Circuitous Thinking

SEND JUDGES TO *BOOKER/FANFAN* RE-EDUCATION CAMP

by Richard Ware Levitt

Richard Ware Levitt is a criminal defense lawyer in private practice in Manhattan.

During China's Cultural Revolution (1966-69) millions were sent to re-education camps to rid them of bourgeois thinking. I'm not suggesting anything quite so jarring, but a little post-*Booker* re-education seems to be in order to rid judges of "mandatory Guidelines thinking."

The task of re-education might be somewhat different for judges who were judging in the pre-Guidelines era and those who never before tasted freedom. But, for both groups, a good place to start is to compare sentences pre- and post-Guidelines, which is the subject of this article. Some caveats: Of course, the re-education process will involve much more than simply educating courts to pre-Guidelines sentencing patterns. Additionally, we all must keep in mind that judges, under *Booker*, must still seriously "consider" the Guidelines as one of several factors relevant to the sentencing decision. *See* 18 U.S.C. § 3552(b). In other words, we are not returning to pure "almost anything goes" pre-Guidelines sentencing. And we must also understand that Congress' stated purpose in developing the Guidelines, along with other "innovations" such as mandatory minimums and the abolition of parole, was to increase terms of imprisonment for many offenses.

But *Booker* nonetheless frees judges to truly "individualize" sentences (at least where mandatory minimums are not in play) in a way they often could not when hogtied by the Guidelines, and will also permit them to mitigate the harshest and most unfair effects of Congress's sentence-lengthening strategies. As the Second Circuit said recently in *United States v. Crosby*, ___F.3d ___ (2d Cir. 2005), "there need be no 'fear of judging.'"

For reasons too obvious to waste ink explaining, defense attorneys inevitably will play the role of teacher in this re-education process. Our textbook for this article will be a November 2004 publication of the United States Sentencing Commission, "Fifteen Years of Guidelines Sentencing," subtitled, "An assessment of how well the federal criminal justice system is achieving the goals of sentencing reform." ("Guidelines Commission Report). You can download the report at: http://www.ussc.gov/15_year/15year.htm. This report provides a wealth of narrative information and statistics addressing the ebb and flow of sentencing theory and its implementation pre- and post-Guidelines.[1] Although the Commission lauds the Guidelines' effectiveness in changing sentences consistent with Congress' desire, generally, to put more people in prison for longer periods of time, it also provides importance guidance for lawyers and judges who want to understand just how harsh sentences have become compared to what they were for many decades before the mid-1980s.

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A Little History

We think of incarceration as being a terrible fate for malefactors, yet

Prisons initially were designed as a humane alternative to the more traditional forms of punishment popular in the Colonies, which included whipping, fines, banishment, and public humiliations, not to mention the death penalty. Prisons came into vogue after the Revolution as the "enlightened alternative" to "barbarous usages" for most offenses, and "penitentiaries" quickly evolved into places to rehabilitate. Ironically they also became victims of their own success: prisons soon became overcrowded and legislatures were not willing to sustain the funding levels required to maintain the rehabilitation model. Consequently, corporal punishment began to rear its ugly head as a method of dealing with the unruly prison mobs.

By the end of the Civil War most prisons were pretty grim places and they remained so for years to come. At the beginning of the twentieth century, however, reformist theories again took hold, resulting in indeterminate sentences, probation and parole.

Federal prisons were first built around this time – Leavenworth in 1897 and Atlanta in 1902 – and adopted these innovations as

well as others aimed at humanizing prison conditions. The Federal Bureau of Prisons was created in 1929. Rehabilitation again became a goal of the prison system, with parole determinations being made based on an inmate's progress toward rehabilitation.

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By the 1970s, however, the pendulum swung back once again, and the rehabilitation model yielded to determining sentences based principally on the seriousness of the offense and the defendant's risk of recidivism. And then, in the last quarter of the 20th century attention focused increasingly on uniformity and proportionality of sentences. The federal Parole Commission began developing release guidelines based on these overarching concerns. At first, efforts were made to substitute, where possible, non-incarcerative sentences such as home confinement or community service, but many continued to believe that imprisonment was required of virtually all except the most innocuous offenders to adequately punish and deter.

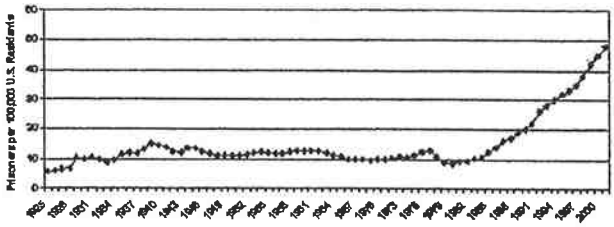
In the federal system, these concerns, and a belief that prison sentences were unreasonably lenient, led to three principal changes: mandatory minimum sentences for certain drug offenders and violent criminals, the abolition of parole, and the federal sentencing guidelines – "innovations" with which we are all too familiar.

Today, some 60 of every 100,000 persons in the United States are sentenced prisoners in a federal institution, and nearly 500 of every 100,000 persons are sentenced prisoners in either a state or federal institution. We've achieved these historically high numbers through a steady climb beginning around 1980, when President Reagan took office. Before 1980, however, the relative prison population had held more or less steady since at least as far back as 1925. Through good times and bad, war and depression, high crime rates and low crime rates, the rate of federal incarceration was around 12 out of every 100,000 and the rate of state and federal combined incarceration was about 100 out of every 100,000. And so, during the last 20 years these rates have increased at least four-fold.

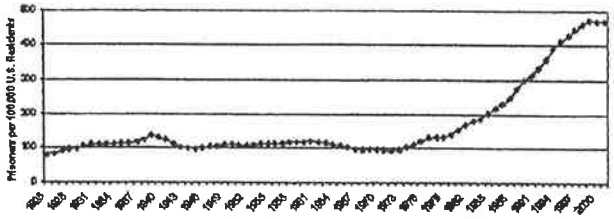
The federal prison system is now the largest incarcerator in the country, having surpassed California and incarcerating some 174,000 inmates.

Figure 2.1 graphs the changing numbers of sentenced prisoners in federal institutions between 1925 and 2000, as well as the combined federal-state numbers during this same period.

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 (1981).

The Effect of Federal Sentencing "Reforms"

The three aforementioned federal reforms – mandatory minimums, the abolition of parole and the federal sentencing guidelines – significantly increased the length of incarceration for the targeted federal inmates, and their overall impact was extraordinary. For example, previous to the abolition of parole, inmates served approximately half their sentence before being admitted to parole. The abolition of parole meant that inmates would now serve ap-

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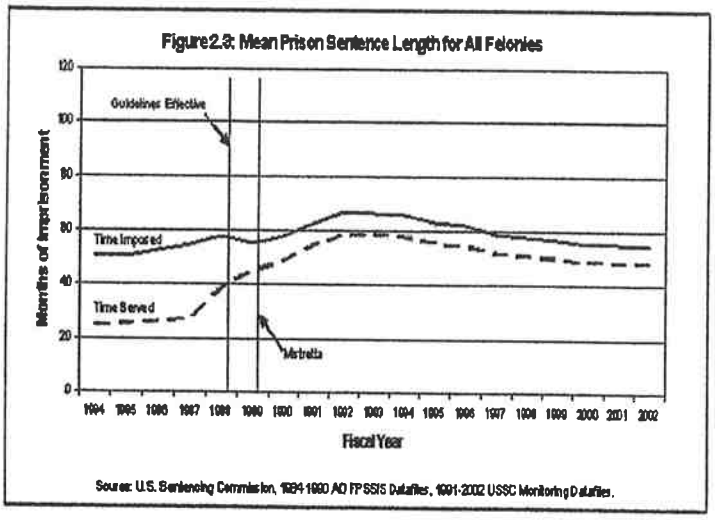
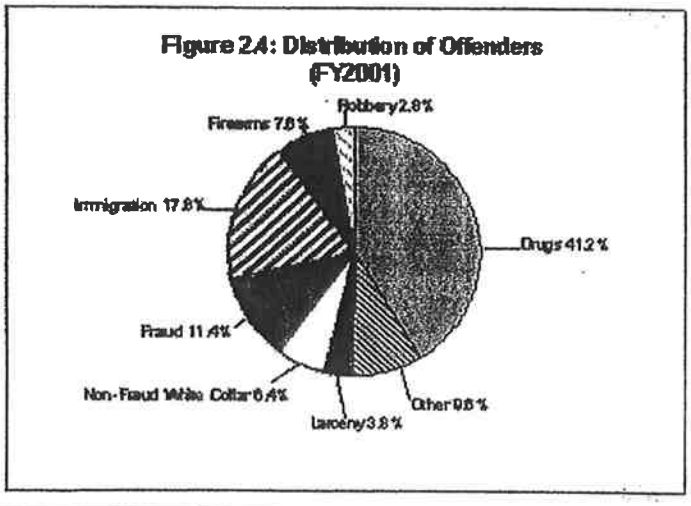
proximately 85% of their sentence. Thus, although Figure 2.3 suggests that the overall *sentence* imposed for felony convictions has increased only slightly, the *period of imprisonment* has markedly increased.[2] In the years previous to the abolition of parole and the implementation of the Guidelines the average period of felony incarceration was about 25 months. These "innovations" have doubled the length of incarceration.

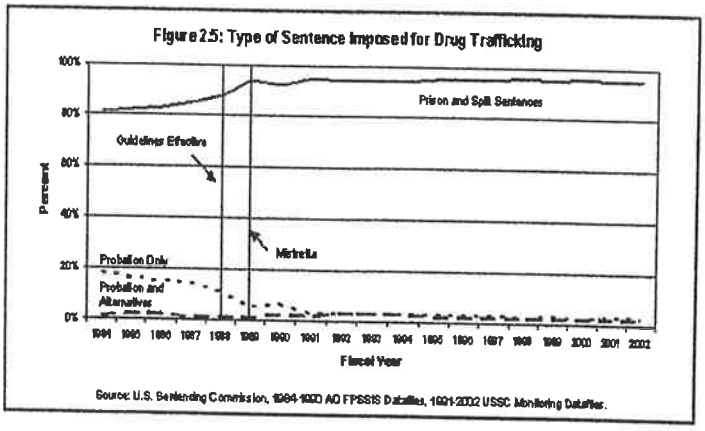


Obviously, figure 2.3 depicts averages and therefore does not tell the full story. Both Congress and the Guidelines Commission made several determinations regarding the adequacy of then-existing sentences and specifically targeted changes with respect to particular crimes. Thus offense levels for many crimes were calculated to maintain the current average time of incarceration, but a determination was made to substantially increase the period of incarceration for many of the most common offenses, including those targeting drug distribution, violence, white collar crime and immigration. Collectively these offenses account for some three quarters of federal offenders. (See Figure 2.4).

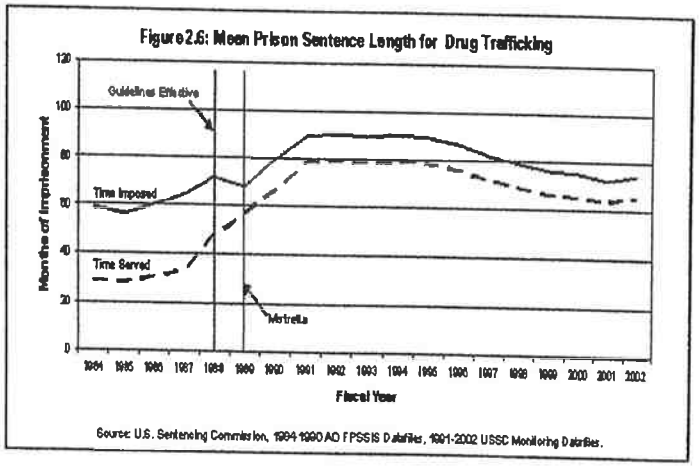


Drug Offenses.

During the past decade drug offenses alone have accounted for between 40 and 50% percent of federal offenders (this percentage has decreased as immigration crimes have increased, but the raw number of drug offenses continues upward). In the pre-guideline era, 15-20% of drug offenders received straight probation. Today, that number is less than 5% (See Figure 2.5).



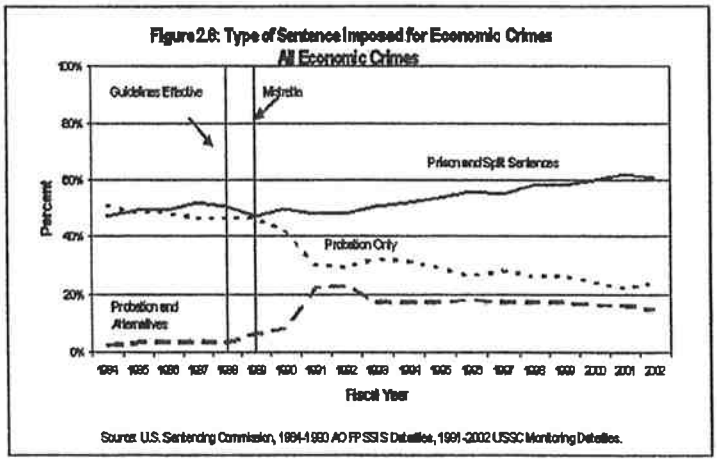
The actual length of incarceration for drug offenses has also more than doubled (Figure 2.6), peaking in the early 90s and then gradually decreasing (a trend explainable to some degree by the implementation of the safety valve, greater application of mitigating circumstances and lower median drug amounts for powder and crack cocaine as well as marijuana).



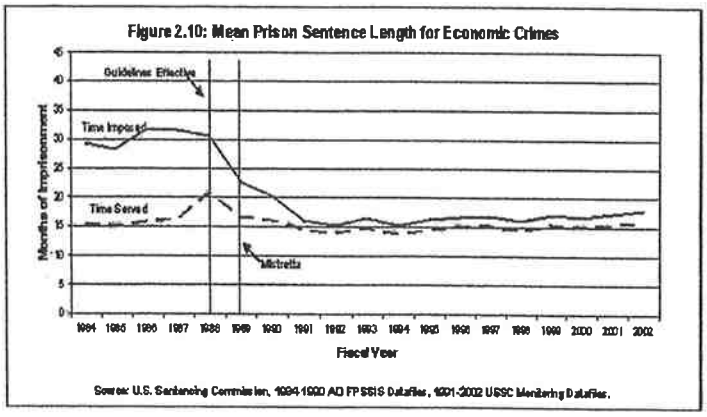
How much of the increase is attributable to mandatory minimums established in 1986 by the Anti-Drug Abuse Act (ADAA) and the recidivist statutes on the one hand, and by the Guidelines on the other hand, is hard to say. Initially it was anticipated that the ADAA would increase average drug sentences from 23 months to 48 months, and the career offender provision would increase sentences by nine months. The Guidelines were estimated to add only an additional month to drug sentences. According to the Commission Report, however, "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."

White Collar Crimes.

Also targeted for more certain and lengthier prison sentences were white collar offenders (as opposed to defendants convicted of common law-type theft). Pre-Guidelines, about 45% of all economic crimes offenders received straight probation. By 2001 that number fell to approximately 22% percent. (Figure 2.8).

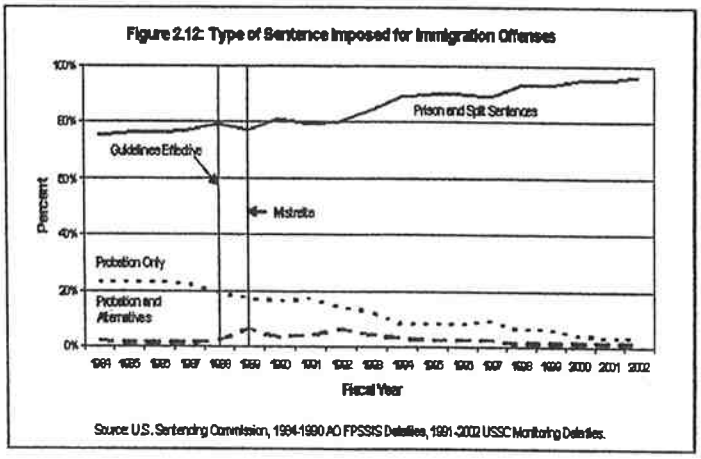


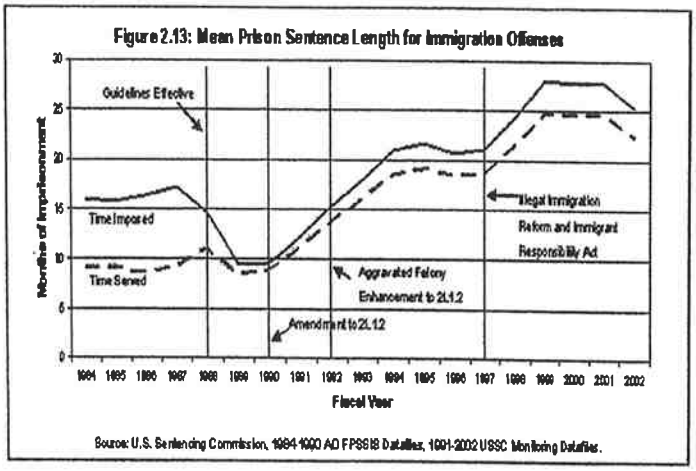
The average length of imprisonment for defendants convicted of all economic crimes in fact remained fairly constant from the period before the Guidelines until 2001. (See Figure 2.18) These figures are deceptive, however, as they include large numbers of offenders who previously would have received probation but who now receive short sentences – bringing the averages down below what they otherwise would have been. Additionally, statistics averaging sentences for all economic crimes don't tell the whole story, as the Commission determined to reduce sentence severity for simple theft, while increasing it for fraud, embezzlement and tax offenses – so-called white collar crimes, which the Commission believed historically had been treated too leniently. Additionally, the Commission has further amended the economic crime Guidelines during the last few years to increase the severity of sentences.



Immigration Offenses and Violent Crimes.

The Commission Report contains similar analyses for immigration sentences and violent crimes. Probationary sentences for immigration offenses ran in the low 20% range pre-Guidelines and have decreased steadily since, and now are virtually non-existent, as the mean prison term for such offenses has more than doubled. (Figures 2.12, 2.13). This marked increase is the result not only of the initially applicable Guidelines ranges but also the aggravated felony enhancements under U.S.S.G. § 2L1.2 as well as the Illegal Immigration Reform and Immigrant Responsibility Act.





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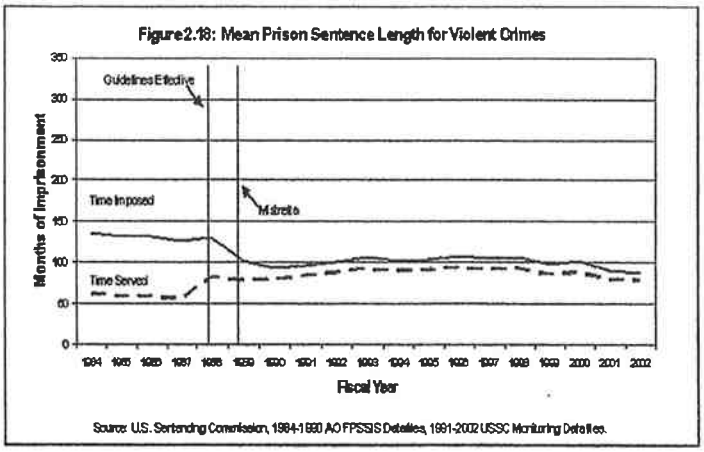
Although the average sentence for federal violent crimes has decreased, the average period of time served has substantially increased, from approximately 60 months during the mid-80s to approximately 80 months by 2002. (Figure 2.18) Time served for firearms offenses have increased even more dramatically as a result of mandatory minimums and as the Commission continued to increase the applicable offense levels. By 2000 prison terms were twice what they had been pre-Guidelines.



What does all this Mean?

So, what should practitioners do with the overwhelming evidence that sentencing inflation has been rampant for the past 20 years? *Booker* frees judges to consider all the sentencing factors enumerated in 18 U.S.C. § 3553(a) and to impose as sentence "sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." These purposes include the need to consider the seriousness of the offense, deterrence, protection of the public and the provision of needed services to the defendant. Historical data shows that most offenders (about 58%) are in CHC I and therefore are not recidivists, and their incarceration is not necessary to deter them or to protect the public (although general deterrence is relevant as well). Alternatives to incarceration are often as effective as imprisonment in achieving these goals while providing the defendant an opportunity to continue working and supporting his or her family, while providing valuable community service. Where incarceration is still indicated, shorter sentences may be appropriate.

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The Guidelines still must be considered, but judges are now free to consider many factors traditionally believed relevant to sentencing, but the application of which was discouraged under the Guidelines such as those factors identified in U.S.S.G. § 5H1, including age, educational and vocational skills; mental and emotional conditions; physical condition; employment record, and family ties. Some indication of how these and other factors might affect a sentence is provided by the sentences that were imposed before these factors became largely irrelevant under the Guidelines, even as we also understand – as we must – that pressures beyond the Guidelines have also contributed to more and greater prison sentences.

Reference to pre-Guidelines sentences in these areas will provide a good starting point for considering an appropriate sentence for these defendants, unencumbered by mandatory Guidelines.

Granted, *Booker* is no panacea. The Guidelines, at least to some extent, reflect the prevailing mood of Congress and others that sentences in certain areas were simply too low, and the end of the mandatory Guidelines regime may not alter that belief in the minds of certain judges. But, particularly when we represent, for example, drug defendants who are on the margins of the business, judges should understand that they can now impose sentences that truly reflect the defendant's culpability rather than, for instance, whether she fortuitously was hired to transport one kilo or a hundred, powdered cocaine or crack. We can emphasize that judges can, once again, give meaningful consideration to the fact that a white collar criminal has lost his livelihood, his professional standing in the community, is a first offender, is statistically unlikely to be a repeat offender, etc., and show how judges sentenced such cases before the Guidelines prohibited consideration of these factors. Similar comparisons can be made on behalf of clients convicted of illegal reentry, who typically return to the United States to work legitimately and send money home to their families.

Notes:

1. Charts used in this article are from the Guidelines Commission Report and retain their original reference numbers.

2. In fact the increase in greater than that depicted in the graph because it includes offenders who previously would have received probation but who now receive short sentences instead, thus bringing down the averages.