Chapter Two:
Impact of the Sentencing Guidelines on the Certainty and Severity of Punishment

A. Introduction to the Chapter and the Data

1. Sentencing Policy and the Scale of Imprisonment

The text and legislative history of the Sentencing Reform Act [SRA], reviewed in Chapter One, make clear that the SRA aimed to increase the certainty and severity of punishment by eliminating parole and increasing sentencing severity for some crimes. Congress instructed the Commission to ensure that "the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense."[53] The SRA specifically required "a substantial term of imprisonment" for some types of offenses and offenders.[54] The Commission also determined from its own analyses that penalties for some types of crime, such as "white collar" offenses, were disproportionately low compared to other types of theft involving similar economic losses. Thus, both Congress and the Commission endeavored to change historic sentencing practices by using the new instrument of policy control created by the SRA—the federal sentencing guidelines. In this chapter we evaluate the effects of these efforts.

Some criminologists have been skeptical that explicit policy changes imposed by centralized authorities, such as adoption of sentencing guidelines, can significantly alter historic sentencing practices. The "going rates" of punishment for various types of crime and the overall "scale of imprisonment"—the proportion of a jurisdiction's population that is imprisoned at any given time—seem subject to local, cultural, and institutional forces that are hard to explain and even harder to control (Zimring & Hawkins, 1991). Experience with sentencing reform in the states has convinced some observers that guidelines can successfully change sentencing practices, despite evidence of circumvention through plea bargaining and other practices (Tonry, 1996). But room for skepticism remains. It has been shown, for example, that neither variation in crime rates among different jurisdictions, nor the adoption of determinate sentencing policies, have consistent effects on rates of prison admissions or on prison populations (Marvel & Moody, 1996). Explicit policymaking through law appears to be just one factor among many that determine incarceration rates at a given time in a given jurisdiction. The analyses in the remainder of this chapter demonstrate, however, that the federal sentencing guidelines have had a significant, independent effect on federal sentencing practices, along with other legal and policy changes occurring during the last fifteen years.

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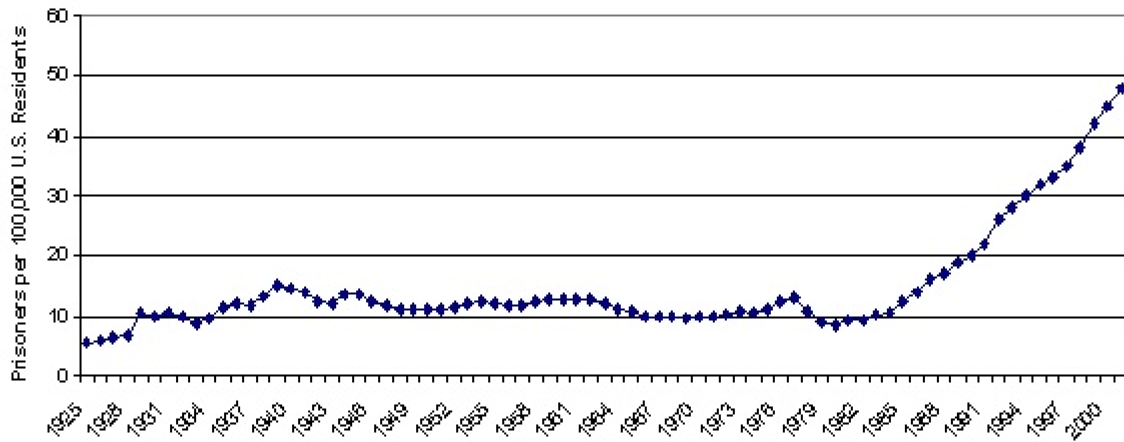
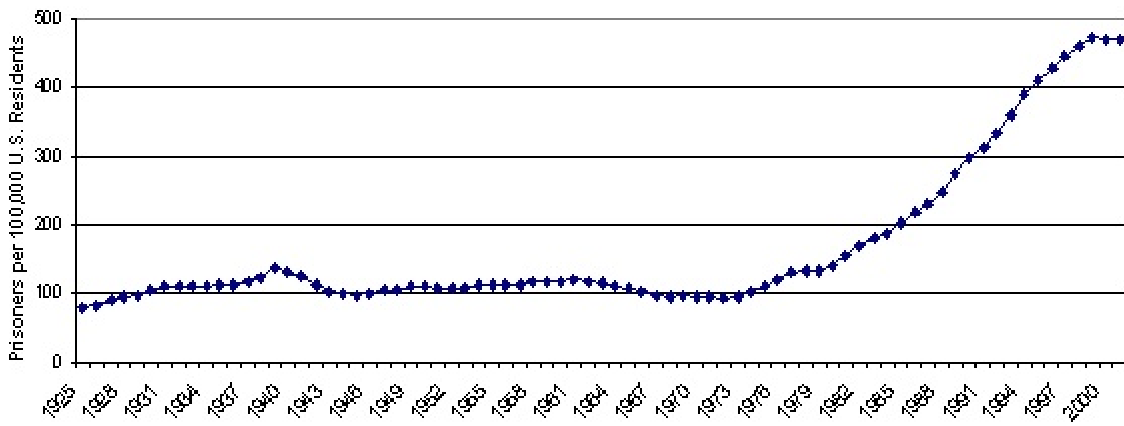
[53] Pub. L. No. 98–473 (1984). *See generally* 28 U.S.C. § 994(m).

[54] 28 U.S.C. § 994(i).

Figure 2.1:
Sentenced Prisoners in Federal Institutions



Sentenced Prisoners in State and Federal Institutions



Source: Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics (2001); BJS, Historical Statistics on Prisoners in State and Federal Institutions (1988).

Whatever the causes, there is no dispute that in recent decades the scale of imprisonment has climbed dramatically over historic levels in the federal and in most state criminal justice systems. Figure 2.1 shows that both federal and national imprisonment rates—the number of prisoners per 100,000 adult residents—remained fairly steady for fifty years before climbing to over four times their historic levels by 2002. The growth of the federal system began a decade after the states but has continued even as growth in the states has flattened. In 2002, the Federal Bureau of Prisons became the largest prison system in the country, surpassing California, and is now responsible for over 174,000 inmates (BJS, 2003; BOP, 2004).

This chapter explores the contribution of the sentencing guidelines to these trends. Specifically, longitudinal data on federal sentencing practices is reviewed, beginning with changes in the percentage of offenders who receive prison time instead of simple probation, or instead of one of the new "intermediate sanctions," such as home confinement with electronic monitoring. The chapter discusses how the abolition of parole has changed the relationship between sentences imposed and time actually served and tracks the expected length of imprisonment for various types of crime over the period of guidelines implementation. After examining overall trends for the major crime groups, the chapter focuses on specific crime types and notes that sentences have increased dramatically for some types of crime while remaining largely unchanged for others. Finally, the extent to which the observed changes can be attributed to the guidelines themselves, as opposed to other legal and social changes that occurred over the same time period, is discussed.

2. Assembling the Data

Longitudinal data on the effects of the guidelines on federal sentences are hard to assemble. One early study covered the beginning of guidelines implementation, but could not continue past 1991 because its data source—the Federal Probation Sentencing and Supervision Information System [FPSSIS]—was dismantled as the Sentencing Commission's database became operational (McDonald & Carlson, 1993). Data from the Administrative Office of the U. S. Courts [AO] cover a long time period but contain limited information on intermediate sanctions and offender characteristics. Periodic reports from the Federal Justice Statistics Program provide trends from data compiled from various agencies, including the AO, the Executive Office for U.S. Attorneys, the U.S. Sentencing Commission [USSC], and the Federal Bureau of Prisons (*see*, *e.g.,* BJS, 2002a). Different agencies collect data for different purposes, however, so it is not surprising that the information collected, and the definitions and categories used, vary somewhat from agency to agency (BJS, 1998). To identify the effects of a particular policy intervention, such as implementation of the guidelines, different datasets must be combined making every effort to ensure comparability across the years.

Technical Appendix D gives more detailed explanations of the data and methods used in this chapter. Trends in the use of imprisonment were determined using FPSSIS for the years in which it is available and USSC monitoring data for subsequent years. Changes is average imprisonment length were determined controlling for the effects of parole for preguidelines cases, and credit for good time for guidelines cases, using an estimation procedure developed by the Commission. Trends are reported for offenders *sentenced,* rather than *released*, in each year to assess the immediate impact of changes in sentencing policy.

B. The Increased Certainty of Imprisonment

1. Historical Development of the Use of Imprisonment in the Federal System

To put the changes of the last fifteen years into context, it is useful to review briefly the history of imprisonment in the United States. Today, the punishment for almost all serious crimes is a term of imprisonment, but prisons were not always the dominant form of punishment. In colonial times, whipping, fines, banishment, and public humiliations, such as time in the stocks, were common punishments for the least serious crimes. Following English practice, repeat offenders and those guilty of more serious offenses were sentenced to capital punishment. After independence, reform-minded legislators sought forms of punishment that were more effective (jurors were reluctant to convict simple thieves knowing that they faced execution) and that were more suitable to the new popular republic. Imprisonment quickly emerged as an enlightened alternative to "barbarous usages," such as corporal punishment or the gallows, for all but the most serious crimes (Rothman, 1995, quoting New York sentencing reformer Thomas Eddy).

During the Jacksonian period, prisons became "penitentiaries," and moral reform of the convict became the goal. Every state—federal criminal courts did not yet generate enough convicts to require separate federal prisons—spent considerable sums on construction of penitentiaries. These were such a noteworthy American experiment that many European visitors, including Alexis de Tocqueville, came to the new republic specifically to study them. As the mix of offenders changed and the number of incarcerated offenders increased, prisons became crowded and unruly, and prison discipline came to include corporal punishment as a way of enforcing strict prison rules (Rotman, 1995). By the end of the Civil War, the reformatory ideals of the penitentiary had largely given way to the practical realities of modern imprisonment, with overcrowding and brutality among prisoners and staff a grim reality.

Prison was not the only method of punishment historically, and is not the only method available today.

The increasingly obvious failure of prisons to achieve the moral reform of inmates led to repeated calls for change and a search for sentencing alternatives (Rotman, 1995). The invention of probation and parole release and the conversion to indeterminate sentences during the Progressive Era early in the twentieth century, as discussed in Chapter One, were responses to these failures. The federal government began to develop separate prisons during this era, with construction of penitentiaries at Leavenworth in 1897 and Atlanta in 1902. The federal system was among the first to adopt innovations, such as merit selection of prison wardens and eight-hour workdays for prison guards, and to humanize conditions in the cell blocks through the introduction of basic amenities, such as round dining tables to replace the long wooden benches of the state "big houses." Most importantly, from its inception, the federal system operated largely as an indeterminate sentencing system. The Federal Bureau of Prisons, created in 1929, set a new standard for classification and assignment of prisoners based on criminological studies, with lower-risk offenders sent to new lower-security prison camps (Rotman, 1995). The Parole Board, later the Parole

Commission, determined release dates based on an assessment of the inmates' progress toward rehabilitation.

As faith in rehabilitation faltered in the 1970s, indeterminate sentences fell into disfavor (Allen, 1981). Many criminologists turned to developing a theory of punishment focused on the seriousness of the offender's current offense and the offender's danger to the community, rather than the offender's potential for rehabilitation (Von Hirsch, 1976; Singer, 1979). Faced with criticism about arbitrary decisions and limited procedures, the federal Parole Commission began the process of developing guidelines for release decisions. These were based on empirical analyses and emphasized the seriousness of the offense and the offender's risk of recidivism, rather than an assessment of their progress toward rehabilitation (Gottfredson, et al., 1975).

In the last quarter of the twentieth century, making punishments uniform and proportionate became the dominant concern of sentencing reformers. To satisfy the principle of proportionality, the *severity* of punishment had to be fitted to the *seriousness* of the crime, and the *length* of imprisonment came to be seen as the primary measure of punishment severity. To avoid the need for imprisonment in all cases, however, interest in "intermediate sanctions," such as home confinement (FJC, 1987) or community service (Feeley, et al., 1992), also grew in the 1980s. To ensure that these intermediate sanctions were sufficiently punitive to punish proportionately, "exchange rates" were invented to equate alternative sanctions with various lengths of imprisonment (Morris & Tonry, 1990).[55] Studies confirmed that offenders found some alternative sanctions equally or more punitive than some types of incarceration (Crouch, 1993; Wood & Grasmick, 1995; Spelman, 1995; Wood & Grasmick, 1999). The perception remained widespread, however, that only imprisonment—the "clanging of the steel doors"—was sufficiently punitive to punish and deter (Sigler & Lamb, 1995).

2. Overall Trends in the Use of Imprisonment

Figure 2.2 displays trends in the percentage of all federal felony and major misdemeanor offenders given either prison, simple probation, or intermediate sanctions from 1984 through 2002. The solid line indicates a term of imprisonment, the dotted line indicates sentences of probation only, and the dashed line indicates an intermediate sanction. In all the figures that follow, split sentences—which involve a period of imprisonment followed by a period of confinement in one's home or a community-based treatment facility—are considered sentences of imprisonment. Sentences to confinement at home or in a community-based facility for the *entire* period of confinement are considered intermediate sanctions, as is intermittent confinement in a local jail or community-based facility on weekends. Sentences involving no confinement of any type,

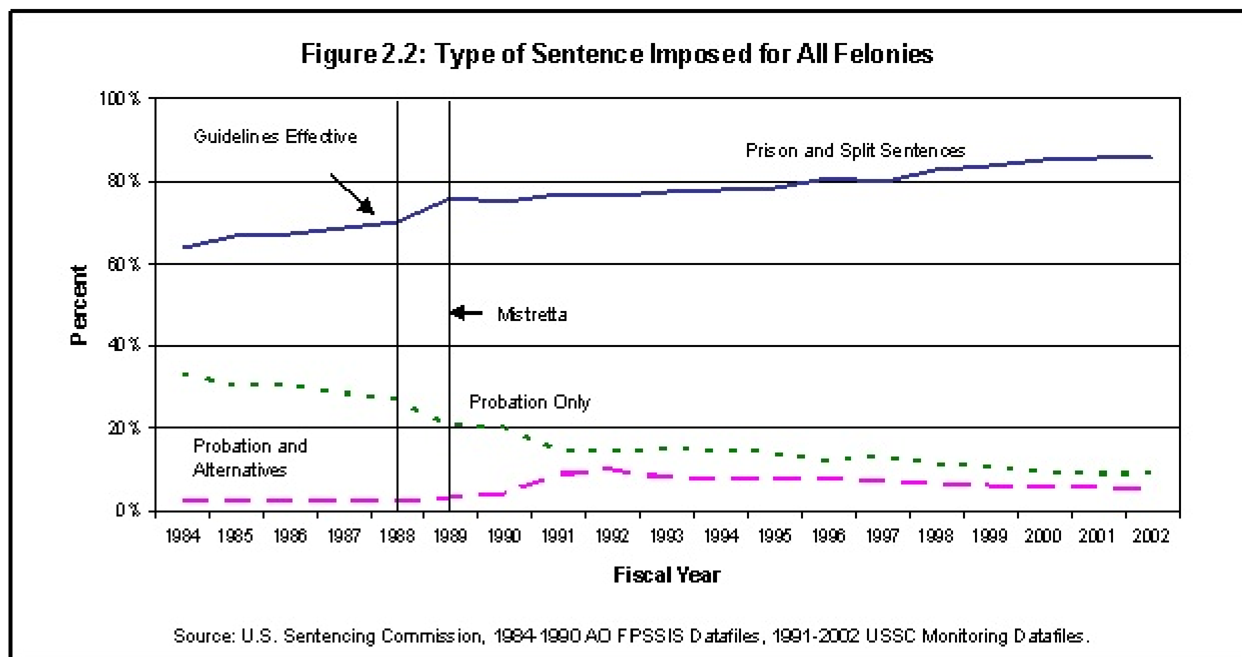
The percentage of offenders receiving simple probation has been cut in half under the guidelines.

[55] USSG §5C1.1(e) represents a simple schedule of this type.

including sentences involving fines and restitution, community service orders, court-mandated drug or mental health treatment, or other restrictive conditions, are all considered simple probation only.

The shift to guidelines sentencing was gradual over several years. Since the guidelines applied only to offenses that were *committed* after their effective date, November 1, 1987 (fiscal year 1988), many of the defendants sentenced during the early guidelines period, in fact, were not sentenced under the guidelines. [All years reported are fiscal years, which end on September 30 of the named year and begin on October 1 of the previous year.] In addition, many courts held the SRA unconstitutional until the United States Supreme Court's decision in *Mistretta v. United States* [56] in fiscal year 1989, indicated by the vertical right line. Thus, no single point marks the beginning of the guidelines era, but the years from 1988 to 1991 are critical transition years. Important mandatory minimum legislation concerning drug trafficking and the use of a firearm during a crime was also enacted in 1986 and 1988. Isolating the effects of these different policy changes is difficult, as discussed at the end of this chapter, but together they established trends toward greater certainty and severity that would become hallmarks of the guidelines era.

Away from the use of simple probation. As shown in Figure 2.2, between fiscal year 1988 and 1991, the first four fiscal years of guidelines implementation, the use of simple probation was cut by half. In 1987, 29 percent of offenders received sentences of probation, while only 14 percent did in 1991. The use of imprisonment spiked in the first few years of guidelines implementation and then declined slightly before resuming a long gradual climb to 86 percent of all offenders sentenced in 2002, over 20 percent higher than during the immediate preguidelines era.



56 488 U.S. 361 (1989).

Examining the seventeen-year trend shows that the percentage of felony and major misdemeanor offenders receiving some time in prison was increasing even prior to implementation of the guidelines, and has continued its gradual long-term increase during the guidelines era. The percentage of serious federal offenders receiving sentences of simple probation declined gradually over the same time period, with the sharpest "step" decrease at the time of guidelines implementation. The decrease in the use of probation is consistent with projections of the effects of the guidelines made by the Commission when the guidelines were promulgated (Block & Rhodes, 1987). The overall pattern suggests that numerous factors—including changes in the composition of the federal caseload, in social attitudes toward crime, and in federal penalty statutes—were toughening sentences throughout the period of study, with implementation of the guidelines having a substantial additional effect.

Widening the net. As described in the section on economic offenses below, much of the decrease in the use of simple probation following implementation of the guidelines is explained by increased use of intermediate sanctions for "white collar" crimes involving lesser economic losses. These offenders historically were likely to receive simple probation, but under the guidelines they increasingly are subject to intermediate sanctions and imprisonment. This development runs counter to the recommendations of some advocates for intermediate sanctions. Many had hoped that alternative sanctions would be used to divert offenders from prison and avoid "net widening"—use of intermediate sanctions for offenders who would historically have received simple probation (Tonry, 1995). Intermediate sanctions have been recommended as cost savers, since they can punish low-risk offenders for somewhat less money than imprisonment (GAO, 1994). But in the federal system, home, community, and intermittent confinement have been used almost exclusively to increase the severity of punishment for offenses that historically received simple probation. The only exception to this general finding is among larceny offenders, as described below.

The increased use of intermediate sanctions during the guidelines era was influenced by both legal and practical factors. Under the guidelines' zone system, discussed in Chapter One, prison is available as a sentence for all offenders, but simple probation is available only for the least serious offenders who fall in Zone A. Offenders in Zone B of the Sentencing Table *must* receive some period of alternative confinement if they are not imprisoned. Offenders in Zone C must receive imprisonment, but may serve up to half of the minimum term in some form of alternative confinement. The Commission amended the Sentencing Table in 1992 to expand modestly the number of offenders who were eligible for alternative confinement, in order to take advantage of the increasing availability of a new technology.[57] Electronic monitoring, considered an important enforcement tool for home confinement, became available nationwide in the early years of guidelines implementation, through the joint endeavors of the Federal Probation Service and the Bureau of Prisons. This made an intermediate sanction available in locations without access to community confinement facilities.

Judges responding to the 2002 Commission survey were very positive about the availability of these alternatives to incarceration. The majority of district judges urged greater availability of

[57] USSG, App. C, Amend. 462 (Nov. 1, 1992).

probation with confinement conditions, particularly for drug trafficking offenders (64 percent), and the majority of circuit judges requested that such sentencing options be made either more available or not reduced from their current availability (USSG, 2003d, III-18). Across all types of offenses, only a small minority of judges (approximately 15 percent) urged reduced availability of these options.

C. The Increased Severity of Prison Sentences

1. The Elimination of Parole and the Importance of Time Served

To appreciate long-term changes in the severity of federal prison sentences, it is important to distinguish between the *sentences imposed* by the courts and the *time actually served* by offenders. In the preguidelines system, the division of authority between the Parole Commission and sentencing judges gave rise to a large gap between sentences imposed and the time offenders actually served in prison. On average, preguidelines offenders served just 58 percent of their imposed sentences (Sabol & McGready, 1999). In the SRA, Congress mandated that all offenders would serve at least 85 percent of the sentence imposed by the sentencing judge, with a maximum reduction of about 15 percent as a reward for good behavior while in prison.[58] Time served today can be affected by other sentence reductions of various kinds. For example, offenders may qualify for early release for successful completion of drug treatment while in prison,[59] or upon motion of the Director of the Bureau of Prisons, for extraordinary and compelling reasons, such as terminal illness.[60] The Commission has occasionally made reductions in the guideline range applicable to certain categories of offenders retroactive under USSG §1B1.10, p.s.

Figure 2.3 illustrates the importance of accounting for the abolition of parole. The solid line shows average sentences imposed on offenders, while the dashed line shows an estimate of the prison time likely to be served. (The sentence severity charts in the remainder of this chapter all follow this standard format.) Examination of the solid line gives no hint of any substantial change at the time of guidelines implementation. Time imposed actually decreased slightly before resuming its gradual upward trend, which continued until 1992. The dashed line, however, shows that prison time likely to be served increased dramatically over the period of guidelines implementation.

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[58] 18 U.S.C. § 3624(b).

[59] 18 U.S.C. § 3621(e).

[60] 18 U.S.C. § 3582(c)(1)(A).

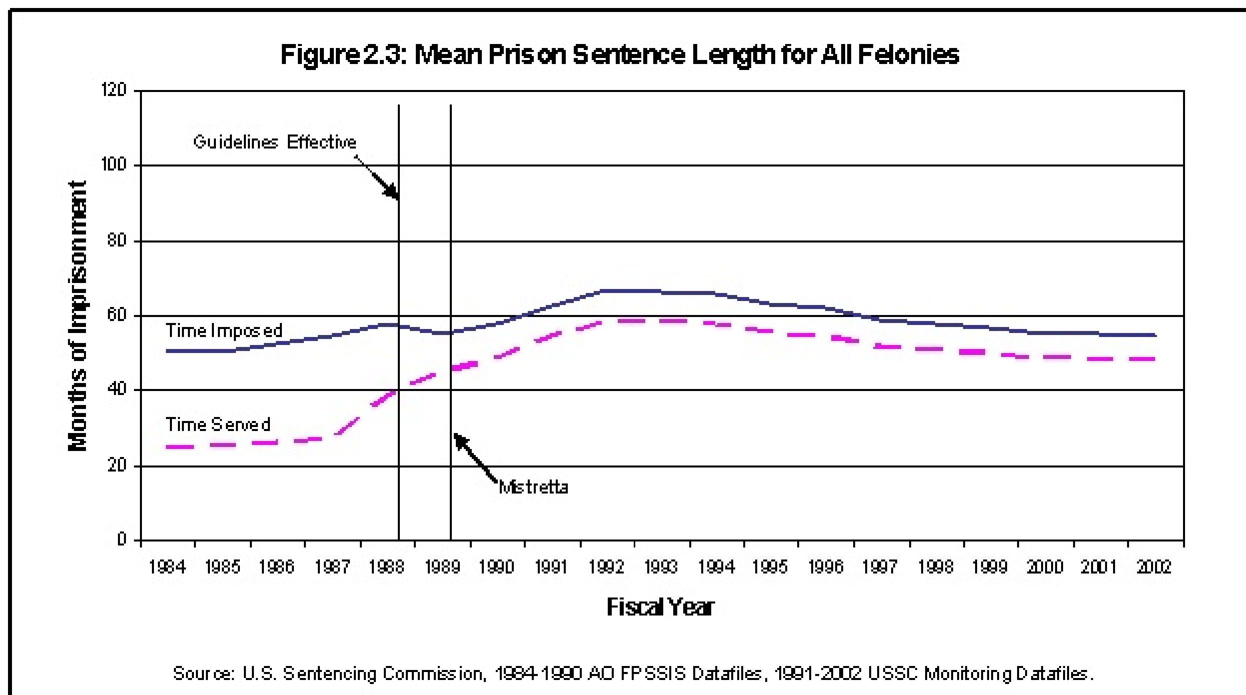


Figure 2.3: Mean Prison Sentence Length for All Felonies

Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

Offenders sentenced to simple probation or intermediate sanctions are excluded from these trends, so readers are cautioned to interpret changes in average sentences in conjunction with changes in the rates of imprisonment. The interaction of these trends can be potentially misleading. For example, imposing short prison terms on offenders who historically received simple probation could cause the average prison term to *decrease*, even while the sentences of other imprisoned offenders remained the same. These interactions will be discussed in greater detail in the sections on variations among different offense types later in this chapter.

2. *Overall Trends in Sentencing Severity*

The data clearly demonstrate that, on average, federal offenders receive substantially more severe sentences under the guidelines than they did in the preguidelines era. Between 1987and 1989, the first year in which the majority of federal offenders were sentenced under the guidelines, the average prison time expected to be served almost doubled. By 1992, the average time in prison had more than doubled, from 26 months in 1986 to 59 months in 1992. Since fiscal year 1992 there has been a slight and gradual decline in average prison time, but federal offenders sentenced in 2002 will still spend about twice as long in prison as did offenders sentenced prior to passage of the SRA.

Average prison time for federal offenders more than doubled after implementation of the guidelines.

The abolition of parole, the enactment of mandatory minimum penalty provisions, and changes in the types of offenders sentenced in federal court all contributed to increased sentence

severity along with implementation of the guidelines. The influence of each of these factors varies among different offenses, which is the subject of the next section.

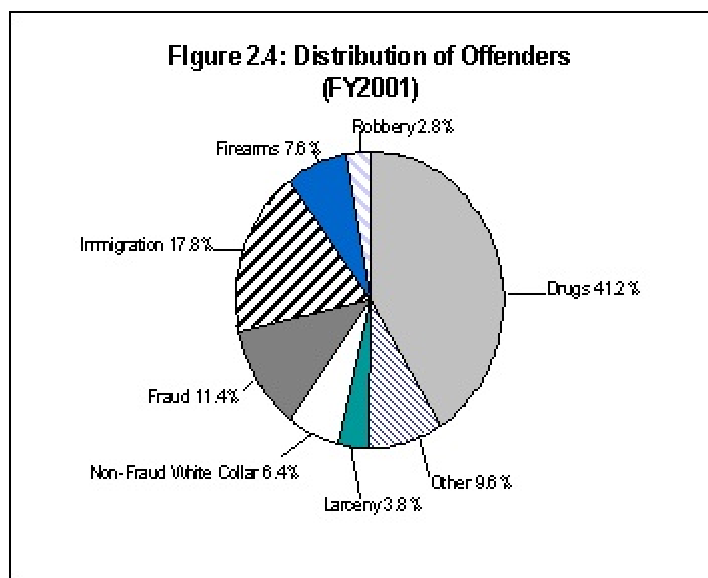
D. Variations Among Different Offense Types

During congressional debates on sentencing reform and in the early discussions of the Commission, considerable attention was paid to the adequacy of existing sentences for various types of crime. For most offenses, the Commission decided to base guideline ranges on the existing average time served, as revealed in the past practice study discussed in Chapter One. One would expect average prison time for these crimes to remain relatively constant under the guidelines. For several other offenses, however, the Commission, either on its own initiative or in response to congressional actions, established guideline ranges that were significantly more severe than past practice. Drug trafficking and "white collar"offenses are the two most notable examples, but guideline ranges were also set above historical levels for robbery of an individual, murder, aggravated assault, immigration, and rape (USSC, 1987). Fifteen years later, it can be confirmed that the policy changes initiated by Congress and the Commission substantially increased sentence severity for virtually all of the targeted offenses. And because these guidelines apply to the most frequently sentenced offenses in the federal courts, they account for the overall severity increases seen in Figure 2.3.

A major advantage of the guidelines approach to sentencing is that offenses and offenders can be categorized along dozens of dimensions relevant to the purposes of sentencing, rather than only a few dimensions. This section, however, must necessarily over-simplify and lump together offenses that are dissimilar in many ways. To obtain comparable groups across the preguidelines and guidelines eras, we categorize offenses only in terms of the most serious count of conviction. When relevant, changes to statutory elements or other factors affecting the characteristics of offenses in each category are noted. Technical Appendix D gives more complete information on the statutes included in each group.

1. Drug Trafficking Offenses

Drug trafficking offenses have comprised the largest proportion of the federal criminal docket for over three decades (AO, Annual Reports, 1971-2001). At the beginning of the guidelines era, approximately half of the persons sentenced under the new laws were drug offenders (USSC, Annual Report, 1989, Fig. VI). As shown in Figure 2.4, that proportion has decreased to about 40 percent in recent years, largely due to a substantial increase in immigration



offenses (USSC, *Sourcebook*, 2001, Tbl. 33). But with growth in the overall size of the federal criminal docket, the sheer number of drug trafficking offenders sentenced in federal court has continued to increase every year, reaching 25,376 in 2002.

The large number of drug offenders means that overall trends in the use of imprisonment and in average prison terms, reviewed above, are dominated by drug sentencing. Analysis using the Federal Bureau of Prison's population simulation model demonstrated that three-quarters of the growth in the federal prison population in the early years of guidelines implementation could be attributed to changes in drug sentencing policies (Simon, 1993). Changes in drug sentencing policies are also a primary cause of a widening gap between the average sentences of Black, White, and Hispanic offenders, which will be discussed in Chapter Four. Understanding these trends, and the influences of the policy choices made by Congress and the Commission, is thus especially important.

Increases in sentence lengths for drug trafficking offenders are the major cause of federal prison population growth over the past fifteen years.

Development of the drug trafficking guideline. The Commission's work developing sentences for drug trafficking offenders was heavily influenced by passage of the Anti-Drug Abuse Act of 1986 [ADAA]. The Commission had begun its work prior to passage of the ADAA by examining the Parole Commission's guidelines, which set release dates for drug traffickers based, in part, on the quantity of pure drug with which an offender was involved (USSC, 1987; Scotkin, 1990). The ADAA codified this quantity-based approach by triggering five- and ten-year mandatory minimum penalties based on the weight of the "mixture or substance containing a detectable amount" of various types of drugs.[61] The ADAA was expedited through Congress in the summer of 1986 in the wake of a number of well-publicized tragic incidents, including the overdose death of a first-round NBA draft pick, Len Bias (USSC, 2002a). The legislative history of the statute is limited primarily to statements made on the House and Senate floors. It presents only a partial picture of why Congress made quantity a dominant consideration for sentencing drug offenders (USSC, 1991b). There are several indications, however, that Congress intended to establish a two-tiered penalty structure for most drugs. Relying on information supplied by law enforcement, Congress apparently linked five-year penalties to amounts that were indicative of "managers of the retail traffic," while amounts linked to ten-year penalties were believed generally indicative of "manufacturers or the heads of organizations" (USSC, 2002a).[62]

Enactment of the ADAA created dilemmas for the Commission. For example, if the Sentencing Commission had followed the Parole Commission and made drug trafficking sentences dependent on the amount of pure drug, instead of the amount of any "mixture or substance containing a detectable amount," courts would be required to consider two different quantities at

[61] 21 U.S.C. § 841(b).

[62] H. REP. NO. 845, 99th Cong., 2nd Sess. Pt. 1, at 16-17 (1986).

sentencing, one for purposes of the statutes and another for the guidelines. If the Commission had given more weight to other potentially relevant factors, such as an offender's role within the drug trafficking organization, then sentences under the guidelines might conflict with sentences required by the statutes in a large number of cases. The statutes would "trump" the guidelines and consideration of the other factors effectively would be voided.

The Commission drafted a drug trafficking guideline that 1) generally measures the applicable amount based on the weight of the mixture or substance, and 2) linked the quantity levels in the ADAA to guideline ranges corresponding to the five- and ten-year mandatory minimum sentences. USSG §2D1.1 assigns base offense levels according to a Drug Quantity Table. The Table requires imprisonment of 63-78 months for offenses involving drug amounts at the five-year mandatory minimum penalty level, and imprisonment of 121-151 months for drug amounts at the ten-year statutory level. Adjustments lengthen the sentence for any prior offenses, for an offender's leadership role, for the possession of any weapon, for any death or injury resulting from use of the distributed drug, and for a variety of other aggravating factors. Downward adjustments for accepting responsibility or for a mitigating role in the offense can reduce the guideline range below the statutory minimum in some cases, in which case Part G of the *Guidelines Manual*, "Implementing the Total Sentence of Imprisonment," requires a guideline sentence at the mandatory minimum level. This "trumping" of the otherwise applicable guideline range creates disparity by treating less culpable offenders the same as more culpable ones (USSG, 1991b), but is necessitated by the need to make the guidelines consistent with the quantity thresholds found in the mandatory minimum penalty statutes.

USSG §2D1.1 adopts and extends the drug quantity-based approach to sentencing drug traffickers found in the Anti-Drug Abuse Act of 1986.

In addition to linking the drug amounts in the statutes to guideline ranges at the five- and ten-year levels, the Drug Quantity Table extends the quantity-based approach across 17 different levels falling below, between, and above the two amounts specified in the statutes. The current table ranges from offense level six, which allows probation for some first-time marijuana offenders, to level 38, which requires prison terms of 235-293 months for first time offenders accountable for large quantities of drugs. Offenders receiving adjustments for criminal history, a leadership role, or other aggravating factors can receive higher guideline ranges up to life in prison. The *Guidelines Manual, Supplementary Report* (USSC, 1987) and other documents published at the time of guideline promulgation do not discuss why the Commission extended the ADAA's quantity-based approach in this way. This is unfortunate for historians, because no other decision of the Commission has had such a profound impact on the federal prison population. The drug trafficking guideline that ultimately was promulgated, in combination with the relevant conduct rule discussed below, had the effect of increasing prison terms far above what had been typical in past practice, and in many cases above the level required by the literal terms of the mandatory minimum statutes.

One explanation for the Commission's approach is the need to provide a full range of quantities and penalties to achieve proportionality in drug sentencing. Under this view, drug type and quantity are reasonable first measures of the *harm* for which a drug trafficker should be held

accountable. Another possible reason for the Commission's approach was to avoid sentencing "cliffs" (USSC, 1991b). A cliff arises where a trivial change in quantity has a substantial effect on sentences. For example, if the Drug Quantity Table contained only the two thresholds found in the ADAA, an increase from 499 to 501 grams of powder cocaine could result in a dramatic increase in punishment, just as it does under the mandatory minimum statutes. The drug trafficking guideline provides more finely tuned distinctions among offenses and, therefore, more incremental increases in punishment.

Finding the proper measure of drug offense seriousness. Whatever the reasons for the emphasis on quantity in the drug trafficking guideline, commentators soon raised potential problems with its operation (Judicial Conference of the United States, 1995; Reuter & Caulkins, 1995). By providing a wide range of punishments for different drug amounts, the importance of quantity was greatly elevated compared to other offense characteristics. Some observers doubted that drug quantity was a reliable measure of offense seriousness, or could be determined with sufficient precision to justify seventeen meaningful distinctions among offenders (Schulhofer, 1992). Specific types of cases in which quantity served as a poor proxy for offense seriousness were identified by the Commission and by other observers (USSC, Working Group Report, 1992; FJC, 1994). For example, the weight of different inactive ingredients mixed with the drug—dilutants, carrier media, and even humidity—can result in disparate sentences for offenders who sell similar numbers of doses of a drug (Alschuler, 1991). Subsequently, the Commission developed a standardized weighing method for LSD doses and added other application notes designed to control for these problems,[63] but arbitrary variations due to the weight of inactive ingredients remain (Meier, 1993; Stockel, 1995).

More generally, the amount of drugs for which an offender is held accountable is determined by the relevant conduct rules and research suggested significant disparities in how these rules were applied (Hofer & Lawrence, 1992). The Commission repeatedly amended the relevant conduct commentary to clarify its operation in drug trafficking cases,[64] but questions remain about how consistently it can be applied (Marks, 2003). Drug quantity often is highly contested, and disputes must be resolved based on potentially untrustworthy factors, such as the testimony of co-conspirators. Drug quantity has been called a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making (Goodwin, 1992; Wasserman, 1995). The Commission also identified ways that drug quantity can *under*estimate offense seriousness, and promulgated commentary encouraging upward departure in these situations.[65]

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[63] *See* USSG, App. C, Amends. 484, 485, 488 (Nov. 1, 1993), & 503 (Nov. 1, 1994). *See also* Chapman v. U.S., 500 U.S. 453 (1991)(holding that the Commission's LSD weighing method could not be used to determine the applicability of mandatory minimum penalties).

[64] USSG, App. C, Amends. 78 (Nov. 1, 1989) & 439 (Nov. 1, 1992).

[65] *See* USSG §2D1.1, comment., n. 1, 9, 12, 15, 16 and comment., backgr'd. (citing examples of circumstances where the Commission recognizes that quantity may underestimate offense seriousness).

Finding the correct ratios among different drugs and the correct quantity thresholds for each penalty level has also proven problematic. The Commission previously reported that the 100-to-1 drug quantity ratio between crack and powder cocaine fails to reflect the relative harmfulness of different drugs (USSC, 1995, 1997, 2002). In addition, the quantity thresholds linked to five- and ten-year sentences for crack cocaine have been shown to result in severe penalties for many street-level sellers and other low culpability offenders. As a result, the Commission recommended revision of the mandatory minimum penalty statutes and the guidelines. In 1995, the Commission recommended that the quantity levels for crack cocaine should be set at the same level applicable to powder cocaine. This recommendation, and a guideline amendment promulgated to implement it, were rejected by Congress.[66] In 1997, the Commission suggested a range of quantity thresholds for both powder and crack cocaine that would have reduced the ratio between them by both raising the threshold for crack and reducing the threshold for powder (USSC, 1997). This recommendation was not acted upon. Most recently, the Commission recommended that the ratio between powder and crack be reduced to 20-to-1 by raising the threshold quantity amounts for crack cocaine. Certain enhancements to the drug trafficking guideline generally were also recommended to better target the most dangerous and culpable offenders (USSC, 2002a). To date, Congress has not acted on this recommendation.

Evidence that the mandatory minimum statutes were resulting in lengthy imprisonment for many low-level, non-violent, first-time drug offenders (DOJ, 1994)[67] led Congress in 1994 to enact a so-called "safety valve," which waived the mandatory penalties for certain categories of less serious offenders.[68] In the same legislation, Congress directed the Commission to revise the guidelines to better account for the mitigating factors that qualify offenders for the safety valve, and thus reduce the importance of drug quantity in those cases. In 1995, a two-level reduction was added for some offenders who met the safety valve criteria,[69] and in 2001 this was expanded to all qualified drug offenders.[70] Most recently, the Commission again attempted to ameliorate the influence of large drug quantities on sentences for the least culpable offenders by capping the quantity-based offense level for defendants who receive a mitigating role adjustment under USSG §3B1.2.[71]

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[66] Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

[67] *See also Federal Mandatory Minimum Sentencing: Hearing on H. R. 2199 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103rd Cong., 1st Sess. 30 (1993).

[68] *See* 18 U.S.C. § 3553(f) and USSG §5C1.2.

[69] USSG, App. C, Amend. 515 (Nov. 1, 1995).

[70] *Id*. at 624 (Nov. 1 , 2001).

[71] *See id.* at 640 (Nov. 1, 2002) and 668 (Nov. 1, 2004).

Given the problems with relying on drug type and quantity to measure the seriousness of drug trafficking offenses, some observers have called for a fundamental re-examination of the role of quantity under the guidelines (Bowman, 1996; RAND, 1997; ABA, 2002). Thirty-one percent of district court judges responding to the Commission's 2002 survey listed drug sentencing as the greatest or second greatest challenge for the guidelines in achieving the purposes of sentencing (USSC, 2003d), with 73.7 percent of district court judges and 82.7 percent of circuit court judges rating drug punishments as greater than appropriate to reflect the seriousness of drug trafficking offenses (USSC, 2003d). The Commission has been asked to identify ways to amend current drug penalties to better target the most culpable and dangerous offenders.[72]

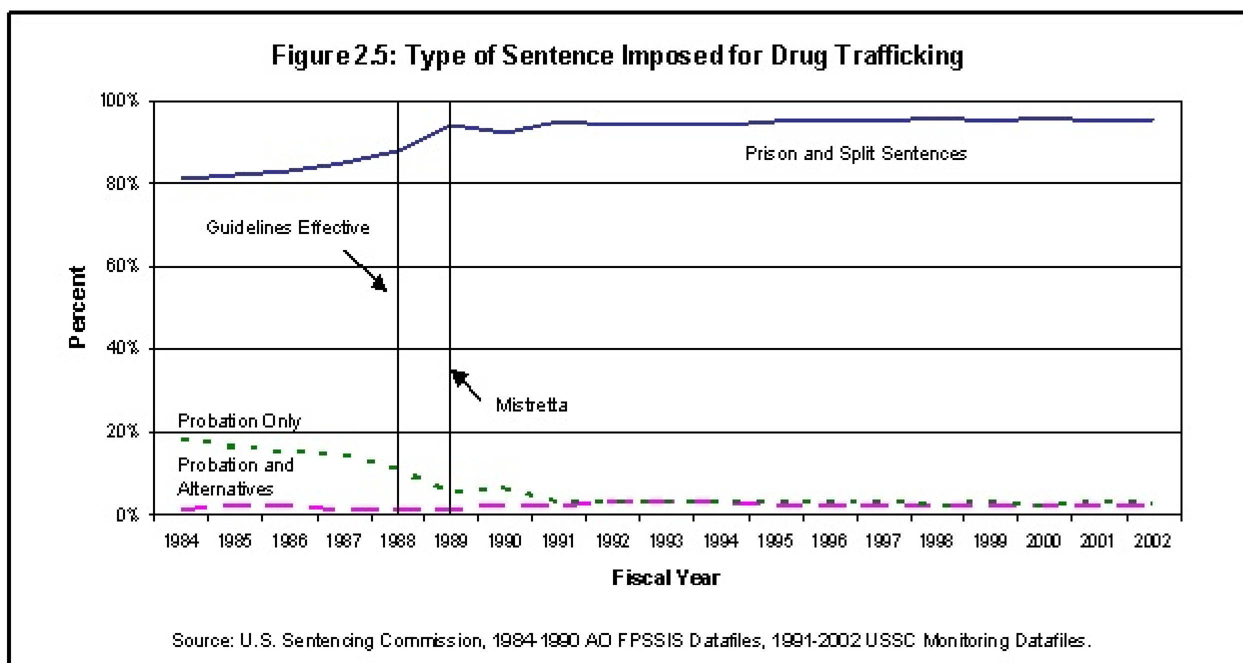

Figure 2.5: Type of Sentence Imposed for Drug Trafficking

Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

Use of imprisonment. Figure 2.5 shows that a large proportion of drug traffickers received sentences of imprisonment in the preguidelines era, and this proportion was increasing at the time of guidelines implementation, perhaps as a result of the ADAA enacted in 1986. Upon full implementation of the guidelines, the percentage rose and has held steady at about 95 percent. The use of simple probation and intermediate sanctions has dropped to less than five percent each. Separate analyses of heroin and other schedule I narcotics, cocaine and other schedule II narcotics, and marijuana (the only breakdowns possible with the data available across the entire time period) show only minor variations in this general pattern.

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[72] Letter from Senator Jeff Sessions, United States Congress, to Judge Diana E. Murphy, Chair, United States Sentencing Commission, regarding "Targeting Sentences on the Degree of Culpability and the Likelihood of Recidivism," July 13, 2000.

Length of time served. The graph in Figure 2.6 shows the dramatic increase in time served by federal drug offenders following implementation of the ADAA and the guidelines. The time served by federal drug traffickers was over two and a half times longer in 1991 than it had been in 1985, hovering just below an average of 80 months. In the latter half of the 1990s, the average prison term decreased by about 20 percent but remained far above the historic average. Analysis of three separate drug groups showed that this overall pattern is repeated for each drug type, although the severity levels are highest for crack cocaine, followed by powder cocaine and heroin and other scheduled narcotics. Marijuana offenses received the shortest prison terms.

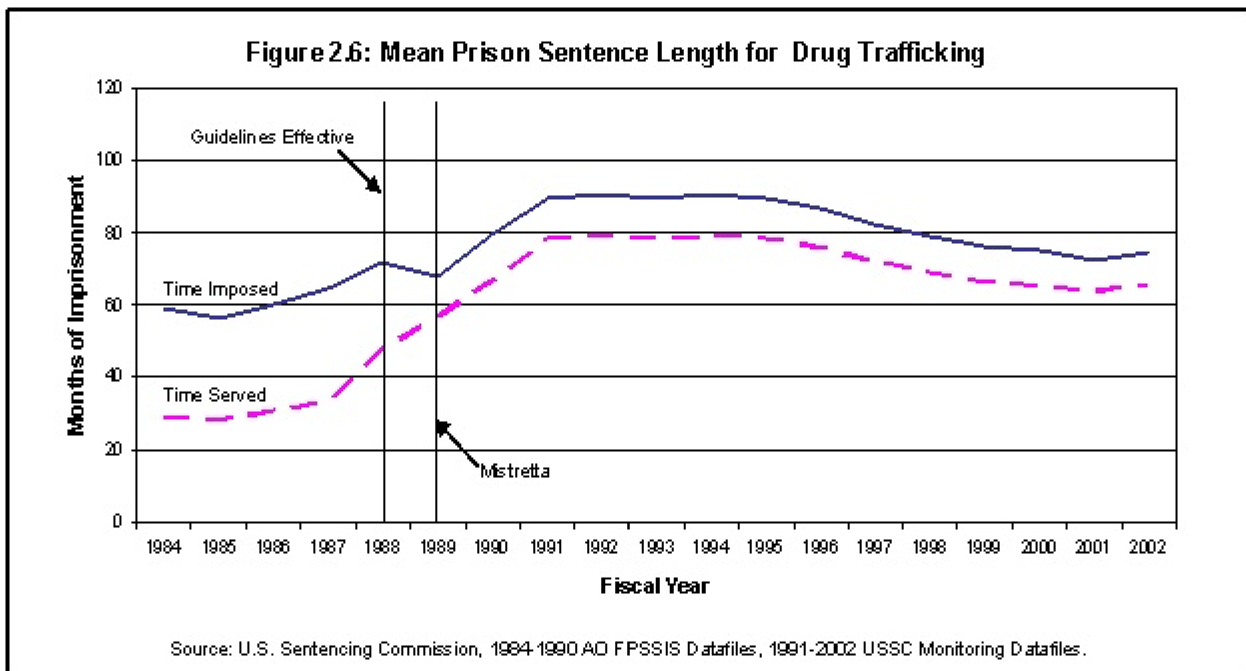


Figure 2.6: Mean Prison Sentence Length for Drug Trafficking

Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

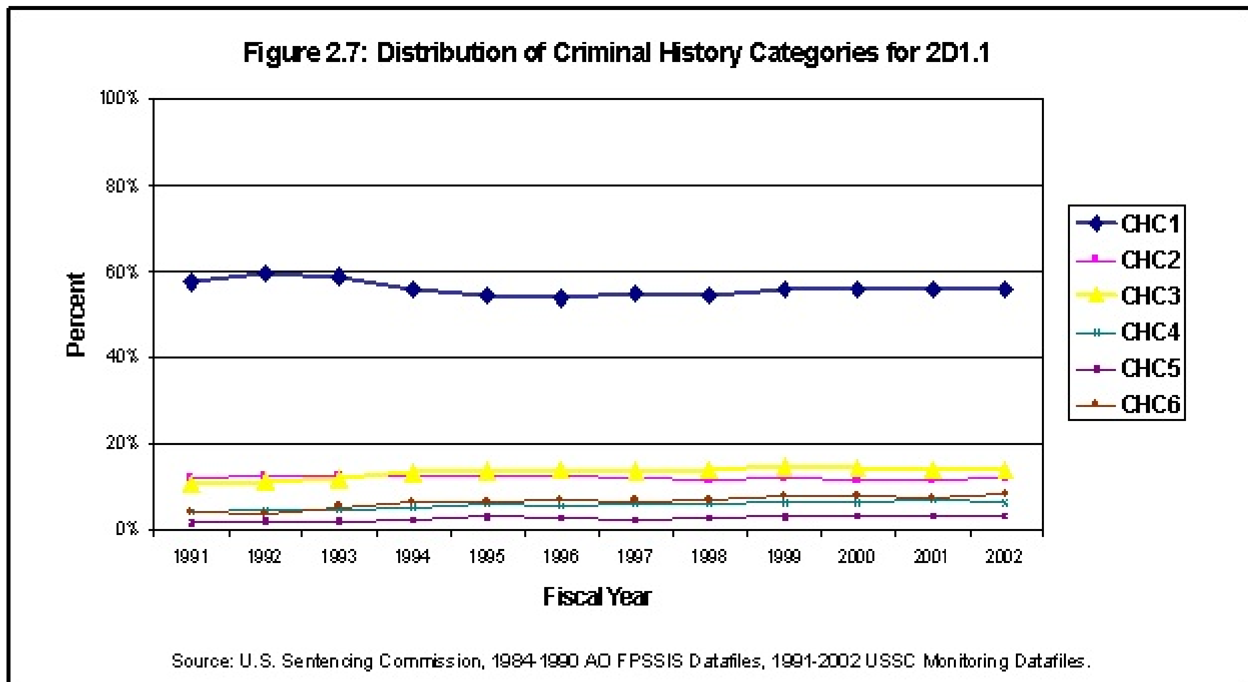
What caused the trends? While sentences for drug trafficking were changing prior to enactment of statutory minimum penalties and implementation of the guidelines, and have continued to change since, there can be no doubt that the policy choices of Congress and the Commission in 1986, 1987, and 1988 each had a dramatic impact on federal sentencing policy for drug offenders. Attempting to precisely allocate responsibility for these changes between the statutes and the guidelines may be impossible (Schwarzer, 1992). As described above, the Commission accommodated the mandatory minimum penalty levels when it developed the drug trafficking guideline, so the influence of the ADAA is both *direct* when it controls the sentence in an individual case by trumping the guidelines, and *indirect* through its influence on the design of the drug guideline itself.

It is important to note, however, that the Commission's choices when drafting the guidelines contributed significantly to these trends. In the *Supplementary Report* that accompanied promulgation of the guidelines, the Commission projected the estimated impact of 1) the ADAA, 2) the career offender provisions of the SRA (implemented at USSG §4B1.1) and 3) the guidelines themselves (USSC, 1987, Table 3, at 69). This analysis suggested that the ADAA would increase average sentences from 23 months to 48 months, and the career offender provision would add another nine months. The guidelines themselves were projected to increase sentences by only an additional month. Later analyses raised questions about this result, however, by reporting that the sentences required by the guidelines above the minimums required by the ADAA significantly increase the average prison term, at least for crack cocaine offenders (McDonald & Carlson, 1993). Analyses conducted for the present report confirm the later findings for all drug offenders: the guidelines have significantly increased average sentence length above the levels required by statute. About 25 percent, or eighteen months, of the average expected prison time of 73 months for drug offenders sentenced in 2001 can be attributed to guideline increases above the mandatory minimum penalty levels. (Appendix D gives details of the analysis supporting this conclusion.)

Over 25 percent of the average prison time for drug offenders sentenced in 2001 can be attributed to guideline increases above the mandatory minimum penalty levels.

The recent downturn. In recent years, attention has focused on the decrease in prison terms that began in the 1990s. There are many possible explanations for the trend, including changes in the characteristics of drug crimes being committed or being sentenced in federal courts, changes in the charges being brought or plea bargains being offered, or changes in the way the guidelines are being applied. In addition, as noted above, Congress and the Commission adopted several measures during this time period that would decrease sentence lengths for some offenders, including the "safety valve" and additional reductions for first-time, low-level offenders. Congress and the Commission also increased penalties for several types of drugs over this time period, however, including methamphetamine, amphetamine, "ecstasy," and various "date rape" drugs.

The available data suggest a general trend toward less serious offenses and a greater incidence of mitigating factors in cases sentenced in the late 1990s. The median drug amount for powder and crack cocaine and for marijuana decreased from 1996 to 2001 (the only years for which data are available). The percentage of defendants pleading guilty and receiving the acceptance of responsibility adjustment has increased steadily over the past decade. The application of mitigating guideline adjustments associated with the safety valve and a defendant's minor role in the offense also have increased. And the percentage of offenders benefitting from downward departures became increasingly frequent, with the use of USSG §5K1.1 departures growing in the early part of the 1990s and other downward departures increasing in later years. On the other hand, as shown in Figure 2.7, the percentage of first offenders sentenced under the drug guideline, while still over 50 percent, has declined slightly since the early 1990s.



The trend toward somewhat lower sentences in the late 1990s has led observers to conclude that those charged with implementing drug sentences have searched for ways to mitigate the severe prison terms mandated by the ADAA and the guidelines (Schulhofer & Nagel, 1997; Saris, 1997; Bowman & Heise, 2001, 2002). This conclusion is reinforced by surveys that have consistently shown that the "harshness and inflexibility" of the drug trafficking guideline is seen as the most significant problem with the sentencing guidelines system (GAO, 1992; *see also* FJC, 1997; USSC, 1991c, 2003).

2. Economic Offenses

Similar punishment for similar loss. As shown in Figure 2.4, economic offenses—which include larceny, fraud, and non-fraud white collar offenses—constitute the second largest portion of the federal criminal docket. A wide variety of economic crimes are prosecuted and sentenced in the federal courts, ranging from large-scale corporate malfeasance, to small-scale embezzlements, to simple thefts. The federal criminal code contains a plethora of provisions covering economic offenses, many of which are not easily placed into simple categories such as fraud or larceny (Bowman, 2001). Particular scholarly and media attention has occasionally focused on "white collar" crimes, although there is no general agreement on what is meant by that term (Schlegel & Weisburd, 1992).

In establishing sentences for economic offenses, the Commission grouped the many statutory provisions into a small number of guidelines and made the pecuniary loss resulting from the crime a primary consideration in determining sentences. The Commission's empirical study of past sentencing practices revealed that in the preguidelines era, sentences for fraud, embezzlement, and

tax evasion generally received shorter sentences than did crimes such as larceny or theft, even when the crimes involved similar monetary losses (USSC, 1987). A large proportion of fraud, embezzlement, and tax evasion offenders received simple probation. In response, the guidelines were written to reduce the availability of probation and to ensure "a short but definite period of confinement"[73] for a larger proportion of these "white collar" cases, both to ensure proportionate punishment and to achieve adequate deterrence (Steer, 2003).

Over the years, additional aggravating adjustments were added to the theft and fraud guidelines, often in response to congressional directives (*see* Appendix B.) The appearance early in the guidelines era of these mandated sentence increases for economic crimes, and the perceived absence of empirical research establishing the need for them, led one former Commissioner to warn that the SRA's promise of policy development through expert research was being supplanted by symbolic "signal sending" by Congress (Parker & Block, 1989).

In 2001, following a six-year process of deliberation, collaboration with the Judicial Conference and DOJ, and field testing, the guidelines governing economic crimes were comprehensively amended as part of an "Economic Crime Package" (*see* Bowman, 2001, for a history of the efforts leading to this package).[74] This amendment sought to further refine and simplify the guidelines, focus the most severe sentences on the most serious offenders, and clarify the definition of pecuniary loss. In the wake of the corporate scandals of 2002, the guidelines again were amended at the direction of Congress to further increase sentence severity (Steer, 2003).[75] The data reported in this section reflect only the initial effects of the Economic Crime Package and none of the effects of the 2002 Sarbanes-Oxley amendments because these changes had not taken effect for cases sentenced by fiscal year 2002.

Use of imprisonment. Figure 2.8 displays trends in the use of imprisonment, intermediate sanctions, and probation for offenders convicted of all economic crimes. The most striking trend is a shift away from simple probation and toward intermediate sentences that occurred as more economic offenders became subject to the guidelines in the early 1990s. These trends among economic offenders drive the overall trends for all felons portrayed in Figure 2.2, because economic offenders comprise the largest share of offenders receiving intermediate sanctions in the federal system. The use of imprisonment for economic offenders also has increased steadily throughout the guidelines era.

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[73] *Sentencing Commission Guidelines: Hearing Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., 55 (1987)(statement of Stephen Breyer, Commissioner, USSC).

[74] USSG, App. C, Amend. 617 (Nov. 1, 2001).

[75] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, §§ 805, 905, 1104, 116 Stat. 745 (July 30, 2002).

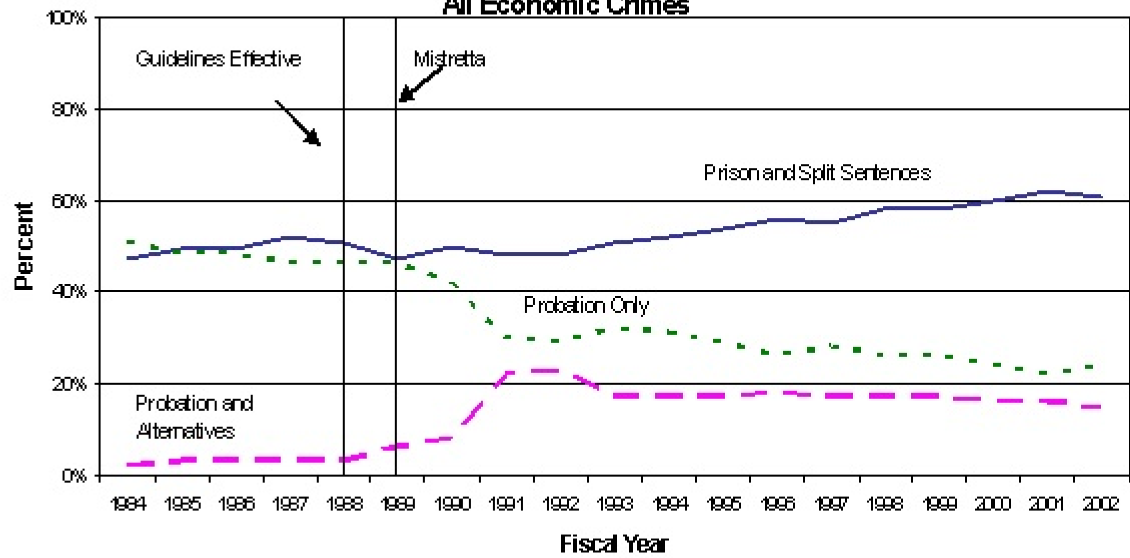


Figure 2.8: Type of Sentence Imposed for Economic Crimes
All Economic Crimes
100%
80%
60%
40%
20%
0%
Percent
Guidelines Effective
Mistretta
Prison and Split Sentences
Probation Only
Probation and Alternatives
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
Fiscal Year
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

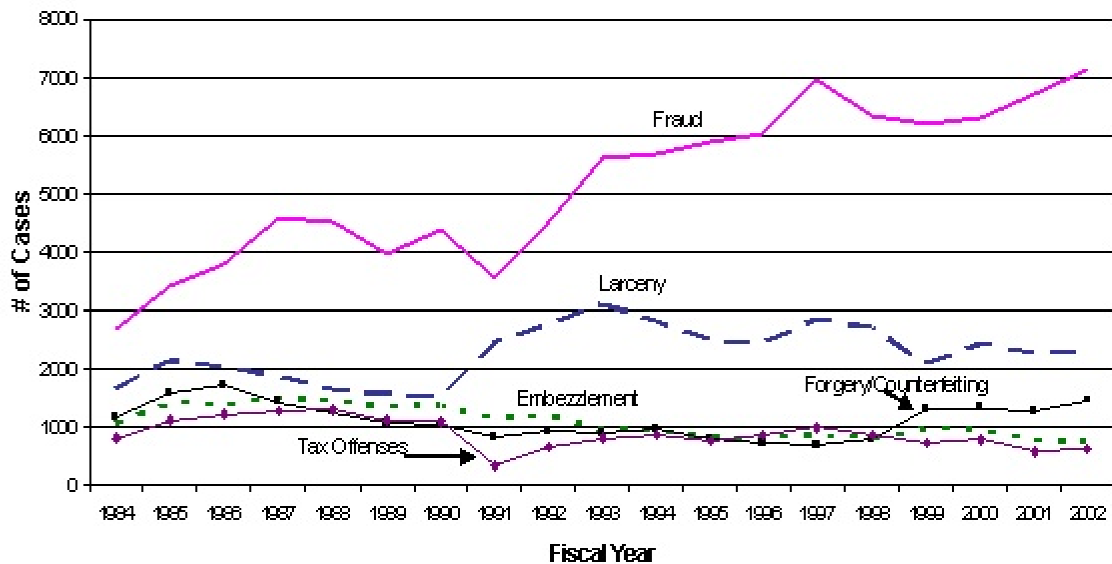


Figure 2.9: Economic Crime Caseload
8000
7000
6000
5000
4000
3000
2000
1000
0
# of Cases
Fraud
Larceny
Embezzlement
Forgery/Counterfeiting
Tax Offenses
1984
1985
1986
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
Fiscal Year
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

As shown in Figure 2.9, fraud offenses constitute the largest proportion of economic offenses, and their proportion has grown. Thus, the trends for economic offenses are dominated by fraud offenders. The thumbnail graphs show that the shift to intermediate sanctions is pronounced for fraud, forgery/counterfeiting, and tax offenders. Embezzlement showed the same shift in the early 1990s, but beginning in 1992, larger numbers of embezzlers were imprisoned. The use of simple probation has been reduced by about two-thirds for fraud offenders and by about half for embezzlers and tax evaders. The rate of imprisonment for fraud offenders rose from about 50 percent in the preguidelines era to almost 70 percent by 2001. For embezzlers, the increase over the same time period was from about 35 to 60 percent. The one unexpected finding is that while use of intermediate sanctions for tax offenders increased from virtually nothing to nearly 30 percent of all cases, the use of imprisonment for tax evaders actually fell slightly after guidelines implementation until returning to historic levels in 2000.

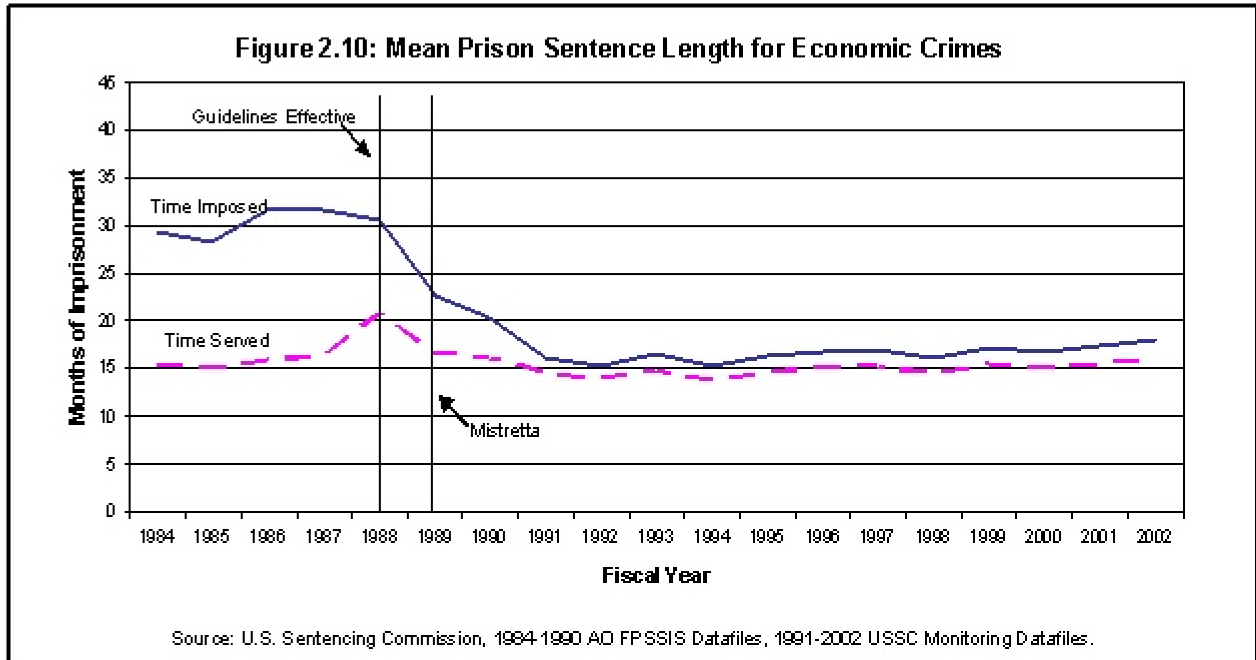
The rate of imprisonment for fraud offenders, the most common economic crime, rose from about 50 percent in the preguidelines era to almost 70 percent by 2001.

Interestingly, among larceny offenders, intermediate sanctions have been used to divert from prison about 20 percent of the offenders who once were incarcerated. While this pattern is commonplace in state systems, it is something of an anomaly in the federal system where intermediate sanctions have generally “widened the net,” as discussed above. The reduced use of imprisonment for larceny offenders appears to reflect the Commission’s concerted effort to equalize penalties between “white collar” and “blue collar” offenders.

These data raise the question of whether the Commission’s goal of assuring a “short but definite period of confinement” for white collar offenders has been achieved. The answer depends both on whether intermediate sanctions satisfy the goal and which offenses count as “white collar.” The guidelines ensure that offenses involving the greatest monetary losses, the use of more sophisticated methods, and other aggravating factors are given imprisonment. Certainly the use of simple probation has been slashed—by about two-thirds for fraud offenders and by about half for embezzlers and tax evaders. For most types of economic crime, the rate of imprisonment has also been substantially increased. Despite these increases, in 2002 many district (63%) and circuit (64%) court judges still felt the guideline sentences were less than appropriate to reflect the seriousness of fraud offenses, with smaller majorities believing the same regarding theft/embezzlement/larceny (USSC, 2002). These findings were obtained prior to the full impact of the Commission’s 2001 Economic Crime Package and the 2002 amendments made pursuant to the Sarbanes-Oxley Act.

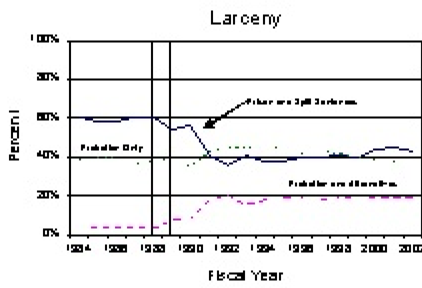
Length of time served. As shown in Figure 2.10, the amount of prison time imposed on economic offenders declined significantly upon implementation of the guidelines, but with the abolition of parole the length of time actually served remained fairly constant at about 15 months. Fraud offenders again dominate the trends, with their average sentence hovering close to 15 months. (The one-year peak in 1988, seen across all economic offense types except tax offenses, may reflect

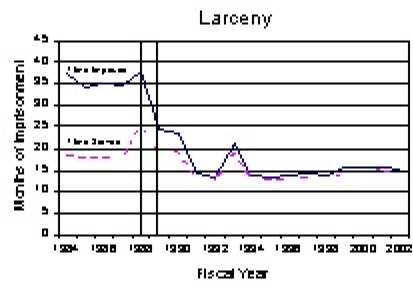
differential implementation of the guidelines in the first year of their application. But it may be a statistical artifact. As a general rule, statisticians look with suspicion on one-year fluctuations in otherwise stable trends, especially if they occur at a time of great tumult in the system. Remember that many courts held the guidelines unconstitutional for this year, potentially affecting the selection of cases for sentencing.)

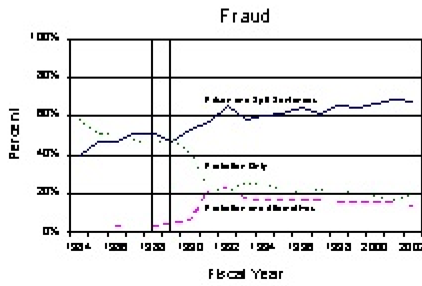


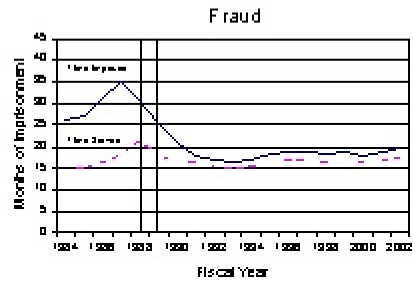
The relatively stable time served by economic offenders, as well as the decreases for some types of offenses, was noted early in the guidelines era (Block, 1989). These trends were caused by the Commission's decision to increase the use of imprisonment. As one Commissioner stated, "[T]he flip side of the Commission's dramatic increase in the likelihood of confinement is an equally dramatic *decrease* in the projected time served by defendants who serve time" (Block, 1989, emphasis supplied). For example, average time served for embezzlement has decreased from preguidelines levels, but nearly twice the proportion of embezzlers are going to prison. As more embezzlers were given short periods of imprisonment, the average length of imprisonment among all embezzlers declined as the new offenders were included in the average. In the case of larceny, however, the reduction in the percentage going to prison is matched by a reduction in time served, again reflecting the Commission's design to reduce sentence severity for simple theft, while increasing it for fraud, embezzlement, and tax offenses (USSC, 1987).

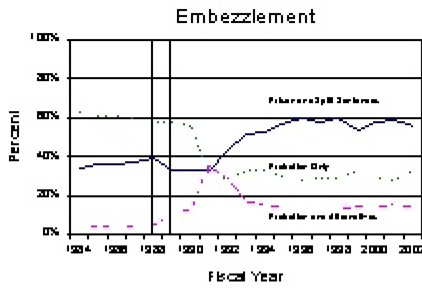
Economic Crime Thumbnails

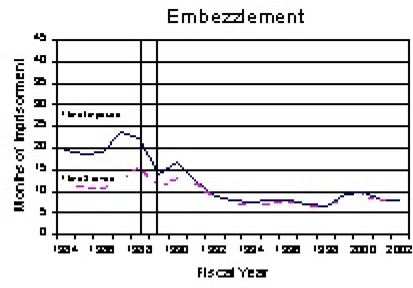


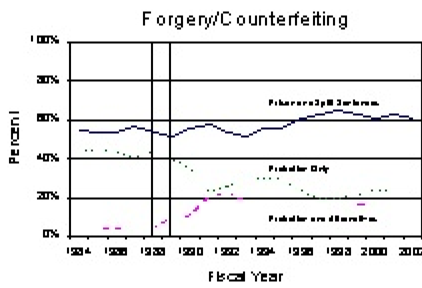


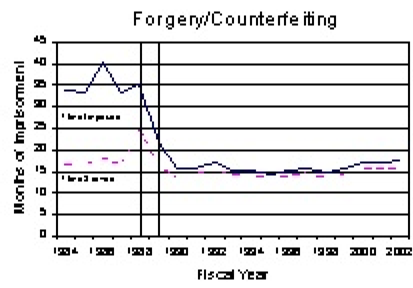


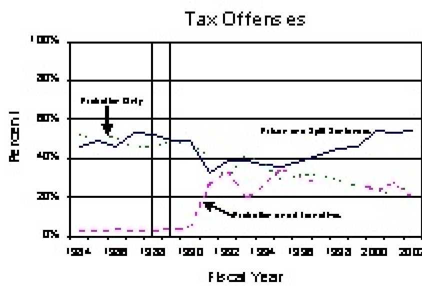


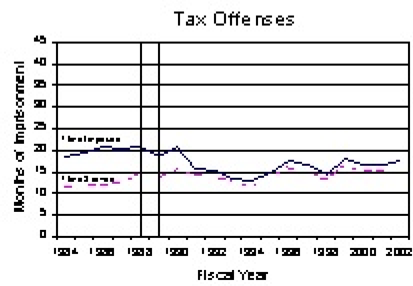






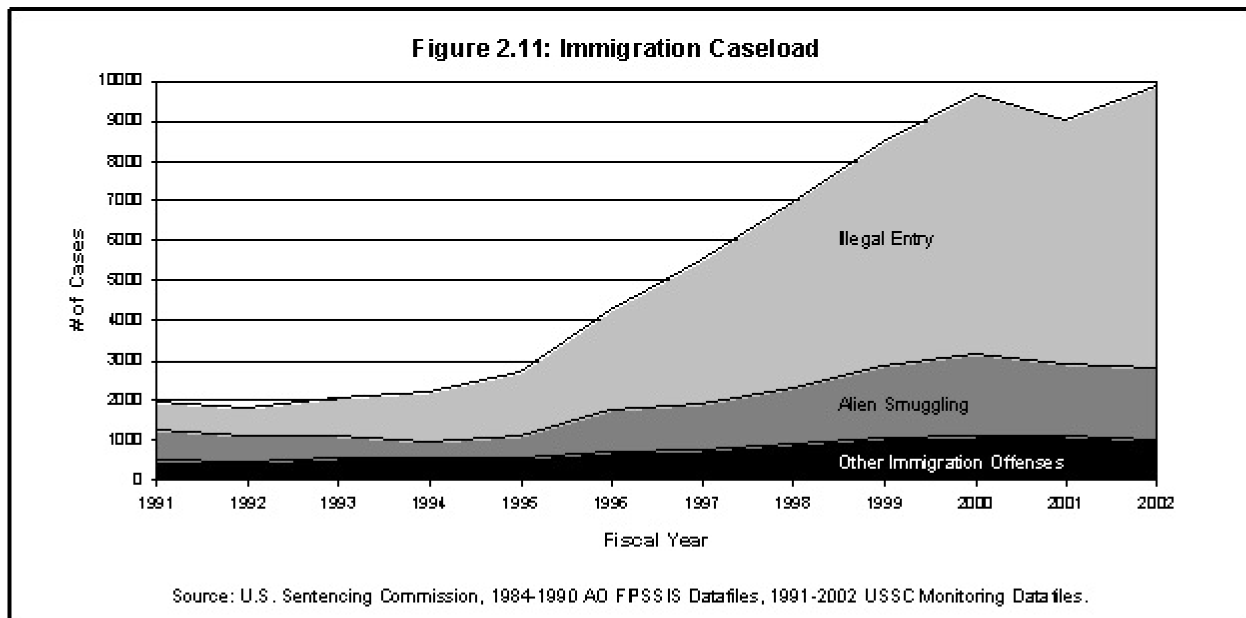






3. *Immigration Offenses*

Prior to fiscal year 1994 there were relatively few immigration cases sentenced in the federal courts. Figure 2.11 shows that in the first three years of the 1990s the number of cases ranged between 1,000 and 2,000 annually (BJS, 2002c). Beginning in 1995, however, the number of cases for alien smuggling and illegal entry began to climb, and after the implementation of Operation Gatekeeper—the Immigration and Naturalization Service's southwest border enforcement strategy—the number began to soar, reaching a peak of just under 10,000 cases in 2000. Along with the phenomenal growth in the size of the immigration offense docket, a series of policy decisions by Congress and the Commission have steadily increased the severity of punishment for the two most common classes of immigration offenses: alien smuggling and illegal entry, sentenced under USSG §§2L1.1 and 2L1.2, respectively.



When the Commission constructed the original guidelines for alien smuggling and illegal entry, they were based largely on past practice, with a slight reduction in the availability of straight probation and the amount of time served (Block & Rhodes, 1989). Beginning in 1988, one year after the original guidelines were enacted, the Commission began a series of amendments which significantly increased the penalties for these offenses.

Smuggling, Transporting, or Harboring an Unlawful Alien—§2L1.1. In early 1988, the Commission amended §2L1.1 to better reflect the typical case sentenced under the guideline, which involved for-profit alien smuggling. The base offense level was increased by three levels, and a three-level reduction was provided if the offense was *not* committed for profit or involved only the

defendant's family members.[76] A second amendment to section 2L1.1 occurred less than a year later, when the Commission increased the base offense level for defendants with prior deportations.[77] In 1991, the Commission increased the base offense level to 20 if the defendant had been previously deported after conviction for an aggravated felony.[78] And again in 1992, the Commission revised the specific offense characteristics to enhance penalties based upon the number of aliens, documents, or passports involved in the offense.[79] Finally, responding to a congressional directive in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the Commission increased the alien smuggling base offense level by three levels and made various other changes to the alien smuggling guideline.[80]

Unlawfully Entering or Remaining in the United States—§2L1.2. The first amendment to §2L1.2, effective on January 15, 1988, limited the guideline to felony cases only and increased the base offense level from six to eight.[81] In 1989, the Commission added a specific offense characteristic to section 2L1.2, increasing the offense level by four levels for defendants previously deported after conviction for a non-immigration related offense.[82] Two years later, the Commission made the most significant change to the guideline by creating a 16-level enhancement for re-entry by offenders with prior convictions for aggravated felonies.[83] In 1997, acting upon a congressional directive in the 1996 Immigration Reform legislation, the Commission expanded the eligibility criteria for the "aggravated felony" enhancement to include numerous other offenses.[84] Finally, in 2001, responding to complaints from sentencing practitioners along the southwest border, the Commission altered the aggravated felony enhancement to provide graduated enhancements of eight, twelve, or sixteen levels for prior aggravated felonies,[85] depending on the seriousness of the prior offense.

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[76] USSG, App. C, Amend. 35 (Jan. 15, 1988).

[77] *Id.* at 192 (Nov. 1, 1989).

[78] *Id.* at 375 (Nov. 1, 1991).

[79] *Id.* at 450 (Nov. 1, 1992).

[80] *Id.* at 543 (May 1, 1997) & 561 (Nov. 1, 1997).

[81] *Id.* at 38 (Jan. 15, 1988).

[82] *Id.* at 193 (Nov. 1, 1989).

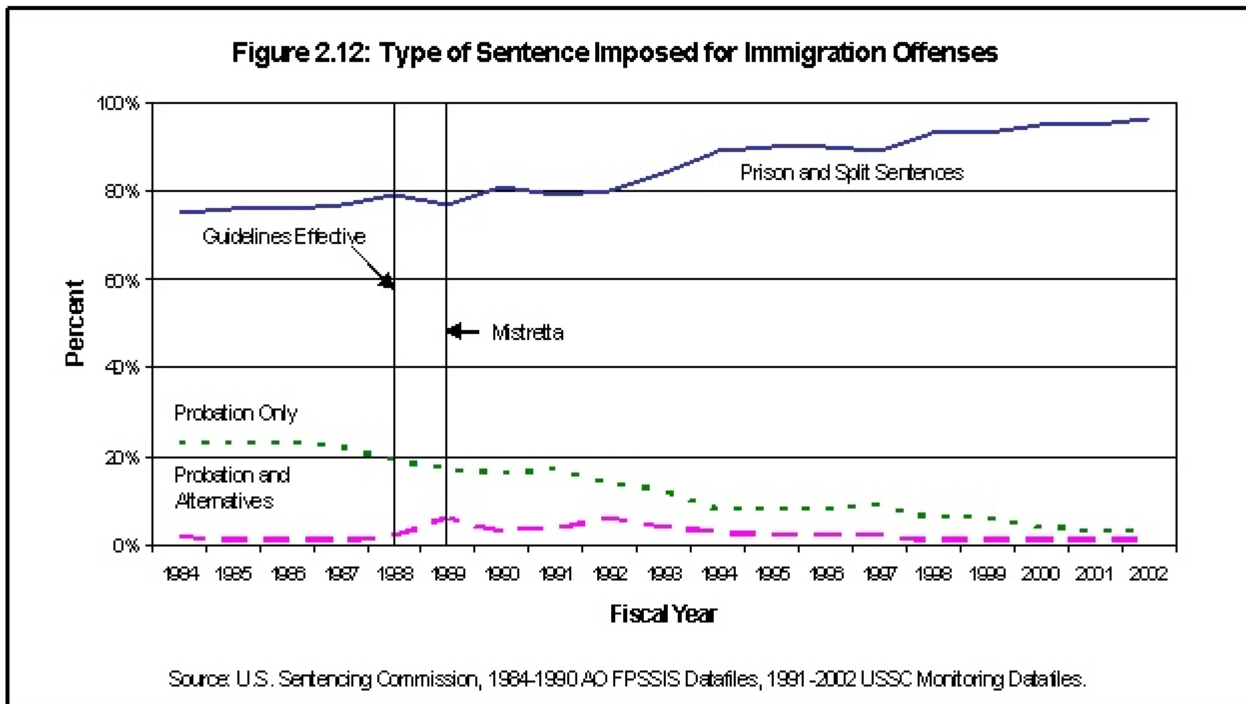
[83] *Id.* at 375 (Nov. 1, 1991).

[84] *Id.* at 562 (Nov. 1, 1997).

[85] *Id.* at 632 (Nov. 1, 2001).

These amendments, especially the enhancement for prior aggravated felonies, and when coupled with the elimination of petty immigration offenses from the guidelines, explain why the original impact projections for the immigration guidelines underestimated the percentage of offenders who would be sentenced to prison and the length of time they would serve (Gaes, et al., 1992; Gaes, et al., 1993). They also explain the trends visible in Figures 2.12 and 2.13, which show the percentage of offenders receiving each type of sentence and the length of prison time likely to be served for all types of immigration offenders combined.

Use of imprisonment. The use of imprisonment in immigration cases is affected by the fact that many offenders are non-resident aliens. Lacking a legal home in the United States, many are incarcerated even prior to sentencing. Immediate deportation has also become a frequent response for those individuals arrested for illegal entry (BJS, 2002c). Figure 2.12 shows that there has been a gradual increase in the use of imprisonment throughout the period of study, reflecting a gradual decrease in the use of simple probation. Legislative and Commission changes to these penalties have focused on increasing offense levels. This has pushed greater numbers of offenders into the zones of the Sentencing Tables in which probation and alternative sentences are unavailable. Even when these alternatives are available, non-resident aliens are generally unable to participate in alternative confinements such as home confinement due to their lack of a home in the United States and their high risk of flight from community detention.



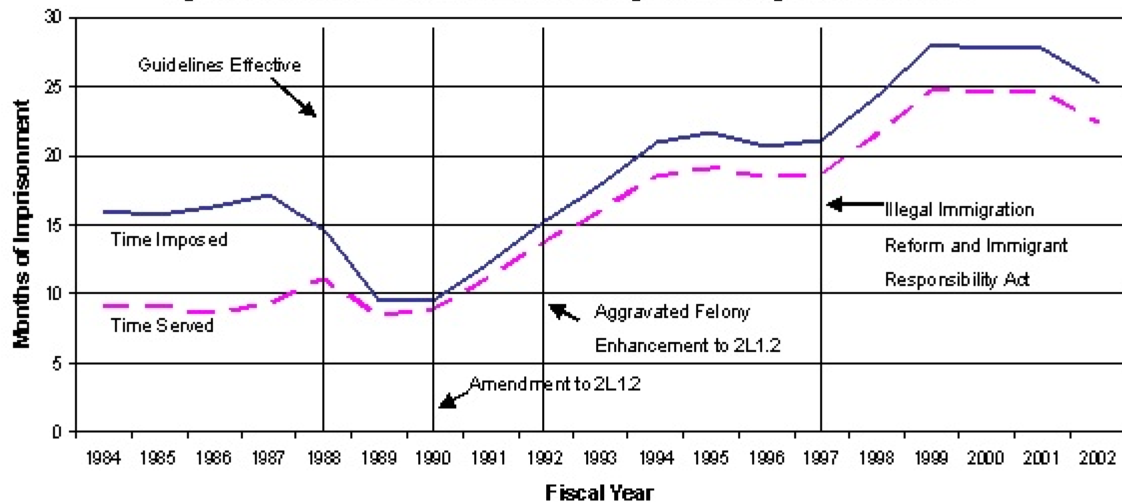


Figure 2.13: Mean Prison Sentence Length for Immigration Offenses
Months of Imprisonment
Guidelines Effective
Time Imposed
Time Served
Illegal Immigration
Reform and Immigrant
Responsibility Act
Aggravated Felony
Enhancement to 2L1.2
Amendment to 2L1.2
Fiscal Year
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

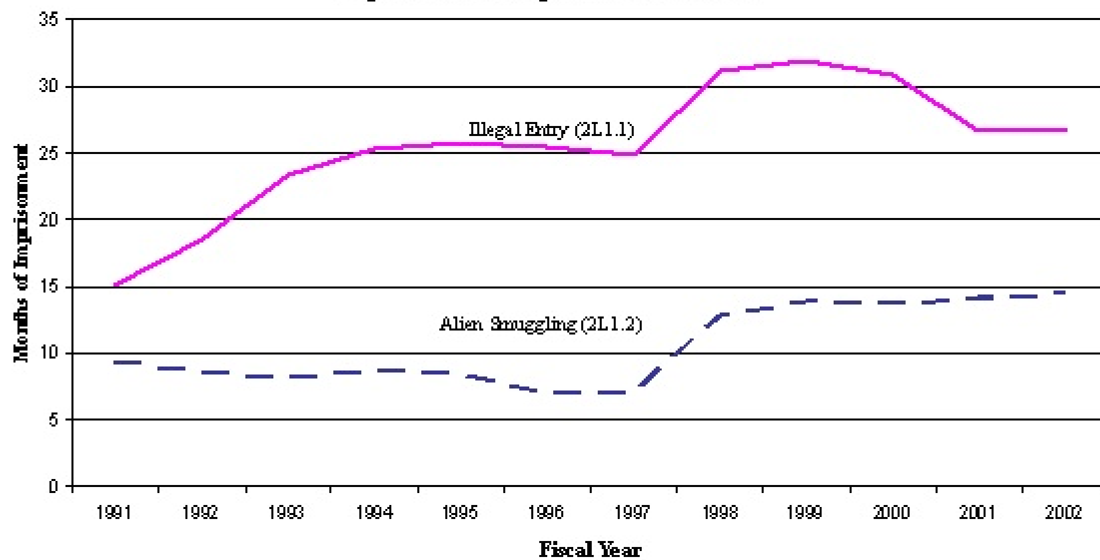


Figure 2.14: Immigration Time Served
Months of Imprisonment
Illegal Entry (2L1.1)
Alien Smuggling (2L1.2)
Fiscal Year
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

Length of Time Served. As discussed above, the original immigration guidelines did not deviate substantially from past practice. The amount of time served actually decreased slightly with guidelines implementation. However, subsequent revisions to the guidelines significantly increased penalty levels. As shown in Figure 2.13, the average length of time served by immigration offenders nearly tripled between 1990 and 2001.

The average length of time served by immigration offenders nearly tripled between 1990 and 2001.

Figure 2.14 displays trends in the average length of time served for alien smuggling and illegal entry separately. Both guidelines have experienced considerable increases in the amount of time served. Illegal entry offenders experienced the first wave of sentence increases in the early 1990s as the guideline amendments enacted in those years became effective. Alien smuggling experienced a steep increase in 1998, as the amendment promulgated pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 took effect.

4. Firearm trafficking and possession

Guns in violent and drug trafficking offenses. The federal criminal code contains a variety of provisions proscribing the possession, use, and trafficking of firearms. In the last two decades, congressional attention has focused on 18 U.S.C.§ 924(c), which provides for a mandatory minimum penalty for offenders who use, carry, or possess a firearm "during and in relation to" a drug trafficking or violent crime. The predecessor to this provision was enacted by Congress in 1968 and originally required a one- to ten-year mandatory prison term for using or carrying a firearm during the commission of a violent felony. In 1984, the statute was amended to require at least five years' imprisonment, to be served consecutive to the sentence for the underlying offense. In 1986, the statute's scope was expanded to include drug trafficking offenses, and additional penalties were added. Further amendments in 1988, 1990, and 1994 required sentences of twenty years to life imprisonment for offenders with prior convictions.

In 1998, in response to a U. S. Supreme Court decision that had narrowly construed the "use" criteria,[86] the statute's scope was again expanded to include "possession in furtherance" of the underlying offense. Penalties were again increased for brandishing or discharging a firearm during a crime, among other things.[87] These sentencing enhancements have been incorporated into the guidelines (Hofer, 2000). In this chapter, the effects of 18 U.S.C. § 924(c) are included in the data for drug trafficking and violent crimes presented in other sections of this chapter.

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[86] Bailey v. U. S., 516 U.S. 137 (1995).

[87] Pub. L. No. 105–386, 112 Stat. 3469 (Nov. 13, 1998).

Firearm trafficking and possession or transfer to prohibited persons. Federal statutes also define two other broad types of firearm offenses. Federal law regulates transactions in firearms and imposes record-keeping and other requirements designed to facilitate control of firearm commerce by the various states. Failure to abide by these federal regulations is a federal crime. In addition, possession of a firearm by certain classes of persons, such as felons, fugitives, or addicts, is prohibited.[88] Knowingly transferring weapons to these persons is also prohibited. Congress has been somewhat less active in sentencing for these offenses over the last two decades than it has for drug trafficking, economic, or sex offenses. But the Commission has chartered several staff working groups concerning sentencing policy for these issues. The Department of Justice and the Bureau of Alcohol, Tobacco, and Firearms have also been active, both in collaborating with the Commission on the development of sentencing policies, and in organizing Task Forces, such as Project Triggerlock, Project Weed and Seed, and Project Exile, which utilize the federal firearm statutes to target dangerous offenders.

The Commission originally based the guidelines for these firearm offenses on its study of past practices (USSC, 1987). Soon thereafter, however, the Commission undertook several major revisions of firearms guidelines, which resulted in significant severity increases over historic levels. In 1990, the Commission increased the base offense level applicable to some offenses.[89] In 1991, the Commission again increased penalties and reorganized the guidelines by consolidating them into a single provision, USSG §2K2.1, which was created to handle most firearm trafficking and possession offenses.[90] The base offense level was linked to the statute of conviction, and enhancements were provided based on the number of firearms trafficked and other aggravating factors. Several later amendments clarified this basic structure.

In the Violent Crime Control Law Enforcement Act of 1994, Congress created several new offenses involving the possession or transfer of firearms to juveniles and expanded the list of persons prohibited from possessing firearms. It also directed the Commission to increase penalties for offenses involving semiautomatic weapons. The Commission amended USSG §2K2.1 in response to these directives.[91] The most recent amendments track statutory changes expanding the class of persons prohibited from possessing firearms and further increasing penalties.[92] In 2001, at the suggestion of the Bureau of Alcohol, Tobacco, and Firearms, penalties were increased for trafficking offenses involving more than 100 weapons.[93]

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[88] 18 U.S.C. § 922(g).

[89] USSG, App. C, Amend. 333 (Nov. 1, 1990).

[90] *Id.* at 374 (Nov. 1, 1991).

[91] *Id.* at 522 (Nov. 1, 1995).

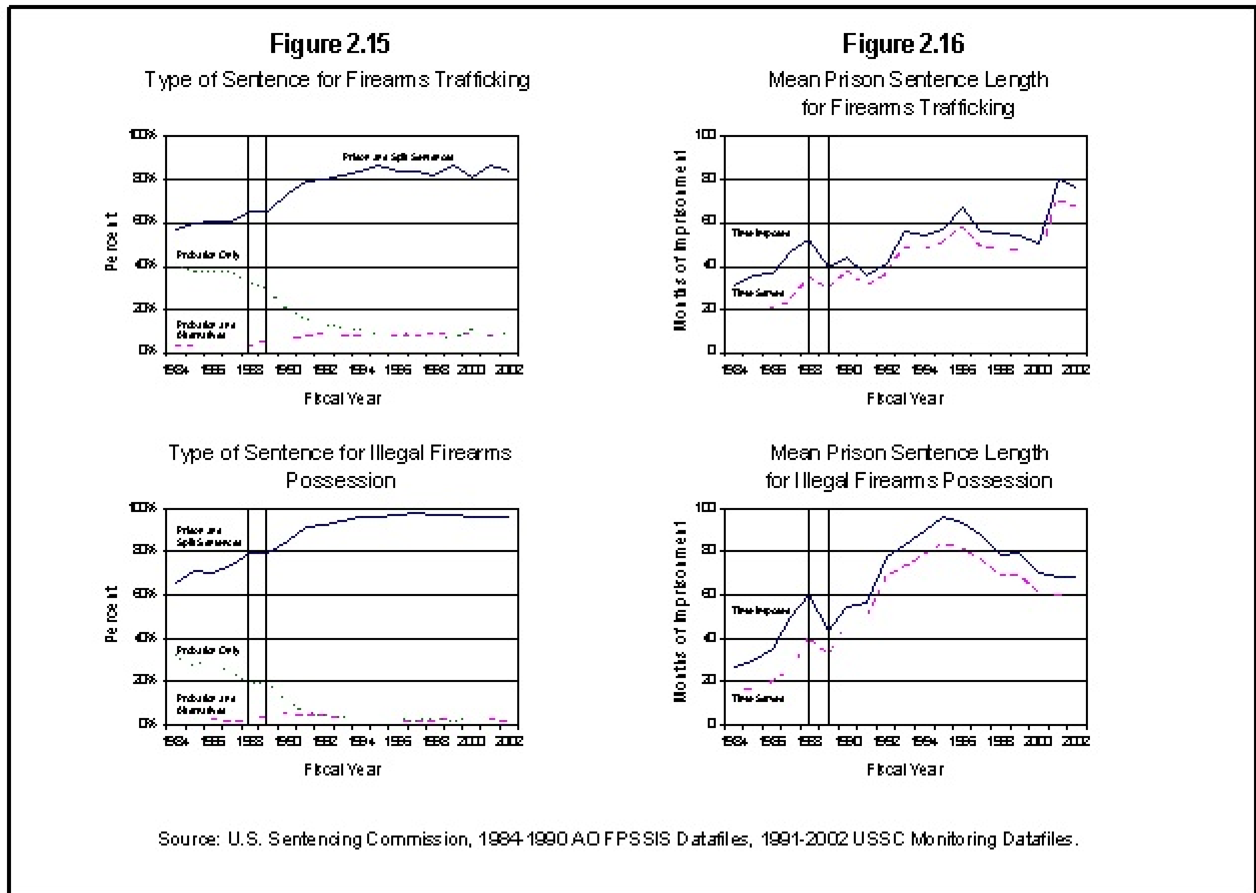
[92] *Id.* at 578 (Nov. 1, 1998).

[93] *Id.* at 631 (Nov. 1, 2001).

Use of imprisonment and length of time served. Figure 2.15 shows changes in the percentage of firearm trafficking and possession offenders who receive sentences of imprisonment, probation, and intermediate sanctions. For traffickers, the use of probation has been steadily reduced to about one-quarter of its preguidelines level, replaced by imprisonment and, to a lesser extent, intermediate sanctions. For illegal possessors, probation has been replaced almost completely by imprisonment.

> ***By 2000, prison terms for firearm offenders were about double what they had been in the preguidelines era.***

Figure 2.16 shows changes in the length of time served. After a period of volatility and decline in trafficking sentences in the first years of guideline implementation, when the guideline was being reconsidered and redesigned by the Commission, time served began a steady climb in fiscal year 1992, the year the Commission's major revision to USSG §2K2.1 became effective. The subsequent amendments to the guideline have continued to increase sentence severity. By 2000, prison terms were about double what they had been in the preguidelines era. The severity increases for possession offenses were equally dramatic, doubling between 1988 and 1995.

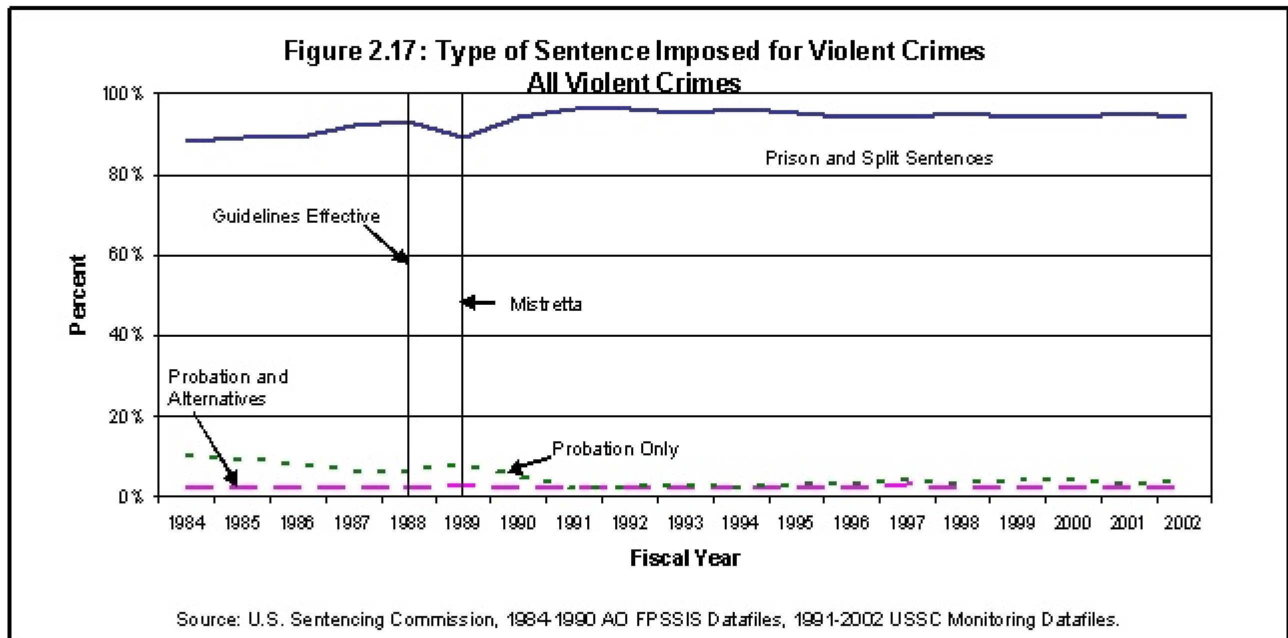


Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

5. *Violent Crimes*

Unlike the state courts, the federal courts sentence relatively few offenders convicted of violent crimes. In 2001, murder, manslaughter, assault, kidnaping, robbery, and arson constituted less than four percent of the total federal criminal docket. Due to the unique nature of federal jurisdiction over these types of crime, a sizeable proportion of murder, assault, and especially manslaughter cases involve Native American defendants. The most common federal violent crime is bank robbery, which has long been of special concern to federal law enforcement.

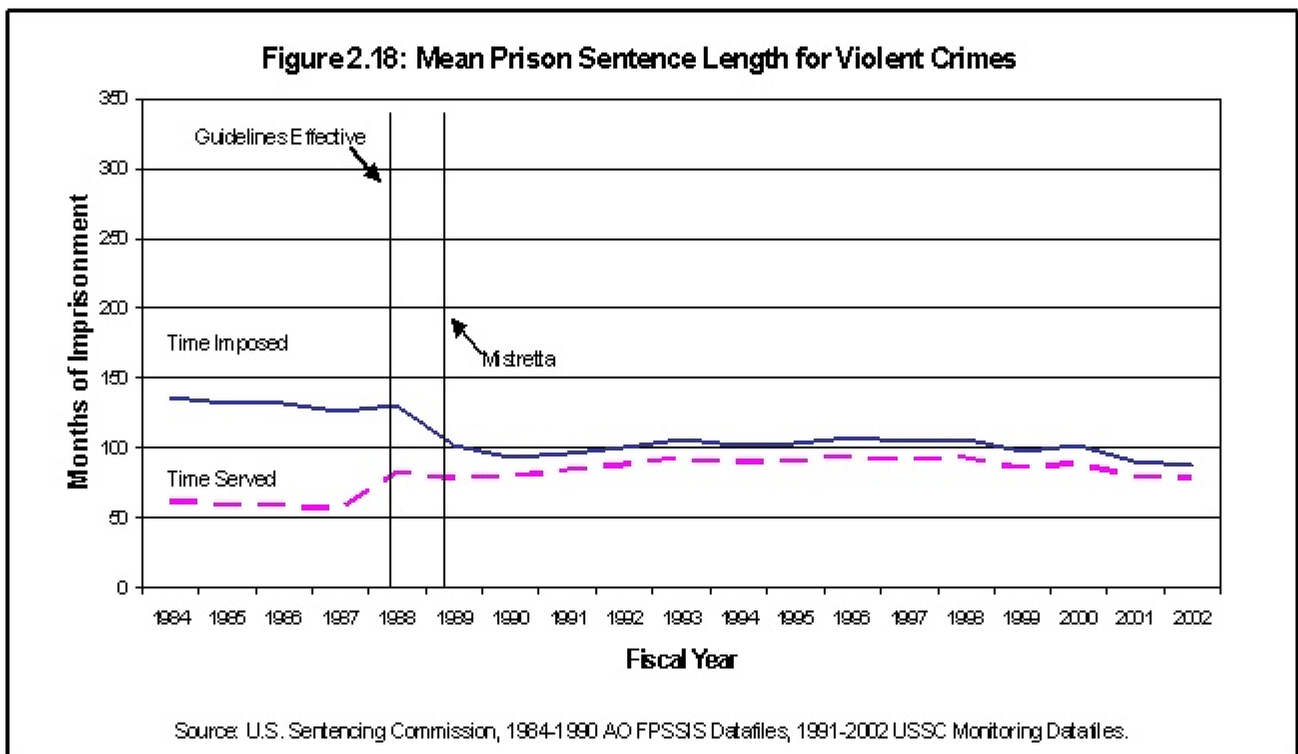
While not expressly directing a change in federal sentencing practices for violent offenses, the SRA and numerous other penalty statutes display a special concern with violent crimes.[94] In addition, "the Commission was careful to ensure that average sentences for such [violent] crimes at least remained at current levels, and it raised them where the Commission was convinced that they were inadequate" (USSC, 1987, 18-19). For robbery, the Commission found from its study of past practices that bank robbers and muggers were treated differently. Lacking a principled reason why this should be, it increased the sentences for personal robbery to make them more proportional to those for bank robbery while still recognizing the greater seriousness of offenses against financial institutions (USSC, 1987, 18). For murder and aggravated assault, the Commission felt that past sentences were inadequate since these crimes generally involved actual, as opposed to threatened, violence (USSC, 1987, 19).



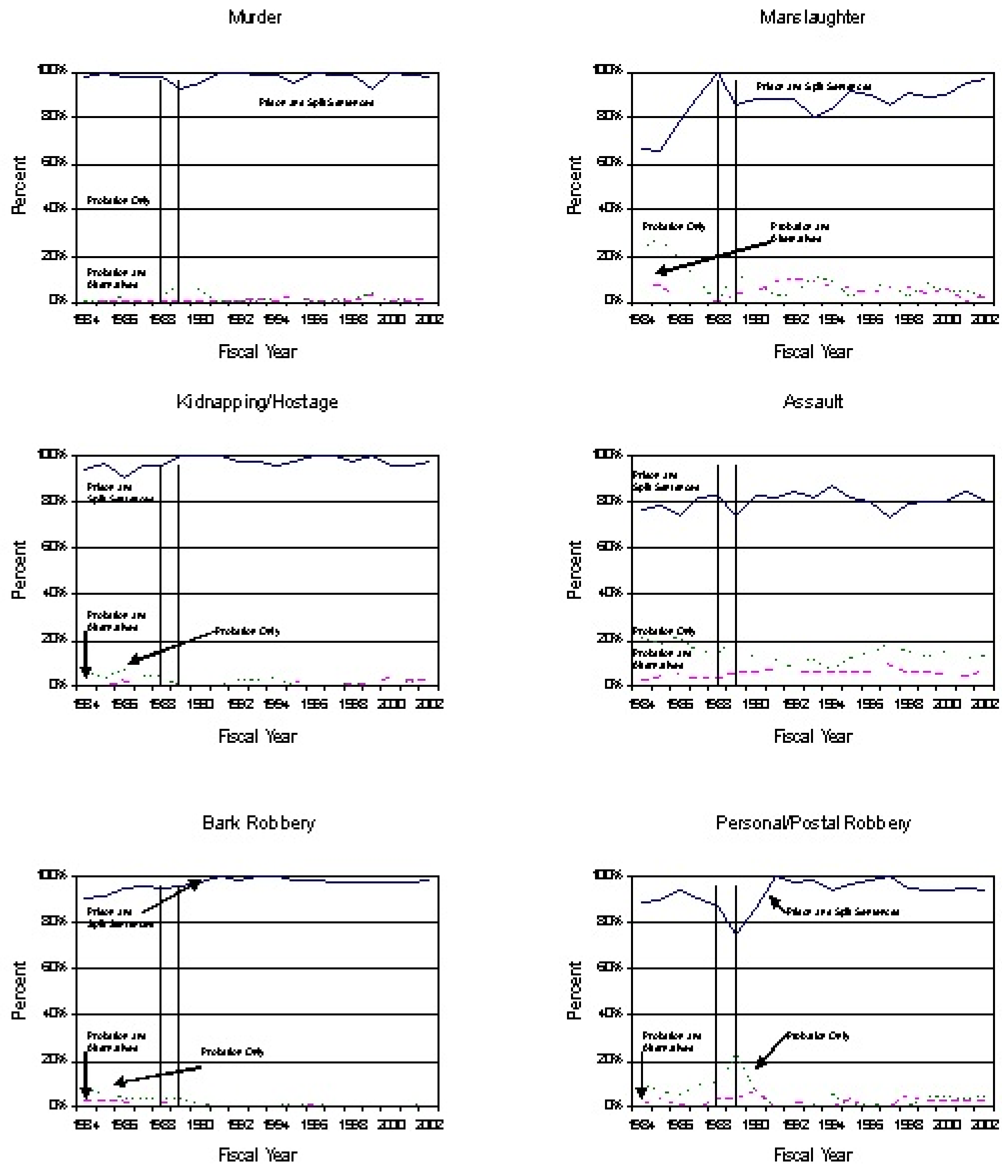
[94] *See e.g.,* 28 U.S.C. § 994(h)(1)(A) and § 994(j); 18 U.S.C. § 924(c).

Use of imprisonment. Figure 2.17 and the accompanying thumbnails in the following pages show that, for most violent offenses, rates of imprisonment have always been high and they have remained so under the guidelines. Only manslaughter, the violent offense for which Native Americans are most highly represented, contained room for significant growth in incarceration rates. The use of alternatives to imprisonment for manslaughter cases has been steadily reduced under the guidelines, and now occurs in less than ten percent of cases. Kidnaping and murder have imprisonment rates between 90 and 100 percent, with arson and assault somewhat lower. The imprisonment rate for bank robbers climbed from the mid- to the high-90s under the guidelines.

Length of time served. Figure 2.18 provides a striking example of the importance of examining time served rather than sentences imposed. Average prison sentences imposed on violent offenders actually decreased at the time of guideline implementation, but, due to the abolition of parole, the time served actually increased significantly. The greatest increases are seen for murder, kidnaping, bank robbery, and arson. The more stable prison term lengths for manslaughter partly reflect the larger proportion of these offenders who are receiving relatively short prison terms rather than an alternative sanction.

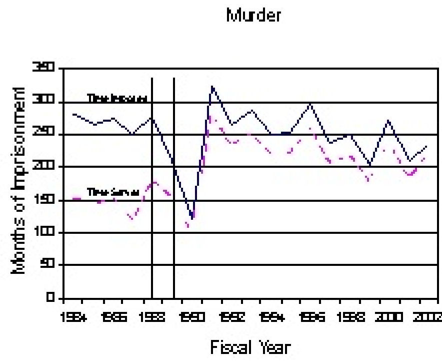


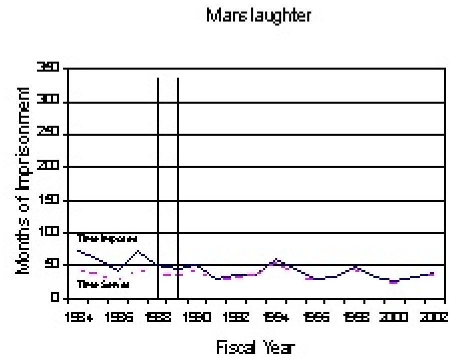
Type of Sentence Imposed for Violent Crimes

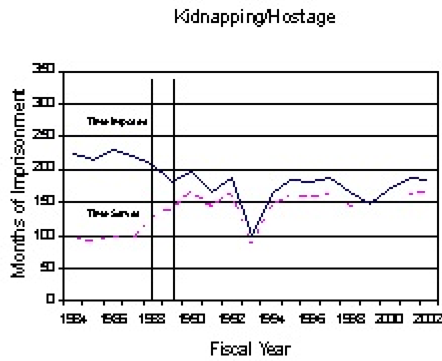


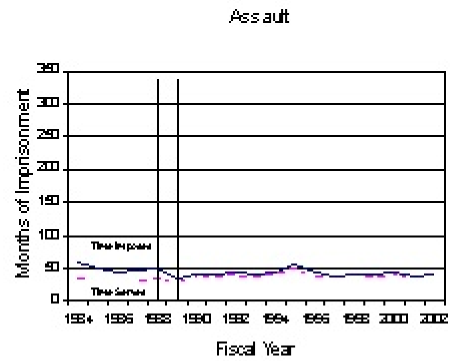
Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

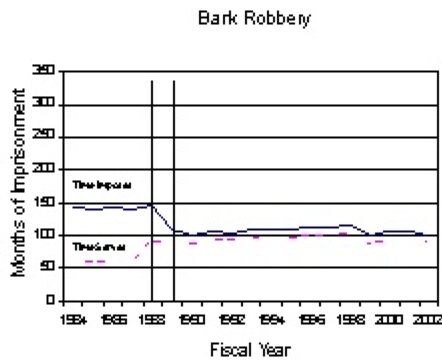
Mean Sentence Length for Violent Crimes

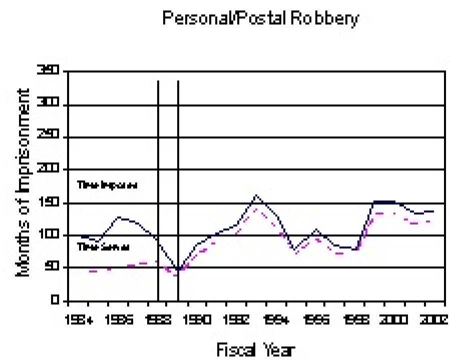












Source: U.S. Sentencing Commission, 1984-1990 AO FPSSIS Datafiles, 1991-2002 USSC Monitoring Datafiles.

6. *Sexual Abuse, Exploitation, and Transportation for Illegal Sexual Activities*

Frequent congressional involvement. Sexual offenses were among the first crimes to test the limits of federal criminal jurisdiction early in the twentieth century (*see* the "White Slave Traffic Act" of 1910, popularly known as "the Mann Act"), and Congress has shown a continuing interest in the federal prosecution of sex crimes. In recent decades, concern has focused on sex offenses involving minors. As shown in Appendix B, Congress has legislated frequently on this issue and at times in rapid succession during the guidelines era. Much like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses. In the PROTECT Act of 2003, Congress, for the first time since the inception of the guidelines, directly amended the *Guidelines Manual* and developed unique limitations on downward departures from the guidelines in sex cases.

Direct congressional control over sentencing policy for sex offenses has increased throughout the guidelines era.

A brief history of just the major sex offense sentencing legislation from the past ten years gives a sense of the frequency and complexity of congressional actions. The Sex Crimes Against Children Prevention Act of 1995 directed the Commission to increase guideline offense levels for crimes involving child pornography, prostitution, and the use of a computer.[95] The Commission amended the guidelines effective November 1, 1996, and also recommended several statutory changes for congressional consideration designed to improve guidelines operation.[96] That same year, however, the Amber Hagerman Child Protection Act and the Child Pornography Act of 1996, while adopting some Commission recommendations, also added new mandatory minimum penalties, including "two-strikes-you're-out" life imprisonment for a second conviction of coercive sexual abuse of a child under the age of 16 years.[97]

In 1998, Congress again directed the Commission to raise penalties for a wide variety of sex offenses, including those involving travel or transportation, the use of a computer, or misrepresentation of the perpetrator's identity.[98] Penalties were directed to be increased for offenders who engaged in a "pattern of activity involving sexual abuse or exploitation of a minor." The Commission responded with a comprehensive revision of the sex offense guidelines, effective November 1, 2000,[99] including significant across-the-board penalty increases and creation of a new, severe guideline, section 4B1.5,

[95] Pub. L. No. 104–71, 109 Stat. 774 (Dec. 23, 1995).

[96] USSG, App. C, Amends. 537 & 538 (Nov. 1, 1996).

[97] Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996). *See generally* 28 U.S.C. § 2241(c).

[98] Pub. L. No. 105–314, Title V., §§ 501 to 507, 112 Stat. 2974 (Oct. 30, 1998).

[99] USSG, App. C, Amend. 592 (Nov. 1, 2000).

for "Repeat and Dangerous Sex Offenders."[100] Offenders convicted of serious sex offenses with previous convictions for sex offenses were made subject to severe penalties, typically requiring twenty or more years in prison. Offenders who engaged in a "pattern of activity" were also subject to severe penalties, regardless of whether the previous activity had resulted in a conviction. "Pattern of activity" was defined as two separate occasions of sexual activity with at least two separate minors. This definition was crafted to target pedophiles who seek out multiple minor victims, rather than "opportunistic" offenders who engage in sexual activity with the same minor on more than one occasion. These "opportunistic" offenses were found to be typical, in the federal system, of offenses involving Native Americans.

In the PROTECT Act of 2003 more mandatory minimum penalties were added and existing statutory minimums and maximums were again increased. The "two-strikes-you're-out" provisions were expanded to include most federal sex offenses against any person under 18 years of age. The definition of "pattern of activity" was revised to include engaging in sexual activity with multiple minors or with any single minor on more than one occasion. In addition, Congress dramatically restricted the permitted grounds for departure below the guideline range for sex offenses.[101] The Commission implemented provisions of this Act in 2003.[102]

The frequent mandatory minimum legislation and specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress. The guideline amendments effective on November 1, 2000, will have affected only some cases in the final year of data in the following graphs. None of the changes in the PROTECT Act will be apparent in these data.

Growth of the Internet. Part of the explanation for the flurry of sex offense legislation in the last fifteen years has been the rapid growth of the Internet, which occurred almost simultaneously with implementation of the guidelines. The Internet has been used to facilitate distribution of illegal pornography and for communication among sex offenders and their potential victims. Congress passed the Child Protection and Obscenity Enforcement Act in 1988 to help control misuse of the new technology, and subsequent legislation has focused on strengthening law enforcement and increasing penalties for computer-distributed and computer-generated images.

A special Task Force of the FBI, "Innocent Images," was developed to target pedophiles by using computer-based investigations. Prosecutions resulting from these investigations are often brought under the provisions of Chapter 117 of Title 18, United States Code (the modern revision of the Mann Act), which prohibit transporting persons or traveling interstate to engage in prohibited sexual activities. Recently amended provisions of Chapter 117 prohibit use of the mails or any facility of interstate

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[100] *Id.* at 615 (Nov. 1, 2001).

[101] Pub. L. No. 108–21, 117 Stat. 650 (April 30, 2003).

[102] USSG, App. C, Amend. 651 (Oct. 27, 2003).

commerce to persuade or entice a minor to engage in prohibited sexual conduct, or to transmit information about a minor that might encourage any person to engage the minor in prohibited sexual activity.

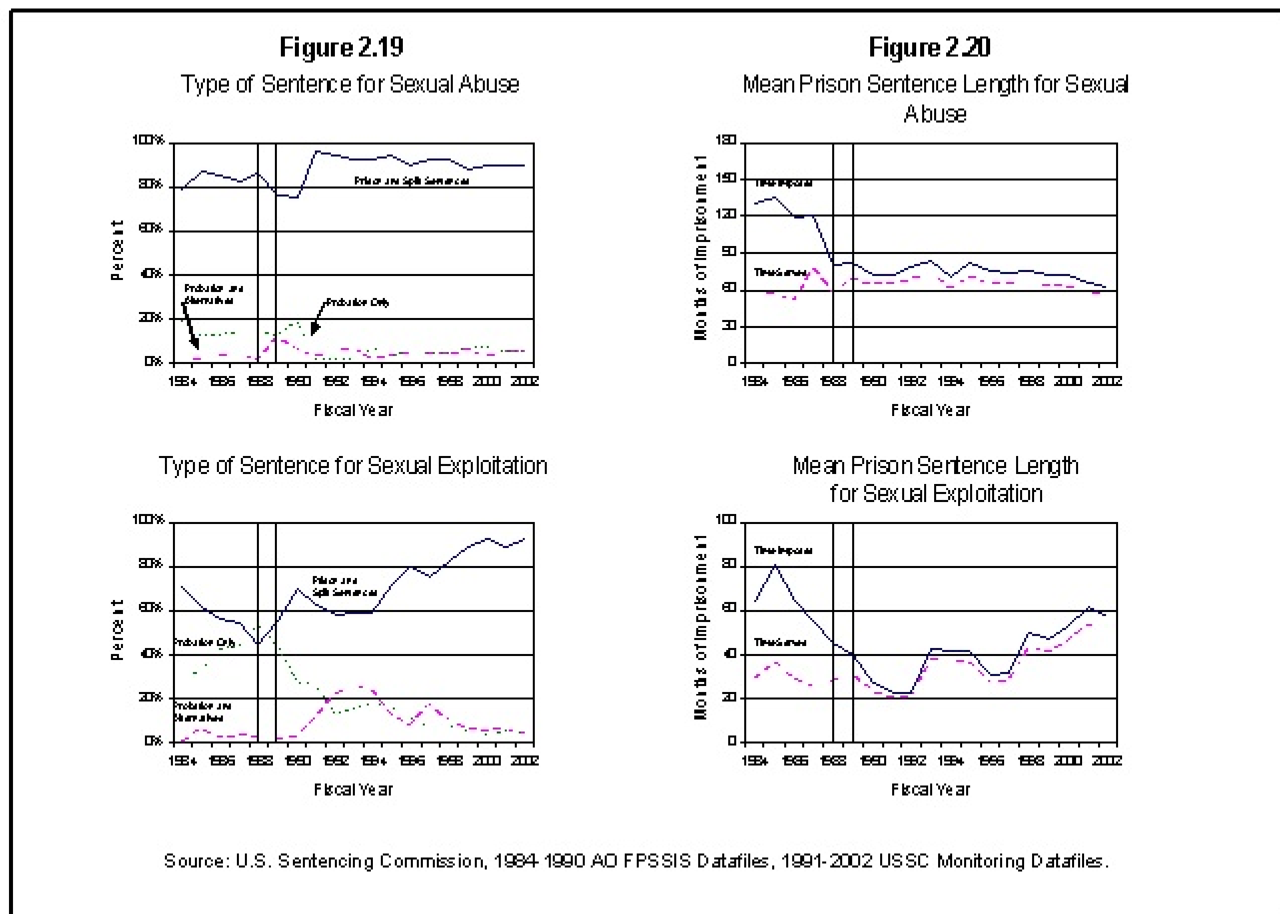
Sexual exploitation and sexual abuse. Other *sexual exploitation* offenses are prosecuted under Chapter 110 of Title 18, United States Code. Sexual exploitation offenses involve the production of child pornography or the exploitation of children for the purposes of prostitution or pornography production, as opposed to *sexual assault* offenses, which involve sexual contact between the offender and victim. Trafficking and possession of child pornography by any means, including but not limited to the Internet, also are prosecuted under these provisions.

A significant number of additional offenses come to the federal courts through federal jurisdiction over Native American lands, military bases, and federal parks. These are usually *sexual abuse* cases, involving what are commonly called rape, statutory rape, and molestation. These are prosecuted under Chapter 109A of Title 18 United States Code. As a result of this special federal jurisdiction, the majority of defendants sentenced for these crimes in the federal courts are Native Americans, with the vast majority in the districts of New Mexico, Arizona, and South Dakota. In 2001, 63 percent of the offenders subject to these sentences were Native Americans.

In practice, some cases might be prosecuted under a number of alternative statutory provisions. The guidelines contain cross-references so that, for example, a conviction for traveling to engage in prohibited sexual conduct with a minor will be sentenced under the guideline for sexual abuse, or attempted sexual abuse, if that guideline better captures the defendant's real offense behavior. When describing historic trends extending to preguidelines practice, however, cases must be grouped according to their statutes of conviction.

Use of imprisonment and prison time served. The thumbnail graphs, Figures 2.19 and 2.20, show the percentage of sexual abuse offenders and sexual exploitation offenders who receive each type of sentence as well as changes in the sentences imposed and time actually served. The percentage of offenders receiving imprisonment increased for both types of offenders, and dramatically so for sexual exploitation offenders who are subject to the recent crackdowns on child pornography. Fewer than ten percent of either type of offender receives probation or intermediate sanctions.

Sentences imposed on sexual abuse offenders show the same decreases observed for violent offenders, but time actually served has remained fairly constant throughout the period of study. The average length of time served for sexual exploitation, however, has increased by twenty months from its preguidelines level.



E. Certainty, Severity, and the Scale of Imprisonment

1. Policymaking in the Guidelines Era

A mix of independent and joint actions. The preceding survey of sentencing trends for different offenses reveals a mixed pattern of policymaking by both Congress and the Sentencing Commission. Continuity with past practices, or changes from them, often can be traced to particular decisions by the Commission when it drafted or amended the guidelines. The Commission chose to keep prison terms for many types of crimes consistent with historic levels, as revealed by its study of past practices. But for several offenses, notably firearm and certain violent offenses, the Commission chose to increase penalties. Among economic crimes, the Commission reduced the use of simple probation for "white

collar" offenses while lowering sentences for some other property crimes in order to eliminate disparity that it detected in past practice. For still other offenses, particularly alien smuggling and illegal entry, separate actions by both the Commission and Congress resulted in significant increases in sentence severity at repeated points over the past fifteen years.

For several important offenses, however, it is impossible to disentangle the effects of Commission actions from those of Congress. Mandatory minimum penalties directly control the sentence in many cases, but their greatest influence is indirect. Mandatory minimum statutes highlight certain case characteristics, such as drug quantity, and establish offense severity levels that the Commission incorporates within the guidelines structure. In addition, as shown by congressional directives to the Commission listed in Appendix B, Congress has influenced policymaking through a variety of other methods, including changes to statutory maximums accompanied by instructions to the Commission to amend the guidelines, general "sense of the Congress" resolutions, and specific directives to amend the guidelines in particular ways. The Commission has invariably followed congressional directives and has taken care to ensure that all its actions conform to law.

Sentencing and prison populations. The changes in sentencing policy occurring since the mid-1980s—both the increasing proportion of offenders receiving prison time and the average length of time served—have been a dominant factor contributing to the growth in the federal prison populations depicted in Figure 2.1. Given that drug trafficking constitutes the largest offense group sentenced in the federal courts, the two-and-a-half time increase in their average prison term has been the single sentencing policy change having the greatest impact on prison populations. Increases for other crimes, such as firearms, also have been significant (Blumstein & Beck, 1999).

Sentencing policy is not the only factor contributing to prison population increases, however. Sheer growth in the federal criminal docket has also been a major influence. The number of cases referred to United States Attorneys for prosecution has grown considerably during the guidelines era, reflecting increased resources appropriated for federal law enforcement (BJS, 2001). No decrease in federal prosecution rate or increase in declination rate, while varying somewhat from crime-to-crime and year-to-year, has offset the growth in the number of cases referred for prosecution. The result is dramatic growth in the number of offenders convicted and sentenced in federal court. For example, the number of drug trafficking offenders sentenced in federal court increased from just under 5,000 cases in 1984 to nearly 25,000 cases in fiscal year 2001.

This growth in the federal criminal docket is *not* a reflection of rising crime rates; indeed, throughout the 1990s, the national crime rate decreased, as measured both by the Uniform Crime Reports and the National Victimization Survey. Similarly, the number of daily and monthly users of most types of drugs, and by inference the number of drug dealers, has declined throughout the guidelines era (BJS, 2001). The federal criminal justice system simply is handling an increasing proportion of a decreasing number of criminals in the United States and imposing increasingly severe penalties upon them.

2. *Sentencing Guidelines: A New Instrument of Policy Control*

As described at the beginning of this chapter, studies of the "scale of imprisonment" have questioned whether imprisonment rates vary as a result of conscious policymaking or from cultural and historical forces beyond human control (Zimring & Hawkins, 1991). The different trends for different offense types reviewed in the previous section certainly suggest that federal prison population growth in the guidelines era has resulted in significant part from deliberate policy choices made by Congress and the Sentencing Commission. The growth could have been less, or more, but the choices that were made substantially increased the certainty and severity of punishment for many types of crimes, and for some crimes quite substantially.

While it is often impossible to disentangle the influences of Congress and the Commission on sentencing practices, it is important to note that the data demonstrate that the guidelines can control and change sentencing practices even in areas where there are no mandatory minimum penalty statutes. Because they take into account many more factors than the statutes, the guidelines create the potential for more precisely targeted policymaking than is possible through mandatory minimum penalty statutes.

Sentencing with explicit and detailed rules, instead of the largely unguided discretion of the preguidelines era, has created something that did not exist before: a precise legal instrument for policy control. One may agree or disagree with the policies the rules represent, but the creation of rules itself brings greater *transparency* to sentencing. This allows all interested parties—whether attorneys negotiating a plea agreement in a particular case, or officials managing the prison population—to better understand and predict federal sentencing practices (Goldsmith & Gibson, 1998).

To date, the guidelines have been used, often pursuant to explicit congressional directives, to increase the certainty and severity of punishment for most types of crime. They could, however, be used to advance different goals, that also are mentioned in the SRA: "For example, the guidelines could be structured and managed "to minimize the likelihood that the federal prison population will exceed the capacity of the federal prisons, as determined by the Commission."[103] Some commentators have argued that the Commission neglected this goal (Parent, 1992), while others argue that this "capacity limitation" was given a low priority in the SRA as finally enacted (Stith & Koh, 1993). To date, Congress has proven willing to appropriate the funds needed to expand the capacity of the federal prisons to the levels needed to accommodate expanded federal prosecution and increased sentence severity.

If policymakers choose to limit prison growth in the future, however, the guidelines provide a precise instrument for controlling federal sentencing policy. Controlling prison populations and correctional budgets, while protecting the public by reserving prison space for the most dangerous offenders, has been one of the noteworthy successes of sentencing reform and sentencing guidelines

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[103] 28 U.S.C. § 994(g).

in the states (Wright, 2002). If controlling the scale of federal imprisonment becomes a priority in the future, the guidelines are in place to shape sentencing practices to the evolving needs of the system.