

# Five Questions for the Next Thirty Years of Federal Sentencing

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

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

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

## Introduction

Sentencing is hard.<sup>3</sup> In 1960, Judge Irving

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

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

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

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

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

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

<sup>4</sup> *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If Congress wants to bring some form of

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

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

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

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

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

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

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

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

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

<sup>14</sup> 42 Pa.C.S. §§ 2154.5 & 2154.6.

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

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

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

<sup>18</sup> 28 U.S.C. §991(a).

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

The voting composition of the PCS has been stable at 11 since its creation in 1979.<sup>20</sup> The chief justice appoints four judges of courts of record. To date, all of them have been trial judges, but nothing prevents the chief justice from appointing an appellate judge or justice. The leaders of each chamber of the General Assembly appoint two of their members, with no more than one per party. Functionally, that means that there is one Democratic and one Republican member from the House of Representatives and the same from the Senate. Pennsylvania's governor appoints a district attorney, a defense attorney, and a law professor or criminologist. No legislative confirmation is necessary for any of the 11 appointees. In 2008, legislation created three *ex officio* nonvoting members: the secretary of Corrections, the chair of the Board of Probation and Parole, and the state victim advocate.<sup>21</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>20</sup> 42 Pa.C.S. §2152(a).

<sup>21</sup> 42 Pa.C.S. §2152(a.1).

<sup>22</sup> Cf. MARVIN FRANKEL, CRIMINAL SENTENCES:

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

The federal system is a different story entirely. Despite the fact that federal judges enjoy the protection of lifetime appointments, the USSC is formally precluded from releasing judge-specific information. Back in 1988, when the USSC was young, politically weak, and facing a hostile judiciary, the USSC and the Administrative Office of the United States Courts (AO) entered into a Memorandum of Understanding that prevents it from releasing judge-specific information.<sup>28</sup> In fact, the federal courts, acting through the AO, have refused to release judge-specific statistics nationally since at least 1974, although the Judicial Conference of the United States afforded local courts the discretion to release that information starting in 1995.<sup>29</sup> Admirably, the District of Nebraska (and, to my knowledge, only that district) has released judge-specific USSC sentencing data since 2007.<sup>30</sup> Nebraska's noble effort is no substitute for detailed information about all judges around the country. A national solution is needed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Sentencing Commission’s Economic Crime Project (and What They Should Do Now)*, 27 FED. SENT’G REP. 270 (2015); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 77 (2003) (“Loss is a proxy for offense seriousness and when it mismeasures seriousness judges should depart.”).

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

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

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

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

Sentencing scholar Paul Hofer summed up the challenge nicely:

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

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

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

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

In recent years, more governors and

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

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

<sup>42</sup> Steven L. Chanenson, *Commissions at the Core* 30 FED. SENT’G REP. \_\_ (forthcoming 2017).

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

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

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

### Conclusion

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

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