.S. 70, 76 (1984) ("[W]e have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill . . . .").
131. See ROBERT A. KATZMANN, JUDGING STATUTES 24-27 (2014); see also Peter L. Strauss, When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 CHI.-KENT L. REV. 321, 329-31 (1990) ("Legislative history has a centrality and importance for agency lawyers that might not readily be conceived by persons . . . accustomed to considering its relevance only to actual or prospective judicial resolution of discrete disputes.").
highlights the key aspects of the Commission’s decision-making process; summarizes the evolving drafts that culminated in the original Guidelines Manual submitted to Congress on April 13, 1987; and addresses the inter-branch and intra-branch obstacles that the Commission had to carefully navigate in discharging its responsibilities under the SRA.

As this overview indicates, the first eighteen months of the Commission’s existence included a significant amount of research, drafting, and debate among Commissioners and Commission staff. The Commission’s internal deliberations were informed by an enormous amount of outreach to and feedback from stakeholders in the criminal justice system.132

A. The Original Commissioners

Although the SRA was enacted in October of 1984, President Reagan did not nominate any Commissioners until September of 1985.133 The Senate promptly confirmed the seven nominees on October 16, 1985.134 Those original seven Commissioners who were confirmed were:

- United States District Judge William W. Wilkins, Jr., of the District of South Carolina (confirmed as the first chair of the Commission). He previously had served as a law clerk for Chief Judge Clement F. Haynsworth, Jr., of the Fourth Circuit, a lawyer in private practice, a circuit solicitor (i.e., a district attorney) in South Carolina, and legal assistant to Senator Strom Thurmond.135
- United States Circuit Judge Stephen G. Breyer of the First Circuit. He was a former Harvard law professor with a specialty in administrative law who had also served as a chief counsel to the United States Senate Committee on the

132. See infra Part III.E–G.
134. 131 CONG. REC. 27,728 (1985).
135. See Wilkins, William Walter, FED. JUD. CTR., https://www.fjc.gov/history/judges/wilkins-william-walter (last visited Aug. 1, 2017). Soon after joining the Commission, Judge Wilkins was elevated to the U.S. Court of Appeals for the Fourth Circuit—to the seat previously held by Judge Haynsworth. Id.
Judiciary from 1979 to 1980—when Senator Kennedy was its chair.136

- United States Circuit Judge George E. MacKinnon of the D.C. Circuit. He previously served as U.S. Attorney for the District of Minnesota, as a U.S. Congressman, and as a member of the state legislature, in which he served as chairman of the judiciary committee.137

- Helen G. Corrothers. She previously had served as a Commissioner on the United States Parole Commission and, before that, as a prison warden in Arkansas.138

- Dr. Michael K. Block, Ph.D. He was a professor of economics and management at the University of Arizona. He had published widely in the field of law and economics, including on the subject of criminal justice, and had advised the Arizona legislature concerning the revision of the state’s penal code.139

- Dr. Ilene H. Nagel, Ph.D. She was a non-lawyer sociologist on the faculty of the University of Indiana School of Law. Like Block, she also had published in the field of criminal justice.140

- Professor Paul H. Robinson. He was a law professor at Rutgers University with an expertise in criminal law and philosophies of criminal sentencing. He previously had served as both a federal prosecutor and a congressional staffer in the Senate (where he worked on federal criminal


140. See id. at 311-13, 345 (statement of Ilene Nagel).
code reform), and also had been involved in criminal code revision projects in two states.

A photograph of the original seven voting Commissioners appears as Appendix B.

The original Commissioners had diverse backgrounds and areas of expertise—in the courtroom (at both the trial and appellate levels), in academia (in both social science and law), and on Capitol Hill. According to Commissioner Breyer, "the varying backgrounds" of the seven original Commissioners complemented each other. According to Commissioner Nagel, however, some Commissioners had somewhat different perceptions about the relative value of other Commissioners’ experiences and professional backgrounds. The first Commissioners were a relatively young group—all but one, Judge MacKinnon, were in their thirties or forties. They also represented all major regions of the country (the East, West, Midwest, and the South). All were white, except Commissioner Corrothers, who was African American. They also were a genuinely bipartisan group. Joining the original seven appointed Commissioners were two ex officio non-voting Commissioners, Ronald Gainer (a high-ranking DOJ official who had worked extensively on the failed cause of “criminal code reform” in the


143. Jon O. Newman, Remembering Marvin Frankel: Sentencing Reform but Not These Guidelines, 14 Fed. Sent’g Rep. 319, 320 (2002) (noting that it was a “surprise to the [SRA’s] supporters, [that] President Reagan named three professors to the first Commission, two from fields other than law”).

144. Nomination of Seven Members of the United States Sentencing Commission, and Designation of the Chairman, supra note 133.


146. See Interview with Ilene H. Nagel, supra note 46, at 82-85 (observing that Commissioner Block, an economist, “had a very negative attitude towards law and lawyers,” while Commissioner MacKinnon, a federal judge, “was not particularly persuaded about the contribution of [social science] research”).

147. Nomination of Seven Members of the United States Sentencing Commission, and Designation of the Chairman, supra note 133.


149. See, e.g., Reagan Names Panel to Standardize Sentencing, supra note 133 ("Kenneth Feinberg, the chairman of the New York State commission which has drawn up [the] state sentencing guidelines, said the Administration had selected a balanced group in nominating the Commission. ‘People who know this field will look at these names and say there’s no ideological or political bent,’ said Mr. Feinberg, a former Senate Judiciary Committee aide who was involved in writing the legislation [that created the Commission].").
1970s and 1980s) as the Attorney General’s representative and Benjamin F. Baer, the chairman of the U.S. Parole Commission.

The original Commissioners, operating under severe time constraints, decided to proceed with their many tasks through various committees, which would report to the full Commission for a vote on important matters. The primary committees were the Just Deserts Committee, the Crime Control Committee, and Offense Characteristics Committee, and the Offender Characteristics Committee. Those committees are discussed in Part IV below.

All of the original Commissioners were appointed on a full-time basis, although some—the judges and professors—also continued to engage in some amount of work in connection with their other jobs. According to Commissioner Nagel, these competing commitments diminished opportunities for those Commissioners to engage further with other Commissioners and staff in between Commission meetings.

### B. Challenges of Getting off the Ground

The Commissioners first met on October 29, 1985, in a small borrowed office in the DOJ’s main building in Washington, D.C. At the time, the Commission did not yet have office space of its own and was forced to use a small office temporarily available at the DOJ. Soon thereafter, Judge Wilkins and several other Commissioners literally walked the streets of Washington, D.C., looking for office space to rent for the Commission. At that time, Congress had not yet appropriated any money for the Commission, so Judge Wilkins signed the original lease for office space in his own name.

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150. See Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note 141, at 2-3; see also Nomination of Seven Members of the United States Sentencing Commission, and Designation of the Chairman, supra note 133.


152. At different times in the Commission’s meeting minutes and other records, these groups were called “committees” and “subcommittees.” For the sake of consistency, this Article will refer to them as “committees.”

153. See infra Part IV.B.2, C.2.

154. See infra Part IV.B.2, C.2.

155. See Interview with Ilene H. Nagel, supra note 46, at 12 ("[T]here was an immediate decision by some members of the Commission not to move [to Washington, D.C.] full-time at all, [and] some not to recuse themselves from their cases [or their teaching responsibilities].").

156. Id. at 12 (identifying the fact that some Commissioners did not move to Washington, D.C., and continued to work elsewhere as a “weakness” of the Commission).


158. Id. at 4-5.

159. Id. at 5-6, 8.
The lack of both its own office space and appropriations in the early days of the Commission underscores the fact that the Commission was not merely faced with the difficult task of creating sentencing guidelines for the federal system. The original Commissioners had to build an agency from the ground up—including hiring a staff, acquiring furniture and office equipment, creating office and personnel policies, and the like.\(^\text{160}\)

Moreover, in 1985, there was no other component of the federal government from which the Commission could readily draw in terms of experience and subject matter expertise. The Commission had been created by Congress as an “independent” policy-making agency located in the federal judiciary.\(^\text{161}\) Virtually all federal policy-making agencies existed in the executive branch, which had its own federal criminal justice agenda in the mid-1980s (often at odds with the policies adopted by the Commission, as discussed below).\(^\text{162}\) The vast majority of the federal judiciary concerned itself with litigation, not policy-making. The only real policy-making unit of the federal judiciary, the Judicial Conference of the United States,\(^\text{163}\) had initially opposed sentencing guidelines and later, after it appeared that Congress would pass legislation requiring guidelines, it sought to have Congress delegate the authority to promulgate the guidelines to the Conference rather than to an independent sentencing commission located within the judicial branch.\(^\text{164}\)

\(^{160}\) Interview with Ilene H. Nagel, supra note 46, at 96 (“As a new agency we had no staff, no location, no furniture, no history, and no good relations with other agencies . . . .”).

\(^{161}\) Mistretta v. United States, 488 U.S. 361, 384-85 (1989) (“The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an ‘independent’ body comprised of seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines.”).

\(^{162}\) Interview with Ilene H. Nagel, supra note 46, at 65-66.


\(^{164}\) In several earlier versions of the bill that ultimately became the SRA, the Judicial Conference was given the authority to promulgate sentencing guidelines. See, e.g., Criminal Code Revision Act of 1981, H.R. 5679, 97th Cong. § 4301; see also Stith & Koh, supra note 111, at 236. The Judicial Conference supported the provisions of these bills that would place the authority to promulgate within the Judicial Conference as opposed to an “independent” agency located within the judiciary. See Stith & Koh, supra note 111, at 254 & n.182, 255-57; see also ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28-29 (1983); ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 87-88 (1982); ADMIN. OFFICE OF THE U.S. COURTS, REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10-11 (1976).
Another significant obstacle—as both a source of personal and institutional stress as well as an eventual distraction—that the original Commission faced was inevitable constitutional challenges to both the Commission itself and the guidelines that it would promulgate. The Commissioners were well aware from the outset of their service on the Commission that both the agency and its eventual guidelines would be challenged as soon as they went into effect in cases in which the offense was committed on or after November 1, 1987. Unlike most other federal agencies—whose administrative regulations are subject to challenge as soon as they are promulgated or even beforehand—the Commission had to wait until both Congress had an opportunity to review (and not reject) the original guidelines (during a period of 180 days after the original guidelines were promulgated in the spring of 1987) and also the additional time that it would take the federal courts to rule on cases in which the guidelines applied. That did not occur until early 1988. Ultimately, over 200 federal district judges ruled that the Commission and its guidelines were unconstitutional—typically on the grounds that the Commission’s placement in the federal judicial branch violated the separation-of-powers doctrine or that the SRA’s delegation of legislative authority to the Commission was improper—while only

165. *See, e.g.*, United States v. Arnold, 678 F. Supp. 1463, 1464 (S.D. Cal. 1988). The original Commission was actively involved in monitoring legal challenges to the Commission and its guidelines and, through its general counsel’s office, it filed amicus curiae briefs and appeared as amicus counsel at oral arguments in pending federal criminal cases in which the guidelines were challenged. *Id.* at 1464 (noting that the Commission’s general counsel, John R. Steer, appeared on behalf of the Commission as amicus curiae).


168. *See, e.g.*, Fed. Defs. of San Diego v. United States Sentencing Comm’n, 680 F. Supp. 26, 27-32 (D.D.C. 1988). An attempt by federal defender organizations from different parts of the country in November of 1987 to obtain a nationwide injunction from a federal district court in Washington, D.C., was rejected because there was no “standing” to bring such a lawsuit. *Id.* at 27-32.

169. *See, e.g.*, United States v. Smith, 686 F. Supp. 847, 865-70 (D. Colo. 1988) (holding that the Commission was invalid on separation of powers grounds); *Arnold*, 678 F. Supp. at 1465, 1469-72 (invalidating the Commission and guidelines on separation of powers grounds).
120 judges upheld the constitutionality of the Commission and the guidelines. It was not until 1989 that the Supreme Court upheld the constitutionality of the Commission and the guidelines.

C. Hiring Staff

A key part of building a federal agency was hiring staff members. As its first Staff Director, the Commission hired Kay A. Knapp, who previously had served as the Director of the Minnesota Sentencing Commission. In 1978, Minnesota became the first state to create a commission charged with promulgating sentencing guidelines. Other key members were added to the new federal Sentencing Commission's staff in the coming months:

- Denis J. Hauptly was the Commission’s first General Counsel. He had served as a Senior Staff Attorney for the U.S. Court of Appeals for the First Circuit in Boston (on which Judge Breyer then served).
- John Steer was hired as Deputy General Counsel. He previously had served as Chief of Staff for Senator Thurmond and would succeed Hauptly as the Commission’s General Counsel in 1987. Eventually, Steer would be appointed as Vice Chair of the Commission in 1999.
- Russell Ghent originally was hired as Chairman Wilkins’s law clerk, but eventually was promoted to serve as Deputy General Counsel. He played an active role in the early phases of the guidelines drafting process. He formerly was a state prosecutor in South Carolina.

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174. See MINN. SENTENCING GUIDELINES COMM’N, ANNUAL REPORT TO THE LEGISLATURE 1 (2008) (“In 1978, the Minnesota Sentencing Guidelines Commission (MSGC) was established, and Minnesota became the first state to implement a sentencing guidelines structure.”).
177. See Meeting Minutes, U.S. Sentencing Comm’n 10-12 (Apr. 1, 1986) (on file with authors) [hereinafter Meeting Minutes, U.S. Sentencing Comm’n (Apr. 1, 1986)]; Meeting Minutes, U.S. Sentencing Comm’n 5-6 (Jan. 21, 1987) (on file with authors) [hereinafter Meeting Minutes,
David Lombardero served as Chief Counsel and played an active role in the guidelines drafting process. He was an attorney with a background in mathematics and econometrics who had conducted criminological research with Commissioner Block before coming to the Commission.¹⁷⁸

Dr. William Rhodes, Ph.D., an economist, was the Commission’s first Director of Research. He had previously worked as a criminology professor as well as a researcher with two leading social science research organizations, the Institute for Law and Social Research (“INSLAW”) and Abt Associates.¹⁷⁹ Dr. Rhodes was in charge of the Commission’s “past practice” and “prison impact” data analyses discussed below.¹⁸⁰

Dr. Peter Hoffman, Ph.D., a criminologist, was hired as a Senior Research Associate, but eventually became the Principal Technical Advisor (i.e., the primary drafter of the guidelines). Before he came to the Sentencing Commission, he had been the Director of Research at the United States Parole Commission (and, in view of his experience drafting the parole guidelines, he would work with Lombardero in drafting the original sentencing guidelines).¹⁸¹

Phyllis Newton, a criminologist, was hired as a Senior Research Associate and was the primary researcher for the Commission’s demographic disparity study of 1985 federal


¹⁸⁰. See SUPPLEMENTARY REPORT, supra note 37, at 55-56. Rhodes previously had advocated for sentencing guidelines that considered both offense severity and an offender’s criminal history. See Brian Forst et al., Sentencing and Social Science: Research for the Formulation of Federal Sentencing Guidelines, 7 HOFSTRA L. REV. 355, 367-70, 372 (1979) (contending that sentencing guidelines should be structured “around two well-established sets of determinants—characteristics of the offense (crime seriousness) and the defendant’s observed criminal propensity (likelihood of recidivism)”). Regarding the first factor, Rhodes and his co-authors contended that the guidelines should be “based on actual sentencing decisions.” Id. at 371-72.

cases (discussed below). She would eventually become Staff Director.\(^{182}\)

- L. Russell ("Rusty") Burress originally came to the Commission on a detail from his position as a United States Probation Officer in the District of South Carolina, but eventually became the Principal Training Advisor. He served as the primary guidelines trainer and liaison to the federal probation officer community.\(^{183}\)

- Paul K. Martin, a former journalist from South Carolina, was hired as the Commission’s Communications Director (and, after obtaining a law degree, eventually became the Deputy Staff Director). He coordinated the Commission’s extensive public outreach during its first eighteen months and also played a role in editing the original guidelines.\(^{184}\)

Excluding administrative assistants and other clerical personnel, the total number of full-time staff employed by the Commission during the first eighteen months was approximately two dozen—roughly evenly divided between attorneys and social scientists.\(^{185}\) Most of those staff members did not begin their employment until different points in 1986.\(^{186}\)

In the Commission’s early years, there was significant turnover among senior staff members.\(^{187}\) Most significantly, Knapp and Hauptly left after a year or so. Both were highly critical of the original Commission’s policy decisions and believed that the federal guideline system should have resembled simpler state guideline systems like Minnesota’s.\(^{188}\) Knapp was succeeded by Suzanne Conlon (although the latter took the title “Executive [D]irector” rather than Staff Director), a

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183. See Meeting Minutes, U.S. Sentencing Comm’n (Jan. 21, 1987), supra note 177, at 2; see also Interview with Ilene H. Nagel, supra note 46, at 125-26; Interview with William W. Wilkins, Jr., Judge, supra note 157, at 3-4, 30-31.


185. See Interview with Ilene H. Nagel, supra note 46, at 12.


188. See MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975-2025, at 111 (2016) (discussing Knapp’s and Hauptly’s criticisms of the federal sentencing guidelines compared to simpler state guidelines); see also Kay A. Knapp, Allocation of Discretion and Accountability within Sentencing Structures, 64 U. COLO. L. REV. 679, 679-85, 687-89, 695-98 (1993) ("[N]o state [sentencing] commission has been so foolish as to adopt the highly complex and mechanistic federal sentencing policy that has incurred the wrath of the federal community.").
federal prosecutor from Illinois who would be appointed to the federal bench in 1988.189

In addition to these staff members, the Commission was also aided by a handful of paid and unpaid consultants (who served independently of the advisory groups with whom the Commissioners and staff conferred in 1986 and 1987).190 Among them were Kenneth R. Feinberg (particularly as an advisor to Commissioner Breyer)191 and Professor Stephen Schulhofer.192

D. Building an Empirical Basis for the Guidelines

Before drafting sentencing guidelines, the original Commission engaged in an extensive study of the existing state guidelines (in particular, the guidelines in Minnesota, Pennsylvania, and Washington),193 the federal parole guidelines, as well as a large body of criminological literature relevant to the issues that the SRA required the Commission to address in creating guidelines (such as offender and offense characteristics).194 However, for the majority of the issues relevant to the federal guidelines, the original Commission ultimately relied on its own original data analyses using a large number of cases from the 1980s.195 In particular, the Commission examined data from nearly 100,000 federal cases from 1983 to 1985, which were included in a large computer file provided to the Commission by the Administrative

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190. See infra notes 418, 545-46 and accompanying text.
192. See infra notes 546-48 and accompanying text. Schulhofer, then a law professor at the University of Chicago, was a paid consultant to the Commission who was primarily responsible for drafting the provision of the initial Guidelines Manual that concerned sentencing for multiple counts of conviction. See infra notes 546-48 and accompanying text. He also worked closely with Commissioner Nagel concerning her study of plea bargaining practices under the initial guidelines. See Schulhofer & Nagel, supra note 13, at 256-86.
193. Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note 141, at 58.
194. See id. at 58; Interview with Ilene H. Nagel, supra note 46, at 15-16; see also SUPPLEMENTARY REPORT, supra note 37, at 25-26.
195. SUPPLEMENTARY REPORT, supra note 37, at 16-17, 21.
Office of the United States Courts ("AO"). Of those cases, the Commission focused on a representative sample of approximately 10,500 felony and Class A misdemeanor cases from 1984 to 1985. The Commission enlisted the services of federal probation officers around the country to code their presentence reports for numerous offense and offender characteristics. That data was merged with corresponding data from the BOP and the United States Parole Commission, which allowed the 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.

The robust dataset produced by the Commission allowed it to undertake three main data analyses. First, using a multiple regression computer analysis, the Commission was able to identify a wide variety of aggravating and mitigating factors that had influenced federal sentencing decisions in the pre-guidelines era. The Commission used that data analysis in drafting guidelines for each type of offense. In the words of Judge Wilkins, it enabled the Commission to create guidelines that would be "applied in a manner similar to the thought process of a judge determining an appropriate sentence." In a related manner, the Commission was able to estimate average sentences for a wide variety of federal offense types (for example, homicide, assault, rape, kidnapping, burglary, robbery, theft, counterfeiting, and fraud), including for different gradations of the same offense types (for example, assault causing bodily injury, assault causing serious bodily injury, and assault causing permanent bodily injury). Those estimates included both the percentage of offenders committing a particular offense type who were sentenced to some term of imprisonment (as opposed to an alternative to incarceration) and also the average length of prison time actually served for those offenders sentenced to a term of imprisonment (in view of the existing parole and good-time allowances practices). Except for federal

196. Id. at 21. The data concerning those nearly 100,000 cases was obtained from the Federal Probation Sentencing and Supervision Information System ("FPSSIS"). Id. at 16, 21.
197. Id. at 21.
198. Id.
199. Id.
200. Id. at 22-24, 35-39 tbl.1(b).
202. See SUPPLEMENTARY REPORT, supra note 37, at 27-34 tbl.1(a).
drug cases and certain white-collar and violent offenses, the Commission generally set penalty levels in the sentencing guidelines based on the pre-guidelines average sentences for the different federal offense types.\textsuperscript{203}

Second, using the same dataset of 10,500 cases, the Commission engaged in a multiple regression study to determine whether demographic factors (in particular, race and gender) and geographical factors (e.g., region of the country) were associated with differences in sentence length.\textsuperscript{204} The Commission’s findings—of both types of demographic disparity as well as geographic disparities in sentencing—were presented to Congress in the summer of 1987, after the Commission had promulgated the initial Guidelines Manual, but before the conclusion of Congress’s 180-day review period under 28 U.S.C. § 994(p).\textsuperscript{205}

Finally, the Commission used the same dataset, together with additional data obtained from the AO, BOP, and Parole Commission, to engage in a “prison impact” analysis that estimated growth in the federal prison population over the following fifteen years (based on both the advent of the guidelines as well as statutory mandatory minimum sentencing provisions enacted by Congress from 1984 through 1986).\textsuperscript{206}


The Commission’s key policy decisions concerning the initial guidelines resulted from an iterative process, in which the Commission issued a series of “preliminary” draft guidelines, sought public comment on them (including through a series of public hearings), and later refined subsequent drafts based on that feedback and also based on the data analyses discussed above.\textsuperscript{207} The first draft guidelines were produced by Commissioner Paul Robinson’s Just Deserts Committee and informally circulated to select stakeholders for comment in the spring and summer of 1986.\textsuperscript{208} After that draft received negative feedback from its reviewers, the Commission subsequently produced two “preliminary”
drafts published for public comment in the Federal Register. The first was prepared in September 1986 and published on October 1, 1986, and the second, revised preliminary draft was prepared in January 1987 and published on February 6, 1987. Because of perceived problems with the January 1987 draft, significant modifications were made. The next draft, informally known as "Draft X," evolved into the Guidelines Manual submitted to Congress on April 13, 1987. On May 1, 1987, the Commission also sent a lengthy package of "technical, conforming, and clarifying amendments" to Congress. On November 1, 1987, the April 1987 manual, as amended by the May 1987 amendments, became effective when the time for congressional review passed without affirmative legislation disapproving of the manual.

1. Original "Just Deserts" Draft

Within a few months after the Commission first convened, Commissioner Robinson's Just Deserts Committee began drafting the first prototype of federal sentencing guidelines. By mid-1986, his committee had produced a lengthy and well-developed draft guidelines manual. That draft, which was based primarily on a retributivist philosophy of sentencing, sought to account for "all of the injuries and harms, personal and societal, tangible and intangible, that are attributable, directly or indirectly, to the offender and could have been foreseen." The draft "assign[ed] a 'harm value' to each such harm [or unrealized harms that were threatened or risked] that will reflect the

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211. See infra notes 246-48 and accompanying text.


214. See Memorandum from Paul H. Robinson, Comm’r, U.S. Sentencing Comm’n, to Commissioners, U.S. Sentencing Comm’n (Nov. 25, 1985) (on file with authors). As early as November 25, 1985—less than one month after their first Commission meeting—Commissioner Robinson submitted a lengthy memorandum to his fellow Commissioners to which was attached several "preliminary research papers" that he and some staff members (together around 200 pages) put together, addressing a wide variety of issues related to offense and offender characteristics potentially to be resolved by the Commission when formulating sentencing guidelines. See id. at 2-4-6, 4-21-22.

215. See infra notes 391-92 and accompanying text.

seriousness with which society views such harmful conduct or result."217

The draft then considered harm together with other factors relevant to an offender’s culpability, such as his state of mind, role in the offense (if it involved multiple actors), and criminal history, to come up with “[t]he offender’s total sanction units,” which corresponded to a particular sentencing range (in months).218 The draft also based penalty levels on an offender’s “real offense” conduct—that is, all criminal conduct that occurred during the offense of conviction or “in some other way related to it,” whether committed by the defendant or a “co-actor[]” if “reasonably foreseeable and in furtherance of the crime of conviction.”219 With respect to a standard of proof at sentencing, the draft provided that “[t]he Court may find that a harm element exists or an adjustment factor applies if there exists any reasonable evidence to support such harm or adjustment.”220

The draft’s sentencing calculus was extremely complex and mathematical. For instance, for property crime cases, the guideline instructed users to engage in a multistep formula that considered not only monetary loss amounts, but also the number of criminal transactions and victims involved. The reader was referred to a complex monetary table with very precise (yet also seemingly arbitrarily-derived) ranges of loss amounts and even suggested use of a calculator whereby sanction units could be determined through a mathematical calculus using quadratic roots. That table appears below as Appendix C.

The just deserts draft was not published in the Federal Register for public comment—as two subsequent draft guideline manuals were. Instead, the draft was circulated to key stakeholders, including select judges, officials within the DOJ, and key congressional staffers during the spring and summer of 1986.221 Except for the DOJ, which favored the draft as a prototype of federal sentencing guidelines, the vast majority of reviewers reacted negatively to the draft.222 Typical of the negative reactions was that of Judge Jon Newman of the Second Circuit, a supporter of the concept of sentencing guidelines,223 who stated:

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217. Id.
218. Id. at 4-5, 15 tbl.1.
219. Id. at 7.
220. Id. at 6.
221. Nagel, supra note 170, at 918-21.
222. Id. at 919-20; see Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 9-10 (noting that ex officio commissioner Gainer and the DOJ generally “were pushing the Robinson approach”).
My first point challenges a basic assumption that underlies the entire proposal—the idea that every increment of harm that can possibly be measured should be reflected in an increment of additional punishment. I seriously doubt that there is moral validity to this idea.… The proposed system requires a precise determination of every factual aspect of the criminal conduct because every factual aspect plays a part in determining the precise numerical score to be used ultimately in determining sanction units. ... The complexity of the proposed system will create enormous grounds for error in application of the guidelines and appeals to challenge the sentence. This is the inevitable consequence of a system that tries for ultimate precision. If everything matters, then every statement of definition must be interpreted, with inevitable mistake and subsequent legal challenge.224

Such resounding criticism caused the majority of the Commission—over Commissioner Robinson’s objection—to abandon the just deserts draft and move to a modified guidelines model.225

2. September 1986 Preliminary Draft
After abandoning the just deserts draft in the late-summer of 1986, the Commission scrambled to put together a more palatable set of guidelines by the end of September 1986 for public comment—this time published in the Federal Register and to be followed by a series of public hearings.226 Commissioner Nagel described the next iteration:

[T]he draft ... was first and foremost an attempt to rid the [just] desert based draft of July, 1986 of its most unacceptable aspects—such as the cumulative ... theory of harms, and impractical provisions—such as elaborate [fact-finding] hearings for scores of guideline factors—while preserving its basic tenets and format[,] such as grouping similar crimes into broad like categories.227

224. Nagel, supra note 170, at 919-20 n.203 (quoting Letter from Judge Jon Newman to Judge William Wilkins (Sept. 3, 1986)).
225. Meeting Minutes, U.S. Sentencing Comm’n 2 (Sept. 23, 1986) (on file with authors) (noting Robinson’s objection to modifying his just deserts draft).
226. See Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920, 3921 (Feb. 6, 1987); see also SUPPLEMENTARY REPORT, supra note 37, at 11 (noting the series of public hearings related to that draft, which were held in six cities during the fall of 1986).
227. Nagel, supra note 170, at 921. A prime example of the simplification was seen the loss table for property crimes. As demonstrated in Appendix C at the end of this Article, the loss table in the just deserts draft was extremely complex. The loss table in the September 1986 was noticeably less complex—with only eleven incremental penalty levels compared to the 143 levels in the just deserts draft. See Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920, 3931-32 (Feb. 6, 1987).
A majority of the Commission recognized that it had to "ensure that its guidelines were not so detailed that they [would] reintroduce[] disparity through inconsistent application."228 Just as with the just deserts draft, the September 1986 draft’s penalty levels were essentially placeholders, insofar as the Commission had not yet created an empirical basis for setting penalty levels.229

The reaction to the September 1986 draft was not as resoundingly negative as the feedback about the just deserts draft, but it remained critical overall. For instance, Judge Frankel, the originator of the federal guidelines concept, criticized the draft’s continued complexity:

I find this draft incredibly complex for an initial cut at a problem of such enormous difficulty as initiating the guidelines on the road to rational sentencing. I would have thought that you’d have started from the opposite end of the telescope, that you’d have started with a very simple document and a very simple set of guidelines that judges, brand new to this and wholly unaccustomed to it, and their probation officers as well, would not view with a kind of fright that I think this preliminary set will engender.230

Although the DOJ was generally supportive of the September 1986 draft, it offered diametrically opposed criticism concerning the draft’s level of complexity.231 Echoing Commissioner Robinson’s position—reflected in the earlier just deserts draft—the DOJ contended that the draft did not allow for consideration of enough “real offense” aspects of a defendant’s criminal conduct—in particular, that it did not account for enough actual or intended harms.232 Finally, the DOJ objected to the


229. Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 16-17 (“[I]n the September draft, . . . the numbers were made up.”).

230. Public Hearing Before the U.S. Sentencing Comm’n 4-5 (N.Y. City, Oct. 21, 1986) (statement of Honorable Marvin Frankel, former U.S. Dist. Judge) (on file with authors). Frankel recommended that the federal guidelines be modeled after existing state sentencing guidelines. See id. at 6 (“[I] prefer to see, a set of grids that look like the Minnesota and Washington efforts, grids that a judge can take out case by case, crime by crime, and apply with relatively simple arithmetic, free of combinations of additions, subtractions, multipliers and fractions that I don’t think are going to work.”).


232. Hearing, supra note 231, at 65-66 (statement of Stephen S. Trott, Assoc. Att’y Gen., U.S. Dep’t of Justice). Associate Attorney General Trott testified the following:

In the Department, we believe that it is absolutely critical that the criminal justice system assure and be clearly perceived by the public to assure that every additional harm caused by an offender in the course of an offense will result in some degree of increase in the
draft's requirement that prosecutors had to prove aggravating factors by a preponderance of the evidence and, instead, suggested that a lesser "some evidence" standard was appropriate.\textsuperscript{233}

3. January 1987 Revised Preliminary Draft

The next iteration of the guidelines manual was guided by the Commission's decision in December 1986 to adopt "Principles Governing the Redrafting of the Preliminary Guidelines."\textsuperscript{234} Despite the criticisms of the September 1986 draft as still being too complex, and despite the Commission's stated intention to "simplify the September draft considerably,"\textsuperscript{235} the Commission did not greatly simplify the next iteration of the guidelines, which was completed in late January 1987 and published in the Federal Register for public comment in early February 1987.\textsuperscript{236}

A primary difference between the September 1986 draft and the January 1987 draft was that the latter first introduced a biaxial sentencing grid (called a "Sentencing Table")—with one axis based on offense level and the second axis based on criminal history—while the former had simply added more "sanction units" based on an offender's sentence. I guess one way to describe this is to say that "every harm must count."

For this reason, we agree with the Commission that some form of modified real offense sentencing is the most appropriate predicate for sentencing guidelines.

However, in view of our beliefs that the sentence for any offense should reflect both the harms resulting from the offense conduct and the conduct related to the offense as well as the relative criminality of the offender, the system outlined in the draft, in our view, will need substantial modification before it will result in sentences that accurately reflect how much harm resulted from an offender's conduct and how serious a criminal committed the offense.

... We recommend that the guidelines provide a sentence enhancement for all conduct, either in furtherance of or otherwise related to the offense of conviction and all resulting harms—accomplished, risked or intended.

... We recognize that the recommendations that we are making...the modified real offense system employed by the guidelines somewhat closer to a pure real offense system.

\textit{Id.} at 63, 66-67.

233. \textit{Id.} at 73-74.


235. \textit{Id.} at 48 app. B.

criminal record. As discussed below, the biaxial grid and the criminal history calculus first appearing in the January 1987 draft were contributions of Commission staff member Peter Hoffman. The penalty levels in the January 1987 draft were, like the September 1986 draft, not based on any empirical study of federal sentencing. Commissioner Robinson responded with a lengthy written dissenting opinion, in which he faulted the other Commissioners for not basing the latest draft on a "coherent, articulated sentencing philosophy"—in particular, for not addressing enough harms in accordance with the just deserts philosophy—and also for allowing for too much sentencing discretion, which, in turn, he asserted, would result in unwarranted sentencing disparities.

The Commission conducted two days of public hearings in order to receive feedback about the January 1987 draft. A significant objection to the draft came from the DOJ, which contended that the draft vested too much discretion in sentencing judges with respect to "specific offenses characteristics." In several places in the January 1987 draft guidelines, judges were given total discretion to add different numbers of offense levels within a specified range for certain types of aggravating factors. For instance, in the guideline for robbery, judges were given discretion to increase the base offense level "by 3 to 6 levels depending on the use made of [a] weapon" during the robbery—without providing for specific criteria for three to six level enhancements. The Department contended that the discretionary nature concerning the number of levels of enhancement in these provisions in effect allowed for broad guideline ranges greatly in excess of the limited sentencing ranges permitted by the SRA's "25-percent rule." Second Circuit Judge Newman was the leading voice against the DOJ's position.


238. See infra notes 899-903 and accompanying text.

239. See Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 29 ("The numbers [were] not very good in the January [1987] Draft because the numbers [did] not yet reflect the [past-practice] data.").


241. SUPPLEMENTARY REPORT, supra note 37, at 11.


244. See Letter from Stephen S. Trott to William W. Wilkins, supra note 242, at 2. In his testimony before the Commission, Trott proposed the following solution:

The solution, ... we believe, [i]n ranges of graduated increases or decreases, appropriately keyed to the particular facts of the case. It is the keying the guideline...
4. "Draft X"

Concern existed among Commissioners Breyer, Block, and Nagel that the January 1987 draft needed significant revision—particularly concerning penalty levels—to be a viable guidelines system in time for the April 13, 1987 statutory deadline. In the late winter, those three Commissioners—working together primarily with staff members Hoffman and Lombardero—began drafting what they referred to as Draft X (apparently intended to be somewhat tongue-in-cheek). According to Commissioner Breyer, “Draft X . . . really became the uniform draft into which other things were melded—not a new draft but a creation out of former parts, which would resolve issues in a systematic and consistent way.” As discussed further below, with the exception of drug offenses, certain white-collar, and violent offenses, the penalty levels in Draft X were largely based on “past practice” data and, to a lesser degree, penalty levels in the parole guidelines.

5. The Initial Guidelines Manual

As the clock wound down to April 13, 1987, a majority of the Commission agreed that Draft X was the best model to fulfill the many directives in the SRA. The Commission also voted to sustain the objection of the DOJ to the January 1987 draft concerning the discretionary enhancements in the specific offense characteristics. As ranges to the facts of the case that, in our view, would make them workable. A judge would be directed to pick the description that most closely approximated the case at hand, interpolating between the two descriptions, if necessary, and then applying the point value that the identified description would carry.


247. Id. at 35.

248. See id. at 37-39; see also infra Part IV.F.1.

249. See Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 51; see
a result, differing levels of enhancement became tied to specific fact-findings made by sentencing judges—such as different levels of enhancement for the manner in which a defendant used a dangerous weapon during a robbery.\footnote{250}

The meeting minutes and internal Commission records from the spring of 1987 show that the Commissioners and staff were working feverishly and around the clock to complete the manual by the statutory deadline of April 13, 1987.\footnote{251} As April 10 turned to April 11, the Commission voted six to one to promulgate a polished version of Draft X.\footnote{252} Commissioner Robinson voted against promulgation and later published a lengthy written dissent\footnote{253} to which the other six Commissioners responded (among other things, referring to Commissioner Robinson’s preferred approach as “a kind of academic fantasy”).\footnote{254} Commissioner Robinson’s primary complaint was that the initial guidelines were “neither comprehensive nor binding”—insofar as they did not provide enough penalty levels for differing degrees of harm and also provided for too many departure provisions.\footnote{255} Although he was a non-voting ex officio member of the Commission, Commissioner Gainer objected to the promulgation of the initial Guidelines Manual for the reasons set forth by Commissioner Robinson.\footnote{256} Despite Gainer’s objection as the ex officio Commissioner representing the Attorney General, the DOJ publicly supported the initial Guidelines Manual.\footnote{257}

\begin{footnotes}
\item[250] Also \textit{Supplementary Report}, supra note 37, at 14-15.
\item[253] Interview with William W. Wilkins, Jr., Judge, supra note 157, at 22 (noting that the final vote occurred at midnight).
\item[257] \textit{See} States Likely to Look Anew at Pretrial Detention, \textit{Nat’l L.J.}, June 8, 1987, at 5 (discussing Attorney General Edwin Meese’s speech to the American Law Institute, in which he echoed Gainer’s criticisms yet said the DOJ would not oppose the guidelines going into effect because the Commission had the opportunity to correct the perceived deficiencies in them); \textit{see also}
The Commission requested that Congress "enact legislation staying the implementation . . . for an additional nine-month period until August 1, 1988."\(^{258}\) The Commission believed that such a nine-month delay would allow the Commission to train judges, probation officers, and practitioners and also to conduct field testing of the guidelines with a variety of groups; "the limited time for preparing the guidelines did not permit the Commission to field test them to the degree the Commission would have desired."\(^{259}\) Such field-testing would permit the Commission to "prepare any necessary technical and substantive amendments" that could go into effect on August 1, 1988.\(^{260}\)

After lengthy congressional hearings about the initial guidelines during the summer and fall of 1987,\(^{261}\) Congress opted not to reject the Guidelines Manual, but also did not enact legislation delaying the guidelines' implementation. The guidelines thus went into effect under the operation of law on November 1, 1987.\(^{262}\)

The initial Guidelines Manual contained seven chapters:

- Chapter one, "Introduction and General Principles," provided an overview of the "major issues" addressed in the manual and also addressed several important rules for guideline sentencing, including "relevant conduct."\(^{263}\)
- Chapter two, "Offense Conduct," included approximately 168 separate guidelines that covered all major federal offense types and many less common ones, with statutory references to the guidelines in Appendix A, which included around 800 statutory provisions.\(^{264}\) A typical guideline had both a "base offense level" (the least aggravated form of the offense) and one or more "specific offense characteristics" (aggravating and mitigating factors that commonly occurred in the commission of that particular offense type).\(^{265}\)

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\(^{258}\) Letter from William K. Wilkins, Chairman, to President of Senate and Speaker of the House, at 2 (Aug. 13, 1987).

\(^{259}\) Id.

\(^{260}\) Id.

\(^{261}\) See, e.g., Hearing, supra note 257 (containing 543 pages of written and oral testimony);


\(^{263}\) See SENTENCING GUIDELINES MANUAL, supra note 3, §§ 1B1.3--5.

\(^{264}\) See id., app. A, §§ 2A1.1--2X5.1. Chapter two also included guidelines concerning defendants convicted of inchoate offenses—such as aiding and abetting, attempted offenses, solicitation, and conspiracy—as well as "[o]ther" offenses. Id. §§ 2X1.1--2X5.1.

\(^{265}\) See, e.g., id. § 2B3.1 (including a base offense level of 18 and several specific offense
• Chapter three, "Adjustments," included guidelines addressing a variety of aggravating and mitigating factors associated with federal offenses generally—including obstruction of justice, acceptance of responsibility, and the defendant’s role in the commission of the offense relative to codefendants.266
• Chapter four, "Criminal History and Criminal Livelihood," contained the rules for calculating a defendant’s criminal history points to be used in placing the defendant in the applicable criminal history category on the Sentencing Table.267 Chapter four also contained provisions for "career offenders."268
• Chapter five, "Determining the Sentence," contained the Sentencing Table (as a biaxial grid) as well as the rules for determining various aspects about a defendant’s sentence, including numerous provisions governing departures from the applicable guideline ranges.269
• Chapter six, "Sentencing Procedure and Plea Agreements," contained guidelines about sentencing procedure and non-binding “policy statements” concerning courts’ acceptance or rejection of plea agreements.270
• Chapter seven, "Violations of Probation and Supervised Release," contained brief policy statements concerning offender’s violations of the conditions of their supervision and the responses that courts should take.271

Consistent with Congress’s intent, the original Commission envisioned the sentencing guidelines as an evolving set of rules concerning sentencing procedures and practices.272 Several places in the original manual stated the Commission’s intention to amend the guidelines in response to data analysis of cases in the future in which the courts would apply the guidelines.273

characteristics for robbery, such as aggravating factors for the amount of money stolen, possession or use of a dangerous weapon, and causing bodily injury).

266. See id. §§ 3A1.1–3E1.1.
267. See id. §§ 4A1.1–3.
268. See id. § 4B1.1.
269. See id. §§ 5B1.1–5C2.1, 5K1.1–5K2.14.
270. See id., §§ 6A1.1–6B1.4.
272. See id. ch.1, pt.A.5; see also 28 U.S.C. § 994(o) (1988) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.”).
273. See, e.g., SENTENCING GUIDELINES MANUAL, supra note 3, ch. 1, pt. A.2; ch. 4, pt. A.
F. Between Rocks and Hard Places

A recent Chair of the Commission observed that the Commission has faced "enormous challenges in its mission to serve as the neutral expert at the intersection of the three branches regarding federal sentencing policy." This observation is particularly true for the original Commission. It was pulled in three different directions by powerful forces in each of the three branches of the federal government and attempted to accommodate all three in developing the initial set of sentencing guidelines.

1. Legislative Branch

First and foremost, the original Commission had received very clear and comprehensive directions from Congress, both in the SRA and the legislative history, regarding the path that the Commission had to follow. The SRA was enacted by a near unanimous vote in the Senate and a lopsided vote in the House. Three of the original Commissioners had worked as staffers for powerful Senators who were key sponsors of the legislation, and the Senate Judiciary Committee had made it clear that it intended to stay in close contact with the Commissioners as they created the sentencing guidelines.

Regarding the SRA, Commissioner MacKinnon noted that he had "followed legislation for over 60 years" as a Congressman, a United States Attorney, and a federal judge and that the SRA "was the most complete set of legislative directives that I have ever seen in a statute." Similarly, Chairman Wilkins stated that "we were told to develop this new system of justice, yet the statute told us how to do

274. Sessions, supra note 191, at 308.
275. See supra note 110 and accompanying text (noting that the Senate voted 91 to 1 and 85 to 3, while the House voted 243 to 166).
276. Hearing, supra note 139, at 330 (statement of Sen. Edward M. Kennedy). Indeed, Senator Kennedy went so far as to state the following at the 1985 confirmation hearing for the original Commissioners:

[W]e are going to try to maintain close communication with the Commissioners as the Sentencing Commission works its way through its responsibilities under the Sentencing Reform Act of 1984. Ultimately we are aware that down the road, the Congress will review and shape the Commission's recommendations and I think that it would be very, very helpful for all of us, at least on the Judiciary Committee, to keep in as close communication as we can during the deliberations.

Id.; see also Letter from Joseph R. Biden, Jr., Minority Member, U.S. Senate, to William W. Wilkins, Jr., Judge, U.S. Dist. of S.C. 2 (Oct. 3, 1985) ("I would ... like to ensure that an ongoing working relationship is established with the Commission throughout its tenure and I will ask Scott Green of the minority staff to work as a liaison with the Commission so that I can be kept abreast of the Commission's work.").

277. Interview with George MacKinnon, supra note 137.
it.” In a co-authored article, Commissioner Breyer and Kenneth Feinberg, who both helped draft the SRA when they were staffers for Senator Kennedy, also wrote that the original Commission’s many policy decisions “reflect the mandate of the statute creating the Commission and authorizing the Commission to promulgate the Guidelines.”

“[T]here were occasions when difficult decisions were made by the Commission,” they added, and “[o]ften these decisions reflect a statutory mandate requiring the Commission to act in a particular way.” Even one of the federal sentencing guidelines’ most ardent critics, Professor Kate Stith, has stated that “by and large, the Commission . . . implemented the Sentencing Reform Act in a manner consistent with legislative intent.”

The statutory directives in the SRA were fleshed out by an exhaustive legislative history, one that was nearly a decade in the making. Moreover, key members of the original Commission and its staff—including Commissioner Breyer and General Counsel John Steer—had worked as staffers for the leading Senators who shepherded the legislation through Congress and, thus, were intimately familiar with Congress’s intent.

The Commission has recognized that the SRA’s “legislative history is extensive—especially a detailed Senate Report that accompanied the legislation.” The Commission pointed out that “[t]he sentencing reform portion of this Report is over 150 pages long and includes 430 footnotes.”

278. Interview with William W. Wilkins, Jr., Judge, supra note 157, at 2.
280. Id.
282. Stith & Koh, supra note 111, at 284. Also notable is that both Marvin Frankel, the “father of sentencing reform,” and Kenneth Feinberg, the main drafter of the SRA, agreed that the initial “Sentencing Commission closely adhered to its statutory mandate in developing and issuing sentencing guidelines.” Brief for Joseph E. DiGenova et al. as Amici Curiae in Support of Affirmance at 21, United States v. Mistretta, 486 U.S. 1054 (1988) (No. 87-1904, 87-7028), 1988 WL 1026043, at *12 (Frankel and Feinberg joined DiGenova and others as amicus curiae); see supra notes 103, 190 and accompanying text.
283. See Stith & Koh, supra note 111, at 230-81 (tracing the legislative history of the SRA).
but was deemed authoritative when the original Commission was seeking to discern congressional intent from it. The interpretive value of legislative history, especially a report from the committee responsible for drafting the bill that ultimately was adopted, was generally accepted as compelling evidence of congressional intent in the 1980s, in particular for a federal agency. 287 Although some had argued that the Commission had the authority to ignore Congress, the Commission unanimously rejected this suggestion. 288 Commissioner MacKinnon, for example, observed “that the ‘policy’ of the Commission is in the statute [i.e., the SRA].” 289 He also noted that “[m]uch of the legislative intent is hidden in the congressional report [i.e., the 1983 Senate Judiciary Committee Report].” 290

In addition to Congress itself, an independent agency located within the legislative branch, the General Accounting Office (“GAO”), also sought to influence the Commission’s deliberations. 291 The SRA required the GAO to conduct a study of the guidelines within 150 days of the publication of the Guidelines Manual, 292 and to conduct another study at the four-year mark. 293 During a meeting with the original Commissioners in April 1986, GAO officials made suggestions for potential Commission action regarding certain key policy issues, including regulating plea bargaining practices and “real offense” sentencing. 294 In other words, officials who would be formally assessing the Commission were offering substantive policy advice to the Commissioners. 295

2. Executive Branch

A second strong influence on the Commission came from the Executive Branch, especially the DOJ. The Department—not only through its ex officio Commissioner, but also through high-level officials, including the Attorney General himself 296—had a strong

287. See supra notes 127-31 and accompanying text.
288. Interview with Ilene H. Nagel, supra note 46, at 42-43 (noting that this suggestion was raised multiple times and on each occasion was rejected unanimously as “simply . . . not an option” available to the Commission).
290. Id.
295. The substantive positions of GAO officials arguably were inconsistent with GAO standards. See U.S. GOV’T ACCOUNTABILITY OFFICE, GOVERNMENT AUDITING STANDARDS 36-37, 197 app. 1 (2011) (noting that an auditor’s preconceived ideas threaten his independence).
296. Interview with Ilene H. Nagel, supra note 46, at 65 (“The Department of Justice played a
motive to seek to influence the Commission, as the guidelines would inform general prosecutorial policies and would be used by line prosecutors in federal cases with respect to charging and plea bargaining decisions.

The Department’s engagement triggered hard choices for the Commission, a fact perhaps best exemplified by the subject of the death penalty. After Congress failed to enact a post-Furman federal capital sentencing statute as part of the larger crime and sentencing legislation that included the SRA, the Department saw the Commission as a fallback option for resurrecting the federal death penalty. In multiple memoranda, the Department contended that the Commission not only possessed the legal authority to promulgate guidelines on the death penalty, but also had the statutory duty to issue such policy. The Commission initially agreed, by a four to two vote (on the motion of Commissioner Block, with Commissioners Breyer and Corrothers voting against), to allow its staff to proceed with drafting guidelines on the death penalty. Thereafter, the Commissioners agreed unanimously, on Commissioner Block’s motion, to hold a public hearing on the topic. But on March 10, 1987, the Commission voted four to three (on the motion of Commissioner MacKinnon, with Chairman Wilkins and Commissioners Breyer and Corrothers voting affirmatively and Commissioners Block, Nagel, and Robinson voting against) not to address capital punishment in the initial Guidelines Manual. Commissioner Breyer, the most vocal proponent for the Commission not to take a position on capital punishment, stated that the Commission

major role in that they made proposals [as the drafts of the guidelines were emerging] all the time. Every unit in the Department actively was making proposals. We had enormous amounts of contact with the Deputy Attorney General, the Attorney General, the head of the Criminal Division, and the Associate Attorney General.

297. See id. at 65-66 (explaining that the Commission, on a weekly basis, would hear from some unit within the DOJ concerning different guideline issues).
298. Furman v. Georgia, 408 U.S. 238 (1972); see also United States v. Kaiser, 545 F.2d 467, 470-71 (5th Cir. 1977) (noting that Furman rendered the federal death penalty scheme then in existence facially unconstitutional).
299. See Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note 141, at 47-50. The Department envisioned the Commission’s promulgating aggravating and mitigating factors that would satisfy the Supreme Court’s post-Furman Eighth Amendment jurisprudence. Id.
could not make a bigger mistake than to promulgate death penalty guidelines because, even if the Department’s legal view on Commission authority was correct, from a political standpoint the Commission’s addressing such a controversial topic would likely result in Congress’s rejection of the entire guidelines. Then-Chairman of the Senate Judiciary Committee, Senator Biden, concurred with Commissioner Breyer’s assessment.

The Department weighed in on other major issues as well, sometimes with success and sometimes without success. For instance, the Department objected to the January 1987 draft guidelines, which afforded district judges discretion in deciding how many levels of enhancement to apply for many specific offense characteristics, on the ground that it violated the 25% rule. In particular, Associate Attorney General Stephen S. Trott noted that, while the Department supported the concept of differing levels of enhancement, the 25% rule required that specific offense characteristics direct a sentencing judge to a particular level for particular conduct—not a range of levels from which to choose one level in the court’s discretion. The initial Guidelines Manual acceded to the Department’s view, acknowledging that “a range of increases in offense levels [with a sentencing judge having discretion to choose any level within the range] may violate the statute’s 25 percent rule.”

3. Judicial Branch

The Commission faced opposition from multiple components of the judicial branch. As noted above, the Judicial Conference of the United

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305. Howard Kurtz, Sentencing Panel Bars Death Penalty; Hill Rejection of Proposal Feared; Justice Dept. Is Rebuffed, WASH. POST, Mar. 11, 1987, at A17 (“Senate Judiciary Committee Chairman Joseph R. Biden Jr. (D-Del.) warned last week that the commission would be ‘dead’ if it voted to revive the death penalty.”).
306. See Interview with Ilene H. Nagel, supra note 46, at 65-66. Commissioner Nagel thought it was “a myth is that [the Department’s regular proposals and contact with the Commission] became policy.” Id. Even a strong critic of the Commission acknowledged that the Commission—in particular, Chairman Wilkins—showed independence from the Department. See Albert W. Alschuler, The Selling of the Sentencing Guidelines: Some Correspondence with the U.S. Sentencing Commission, in THE U.S. SENTENCING GUIDELINES: IMPLICATIONS FOR CRIMINAL JUSTICE, supra note 85, at 49, 91-92 n.8 (observing that Chairman Wilkins “exhibited independence from the Department of Justice”).
307. See, e.g., Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920, 3929, 3931 (Feb. 6, 1987) (noting the levels ranging from one to four, one to five, and one to six).
309. See supra note 244 and accompanying text.
310. SENTENCING GUIDELINES MANUAL, supra note 3, ch. 1, pt. A.
States had opposed having an independent judicial agency promulgate sentencing guidelines and, instead, wished to have Congress delegate that authority to the Conference.\textsuperscript{311} Countless individual federal judges also expressed their displeasure with the Commission and its work creating guidelines,\textsuperscript{312} sometimes directly to the Commission. They complained about the proposed guidelines' complexity, perceived severity, and usurping judicial discretion.\textsuperscript{313}

Federal public defenders, also within the judicial branch, shared judges' general hostility to the guidelines. As a representative example, a federal public defender wrote to Chairman Wilkins to note that he found the draft guidelines "very disturbing," because the guidelines' ranges were "extremely harsh," they "[divested] the court of its discretion and its traditional role in the sentencing process," and they would make the sentencing process "far more complicated."\textsuperscript{314} Moreover, he asserted, the Commission’s approach to acceptance of responsibility "formulate[s] an incentive for pleading guilty" and a "disincentive or even punishment for going to trial," which he deemed "simply repugnant to the way we like to think our judicial system operates."\textsuperscript{315}

Resistance to the Commission also came from the AO and the Federal Judicial Center ("FJC"), which were the Commission’s older-sister agencies in the federal judiciary.\textsuperscript{316} According to Commissioner Nagel, the AO and the FJC perceived the Commission as a "threat from the beginning," and as "intruders and interlopers."\textsuperscript{317} As an example, the

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\item \textsuperscript{311} See supra note 164 and accompanying text.
\item \textsuperscript{312} See, e.g., Interview with Ilene H. Nagel, supra note 46, at 8-11, 108-09, 119 (discussing the very strong and widespread resistance to the original Commission's creation of sentencing guidelines by federal judges); see also Sentencing Guidelines: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary, 100th Cong. 482 (1987) (noting the testimony of Judge Newman) ("As far as the guidelines themselves, . . . you have heard in the past and you will hear in the future considerable criticism of the guidelines from judges. I don't think you ought to be the least bit surprised that judges are critical of the guidelines. . . . And I think the reason is quite clear. Sentencing judges have been sentencing with unfettered discretion. The guidelines structure their discretion. There is no exerciser of discretion I know who prefers to have his or her discretion in any way limited.").
\item \textsuperscript{315} Id. at 3.
\item \textsuperscript{316} See Interview with Ilene H. Nagel, supra note 46, at 98.
\item \textsuperscript{317} Id. at 98; see Interview with William W. Wilkins, Jr., Judge, supra note 157, at 31-32 (noting that the FJC "saw us [as] . . . intruding into their area of training" and there "was a lot of
SRA empowered the Commission to hold "seminars and workshops providing continuing studies for persons engaged in the sentencing field" and "periodic training programs of instruction in sentencing techniques for judicial and probation personnel and other persons connected with the sentencing process." 318 Training in the federal courts, however, had been a traditional function of the FJC. 319 In an effort to broker shared understanding on their respective roles, the Commission held a meeting with the FJC and five judges, on March 10, 1986, to discuss how the two agencies could coordinate in guidelines education. 320

Despite the widespread resistance within the judiciary to the Commission in its early years, there was one segment of the judicial branch that proved to be a critical ally of the Commission—United States Probation Officers. The launch of the guidelines experiment hinged on probation officers, because they were responsible for PSRs, the epicenter of the sentencing process. Indeed, these PSRs contained virtually all relevant sentencing information, including guidelines calculations. 321 Were it not for the probation officers' knowledge of the guidelines and their support for this system, the guidelines may have faltered at the outset. Rusty Burress, the original Commission’s primary trainer and liaison to the federal probation officer community—himself a former federal probation officer—is credited with educating the probation officers about the guidelines and securing their critical buy-in. 322

319. Id. § 620(a), (b)(3) (establishing the FJC, in part, “to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government and other persons whose participation in such programs would improve the operation of the judicial branch”).
320. Meeting Minutes, U.S. Sentencing Comm’n, supra note 289, at 1-8. Ultimately, because of the two agencies’ inability to coordinate education of judges concerning sentencing, in 1991, a report by the Committee on Appropriations provided the following admonition:

[T]he Committee expects the Federal Judicial Center, the Sentencing Commission, and the Administrative Office to coordinate more closely efforts to accomplish training objectives. For example, the Commission, with its expertise in the subject matter should be utilized for assigning faculty responsibility for planning and instruction for Center-sponsored conferences for Court personnel, while the Center can focus its efforts on those areas for which it has acknowledged expertise, i.e. conference logistics and training program production.

321. See FED. R. CRIM. P. 32. Notably, Federal Rule of Criminal Procedure 32 was amended in 1987, in conjunction with the promulgation of the original Guidelines Manual, to require federal probation officers to include a detailed calculation of the defendant’s sentencing guideline range. Id. 32(d)(1)(C).
322. See Interview with Ilene H. Nagel, supra note 46, at 125-26 (praising the training staff,
4. On an Island

As various entities in the three branches of the federal government exerted pressure on the Commission, and as these entities possessed varied and often conflicting interests, the Commission faced a formidable challenge. Commissioner Nagel indicated that Congress was aware that the Commission would be making unpopular decisions, most notably the curbing of judicial discretion and raising penalties for at least some offenders, but that Congress deliberately established the Commission to "take all the heat."[323] As the Commission was independent and yet pushed and pulled in different directions by multiple governmental actors, she aptly likened the Commission's position to being an "island."[324]

It may have been unavoidable for the Commission to be in this tenuous position. The Commission was an entirely new agency that had to establish itself with other agencies and actors that had existed and that had been working together for decades. That is, the Commission lacked these prior institutional relationships, and the creation of a new agency would upset the prevailing order of things.[325]

The Commission was not only new, but also unknown or, worse, misunderstood. Even those in high levels of the federal government generally possessed little understanding of the Commission in the early years.[326] The Commission appeared to be sensitive to the need to educate others about its purpose and work. Chairman Wilkins identified such education as a priority.[327] But there are doubts as to whether the Commission succeeded in this mission. Commissioner Nagel, for example, opined that, as the Commission was creating the initial guidelines, the Commission erred in not building better relationships with Congress, the judiciary, and the public.[328]
The Commission was able to meet the daunting statutory mandate of developing guidelines within an eighteen-month window due to a process characterized by prolific production, regular discussions, and broad-based engagement. To begin with, the Commission scheduled standing meetings to occur every other week. Between their first meeting on October 29, 1985, and the promulgation of the technical, clarifying, and conforming amendments to the first Guidelines Manual on May 1, 1987, the Commission held at least forty business meetings, some of which lasted two or three days and occasionally would go well into the evening hours.

At their very first meeting, the Commissioners resolved that, whatever their substantive decisions, their deliberative process would be open. Accordingly, anyone with an interest in the Commission’s work could attend and take part in its business meetings. At the April 1, 1986, meeting, the Commission decided to adopt, in response to a rumor that some Commission meetings were “secret,” a formal policy that would encourage public attendance and participation. In particular, the Commission unanimously agreed to post public notices of its meetings, to do so by noon every Friday before the following week’s meeting, and to publish this posting procedure in the Federal Register.

The Commission also sought out the expertise of myriad others in the sentencing community. Commissioner Breyer recalled that, at their very first meeting, the Commission determined to “solicit points of view” that were “far and wide” on possible approaches and to receive reactions to Commission proposals. This outreach took several forms.

330. The authors’ review of the Commission’s records has identified no less than forty different meeting minutes from October 1985 through April 1987. Some minutes refer to meetings on dates for which no minutes can be located in the Commission’s records, so the actual number of Commission meetings in the first eighteen months was likely more than forty.
332. See Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note 141, at 36 (noting that “we’d go through meetings late at night”); Interview with William W. Wilkins, Jr., Judge, supra note 157, at 16 (noting that the Commissioners and staff “worked . . . weekends, long hours, late at night, [and] back the next morning”).
334. See id. at 2-3 (noting that, at the very first Commission meeting, the original Commissioners made a decision to have meetings open to the public).
336. Id.

http://scholarlycommons.law.hofstra.edu/hlr/vol45/iss4/11
For example, the Commission established, and regularly met with, several advisory and working groups. There were three groups of federal judges, as well as groups that included federal probation officers, federal prosecutors, state prosecutors, federal public defenders, and leading academics, among others. The Commission also received briefings from officials with various government agencies, including the DOJ, the BOP, and the GAO. In between these formal meetings, the Commissioners informally visited and shared guideline drafts with many others, including judges, academics, and executive officials. In addition, the Commission distributed a questionnaire on offense seriousness to judges, practitioners, and even members of the press.

Moreover, the Commission held thirteen public hearings during the relevant eighteen-month span, at which it received oral testimony from 213 witnesses and written testimony from more than 1020 individuals and groups. Six of the thirteen hearings focused on particular substantive areas: offense characteristics, offender characteristics, corporate sanctions, sentencing options, plea agreements, and the death penalty. The Commission held some hearings following the release of draft guidelines, in order to receive feedback on the drafts. In particular, six hearings were held following the publication of the September 1986 draft, and two days of public hearings following the publication of the January 1987 draft. To facilitate that feedback, the Commission distributed over 5500 copies of the September 1986 draft guidelines to all Article III judges, and to many practitioners, researchers, and other interested persons, and engaged in a similar process for the revised draft.


339. SUPPLEMENTARY REPORT, supra note 37, at 9.

340. Id.


342. SUPPLEMENTARY REPORT, supra note 37, at 11.


344. Meeting Minutes, U.S. Sentencing Comm’n (Apr. 15, 1986) (on file with authors);


347. See id.; Meeting Minutes, U.S. Sentencing Comm’n, supra note 225.


349. SUPPLEMENTARY REPORT, supra note 37, at 11.

350. Id. at 10-11.
The extent to which the Commissioners actively sought external feedback is reflected in the beginning of the draft guidelines. In an “Open Letter” at the outset of the September 1986 preliminary guidelines, the Commission noted that the draft was “an excellent vehicle for public comment” and added that the Commission “[sought] your critical analysis.”\(^{351}\) Similarly, on the very first page of the January 1987 revised draft, Chairman Wilkins stated that the Commission benefited from the public input on the initial draft and that, as a result, the Commission again “seek[s] your critical analysis and comments” on the subsequent draft.\(^ {352} \)

The Commissioners’ interest in outreach took them across the country. The Commission held public hearings in Chicago, New York City, Atlanta, Denver, San Francisco, and Washington, D.C.\(^ {353} \) The Commissioners also attended and presented at conferences (including Sentencing Institutes), toured three correctional facilities,\(^ {354} \) and met with officials from several states concerning their sentencing guidelines and sentencing programs.\(^ {355} \) Two Commissioners went to Chicago to meet with leaders in the law and economics school of thought, including Judges Easterbrook and Posner.\(^ {356} \)

The caliber of those from whom the Commission received input cannot be overstated. The Commission engaged with a veritable “who’s who” of federal sentencing theory and practice. Judges Frankel and Newman—the two federal judges who helped make the strongest case for a federal sentencing commission and guidelines in the 1970s—regularly conferred with the Commissioners.\(^ {357} \) Other prominent federal judges, such as Jack Weinstein and Abner Mikva, also contributed to the Commission’s deliberations, as did leading academics, such as Professors Albert Alschuler, John C. Coffee, Jr., Charles Ogletree, and Stephen J. Schulhofer; influential public officials, such as Kenneth Feinberg (then-Chair of the New York Sentencing Commission), Douglas Ginsburg (later appointed to be a D.C. Circuit Judge), and William F. Weld; leaders in the criminal defense community, such as Judy Clarke and Terence F. MacCarthy; and representatives from major organizations, such as the American Bar Association, American Civil

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\(^{353} \) SUPPLEMENTARY REPORT, supra note 37, at 11.

\(^{354} \) Meeting Minutes, U.S. Sentencing Comm’n, supra note 177, at 1.

\(^{355} \) SUPPLEMENTARY REPORT, supra note 37, at 1.

\(^{356} \) See infra notes 426-27 and accompanying text.

\(^{357} \) SUPPLEMENTARY REPORT, supra note 37, at 4 app. A.

IV. KEY POLICY DECISIONS OF THE ORIGINAL SENTENCING COMMISSION

The previous two Parts of this article have discussed the historical context in which the original Commission operated and the processes it created to build a federal sentencing guideline system.359 This Part discusses the key substantive policy decisions of the original Commission, namely:

- whether to model the structure of the federal guidelines on existing state guidelines;
- whether the guidelines should be prescriptive (i.e., embodying a particular sentencing philosophy as a uniform national sentencing policy) or descriptive (i.e., reflecting existing sentencing practices);
- how the guidelines should regulate judges’ sentencing discretion;
- whether the federal guidelines should account solely for the nature of the offenses of conviction or, instead, more broadly account for offenders’ related conduct for which they were not convicted;
- how to set guidelines penalty levels based on a variety of different factors, including Congress’s creation of new drug and firearms offenses carrying statutory mandatory minimum sentences in the mid-1980s;
- how to account for offender characteristics, including personal characteristics and criminal history (or lack thereof);
- how to structure the Sentencing Table (the biaxial grid accounting for both offense severity and criminal history); and
- the extent to which considerations of prison capacity should affect the Commission’s policy decisions reflected in the guidelines.

358. Id.
359. See supra Parts II–III.
A. Rejecting State Guidelines as a Model for the Federal System

At the time that the original Commission first met in October 1985, several state sentencing commissions, most notably in Minnesota and Washington, already had promulgated sentencing guidelines that were being implemented by their state courts.360 These state guidelines generally were similar to each other in that the applicable guideline ranges were based on the offense of conviction and had one severity level for each offense type reflecting the “usual case.”361 The state sentencing commissions ranked the different offense types by perceived severity and, like their eventual federal counterpart, the state guidelines each had a biaxial Sentencing Table—with the vertical axis of the Sentencing Table accounting for offense seriousness and the horizontal axis accounting for an offender’s criminal record.362 Certain severity levels comprised more than one offense type (e.g., in Washington’s guidelines, offense severity level nine included robbery, manslaughter, statutory rape, and certain types of drug trafficking offenses).363

Unlike the federal guidelines that went into effect in 1987—which, for each offense type, provided for a “base offense level” (generally reflecting the least aggravated version of offense type) and “specific offense characteristics” that distinguished among offenses of the same general type (based primarily on different aggravating factors)—the state guidelines were relatively simple in nature.364 The state guidelines did provide for a limited number of aggravating and mitigating factors, but those factors usually were only relevant for deciding whether to depart from guideline ranges for “usual” offenses. Otherwise, the state guidelines did not follow the modified real offense approach of the


361. See Knapp & Hauptly, supra note 360, at 8-9; Knapp & Hauptly, supra note 173, at 689-90.

362. See, e.g., WASHINGTON SENTENCING GUIDELINES MANUAL I-11-12 tbl.3 (WASH. SENTENCING COMM’N 1986, amended 2016) [hereinafter WASHINGTON SENTENCING GUIDELINES MANUAL].

363. See id. at 1-3 tbl.2.

364. See, e.g., MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 32 (MINN. SENTENCING COMM’N 1986, amended 2016); WASHINGTON SENTENCING GUIDELINES MANUAL, supra note 362, at I-2 tbl.1. For instance, the 1986 version of the Minnesota Guidelines Manual had ten offense severity levels and six criminal history categories, for a total of sixty different cells in the sentencing table (“Sentencing Guidelines Grid”). See id. at 32. Washington had fourteen severity levels and nine criminal history categories, for a total of 126 different cells in the sentencing table. See WASHINGTON SENTENCING GUIDELINES MANUAL, supra note 362, at I-2 tbl.1. By contrast, the federal sentencing table had forty-three offense levels and six criminal categories, for a total of 258 cells. See SENTENCING GUIDELINES MANUAL, supra note 3, ch. 5, pt. A.
federal guidelines and, instead, were primarily based on the offense of conviction rather than what a defendant actually did in committing an offense.\textsuperscript{365} In addition, some state sentencing commissions, such as Minnesota's Commission, had explicit instructions from their state legislatures to factor in prison capacity into their decisions about setting guideline penalty levels, with the result being that some state guidelines were amended to reduce penalty levels when state prisons became overcrowded\textsuperscript{366}

The original federal Commission made a deliberate decision to reject existing state sentencing guideline systems as a model for the new federal guidelines. That decision, however, was not made until after the Commission had carefully considered the existing state systems as potential models—by studying state guidelines and corresponding state penal codes and hearing directly from commissioners or senior staff of all of the main state sentencing commissions then in existence.\textsuperscript{367} Furthermore, the Commission demonstrated its interest in seriously considering state guidelines by hiring, as its original Staff Director, Kay Knapp, the executive director of the Minnesota Sentencing Commission.\textsuperscript{368}

The original federal Commission decided not to model the federal sentencing guidelines after the existing state guidelines for three main reasons. First, the SRA and its legislative history contained many directives that were simply incompatible with the existing state guidelines.\textsuperscript{369} Second, federal penal statutes—unlike the state penal codes that were largely based on the Model Penal Code ("MPC"), with a much smaller number of offenses\textsuperscript{370}—did not provide a meaningful statutory base on which the construct sentencing guidelines tied to a defendant's offense of conviction.\textsuperscript{371} Rather than being a well-organized

\textsuperscript{365} See Knapp & Hauptly, supra note 173, at 683-85.
\textsuperscript{366} Meeting Minutes, U.S. Sentencing Comm'n 4-5 (June 15, 1986) (on file with authors).
\textsuperscript{367} See Meeting Minutes, U.S. Sentencing Comm'n (Jan. 21, 1987) supra note 177, at 9-10; see also Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note 141, at S8; Interview with Ilene H. Nagel, supra note 46, at 53-54.
\textsuperscript{368} See supra notes 172-74 and accompanying text.
\textsuperscript{369} See, e.g., 28 U.S.C. § 991(b)(2) (1988); see infra notes 505-10 and accompanying text (discussing the 25% rule); see also S. REP. No. 98-225, at 169 (1983) (summarizing the SRA and instructing the Commission to create "detailed and refined" sentencing guidelines that "reflect every important factor relevant to sentencing"). In a similar vein, the Senate Report also specifically noted that Congress expected sentencing guidelines "considerably more detailed than the existing parole guidelines." S. REP. No. 98-225, at 168.
\textsuperscript{370} Breyer, supra note 234, at 3. For example, at the time that the Commission drafted the federal sentencing guidelines, the two leading state guideline jurisdictions—Minnesota and Washington—had a total of 251 and 108 different statutory offenses, respectively. See id.
\textsuperscript{371} Id.
and logical system like the MPC, federal criminal offenses numbered in the thousands,\(^{372}\) were spread throughout dozens of titles in the United States Code having been enacted in different decades, included a vast array of disproportionate statutory ranges of punishment, and often were broad and vague offense types that encompassed an endless variety of different means of criminal conduct—such as the Hobbs Act or the Racketeer Influenced and Corrupt Organizations Act.\(^{373}\) Third, in order to reduce sentencing disparity based on prosecutorial charging decisions, the Commission decided that a modified real offense system—one that considered not only the offense of conviction but also “relevant conduct”—was the best means to equalize sentences for offenders who engaged in similar criminal conduct, but who were charged in disparate manners as the result of prosecutorial idiosyncrasies or other reasons unrelated to the seriousness of the offense or offender.\(^{374}\)

B. A Philosophical or Empirical Approach in Creating Guidelines—or Both?

1. Four Main Purposes of Punishment

The SRA required the Commission, in developing sentencing guidelines, to “assure the meeting of the purposes of sentencing”\(^{375}\)—retribution, deterrence, incapacitation, and rehabilitation.\(^{376}\)

In Western thought and throughout American history, these four theories have traditionally served as legitimate justifications for criminal punishment.\(^{377}\) First, the retributive theory of punishment seeks to hold the offender accountable for the harm he has caused or attempted to

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373. See Breyer, supra note 234, at 3-4.

374. See infra notes 632-33 and accompanying text.

375. 28 U.S.C. § 991(b)(1)(A) (1988); see also id. § 994(a)(2), (f), (m).


377. See Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMPO. PROBS. 401, 401 (1958) (identifying the purposes of punishment as the (1) “deterrence of offenses,” (2) “rehabilitation of offenders,” (3) “disablement of offenders,” and (4) “sharpening of the community’s sense of right and wrong [as well as] satisfaction of the community’s sense of just retribution”).
cause to specific victims and to society, reflecting the offender’s blameworthiness and the consequent need for his just deserts in proportion to his culpability.\textsuperscript{378} Second, under deterrence theory, punishment should be calculated to effectively discourage the offender (specific deterrence) and others (general deterrence) from committing offenses in the future.\textsuperscript{379} Third, incapacitation theory provides that an offender should be removed from society for as long as necessary to prevent him from engaging in any additional criminality.\textsuperscript{380} Fourth, under the doctrine of rehabilitation, punishment affords the offender with an opportunity to be “corrected” such that, with this personal development, the offender subsequently will be able to avoid criminal behavior.\textsuperscript{381} The first, backward-looking “just deserts” justification may be contrasted with the remaining three purposes of punishment, which are focused prospectively on utilitarian or “crime control” considerations.\textsuperscript{382}

Because the SRA directed the Commission to assure that the guidelines would meet the purposes of sentencing, Chairman Wilkins wrote his fellow Commissioners shortly after their first meeting that, to satisfy congressional intent, the Commission had to focus on this philosophical task as a threshold matter.\textsuperscript{383} Because the purposes of punishment are often conflicting\textsuperscript{384} and also because Congress did not clearly state a preference for any particular purpose\textsuperscript{385} (and even

\textsuperscript{378} See IMMANUEL KANT, THE PHILOSOPHY OF LAW 195 (W. Hastie, B.D. trans., T. & T. Clark 1887) (1796) (stating that punishment “must in all cases be imposed only because the individual on whom it is inflicted has committed a Crime”).

\textsuperscript{379} See JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 19-21 (1830) (“[Punishment involves both] particular prevention, which applies to the delinquent himself; and general prevention, which is applicable to all the members of the community without exception.”).

\textsuperscript{380} See 4 WILLIAM BLACKSTONE, COMMENTARIES *362-63 (noting that punishment may prevent future crime by “depriving the party injuring of the power to do future mischief”).

\textsuperscript{381} See Williams v. New York, 337 U.S. 241, 248-49 (1949) (likening rehabilitation to the “belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.”).

\textsuperscript{382} HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 11 (1968) (“The retributive view is essentially backward-looking; it regards the offense committed by the criminal as crucial, and adjusts the punishment to it. The utilitarian view is forward-looking; it assesses punishment in terms of its propensity to modify the future behavior of the criminal and ... of others who might be tempted to commit crimes.”).

\textsuperscript{383} Memorandum from William W. Wilkins, Jr., Chair, to the Commissioners, Dec. 17, 1985, at 4 (on file with authors).

\textsuperscript{384} See, e.g., United States v. Cavera, 550 F.3d 180, 189-90 (2d Cir. 2008) (acknowledging that there are “various, often conflicting, purposes of sentencing”).

\textsuperscript{385} Kenneth R. Feinberg, The Federal Guidelines and the Underlying Purposes of Sentencing, 3 FED. SENT’G REP. 326, 326-27 (1991) (“Congress was ambivalent about the prioritization of purposes and largely fudged the issue in drafting the underlying enabling legislation ...”). As noted above, as a Senate staffer (and colleague of Commissioner Breyer when
recognized that some purposes may not apply in particular cases), the Commission’s task was a difficult one.

2. Two Committee Strategy: Just Deserts and Crime Control

At its meeting on March 12, 1986, the Commission developed a strategy in response to its statutory mandate to create guidelines that implemented the purposes of punishment. Commissioners Block and Nagel “wanted to create a model using crime control [i.e., incapacitation and deterrence] as the sole factor determining the guidelines,” while Commissioner Robinson wanted guidelines primarily to reflect “just deserts.” The Commission decided to form two committees: a “Just Deserts” committee to be chaired by Commissioner Robinson, and a “Crime Control” Committee to be chaired by Commissioner Block and joined by Commissioner Nagel. Commissioner Gainer, the ex officio Commissioner representing the Attorney General, was part of the just deserts group. Commission staff made up the rest of the two committees.

The two committees reflected the personal ideologies of their two leaders: Commissioner Robinson, a prolific law professor, strongly aligned himself with the retributivist or “just deserts” school of...
thought, while Commissioner Block, an economist who focused on the legal system, was a devotee of the emerging “law and economics” school. According to Commissioner Nagel, the philosophical divide between the two camps was stark at the very outset: at the Commissioners’ very first meeting, held at the DOJ, Commissioner Robinson observed that the Department is called “Department of Justice,” not the “Department of Maximizing Social Utility,” to which Commissioner Block responded that the SRA is part of the Comprehensive Crime Control Act, not the “Comprehensive Justice and Fairness Act.”

The charge of each committee was to develop draft guidelines grounded purely in their respective sentencing philosophies. The Commissioners could then, in receipt of these drafts, consider the advantages and disadvantages of the submitted drafts in the hopes of melding their positive attributes into one guidelines manual. The Commissioners agreed that ultimately the work of the committees would be “consolidate[d]” and the two draft guidelines would be “merge[d].” The Commissioners resolved that the two committee drafts would be submitted by the summer of 1986.

with authors). However, many others—including the Supreme Court—have equated the two. See Tapia v. United States, 564 U.S. 319, 325-26 (2011) (equating just deserts in the SRA with “retribution”).

392. See, e.g., Paul H. Robinson, A Brief History of Distinctions in Criminal Culpability, 31 Hastings L.J. 815, 818-21 (1980); Paul H. Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, 23 UCLA L. Rev. 266, 273-78, 280-87 (1975). After leaving the Commission, Professor Robinson has continued to write extensively about “just desert” topics. See, e.g., Paul H. Robinson, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 6-12 (2013). Professor Robinson has not only argued that just deserts should be the only purpose of punishment, but he also contends that a focus on just deserts will have the effect of controlling crime. See, e.g., Paul H. Robinson, Empirical Desert, in CRIMINAL LAW CONVERSATIONS 29, 29-38 (Robinson et al. eds., 2009).


394. Interview with Ilene H. Nagel, supra note 46, at 84.

395. Id. at 19-20.

396. See Nagel, supra note 170, at 918; Interview with Ilene H. Nagel, supra note 46, at 21.


398. See Nagel, supra note 170, at 918.
a. Just Deserts Approach

The Just Deserts Committee worked through the spring and early summer of 1986 to produce a well-developed draft guidelines manual by July 10, 1986. 399 That draft grouped federal offenses into several larger categories, such as “death and personal injury,” “theft and property destruction,” and “unlawful drug trafficking.” 400 The draft also required a sentencing court to identify all actual or intended harms, “personal and societal,” attributable to the defendant—whether caused “directly or indirectly”—and to aggregate the numerical “harm values” assigned to each identified harm. 401 These harm values were designed to “reflect the seriousness with which society views such conduct or result.” 402

The just deserts draft included complex formulas for determining harm values for drug offenses and economic offenses. 403 In particular, the draft included elaborate quantitative tables, such as the “Property Harms Table” and “Drug Units Harm Values Table,” that drew myriad distinctions between drug quantities and financial loss amounts. 404 The raw harm values for each offense type were to be adjusted according to several aggravating and mitigating circumstances, such as the defendant’s mental disability or his role in the offense, which had specific multipliers that could either increase or decrease the harm values. 405 The final computation of “harm values” was to be translated to “sanction units.” 406 The sanction units then could be increased by a defendant’s criminal record and decreased by a guilty plea or cooperation with the authorities. 407 Formulas translated the final sanction units into forms of punishment, such as fines, probation, and imprisonment, or a mixture of multiple forms of punishment. 408

In June 1986, an advisory group of federal district court judges held a meeting at the Commission’s offices in which they discussed the just deserts concept for a sentencing guidelines system. 409 Those judges—

400. See id. at 4, 8, 19.
401. See id. at 4-5.
402. Id. at 4.
403. Id. at 18-21, 39.
404. See, e.g., id. at 15 tbl.1, 25-27 tbl.2B. The Property Harms Table is reproduced in Appendix C at the end of this Article.
406. Id. at 4.
407. Id. at 58 tbl.A, 58-59.
408. Id.
409. See Meeting Minutes, U.S. Sentencing Comm’n (June 10, 1986) (on file with authors).
who are not named in Commission records—generally supported the just
deserts model.\textsuperscript{410} The DOJ also supported the just
deserts draft.\textsuperscript{411} Chairman Wilkins initially supported it as well, because the draft was
something to build on and nothing had been produced by the efficient
Crime Control Committee.\textsuperscript{412}

Support quickly waned, however. Commissioner Nagel expressed
concern that the draft’s determinations of harm seriousness were
seemingly based on Commissioner Robinson’s subjective judgments and
not on empirical data or other objective sources, such as public opinion
surveys.\textsuperscript{413} Commissioner MacKinnon, a former United States Attorney
for nearly a decade and a federal circuit judge since 1969,\textsuperscript{414} complained
that the complex draft could not be easily understood and applied by
busy judges.\textsuperscript{415} Commissioner Breyer described the draft as a “very
major contribution”\textsuperscript{416} and a “serious intellectual effort,” but also
deemed it “not workable.”\textsuperscript{417}

In their attempt to convince the Commissioners who supported the
just deserts draft that it was not viable, Commissioner Breyer and
Kenneth Feinberg, who had helped draft the SRA as a staffer for Senator
Kennedy, arranged a meeting with three influential judges (two active
and one retired) who were strong supporters of the concept of federal
sentencing guidelines: U.S. District Judges Harold Tyler and Marvin
Frankel (the latter had retired from the bench) and United States Circuit
Judge Jon Newman.\textsuperscript{418} According to Commissioner Breyer, these judges
persuaded Chairman Wilkins that the just deserts draft simply would not
work in practice.\textsuperscript{419} Chairman Wilkins became convinced to “[pull] the

\begin{footnotes}
\item 410. See id. at 2 (“[T]he working group of federal judges who had met with the Commissioner
earlier that week supported the concept.”).
\item 411. See Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 9; see
also Interview with Ilene H. Nagel, supra note 46, at 76-77.
\item 412. See Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note
141, at 16.
\item 413. See Nagel, supra note 170, at 918.
\item 414. Interview with George MacKinnon, supra note 137.
\item 415. Id. at 2, 4.
\item 416. Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 12-13
(adverting that the just deserts draft helped identify the “most important elements” in criminal law,
“organize [the] subject,” and “flag[ging] a number of important issues”).
\item 417. See Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note
141, at 14-15; see also Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1,
at 7.
\item 418. See Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note
141, at 16-17. Judges Frankel and Newman had been instrumental in making the case for federal
sentencing reform and their push helped give rise to the SRA and the Commission. See supra notes
103-09, 221-24 and accompanying text; see also Interview with Ilene H. Nagel, supra note 46, at
76-77.
\item 419. See Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note
\end{footnotes}
plug” on Commissioner Robinson’s just desert guidelines project by the end of the summer of 1986.420

b. Crime Control Approach

On April 1, 1986, Commissioner Block reported that he had been working with a fellow economist, Mark Cohen, a Senior Research Associate on staff, to “clarify and solidify” the conceptual framework for crime control guidelines.421 Commissioner Block reported that his committee’s goal was to translate the theoretical work of Professors Gary Becker, A. Mitchell Polinsky, and Steven Shavell—early leaders in the law and economics school422—into guidelines capable of producing “efficient sentences” that would deter criminal conduct.423 While Commissioner Block, together with Mark Cohen, developed the conceptual framework for the model, Commissioner Nagel assumed responsibility for the empirical side of the group’s work.424 Commissioner Nagel sought reliable data on various issues, including the “costs of the harm” caused by crime, the “rate of detection and rate of conviction,” and deterrence resulting from criminal punishment.425

In the spring of 1986, Commissioners Block and Nagel, along with Research Director William Rhodes, met with leading figures of the law and economics school: two economics professors, Gary Becker and Bill Landes, as well as two former law professors, Judges Frank Easterbrook and Richard A. Posner.426 At the meeting, these experts expressed concerns about the difficulties of implementing a crime control model in practice.427 Ultimately, the Crime Control Committee’s efforts were thwarted by a lack of data and time.428 As Commissioner Nagel later stated, “the principles of crime control, however well developed [in

141, at 17-18. If Commissioner Robinson was the leading proponent for complex guidelines accounting for every harm, then Commissioner Breyer was the leading proponent for sentencing guidelines on the simpler end of the spectrum. As he stated in 1987, “[m]y personal view, which is not necessarily shared by the Commission . . . [is that the Commission should have] take[n] the Minnesota Guidelines and Parole Guidelines and improve[d] them.” Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 4.
420. Interview with William W. Wilkins, Jr., Judge, supra note 157, at 12.
422. Id. at 8. The leading theoretical work advocating an “economic approach” to determining criminal punishment was Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. POL. ECON. 169 (1968).
424. Id.
425. Id. at 8-9.
427. Id. at 4.
428. Nagel, supra note 170, at 918-19.
theory], did not easily translate into empirically verifiable specifications" for sentencing guidelines that would produce sentences that could efficiently promote deterrence. She stated that "ultimately, at the end of the day . . . there were no data to support this theory."

3. Evolution in the Drafts Away from a Pure Just Deserts Model

The Commission’s strategy to build, from the work of the Just Deserts and Crime Control Committees, a coherent philosophical approach to sentencing did not go as planned. But their interest in harmonizing the purposes of punishment remained. On July 28, 1986, the Commissioners began discussing the perceived need to produce a "statement of purposes" in which the four purposes "should not be on an equal footing in all kinds of cases . . . rehabilitation, in particular," should have less influence because it was "qualified twice in the [SRA]." They referred to positions in the SRA stating that it is generally inappropriate to impose "imprisonment for the purpose of rehabilitating the defendant," and further that "[r]ehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason" for a sentence reduction.

With the clock running, Chairman Wilkins and a few staff members scrambled to put together a new draft guidelines manual that could be published for public comment in the Federal Register by the end of September 1986. They attempted "to rid the [just desert based draft . . . of its most unacceptable aspects," although the version they produced resembled the just deserts draft in many ways. As Commissioner Breyer observed, the Commission needed a "vehicle for people to comment," even if the public "would comment negatively."

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429. Id.
430. Interview with Ilene H. Nagel, supra note 46, at 28.
433. Id. § 994(t).
434. See Interview with William W. Wilkins, Jr., Judge, supra note 157, at 14-15; see also Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note 141, at 20.
435. See Nagel, supra note 170, at 921.
436. For example, although considerably less complex in nature than the just deserts draft, the September 1986 draft included a "Property Table" (with increasing "offense values" based on the amount of loss). Preliminary Draft of Sentencing Guidelines for United States Courts, 51 Fed. Reg. 35,080, 35,094 (Oct. 1, 1986). It also included a Drug Quantity Table (with increasing "offense values" based on drug quantity and weight). Id. at 35,098. Moreover, like the just deserts draft, it included myriad offense guidelines in chapter two and several "adjustments" for factors like acceptance of responsibility, obstruction of justice, and criminal history in chapter three. Id. at 35,088-119.
This "preliminary draft," which was completed in late September and published in the Federal Register shortly thereafter, adopted no single, overriding purpose for or theory of sentencing—reflecting the fact that the SRA provided that sentencing guidelines should further each of the purposes of sentencing. Nevertheless, the preliminary draft deemphasized rehabilitation. In the draft's commentary, the Commission explained that rehabilitation "must be secondary" to the other purposes of punishment, "especially that of protecting the public." Because rehabilitation cannot be furthered by imprisonment under the SRA, "rehabilitation can be a primary sentencing consideration only for relatively minor offenses where other statutory considerations do not mandate imposition of a substantial penalty," the Commission added.

As with the earlier just deserts draft, the preliminary draft assigned numerical values, based largely on the Commission's judgment, rather than based on data, to the offense of conviction and to aggravating or mitigating circumstances. These values—and the corresponding sentencing ranges—were "highly tentative" and that draft was solely intended to elicit public comment and did not yet reflect the definitive policy position of the Commission. The Commission thereafter held six public hearings and received hundreds of written comments on the preliminary draft. Commissioner Breyer observed that "we had...learned quite a lot."

On December 15, 1986, Commissioner Nagel circulated a memorandum that memorialized a majority of the Commissioners' views as to how the purposes of punishment could be coordinated. Under this "amalgam approach"—a term used initially by Commissioner

438. See SUPPLEMENTARY REPORT, supra note 37, at 11.
440. Id.
441. Id.
442. Id. at 35,085.
443. See id. at 35,084.
444. Id. at 35,081 ("[T]he Commission voted to publish a preliminary working draft of sentencing guidelines well in advance of any required publication date in order to provide a vehicle for critical analysis and public comment. While these guidelines do not reflect the views of all Commissioners, the Commission voted for publication to provide a means for identifying the issues that must ultimately be resolved."); see id. at 35,089 ("Offense values rest on preliminary research results and initial efforts to reflect appropriate sentences for different forms of criminal conduct. Due to the Commission's desire to obtain early comment, the published numerical values must be treated as highly tentative, preliminary, and subject to change.").
445. See SUPPLEMENTARY REPORT, supra note 37, at 11.
MacKinnon— the guidelines should consider both retributive and utilitarian considerations, but when they conflict, the unifying principle is that “crime control paradigm will prevail.” The tie should go to crime control for three reasons: “crime control is the underlying justification for punishment;” crime control “provided the initiative” (as the SRA was part of the Comprehensive Crime Control Act); and “crime control incorporates the retributivist objectives of just punishment.

Around the same time, Commissioner Breyer prepared principles for redrafting the preliminary guidelines, which were adopted by the Commission on December 16, 1986. His document began by stating that “[t]he Guidelines seek to insure that [all] sentences imposed will fulfill the purposes of sentencing mandated by Congress.” Next, the document declared, consistent with crime control considerations, that the “[g]uidelines seek to insure that [all] sentences convey the fact that crime does not and will not pay.” Moreover, “the Guidelines seek to increase the degree to which punishments are commensurate with the seriousness of the offense and the offender’s blameworthiness” to ensure proportionality in sentencing, which are retributive considerations. It continued by stating that “[t]he overall purpose of the institution of punishment . . . is to control crime.” Commissioner Robinson moved to delete this overall purpose statement, but the motion failed for a lack of a second. The document further noted that punishment must be distributed in a manner that “efficiently decrease[s] the level of crime through deterrence and incapacitation,” and that is “commensurate with the seriousness of the offense and the offender’s blameworthiness.” In the event of a conflict between crime control and retributive considerations, the document answers that “the resolution of the conflict will be based on the principles of crime control unless a specific decision

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448. Interview with Ilene H. Nagel, supra note 46, at 19.
449. Memorandum from Ilene H. Nagel, supra note 447, at 1-2.
450. Id. at 4.
451. Id.
452. U.S. Sentencing Comm’n, Principles Governing the Redrafting of the Preliminary Guidelines (Dec. 16, 1986) (on file with authors); see also Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 17-18 (noting that commissioner Breyer had drafted some principles for redrafting).
454. Id.
455. Id.
456. Id.
to the contrary is made by the Commission." Commissioner Robinson moved to amend this provision to state that, "Where the principles of just punishment and crime control conflict, the Commission shall be so informed." The motion failed for lack of a second.

Despite the Crime Control Committee’s inability to produce a set of draft guidelines, Commissioner Block still advocated for a primary emphasis on general deterrence. On January 8, 1987, he distributed to his fellow Commissioners a memorandum, entitled “Optimal Sentence Structure,” in which he contended that offenders place greater weight on the immediate loss of liberty and correspondingly diminishing weight on subsequent loss of liberty. He asserted that, for this reason, there would be little to be gained from a deterrence perspective in imposing a prison sentence beyond ten or fifteen years for the vast majority of offenders. He added that “optimal sentence lengths for deterrence purposes will be moderate.” Furthermore, he expressed doubt that the purpose of incapacitation could justify a sentence beyond what was supported by the deterrence principle. Although he was advocating against lengthy prison sentences, Commissioner Block also contended that probation would be “wasteful,” because it would not be an adequate substitute for imprisonment from a deterrence perspective.

In January 1987, the Commission finished a “revised draft” of the preliminary guidelines manual first published in the prior fall. The revised draft provided that a sentence generally should further the four purposes of punishment, but also stated that “the fundamental objective of the Comprehensive Crime Control Act [of 1984] is to prevent crime and protect the public from criminal activity.” If the retributive and crime control goals conflict, the draft noted, “justice for the public is the overreaching goal.” The January 1987 draft was similar to the September 1986 draft in many respects—including primarily basing penalty levels on drug type and weight in drug cases and monetary

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459. Id.
460. Meeting Minutes, U.S. Sentencing Comm’n, supra note 301, at 5.
461. Id.
462. See Memorandum from Michael K. Block, Comm’r to All Comm’rs (Jan. 8, 1987) (on file with authors).
463. Id.
464. Id.
465. Id.
466. Id.
468. Id. at 3923.
469. Id.
470. Id. at 3920, 3938-39 tbl.1.
loss in theft and fraud cases— but did include a new biaxial Sentencing Table that accounted for offenders’ criminal history on a separate axis based on a complex set of rules. As discussed below, that criminal history calculus was based in significant part on utilitarian considerations, such as risk assessment. The Commission held two additional public hearings on the revised draft manual, and received additional feedback.

On April 13, 1987, the Commission submitted to Congress, for its 180-day review, the first Guidelines Manual. The first chapter, authored by Commissioner Breyer, acknowledged that the Commission confronted a “philosophical problem” in trying to “reconcile the differing perceptions of the purposes of criminal punishment.” While “[m]ost observers of the criminal law agree that the ultimate aim of the law itself, and of punishment in particular, is the control of crime,” the Commission faced a “profoundly difficult” choice between retribution and crime control as the relevant distributive principle. A pure retributive model is wanting, he explained, because there is no “moral consensus” as to how much punishment an offender “deserved” for a particular crime. At the same time, there was no reliable data to determine how punishment can be best calibrated to control crime.

Over Commissioner Robinson’s vigorous dissent, the Commission ultimately decided to avoid making one sentencing philosophy predominant and instead adopted an empirical approach whereby the majority of the guidelines were based on “past practice” data.

4. Empirical Approach

Taking its cue from Congress, and running out of time, the Commission adopted an “empirical approach” as a means to resolve the problem of giving effect to the four purposes of punishment in the guidelines. Congress had required the Commission, “as a starting
point in its development of the initial sets of guidelines . . . [to] ascertain the average sentences imposed" for different offense types.\textsuperscript{483} The Commission therefore obtained extensive information on current sentencing practices and used this data as the anchor for its sentencing benchmarks for most offense types.\textsuperscript{484} Past sentencing practices were not necessarily devoid of principle, as the average sentences could be said to embody the varying sentencing philosophies.\textsuperscript{485} Aware of the importance of buy-in from judges tasked with applying the new guidelines, Commissioner Breyer took the position that "it was easier to defend the guidelines based on imperfect data than on subjective choice" about sentencing philosophy.\textsuperscript{486} Moreover, retributivist and utilitarian approaches to sentencing appeared to provide overlapping justifications for sentencing outcomes, leaving little actual difference between the two.\textsuperscript{487} In the end, the debate between the competing purposes of punishment was seen by the Commission to be "more symbolic than pragmatic."\textsuperscript{488}

Not all Commissioners agreed with the empirical approach ultimately taken. In particular, Commissioner Robinson agreed that the SRA did not "adopt a particular distributive principle or combination of distributive principles" and that it did not "define the interrelationship between the four traditional purposes of sentencing."\textsuperscript{489} But Congress expected the Commission to give coherence to the four purposes, he contended.\textsuperscript{490} According to Commissioner Robinson's dissent from the promulgation of the initial Guidelines Manual, the Commission had failed to meet this goal.\textsuperscript{491} If one judge sentences for deterrence reasons now it["]s getting late."); Breyer, supra note 234, at 17 ("Faced, on the one hand, with those who advocated 'just deserts' but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other hand, with those who advocated 'deterrence' but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines primarily upon typical, or average, actual past practice.").

\textsuperscript{484} See infra notes 724-42 and accompanying text.
\textsuperscript{485} See Nagel et al., supra note 43, at 1837 ("[A]ll sentences in the past reflected concerns for deterrence, concerns for crime control, and concerns for just punishment for the offense.").
\textsuperscript{486} Meeting Minutes, U.S. Sentencing Comm'n 6 (Apr. 3, 1987) (on file with authors).
\textsuperscript{487} See SENTENCING GUIDELINES MANUAL, supra note 3, ch. 1, pt. A.3; see also SUPPLEMENTARY REPORT, supra note 37, at 15-16 (noting that the two philosophies are "generally consistent with the same result").
\textsuperscript{488} SUPPLEMENTARY REPORT, supra note 37, at 16.
\textsuperscript{490} Id. at 7-8 n.31.
and another for rehabilitative reasons, for example, an average may to some degree contain both those philosophies, he conceded. But mathematical averages do not express how the purposes of punishment are to be harmonized, producing, in Commissioner Robinson’s words, sentences that are irrational and “bastardized.”

C. Regulating Judicial Discretion in Sentencing

In place of the standardless pre-guidelines sentencing regime that produced significant sentencing disparities, the SRA erected a broad structure, to be built upon by the Commission, to regulate and standardize judges’ sentencing discretion. In accordance with that congressional directive, the original Commission made several policy decisions that removed a large extent of traditional sentencing discretion possessed by federal judges.

1. Guidelines Designed to Produce Similar Sentences for Defendants with Similar Criminal Records Who Committed Similar Offenses

Congress wrote into the SRA several provisions designed to promote consistency in sentencing decision-making in order to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.” For example, the SRA’s “25% rule” directs the Commission to establish sentencing ranges “for each category of offense involving each category of defendant,” and further specifies that, for sentences including imprisonment, “the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months.” In addition, the SRA also prescribed the limited circumstances in which a judge may depart from the applicable sentencing range. In particular, the SRA authorized a judge to depart if

492. Robinson, supra note 489, at 15.
493. Id. Although Commissioner Block voted to promulgate the initial Guidelines Manual, after resigning from the Commission, he criticized the initial Commission for failing to adopt a particular sentencing philosophy in the guidelines (although his preferred philosophy, as noted above, was not the same one shared by Commissioner Robinson). See Jeffrey S. Parker & Michael H. Block, The Limits of Federal Sentencing Policy; or, Confessions of Two Reformed Reformers, 9 Geo. Mason L. Rev. 1001, 1011-12, 1014-16 (2001) (“While there is much to be said for the empirical approach of the initial guidelines, ultimately such an approach cannot substitute fully for the development of sound sentencing principles, if sentencing reform is to progress toward its ultimate goal of creating a measurably more effective system of criminal punishment.”).
495. Id. § 994(b)(2) (noting that the one recognized exception to the 25% rule is that “if the minimum term of the range is 30 years or more, the maximum may be life imprisonment”).
the prosecution moved the court for a departure to reflect the defendant’s “substantial assistance” to authorities or if the judge found an aggravating or mitigating circumstance not adequately taken into account by the guidelines, because the circumstance is a “rarity” or is present in an “extreme” form. The SRA also required a judge who departed from the applicable guidelines range to state on the record the reasons for the departure, for both sentencing transparency and to facilitate potential appellate review. Moreover, the SRA prohibited judges from considering the “race, sex, national origin, creed, and socioeconomic status of offenders” in imposing an appropriate sentence and also noted the general inappropriateness of considering the “education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant” for purposes of determining whether, or how long, a defendant may be imprisoned.

Building from this blueprint, the initial Commission created a guidelines system with 170 generic categories meant to cover the most commonly used statutory provisions out of the the approximately 3000 offenses in the United States Code in the mid-1980s. Offenders convicted of the same type of offense would receive the same “base offense level” as the starting point for their sentence, while increases or decreases in the base offense level would be made by way of relevant “specific offense characteristics” (in chapter two) and “adjustments” (in chapter three) with specific offense levels. While base offense levels were generally to be determined through the offense of conviction, the specific offense characteristics and adjustments were typically to be

496. *Id.* § 994(n); see 18 U.S.C. § 3553(e) (1988).
497. 18 U.S.C. § 3553(b)(1); see *S. Rep.* No. 98-225, at 78-79 (1983). Although 18 U.S.C. § 3553(a) listed a variety of factors for a sentencing court to consider in imposing a sentence, including the “nature and circumstances of the offense and the history and characteristics of the defendant,” § 3553(b) specifically required the court to impose a sentence within a properly calculated guideline range unless the guidelines authorized a departure or the court found the existence of “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” 18 U.S.C. § 3553(a)-(b); see United States v. DeRiggi, 45 F.3d 713, 716 (2d Cir. 1995) (“Notwithstanding that the Guidelines appear to be but one of several factors to be considered by a sentencing court, the statute goes on to say that the court ‘shall impose a sentence of the kind, and within the [Guidelines] range . . . unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission . . . .' 18 U.S.C. § 3553(b). Thus, although subsection (a) fails to assign controlling weight to the Guidelines, subsection (b) does so.”).
498. 18 U.S.C. § 3553(c)(2).
500. *Id.* § 994(e).
501. See *supra* notes 372-743 and accompanying text.
determined through uncharged relevant conduct found by a sentencing judge based on evidence with "sufficient indicia of reliability to support its probable accuracy." 503 Criminal history would be calculated in the same manner for all offenders based on a comprehensive set of rules. 504 Finally, the Sentencing Table would help ensure that similar offenders with similar criminal records would receive a sentence selected from a range not to exceed 25%, and the Sentencing Table's zones would help ensure that offenders would receive a similar type of sentence. 505 Several of these aspects of the federal sentencing guidelines can be traced to Commissioner Robinson's initial just deserts draft.

The impact of the SRA's 25% rule on the initial Commission's creation of the guidelines is worth highlighting in terms of its significant effect in limiting judges' sentencing discretion. As the Commission interpreted that directive in the SRA, it limited judges' discretion in two different manners. First, because the maximum of a sentencing range could not be more than 25% of its minimum, the availability of probation—treated as zero months—was limited to the lower echelons of the Sentencing Table. If probation were an option in the higher ranges, it would run afoul of the 25% rule—for instance, a range of twelve to eighteen months could not include probation as an option since it effectively would render the range zero to eighteen months. 506

Second, as discussed above, the Commission, agreeing with the Justice Department's objection to the January 1987 draft guidelines, interpreted the 25% rule to mean that the guidelines must prescribe a single recommended level, not a variable range of levels to be selected within a court's discretion, for each category of offense and offender. 507 This interpretation not only placed into sharp focus a particular sentencing level with a corresponding, narrow sentencing range, but also recognized as a "departure" any sentence outside of that particular range. 508 Furthermore, the Commission carefully limited the permissible

503. Id. at § 6A1.3(a); see infra notes 640-59 and accompanying text (discussing "relevant conduct"). Notably, the original Guidelines Manual did not expressly provide that disputed factors had to be proved by a preponderance of the evidence. For a discussion of Supreme Court precedent, see McMillian v. Pennsylvania, 477 U.S. 79, 90-91 (1986), expressly setting forth the preponderance standard that was added to the commentary following § 6A1.3(a) in 1991. See United States Sentencing Guidelines, App. C, amend. 387.
504. See infra Part IV.G.
505. See infra Part IV.H.
507. See supra notes 242-44 and accompanying text.
508. SENTENCING GUIDELINES MANUAL, supra note 3, ch. 1, pt. A.
reasons to depart. The practical effect of the 25% rule therefore would be to draw the sentencing judge to the recommended narrow range based on the facts found—which, when considered with limited grounds for departures, would thereby avoid disparities among similarly situated offenders.

2. Offender Characteristics

The Commission also decided to regulate sentencing discretion by limiting judges’ consideration of offender characteristics, with the primary exception of criminal history, as discussed below. Instead, the Commission decided to focus the guidelines on offense characteristics. The SRA informed the Commission’s broad view on the relative importance of offender characteristics, compared to offense characteristics, and also directed the Commission to assess the relevance of particular offender traits. In general, the Commissioners seized on the text and legislative history of the SRA to emphasize the primary role of offense characteristics in sentencing determinations, in order ensure that the balance of sentencing considerations was not tipped too heavily in favor of individualized offender characteristics such that sentencing disparities would arise. Commissioner MacKinnon put it this way: “Congress has decreed that the sentence shall fit the crime,” not that “the sentence should fit the individual.” Commissioner Nagel echoed that view of the SRA: “Congress very specifically says in the statute that the sentence shall be based primarily on the offense rather than the offender which is a complete reversal from what it used to be pre-guidelines[,] [resulting in] a de-emphasis on offender based characteristics.” She added that 18 U.S.C. § 3553(a)(2)(A) “specifically eschews the words just punishment for the offender and uses instead the words just punishment for the offense.”

509. See infra notes 526-33 and accompanying text.
510. See infra Part IV.G.
512. See, e.g., 18 U.S.C. § 3553(a)(2)(A), (6) (1988) (stating that a sentence must “reflect the seriousness of the offense” and “provide just punishment for the offense” (emphasis added)); see also S. Rep. No. 98-225, at 75-76 (1983) (“This purpose . . . is another way of saying that the sentence should reflect the gravity of the defendant’s conduct. From the public’s standpoint, the sentence should be of a type and length that will adequately reflect, among other things, the harm done or threatened by the offense, and the public interest in preventing a recurrence of the offense. From the defendant’s standpoint the sentence should not be unreasonably harsh under all the circumstances of the case and should not differ substantially from the sentence given to another similarly situated defendant convicted of a similar offense under similar circumstances.”).
513. Interview with George MacKinnon, supra note 137, at 10.
514. Interview with Ilene H. Nagel, supra note 46, at 17-18.
515. Id. at 18.
The SRA instructed the Commission to determine whether, and to what extent, judges should consider the eleven specific offender characteristics. An offender characteristics committee, chaired by Commissioner Block and aided by Commissioner Robinson, listed and categorized potential offender characteristics, drawing on state guidelines and discussions with DOJ personnel and other Commission staff. After holding public hearings and reviewing public comment on the subject, the Commission, largely following the lead of the Parole Commission in its guidelines, concluded that nine of the offender traits in the SRA—age, education, vocational skills, mental and emotional condition, physical condition, employment, family ties and responsibilities, role in the offense, and community ties—are “not ordinarily relevant” for sentencing purposes.

The original Commissioners understood that many of these offender characteristics—employment record and vocational skills, education, family and community ties—were potentially relevant as aggravating or mitigating factors, but that their consideration would potentially benefit white offenders and wealthy offenders more than minority offenders and poor offenders. The SRA specifically

516. 28 U.S.C. § 994(d).
518. Breyer, supra note 234, at 19-20 (“[T]he Commission decided to write its offender characteristics with an eye towards the Parole Commission’s previous work in this area.”). The Parole Guidelines then in effect only considered two characteristics in addition to an offender’s criminal record—age and drug dependence. Id. at 19 & n.97. As noted above, the Sentencing Commission went further and decided that those two factors were ordinarily not relevant.
519. SENTENCING GUIDELINES MANUAL, supra note 3, §§ 5H1.1–7; William W. Wilkins, Jr., The Federal Sentencing Guidelines: Striking an Appropriate Balance, 25 U.C. DAVIS L. REV. 571, 581-82 (1992). The inclusion of the word “ordinarily” has been attributed to U.S. District Judge Jack Weinstein. See Symposium, Alternative Punishments Under the New Federal Sentencing Guidelines, 1 FED. SENT’G REP. 96 (1988) (noting statements of Kenneth Feinberg). Regarding drug or alcohol addiction, the guidelines provided that such addiction was not a basis to depart in any case because “[s]ubstance abuse is highly correlated to an increased propensity to commit crime.” SENTENCING GUIDELINES MANUAL, supra note 3, § 5H1.4. The Senate Judiciary Committee’s report had generally recommended against consideration of an offender’s substance abuse history as an aggravating or mitigating factor. See S. REP. NO. 98-225, at 173 (1983) (“Drug dependence, in the Committee’s view, generally should not play a role in the decision whether or not to incarcerate the offender.”). Similar concerns were raised by a leading expert in criminology, Professor Alfred Blumstein of Carnegie-Mellon University, who wrote to Commissioner Block. Letter from Alfred Blumstein, Professor, Carnegie-Mellon Univ., to Michael K. Block, Chairman, Offender Characteristics Subcomm., U.S. Sentencing Comm’n (Feb. 6, 1986) (on file with authors) (“[T]here is widespread concern that the invoking of socioeconomic variables (many of which we know to be
prohibited the guidelines from considering an offender’s race and socio-economic status and also discouraged the consideration of other offender characteristics that could serve as “proxies” for race and socio-economic status. The Commissioners also understood that some of the offense characteristics—such as an offender’s youth and drug addiction—were “two-edged swords,” insofar as they could be mitigating from a retributivist standpoint, but at the same time could be aggravating from a utilitarian perspective.

For all these reasons, the Commissioners created a guidelines manual that limited consideration of age, education, vocational skills, mental and emotional condition, physical condition, employment, family ties and responsibilities, and community ties. The Commission permitted consideration of a defendant’s mental or emotional condition that rose to the level of “diminished capacity,” but only in a non-violent case and only if the defendant did not have a serious criminal record.

3. Limiting Judges’ Departures from the Applicable Guidelines Ranges

The SRA contained two main provisions relevant to judges’ ability to depart from the sentencing guidelines to be promulgated by the Commission: (1) it directed the Commission to draft guidelines that have “sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of [the guidelines];” and (2) it directed sentencing

521. See Mistretta v. United States, 488 U.S. 361, 376 (1989) (“Congress also prohibited the Commission from considering the ‘race, sex, national origin, creed, and socioeconomic status of offenders,’ § 994(d), and instructed that the guidelines should reflect the ‘general inappropriateness’ of considering certain other factors, such as current unemployment, that might serve as proxies for forbidden factors, § 994(e).”).

522. See Penry v. Lynaugh, 492 U.S. 302, 323-24 (1989) (“Penry’s mental retardation and history of [child] abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.”).

523. See, e.g., Interview with Ilene H. Nagel, supra note 46, at 24-26 (explaining that an offender’s youth or drug addiction made him less culpable but also made him more likely to recidivate).

524. SENTENCING GUIDELINES MANUAL, supra note 3, §§ 5H1.1–6 (providing that such offender characteristics were “not ordinarily relevant” in deciding whether to depart from the applicable guideline range).

525. SENTENCING GUIDELINES MANUAL, supra note 3, § 5K2.13 (“If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant’s criminal history does not indicate a need for incarceration to protect the public.”).

courts to impose a sentence within the applicable guideline range "unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that [called for by the guidelines]."

These two related provisions authorized the Commission to include as many aggravating and mitigating factors as it deemed appropriate in the guidelines and, to the extent that the Commission did not include such factors, a sentencing court could depart from the applicable guidelines range only to the extent that the Commission had not "adequately" considered them in formulating the guidelines. In Commissioner Breyer's words, "the [SRA] states that the Commission has the authority to limit departures."

Exercising its statutory authority, the original Commission created a guidelines scheme that required, allowed, limited, or prohibited consideration of a wide variety of aggravating and mitigating factors identified at various places in the 268 pages long 1987 Guidelines Manual—in chapter two offense guidelines, in chapter three "adjustments," or "departure" provisions in chapters four and five. In section 5K2.0, the Commission provided that a court had "discretion" to depart from the applicable sentencing range if the court determined that the Commission had not "given adequate consideration" to a particular aggravating or mitigating factor or a particular "guideline level attached to [a particular] factor is inadequate" in view of "unusual circumstances" in a case. It further provided that "[w]here the applicable guidelines, specific offense characteristics, and adjustments do take into consideration a factor listed in this part, departure from the guideline is warranted only if the factor is present to a degree

527. 18 U.S.C. § 3553(b).
529. See, e.g., SENTENCING GUIDELINES MANUAL, supra note 3, § 2B3.1(b)(2)(A) (noting that a robbery guideline required an increase of three to five levels in a defendant’s offense level depending on how a dangerous weapon or firearm was used); id. § 2K2.1 (prohibiting persons who possessed firearms providing for a decrease by four levels in the defendant’s offense level “[i]f the defendant obtained or possessed the firearm solely for sport or recreation”).
530. See, e.g., id. §§ 3B1.1–2 (providing for two to four level increases or decreases—in the aggravating and mitigating role provisions—in a defendant’s offense level based on the role played in an offense vis-à-vis codefendants).
531. See, e.g., id. § 4A1.1; id. §§ 5K2.12–.13 (allowing downward departures based on coercion, duress, or defendant’s diminished capacity); id. §§ 5H1.1–6 (noting provisions limiting or prohibiting departures base on certain offender characteristics).
532. Id. § 5K2.0.
substantially in excess of that which ordinarily is involved in the offense of conviction.”

4. Accounting for Multiple Offenses or Multiple Harms

One of the most challenging issues in the Commission’s attempt to regulate judicial discretion concerned sentencing of offenders who committed multiple distinct offenses or caused multiple harms (whether or not charged as separate offenses), either at one fell swoop or sequentially on separate occasions. A closely related issue was whether sentences for multiple convictions should run concurrently or consecutively to each other. The SRA provided little guidance concerning these issues, other than the general directive that the Commission “shall insure” that the guidelines reflect “incremental [penalties]” for cases in which an offender is convicted of “multiple offenses committed at different times.” State practices did not offer a satisfactory solution, as some states simply left it up to the sentencing judge’s discretion to run multiple counts concurrently or consecutively—which resulted in sentencing disparities—while others provided “that sentences for property offenses [were to] run concurrently and sentences for offenses against the person were to run consecutively[,]” which could result in disproportionately low sentences for the former and disproportionately high sentences for the latter. The federal parole guidelines also did not provide a model, because they did not address the issue in any meaningful way.

533. Id.
534. 28 U.S.C. § 994(f)(1)(B) (1988). That section of the SRA also directed the Commission to provide for incremental penalties for multiple offenses when at least one was prosecuted in federal court under federal “ancillary jurisdiction.” See id. § 994(f)(1)(A); Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375-76 (1978) (using the term ancillary jurisdiction in the context of federal civil cases concerning the exercise of jurisdiction over related state law civil causes of action). Apparently, that provision was an accidental vestige of an earlier version of the bill containing the SRA when Congress was also considering enacting a sweeping federal “code reform” bill, which, among other things, would have created ancillary jurisdiction in federal criminal cases over related state law offenses. Gainer, supra note 51, at 97-98, 100-01.
536. See Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 64. The version of the parole guidelines in effect when the Commission was initially drafting the Sentencing Guidelines simply provided that “[i]f an offense behavior involved multiple separate offenses, the severity level may be increased” to reflect “the overall severity of the underlying criminal behavior.” 28 U.S.C. § 2.20, chpt. 13 (1982). In 1986, the parole guidelines were amended to provide for more guidance about multiple offenses and multiple counts. For drug and property offenses, “the total amount of the property or drugs involved is used as the basis for the offense severity rating,” while for other offense types the parole guidelines provided a chart with recommended incremental enhancements in severity level depending on the number of separate offenses committed. See 28 U.S.C. § 2.20, chpt. 13 (1988).
This issue presented not only theoretical concerns over what constitutes a single crime and how a sentence should properly increase in proportion to multiple harms,\(^{537}\) but also practical concerns about disparities. Senator Kennedy, one of the framers of the SRA, had commented on the "glaring disparities" stemming from the "unfettered discretion" given to judges in imposing concurrent or consecutive sentences in pre-SRA cases in which defendants were convicted of multiple offenses.\(^{538}\) Commissioner Breyer warned that, if the Commission did not create a guideline that governed sentencing in multi-count cases, a "gigantic loophole" would exist in the guidelines' regulation of sentencing discretion.\(^{539}\) He highlighted the difficulty of this issue, noting "[w]e have not found any perfectly satisfactory way of treating multiple harms and multiple (related) convictions."\(^{540}\)

Commissioner Breyer initially proposed rules that would aggregate loss amounts for economic crimes committed in the same "course of conduct," would provide incremental penalties for separate counts of conviction that were not part of the same course of conduct, and would instruct the judge to select the crime with a "higher harm value" where multiple offenses of conviction overlapped.\(^{541}\) Chairman Wilkins similarly suggested that, for property or financial crimes, the total loss amount be added for multiple related offenses, and further proposed that, for other types of offenses, the count of conviction that "generates the highest total offense level" be recognized as the "primary count," which could be supplemented by incremental increases in the penalty level based on additional convictions.\(^{542}\)

Eventually, the Commission settled on a complex set of rules that usually turns on the nature of the multiple offenses committed by

\(^{537}\) See, e.g., Stephen G. Breyer, Difficult Guideline Issues 25 (Sept. 15, 1986) (unpublished manuscript on file with authors) (posing the question of "how to treat the bank robber who pistol whips three (or ten) tellers, the conman who sends 10,000 letters defrauding each recipient of $10, and the drug dealer who shoots a policeman, while endangering several others"); Stephen J. Schulhofer, Professor, Univ. of Chi. Law Sch., Statement Before the U.S. Sentencing Commission 8 (Mar. 12, 1987) ("There are many possible standards for the consecutive sentencing question, focusing on such elements as the number of distinct transactions, objectives or victims . . . .").


\(^{539}\) Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 64-65.

\(^{540}\) Breyer, supra note 537, at 30; see Breyer, supra note 234, at 25-28 (describing the treatment of multiple counts as an "intractable sentencing problem" that "is so complex that only a rough approach to a solution is possible" and arguing that the widely held perception that more severe punishment is warranted for each additional unit of harm inflicted, but that the corresponding increase should not be strictly proportional, "make it difficult to write rules that properly treat 'multiple counts'").

\(^{541}\) Breyer, supra note 537, at 26-28.

\(^{542}\) Memorandum from William W. Wilkins, Jr., Determining the Sentence 2 (Feb. 26, 1987) (on file with authors).
defendants. For most federal offense types, such as drug trafficking and economic offenses, the Guidelines Manual provided that, with respect to multiple harms caused by a defendant, all harms that occurred as "part of a single criminal episode" or "a single course of conduct with a single criminal objective" would be "grouped" together for a single guidelines calculation, regardless of the number of counts of conviction or number of different victims.543 For certain other offense types, such as crimes of violence, the Guidelines Manual required that a defendant’s offense level generally be increased incrementally based on the number of counts of conviction rather than aggregating all harms resulting from multiple distinct offenses into a single guidelines calculation, even if the harms occurred as part of single course of conduct (for example, a spree of bank robberies occurring during a short time period).544

The Commission’s policy concerning sentencing for a defendant convicted of multiple offenses is primarily attributable to Professor Stephen Schulhofer, a consultant retained by the original Commission, who proposed a solution that the Commission ultimately adopted.545 His multi-count approach is reflected in provisions in both chapters three and five of the initial Guidelines Manual.546

The Commission’s multi-count policy was not based on its analysis of "past practice" data. Instead, it was a policy decision made by the Commission.547 Commissioner Breyer observed that "the Commission’s rules produce a highly approximate solution[]" to the problem of creating a rational sentencing regime for multiple counts.548 "Yet, the
rules represent a compromise preferable to the alternatives—doing nothing or adopting yet more arbitrary rules."

5. Plea Bargaining

Despite all of the efforts made by the original Commission to regulate sentencing discretion, there remained another potential loophole that potentially threatened to undermine the new guidelines system's goal of avoiding unwarranted disparity and providing for proportionate sentences: plea bargaining. Before the SRA, it was widely recognized that variations in plea bargaining practices caused sentencing disparities, often undermined the extent to which a sentence would reflect the offender's real offense conduct, and threatened the extent to which the purposes of punishment would be furthered. The exercise of federal prosecutors' plea bargaining power was extremely common in pre-guidelines sentencing—occurring in over three-quarters of all federal cases.

Congress was well aware of the possibility that plea bargaining could subvert the primary goal of the SRA, namely the reduction of unwarranted disparities. The Senate Judiciary Committee's report acknowledged concerns that a "prosecutor will use the plea bargaining process to circumvent the guidelines recommendation if he doesn't agree with the guidelines recommendation." The report further noted that unchecked prosecutorial decisions "could effectively determine the range of sentence to be imposed, and could well reduce the benefits otherwise to be expected from the [SRA's] guideline sentencing

549. Id. at 28.

550. See Interview with Ilene H. Nagel, supra note 46, at 6-7 ("[W]hile Congress recognized that plea bargaining was separate [from judicial sentencing disparities] and that the Commission should try . . . to do something about it, I think that they underestimated the degree to which [plea bargaining] would basically have the potential to completely gut the [guidelines] system.").


552. See Memorandum from Debbie Lister to Michael K. Block, Comm'r, U.S. Sentencing Comm'n (Mar. 5, 1987) (on file with authors) (noting that from a sample of 450 cases, 366, or 81.3%, were resolved by guilty pleas and 349, or 77.6% of all cases, were resolved through plea agreements). The incidence of plea bargains had increased substantially since the 1970s, when the Supreme Court finally gave its blessing to the practice. See Blackledge v. Allison, 431 U.S. 63, 76 (1977) ("Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a sub rosa process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. Indeed, it was not until our decision in Santobello v. New York, 404 U.S. 257 that lingering doubts about the legitimacy of the practice were finally dispelled."); see also Santobello v. New York, 404 U.S. 257, 261 (1971) (recognizing that guilty pleas are both an "essential" and "highly desirable" part of the criminal process).

553. S. REP. NO. 98-225, at 63.
The SRA thus directed the Commission to issue "policy statements" that would help judges decide whether to accept or reject a plea agreement. This guidance, the report explained, would assist judges in "mak[ing] certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines." The report added that this "judicial review of plea bargaining" could "alleviate any potential problem in this area."

The initial Commission faced a dilemma: how to regulate a pervasive and heretofore entirely unregulated practice in the federal sentencing system without jeopardizing the acceptance of the guidelines in the field? This difficulty is reflected in the Commissioners' deliberations. For example, Commissioner MacKinnon asserted that, under the SRA, "one of the Commission's primary duties is to stop U.S. Attorneys from plea negotiations" that would undermine the effect of the new guidelines, while Commissioner Breyer countered that "plea bargaining could not be abolished." The question thus became how far the Commission was willing to go in attempting to regulate plea bargaining without endangering essential support from key actors in the federal sentencing arena.

The Commission was required to consider two main types of plea bargain practices—"charge bargaining" and "sentence bargaining." Although Congress wanted sentencing judges to "review charge-reduction plea agreements to ensure that such agreements do not result in undue leniency or unwarranted sentencing disparities," realistically courts had no power to control what charges were brought in the first place and had virtually no power to control a prosecutor's decision outside the plea bargaining process to dismiss an existing charge and bring a different, superseding charge. That meant the primary issue for the Commission was how to regulate "sentencing bargains."
On September 23, 1986, the Commission held a public hearing on plea negotiations. In his written testimony submitted on behalf of the DOJ at the Commission's hearing, Assistant Attorney General William Weld stated that:

We do not believe that the Sentence Reform Act eliminates "sentence bargaining" . . . . The prosecution and the defendant should still be able to agree that a particular sentence is appropriate . . . [T]he agreed-upon sentence must be one which, based upon the facts and circumstances of the offense and the defendant's background, is within the permissible range of sentences under the guidelines, or the plea agreement must set forth some justification for going outside the guidelines.

The September 1986 preliminary draft guidelines published shortly thereafter recognized that the federal criminal justice system "relies heavily" on plea bargains. The preliminary draft also acknowledged that, from an administrative perspective, any drastic changes to plea bargaining practices, in light of the percentage of criminal cases disposed by way of guilty pleas, "would likely require a considerable increase in federal judicial resources," insofar as more cases could end up going to trial. The preliminary draft did not include policy statements on plea agreements, opting instead to pose for public comment a series of five questions on how the Commission may "insure responsible plea negotiation practices that do not perpetuate unwarranted sentencing disparities."

dismiss. Although the Supreme Court has not delineated the circumstances in which this discretion may be exercised, the [lower] courts have agreed that the primary purpose of the rule is protection of a defendant's right. . . . [T]he purpose of the rule is to prevent harassment of a defendant by charging, dismissing and re-charging without placing a defendant in jeopardy." Therefore, a court generally would abuse its discretion under Rule 48(a) in refusing to grant a prosecutor's motion to dismiss a charge that benefited a defendant by limiting his sentencing exposure. See, e.g., United States v. Hamm, 659 F.2d 624, 629-30 (5th Cir. 1981) (holding that, when a defendant consents to the dismissal of a charge, it is only "in extremely limited circumstances in extraordinary cases [that a court] may deny the motion").

563. See Schulhofer & Nagel, supra note 13, at 255-56; see also S. REP. No. 98-225, at 63.
565. William F. Weld, Assistant Att'y Gen., Criminal Div., Department Statement Before the United States Sentencing Commission 9-10 (1986) (on file with authors); see Dep't of Justice, Comments on Preliminary Draft of Sentencing Guidelines 268-69 (undated) (on file with authors) ("With respect to the broader question of the interrelationship of plea agreements to the Sentencing Reform Act of 1984, we are of the view that passage of that statute was not intended to modify plea bargaining in any major way and that the Commission's policy statements should therefore consist of general factors and considerations that would be applicable now as in the future with respect to advising judges on when to accept or reject a plea agreement.").
567. Id. at 35,086-87.
568. Id. at 35,130.
The subsequent January 1987 revised draft guidelines contained policy statements about plea bargain practices that appeared to reflect what the DOJ had proposed. Most important, it authorized a judge to accept a recommended or agreed sentence outside of the guidelines contained in a plea bargain so long as "reason exists for departure from the guidelines" and that the sentence does not undermine the purposes of sentencing. Consistent with the concept of real offense sentencing, the revised draft guidelines required plea bargains to "set forth all relevant facts and circumstances of the offense conduct."  

In accordance with the SRA's directive concerning plea bargaining, the original Guidelines Manual ultimately addressed plea bargain practices in a set of non-binding "policy statements" rather than in binding guidelines. These statements provided that a court could accept a plea bargain agreement that provided for a sentence outside of the applicable guideline range so long as the sentence "departs from the applicable guideline range for justifiable reasons." The commentary further provided that a court should only accept a plea agreement with a sentence outside of the applicable guideline if the sentence "departs from the applicable guideline range for justifiable reasons and does not undermine the basic purposes of sentencing." The 1987 manual did not define "justifiable reasons" and, in particular, unlike a subsequent version of the commentary, did not require there to be a valid factual and legal basis for a departure from the guidelines range. 

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570. Id.
571. Id.
572. See 28 U.S.C. § 994(a)(2)(E) (1988) (requiring the Commission to issue "general policy statements" concerning plea agreements). Judge Wilkins saw significance in the fact that Congress directed the Commission to issue policy statements rather than guidelines concerning plea bargaining and stated that "[i]n providing for general policy statements rather than guidelines for plea negotiations, Congress no doubt recognized the delicate balance to be struck between the ideals of sentencing reform and the practical realities of a system, however imperfect, that must dispose of thousands of criminal cases every year." Wilkins, supra note 201, at 187.
573. United States v. Goodall, 236 F.3d 700, 701-02 (D.C. Cir. 2001) ("Both the Introduction to the Guidelines itself and the brief introductory comments prefacing Chapter 6, Part B, state that policy statements, such as § 6B1.2, are non-binding 'norms' to which courts may refer in deciding whether to accept or to reject plea agreements.").
574. SENTENCING GUIDELINES MANUAL, supra note 3, § 6B1.2. The same justifiable reasons standard applied to recommended sentences (i.e. those that would not be binding on the court at sentencing) or agreed sentences (i.e. those that if the court accepted the plea bargain, would be binding on the court at sentencing). Id. § 6B1.2(b)-(c); see also FED. R. CRIM. P. 11(e)(1)(B)-(C).
575. SENTENCING GUIDELINES MANUAL, supra note 3, § 6B1.2 cmt.
576. In 1989, the Commission amended the policy statement's commentary to provide the following: [T]he court will accept a recommended sentence or a plea agreement requiring
provide that courts, before accepting a recommended or agreed sentence in a plea agreement, should first order the preparation of a presentence report in order to inform the court’s decision.577

The manual explicitly noted the tension between upending current practices that depended significantly on plea bargains, on one hand, and creating a “loophole” in the guidelines structure, on the other.578 The manual made it clear that the Commission did not make “significant changes” to plea bargain practices and was reserving a policy decision on any major changes until data about plea bargain practices under the guidelines could be collected and analyzed.579 Commissioner Breyer stated that the Commission sought to “leave plea bargaining roughly where it found it,”580 with only a “slight[]” change from the pre-guidelines practice.581 On another occasion, he was somewhat more blunt, suggesting that the Commission had “punted” on the plea bargaining issue.582 Notably, in a September 1986 memorandum to his fellow Commissioners, he noted a strong practical advantage of maintaining the pre-guidelines rate of plea bargaining: “a change in sentencing practice that significantly raised the number of cases that
must be tried would likely require a significant increase in the number of federal courts."

Despite the initial Commission's decision not to regulate plea bargaining more vigorously, the guidelines, nonetheless, were said to offer two distinct advantages over pre-guidelines plea bargaining practices: the initial guidelines themselves could serve as a baseline for the prosecutor and defense counsel as they engaged in plea negotiations, and the applicable guidelines range could serve as a "norm" for a judge in deciding whether or not to accept a plea bargain. Because the guidelines provided that PSRs should be prepared before a judge accepted a sentence bargain, a judge would have significant information available to him or her about the offender, offense, and guidelines calculations. The judge thus could stand in a better position, compared with the pre-guidelines world, to weigh the appropriateness of the plea bargain in light of the real offense conduct and the guidelines range.

Even with these benefits, the initial guidelines left largely undisturbed a central feature of pre-guidelines federal sentencing, thereby preserving prosecutors' significant power over the sentencing process. It would be up to the DOJ to police itself regarding both charge and sentence bargains. Shortly after the original Guidelines Manual went into effect in November 1987, the DOJ issued a national policy applicable to all federal prosecutors. According to a memorandum issued by Assistant Attorney General Stephen Trott, "plea agreements should not be used to circumvent the Guidelines." Prosecutors ordinarily should charge the "most serious offense or offenses consistent with the defendant's conduct," any plea bargain ordinarily should require the defendant to plead guilty to the most serious charge, and prosecutors ordinarily should seek a sentence within the applicable guideline range.

583. Breyer, supra note 537, at 9.
584. See SENTENCING GUIDELINES MANUAL, supra note 3, ch. 1, pt. A; see also Breyer & Feinberg, supra note 191, at 28 ("Whether a judge accepts a plea or not is likely to depend on his view of the Guidelines and how the plea arrangement stacks up against the Guidelines.").
585. SENTENCING GUIDELINES MANUAL, supra note 3, § 6B1.1(c).
587. Schulhofer & Nagel, supra note 13, at 252 ("Senior officials of the Department understood that plea bargaining must be controlled to make the entire Guidelines process work. Although their commitment to sentencing reform, like the commitment of conservatives in Congress, may have stemmed more from a desire to curb undue leniency than from a fervor for equal treatment, these officials (Trott, Weld, and later Thornburgh) were largely dedicated to plugging loopholes to every extent possible.").
or a below-range sentence if it were consistent with the Guidelines Manual's provisions authorizing departures. The "Trott Memorandum" was followed up in 1989 by a more detailed and even more forceful set of plea bargaining standards issued by Attorney General Richard Thornburg.

D. Creating a "Modified Real Offense" System

One of the primary ways that the original Commission sought to regulate sentencing discretion was for the guidelines to consider not only the offense or offenses of conviction but also other, related criminal conduct of which a defendant had not been convicted but which a sentencing judge found at the sentencing hearing. That particular policy decision differed significantly from existing state sentencing guidelines, which focused almost exclusively on the offense of conviction.

1. Tension Between Uniformity and Proportionality

As noted above, Congress’ concern about sentencing disparities was the primary motivating factor leading it to create the Commission. The Commission easily could have furthered the goal of uniformity by adopting a charged offense system, in which every offense of conviction carries a set guidelines sentence, regardless of any attendant circumstances. As Chairman Wilkins noted, "the Commission ostensibly could have achieved perfect uniformity simply [for example] by

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589. Id.
590. Memorandum from Richard Thornburgh, Att’y Gen., to All U.S. Att’ys (Mar. 13, 1989), reprinted in Thornburgh Bluesheet, 6 FED. SENT’G REP. 347, 347-49 (1994). Thornburgh’s memorandum stated the following:

It is vitally important that federal prosecutors understand these guidelines and make them work. Prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve. . . . [A] federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant’s conduct. . . . The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government’s ability readily to prove a charge for legal or evidentiary reasons. . . . [P]rosecutors may bargain for a sentence that is within the specified guideline range. . . . It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain which is based upon the prosecutor’s and the defendant’s agreement that a departure [from the sentencing guidelines] is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it.

Id. at 347-48.
591. See supra Part IV.C.1, C.4.
592. See supra Part II.A.4.
specifying that every defendant convicted of robbery would receive a two-year prison sentence." 593

But uniformity is not the only interest in federal sentencing. In addition to mandating similar sentences for similar offenders, Congress also required the Commission to ensure that sentences are proportionate to the offense. 594 The Commission concluded that a modified "real offense" system, based not only on the charged offense but also on the actual conduct of the offender in committing the offense and related conduct, would further such proportionality. 595

There is, however, an inherent tension between uniformity and proportionality. Promoting uniformity, through a charged offense system, could, as Commissioner Breyer recognized, unduly lump together offenses that are different in meaningful respects. 596 For example, a single sentence for all robberies would not reflect important factual distinctions between robberies, such as whether the offenders were armed, whether injuries resulted, or how much money was taken. 597 A charged offense system, he noted, "would have been far too simplistic to achieve just and effective sentences." 598 At the same time, a real offense system that considers all distinguishing characteristics would promote proportionality at the expense of uniformity and feasibility. Commissioner Breyer observed that, a "system tailored to account for every conceivable offense and offender characteristic would quickly become too complex and unworkable." 599

2. "Modified Real Offense" Approach

In the choice between a charged offense and real offense system, the Commission's early efforts began on the "pure real offense" end of the spectrum. The just deserts draft based sentences on a myriad of harms resulting from the commission of an offense that could be identified and gradated. 600 Commissioners Robinson and Gainer, together with the DOJ, supported the use of such a real offense system. 601 In that sentencing scheme, "every harm must count." 602 But,
as noted above, other Commissioners came to realize that the pure real offense system was not workable.\textsuperscript{603}  

On July 28, 1986, the Commission moved away from a "pure" real offense system to a "modified" real offense system.\textsuperscript{604} In its deliberations, the Commission first rejected the charged offense approach used by the existing state sentencing guidelines.\textsuperscript{605} The Commission decided in favor of a system based both on the offense of conviction as well as on certain "real offense" aspects, because such sentencing comported with current practice in which judges relied on presentence reports to base sentences on what offenders actually did—in addition to what they had been convicted of.\textsuperscript{606} Indeed, the Supreme Court in \textit{Williams v. New York}\textsuperscript{607} had held that uncharged criminal conduct was relevant to sentencing, and the federal parole guidelines also considered an offender's real offense conduct and not merely the offense of conviction.\textsuperscript{608}  

In addition, the SRA clearly envisioned such a system, as it both created a broad rule of admissibility\textsuperscript{609} and directed the Commission to consider the relevance of several "real offense" factors along with the offense conviction. These included the "circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;"\textsuperscript{610} the defendant’s "role in the offense;"\textsuperscript{611} and "the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust."\textsuperscript{612} Many of these types of factors are not typically elements of the offense of conviction.

\begin{itemize}
\item \textsuperscript{603} See supra note 225 and accompanying text; see also Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 16 ("Realization (1) [from Commissioner Robinson's draft] was that this real offense approach would not work.").
\item \textsuperscript{604} Meeting Minutes, U.S. Sentencing Comm'n 3 (July 28, 1986) (on file with authors).
\item \textsuperscript{605} See id.
\item \textsuperscript{606} Id.
\item \textsuperscript{607} 337 U.S. 241 (1949).
\item \textsuperscript{608} Id. at 249-52; see U.S. PAROLE COMM.'N, RULES AND PROCEDURES MANUAL § 2.19 (1985).
\item \textsuperscript{610} 28 U.S.C. § 994(c)(2) (1988).
\item \textsuperscript{611} Id. § 994(d)(9).
\item \textsuperscript{612} Id. § 994(c)(3). The Senate Judiciary Committee's report also clearly envisioned that Commission would create guidelines that considered a broad range mitigating and aggravating.
\end{itemize}
In the September 1986 preliminary draft guidelines, the Commission explained the “modified real offense” paradigm. The preliminary draft explained that a real offense approach would promote proportionality in that it would permit judges to sentence “[t]wo seemingly alike offenders . . . in a way that reflects [real] differences” between the two.613 The example is given of two individuals: both are charged with bank robbery, but one steals more money, uses a gun in the commission of the offense, and strikes a teller; under a real offense system, this offender should be sentenced more severely.614 In doing so, the sentencing judge can ensure that a sentence properly serves “society’s needs for retribution, deterrence, and incapacitation.”615

The preliminary draft also noted that it was common practice at that time for sentencing judges to consider “actual” or “real” offense conduct.616 The preliminary draft therefore comported with what judges were actually doing, and had been doing for decades. Moreover, the Commission pointed to the fact that the “present parole guidelines system overtly relies on real criminal conduct.”617

The preliminary draft also acknowledged several problems with a pure real offense system. First, that approach may be unfair to the offender from a procedural standpoint.618 That is, a charge of conviction must be proven to a jury beyond a reasonable doubt, or the defendant must plead guilty to the charge, but the real offense conduct need only be found by a judge by a preponderance of evidence.619 In addition, the real offense conduct may be based on information that would not be factors other than the elements of the offense or offenses of conviction. See, e.g., S. REP. NO. 98-225, at 170 (“Among the considerations the Commission might examine under [section 994(c)(2)] are whether the offense was particularly heinous; whether the offense was committed on the spur of the moment or after substantial planning; whether the offense was committed in reckless disregard of the safety of others; whether the offense involved a threat with a weapon or use of a weapon; whether the offense was committed in a manner plainly designed to limit the danger to victims; whether the defendant was acting under a form of duress not rising to the level of a defense; etc.”). Also notable in this regard is the report’s statement that, in factoring in a defendant’s past criminal conduct, the Commission could account not only for prior convictions but also any prior criminal acts “whether or not they resulted in convictions.” Id. at 174.

614. Id.; see Breyer, supra note 234, at 9-10 (observing that, under a charged offense system, “particular crimes may be committed in different ways, which in the past have made, and still should make, an important difference in terms of the punishment imposed”).
616. Id.
617. Id.
618. See Breyer, supra note 234, at 10-11.
admissible at trial, such as hearsay. Second, an offender may expect that certain facts may be “mooted” by a plea agreement, only to find out later that the facts are weighed by a judge and even then based on a lower standard of proof. Third, under a pure real offense system, an offender would not know with reliability what added circumstances a sentencing judge may or may not consider in imposing a sentence, and as such an offender may not be able to predict his or her sentence and thereby evaluate the benefits of a particular plea offer. In a related manner, if a judge were to go outside of negotiated facts to real offense conduct, the value of plea negotiation would be undermined. As a consequence, trials could become more common and judicial resources strained. Fourth, taking into account every conceivable aspect of the offense would introduce significant complexity into the sentencing process and thereby heighten the risk of erroneous guideline application, which could produce sentencing disparities and threaten the goal of uniformity that lies at the heart of the SRA and the guidelines.

The draft also noted that an offense of conviction system had advantages because it would promote certainty in sentencing and facilitate plea negotiations. It would also maximize procedural protections for defendants because, as Commissioner Breyer stated, “it places before a jury all factual elements relevant to punishment” and “the jury must find the existence of each relevant disputed fact ‘beyond reasonable doubt.’”

But the Commission recognized that a charged offense system contains problems of its own. First, statutes may be written in very general, broad language that may not provide a judge with the information necessary for proportionate sentencing. Second, even if statutes were specific, variations in offense conduct would be ignored, thereby inviting “unwarranted similarit[ies] in sentences,” subverting the SRA’s command that relevant variations be considered,

620. See Breyer, supra note 234, at 10-11, 11 nn.65-66.
622. See id. at 35,086-87.
623. See id. at 35,087.
624. Id.
625. Id.
626. Id.
627. Breyer, supra note 537, at 3.
creating mismatches between the seriousness of the offense and the sentences imposed.\textsuperscript{631} Third, a charged offense guideline system would tether sentences to the offense of conviction,\textsuperscript{632} resulting in the transfer of sentencing authority from the judge to the prosecutor.\textsuperscript{633}

Considering both the advantages and drawbacks of a real offense system, the Commission in the preliminary draft settled upon a limited, or "modified," real offense system.\textsuperscript{634} Consistency and proportionality would both be furthered by assigning specified weight to the offense of conviction (the "base offense" level) and by mandating that judges consider some (but not all) real offense conduct as aggravating or mitigating circumstances, each having specified weight ("specific offense characteristics").

As to what real offense conduct would be considered, the September 1986 draft contained only those real offense characteristics that are "bound up with the conduct that constitutes the crime charged."\textsuperscript{635} It did not account for any real offense conduct that did not "typically accompany" the offense.\textsuperscript{636} The Commission also expressly rejected a rule that would have limited a sentencing judge from considering a real offense characteristic when it could have been, but was not charged as a separate federal offense along with the offense actually charged.\textsuperscript{637} This decision was made in part because the existence of "a separate [federal] crime often depends upon the happenstance of factors creating federal jurisdiction.\textsuperscript{638} The Commission also declined to include in the September 1986 draft a rule that would define the scope of relevant harms to mean "in furtherance of" the crime of conviction, because it believed that determining what was "in furtherance of" would be difficult and could tend to produce disparities.\textsuperscript{639}


\textsuperscript{632.} See id.; see also Breyer, supra note 537, at 5.

\textsuperscript{633.} See Preliminary Draft of Sentencing Guidelines for United States Courts, 51 Fed. Reg. 35,080, 35,087; see also Interview with Ilene H. Nagel, supra note 46, at 59 ("The argument against [the charged offense system] . . . was that it completely turns all of the discretion over to the prosecutor. . . . [E]verything is in the prosecutor's hands. He can determine the sentence by virtue of the offense for which you are convicted.").


\textsuperscript{635.} Id. at 35,087.

\textsuperscript{636.} Id.

\textsuperscript{637.} Id. at 35,088.

\textsuperscript{638.} Id.

\textsuperscript{639.} See id.
3. "Relevant Conduct"

Following the publication of the September 1986 draft in the Federal Register, the Commission held six hearings, received hundreds of public comments, and continued to engage in discussions with various stakeholders. In review of this feedback and these conversations, Senior Research Associate Phyllis Newton and the Chairman’s law clerk Russell Ghent stated in a December 8, 1986, memorandum that the revised draft of the guidelines—to be completed in January 1987 and then published in the Federal Register for public comment—should retain the modified real offense approach. But, according to Newton and Ghent, the term “modified real offense” seemed “value-laden” and suggested that the Commission was “developing a new concept of sentencing” as opposed to capturing the current sentencing process. As a result, “modified real offense” was to be replaced with the term “relevant conduct.”

The memorandum proposed specific rules about the consideration of real offense characteristics. “Relevant conduct” was defined as “all conduct and injuries relevant to the offense of conviction and all relevant defendant characteristics.” But the relevant offense conduct would be tied to the offense of conviction, such as conduct in preparation of, during, and following the offense of conviction. In this sense, the Commission’s approach could be said to have “moved closer to a ‘charge[d] offense’ system.”

On December 16, 1986, the Commission approved principles for the redrafting of the preliminary guidelines, which had been prepared by Commissioner Breyer. The principles adopted the “relevant conduct” approach: “While generally referring to the statutory offense of conviction, the Guidelines will provide a method for the judge to take into account all relevant misconduct.” The revised draft guidelines maintained the relevant conduct approach as outlined in the December 8, 1986, memorandum. The original Guidelines Manual similarly kept...
This model, though it moved the pertinent language from the overview of chapter two to the application instructions of chapter one. It also expressed the Commission's expectation that the "court system will be able to devise fair procedures" for the determination of relevant conduct.

One critical issue concerning "relevant conduct" was what actions of another person—either a co-defendant or an uncharged co-conspirator—would be attributable to a defendant for sentencing purposes. By the mid-1980s, the federal law of vicarious criminal law liability was well-established. A federal defendant could be convicted of a federal crime for which the defendant did not engage in the actual criminal conduct—the actus reus—in two different ways. First, a defendant could be convicted for having aided or abetted another who actually engaged in the actus reus, when the defendant did not do so, so long as the defendant intended the co-defendant to succeed in committing the crime. Second, the defendant could be convicted of a crime that was committed by a co-conspirator "in furtherance" of a conspiracy concerning a different crime, so long as the crime committed in furtherance of the conspiracy was "reasonably foreseeable."

The original Commission adopted similar legal principles as part of the "relevant conduct" provision of the original Guidelines Manual. Relevant conduct, as defined in the 1987 manual, included:

[A]cts or omissions committed or aided and abetted by the defendant, or by a person for whose conduct the defendant is legally accountable, that... are part of the same course of conduct, or a common scheme or plan, as the offense of conviction...

6, 1987).

650. SENTENCING GUIDELINES MANUAL, supra note 3, ch. 1, cmt.
651. Id.
653. Id. at 619.
655. SENTENCING GUIDELINES MANUAL, supra note 3, § 1B1.3(a). The original 1987 Guidelines Manual was somewhat ambiguous about whether this definition allowed for conduct outside of the scope of the offense of conviction to be used to calculate a defendant's guideline range. See United States v. Taplette, 872 F.2d 101, 106 (5th Cir. 1989). This resulted in the Commission amending the "relevant conduct" definition in January 1988 in order to provide that "relevant conduct" was to be used in determining: "(i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three." SENTENCING GUIDELINES MANUAL, supra note 3, app. C, amend. 3; see also United States v. Silverman, 692 F. Supp. 788, 792 (S.D. Ohio 1988). In 1992, for clarification purposes, the Commission also later amended the "relevant conduct" definition to replace "acts and omissions" by a person for whose conduct the defendant is legally accountable with "jointly undertaken criminal activity (a criminal plan, scheme,
Therefore, a defendant would be vicariously accountable for sentencing purposes for (1) conduct of another that the defendant aided and abetted or (2) "reasonably foreseeable" conduct committed by another in furtherance of a conspiracy. The relevant conduct rule also encompassed the defendant's (or a conspirator's or codefendant's) conduct that was part of the "same course of conduct or common scheme or plan" as the offense of conviction. The Commission modeled this aspect of the rule conceptually on both Federal Rule of Evidence 404(b), concerning the admissibility of evidence of "other crimes" similar to that charged, and Federal Rule of Criminal Procedure 8(a), concerning "joinder" of related offenses in an indictment. Notably, both aiding-and-abetting and conspiratorial vicarious sentencing accountability provisions were included in Commissioner Robinson's just deserts draft guideline manual.

Such "relevant conduct" could factor into a defendant's guideline penalty levels in one of two ways. First, and most commonly, uncharged relevant conduct—such as using a weapon during a bank robbery or drug deal, when the indictment did not allege such conduct—could increase a defendant's offense level. In rare cases, such uncharged conduct also could result in a cross-reference to a different chapter two guideline if the relevant conduct—when assessed in the other guideline—would result in a higher guideline sentencing range than the range in the guideline associated with the offense of conviction.

E. Offense Characteristics as a Basis for Sentencing

Although the Commission's "relevant conduct" policy permitted a broad range of offense conduct beyond the elements of the offense or endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (U.S. SENTENCING COMM'N 1992, amended 2016); U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 439 (U.S. SENTENCING COMM'N 2003, amended 2016).

656. U.S. SENT. GUIDELINES MANUAL, supra note 3, § 1B1.3 cmt. n.1.
658. See, e.g., SENTENCING GUIDELINES MANUAL, supra note 3, § 2B3.1(b)(2) ("(A) If a firearm was discharged increase by 5 levels; (B) if a firearm or a dangerous weapon was otherwise used, increase by 4 levels; (C) if a firearm or other dangerous weapon was brandished, displayed or possessed, increase by 3 levels.").
659. See, e.g., id. § 2A4.1(b)(5) ("If the victim was kidnapped, abducted, or unlawfully restrained to facilitate the commission of another offense: (A) increase by 4 levels; or (B) if the result of applying this guideline is less than that resulting from application of the guideline for such other offense, apply the guideline for such other offense." (emphasis added)).
offenses of conviction to be considered for sentencing purposes, the Commission still had to determine which offense characteristics mattered at sentencing and how they would impact guideline calculations. Chairman Wilkins framed the Commission's decision about offense characteristics in this way: "[W]hat is it about a particular crime, the way in which it is committed, [and] the impact upon others which we should consider as a Commission in drafting our guidelines?" 660

Inherent in this inquiry were two subsidiary issues. First, what were the proper sources of offense-based distinctions? As Commissioner Nagel asked, "According to whose values do we define likeness of crime. . . . By what criteria [for example] does one [equate] a robbery with an embezzlement?" 661 Second, how should the Commission achieve a proper balance between simplicity and comprehensiveness? In his summary of major policy decisions, Commissioner Breyer noted that while the Commission was to "identify, offense by offense, those characteristics about the way in which an offense is committed that should lead to a greater (or lesser) punishment," it "cannot take all arguably relevant distinctions into account without producing guidelines that are unworkably complex." 662 Such complexity would come at the cost of "misunderstanding or mistakes in application," and "reintroducing sentencing disparity," but "an inadequate number of distinctions also risks unfairness" in that "two offenders who engaged in quite different behavior would nonetheless receive exactly the same sentence." 663

Early on, the Commission formed a subcommittee on offense characteristics that was chaired by Commissioner Breyer and joined by Commissioner Robinson. 664 The committee's work was guided by the SRA, which required the Commission to consider whether and to what extent several offense-related factors have an impact in sentencing determinations: "the grade of the offense;" "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;" "the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;" "the community view of the gravity of the offense;" "the public concern

662. Breyer, supra note 537, at 21-22.
663. Id. at 22.
generated by the offense;" "the deterrent effect a particular sentence may have on the commission of the offense by others;" and "the current incidence of the offense in the community and in the Nation as a whole."665

The Committee focused its efforts on distinctions that affected the relative seriousness of offenses. Chairman Wilkins observed that "[t]he ranking of offenses by seriousness is one of the most important steps in establishing a rational sentencing policy and promulgating guidelines."666 To provide a taxonomy and ranking of federal offenses for sentencing purposes, the Committee looked to multiple sources, including the mandatory minimums and statutory maximums set by Congress.667 Commissioner Breyer believed that the failed federal code reform legislation—that had created an elaborate taxonomy of federal offenses—was an appropriate consideration as well.668 He observed that "[t]he use of the proposed Criminal Code Revision [was] for classification purposes" only—not for actually setting penalty levels or criminalizing new conduct.669

The Committee also examined the actual time served by federal offenders for particular offenses as a measure of relative offense seriousness,670 as well as how the federal parole guidelines ranked offense seriousness.671 Outside of the federal system, the committee looked at the relative severity of offenses in state systems.672 It also examined the MPC's offense rankings673 and the rankings prepared by other organizations, such as the American Civil Liberties Union.674

The committee also considered existing surveys, and distributed its own offense seriousness questionnaire to around 200 judges and

668. See Meeting Minutes, U.S. Sentencing Comm'n, supra note 372, at 6; Meeting Minutes, U.S. Sentencing Comm'n, supra note 338, at 5-6.
669. See Meeting Minutes, U.S. Sentencing Comm'n, supra note 372, at 7 ("[A]bout 98% of the changes in the proposed Criminal Code Revision were technical, and only about 2% were controversial.").
671. See id. at 5-6.
672. See Meeting Minutes, U.S. Sentencing Comm'n 5 (Feb. 11, 1986) (on file with authors); Meeting Minutes, U.S. Sentencing Comm'n 6-7 (Feb. 12, 1986) (on file with authors).
674. See id.
practitioners, newspaper editors, and organizations. The questionnaire asked respondents to rank sixteen “crime scenarios” by seriousness. Chairman Wilkins noted that these vignettes were “derived from the legal and social science literature pertaining to offense seriousness.” The accompanying cover letter, signed by Chairman Wilkins, also asked respondents to address three questions: “[1] How should the Commission compare the relative seriousness of different kinds of crimes? . . . [2] Should the manner of carrying out an offense affect a ranking more or less than the harm caused by the offense? [and] [3] Are certain kinds of sanctions more appropriate for certain kinds of crimes?” The Commission received over 130 completed responses. The idea of conducting a broader public opinion survey—proposed initially by Commissioner Nagel—was not pursued, although the Commission later did so in the 1990s.

At the March 12, 1986, Commission meeting, Commissioner Breyer went over the offense committee’s initial report. The report, in Commissioner Breyer’s view, would serve as a catalyst for reaction from criminal justice professionals and others. To obtain that outside perspective, the Commission endorsed Commissioner Breyer’s suggestion of preparing and distributing the aforementioned offense seriousness questionnaire. A March 26, 1986, version of the report classified offenses into eight larger groups: “Offenses Against the Person; Offenses Against Property; Offenses Against Government Processes; Offenses Against Public Order, Safety, Health, and Welfare; Offenses Against National Defense; Offenses Against Civil Rights; Offenses Involving International Affairs; and Offenses Involving International Affairs; and Offenses Involving International Affairs."

675. See id. at 83-84, 149-50; see also U.S. Sentencing Comm’n, supra note 341, at 1.
676. U.S. Sentencing Comm’n, supra note 341, at 1.
680. See Meeting Minutes, U.S. Sentencing Comm’n, supra note 372, at 12 (suggesting a public opinion survey conducted by two leading survey experts, Dr. Peter H. Rossi and Dr. Richard A. Berk); see also Interview with Ilene H. Nagel, supra note 46, at 22.
681. Breyer, supra note 234, at 16 (“The [initial] Commissioners believed that public polling was not sufficiently advanced or detailed to warrant its use as accurate sources in ranking criminal behaviors.”).
682. See U.S. SENTENCING COMM’N, A NATIONAL SAMPLE SURVEY: PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 15-24 (1995) (noting that the survey was conducted for the Commission by Doctors Berk and Rossi).
684. Id. at 10-12.
Taxation." The bulk of the report listed and described offenses within these eight categories, and set out for each offense the mean and median time served, the percentage of offenders sentenced to probation, the statutory minimum and maximum penalties, and the Parole Commission's rankings of the offense types. The report also contained "grading factors," which were factors that seemed to bear on the offense severity within a single offense type, including the amount of drugs distributed, the monetary amount of the fraud, and the defendant's role in the offense.

On April 15, 1986, the Commission also held a public hearing on offense seriousness. The Commission received testimony from a number of stakeholders, including representatives from the American Civil Liberties Union, New York City Bar Association, Crime Magazine, Federal Probation Officers Association, Federal Public Defenders Association, Institute for Government and Politics, National Association of Criminal Defense Lawyers, National Interreligious Service Board for Conscientious Objectors, National Rifle Association, and Washington Legal Foundation. The witnesses addressed a number of topics, including the relevance of real offense conduct at sentencing, regional differences in perceived offense seriousness and the need for a single federal sentencing policy applicable across the nation, and the relationship between the theories of punishment and offense seriousness.

The September 1986 preliminary draft guidelines contained twelve offense classifications—it kept the eight original classifications in the offense committee report, but added categories for criminal enterprises, drugs, and immigration, and also split into two categories offenses against public order and safety and offenses against public health. The

686. See id.
687. See, e.g., id.
688. See, e.g., id.
689. See, e.g., id.
691. See Public Hearing, supra note 660, at 2 (stating the hearing's agenda).
692. Id. at 17.
693. Id. at 24-27.
694. Id. at 112-14.
draft manual focused on harm values—those actual or intended harms attributable to and foreseeable by the offender—and offense values were assigned to characteristics similar to those in the committee report, such as loss amount, drug weight, and the offender’s role in the offense.

The preliminary draft guidelines retained much of Commissioner Robinson’s earlier just desert draft’s categorization of offenses and retributivist bases for distinguishing between offenses. The preliminary draft manual, for example, contained different base offense levels depending on the amount of the fraud and the drug quantity involved. In the chapter on offender characteristics, the manual called for total offense levels to be multiplied by figures corresponding with the offender’s role in the offense. For instance, the total offense level for an offender who controlled a criminal enterprise would be multiplied “by a number between 1.5 and 2,” whereas a “minor participant” would have the total offense level multiplied “by a number within a range of .5 to .7.”

While the September 1986 preliminary draft marked an improvement in simplicity from the just deserts draft, the Commissioners agreed that the next draft manual needed to be simplified “considerably.” In particular, Commissioner Breyer’s drafting principles, approved by the Commission, noted that distinctions between offenses would be made if required by statute, supported by past practice, or otherwise based on a “persuasive or special reason” found by the Commission. Accordingly, the subsequent revised draft guidelines manual aimed to include fewer offense-based distinctions. The revised draft retained features of the preliminary draft, but with important differences. Drug quantity still determined the base offense level for trafficking offenses, but loss amount became a specific offense characteristic. Role in the offense moved from an offender characteristic to an offense characteristic, and also served as a specific

696. See id. at 35,084.
697. See id. at 35,084, 35,093, 35,098.
698. See, e.g., id. at 35,094-95.
699. See, e.g., id. at 35,098 (containing the base offense values table for drug trafficking).
700. Id. at 35,114-15.
701. Id. at 35,115.
702. Id.
703. U.S. Sentencing Comm’n, Principles Governing the Redrafting of the Preliminary Guidelines, supra note 452.
704. Id.
706. Id. at 3931.
offense characteristic that would result in added or subtracted points according to specified ranges rather than a multiplication of the total offense value.\(^707\)

The 1987 Guidelines Manual adopted a modified structure concerning offense-based distinctions. The manual listed specific offense characteristics corresponding only to particular offenses in chapter two,\(^708\) and placed generic offense characteristics, including an offender's role in a multi-offender case (as a leader or follower), in chapter three.\(^709\) Notably, the Commission generally only included offense characteristics—as aggravating or mitigating factors—in the original manual if the “past practice” data analyses showed that those characteristics made a difference in sentence length in more than a trivial number of cases.\(^710\) For instance, the Commission decided not to include death occurring during the course of a robbery as a specific offense characteristic, because the past practice analyses showed that death rarely occurred during robberies prosecuted in federal court. Instead of including death in the robbery guideline, it was included as a potential ground for departure.\(^711\)

**F. Setting Guideline Penalty Levels**

1. On What Basis to Set Penalty Levels?

Shortly after the Commission first met, debates ensued about where penalty levels should be set and, in particular, on what basis they should be set. As discussed above, certain Commissioners' views on this topic were informed by their different philosophical perspectives—with Commissioner Robinson advocating for penalty levels reflecting a “just deserts” or retributivist philosophy, and Commissioners Block and Nagel advocating for penalty levels that would optimize utilitarian considerations of “crime control.”\(^712\) When the former failed to produce a viable draft and the latter did not produce any draft at all, the

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707. *Id.* at 3972.
708. *See, e.g.*, [SENTENCING GUIDELINES MANUAL, supra note 3, §§ 2B3.1(b)(2), 2D1.1(b)(1)](noting the offense enhancement for the use of a firearm in the course of a robbery and drug trafficking guidelines).
709. *Id.* §§ 3B1.1—2.
711. *See id.* at 42; *see also* [SENTENCING GUIDELINES MANUAL, supra note 3, §§ 2B3.1, 5K2.1](authorizing an upward departure if death resulted from an offense).
Commission was forced to look for a different manner on which to base penalties.

As it turned out, Congress had instructed the Commission to first consider average sentences for different offense types in pre-guidelines federal criminal cases. In particular, the SRA required the Commission, “as a starting point in its development of the initial sets of guidelines for particular categories of cases,” to “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.” But Congress did not direct the Commission to simply codify average sentences. The SRA required the Commission to “insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense.” The SRA made clear that the Commission is not “bound by such average sentences,” and instead must “independently develop a sentencing range,” provided only that the range “is consistent with the purposes of sentencing described in section 3553(a)(2) of title 18, United States Code.”

In setting penalty levels, the original Commission considered two related sources of data about past sentencing practices: data about the application of the parole guidelines and a more complex dataset, which considered all sentences imposed by district courts. The latter dataset, unlike the former dataset, included not only prison sentences in which parole or good-time credit had been granted but also non-incarceration sentences and prison sentences of twelve months and below (which were not subject to parole). The latter types of sentences accounted for around two-thirds of pre-SRA sentences.

a. Data About the Parole Guidelines

The federal parole guidelines provided imprisonment ranges for a wide variety of federal offense types, which the Sentencing Commission considered in formulating penalty levels in the sentencing guidelines.

714. Id.
715. Id.
716. See infra Part IV.F.1.b (discussing the “past practice” data study).
717. SUPPLEMENTARY REPORT, supra note 37, at 25 n.66.
718. See MECHAM, supra note 61, at 261-62 tbl.D-5. In the pre-SRA era, approximately one-half of federal offenders received non-incarceration sentences. See id. at 262 tbl.D-5. Furthermore, of those receiving prison sentences, around one-third received sentences of twelve months or less. See id. at 261 tbl.D-5. Therefore, the parole guidelines applied to only around one-third of federal offenders in the pre-SRA era. See id. at 261-62 tbl.D-5.
719. See Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 37-39;
Yet the Commission put less weight on the parole guidelines, which Congress clearly did not intend for the Commission to simply mimic, and more weight on the past practice data that considered all types of cases—not merely the one-third of pre-SRA cases subject to the parole guidelines.

The April 1987 sentencing guidelines submitted to Congress differed from the parole guidelines in both complexity and penalty levels regarding many offense types. For example, in the parole guideline for theft offenses, there were five gradations for the monetary value of the stolen property, while in the sentencing guidelines there were fourteen gradations. Those differences in gradations resulted in significant differences in penalties. For example, under the parole guidelines, an offender with no criminal history who stole $200,000 faced a range of twenty-four to thirty-six months. Conversely, an offender who stole that same amount with "more than minimal planning" faced a range of fifteen to twenty-one months under the 1987 sentencing guideline for theft, before any credit for acceptance of responsibility—an adjustment not made in the parole guidelines.

b. Past Practice Study

The primary empirical basis for the original sentencing guidelines was the Commission's study of federal sentences imposed in the mid-1980s. The Commission assembled detailed data in 40,000 of these cases, which included the most commonly prosecuted crimes, were drawn from fiscal year 1985 (from October 1984 through September 1985), and featured wide geographical representation. The

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see also SUPPLEMENTARY REPORT, supra note 37, at 25, app. C.

720. S. REP. NO. 98-225, at 168 (1983) (directing the Sentencing Commission to produce "guidelines considerably more detailed than the existing parole guidelines").


722. See 28 C.F.R. § 2.20 (noting that a lost amount of $200,000, but not more than $500,000, falls within category five of the Sentencing Table); see also infra App.A, (Sentencing Table for the parole guidelines, showing a sentencing range of twenty-four to twenty-six months for an offender with no criminal history, as reflected in his SFS).

723. See SENTENCING GUIDELINES MANUAL, supra note 3, § 2B1.1(a), (b)(1)(J), (b)(4) (providing that for a loss amount between $100,001 to $200,000 there was an offense level of four plus eight levels based on the loss amount and two additional levels if there was "more than minimal planning"); id. at § 3E1.1 (potential two-level reduction for acceptance of responsibility); see also id. ch. 5, pt. A (Sentencing Table) (offense level of fourteen and CHC I results in a sentencing range of fifteen to twenty-one months).

724. See SUPPLEMENTARY REPORT, supra note 37, at 16.

Commission then focused on a representative sample of around 10,500 of those cases and created a dataset providing information about sentences for (1) first-time offenders, (2) convicted at trial, (3) who had committed felonies and serious misdemeanors, and (4) who were sentenced to some term of imprisonment. The PSRs from those cases were coded for a variety of offender and offense characteristics, and a multiple-regression analysis was conducted in order to identify which real offense sentencing factors mattered to judges in sentencing. The coding was done by probation officers, as they were "most qualified to do the data collection since they are the most familiar with the cases." In order to account for the effect of parole and good time credit on sentence length and thereby determine the length of prison terms "actually served" for each offense type, the Commission integrated data from the BOP and Parole Commission into the "front-end" sentencing data. In its 1987 Supplementary Report, the Commission published summaries of its past practice data results, noting the average "baseline" amount of time-served for various offense types and the average "adjustments" in sentence length for various aggravating or mitigating circumstances. These numbers generally served as the "numerical anchor" for base offense levels and certain specific offense characteristics in the 1987 Guidelines Manual.

Commissioner Nagel noted that the "past practice" data was not precise—in terms of average sentences for particular types of offenses—but instead provided estimated ranges. Research Director Rhodes echoed his view by noting that "[g]iven the limitations of available data
and the need to make simplifying assumptions to analyze the data, [the results of the data analyses for the many offense types do not] perfectly reflect typical sentencing practices.735

The complex nature of the past practice analyses and the incomplete description of the past practice data analyses in publicly available documents raised questions about the accuracy, and severity, of the guideline penalty levels set by the original Commission. In particular, if the past practice data was based only on past average prison sentences, the concern was that average sentences would not reflect actual sentencing practices and, instead, would be artificially high. In his dissent to the original guidelines, Commissioner Robinson alleged that, in calculating average past sentences, the Commission “[eliminated] all past nonincarcerative sentences from the ‘averages’ calculations,” which “seriously distort[ed] [the] claimed replication of past practice.”736

Other Commissioners disputed Commissioner Robinson’s claim. For example, when asked about Commissioner Robinson’s point, Commissioner Breyer stated, “he’s wrong,” in that the Commission considered both data on average prison time served for those offenders who were sentenced to a term of imprisonment and data on “the percentage of the people who go to prison.”737 Similarly, Commissioner Nagel explained that the Commission was “anchored . . . [b]ut not bound by an examination of the average time served in past years for offenders convicted of that same offense . . . [a]nd the percentage given a non incarceration sentence.”738

The 1987 Supplementary Report offers additional evidence of the Commission’s consideration of non-incarceration sentences in devising penalty levels. According to the report, the average “baseline” figures were for offenders who had been sentenced to some amount of imprisonment for particular offense types. But a column next to these figures also noted the estimated percentage of such offenders who were sentenced to prison.739 The Commission “discounted” the average sentence based on the percentage of such offenders who did not receive a sentence of imprisonment. The Supplementary Report offers an example of this reduction:

735. Memorandum from William Rhodes, supra note 725, at 1.
737. Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 52.
738. See Nagel et al., supra note 43, at 1817.
739. See SUPPLEMENTARY REPORT, supra note 37, at 27-34 tbl.1(a).
Conviction for an unsophisticated embezzlement of less than $1,500 results in a level 8 prison term (an average of about 5 months or a range of 2-8 months) if a prison term is imposed. However, a prison term is currently imposed in only about 24 percent of such cases. Because of this, the average time served by all first-time embezzlers convicted at a trial of stealing $1,500 is actually about 1 month (rather than [the average of] 2-8 months [or 5 months as an in-between point]).

The guideline levels in the original Guidelines Manual confirm that the Commission did not set penalty levels based on “un-discounted” average prison sentences. Staying with the example of an unsophisticated embezzler who stole less than $1500 and who went to trial (i.e., was not eligible for a two-level downward adjustment for acceptance of responsibility under section 3E1.1), the base offense level would be four and the specific offense characteristic for a loss amount of between $1001 to $2000 would be two. A total offense level of six combined with a Criminal History Category of I corresponded to a guideline range of zero to six months—not a range of two to eight months that would have been based on consideration of average prison sentences alone. If the guidelines’ offense levels had been based on data that did not account for “nonincarcerative” sentences, the guideline minimum for such an offender would have been two months, not zero months. In this instance, the Commission actually set the bottom of the guideline range below the “discounted” average sentence of one month for such offenders. Accordingly, the historical record supports the conclusion that the Commission did not base the original Guidelines Manual’s penalty levels solely on data from pre-guidelines cases in which defendants were sentenced to prison.

c. Adjusting Average Past Sentences

Congress envisioned that the Commission would “independently” assess the appropriateness of past sentences and, for “many” cases, would create sentencing guidelines that called for higher penalties.
determining which offenses warranted these higher penalties, the Commission took its cue from Congress. In particular, the Commission raised guideline sentences as to certain drug trafficking offenses, violent offenses, and significant white-collar offenses, because Congress established new statutory mandatory minimum penalties and also issued directives in the SRA concerning these three areas.\footnote{Memorandum from Bill Rhodes, Research Dir., U.S. Sentencing Comm’n, to Michael Block, Comm’r, U.S. Sentencing Comm’n 8 (Aug. 10, 1987) (on file with authors) (“Excluding sentences for drug law violators, career offenders, some white collar offenders, and certain violent crimes, there exists a close correspondence (but not an identity) between [the prison] time at risk for offenders given . . . sentencing practices [from fiscal year 1985, which were set forth in the levels table in the 1987 Supplementary Report] and given the [corresponding ranges in the] guidelines.”).}

First, regarding drug trafficking, Congress directed the Commission to ensure that a “substantial” term of imprisonment would be imposed on an offender who trafficked in “a substantial quantity of a controlled substance.” At the time of the SRA, there were no mandatory minimum statutory penalties for federal drug trafficking offenses.\footnote{See Control Substances Penalties Amendments Act of 1984, Pub. L. No. 98-473, §§ 502, 98 Stat. 2068, 2068 (1984) (codified as amended at 21 U.S.C. §§ 841, 960).} However, at the same time that it enacted the SRA, Congress also raised the statutory maximum for federal drug trafficking offenses from fifteen to twenty years—for first offenders—and from thirty to forty years for offenders with a prior felony drug conviction.\footnote{See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1002, 1007–08, 100 Stat. 3207, 3207-2, 3207-7 (codified as amended at 21 U.S.C. §§ 841, 960). The Commission’s policy decisions concerning how to account for the 1986 statutory penalties are further discussed in the next section. See infra Part IV.F.1.d.}

Second, regarding violent offenses, Congress directed the Commission to ensure that the guidelines reflected the “general appropriateness” of imposing a “substantial” term of imprisonment for violent offenses that resulted in a serious bodily injury and of imposing a non-incarceration sentence for first-time offenders not convicted of a “violent” or “otherwise serious offense.”\footnote{28 U.S.C. § 994(j).}

\footnote{See Memorandum from Bill Rhodes, Research Dir., U.S. Sentencing Comm’n, to Michael Block, Comm’r, U.S. Sentencing Comm’n 8 (Aug. 10, 1987) (on file with authors) (“Excluding sentences for drug law violators, career offenders, some white collar offenders, and certain violent crimes, there exists a close correspondence (but not an identity) between [the prison] time at risk for offenders given . . . sentencing practices [from fiscal year 1985, which were set forth in the levels table in the 1987 Supplementary Report] and given the [corresponding ranges in the] guidelines.”).}
Third, regarding white-collar offenses, Congress generally expressed the need for higher penalties in this area. For example, the Senate Judiciary Committee's report stated that “[t]here will be some logical changes from historical [sentencing] patterns, of course, as in the case of . . . white-collar offenses for which plainly inadequate sentences have been imposed in the past.”750 The sense of Congress, according to Commissioner Nagel, was that the discrepancies in penalties for white-collar offenses compared to penalties for theft had class-based and race-based undertones.751 Similarly, Commissioner Breyer discussed the Commission’s findings that, “people who were convicted of fraud, a white-collar crime, were treated less harshly than those convicted of theft, a blue-collar crime,” and the Commission’s conclusion that white-collar penalties should be elevated to “mirror the theft penalties.”752 This would mean, Commissioner Breyer noted, “less unadulterated probation and more brief terms of confinement” for typical white-collar offenders.753

d. Accounting for New Statutory Mandatory Minimum Sentences in Drug Cases

In the wake of enacting the SRA—which directed the new Commission to create a detailed set of sentencing guidelines addressing “all important variations that commonly may be expected in criminal cases, and that reliably break[] cases into their relevant components and assure[] consistent and fair results”754—Congress took a substantial step in the opposite direction by enacting new statutory mandatory minimum sentences that carried severe penalties.755 If guidelines were intended to

750. S. REP. NO. 98-225, at 77, 116 (1983) ("[S]ome major offenders, particularly white collar offenders and serious violent offenders, frequently do not receive sentences that reflect the seriousness of their offenses."); see id. at 92 ("The placing on probation of an embezzler, a confidence man, a corrupt politician, a businessman who has repeatedly violated regulatory laws, an operator of a pyramid sales scheme, or a tax violator, may be perfectly appropriate in cases in which, under all the circumstances, only the rehabilitative needs of the offender are pertinent; such a sentence may be grossly inappropriate, however, in cases in which the circumstances mandate the sentence’s carrying substantial deterrent or punitive impact.").

751. Interview with Ilene H. Nagel, supra note 46, at 47-49.


753. Id.

754. S. REP. NO. 98-225, at 168-69 (directing that the guidelines should “reflect every important factor relevant to sentencing”). The senate report also noted that “[t]he Committee generally looks with disfavor on statutory minimum sentences . . . since their inflexibility occasionally results in too harsh an application of the law.” Id. at 89 n.194.

755. See Breyer, supra note 284, at 184-85 ("Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentences, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. . . . [Congress needs to] abolish mandatory minimums altogether."); Freed, supra note 163, at 1752 ("These rigid
be carefully-calibrated tools for sentencing based on a wide variety of offense and offender characteristics that seek to sentence in a proportionate manner, mandatory minimum sentences generally are blunt instruments that are based on a single offense characteristic.

The most important of these new statutes concerned drug trafficking offenses. These offenses constituted about one quarter of the federal criminal caseload before the guidelines went into effect and increased to around 40% of the caseload during the height of the “War on Drugs” in the late 1980s and continuing throughout the 1990s. In October 1986, a month after the Commission had published its first preliminary draft guidelines in the Federal Register for public comment, Congress enacted the ADAA, which created new statutory mandatory minimum penalties for a wide variety of drug offenses—including five- and ten-year mandatory minimum penalties with corresponding maximum penalties of forty years and life imprisonment—and for a wide variety of drug trafficking offenses, including for first-time offenders. The new statute, codified in an amended 21 U.S.C. § 841(b), set forth mandatory minimum penalties for a wide variety of drug types, including powder cocaine, “crack” cocaine, methamphetamine, heroin, and marijuana. The mandatory minimums were triggered by certain drug types and drug quantities. For example, 500 grams of powder cocaine carried a mandatory minimum prison sentence of five years, while five kilograms of powder cocaine carried ten years. The ADAA was hastily enacted by Congress. The original bill was introduced in early August of 1986 and was enacted less than three months later, on October 27, 1986.

[mandatory minimum] statutes are wholly at odds with the sort of principled guidance and permissible individualization of penalties that Congress described in the SRA.”); Orrin G. Hatch, The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System, 28 WAKE FOREST L. REV. 185, 193-94, 194 n.72, 195 (1993) (noting that “[t]he compatibility of the guidelines system and mandatory minimums is also in question” because “they are structurally and functionally at odds with each other and with the SRA’s goals”); see also Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., Speech at the Am. Bar Ass’n Annual Meeting (Aug. 9, 2003) (criticizing mandatory minimum statutes).

756. See Newton, supra note 58, at 331-33.


The Commission felt compelled to re-write the draft drug trafficking guidelines following the passage of the 1986 statute. As noted, shortly before the 1986 statute was enacted in October, the Commission had published for public comment a preliminary draft of the guidelines manual.\textsuperscript{761} The penalty levels set forth in that draft guideline were "highly tentative, preliminary, and subject to change" in the final promulgated manual.\textsuperscript{762}

The primary drug trafficking guideline in the preliminary draft—section D211—included different "base offense values" (the precursor of offense levels in the guidelines eventually promulgated in April 1987) that depended on drug type and drug quantity.\textsuperscript{763} Notably, for the most common serious drug types, such as cocaine and heroin, the highest base offense value was 180, which equated to a sentencing range of 168 to 210 months for an offender with no criminal record (before any reduction for acceptance of responsibility evidenced by a guilty plea or for other cooperation with the authorities).\textsuperscript{764} The threshold drug quantities triggering the maximum "base offense values" were one kilogram of heroin and two kilograms of cocaine.\textsuperscript{765} Aggravating factors, such as possession of a firearm or causing bodily injury during the offense, could increase the guideline range.\textsuperscript{766}

The maximum guideline penalty ranges based solely on drug quantity were substantially higher than the average prison sentences actually served by federal drug offenders in the period immediately before the Commission was created. For instance, in fiscal year 1985, the average prison sentence actually served by offenders convicted at trial of trafficking in amounts between one and ten kilograms of heroin was between fifty-one and sixty-three months, while the average prison sentence actually served by offenders convicted at trial of trafficking in amounts between one and six kilograms of cocaine was between forty-six and fifty-seven months.\textsuperscript{767}

\textsuperscript{761} See supra note 209 and accompanying text.
\textsuperscript{763} Id. at 35,098.
\textsuperscript{764} Id. at 35,098, 35,121. That base offense level of 180 was equivalent to what later would become offense level 35 (for first offenders) in the Sentencing Table. See \textit{SENTENCING GUIDELINES MANUAL}, supra note 3, ch. 5, pt. A.
\textsuperscript{765} Preliminary Draft of Sentencing Guidelines for United States Courts, 51 Fed. Reg. 35,080, 35,098. Trafficking in very large quantities—such as 100 kilograms of cocaine—would carry the same guideline range as trafficking in the threshold quantity of two kilograms. See id.
\textsuperscript{766} Id. at 35,100.
\textsuperscript{767} SUPPLEMENTARY REPORT, supra note 37, at 32 tbl.1(a). Note that those average sentencing ranges were adjusted based on the assumption that all offenders would have received the
Although the penalty levels set forth in the preliminary draft were "highly tentative" and that draft was solely intended to elicit public comment and did not yet reflect the definitive policy position of the Commission, it appears the Commission was implementing the congressional directive in the SRA to provide for "substantial term[s] of imprisonment" for "trafficking in substantial quantit[ies] of a controlled substance." Indeed, for large-scale drug traffickers, the proposed sentencing ranges, when measured by quantity alone, roughly tripled the sentences from their pre-guidelines levels. It is also notable that, although the ADAA had not yet been enacted when the Commission published the preliminary draft for public comment, Congress had already been conducting high-profile hearings about drug trafficking and a bill, creating five- and ten-year mandatory minimum penalties depending on the type and quantity of drugs being trafficked, had been reported out of the House Committee on the Judiciary on August 13, 1986. Furthermore, there was strong bipartisan support for the bill.

After the ADAA was enacted in October 1986, the Commission decided that, to be consistent with new statutory scheme, the drug trafficking guideline in the January 1987 draft should be recalibrated to reflect the new statutory punishment scheme. In particular, the

15% good time credit created by the SRA. See id. at 23-24.

768. Preliminary Draft of Sentencing Guidelines for United States Courts, 51 Fed. Reg. 35,080, 35,081 ("T]he Commission voted to publish a preliminary working draft of sentencing guidelines well in advance of any required publication date in order to provide a vehicle for critical analysis and public comment. While these guidelines do not reflect the views of all Commissioners, the Commission voted for publication to provide a means for identifying the issues that must ultimately be resolved."); see id. at 35,089 ("Offense values are based on preliminary research results and initial efforts to reflect appropriate sentences for different forms of criminal conduct. Due to the Commission’s desire to obtain early comment, the published numerical values must be treated as highly tentative, preliminary, and subject to change.").


771. Matthew P. Fitzsimmons, Primary, Significant, or Merely More than Incidental: What Level of Intent Does the Federal Drug-Involved Premises Statute Really Require?, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 177, 188 nn.64-65 ("The Anti-Drug Abuse Act of 1986 came to the floor of the House with an astounding 301 co-sponsors and strong bipartisan support.").

772. See Proposed Sentencing Guidelines for United States Courts, 52 Fed. Reg. 3920, 3920 (Feb. 6, 1987); see also Nagel, supra note 97, at 25-26 ("Because these mandatory minimum sentences enacted by Congress were deliberately set to increase sentences substantially beyond past sentencing practice, the [C]ommission was obliged to disregard past sentencing practice data for the crimes in question, and to prescribe guidelines sentences . . . [that were] significantly more severe than past sentencing practices.").
Commission set the guideline penalty ranges—based on drug type and drug quantity—to track the statutory penalty levels. The offense levels for the most serious common drug types, such as cocaine and heroin, corresponded to the minimum amounts triggering statutory mandatory minimum penalties (for offenders with no criminal record and whose offenses did not involve any aggravating conduct such as possessing a weapon or causing bodily harm). For example, one kilogram of heroin and five kilograms of powder cocaine—which triggered a ten-year statutory mandatory minimum penalty under the amended 21 U.S.C. § 841(b)(1)(A)—were set at offense level thirty-two, which corresponded to a guideline range of 121 to 151 months, before any reduction for acceptance of responsibility evidenced by a guilty plea or other cooperation with the authorities.773 One hundred grams of heroin and five hundred grams of cocaine—which triggered a five-year statutory mandatory minimum penalty under the new statute—were pegged at offense level twenty-six, which corresponded to a guideline range of sixty-three to seventy-eight months for an offender with no criminal history, before any reduction for acceptance of responsibility evidenced by a guilty plea or other cooperation with the authorities.774 As Commissioner Block informed Congress in March of 1987, “[g]iven the recent and strongly-expressed intent of Congress and the Administration to deal harshly with drug traffickers, the Commission does not feel at liberty to propose guidelines” not tied to the statutory mandatory minimum penalties.775

Nevertheless, like the drug trafficking guideline in the September 1986 preliminary draft, the guideline in the January 1987 revised draft provided for a maximum base offense level based on threshold amounts (i.e., one kilogram of heroin and five kilograms of cocaine) that were much lower than the amounts that later appeared in the guideline promulgated in April of 1987. After the Commission published the January 1987 draft, it decided that it needed to create higher offense levels for drug quantities in excess of the amounts that triggered the statutory mandatory minimum penalties.776 In the January 1987 draft, the maximum offense level, based on quantity alone, was thirty-two, which corresponded to a range of 121 to 151 months for an offender with no

774. Id.
criminal record. Conversely, the April 1987 Guidelines Manual included a maximum offense level of thirty-six for threshold amounts of ten kilograms of heroin and fifty kilograms of cocaine. An offense level of thirty-six corresponded to a range of 188 to 235 months for an offender with no criminal record. According to Commissioner Nagel, “the only logical way to proceed was to interpolate and develop a [proportional] scale” in the Drug Quantity Table for quantities significantly above the minimum amounts that triggered the ten year minimum penalty under the ADAA. The April 1987 drug trafficking guideline created different penalty levels for all of the drug types listed in the ADAA—including cocaine, cocaine base, heroin, PCP, LSD and marijuana. For each drug type associated with mandatory minimum prison sentences in the ADAA based on particular quantities, the guideline levels were mathematically interpolated in the Drug Quantity Table based on the minimum amounts triggering the mandatory minimums in the statute.

For drug types and quantities that did not trigger mandatory minimum prison sentences—including many types of less commonly known drugs appearing in the Drug Enforcement Agency’s (“DEA”) schedules (I-IV)—the Commission set offense levels based on “equivalents,” with a particular quantity of each such drug being equivalent to a certain quantity of drugs that triggered statutory mandatory minimum sentences. Both the portions of the Drug Quantity Table not tied to the statutory mandatory minimums and the Drug Equivalency Table were created after consultation with the DEA, prosecutors and defense counsel, probation officers, and outside

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778. SENTENCING GUIDELINES MANUAL, supra note 3, § 2D1.1 (containing a Drug Quantity Table).
779. Id. ch. 5, pt. A.
780. Interview with Ilene H. Nagel, supra note 46, at 43 (“When Congress says for 50 grams of crack the minimum is 10 years, they are not saying the mandatory sentence is 10 years, they are saying the minimum sentence is 10 years. The Commission interpreted that meaning if 5 grams of crack was 5 years and 50 grams of crack was 10 years, then the only logical way to proceed was to interpolate and develop a [proportional] scale [in the Drug Quantity Table] . . . .”).
781. SENTENCING GUIDELINES MANUAL, supra note 3, § 2D1.1 cmt. n.10. For the first time under federal law, the ADAA (and, thus, the guidelines) distinguished between “cocaine base” (known as “crack” cocaine) and “powder” cocaine and the 1986 law severely punished crack in relation to powder cocaine—with a “100-to-1” ratio in terms of the quantities necessary to trigger the statutory mandatory minimum penalties. See U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY 2-3 (2007).
782. SENTENCING GUIDELINES MANUAL, supra note 3, § 2D1.1 cmt. n.10. For instance, one gram of methamphetamine (which was not then explicitly mentioned in 21 U.S.C. § 841) was deemed equivalent to two grams of cocaine. Id.
experts, including Dr. Louis Harris, one of the country's leading experts on the effects of drug use. The equivalencies for drugs not specifically mentioned in the ADAA were derived "after considering the nature of the substances . . . their potential for abuse, and the statutory maximum sentences authorized" for the different drugs set forth in the DEA schedules of drugs. At least for some types of drugs, the equivalencies in the sentencing guidelines were modeled to some degree on the drug equivalencies in the parole guidelines.

The initial just deserts draft guideline manual included adjustments in penalty levels based on the purity of drugs being trafficked, which was consistent with the parole guidelines. The Sentencing Commission abandoned a purity adjustment except for PCP after Congress made virtually no distinctions in purity levels in the ADAA. Rather than create varying penalty levels based on purity, Congress, with a single exception in the original ADAA, created its statutory penalty levels for offenders trafficking in particular quantities of "a mixture or substance containing a detectable amount of" a particular drug type.

2. Acceptance of Responsibility, Cooperation with the Authorities, and Obstruction of Justice

In addition to incorporating factors related to the offense and the offender, the Commission also accounted for offenders' post-offense
behavior. The Commission determined that two of those factors—acceptance of responsibility and cooperation with the authorities—should lead to a lower sentence, while a third factor—obstruction of justice—should lead to a higher sentence.\textsuperscript{793}

a. Acceptance of Responsibility

Despite being so detailed about offense and offender characteristics, the SRA was silent about whether the Commission should create a provision that allowed for reductions in defendants’ guideline ranges if they pled guilty or expressed remorse. The Commission’s research revealed that guilty pleas and corresponding sentencing reductions were an extremely common feature of pre-guidelines cases.\textsuperscript{794} The high incidence of guilty pleas was largely a function of the Supreme Court’s blessing of the practice of plea bargaining in 1971.\textsuperscript{795} For example, in a Commission study of 450 federal cases from 1985 involving all of the major offense types, 81.3\% of cases were disposed with guilty pleas, with 77.6\% of the 450 cases pursuant to plea agreements.\textsuperscript{796} The guilty pleas translated into significant reductions in the sentences imposed. The Commission’s “past practice” study demonstrated that guilty pleas generally reduced offenders’ sentences by 30\% to 40\%.\textsuperscript{797}

The Commission’s decision to adopt a guideline providing for reductions of defendants’ sentences for their “acceptance of responsibility”—a phrase proposed by Chairman Wilkins that became the title of one of the most well-known provisions in the Guidelines Manual\textsuperscript{798}—was not, however, a foregone conclusion. Such a reduction was not included in the parole guidelines, which otherwise helped

\textsuperscript{793} SENTENCING GUIDELINES MANUAL, supra note 3, §§ 3C1.1, 3E1.1, 5K1.1.
\textsuperscript{794} See SUPPLEMENTARY REPORT, supra note 37, at 48 (noting that 85\% of the study sample involved guilty pleas, which reduced sentences on average by 30\% to 40\%).
\textsuperscript{795} See Blackledge v. Allison, 431 U.S. 63, 76-77 (1977) (“Only recently has plea bargaining become a visible practice accepted as a legitimate component in the administration of criminal justice. For decades it was a sub rosa process shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges. Indeed, it was not until our decision in Santobello v. New York, 404 U.S. 257, that lingering doubts about the legitimacy of the practice were finally dispelled.”); see also Santobello v. New York, 404 U.S. 257, 261-63 (1971) (recognizing that guilty pleas are both an “essential” and “highly desirable” part of the criminal process).
\textsuperscript{796} See Memorandum from Debbie Lister to Michael K. Block, supra note 552.
\textsuperscript{797} See Wilkins, supra note 201, at 191; see also SUPPLEMENTARY REPORT, supra note 37, at 38 tbl.1(b), 48 (noting that sentence reduction varied by offense type but could be as much as the equivalent of a seven level reduction under the guidelines).
\textsuperscript{798} Interview with William K. Wilkins (July 13, 2016) (on file with authors); see also SENTENCING GUIDELINES MANUAL, supra note 3, § 3E1.1.
inform the contents of the original sentencing guidelines. Moreover, the Commissioners were concerned that a reduction in penalty levels based on a guilty plea could be deemed an unconstitutional "trial penalty" for those defendants who did not plead guilty. Commissioner Breyer, for example, acknowledged the argument that "a discount for a guilty plea means an aggravated sentence for insisting upon one's right to a jury trial." But he noted the fact that the Supreme Court had upheld, the "providing [of] an offender with an incentive" to plead guilty. If the inducement of guilty pleas was happening with the imprimatur of the Court, "arguably the guidelines should cover the practice and regulate it," he reasoned.

The different preliminary drafts of the guidelines and the ultimate Guidelines Manual contained a sentencing reduction for "acceptance of responsibility." Commissioner Robinson's just deserts draft had authorized a 25% sentence reduction for a defendant who cooperated with the authorities against another person or who "show[ed] sincere and genuine remorse." The September 1986 preliminary draft also had included a downward adjustment for acceptance of responsibility: if an offender "recognizes and sincerely accepts responsibility for the offense(s)," the judge would be authorized to reduce the sentence by up to 20% of the total offense level from chapter two. That draft further provided that a reduction for acceptance was not automatic, but instead was conditioned on a finding by the judge of the offender's sincere remorse. The draft explained that the reduction has support in the purposes of punishment, as acceptance is a "sound indicator of [rehabilitative] potential." The January 1987 revised draft retained the acceptance of responsibility provision, although this version specified that a judge had discretion to reduce the total offense level between one

799. Breyer, supra note 537, at 40; see U.S. CONST. amend. VI (providing the right to a jury trial in a criminal case).
801. Breyer, supra note 537, at 40.
804. Id. Chairman Wilkins explained that the Commission rejected automatic discounts for acceptance of responsibility for several reasons, including the fact that "sentence reductions for guilty pleas under past practices were not automatically given in every case. . . . [A]n automatic fixed discount would reward every defendant who pled guilty regardless of the circumstances of the offense or the defendant's post-offense conduct." Wilkins, supra note 201, at 191.
806. Id.
and three levels. Responding to the Justice Department’s objection to such variable adjustments, the Commission in the initial Guidelines Manual authorized judges to reduce by two levels the total offense level for a defendant’s acceptance of responsibility, additionally making clear that the reduction is neither predicated on a guilty plea nor an automatic benefit for those who do plead guilty. A two-level reduction on average resulted in around a 25% reduction in an offender’s sentence. The maximum three-level reduction for acceptance of responsibility for defendants with final offense levels of sixteen or greater was later added in 1992.

b. Cooperation with the Authorities

Related but distinct from a defendant’s acceptance of responsibility was the issue of a sentencing reduction for a defendant’s affirmative cooperation with the authorities against another offender. The parole guidelines authorized the Parole Commission to consider, as a factor in release determinations, “a prisoner’s assistance to law enforcement authorities in the prosecution of other offenders.” Such assistance had to be “important” or “significant” in a prosecution or investigation, and had to be verified by a prosecutor or similar official. The parole guidelines generally contemplated a one-year reduction in sentence for such assistance.

When the SRA was originally enacted in October 1984, it did not include any reference to a defendant’s cooperation as a basis for a reduction in sentence. However, in the ADAA in 1986, Congress created two provisions concerning cooperation—the statutory

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808. See supra notes 249-50 and accompanying text.
809. SENTENCING GUIDELINES MANUAL, supra note 3, § 3E1.1; see Wilkins, supra note 201, at 190-91 (noting that a “fixed” discount for acceptance of responsibility was “consistent with one of the underlying purposes of sentencing reform, that of ‘certainty’ of punishment”).
810. See SENTENCING GUIDELINES MANUAL, supra note 3, ch. 5, pt. A. The precise percentage reduction varies depending on the particular combination of offense level and criminal history category in the Sentencing Table, yet the typical reduction in the guideline range minimum and maximum is around 25% when two offense levels are subtracted. See id.
812. 28 C.F.R. § 2.62(a) (1986).
813. 28 C.F.R. § 2.63(a)(1)-(2).
814. 28 C.F.R. § 2.63(b).
provisions that currently appear in 18 U.S.C. § 3553(e)\textsuperscript{817} and 28 U.S.C. § 994(n).\textsuperscript{818}

In public hearings conducted by the Commission, both prosecutors and defense counsel urged the Commission to include in the guidelines a potential reward for cooperation. "These parties argued forcefully that without some mechanism to give these defendants special consideration, few would be willing to cooperate," Chairman Wilkins recalled.\textsuperscript{819} Commissioner Robinson’s just deserts draft allowed for a 25% sentence reduction for cooperation, as an alternative to a reduction for acceptance of responsibility.\textsuperscript{820} The Commission’s September 1986 draft—promulgated shortly before the October 1986 statutory provisions governing cooperation—provided that, upon the prosecutor’s certification, an offender’s total offense level could be reduced by 25% for “truthful and significant information” on others’ criminality, a 30% reduction for “active[]” assistance in an ongoing investigation or “truthful and significant” testimony, and a 40% reduction for “exceptional assistance.”\textsuperscript{821} Under the January 1987 draft, which was published for public comment after the statutory amendments, a defendant who provided “significant and truthful information” about the criminal activities of others, assisted in an ongoing investigation, or otherwise provided “substantial assistance,” could receive a decrease in sentence as the court deemed “appropriate.”\textsuperscript{822} The draft guideline made clear that a refusal to cooperate could not be an aggravating factor, though it could bear on the issue of acceptance of responsibility.\textsuperscript{823} Notably, the provision for cooperation did not require a motion by the prosecution. Rather, it was in the sole discretion of the court, although

\textsuperscript{817} 18 U.S.C. § 3553(e) (1988) ("Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.").

\textsuperscript{818} 28 U.S.C. § 994(n) ("The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.").

\textsuperscript{819} Wilkins, supra note 201, at 196.


\textsuperscript{823} Id. at 3976.
the draft advised that "[s]ubstantial weight should be given to the
government's evaluation of the extent of the defendant's cooperation." 824

The 1987 Guidelines Manual shifted consideration of cooperation
from an adjustment in chapter three, where it had resided along with the
acceptance of responsibility provision, to a departure provision—section
5K1.1—in chapter five. 825 This move recognized an important
conceptual difference between acceptance of responsibility and
coopration: acceptance is focused on the offender as related to his or
her offense; by contrast, substantial assistance concerns the offender and
the criminality of others. 826 In addition, unlike other departure
provisions, the 1987 Guidelines Manual specified that the court may
depart for a defendant's cooperation only where, "[u]pon motion of the
government," a defendant that "has made a good faith effort to provide
substantial assistance in the investigation or prosecution of another
person who has committed an offense." 827 Although the 1986 legislation
required a motion from the prosecution for a departure below a statutory
mandatory minimum penalty, it did not require such a motion for a
sentencing reduction under the guidelines where no statutory mandatory
minimum sentence applied. 828 Nevertheless, section 994(n) did reference
departures under the guidelines and departures under a statutory
minimum in the same breadth and, thus, could be read as in pari
materia. 829 After debating whether to require a prosecution motion for a
guidelines departure for cooperation, the Commission on March 25,
1987, voted six to zero—with Commissioner Robinson abstaining—to
require a government motion. 830

824. Id.
825. SENTENCING GUIDELINES MANUAL, supra note 3, ¶ 5K1.1.
826. See id. at ch. 5, cmt. background.
827. Id. ¶ 5K1.1.
§ 994(n) (noting that the guidelines "should reflect the general appropriateness of imposing a lower
sentence" but not specifying whether a government motion was required).
829. 28 U.S.C. § 994(n) (1988) ("The Commission shall assure that the guidelines reflect the
general appropriateness of imposing a lower sentence than would otherwise be imposed, including a
sentence that is lower than that established by statute as a minimum sentence, to take into account a
defendant's substantial assistance in the investigation or prosecution of another person who has
committed an offense." (emphasis added)).
one point during the debate, Commission Breyer had stated that allowing a downward departure
from the guidelines range "only on the government's motion took too much discretion away from
judges." Id. He ultimately decided to vote in favor of the requirement. Id.
c. Obstruction of Justice

The Commission decided that, whereas acceptance and cooperation were aspects of an offender's post-offense conduct that could yield a reduction in sentence, an offender's efforts to obstruct justice, such as committing material perjury or intimidating witnesses, could lead to a sentence increase.831

It is important to differentiate obstruction of justice as a separate offense, on the one hand, and as an aggravating factor tied to the instant offense, on the other. Before and after the SRA, federal law prohibited obstruction of justice as standalone crimes.832 The guideline drafts reflected these federal prohibitions. Commissioner Robinson's just desert draft, for example, specified offense levels for perjury, improper influence, obstruction, or disruption of "government processes."833 Similarly, the September 1986 draft834 contemplated, and both the January 1987 revised draft835 and initial Guidelines Manual836 contained, in chapter two, separate guidelines for obstruction of justice offenses.

An offender also could receive an enhanced sentence for a different offense, such as fraud or a drug offense, based on obstruction of justice in connection with the investigation or prosecution of that offense. The just deserts draft did not provide for obstruction of justice as an aggravating factor,837 but the chapter three adjustments in the preliminary draft,838 revised draft,839 and initial Guidelines Manual840 all did. Neither the SRA nor the legislative history of the SRA expressly mentions obstruction of justice as a sentencing enhancement, referring

831. See Meeting Minutes, U.S. Sentencing Comm'n (Jan. 21, 1987), supra note 177, at 4. Perjury is a distinct criminal act, although for guidelines purposes, it is viewed in tandem with obstruction of justice. Id. (agreeing that the enhancement range for obstruction of justice should be the same as the range for perjury).
836. SENTENCING GUIDELINES MANUAL, supra note 3, §§ 2J1.2–3.
837. See United States Sentencing Commission Proposed Sentencing Guidelines Manual, supra note 208, at 56 (noting the harm value for "hindering law enforcement efforts" but not classifying it as an aggravating factor).
838. Preliminary Draft of Sentencing Guidelines for United States Courts, 51 Fed. Reg. 35,080, 35,115. This enhancement could not be applied if the offender was independently prosecuted for the same conduct giving rise to the enhancement. Id.
840. See SENTENCING GUIDELINES MANUAL, supra note 3, § 3C1.1.
only instead to the independent violation. But the Commission’s past practice study indicated that judges were imposing upward adjustments for offenders who engaged in the obstruction of justice as to their instant offenses. 841

G. Accounting for Criminal History

The SRA specifically directed the Commission to consider offenders’ criminal record in several ways 842 and, two years after the enactment of the SRA, Congress also had demonstrated its clear intention that, at least for drug trafficking and firearms offenders, criminal history was a particularly important aggravating factor. 843 The Commission received a large amount of public comment about the consideration of an offender’s criminal history in the guidelines and also conducted a public hearing on the subject. 844 In chapter four of the Guidelines Manual that was submitted to Congress in the spring of 1987, the Commission addressed an offender’s criminal history—or lack thereof—in three main ways: (1) providing, as a general matter, for higher guideline ranges for offenders with more serious criminal records than for otherwise similar offenders with less serious records; (2) providing a “career offender” enhancement for offenders who met the criteria set forth in the SRA; and (3) providing for potential non-incarceration sentences for “first offenders” who were convicted of non-violent and—in the Commission’s judgment—otherwise non-serious offenses. 845

841. See SUPPLEMENTARY REPORT, supra note 37, at 39 tbl.1 (b).
842. See 28 U.S.C. § 994(d)(10) (1988) (directing the Commission to consider an offender’s “criminal history” in formulating the guidelines); § 994(h) (directing the commission to consider offenders who have been previously convicted “of two or more prior felonies”); § 994(i)(1) (directing the Commission to “assure that the guidelines specify a sentence to a substantial term of imprisonment for [a defendant who . . . has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions”); id. § 994(j) (directing the Commission to “insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense”).
843. See id. § 924(e) (providing that an offender convicted of being a felon in possession of a firearm faces a statutory range of imprisonment of fifteen years to life without parole if the offender has three or more predicate violent or drug trafficking offenses; offenders without three such predicate offenses face a statutory range of punishment of probation to ten years of imprisonment); see also 21 U.S.C. § 841(b)(1)(A) (1988) (setting forth enhanced statutory ranges of punishment for drug traffickers with prior felony drug offenses—defendant with one such prior conviction could face a twenty-year mandatory minimum rather than a ten-year mandatory minimum prison sentence for possessing at least five kilograms of powder cocaine).
845. SENTENCING GUIDELINES MANUAL, supra note 3, ch. 4, pt. A introductory cmt.,
1. Criminal History Points and Criminal History Categories

The September 1986 preliminary draft guidelines simply added incremental "sanction units" to account for an offender's criminal record on top of sanction units for the offense conduct, just as the earlier just deserts draft did. In the January 1987 draft and the original Guidelines Manual, however, the Commission decided to create a separate horizontal axis on a two-dimensional sentencing table, as discussed further below in Part IV.H, which would provide for increasing sentencing ranges based on the extent of an offender's criminal history. The horizontal axis comprised six "Criminal History Categories" ("CHCs"), which in turn were based on the number of criminal history points calculated in a defendant's case. As a general rule, each increase in CHC was equivalent to a one-level increase in offense level on the vertical axis of the grid. Such an increase was generally around a 12% to 15% increase in the bottom and top ends of the applicable sentencing range. Therefore, the increase from CHC I to CHC VI generally would be approximately twice the amount of the bottom and top ends of the applicable sentencing range.

With respect to determining the number of criminal history points appropriate for an offender, the original Commission studied both the existing state sentencing guidelines and the federal parole guidelines. The Commission ultimately decided to model what became chapter four of the 1987 Guidelines Manual more on the federal parole guidelines—in particular, its Salient Factor Score ("SFS")—than on criminal history provisions of the state guidelines. The SFS had been developed by Peter Hoffman in the 1970s, when he was the Director of Research at the U.S. § 4Al.1, 4A1.3, 4B1.1.

846. See Preliminary Draft of Sentencing Guidelines for United States Courts, 51 Fed. Reg. 35,080, 35,120 (Oct. 1, 1986). That criminal history calculus assigned different "criminal history points" depending on the length of the sentence imposed in the defendant's prior case. Id. at 35,119. A defendant's total criminal history points were translated to additional "offense values" to be added to the offense values resulting from the defendant's offense conduct, which in turn corresponded to sentencing ranges. See, e.g., id. at 35,131.


848. See infra Part IV.H.

849. See Proposed Sentencing Guidelines for United States Courts, supra note 210, at 3974, 3977; see also SENTENCING GUIDELINES MANUAL, supra note 3, ch. 4, pt. A.

850. SENTENCING GUIDELINES MANUAL, supra note 3, § 4Al.1, ch.5, pt. A.

851. Id. ch. 5, pt. A. For instance, offense level fifteen and CHC I results in a range of eighteen to twenty-four months, while offense level fifteen and CHC II results in a range of twenty-one to twenty-seven months. Id.

852. See id. For instance, offense level fifteen and CHC I results in a range of eighteen to twenty-four months, while offense level fifteen and CHC VI results in a range of forty-one to fifty-one months. Id.
Board of Parole.\textsuperscript{853} The SFS was intended to serve solely as an easily-applied risk assessment instrument, and an offender’s SFS score placed him in one of four categories on the horizontal axis of the parole guidelines’ sentencing grid. After moving from the Parole Commission to the Sentencing Commission, Hoffman was influential in convincing the original Commissioners to model the federal sentencing guidelines’ criminal history rules on the SFS.\textsuperscript{854} As discussed below, although there were some major similarities between the chapter four calculus and the SFS, notable differences existed.\textsuperscript{855}

First, like the parole guidelines and unlike the criminal history provisions of most existing state guidelines, chapter four of the 1987 Guidelines Manual based criminal history points on the length of sentences imposed for prior convictions rather than on the nature of prior convictions—for example, whether it was a “violent” or “drug” offense.\textsuperscript{856} The Commission chose sentence lengths of sixty days and thirteen months as break points—providing for three criminal history points for a prior conviction receiving a sentence of incarceration in excess of thirteen months; two points for a prior conviction receiving a sentence of incarceration between sixty days and thirteen months; and one criminal history point for a prior conviction receiving any other sentence.\textsuperscript{857} The SFS’s calculus provided for a simpler demarcation, with sentences of thirty days or less and sentences in excess of thirty days receiving different treatment.\textsuperscript{858} Both the SFS and chapter four excluded
consideration of many types of minor petty misdemeanors—either categorically or based on certain sentence lengths.859

Second, the SFS was designed solely to be a risk assessment instrument. Factors were included in the SFS’s calculus only if they added to the calculus’s predictive value regarding an offender’s likelihood of recidivating. Conversely, although chapter four’s calculus was primarily a risk assessment instrument, it also had certain retributivist elements not present in the SFS that were not shown to predict recidivism.860 For instance, the original Commission decided to have ten- and fifteen-year “staleness” rules that limited consideration of older prior convictions depending on the length of the sentence imposed. For example, a prior conviction for which the offender received a sentence in excess of thirteen months would be counted so long as the offender was incarcerated in connection with the conviction within fifteen years of commission of the current federal offense. The SFS had only a single ten-year “staleness” rule for all prior convictions. The sentencing guidelines’ ten- and fifteen-year rules were “negotiated among Commission members on the basis of perceptions of just desert” rather than because they predicted recidivism better than the SFS’s simpler model.861 Despite the more complex nature of chapter four’s calculus, both chapter four and the SFS have been shown to have similar predictive power regarding recidivism, although the SFS performs slightly better.862

Third, unlike other risk assessment instruments used in the criminal justice system,863 the version of the SFS on which chapter four was modeled did not include factors related to an offender’s socio-economic status, such as his employment record or family circumstances. A prior version of the SFS had included such factors,864 but the Parole Commission deleted them in 1981—despite their additional predictive power—because of “fairness” concerns, insofar as such factors may be

859. Compare id., with SENTENCING GUIDELINES MANUAL, supra note 3, § 4A1.2(c).
860. SUPPLEMENTARY REPORT, supra note 37, at 41-43. Chapter four’s criminal history rules were not in any manner based on the Commission’s “past practice” study. See Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 44-45 (“Chapter Four [did not] derive[] from the Rhodes [past practice] data.... It’s much more closely correlated with and derives from the Parole Commission [parole guidelines].”); see also id. at 45, 48 (giving Peter Hoffman primary credit for the creation of chapter four).
862. See LINDA DRAZGA MAXFIELD ET AL., supra note 857, at 12.
beyond an offender’s control because of his socio-economic circumstances.\textsuperscript{665} Consistent with the directives in the SRA that either prohibited or discouraged the sentencing guidelines’ consideration of an offender’s education, employment record, and family ties, chapter four’s calculus also did not consider any such personal characteristics of offenders and, instead, focused solely on an offender’s criminal record.\textsuperscript{666} In addition to socio-economic factors like employment and educational records, the Commission also excluded consideration of an offender’s age and drug abuse history in chapter four’s calculus—two offender characteristics included in the version of the SFS originally considered by the Commission.\textsuperscript{667}

2. Career Offenders

The SRA contained a specific directive requiring the Commission to create a “three strikes” guideline enhancement provision for offenders whose prior convictions and their current conviction involved crimes of violence or drug trafficking.\textsuperscript{668} That provision had been added to earlier


[I]s it really a good idea for the guidelines to increase sentences for younger offenders, those with less education or those from less advantageous family backgrounds? Likelihood of recidivism alone probably would suggest longer sentences for each such factor. In fact, a number of state guideline systems and the federal parole guidelines use some of these factors to lengthen sentences, but I question whether that would be acceptable or even a good idea in the federal guideline system.

Interview by Champion, supra note 176, at 44.

\textsuperscript{666} 28 U.S.C. § 994(e) (1988); \textit{SENTENCING GUIDELINES MANUAL}, supra note 3, ch. 4.


\textsuperscript{668} See 28 U.S.C. § 994(h). That provision states:

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

\textit{Id.}
versions of the SRA legislation introduced by Senator Kennedy in 1982 and 1983.869

The plain language of the directive to the Commission required it to create a guideline range for offenders convicted of their third strike "at or near the statutory maximum" for the offense of conviction.870 The Commission responded to this directive by promulgating section 4B1.1 ("Career Offender"), which assigned offense levels that, in conjunction with the offender's CHC corresponded to a guideline sentencing range at or near the statutory maximum for the third strike conviction. The guideline required all "career offenders" to be placed in CHC VI, even if an offender's actual criminal history points would have placed him or her in a lower CHC.871 Thus, for example, a career offender facing a statutory maximum of life imprisonment for his offense of conviction would be at offense level thirty-seven and be in CHC VI, with a corresponding guideline range of 360 months to life.872

Shortly after completing his service on the Commission, then-Circuit Judge Breyer—a former chief counsel for the Senate Judiciary Committee—stated that, in creating the directive requiring the Commission to promulgate a career offender guideline, Senator Kennedy and other sponsors of the SRA envisioned "federal code reform" that would have worked rationally with the career offender guideline concerning statutory maximums.873 In the early 1980s, when the career offender provision was first introduced in the proposed sentencing reform legislation, there was still some momentum in the Senate for federal code reform.874

869. See S. REP. NO. 98-225, at 175 (1983); Stith & Koh, supra note 111, at 268-69 & n.283; see also 128 CONG. REC. 26,517-18 (1982).
870. See Breyer, supra note 57, at 43 (observing that "the Commission had little legal room" regarding the Career Offender provision); see also United States v. Wright, 924 F.2d 545, 549 (4th Cir. 1991) ("In setting forth the duties of the Sentencing Commission in 28 U.S.C. § 994, Congress specifically required that career offenders be sentenced at or near the maximum term allowed under the Guidelines. 28 U.S.C. § 994(h). And the Commission took note of that mandate in writing the Career Offender guideline."); U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 4B1.1, cmt. background.
871. Id. § 4B1.1.
873. Breyer, supra note 57, at 44 ("Congress intended the words 'at or near the maximum authorized’ to refer to rationalized, real time, sentences that a revised criminal code was to contain, not pre-existing (and current) statutory law.").
874. See Gainer, supra note 51, at 123-24 (noting that the last bill in the Senate for federal code reform, S.1630, died in 1982, but that Senator Thurmond, chairman of the Senate Judiciary Committee, believed that "general code [reform]...could then be resumed in the following
Furthermore, when the career offender provision was introduced as an amendment to sentencing reform legislation in the early 1980s, the highest statutory maximum for any federal drug trafficking offense was fifteen years, unless an offender had a prior felony conviction for a drug offense, in which case the maximum increased to twenty years—but only in the event that the prosecutor filed an "information" alleging the prior conviction before the defendant’s conviction in the instant federal case. The same Congress that enacted the SRA also had enacted the Controlled Substances Penalties Amendments Act of 1984. That statute raised the statutory maximum for the most serious drug trafficking offenses from fifteen years to twenty years. For offenders with "one or more” state or federal prior felony drug convictions, the statutory maximum was raised to forty years. Yet, just as under prior law, section 851 required the prosecutor to file an “information” alleging the prior conviction before the enhanced statutory maximum could apply. The maximum remained fifteen years for most other Schedule I or II controlled substances, with a thirty-year statutory maximum for an offender with one or more prior felony drug convictions, properly alleged under section 851, and three or five years for other drug types—including marijuana. It was not until the enactment of the ADAA—two years after the SRA—that the statutory maximums for most federal drug trafficking offenders were raised to forty years and life imprisonment, even for first time offenders who possessed the minimum quantities required to trigger the mandatory minimum penalties. Those increased statutory maximums had a direct and substantial impact on the career offender guideline, which, as noted, required sentences “at or near the statutory maximum.”

3. “First Offenders”

As a counter-balance to the career offender directive in the SRA, Congress also directed that, “[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first

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Congress”).

877. Id.
878. Id.
882. SENTENCING GUIDELINES MANUAL, supra note 3, § 4B1.1 cmt. background.
offender who has not been convicted of a crime of violence or an otherwise serious offense.883

The original Commission sought to implement this directive in two ways. First, it generally set base offense levels for violent offenses high enough that, even with credit for acceptance of responsibility (which was originally a maximum reduction of two levels), such offenders' guideline ranges would preclude probation884—requiring at least some imprisonment, absent a downward departure.885 Second, with respect to “otherwise serious” non-violent offenses, the Commission allowed for non-incarceration sentences only if a first offender’s final offense level was ten or less.886 The original Commission’s policy decision was to draw a line between offense level ten and eleven—the dividing line between probation eligibility for first offenders887—with respect to what was “otherwise serious” for offenders in CHC I.888 Although reasonable


884. The original Commission created a sentencing scheme that provided that, absent a downward departure from the applicable guideline range, only offenders with final offense levels of ten or less, what later were designated Zones A or B of the Sentencing Table, could receive probation. Offenders above that offense level had to require some amount of imprisonment, absent a downward departure. See infra notes 897-98 and accompanying text.

885. See e.g., SENTENCING GUIDELINES MANUAL, supra note 3, §§ 2A1.3, 2A2.2, 2A4.1 (noting base offense levels of twenty-five for voluntary manslaughter, fifteen for aggravated assault, and twenty-four for kidnapping).

886. In the introduction to the original Guidelines Manual, the Commission stated the following:

The [SRA] provides that the guidelines are to “reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense . . . .” 28 U.S.C. § 994(j). . . . [T]he guidelines work as follows in respect to a first offender. For offense levels one through six, the sentencing court may elect to sentence the offender to probation (with or without confinement conditions) or to a prison term. For offense levels seven through ten, the court may substitute probation for a prison term, but the probation must include confinement conditions (community confinement or intermittent confinement).

SENTENCING GUIDELINES MANUAL, supra note 3, ch. 1, pt. A (citation omitted). This discussion of “first” offenders’ eligibility for probation under the guidelines equated “first” offenders with all those falling in CHC I—as opposed to only those with zero criminal history points. See id. ch. 5, pt. A cmt. Yet some offenders falling in CHC I have a criminal history and, thus, are not actually “first” offenders. Id. Furthermore, even some offenders with zero criminal history points have convictions that did not receive criminal history points under Sentencing Guidelines section 4A1.2(e)’s staleness rule. Id. § 4A1.2(e).

887. Id. ch. 5, pt. A, § 5B1.1(a).

888. See Meeting Minutes, U.S. Sentencing Comm’n 3-4 (Apr. 9, 1987) (on file with authors) (noting that the policy decision was proposed by Commissioner Breyer and adopted by the Commission without dissent); see also Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 73-74. The Commissioners discussed the apparent conflict between 18 U.S.C. § 3561 (which authorized, but did not require, probation for federal offenses other than class A or class B felonies), and 28 U.S.C. § 994(j), which directed the Commission, generally, to provide for probation or other non-incarceration sentences for offenses that were not violent or “otherwise
people (including at least one original Commissioner) have debated whether ten was too low of a dividing line on the Sentencing Table, the original Commission’s decision was itself reasonable in view of sentencing data from the early years of the guidelines. In particular, over half of all defendants who had no criminal history points in the early years of the guidelines fell in cells of the Sentencing Table allowing for probation. Furthermore, although the guidelines did not include an explicit presumption in favor of probation for first-time offenders falling in such cells, the SRA itself contains a provision—known as the “parsimony clause”—directing sentencing judges to “impose a sentence sufficient, but not greater than necessary” to fulfill the purposes of punishment and comply with the sentencing guidelines. Notably, the original Commission decided to include that language from the parsimony clause in the introductory commentary immediately before the Sentencing Table, presumably to signal that probation was normally the appropriate sentence for a first offender whose final offense level was ten or less.

not serious” and only when the offender was a first offender. See Meeting Minutes, U.S. Sentencing Comm’n, supra, at 3-4.

889. In 1990, an advisory group led by original Commissioner Helen G. Corrothers—which included some of the then-leading members of the national criminal justice community—recommended that the Commission expand zones A through C of the Sentencing Table not only for offenders in CHC I, but also those in CHCs II and III. See U.S. SENTENCING COMM’N ALTERNATIVES TO IMPRISONMENT PROJECT, THE FEDERAL OFFENDER: A PROGRAM OF INTERMEDIATE PUNISHMENTS 55-65, attachment 2 (1990), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/121990_Intermediate_Punishments.pdf. For CHC I offenders, their proposal called for effectively expanding Zone B of the Sentencing Table by permitting probation with the condition of home detention or community confinement in lieu of incarceration all the way up to offense level thirteen—with a guideline range of twelve to eighteen months—in the case of probation with home detention and to offense level fifteen—with a guideline range of eighteen to twenty-four months—in the case of probation with the condition of community confinement. See id. at 63-64, attachment 2. The Commission did not adopt the recommendation.

890. Newton, supra note 58, at 324 n.65, 325.

891. 18 U.S.C. § 3553(a)(1)-(2)(C) (1988); United States v. Macias-Pedroza, 694 F. Supp. 1406, 1417-18 (D. Ariz. 1988) (“The Sentencing Table . . . when read with the probation guidelines (§ 5B1.1), permits probation without a confinement condition as a Guidelines sentence for the first six offense levels for a first offender, and permits probation with a confinement condition as a Guidelines sentence for four additional offense levels. When these Guidelines provisions are read together with the directive to the sentencing judge found in 18 U.S.C. § 3553(a) that he impose a sentence sufficient, but not greater than necessary to comply with the purposes of sentencing, the result is that a first offender convicted of a non-serious offense will usually be sentenced to probation.”).

892. See Meeting Minutes, U.S. Sentencing Comm’n, supra note 256, at 7 (stating that the Commissioners voted to include in the Guidelines Manual’s chapter five’s introduction the following: “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing”); see also United States v. Lacy, 99 F. Supp.2d 108, 119 (D. Mass. 2000) (“The Sentencing Guidelines mandate the parsimony principle: I am obliged to
H. The Sentencing Table

As discussed above in Part III, the first two draft guidelines manuals—Commissioner Robinson's just deserts draft and the September 1986 preliminary draft guidelines—did not feature a biaxial sentencing grid.\footnote{93} Beginning with the January 1987 revised draft, the Commission included a sentencing table, which had an "offense level" vertical axis and a "criminal history" horizontal axis.\footnote{94} Such a biaxial grid was included in the federal parole guidelines and also in several state sentencing guidelines already in existence by the mid-1980s.\footnote{95} It also had been proposed by future Sentencing Commission staff members Hoffman and Rhodes in articles that they published in social science journals in the 1970s.\footnote{96}

The vertical axis of the original Guideline Manual's Sentencing Table, which had forty-three "offense levels," was much simpler than the September 1986 preliminary draft's 360 "sanction units" (a vestige of Commissioner Robinson's just deserts draft).\footnote{97} The original Sentencing Table appears below as Appendix D.\footnote{98} According to Peter Hoffman, the forty-three levels were based on a compromise position—in-between the 360 sanction units in the September 1986 draft and the eighteen levels that Hoffman had proposed to the Commissioners.\footnote{99} Hoffman's eighteen-level proposal was, mathematically, meant to account for two things: (1) the statutory range of punishment of zero months (i.e., probation or a fine only as the punishment) all the way to life imprisonment, the least severe minimum sentence and the most severe non-capital sentence under federal law (as the Sentencing Table would be used for all federal offense types); and (2) the 25% rule, which required that "the maximum" of each guideline range set by the Commission "shall not exceed the minimum of that range by more than the greater of 25% or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment."\footnote{100}

In addition, under an eighteen-level vertical axis, "each guideline range assign a sentence 'sufficient, but not greater than necessary' to comply with the purposes of sentencing.")

\footnote{893. See supra notes 237-38 and accompanying text.}
\footnote{895. See supra notes 29-30, 361-63, and accompanying text.}
\footnote{896. See supra notes 179-81 and accompanying text.}
\footnote{898. See infra app. D.}
\footnote{899. See infra app. D.}
\footnote{900. See 28 U.S.C. § 994(b)(2) (1988); see also Hoffman, supra note 897, at 366.}
contains at least one point in common with the adjoining range, thereby avoiding ‘cliffs’ between the guideline ranges.901

According to Hoffman, another staff member902 convinced the Commissioners to adopt forty-three offense levels instead of the mathematically minimum eighteen levels:

The compromise adopted by the Commission – a forty-three-level offense scale having overlapping guideline ranges drafted by another Commission staffer – is, in essence, the eighteen-level offense scale with (1) three additional even-numbered offense levels at the lower end of the scale (addressing minor offenses); (2) one additional odd-numbered offense level at the upper end of the scale (providing life imprisonment only); and (3) twenty-one additional odd-numbered offense levels placed on either side of, and substantially overlapping with, the twenty-one even numbered offense levels.903

The Commission’s stated rationale for the forty-three level system was that:

By overlapping the [ranges], the table should discourage unnecessary litigation. Both prosecutor and defendant will realize that the difference between one level and another will not necessarily make a difference in the sentence that the judge imposes. Thus, little purpose will be served in protracted litigation trying to determine, for example, whether $10,000 or $11,000 was obtained as a result of a fraud.904

As discussed above, the horizontal axis of the Sentencing Table, which accounted for an offender’s criminal history, was based primarily on the horizontal axis of the Parole Commission’s sentencing grid. The Commission added two additional categories to the parole guidelines’ grid, which had four categories compared to the six CHCs in the Sentencing Table.905

901. Hoffman, supra note 897, at 366.
902. See supra note 246 and accompanying text. Although Hoffman’s article does not name that other staff member, it presumably was David Lombardero, who, along with Hoffman, was the other staff member primarily involved in drafting the Guidelines Manual that was sent to Congress in the spring of 1987. See supra note 246 and accompanying text.
903. Hoffman, supra note 897, at 366.
904. SENTENCING GUIDELINES MANUAL, supra note 3, ch. 1, pt. A.
905. See supra notes 853-54 and accompanying text.
I. Considering Prison Capacity

The SRA directed that, in promulgating guidelines, the Commission:

[S]hall take into account the nature and capacity of the penal, correctional, and other facilities and services available, and shall make recommendations concerning any change or expansion in the nature or capacity of such facilities and services that might become necessary as a result of the guidelines promulgated pursuant to the provisions of this chapter. The sentencing guidelines prescribed under this chapter shall be formulated to minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons, as determined by the Commission.906

This provision was added to the SRA in lieu of an unsuccessful amendment in early 1984 by Senator Charles Mathias from Maryland, who wished instead for there to be a stronger provision requiring the Commission to “assure” that the guidelines did not result in prison overcrowding.907 The corresponding legislative history in the Senate Judiciary Committee Report stated the following:

The purpose of [requiring the Commission to take into account the nature and capacity of the penal, correctional, and other facilities and services available] is to assure the most appropriate use of the facilities and services to carry out the purposes of sentencing, and to assure that the available capacity of the facilities and services is kept in mind when the guidelines are promulgated. It is not intended, however, to limit the Sentencing Commission in recommending guidelines that it believes will best serve the purposes of sentencing.908

According to Commissioner Nagel, at the 1985 confirmation hearing for the original Commissioners, unnamed senators told the Commission nominees that the Senate’s vote against the Mathias amendment was ninety-three to one—which she interpreted to mean that the Senate did not want the original Commission to be concerned with prison overcrowding when it created the sentencing guidelines.909 Prior public comments by key Senators confirmed her understanding.910

907. Stith & Koh, supra note 111, at 261, 266-67.
909. See Meeting Minutes, U.S. Sentencing Comm’n (Apr. 1, 1986), supra note 177, at 19; see also Interview with Ilene H. Nagel, supra note 46, at 15-16.
910. 130 CONG. REC. 13,077 (1984). Senator Hatch, a principal sponsor of the SRA, representing that his position was shared by the chairman of the Senate Judiciary Committee and several other Committee members who were the other principal sponsors, stated the following: “Preventing overcrowding is not the Commission’s function. It is the function of the Commission...”
addition, the position of the DOJ—of which the BOP is a component—and the actions of Congress in late 1986 also were consistent with that understanding. So did the increasing size of the BOP’s annual budgets. While the annual budget had doubled in size during the first seven years of the 1980s—from $329,844,000 in 1980 to $605,562,000 in 1986—it quadrupled in size during the first few years of the guidelines’ implementation. It reached $2,650,731,000 by 1990.

The original Commission undertook a study that estimated the effect that the guidelines, along with the new mandatory minimum statutory penalties that Congress also recently had enacted, would have on the federal prison population. That study was done under the direction of Commissioner Block, with the assistance of William Rhodes and an outside consultant, Professor Arnold Barnett, an MIT economist with an expertise in statistical modeling. They proved to be remarkably prescient. They predicted that, in a “high growth scenario,” the federal prison population would grow from approximately 42,000 in 1987 to approximately 118,000 by 1997—ten years after the guidelines went into effect—and to approximately 156,000 by 2002—fifteen years after the guidelines went into effect. In fact, by 1997, the BOP population was 112,973, and it grew to 151,618 by 2002. Notably, simply to assure the imposition of sentences that will achieve the purposes of sentencing period. It is the function of the executive branch and the Congress to avoid unnecessary overcrowding of the prison system.”

According to Associate Attorney General Trott, in a written submission to the Commission in late 1986:

We do not view section 994(g) as limiting the assessment of the guidelines’ impact on prison capacity to the status of prison space in the short run. That is, a temporary excess in prison population as the result of guideline implementation that will be followed by a gradual increase in prison space with a resultant adequate capacity would meet all the requirements of 28 U.S.C. [§] 5994(g). In this regard it should be noted that Congress recently authorized $96,500,000 for the construction of federal penal and correctional institutions for fiscal year 1987, and directed the Secretary of Defense to provide the Attorney General with a list of all sites under the jurisdiction of the Department of Defense which could be used, or are being used, as detention facilities for felons.


Block and Rhodes predicted that the growth would only be marginally attributable to the impact of the sentencing guidelines, other than its career offender provision, which, as discussed above, was dictated by Congress in the SRA. The majority of the growth that the study predicted would result from the implementation of the new mandatory minimum statutory penalties, such as those contained in the ADAA, together with the career offender guideline. Three decades of experience have confirmed their specific prediction.

V. CONCLUSION

The original Guidelines Manual was a product of collaboration of the original Commissioners, who each brought different strengths and perspectives— including Commissioner Robinson, who vigorously dissented from the promulgation of the 1987 Guidelines Manual, but whose intellectual contributions were reflected in the final product transmitted to Congress in the spring of 1987. Several key original staff members—including William Rhodes, Peter Hoffman, and David Lombardero—also contributed in important respects to the creation of...
the first Guidelines Manual.\textsuperscript{921} Often the policy decisions were the result of compromises among the Commissioners,\textsuperscript{922} including what Commissioner Breyer referred to some "uneasy compromises."\textsuperscript{923} Although in many instances those compromises rested ultimately on an empirical basis—in particular, the "past practice" study—in other instances the Commission simply followed the political will of Congress, most notably, in the case of the drug trafficking guideline following the passage of the ADAA and the career offender guideline.

In his dissent from the January 1987 draft guidelines, Commissioner Robinson correctly recognized that "[t]he Commission has been given an extremely difficult task and asked to perform it quickly under the bright lights generated by strong and conflicting political [and institutional] interests."\textsuperscript{924} Senator Fritz Hollings went further, deeming it "an almost impossible task."\textsuperscript{925} One cannot review the history of the original Commission without appreciating the enormity of the its responsibilities: to start a novel federal agency from scratch and to develop necessarily complex sentencing guidelines governing several hundred fiercely independent federal judges accustomed to complete sentencing discretion, while facing competing macro-level theoretical and micro-level practical difficulties, significant inter-branch and intra-branch pressures, and an extremely daunting statutory deadline. In addition, the historical context in which the original Commission operated—historically high (and rising) crime rates and a general belief that rehabilitation did not work—should not be overlooked. Whatever one thinks of the substantive product sent to Congress in the spring of 1987, the Commission’s ability to discharge its statutory duties was nothing short of remarkable. In addition to the different contributions made by various Commissioners and staff members, the promulgation of the original Guidelines Manual under such difficult circumstances was a tribute to the leadership of Chairman

\textsuperscript{921} See Interview by Michael Courlander & Kent Larsen with Stephen Breyer, supra note 141, at 11-14, 25 (noting that "Rhodes gets absolutely very, very high marks for creating" the past practice dataset upon which much of the original guidelines were based and recognizing Hoffman and Lombardero for their role in drafting Draft X, which evolved into the initial Guidelines Manual); Interview by Gen. Accounting Office with Stephen G. Breyer, supra note 1, at 45, 48 (crediting Hoffman for chapter four of the Guidelines Manual); Interview with Ilene H. Nagel, supra note 46, at 58-59 (attributing the "modified real offense" approach of the sentencing guidelines to the influence of Hoffman).

\textsuperscript{922} See generally Breyer, supra note 234 (discussing the various compromises that led to the creation of the sentencing guidelines).

\textsuperscript{923} Breyer, supra note 57, at 13.

\textsuperscript{924} Paul H. Robinson, Dissent from the United States Sentencing Commission’s Proposed Guidelines, 77 J. CRIM. L. & CRIMINOLOGY 1112, 1122 (1986).

\textsuperscript{925} 140 CONG. REC. 14715 (1994).
Wilkins, who was widely praised by both supporters and critics of the sentencing guidelines alike.  

Following the promulgation of the first Guidelines Manual, Chairman Wilkins appeared before members of the House Judiciary Committee. He reminded the committee members that the task of the Commission was not to develop a “perfect [guideline] system,” one that we may “dream about.” Rather, he said, our goal was to “bring greater certainty and fairness” to federal sentencing. This Article describes how the Commission sought to fulfill this charge, to replace an unstructured, decentralized federal sentencing regime with structured, national sentencing policies and to thereby enhance the justice and effectiveness of federal sentencing. In particular, this Article chronicles the key policy decisions of the original Commission and the process that led to those critical decisions. It does so by way of synthesizing historical information already in the public domain and by adding information from important sources that heretofore have not been part of the public record. The hope is that this integrated, comprehensive treatment of the early Commission will yield a deeper, more accurate understanding of the original Commission’s work.

Aside from improving the historical account of the original Commission, this Article has a more ambitious aim. The guidelines were viewed, at the outset, as necessarily being “evolutionary.” It is hoped that this Article will serve as a useful resource as the sentencing community considers how it may achieve an increasingly just and workable sentencing system in the federal courts. In this respect, we seek not only to enrich the current understanding of the past, but also to

926. See, e.g., 152 CONG. REC. 8070 (2006) (noting the remarks of Senator Lindsay Graham praising Chairman Wilkins’s leadership on the Commission); 140 CONG. REC. 14715 (noting the remarks of Ernest Hollings praising Chairman Wilkins’s leadership on the Commission); Albert W. Alschuler, supra note 306, at 91-92 n.8 (noting that Chairman Wilkins “has always been courteous, open, and fair”); Naftali Bendavid, Wilkins’ Tenure Transformed the Courts, LEGAL TIMES, Sept. 19, 1994, at 23 (quoting the President of the American Bar Association’s Sentencing Guidelines Committee, Sam Buffone, as stating that “I have nothing but praise for Billy Wilkins’s tenure.... We certainly came from opposite sides in terms of the issues. But he was always fair, always willing to meet and talk. He did and exceptional job, given a very difficult situation”); Interview with John Steer, supra note 176 (praising Wilkins’s “masterful leadership”).

927. SENTENCING GUIDELINES MANUAL, supra note 3, ch. 1, pt. A (stating that the guidelines were “but the first step in an evolutionary process”).

928. Id. at 645, 649, 657.
929. See supra Part II.
930. See supra Part IV.
931. See supra Part IV.
932. See supra note 306.
facilitate future efforts towards achieving a more just federal sentencing system.

Finally, any historical accounting of the original Commission and the initial sentencing guidelines should be careful to disaggregate the work of the original Commission from what occurred during the ensuing three decades—a significant amount of it unforeseeable in 1987. During those three decades, many dramatic changes occurred in the statutory and constitutional landscape, in Congress’s relationship with the Commission, in the nature of federal offenses and offenders, and in other factors such as the crime rate, the ability of the criminal justice system to rehabilitate offenders, and changing views about the purposes of sentencing among leading criminal justice policy-makers.


934. See, e.g., United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the “mandatory” nature of the guidelines was unconstitutional and, as a remedy, rendering the guidelines “advisory”).

935. See R. Barry Ruback & Jonathan Wroblewski, The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification, 7 PSYCHOL. POL’Y & L. 739, 752-53 (2001) ("The Commission itself, in an attempt to ward off mandatory minimum penalties, offers Congress more aggravating factors that the Commission argues can do the job of mandatory minimums while at the same time retaining proportionality. Examples of this phenomenon of 'factor creep' include congressional directives to the Commission to consider adding some type of new enhancement for a variety of aggravating factors, ranging from hate motivation, to use of juveniles in the course of certain crimes, to the involvement of gangs, to property damage at veterans' cemeteries."); Sessions, supra note 191, at 317-21 ("In addition to, or sometimes in lieu of, mandatory minimums, Congress has issued countless 'directives' to the Commission over the past twenty-five years [almost always requiring higher penalty levels]. There have been different species of directives — some general (requiring the Commission to consider adjusting penalties for certain types of offenses after a period of study) and some very specific (dictating precise changes in specific guidelines).")

936. See Newton, supra note 58, at 330-38 (discussing the substantial changes, during the past three decades, in the types of offenses prosecuted in federal court and the changes in federal offenders—both of which have resulted in higher penalties being imposed irrespective of changes in the guidelines).

937. See supra note 96 and accompanying text (discussing the decreasing crime rate since the 1990s).

938. See supra note 102 and accompanying text (discussing improvements in correctional programming, which has reduced the recidivism rate).

939. See, e.g., DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 4 (2013) ("Incarceration is not the answer in every criminal case.")
In other words, an assessment of the original Commission and its inaugural guidelines, while not with an uncritical eye, should not occur through the lens of 20/20 hindsight.

Across the nation, no fewer than seventeen 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.”); Brian Bensimon, Texas Committee Recommends Reducing Costs by Expanding Alternatives to Incarceration, RIGHT ON CRIME (Feb. 2, 2017), http://rightoncrime.com/2017/02/texas-committee-recommends-reducing-costs-by-expanding-alternatives-to-incarceration (“Despite a perceived reputation as a ‘tough on crime’ state, Texas has led the criminal justice reform movement by enacting bold reforms that emphasize public safety and reduce recidivism. . . . By adopting alternatives to incarceration, such as drug courts and expanding parole and probation capacity, large numbers of non-violent offenders have been diverted away from the prison system.”); John Comyn, It’s Time for Criminal Justice Reform, MEDIUM BLOG (June 21, 2016) https://medium.com/@JohnComyn/its-time-for-criminal-justice-reform-bae837c09e8#.uyl1fdg5p (“It’s not often that some of the Chamber’s most liberal Members like Senator Leahy and Senator Durbin come together with conservatives like myself and Senator Lee to rally behind a piece of legislation [i.e., the Sentencing Reform and Corrections Act]. . . . The bill re-targets and reduces some mandatory minimums and sentencing enhancements to make sure law enforcement directs resources towards locking up violent and career criminals, instead of non-violent, low-level drug offenders.”).
APPENDIX A: SENTENCING GRID FROM 1986 FEDERAL PAROLE GUIDELINES

<table>
<thead>
<tr>
<th>OFFENSE CHARACTERISTICS:</th>
<th>OFFENDER CHARACTERISTICS: Parole Prognosis (Salient Factor Score)</th>
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</thead>
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<tr>
<td>Category One</td>
<td>Guideline Range &lt;=4 months</td>
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<td>Category Two</td>
<td>Guideline Range &lt;=6 months</td>
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<tr>
<td>Category Four</td>
<td>Guideline Range 12-18 months</td>
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<tr>
<td>Category Five</td>
<td>Guideline Range 24-36 months</td>
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<td>Category Six</td>
<td>Guideline Range 40-52 months</td>
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<td>Category Seven</td>
<td>Guideline Range 52-80 months</td>
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<tr>
<td>Category Eight</td>
<td>Guideline Range 100+ months</td>
</tr>
</tbody>
</table>
APPENDIX B: PHOTOGRAPH OF ORIGINAL COMMISSIONERS

## Appendix C: Excerpt from “Just Deserts” Draft of Sentencing Guidelines

### The Factors and Values That Appear on This Page Do Not Necessarily Represent the Views of the Commission or of Any Commissioner.

<table>
<thead>
<tr>
<th>Table 1: Property Harm Table*</th>
</tr>
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<td>149-178 18</td>
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<tr>
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<td>18,395-19,961 59</td>
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<tr>
<td>19,962-21,366 60</td>
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</table>

** The Harm Value may also be calculated using an electronic calculator as follows:

1. Enter the total monetary value, rounded to the nearest dollar.
2. (ii) Push the square root button (usually marked with a √ sign) twice.
3. (iii) Multiply the resulting number by 5.

In other words, Harm Value = \( 0.5 \times \text{Value} \)
### APPENDIX D: SENTENCING TABLE IN 1987 GUIDELINES MANUAL

**SENTENCING TABLE**

<table>
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*October, 1987*