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The Time Penalty: Examining the Relationship Between Time to Conviction and Trial vs. Plea Disparities in Sentencing

Mindy S. Bradley-Engen, Rodney L. Engen, Chris

Shields, Kelly R. Damphousse and Brent L. Smith

Although studies of sentencing routinely find that defendants who plead guilty receive relatively lenient sentences compared with similarly situated defen- dants convicted by trial, we have yet to fully understand the role of “mode of conviction” in the sentencing process. In particular, we know little about how the size of the disparity between guilty pleas and trial convictions may depend upon time in case processing, or the timing of pleas; that is, when during the process defendants plead guilty. This is a considerable issue, as “time” often is central to explanations given for plea-trial disparities. The current study examines this central, yet seldom empirically captured, dimension of the sen- tencing process. Using information gathered in an ancillary data collection effort operated under the supervision of the American Terrorism Study, we differentiate between the mode of conviction and time to conviction and explore the role of “time” in sentence severity, especially with regard to the

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plea-trial disparity. While consisting of defendants identified in connection with terrorism investigations, and sentenced in federal courts, our study takes advantages of a unique opportunity to isolate the effects of time from the mode of disposition and to explore time correlates of sentencing outcomes. In doing so, we raise important questions about the multiple ways in which time and mode of conviction may affect sentencing more generally and contribute to the larger theoretical discussions of how punishment decisions are made.

Keywords sentencing; plea bargaining; courts

Introduction

Although studies of sentencing routinely find that defendants who plead guilty receive relatively lenient sentences compared with similarly situated defendants convicted by trial, important questions remain about these plea discounts (or trial penalties) and about the role of the “mode of conviction” in the sentencing process generally. Numerous studies examine “unwarranted” sentencing disparity by race, ethnicity, and gender——and most of these control for whether defen- dants plead guilty or were convicted in a trial——yet research explicitly examining disparity associated with the mode of conviction, the mechanisms linking the mode of conviction with sentence severity, or factors that may condition the size of the plea-trial disparity is relatively sparse (Ulmer, Eisenstein, & Johnson,

2010). In particular, we know little about how the size of the disparity between guilty pleas and trial convictions may depend upon time in case processing, or the timing of pleas; that is, when during the process defendants plead guilty. This is a considerable issue, as “time” often is central to explanations given for plea-trial disparities. Indeed, the idea that individuals who take up the court’s time by exer- cising their right to trial are punished more severely——the “he takes some of my time, I take some of his” explanation (Uhlman & Walker, 1979, 1980)——is common in sentencing literature (see also Alschuler, 1968, 1983; Bowen, 2009; Downie, 1971). The “timing” of pleas also may be important, as the circumstances surrounding guilty pleas entered early in the process may differ substantially from those that occur later, or even during the course of a trial.

Yet, traditional sentencing studies seldom are able to examine the timing of guilty pleas specifically or to disentangle “time” as a dimension of case processing from the mode of conviction. The current study examines this poten- tially important, yet seldom discussed, dimension of the sentencing process. Specifically, we differentiate between the mode of conviction and time to con- viction and explore the theoretical implications of “time” for understanding sentence severity and, especially, the plea-trial disparity. We derive several hypotheses regarding the effects of time and the timing of convictions on sen- tence severity and test these predictions using information gathered in an ancil- lary data collection effort operated under the supervision of the American Terrorism Study (ATS). While consisting of defendants identified in connection with terrorism investigations, and sentenced in federal courts, this data-set provides a unique opportunity to isolate the effects of time from the mode of

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disposition and to explore time correlates of sentencing outcomes. Our study demonstrates the significant impact that time, itself, can have on sentence severity, and the impact that controlling for time can have on the interpreta- tion of some common findings of sentencing research. It also shows how exam- ining both the mode of conviction and time to conviction can further our theoretical understanding of punishment decisions and suggests multiple ways in which time and mode of conviction may affect sentencing more generally.

The Guilty Plea-Trial Disparity in Sentencing Research

Although the mode of conviction is not usually the main focus of sentencing research, much of the research published in the last 30 years is relevant to this discussion. Specifically, many empirical studies find that trial-convicted defen- dants are more likely to be incarcerated and receive longer sentences than defendants who pled guilty, even net of legally relevant factors related to the offense, the offenders’ criminal history, or other offender characteristics (e.g. Albonetti, 1991, 1998; Bushway & Piehl, 2001; Dixon, 1995; Engen & Gainey,

2000; Johnson, Ulmer, & Kramer, 2008; Kautt, 2002; King, Soule, Steen, & Weidner, 2005; Kramer & Ulmer, 2002, 2009; LaFree, 1985; Peterson & Hagan,

1984; Spohn & Holleran, 2000; Spohn, Gruhl, & Welch, 1982; Steffensmeier & DeMuth, 2000, 2001; Steffensmeier, Ulmer, & Kramer, 1998; Ulmer & Kramer,

1996; Zatz, 1984).1 Some (e.g. LaFree, 1985; Smith, 1986) have argued that

“plea bargains” are more of an illusion than an actual “bargain” for defendants (i.e. some offenders who plead guilty would have been acquitted or convicted of lesser offenses had they exercised their right to trial), and some earlier studies failed to find evidence of a trial penalty (Eisenstein & Jacob, 1977; Hagan, 1975). However, the bulk of evidence since the 1980s indicates that, among persons who are convicted, whether he or she pled guilty or was found guilty by trial is likely to have a unique and significant influence on his/her sentence (Blumstein, Cohen, Martin, & Tonry, 1983; Kramer & Ulmer, 2009; Ulmer & Bradley, 2006).

The ubiquity of the plea-trial disparity in sentencing research is noteworthy. The studies cited above present analyses of data from numerous cities, states,

1. The practice of rewarding guilty pleas is not unique to the USA. For example, Canadian law describes plea bargaining as the “agreement by the accused to plead guilty in return for the prom- ise of some benefit” (Law Reform Commission of Canada, 1975, p. 45). Benefits a prosecutor may provide include his/her recommendation for a specific sentence range, agreement to not oppose a specific sentencing range recommended by the defense, and his/her agreement to not pursue addi- tional punishment or more severe sentences (Canadian Department of Justice, www.justice.gc.ca). Plea bargaining has also been officially acknowledged, more recently, in England and Wales (Vogel,

2006). Whereas English law had traditionally denied formal plea bargaining, recent judgments

(including R v Goodyear) and the most recent Definitive Guidelines formally outline provisions for “Reductions for Pleading Guilty” (Sentencing Guidelines Council, 2007). The guidelines include a series of recommendations “for a reduction no greater than one-third (with lower levels of reduc- tion where a plea is entered other than at the first reasonable opportunity)” (Sentencing Guidelines Council, 2007, p. I, emphasis added).

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and federal courts. In addition, the plea/trial effect appears in studies of gen- eral samples of offenders and in studies of persons convicted of specific types of crimes, including drug offenders (Albonetti, 1997; Rhodes, 1991; Steen, Engen, & Gainey, 2005), white-collar offenders (Albonetti, 1998), serious vio- lent offenders (Kramer & Ulmer, 2009; Ulmer & Bradley, 2006), and terrorist defendants (Smith & Damphousse, 1996, 1998); and in research on “depar- tures” from sentencing guidelines (Engen, Gainey, Crutchfield, & Weis, 2003; Everett & Nienstedt, 1999; Frase, 1993; Johnson, 2003; Kempf-Leonard & Sam- ple, 2001; Moore & Miethe, 1986; Ulmer, 1997; Ulmer & Kramer, 1996). More- over, although the size of the plea-trial disparity may vary, the mode of conviction (usually defined as simply whether the defendant pleaded guilty or was convicted at trial) is frequently among the strongest predictors of sen- tence severity, in some instances rivaling the effects of “legally relevant” vari- ables such as offense severity, weapon use, or prior convictions; and generally having a greater impact than offender status characteristics such as gender, race/ethnicity, or age (Albonetti, 1991; Bushway & Piehl, 2001; Engen & Gainey, 2000; Johnson, 2003; Moore & Miethe, 1986; Spohn, Welch, & Gruhl,

1985; Spohn & Holleran, 2000; Ulmer & Johnson, 2004; Ulmer et al., 2010).

Theoretical Considerations

Questions surrounding the meaning and impact of plea bargaining have been topics of considerable debate (e.g. Alschuler, 1968, 1979; Brunk, 1979; Mather,

1973, 1979a, 1979b). Critics question the benefits and voluntariness of the plea bargaining process for defendants, and the legitimacy of a legal process in which organizational concerns may influence a defendant’s sentence at all. They note that the conditions of plea bargaining, particularly the looming threat of more severe punishment if one is convicted at trial, often present defendants with few or no real alternatives, and in effect renders the practice coercive (Brunk, 1979; Langbein, 1978). Consideration of court actors’ practi- cal concerns may also compromise determinations of appropriate punishment. The idea that punishment decisions could be swayed by factors beyond the specifics associated with an offender and his/her case, particularly the court’s desire to process cases quickly, challenges widely held notions of fairness and jurisprudence (Kingsnorth & Risso, 1979; Mather, 1973, 1979a, 1979b). One problem is that while, in principle, plea bargaining may be compatible with individualized justice, the extent to which individual circumstances are in fact considered is difficult to know (Maynard, 1984). As Mather (1979a, p. 282) notes, “An important question, of course, is the extent to which plea compro- mises actually did reflect a concern for substantive justice in the individual case rather than the pressures of administrative expediency or simply political influence.”

This question and the criticisms that prompted it reflect two prominent themes that run throughout theoretical discussions of the plea-trial disparity.

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On one hand, most researchers agree that the institutionalized practice of “rewarding” those who plead guilty and “penalizing” those who lose at trial serves a variety of administrative or organizational needs including, but not limited to, the need for efficiency in case processing (Dixon, 1995; Engen & Steen, 2000; Holmes, Hosch, Daudistel, Perez, & Graves, 1996; Uhlman & Walker, 1980). On the other hand, the plea process also provides a means by which courtroom workgroups are able to pursue substantive justice; fair pun- ishments that take into account the unique circumstances of each case, such as the defendant’s culpability or danger to the community (Ulmer & Bradley,

2006), and that can even mitigate the effects of harsh sentencing laws (Math- er, 1979; Rosett & Cressey, 1976). In Rosett and Cressey’s (1976, p. 7) words, “Guilty plea negotiations are negotiations about proper punishment.” Of course these explanations are not necessarily mutually exclusive, and they each appear in contemporary theories such as Albonetti’s (1991, 1997) causal attribution/uncertainty avoidance theory and the focal concerns perspective (Steffensmeier & DeMuth, 2000; Steffensmeier, Kramer, & Streifel, 1993; Stef- fensmeier et al., 1998; Ulmer et al., 2010). However, because they suggest different processes underlying the plea-trial disparity they may also have dif- ferent implications for the role of time and the timing of guilty pleas.

In the 1960s scholars painted a portrait of American criminal justice as fun- damentally an “administrative” process, highly constrained by organizational imperatives to conserve resources such as time, manage caseloads, obtain high conviction rates, and maintain working relationships (e.g. Alschuler, 1968; Blumberg, 1967; Packer, 1968). In a related vein, studies drawing on the court community perspective argue that court actors often view trials as unpleasant, conflictive, and disruptive of court community working relations, and thus seek to discourage them (Flemming, Nardulli, & Eisenstein, 1992; Ulmer, 1997). From this perspective, the disparity in sentence severity between trial convic- tions and guilty pleas is the product of the court rewarding defendants who plead guilty with lighter sentences and penalizing those who go to trial, because it is in court actors’ mutual interest. Rosett and Cressey (1976, p.

146) said it bluntly——“In the present system of criminal justice ... harsh stat- utes and pain-producing administrative practices have become essential, because it is through threats of severe punishment that acquiescence is obtained.” Similarly, Albonetti (1991, p.255) argued “Defendant cooperation exemplified by a willingness to plead guilty is viewed, by the sentencing judge, as an indication of the defendant’s willingness to ‘play the game’ in a routine, system defined manner.”

Consistent with this administrative or bureaucratic justice interpretation, Dixon (1995) found that the size of the plea-trial disparity was conditional on the level of court bureaucratization. More recently, examinations of federal sen- tencing found that district-level caseload pressure significantly increases the size of trial effects on both the likelihood of sentence departures (Johnson et al.,

2008) and sentence severity (Ulmer et al., 2010). Likewise, trial penalties among serious violent offenders in Pennsylvania tend to be larger in counties with larger

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caseloads (Ulmer & Bradley, 2006) and lower trial rates (Kramer & Ulmer, 2009), suggesting that large trial penalties helped limit the number of trials.

Although researchers have tended to interpret the plea-trial disparity as motivated by organizational concerns, substantive concerns may also contrib- ute to the plea-rial disparity. The substantive justice or substantive rationality perspective views the sentencing process, including plea bargaining, as primar- ily oriented toward producing “appropriate” punishments that take into consid- eration the circumstances of the crime and characteristics of the individual offender (Mather, 1979a; Rosett & Cressey, 1976; Savelsberg, 1992). Consistent with this substantive emphasis, much of the recent research on trial penalties draws upon the focal concerns and court community perspectives (Kramer & Ulmer, 2009; Ulmer & Bradley, 2006; Ulmer et al., 2010). Focal concerns argues that judges, attempting to make “rational” decisions with limited infor- mation, form attributions for defendants’ conduct that are shaped by legal as well as extra-legal factors (see also Albonetti, 1991, 1997). These attributions then shape judges’ assessment of three “focal concerns”: offender blamewor- thiness (culpability), community protection/offender dangerousness, and the practical costs and consequences of sentencing decisions, which includes orga- nizational efficiency (see Kramer & Ulmer, 2009; Steffensmeier, 1980; Stef- fensmeier & DeMuth, 2000, 2001; Steffensmeier et al., 1993, 1998). These theories suggests that whether a defendant pleads guilty or not provides infor- mation about the defendant’s character, which in turn may affect judges’ attributions for their criminal conduct and perceptions of blameworthiness/ culpability, the likelihood of recidivism, and/or future dangerousness (Albo- netti, 1991; Steffensmeier et al., 1998; Ulmer & Bradley, 2006).

From this perspective, the mode of conviction could affect punishment in several ways. For example, pleading guilty is essentially a legal admission of guilt, which may enable the court to view a defendant more favorably (see also Rosett & Cressey, 1976). A defendant who pleads guilty is not only sparing the court the resource costs of a trial (a practical concern), but is also allaying con- cerns regarding his accountability and criminality by “admitting” guilt rather than “denying” it. As such, guilty-pled defendants may appear more remorse- ful, less dangerous, and/or less likely to reoffend than s/he would have otherwise. In addition, Ulmer and Bradley (2006) argue that trials may negatively impact judges’ perception of defendants due to the disclosure of dis- paraging information, or “bad facts,” that “dirty up” defendants. Prosecutors will present evidence in the most damaging way, not only to prove the defen- dant’s culpability, but often to undermine his or her credibility and moral char- acter. They are also likely to emphasize the gravity of the crime, the harm inflicted on victims and the community, and the full extent of the defendant’s involvement. “Bad facts” could be covered up, or at least not have as much impact, in a guilty plea agreement (see Brereton & Casper, 1982; Flemming et al., 1992; Ulmer, 1997). Disclosure of disparaging information may also occur prior to a defendant pleading guilty, but it is virtually assured once trial begins.

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The Role of Time and the Timing of Guilty Pleas

These theories and the sentencing literature collectively provide ample reasons to believe that the meaning, motives (of both the defendant and the prosecu- tor), and benefits of pleading guilty may change as cases progress. In addition, time itself——as in the time invested (or cost incurred) by the organization in procuring a criminal conviction——may affect sentencing outcomes indepen- dently of the mode of conviction. Unfortunately, quantitative, multivariate sen- tencing research seldom includes case-processing information beyond the mode of conviction and, occasionally, pre-trial detention or type of counsel. This may be because the publicly available sentencing data-sets used by many researchers simply do not include measures such as the length of time spent on a case leading up to conviction, or when a guilty plea was entered. Consequently, our review of the literature identified no peer-reviewed quantitative research incorporating time explicitly, or distinguishing mode of conviction from timing of conviction.

However, qualitative studies often describe how court actors’ decisions may be related to the investment of resources, including time associated with a particular case (e.g. Blumberg, 1967; Cole, 1970). Likewise, when Uhlman and Walker (1979, 1980) found that defendants convicted by jury trials received substantially longer sentences than both defendants who pled guilty and those convicted by bench trial, they invoked “time,” explaining this as an unstated judicial policy designed to discourage defendants from time-consuming and costly trials. The explicit acknowledgment that individuals who take up the court’s time receive harsher sentences——“he takes some of my time, I take some of his”——speaks volumes (Uhlman & Walker, 1979, 1980). More than one judge’s rationalization for trial penalties, in analytic terms it identifies time as a mechanism, or mediating variable, that should account for the plea-trial dis- parity, at least partially. Given that trials generally take longer than guilty plea convictions, time to conviction should mediate, partially, the plea-trial disparity. In other words, if we were able to control for “time,” statistically, we should find that the plea-trial disparity is reduced.

Uhlman and Walker’s analysis also highlights the centrality of “time” itself as a scarce resource not to be squandered. If time explains the plea-trial disparity, we should expect time itself, as a measure of organizational costs incurred, to also affect sentencing directly. This is consistent with an adminis- trative justice/organizational efficiency perspective, and suggests that, all else being equal, we should expect the punishment meted out in a case to be a function of the organizational cost incurred in procuring the conviction——the “he takes some of my time, I take some of his” principle——applied broadly. In other words, the overall time to conviction should have a direct effect on sentence severity.

For several reasons, we would also expect the size of the plea reward/trial penalty to be conditioned by the amount of time invested to secure a conviction and by the stage at which the plea occurs. Descriptions of the bench vs. jury

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trial processes in state courts suggest that time changes the meaning of the mode of conviction (Eisenstein & Jacob, 1977; LaFree, 1985; Ulmer, 1997). Mather (1973) notes that, in some jurisdictions, bench trials can be character- ized as judge-mediated “slow pleas.” Also, defendants can, and do, plead guilty at all stages of the process. Although trials generally will take longer, guilty pleas do not always take place early in the process. The prosecution and defense may strike a plea agreement on the day before trial is scheduled to commence, or even during the trial; and tentative plea agreements arrived at early in the process may be withdrawn in favor of going to trial (Kramer & Ulmer, 2009). Other studies distinguish between negotiated and open/nonnego- tiated guilty pleas, which might also reflect differences in time or organizational costs (e.g. Johnson, 2003; Ulmer, 1997; Ulmer, Kurlychek, & Kramer, 2007).

From an administrative perspective we would expect that the resource investment, relative power, and motivations for plea bargaining will vary as cases progress. In general, we should expect the least punishment for those who conserve the most resources, so defendants who plead guilty earlier in the process should receive larger reductions than those who plead later. When defendants plead guilty later, say nearer the pending trial date, court actors who were initially motivated to give large incentives to defendants who plead guilty and avoid the costs of trials have less and less motivation. Judges will probably continue to reward defendants who plead guilty, but those rewards will be smaller. Once a trial has commenced, though, and the major costs have been incurred, the size of the plea-trial disparity is harder to predict on theo- retical grounds. On the one hand, it is likely prosecutors will still provide defendants an incentive to plead guilty in order to secure the conviction, and judges will concur, but they will offer far less substantial rewards. On the other hand, the prosecutor’s motivation to secure a conviction may increase at this point. Trials are inherently uncertain events (Albonetti, 1991). Moreover, when cases depend on potentially unreliable or disreputable witnesses, ques- tionable testimony, and/or the use of less-direct evidence, as often occurs in terrorism cases (Shields, Damphousse, & Smith, 2006; Smith & Damphousse,

1998), the likelihood of conviction may diminish over time. In this scenario, the size of the reward associated with guilty pleas might increase as these elements play out and the level of uncertainty increases over the course of a trial (Albonetti, 1998).2 Unfortunately, it is not clear, a priori, which of these patterns is most likely.

From a substantive justice/substantive rationality perspective, like focal concerns, we would also expect the timing of a guilty plea, and the stage at which the plea is entered to condition the size of the benefit to defendants. A “late” guilty plea may change what pleading guilty implies about their moral

2. Where the risk of losing may be greater, prosecutors may not only offer substantial rewards prior to trial, but continue to provide comparable or larger rewards to secure convictions as the trial progresses and the potential for nonconviction becomes more salient. Judges also may be less apt to impose severe sentences in these “weaker” cases, where there is less compelling evidence or mitigating information has been introduced.

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character. The defendant who pleads early in the pre-trial stages of the pro- cess may appear remorseful, less culpable, and less dangerous, but the defen- dant who pleads guilty later, or during the course of a trial, is likely to be seen as driven by fear of a more severe sentence in anticipation of being con- victed, particularly if s/he could be convicted of a more serious charge than that for which s/he has the opportunity to plead guilty (Brereton & Casper,

1982; Ulmer, 1997; Ulmer & Bradley, 2006; Walsh, 1990). Thus, to the extent that judges view guilty pleas as sign of positive moral character, we would expect the plea reward to diminish over time. At some point in the process, then, we would expect judges to sentence defendants who plead guilty more similarly to those found guilty at trial.

To summarize, the administrative justice and substantive justice interpreta- tions of plea bargaining and our consideration of the potential importance of “time” suggest some familiar predictions, as well as some novel ones. Given that theory and empirical evidence on the meaning of the plea-trial disparity, the role of time, and the timing of guilty pleas are relatively limited, we offer the following tentative hypotheses to guide our analyses.

H1: Offenders convicted by trial will receive more severe sentences than defendants who plead guilty to similar offenses.

H2: Offenders whose cases take more time to conviction will receive more severe sentences than offenders whose cases take less time.

H3: The plea-trial disparity will be explained, in part, by time to conviction

(the magnitude of the effect will decrease when controlling for time).

H4: The size of the sentence disparity between those who plead guilty and those who are convicted at trial will decrease as time to conviction increases (plea rewards diminish).

Methods

Data

Unfortunately, the data sources used in most prior sentencing research, includ- ing studies of sentencing in US District Courts, do not include measures of the time to conviction or the timing of guilty pleas in the sentencing process. For this reason, the current study utilizes a unique data-set on 463 convicted offenders indicted in federal courts from 1983 through 2004, and included in the ATS (Smith, 1994; Smith & Damphousse, 1996).3 Although not principally designed for the study of sentencing, the ATS provides a distinctive opportu- nity to study the effects of time and its relationship with the mode of convic-

3. The ATS started in 1988 in collaboration with the FBI’s Terrorist Research and Analytical Center and was supported by the Department of Justice. The ATS is housed at the University of Arkansas, and is affiliated with the National Consortium for the Study of Terrorism and Responses to Terrorism, a US Department of Homeland Security Center of Excellence housed at the University of Maryland.

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tion. Data on each case were extracted directly from the federal criminal case files at either the district court where the case was tried or the regional fed- eral records facility where the case has been archived, and were then supple- mented with sentence-specific information provided by the Administrative Office of the US Courts and the United States Sentencing Commission (see Smith, 1994; Smith & Damphousse, 1996, 1998). In addition, the National Insti- tute of Justice provided funding to collect additional data on each of these cases as part of a project examining prosecution and defense strategies in ter- rorism trials.4 Specifically, as part of this ancillary data collection effort researchers recorded the dates of conviction, initial indictment, and first trial proceedings from original court documents, thus making it possible for us to operationalize time to conviction and the timing of guilty pleas independently from the mode of conviction.

Given that our focus is on the interplay of “time” and the mode of convic- tion in the sentencing process, generally, and not on aspects of this process that may be unique to the sentencing of “terrorists,” some elaboration regard- ing this special study sample is warranted. Offenders included in the ATS were all indicted as the result of an official FBI “intelligence investigation for terror- ism-related activities.”5 However, nearly all of the individuals in the ATS were charged and convicted of traditional offenses, not crimes of “terrorism.” Only

6.3% of all counts in the ATS were filed specifically as terrorism under Chapter

113b of the United States Code. Charges that are both rare and clearly not representative of common offenses (e.g. sedition, or providing financial sup- port to terrorist organizations) were excluded from the analysis.6 The remain- ing cases were prosecuted for a wide variety of traditional crimes ranging from weapon violations and homicide to monetary transactions. In all, the sample includes indictments filed under 288 different federal statutes or combination of statutes. Thus, while not a representative sample of all federal offenders, the ATS provides a sufficiently large and diverse sample of offenders, and can be nonetheless informative.

Finally, while a representative sample of all convicted offenders sentenced in US District courts (or in one or more states) would be ideal for testing our predictions, the available empirical evidence suggests that the sentencing pro- cess for ATS defendants is not fundamentally different from other kinds of defendants. Comparative studies using the ATS data consistently find that pre- dictors of sentencing outcomes do not significantly differ between terrorists

4. National Institute of Justice Award # 2006-IJ-CX-0026, An Assessment of Defense and Prosecuto- rial Strategies in Terrorism Trials: Implications for State and Federal Prosecutors.

5. Domestic cases resulted from investigations under the Attorney General Guidelines on General Crimes, Racketeering Enterprises, and Domestic Security/Terrorism Investigations and subsequent editions (1983, 1989, 2002). In the case of international terrorists, cases result of investigation under the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Coun- terintelligence Investigations.

6. Of the 494 original cases in the data-set, cases determined to be significant outliers with regard to time to conviction or sentence length, cases that resulted in life sentences, and death penalty cases were also excluded from the analyses, for a final sample of 463.

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and nonterrorists (Shields et al., 2006; Smith, 1994; Smith & Damphousse,

1996, 1998). In other words, the major predictors of sentencing outcomes for this “terrorist” sample, including crime severity, age, education, mode of con- viction, etc. acted much the same way as in sentencing of nonterrorist cases. That being said, cases resulting from terrorism investigations probably have unique features that we have not accounted for, and our findings may differ from those we might obtain in a general sample. Thus, the generalizeability of our findings remains an open question.

Dependent variable

Sentence length. Much of previous research models both the likelihood of receiving a prison sentence and the length of prison sentence ordered (e.g. Steffensmeier & DeMuth, 2000; Mullins & Spohn, 2006; Rodriguez, Curry, & Lee, 2006; Steffensmeier et al., 1993, 1998; Ulmer & Johnson, 2004; Ulmer & Kramer, 1996; Wooldredge, 2007). In our data-set, there is little variability in the likelihood of imprisonment; over 85% of cases received prison terms.7

Thus, the analyses presented do not include in/out incarceration decisions; we model sentence severity using the length of imprisonment ordered (sentence length) as our dependent variable. Given that the distribution of the sentence length variable is skewed, as is typical with many criminological outcomes (e.g. Osgood, Finken, & McMorris, 2002),8 we use the natural logarithm of the sentence length in months (Bushway & Piehl, 2001; Kurlychek & Johnson,

2004; Osgood & Rowe, 1994; Ulmer & Bradley, 2006).

Independent variables

Months to conviction. Our principle theoretical variable of interest, Months to Conviction indicates the amount of time from the date of the initial indictment to the date of the conviction, in whole months. All cases require at least some time between the indictment and conviction (no cases have 0 months to conviction). Not surprisingly, this variable is highly skewed, therefore our anal- yses use the natural logarithm of months to conviction, which considerably normalized the distribution.

Mode of conviction. Consistent with the bulk of the sentencing literature, the mode of conviction is captured by a dummy variable indicating that the case resulted in a trial conviction (trial conviction = 1), with guilty plea as the refer- ence category.

7. Although research on sentencing in the states illustrates the need to differentiate between jail and prison sentences as outcome measures (Harrington & Spohn, 2007; Holleran & Spohn, 2004), all incarceration sentences in US federal courts are prison sentences. Moreover, 93% of cases in which prison was ordered received sentences over year. Thus, there are relatively few of the kinds of cases that might result in jail sentence were they in state courts.

8. Reported sentence length ranges from 1 to 360 + months.

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Control variables. Consistent with prior research, our analyses include individ- ual demographic control variables as well as case-related variables of interest. Race (nonwhite = 1, white = 0), gender (female = 1), and age (in years, cen- tered) are included as indicators of extra-legal predictors of sentencing out- comes.9 We also include controls for criminal history score, coded from 1 to

6, based on the Federal Sentencing Guidelines criminal history category (I-VI), and crime severity.10 The ATS data utilize an ordinal crime severity scale based on the National Survey of Crime Severity (NSCS) rankings (Wolfgang, Figlio, Tracy, & Singer, 1985), ranking case severity from 1 (least severe) to 29 (most severe). Crimes not found in the original NSCS rankings were assigned ranks based on the maximum punishments available for those offenses, as indi- cated by the Federal Criminal Code and Rules, 1993.11 That is, the maximum punishments for these “unranked” offenses were compared with the maximum punishments applicable to crimes included in the National Survey, and appro- priate ranks were assigned.12 Finally, in addition to the severity of the most serious offense, cases that involve more offenses can also negatively affect perceptions of a defendant’s character and the severity of punishment imposed. Thus, we also include the total number of counts in the original indictment.13

9. Initial models also included education (coded 1-9, with 1 = less than eighth grade and 9 = post- graduate); this variable was found to be nonsignificant and did not improve model fit, and is there- fore not included in the analyses presented here.

10. Our early examination of the data indicated that most missing values were ‘missing at random’ as defined by Rubin (1976) and Little and Rubin (1987). Only three variables (Education, Offenses Severity, and Criminal History) were missing more than four cases. Nevertheless, to address any sensitivity of results to missing data we ran models using multiple imputation methods described by Royston (2004) (specifically, mi impute mvn command in Stata, with m = 5 imputations). This method is similar to the EM algorithm and other computational methods for calculating maximum- likelihood estimates based on the observed data alone. Estimated coefficient models are pre- sented. Supplemental analyses using case-deletion strategies did not did substantively differ.

11. We conducted several additional sensitivity analyses to test whether including controls for offense type (such a drug trafficking or other ‘unique’ offenses) alter our conclusions. In addition, because the federal sentencing guidelines changed yearly and the data span over several years, we conducted analyses to test whether including controls for year for sentencing eras alter our conclusions. Results from all of these analyses indicated that they did not meaningfully change our key findings.

12. Unfortunately, the actual offense severity level indicated by the US Sentencing Guidelines was not included in the case files reviewed in the original ATS data collection, and no individual identi- fiers are available that would allow us to link the ATS data to the US Sentencing Commission’s data. However, the NSCS ranking may provide a reasonable proxy for guideline severity levels. Rossi and Berk (1997) found that the actual US sentencing guidelines correspond very closely (R2 = 0.80) to public views of the appropriate punishments for 20 common crimes described in their survey. It seems reasonable to assume, then, that the NSCS ranking, based on public perceptions of crime severity, should also be positively correlated with guideline severity levels.

13. We do not include all predictors of sentencing, such as measures of mandatory minimums or departures. Given that our main research objective is to determine whether time to conviction affects sentence length, and whether the effect of time interacts with plea, the mere fact that an omitted variable might also affect on sentence length is less important. Including these omitted variables might be informative. However, in our opinion, controlling for these case characteristics would most likely not alter our main conclusions.

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Analysis and Findings

Our analysis begins with a descriptive overview of the sample and a brief comparison of cases by the mode of conviction. Table 1 presents descriptive statistics for the variables included in our analyses. Bivariate correlations for all variables are presented in Table 2. Consistent with much of sentencing research, defendants were predominately male (88.98%) and white, although nonwhites were disproportionately represented among the sample (23.97%). While the proportion of terrorism cases that go to trial is slightly higher than those typically found in traditional sentencing studies, the majority of sample (approximately 70%) was convicted via guilty pleas (n = 324). The remaining

28% of defendants were convicted as the result of a trial (n = 139).

The average crime severity ranking was 17.40 (on a scale of 1-29). The mean severity of the conviction offense differed substantially across mode of convic- tion, with defendants who pled guilty having less severe conviction offenses than those who were convicted at trial (16.20 vs. 19.00). The mean sentence length ordered was approximately 76 months. The average sentence length for trial-convicted defendants was substantially longer than guilty-pled defen- dants. On average, those who pled guilty received sentence lengths of approxi- mately 64 months, while those who were convicted at trial received sentence lengths of about 108 months.

The average length of time between the initial indictment and the final judgment was about 14 months. Not surprisingly, defendants convicted via guilty plea had the smallest average amount of time between indictment and conviction. The mean number of months between indictment and conviction for trials and guilty pleas was 15.04 (SD 10.15) months and 13.65 (SD 9.61), respectively. However, there is considerable variability in the amount of time between a defendant’s initial indictment and his/her conviction. We found this to be true among guilty pleas as well as trial convictions. Figure 1 shows the distributions of the months to conviction by mode of conviction. These distri- butions provide further evidence that, among both guilty pleas and trial con- victions, there is considerable variability in the amount of time, and thus potentially the amount of court resources, invested in securing convictions.

Furthermore, a comparison of frequency distributions reveals that, in some cases, the time between indictment and conviction for guilty pleas is lengthier than that required for trial convictions. This is consistent with our contention that the measure of guilty pleas vs. trial conviction that does not account for time could provide an inaccurate comparison of trial penalties, and potentially obfuscate the true effect of pleading guilty and avoiding a trial. Supplemental analyses (available upon request), indicate that logging our measure of time to conviction considerably normalizes the distributions.

To test our hypotheses regarding the effects of time and mode of conviction, we estimate three ordinary least squares (OLS) regression models predicting logged sentence length. Our first model includes offender characteristics (sex,

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Table 1 Description of sample

N (% or SD)

Offender characteristics

Male 412 (88.98%) Nonwhite 111 (23.97%) Age 37.78 (10.81) Education (1 = less than 8th to 9 = post-grad) 4.63 (2.71) Mean criminal history

All cases 1.44 (1.12) Guilty pleas 1.48 (1.32) Trial convictions 1.42 (1.01)

Offense characteristics

Mean crime severity

All cases 17.40 (9.70) Guilty pleas 19.00 (9.65) Trial convictions 16.20 (9.52)

Number of counts on Indictment

|  |  |
| --- | --- |
| Mode (n = 129) | 1 |
| Median | 4.00 |
| Mean-all cases | 6.60 (6.12) |
| Guilty pleas | 5.63 (6.32) |
| Trials convictions | 8.94 (7.67) |

Conviction characteristics

|  |  |
| --- | --- |
| Guilty pleas | 324 (69.98%) |
| Trial conviction | 139 (30.02%) |
| Number of months to conviction |  |
| Median | 12.00 |
| Mean-all cases | 14.03 (9.76) |
| Guilty pleas | 13.65 (9.61) |
| Trial convictions | 15.04 (10.15) |
| Mean sentence length in months | |
| All cases | 75.91 (68.98) |
| Guilty pleas | 64.00 (56.82) |
| Trial convictions | 107.89 (86.81) |

race, age, education), controls for legally offense characteristics (crime sever- ity, criminal history, total counts), and mode of conviction (trial). In Model 2,

conviction

|  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  | Age | Female | Nonwhite | Education | Number of counts | Count severity | Criminal history | Guilty plea | Months to conviction | Sentence length |
| Age | 1.00 | -0.01 | -0.02 | 0.00 | -0.01 | 0.02 | -0.08 | -0.180⁄⁄ | 0.05 | 0.03 |
| Female | -0.01 | 1.00 | 0.04 | 0.08 | 0.02 | -0.06 | -0.116⁄ | -0.02 | 0.05 | -0.115⁄ |
| Nonwhite | -0.02 | 0.04 | 1.00 | -0.122⁄ | 0.107⁄ | 0.09 | -0.06 | -0.05 | 0.163⁄⁄ | 0.07 |
| Education | 0.00 | 0.08 | -0.122⁄ | 1.00 | 0.161⁄⁄ | -0.02 | 0.13 | -0.123⁄ | 0.130⁄ | -0.02 |
| Number of  counts | -0.01 | 0.02 | 0.107⁄ | 0.161⁄⁄ | 1.00 | 0.01 | 0.179⁄⁄ | -0.158⁄⁄ | 0.190⁄⁄ | 0.330⁄⁄ |
| Count severity | 0.02 | -0.06 | 0.09 | -0.02 | 0.01 | 1.00 | 0.06 | -0.07 | 0.00 | 0.329⁄⁄ |
| Criminal  history | -0.08 | -0.116⁄ | -0.06 | 0.13 | 0.179⁄⁄ | 0.06 | 1.00 | 0.04 | 0.10 | 0.238⁄⁄ |
| Guilty plea | -0.180⁄⁄ | -0.02 | -0.05 | -0.123⁄ | -0.158⁄⁄ | -0.07 | 0.04 | 1.00 | -0.08 | -0.403⁄⁄ |
| Months to | 0.05 | 0.05 | 0.163⁄⁄ | 0.130⁄ | 0.190⁄⁄ | 0.00 | 0.10 | -0.08 | 1.00 | 0.203⁄⁄ |

Sentence length

0.03 -0.115⁄ 0.07 -0.02 0.330⁄⁄ 0.329⁄⁄ 0.238⁄⁄ -0.403⁄⁄ 0.203⁄⁄ 1.00

PLEA BARGAINING

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⁄p < 0.05, ⁄⁄p < 0.01, ⁄⁄⁄p < 0.001.



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Figure 1 Distribution of time between indictment and conviction across mode of conviction.



we include our measure of time to conviction (logged time between indictment and conviction). Our final model incorporates both the main effects of time and mode of conviction, plus the predicted interaction effect of time x trial.14

Table 3 presents the results of these OLS models.15 Model 1, our baseline

model, shows that males, nonwhite defendants, those with more serious criminal histories, and those convicted of more severe offenses receive generally longer sentences relative to other offenders. Age and education did not exert significant effects. These findings are consistent with much of the research on sentencing among traditional offenders, and remain relatively con- sistent across models. Also consistent with previous research, and Hypothesis

1, offenders convicted via trial receive sentences that are significantly longer than comparable defendants who pled guilty. Specifically, trial conviction

increases sentence length by about 88%, a substantial trial penalty considering

14. All multivariate collinearity diagnostic indicators (available upon request) were at acceptable levels. All tolerances were greater than 0.60. Variance inflation factors scores did not exceed 1.4.

15. To control for possible differences in sentence severity across courts we re-estimated our mod- els including a set of dummy variables for court regions. Most were not significant and did not alter our findings substantively. However, excluding them conserves degrees and freedom and optimize statistical power, therefore we present the results from models without the regional dummies. Including district level dummy variables was not possible due to the large number of districts rep- resented (50), many of which had one or few cases.

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|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
|  |  | Model 1 |  |  | Model 2 |  |  | Model 3 | SD(b)  -0.11⁄ |
| b | se | SD(b) | b | se | SD(b) | b | se |
| Individual characteristics |  |  |  |  |  |  |  |  |
| Age | – |  |  |  |  |  |  |  |
| Nonwhite | 0.41 | 0.17 | 0.13⁄ | 0.36 | 0.16 | 0.12⁄ | – |  |
| Female | -0.55 | 0.23 | -0.13⁄ | -0.43 | 0.23 | -0.10⁄ | -0.47 | 0.21 |
| Education level | – |  |  | – |  |  | – |  |
| Offense characteristics |  |  |  |  |  |  |  |  |
| Crime severity | 0.04 | 0.01 | 0.28⁄⁄ | 0.04 | 0.01 | 0.32⁄⁄⁄ | 0.04 | 0.01 | 0.33⁄⁄⁄ |
| Criminal history | 0.06 | 0.03 | 0.11⁄ | 0.04 | 0.03 | 0.07⁄ | 0.05 | 0.03 | 0.10⁄⁄ |
| Total number of counts | 0.07 | 0.01 | 0.37⁄⁄⁄ | 0.05 | 0.01 | 0.28⁄⁄⁄ | 0.05 | 0.01 | 0.29⁄⁄⁄ |
| Conviction characteristics |  |  |  |  |  |  |  |  |  |
| Trial | 0.88 | 0.14 | 0.37⁄⁄⁄ | 0.70 | 0.14 | 0.29⁄⁄⁄ | 0.24 | 0.17 | 0.10⁄⁄⁄ |
| Ln(Time) |  |  |  | 0.03 | 0.01 | 0.27⁄⁄⁄ | 0.01 | 0.01 | 0.12⁄⁄⁄ |
| Ln(Time) x trial |  |  |  |  |  |  | 0.05 | 0.01 | 0.36⁄⁄⁄ |
| R2 (adjusted) | 0.42 |  |  | 0.47 |  |  | 0.51 |  |  |
| ⁄p < 0.05, ⁄⁄p < 0.01, ⁄⁄⁄p < 0.001. |  |  |  |  |  |  |  |  |  |

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that the average sentence ordered for defendants who plead guilty was just over 5 years (64 months).

Consistent with Hypothesis 2 and an administrative justice perspective, Model 2 reveals a direct effect of time to conviction on sentence length that is not only statistically significant, but substantial. Each 1% increase in the time between the initial indictment and the conviction resulted in approximately a

3% increase in length of incarceration ordered, which is just slightly smaller than the effect of a unit increase in crime severity or criminal history. Intro- ducing time also explains an additional 5% of the total variance in sentence length, thus accounting for 10% of the explained variance. Furthermore, a comparison of Models 1 and 2 provides strong support for Hypothesis 3. Consis- tent with organizational efficiency explanations of trial penalties, the main effect of a trial conviction, i.e. the trial penalty, decreases substantially when accounting for time to conviction. Specifically, the disparity between trials and guilty pleas is reduced by 20%. However, the trial effect remains signifi- cant and strong, with those who go to trial and are found guilty still receiving roughly 70% longer sentences than comparable defendants who pled guilty; a substantial trial penalty that is not accounted for by time to conviction. The effects of race and gender also reduce substantially when we control for time but, like the trial effect, they remain significant.

Finally, Hypothesis 4, derived from both the administrative justice model of sentencing and the substantive rationality/focal concerns perspective, pre- dicted that the size of the plea-trial disparity would decrease as time to con- viction increased. Interestingly, Model 3 shows a significant and strong interaction between trial and time to conviction, but it is positive interaction. If the plea-trial disparity diminished over time we would expect to see positive main effects of trial and time, and a negative coefficient for the interaction. The main effect of the trial penalty is largely reduced (from 70% in Model 2 to

24% in Model 3), but remains positive and significant, indicating that, at the median time to conviction, defendants convicted at trial received sentences averaging 24% longer than comparable defendants who pled guilty. However, the time x trial interaction is also positive, indicating that the trial penalty increases by 5% (0.05) for each 1% increase in the time to conviction. Consider- ing the positive main effect of time, this means that trial-convicted defen- dants received a 6% increase in sentence length (0.01 main effect for time

+ 0.05 interaction effect) for each percent increase in the time to conviction. The main effect of time indicates that among those who pled guilty the “time penalty” was substantially smaller, but still significant.

Figure 1 provides a visual illustration of our main findings, to facilitate inter- pretation. Specifically, we plotted the standardized predicted logged sentence length by time and mode of conviction, based on the regression estimates in Model 3. Three things are immediately apparent. First, guilty pleas are almost never punished as severely as trial convictions. Even when time to conviction exceeds the median value by 38 months——roughly four standard deviations——the expected sentence for a guilty plea is still less than the expected sentence in a

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trial where the time to conviction is at the median. Second, there is a “time penalty” irrespective of the mode of conviction. Third, as time increases, the gap between trials and guilty pleas widens considerably (see Figure 2).

What does this mean with respect to Hypothesis 4? In some ways, the mean- ing of the interaction depends on the comparisons one makes. If we focus just on those who plead guilty, it is clear that those who plead later are punished more severely than those who plead guilty earlier, consistent with the general argument, but not by much. Sentences do increase over time among plead cases, but the slope of the line is not particularly steep. At least in an absolute sense, then, pleading guilty late in the process does not produce the same benefit to defendants as pleading guilty early; but pleading late also never truly negates the benefit of pleading guilty. However, when the comparison is between guilty pleas and trials, it is clear that the disparity between guilty pleas and trials does not shrink, it grows. Importantly, this is because sentence length increases markedly among trials. In other words, the plea reward dimin-

ishes, but only slightly, while the trial penalty increases sharply.

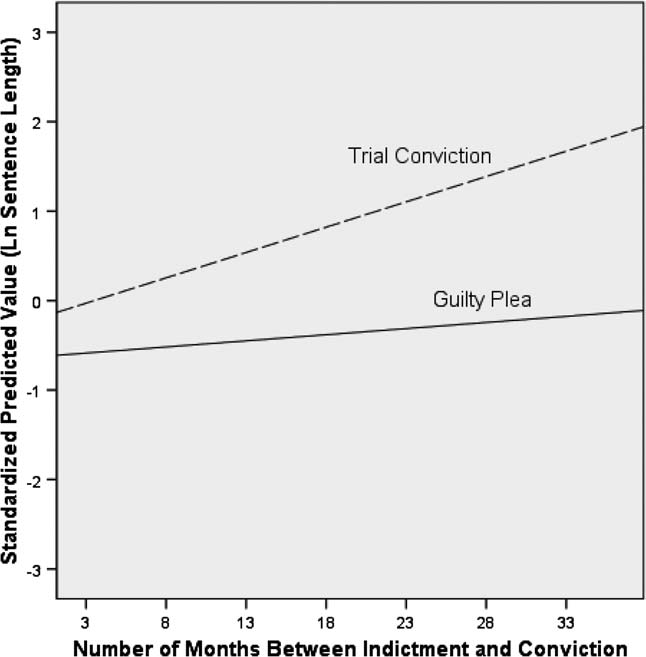


Figure 2 Predicted Ln (sentence length) over time.

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Discussion

Major Findings

Our analyses suggest that time, measured here by the duration of case pro- cessing/time to conviction, may be a critical dimension of the sentencing process that prior quantitative sentencing studies have not examined. Specifi- cally, time affects sentence severity in three ways. (1) Time to conviction exerts a strong, robust, direct effect on sentence length——a “time penal- ty”——that is independent of and comparable to the mode of conviction; after controlling for crime severity, criminal history, total counts, age, sex, race, and the mode of conviction, a 1% increase in time to conviction increases sentence length by approximately 3%. The addition of time increased the explained variance by an additional 5%. (2) Time to conviction partially mediates the effect of mode of conviction, reducing the plea-trial disparity by 20%. It also mediates the effects of offender race, which reduced to nonsignificance in the final model, and to lesser degrees mediates the effects of gender, criminal history, and total counts. (3) Time conditions the plea-trial disparity, widening the punishment gap between trial convic- tions and guilty pleas.

Mode of conviction also affects sentence severity in three distinct ways: (1) as with prior research, we find a significant and strong direct effect of trial conviction (i.e. a trial penalty), which increases sentence length by a substan- tial 70% even after controlling for time to conviction; (2) trials increase sen- tence length indirectly, simply because they take longer, thus incurring a larger cumulative time penalty; and (3) the mode of conviction moderates the time penalty, which is nearly five times larger for defendants convicted by trial (alt: one of the ways pleading guilty results in a lighter sentence is by mitigat- ing the time penalty).

Finally, the effects of time are substantively important. The standardized coefficients presented in Table 3 show that, after crime severity, the strongest predictors of sentence length are the mode of conviction (the trial penalty), time to conviction, and their interaction. Also, seldom in criminological research (especially sentencing research) does the introduction of a new vari- able or an interaction term produce such a marked increase in explanatory power. Total R2 increased by 5% with the addition of the main effect of time, and by another 4% with the interaction of time and trial. Together, these two terms account for nearly 18% ([0.51-0.42]/0.51 = 0.176) of the total explained variance.

Theoretical Implications

Our models reveal the mediating effect of time on the relationship between trial conviction and sentence length. When accounting for time, the size of the

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main effect for trial convictions substantially decreases. From an administra- tive justice perspective, the decrease in the size of the trial penalty and sig- nificant main effect of time imply that some of the trial penalty often found in sentencing research may be associated with punishing those who take up the court’s time, independent of mode of conviction. Similarly, those who go to trial and lose receive longer sentences (i.e. trial penalties) independent of the amount of time invested. This could be the result of “bad facts” revealed dur- ing the trial, as Ulmer and Bradley (2006) suggest, or it could simply mean that time to conviction does not fully capture the institutional cost of a trial. Dif- ferentiating these possible mechanisms in future research will require more nuanced measures of both the institutional costs of trials as well as the infor- mation presented to judges.

Furthermore, we find that the “time penalty” was much smaller for guilty pleas than for trial convictions. Models also show that, among defendants who take comparable amounts of time, those who plead guilty are still rewarded for doing so. As time progresses, those who plead guilty later still received smaller sentences than trial convicted-defendants, but their sen- tences were longer than comparable defendants who had pled guilty early on. Although taking more of the court’s time did increase an offender’s sen- tence even if they plead guilty, the greatest effect was upon those convicted at trial.

Interpreting statistical interactions substantively is seldom straightforward or obvious. Making sense of them theoretically can be even more challenging, especially when the interaction contradicts a hypothesis suggested by multi- ple theoretical perspectives. If, on the one hand, judges perceive pleading guilty as a sign that the defendant accepts responsibility for his or her actions and feels remorse, the interaction here suggests that, for the most part, it does not change much depending on when they plead guilty. If, on the other hand, the plea-trial disparity is simply driven by administrative goals, the interaction with time suggests that it is principally a trial penalty. Another interpretation of this interaction is that the size of the “time pen- alty” differs significantly for those who pled guilty compared to those con- victed at trial, and that one of the ways guilty pleas are rewarded is by mitigating the “time” penalty.

Limitations

The ATS data-set is of limited utility with respect to the general aims of most sentencing research. However, it has some unique features that most prior published sentencing research does not. We were able to differentiate between the mode of conviction and time to conviction, explore the interplay between the two, and test some tentative hypotheses, derived from extant theory, regarding the role of “time.” We believe that this strength outweighs the limitations that exist.

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Potential limitations regarding generalization are not unique to our sam- ple here, and are endemic to studies focusing on specialized samples of defendants. For example, studies using samples of only white-collar offend- ers, drug offenders, sex offenders, or other unique defendants also face the possibility that their findings may differ in some ways from the overall population of convicted defendants. One of the central dynamics in terror- ism cases is that the state has a deep interest in information about terror- ist activities generally, beyond the interest in any one specific case. This could also be true for those cases involving white-collar offenses or drug offenses——where the state has a similar interest in full-scale investigations for entire operations and “beheading” the organizational leadership. Fur- thermore, the public fear and condemnation associated with terrorism may make blameworthiness or taking responsibility for one’s actions especially relevant in terrorism cases. Cases that involve unreliable witnesses, ques- tionable testimony, or the use of less direct evidence, such as terrorism cases (Shields et al., 2006; Smith & Damphousse, 1998), or white-collar offenses (Albonetti, 1998), may increase the uncertainty of conviction. Time (particularly as it relates to the revealing of information) may be especially important in both terrorism and these other nontraditional/ unique cases.

We do not know whether some factors may be particularly influential in terrorism cases, or how magnitude of the effects may differ in comparison with other defendants. Because our data include those indicted as results of terrorism investigations (although they are convicted of traditional offenses similar to defendants in other sentencing data-sets), we do not know the extent to which other data-sets would yield identical findings. However, while the relative effect sizes may be different, research comparing terror- ism cases to nonterrorism cases finds that the predictors operate in much the same way. While we cannot speak to differences in magnitude of time effects, there has been no evidence in the literature suggesting that time would not be influential in other cases beyond terrorism cases. On the con- trary; the literature argues that time is influential, in that current sentencing research consistently interprets findings in time-relevant ways. We believe it is unlikely that while all other predictors (offense severity, prior record, mode of conviction, gender, race, age, etc.) have been found to operate in the same direction amongst both terrorism and nonterrorism defendants, time would be only influential for terrorism cases, or that the effect of pleading guilty would only vary over time for terrorism cases and not be influential in sentencing outcomes for any other cases. However, research has yet to make any such comparisons. Future studies incorporating time measures could explore the uniformity of time influences, comparing the

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extent to which the findings we present here differ across other populations of offenders.16

It is also reasonable to expect the effect of key variables of interest on sen- tencing researchers, including race, ethnicity, gender, offense, and criminal history, could vary across type of guilty plea and over time as well. Some cur- rent research supports this idea. Specifically, Johnson (2003), in a comparison of bench vs. jury convictions, found that mode of conviction conditioned the impact of race on disparities. African Americans were least likely to obtain downward guideline departures following trials, especially jury trials. Impor- tantly, although there have been distinctions found within types of trials, this and other such studies do not make these distinctions with regard to types of pleas. While many agree that there are different processes at work during bench vs. jury trials, we have yet to investigate the importance of differentiat- ing between early vs. late pleas. Unfortunately, our sample was not large enough to have sufficient variability to model these interactions. Our study provides some evidence that failing to account for differences in types of pleas is an important limitation within sentencing research. Whether or not the role of time and type of guilty plea vary across these other legal and extralegal characteristics is an important question for scholars to explore.

Perhaps most commonly, researchers explain guilty plea vs. trial sentencing differences as the product of courts rewarding those who plead guilty for behavior or attitudes that courts organizationally value——i.e. efforts that make their jobs easier and court proceedings run smoothly. Our study, while consistent with this explanation in some ways, raises questions about how this approach can be applied to further explain variations in sentences among defendants across modes of conviction [who plead guilty]. The “time penalty” accounted for a large amount of the difference between those who plead guilty and those convicted by trial.

Furthermore, although in all cases time was associated with increases in sentence length, the effect of time was much smaller for those who plead guilty later on than those who receive trial convictions. Cases that took up the court’s time, perhaps by not avoiding trial before and later entering guilty pleas, nonetheless received substantially less severe sentences by pleading guilty. The large main effect of mode of conviction, accompanied with the

16. The USA has traditionally prosecuted politically motivated offenders, as “conventional crimi- nals” (Smith, 1994; Turk, 1982), a practice that has continued, and even increased, in the last dec- ade (Chesney, 2007; Smith et al., 2011). Prosecuting terrorists for traditional crimes (e.g. illegal possession of firearms) avoids the political specter created by a “terrorism” trial (Smith & Damp- housse, 1998). It also renders the defendant’s political motives irrelevant. Of course, defendants’ political motives or terrorist connections might still be asserted or implied at the sentencing phase, perhaps leading judges to view defendants as more dangerous, more likely to reoffend, and possi- bly even more culpable than nonterrorists. However, the most likely consequence of this would be to increase the severity of punishment. There is no theoretical reason to expect that allegations of “terrorist” motives would alter the basic sentencing calculus; more serious offenses and offenders with more criminal history will receive stiffer penalties, and defendants who cooperate by pleading guilty and perhaps rendering assistance will still be compensated.

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sizeable difference in the time penalty between guilty pleas and trials, suggest that different concerns become more or less salient over the course of a trial. This finding calls for further attention to the relative strength of evidence, the changing dynamics of case processing, and the shifts in the decision-making process at each stage of court processing. One possibility is that the less severe sentences bestowed upon early pleading defendants reflect the organi- zational efficiency model, indicating the court’s motivation to avoid the resource and time expenditures associated with trials. On the other hand, over the course of a trial, securing a conviction may become more salient. Once a trial has begun and the costs have incurred, prosecutors may be motivated to secure a return on these investments. The much less severe sentences given to guilty pleas compared to trials could be indicative of the prosecutor’s (and/or judges) motivation to avoid uncertainty and secure convictions.

The stakes are high for all parties in many cases. Both parties want to avoid the risk of losing, yet come to a favorable resolution. Defendants who felt con- fident or defiant early on may later find themselves increasingly risk averse, as the reality of a possible conviction and an even lengthier sentence becomes more salient. From a prosecutorial standpoint, weaknesses in a case may inter- rupt an efficiency orientation. That is, prosecutors may be more anxious to “make deals” early on when they suspect their cases to be weak. Later, prose- cutors may still have incentives to plea bargain, but now feel more confident about their cases. They have less motivation to be lenient, believing that there is higher likelihood of securing a conviction on charges that they may have pre- viously dismissed or reduced. Based on these circumstances and/or the pres- sure to get the highest return on their investment of resources, they are more motivated to push for longer sentences that they would have early on, even if they are still rewarding pleas.

Seldom discussed are the consequences of not making distinctions among guilty pleas, nor how failing to account for timing of plea may “muddy” our findings. The unavailability of these kinds of variables limits the extent to which trial vs. plea disparities can be understood in the context of court pro- cesses. Evidentiary strength, time, and time-related measures (such as expo- sure to negative information) are relevant factors for sentencing outcomes, and we must both recognize this shortcoming and extend efforts to incorporate this information into our future research and data collection efforts.

By not differentiating between pleas prior to trial and those during the course of a trial, research runs the risk of misclassifying relatively dissimilar cases as similar, overlooking a significant and meaningful distinction. Distin- guishing time to conviction from mode of conviction can help deconstruct the meaning of the trial penalty. It may help identify what proportion of the trial penalty may perhaps be a “time penalty,” and provide further evidence of the importance of the court processing-related measures for sentencing outcomes. A better understanding of the relationship between mode conviction and sen- tencing disparity can be by taking this conflating measure into account.

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Research that does not take variation within mode of disposition into account risks overlooking significant sources of sentencing disparities.

The analyses presented here demonstrate the importance of incorporating more case process measures into studies of sentencing disparities. Having a variable that is often assumed, attributed, and instrumental in many interpre- tations within the sentencing literature, yet is not actually measured, we show how such things as the timing of the mode of conviction may play a critical role in defining the meaning of a guilty plea. Specifically, our study suggests that utilizing a simple trial vs. plea control may be masking important varia- tions within mode of conviction.

Furthermore, in taking advantage of this unique opportunity, our work is consistent with recent calls by prominent scholars to seek out new data, ask different questions (particular those that emphasize sentencing as a process), and look for new ways to expand our current knowledge of sentencing and cor- rections.17 The current paper is a step in this direction. Given the vital role of plea “agreements” in the day-to-day operation of US courts, further research examining the mode of conviction, time, and the interplay between time and guilty pleas has the potential to contribute significantly to our understanding of the sentencing process.

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17. This call was most recently the theme of an NSF-sponsored conference, hosted at SUNY-Albany, entitled Symposium on Crime and Justice: The Past and Future of Empirical Sentencing Research.

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