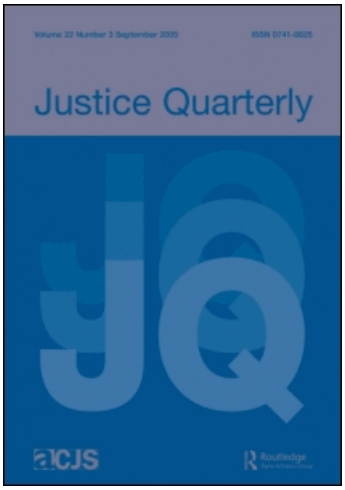

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Trial Penalties in Federal Sentencing: Extra-Guidelines Factors and District Variation

Jeffery T. Ulmer, James Eisenstein and Brian D. Johnson

The guarantee of the right to a jury trial lies at the heart of the principles that underlie the American criminal justice system's commitment to due process of law. We investigate the differential sentencing of those who plead guilty and those convicted by trial in U.S. District Courts. We first investigate how much of any federal plea/trial sentencing differences are accounted for by substantial assistance to law enforcement, acceptance of responsibility, obstruction of justice, and other Guideline departures. Second, we investigate how such differences vary according to offense and defendant characteristics, as well as court caseloads and trial rates. We use federal sentencing data for fiscal years 2000–02, along with aggregate data on federal district court caseload features. We find that meaningful trial penalties exist after accounting for Guidelines-based

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rationales for differentially sentencing those convicted by guilty plea versus trial. Higher district court caseload pressure is associated with greater trial penalties, while higher district trial rates are associated with lesser trial penalties. In addition, trial penalties are lower for those with more substantial criminal histories, and black men. Trial penalties proportionately increase, however, as Guideline minimum sentencing recommendations increase. We also supplement our analysis with interview and survey data from federal district court participants, which provide insights into the plea reward/trial penalty process, and also suggest important dimensions of federal court trial penalties that we cannot measure.

Keywords sentencing; federal courts; trials; guilty pleas; sentencing Guidelines; sentencing disparity

The guarantee of the right to a jury trial in the Sixth Amendment to the U.S. Constitution lies at the heart of the principles that underlie the American criminal justice system's commitment to due process of law. Yet, defendants rarely exercise their right to trial, and instead often plead guilty. Plea bargaining has a long history in the USA (Alschuler, 1978; Mather, 1979); today it is firmly entrenched in the organizational fabric of American criminal justice. As the National Academy of Sciences panel on sentencing reform observed over 25 years ago, "The strongest and most consistently found effect of case-processing variables is the role of guilty pleas in producing less severe sentences" (Blumstein, Cohen, Martin, & Tonry, 1983, p. 18).

Trials serve important symbolic functions, particularly in the federal court system (Wright, 2005)—they serve as a check on prosecutorial power and symbolize the full exercise of due process for federal defendants. Yet substantial evidence exists that federal defendants who exercise their rights to trial and lose receive more severe sentences, a practice known as a "trial penalty" (e.g., Albonetti, 1997, 1998; Johnson, Ulmer, & Kramer, 2008; Kautt, 2002). Although the U.S. Supreme Court has upheld the constitutionality of plea bargaining (*Santobello v. New York* [404 U.S. 257, 260 1971]), trial penalties raise important social justice issues regarding potential violations of defendants' Constitutional rights to trial. As such, the nature and size of trial penalties merits close scrutiny.

U.S. District Courts are a particularly opportune arena for investigating trial penalties. Excluding immigration cases, well over 50,000 felony defendants are convicted and sentenced in U.S. District Courts each year, and about 80% of them receive prison sentences. In addition, the federal sentencing Guidelines (hereafter, Guidelines) are a very ambitious attempt to control sentencing discretion. The U.S. Sentencing Commission (hereafter USSC) aims to codify and incorporate nearly all factors ordinarily relevant to determining sentences, including offense-related behavior and relevant conduct, for which (until recent Supreme Court decisions) the defendant may not have been proven guilty beyond a reasonable doubt. Whether a defendant is convicted by trial versus

guilty plea is not explicitly recognized as relevant to sentencing under the Guidelines.

The presence of plea/trial sentence differentials does not mean that trial conviction alone results in unwarranted sentencing penalties. Such differences can result from: (1) fostering cooperation with law enforcement by those pleading guilty, such as providing information about other crimes; (2) offenders taking responsibility and expressing remorse for their crimes; and (3) upholding the integrity of the criminal justice system by punishing defendants who obstruct justice (for instance, by committing perjury) at trial. The Guidelines explicitly incorporate all three of these rationales, authorizing reduced sentences for those who provide "substantial assistance" to law enforcement or "accept responsibility," and increased sentences for those who "obstruct justice."

We investigate the extent to which these Guideline-approved reasons explain plea-trial sentencing differentials in federal sentencing, focusing on the ways plea/trial differences vary by court case-processing characteristics, and characteristics of offenses and offenders. To our knowledge, no previous research examines these questions in U.S. District Courts. Beyond the finding that plea/trial sentencing differences exist, little is known about the nature and variation of trial penalties in federal sentencing. This paper presents the first multilevel analysis of plea/trial sentencing differences in the federal courts.

First, we investigate plea/trial sentencing differentials after accounting for the three "Guidelines approved" grounds for differentially sentencing defendants. In other words, we investigate how much of a trial penalty remains after substantial assistance departures, acceptance of responsibility reductions, and obstruction of justice enhancements are taken into account. Second, we examine the degree to which trial penalties are associated with other Guideline departures, that is, sentences falling below the recommended Guidelines for reasons other than substantial assistance. Third, we test the extent to which trial penalties are conditioned by two features of federal court case processing: caseload and trial rate. Finally, we examine how plea/trial differences vary according to offense characteristics like offense severity and type, and defendant characteristics such as criminal history, race/ethnicity, and sex.

Our analysis draws upon three sources of information. First, we present multilevel analyses of plea/trial differences using individual sentencing and aggregate federal court data for fiscal years 2000–02. Second, we supplement this with data from interviews with federal judges, U.S. Attorneys and Assistant U.S. Attorneys, federal defense attorneys, and federal probation officers that we conducted in eight federal district courts from 2001–03.[1] Third, we incorporate responses to a nationwide survey of federal judges, federally

1. As part of a larger project, we conducted 314 interviews with federal judges, U.S. Attorneys and Assistant U.S. Attorneys, federally practicing defense attorneys, and federal probation officers in seven geographically dispersed districts varying in size. For further details, see Miller and Eisenstein (2005), Ulmer (2005).

practicing defense attorneys, and probation officers conducted between 2006 and 2007.[2]

Research on Plea/Trial Sentencing Differences

Most studies examining plea/trial sentencing differences focus on state rather than federal courts. The preponderance of evidence from this literature points to the existence of plea/trial sentencing differences. A variety of explanations are given for them, but little is known about how they might vary by jurisdiction, or offense and offender characteristics.

Many studies of state courts find that those convicted by trial, especially jury trials, receive more severe sentences (e.g., Brereton & Casper, 1982; Dixon, 1995; Johnson, 2003; Uhlman & Walker, 1979, 1980; Ulmer, 1997; Ulmer & Bradley, 2006; Zatz & Hagan, 1985). In one recent analysis, King, Soule, Steen, and Weidner (2005) consistently found significant "process discounts," or plea/trial sentencing differences in five sentencing Guidelines states. Numerous other state court studies find that offenders convicted through trials are sentenced more severely than those who plead guilty when mode of conviction is simply treated as a control variable (e.g., Albonetti, 1991; Engen & Gainey, 2000; Kurlychek & Johnson, 2004; Spohn, Gruhl, & Welch, 1982; Spohn & Holleran, 2000; Steffensmeier & Demuth, 2001; Steffensmeier & Hebert, 1999; Steffensmeier, Kramer, & Streifel, 1993; Steffensmeier, Ulmer, & Kramer, 1998; Ulmer & Kramer, 1996; Zatz, 1984). A few contrasting studies fail to find significant plea rewards or trial penalties (Eisenstein & Jacob, 1977; Hagan, 1975; Smith, 1986).[3]

Very few of these studies, however, have examined variation in trial penalties. Rhodes (1979) found that the size of plea-trial sentencing differences

2. Invitations to participate in this survey were sent by email and US mail to 800 active federal judges, all federal public defenders' offices, the district coordinators of Criminal Justice Act (CJA) Panel defense attorneys (who were asked to distribute them to the Panel attorneys), and 89 federal probation offices (where the federal probation officer in charge of presentence reports was instructed to fill the survey out). We received 262 responses from federal judges, 163 responses from federal public defenders, 163 responses from CJA Panel defense attorneys, and 55 responses from federal probation officers, for a total of 642 responses. The response rate for judges was roughly 33% and for the defense attorneys, overall was about 40%. However, we received valid responses from judges in 81% of the 89 federal districts in the USA (excluding the District of Columbia), valid responses from defense attorneys in 62% of the districts, and valid responses from probation officers in 62% of the districts. The full survey and further details about the survey's sampling and data are available from the first author on request.

3. Rhodes (1979), Smith (1986), and LaFree (1985) argue that the chances of acquittal may offset the potential for a greater penalty after losing at trial, and may also offset the potential for a more lenient sentence through plea bargaining. Smith (1986) and Rhodes (1979) in particular hinge the assessment of trial penalties on the comparison of sentences defendants received after pleading guilty with those they would have gotten had they gone to trial, adjusted for the probability of conviction at trial. Using this approach, both Smith (1986) and Rhodes (1979) find limited evidence for trial penalties. On the other hand, Zatz and Hagan (1985) find the opposite—significant plea–trial sentencing differences appeared only after they controlled for the likelihood of conviction versus acquittal or charge dismissal.

varied by offense type, with meaningful differences in robbery cases but not assault, burglary, or larceny. Dixon (1995) found that plea rewards were more substantial in jurisdictions characterized by greater bench or prosecutorial bureaucratization. More recently, Ulmer and Bradley (2006) examined the size and variation of substantial trial penalties for serious violent offenders under Pennsylvania's sentencing Guidelines. Trial penalties increased with court caseload, violent crime rates, court size, and percent black. They also found that trial penalties increased with offense severity, but decreased with prior record.

Much less research exists on plea/trial sentencing differences in federal courts. Some studies, using mode of conviction as a control variable, find going to trial increases sentences (Albonetti, 1997, 1998; Johnson et al., 2008; Kautt, 2002; Peterson & Hagan, 1984; Steffensmeier & Demuth, 2000). For example, though their analysis did not focus on plea/trial sentencing differences, Albonetti (1997) and Kautt (2002) found significant plea/trial differences among federal drug offenders sentenced under the Guidelines, and Albonetti (1998) found them among federal white collar offenders. Similarly, Johnson et al. (2008) reported that trial conviction reduced the odds of downward departures under the federal sentencing Guidelines for a sample of diverse federal offenses. Because the goal of these studies was not to examine plea/trial differences in detail, however, they did not inquire into how much of the plea/trial sentencing difference was attributable to factors codified in the federal Guidelines.[4] Consequently, we do not know whether the plea/trial differences found in prior studies are attributable to Guidelines-approved reasons or not.

Potential Reasons for Trial Penalties

Seven explanations of plea/trial sentencing differences have been proposed. The first three are related to key Guideline factors, and the others are explanations proposed in the sentencing literature: (1) rewarding cooperation with law enforcement, (2) rewarding remorse or acceptance of responsibility, (3) the need to uphold the justice system's operational integrity by discouraging perjury, (4) reactions to "bad facts" coming out at trial that are damaging to the defendant's moral standing, (5) substantive justice concerns where plea negotiations may be utilized to mitigate punishments that are seen as too harsh under individual case considerations, (6) reducing uncertainty for prosecutors and judges by using plea to insure convictions, particularly in cases with evidentiary problems, and (7) efficiency, that is, rewarding guilty pleas and penalizing unsuccessful trials encourages efficient case processing.

The first three rationales for sentence differentials are explicitly built into the Guidelines and have been found Constitutional by the Supreme Court. Upon

4. Kautt (2002) and Albonetti (1997, 1998) incorporated substantial assistance departures with other downward departures (under federal rule 5K2) into a measure of all downward departures, whereas Johnson et al. (2008) separately examined the influence of trial conviction on the likelihood of both substantial assistance and "other" downward departures.

a motion of the U.S. Attorney's Office (hereafter, USAO), a defendant who renders "substantial assistance" (however, the USAO defines it) to law enforcement may be sentenced below the Guideline-recommended minimum. Upon granting this motion, the judge is free to depart anywhere below the Guidelines. These are known as *5K1 departures* (after the federal rule describing them).

The Guidelines also provide for a sentence reduction of two to three levels for defendants who accept responsibility for their crimes. The act of pleading guilty is considered a sign that the defendant accepts legal responsibility for an offense, and therefore merits a lesser sentence. On the other hand, defendants who engage in "obstruction of justice," for example, by presenting perjured testimony at trial, may receive a higher sentence under the Guidelines. Punishing obstructionist tactics is justified as a way to defend the integrity of the justice system. Although the Guidelines permit plea/trial sentencing differences based on acceptance of responsibility, substantial assistance, and obstruction of justice, they do not explicitly sanction the other rationales for such differences.

Substantive Rationality, Focal Concerns, and Trial Penalties

Our conceptual approach to sentencing (and therefore to plea/trial sentence differentials) draws on the notion of substantive rationality and focal concerns. This approach provides a theoretical grounding for our inclusion of variables measuring case load pressures, trial rates, defendant characteristics, and offense characteristics in our statistical analysis of trial penalties. Sentencing Guidelines and their history highlight an age-old dilemma of sentencing: the clash between the goal of uniformity and the goal of individualized justice, which necessitates local discretion and substantive considerations. Savelsberg (1992) and Ulmer and Kramer (1996, 1998) have described how sentencing Guidelines represent an attempt to institute a greater degree of formal rationality in sentencing. In "real world" sentencing, however, substantive rationality coexists with formal rationality (Ulmer & Kramer, 1998). Substantive rationality incorporates value-based or even ideology-driven goals that may or may not coincide with sentencing Guidelines' formal goals (for a helpful theoretical review, see Savelsberg, 1992). Substantively rational criteria likely surround trial penalties, as we explain below.

The focal concerns perspective, which has been extended at length elsewhere (e.g., Bontrager, Bales, & Chiricos, 2005; Curry, Lee, & Rodriguez, 2004; Engen, Gainey, Crutchfield, & Weis, 2003; Johnson, 2005; Kramer & Ulmer, 2002; Steen, Engen, & Gainey, 2005; Steffensmeier & Demuth, 2000; Steffensmeier et al., 1998; Ulmer & Johnson, 2004; Ulmer, Kurlychek, & Kramer, 2007), emphasizes particular substantively rational criteria used by judges and others in sentencing decisions. Judges and other key decision makers (i.e., prosecutors) often make situational imputations about defendants' character and expected future behavior, and assess the implications of these imputed

characteristics in terms of three focal concerns: *defendant blameworthiness, defendant dangerousness/community protection, and practical constraints and consequences connected to the punishment decision*. These situational definitions of defendants in light of the focal concerns shape sentencing decisions. Pleading guilty or being convicted by trial is likely to trigger certain assessments of defendants relative to the focal concerns.

We expect that substantial trial penalties occur in federal sentencing, and that they are not all attributable to the "approved" Guidelines factors relevant to plea/trial sentencing differences discussed above. As we describe below, there are persuasive reasons to expect that additional, non-Guideline-based factors affect the evaluation of cases and defendants *vis a vis* focal concerns of sentencing and influence trial penalties.

Offense and Offender Characteristics

Conviction after trial may mobilize substantive rationality concerns such as negative attributions about defendants' blameworthiness and dangerousness, and this may influence sentencing decisions beyond any Guideline considerations (for an elaboration of this point, see Ulmer & Bradley, 2006). State court research has found that "bad facts" about the crime or the defendant that may come out during trial may be taken into account at sentencing (Flemming, Nardulli, & Eisenstein, 1992; Ulmer, 1997). Guilty pleas can obscure bad facts; trials can dramatize a defendant's criminality and negative moral standing (Emmelman, 2003). In a related vein, Ulmer and Bradley (2006) hypothesized, and found, that trial penalties increased with sentence severity. They reasoned that trials would give greater opportunity for prosecutors to dramatize "bad facts" that morally discredit defendants, and that such defendants would pay for this at sentencing.

On the other hand, one can imagine how a commitment to substantive justice could lead to support for guilty pleas that mitigate Guideline-recommended punishments that might be viewed as unjustly harsh (Kramer & Ulmer, 2009). If prosecutors and/or judges feel that the Guideline-recommended sentence is too severe, they might negotiate a plea agreement to a substantially lesser sentence. Those convicted by trial, however, might not benefit from such leniency.

Ethnographic research on state courts has noted that court actors draw a distinction between "legitimate" and "illegitimate" trials (see Eisenstein, Flemming, & Nardulli, 1988; Flemming et al., 1992). These studies have found that judges, prosecutors, and even defense attorneys commonly accepted trial penalties for obstreperous defendants who insisted on going to trial without a valid case (Eisenstein & Jacob, 1977; Flemming et al., 1992). However, court actors acknowledged that trials were appropriate in cases with important issues to resolve, or where the defendant faced a long sentence. Guideline Federal defendants face substantially more severe sentences than even the serious

violent offenders in state courts studied by Ulmer and Bradley (2006). Federal court actors may therefore be less inclined to penalize defendants who are convicted at trial in cases where the defendant has greater exposure to severe Guideline sentence recommendations than in cases where defendants face relatively shorter Guideline sentences. Thus, Guideline trial penalties might be comparatively smaller for offenders who face greater exposure to severe punishment. Federal judges (and prosecutors) might either feel that the defendant is already facing a severe enough sentence under the Guidelines, and/or else might view the defendants' decision to go to trial as warranted given his/her exposure to comparatively long sentences (minimum sentence recommendations of 20–30 years are not uncommon in the upper ranges of the federal Guidelines).

Trial penalties also likely vary among types of offenses. Different offenses might present qualitatively different implications for attributions of offender blameworthiness or community protection. For example, violent crimes are more likely to elicit outrage or fear. Their dramatization in court at trial, with the disclosure of damaging facts to the defendant, might result in greater trial penalties for these defendants than for property or even drug offenders. Alternatively, some types of offenses, such as property crimes, might systematically receive more favorable plea agreement terms than others. Thus, net of offense severity considerations, we expect between-offense differences in trial penalties.

Criminal history might also condition trial penalties. That is, defendants with different criminal histories might get different trial penalties. This possibility has not been examined in the published literature on federal sentencing, but two competing alternatives exist. On one hand, trials, and the sentencing hearings before the judge that follow them, might provide an opportunity for prosecutors to dramatize the criminality of the defendant, to "dirty him/her up" (to use a phrase common among defense lawyers). If so, those with more extensive prior criminal records would experience a greater trial penalty.

On the other hand, trials might carry less of a sentencing penalty for those with more substantial criminal histories. Trials might be an occasion where defendants with more substantial criminal histories can be presented in a more sympathetic, mitigating light. Alternately, perhaps federal prosecutors offer less generous plea agreement terms to defendants with more substantial criminal histories. If so, this would result in less pronounced plea/trial sentencing differences among these offenders. Ulmer and Bradley (2006) in fact found that trial penalties decline with criminal history in Pennsylvania, a finding consistent with the latter two explanations. In addition, since defendants with more serious criminal records face longer sentences, they have less to lose by taking a shot at a jury acquittal. Such trials may be seen as more "legitimate" and hence less deserving of a trial penalty.

Trial penalties might also vary by the race/ethnicity of the defendant. Court actors' interpretations and assessments of focal concerns such as perceived dangerousness or blameworthiness, as well as the salience of relevant practical

constraints and consequences, might be influenced by race, ethnicity and gender (Peterson & Hagan, 1984; Spohn & Holleran, 2000; Steffensmeier et al., 1998). Furthermore, the influence of race, gender, or ethnicity might also vary by mode of conviction (as suggested by Johnson, 2003; Steen et al., 2005). Marginalized racial or ethnic identities might mobilize more negative emotional responses and criminal stereotypes (Barkan & Cohn, 2005; Beim & Fine, 2007). This might be particularly the case for focal concerns involving attributions of dangerousness and community protection, in which case trial penalties for black and Hispanic offenders, who might be seen as particularly threatening and crime prone, would be correspondingly greater than for whites. In one of the only studies to investigate this possibility, Ulmer and Bradley (2006) found that trial penalties were moderately larger for black defendants sentenced under Pennsylvania's Guidelines, though this effect was rendered non-significant when controlling for county percent black.

Furthermore, women defendants tend to arouse less fear, are often seen as less crime-prone, more amenable to treatment and less morally blameworthy, and tend to be the objects of more sympathy (see reviews by Griffin & Wooldredge, 2006; Koons-Witt, 2002; Steffensmeier et al., 1993). Therefore, trials involving women defendants might arouse more sympathy and less negative feelings toward the defendant, and if so, their trial penalties would be correspondingly less. On the other hand, Ulmer and Bradley (2006) found no significant difference in trial penalties between women and men in Pennsylvania.

Caseload Pressure and Trial Rates

Many studies suggest that the size of any plea-trial sentencing differences likely varies by jurisdiction (Brereton & Casper, 1982; Eisenstein & Jacob, 1977; King et al., 2005; Nardulli, Eisenstein, & Flemming, 1988; Schulhofer & Nagel, 1989; Ulmer, 1997; Ulmer & Bradley, 2006). Specifically, scholars have debated the relationship between trial penalties-plea rewards and court caseloads, with some arguing that heavy caseloads drive mode of conviction differences, and others that such differences exist independent of caseload pressure, for example, due to the content of a court community's culture (for reviews, see Brereton & Casper, 1982; Dixon, 1995; Farr, 1984; Holmes, Daudistel, & Taggart, 1992; Meeker & Pontell, 1985; Nardulli et al., 1988; Wooldredge, 1989).

The need for organizational efficiency in case processing has been tied to the focal concern regarding practical constraints and consequences (Ulmer & Bradley, 2006; Ulmer & Johnson, 2004). Rewarding people who plead guilty avoids time- and resource-intensive trials, keeps cases moving and avoids docket backlogs (Dixon, 1995; Engen & Steen, 2000; King et al., 2005; Uhlman & Walker, 1980).

Caseload pressure is expected to raise the premium on efficient case disposition, resulting in strong incentives for the use of trial penalties to induce guilty pleas. Research on state courts shows that case-processing efficiency is indeed an organizationally valued goal (Dixon, 1995; Eisenstein & Jacob, 1977; Engen &

Steen, 2000), and that it can be associated with differences in guilty pleas and trial penalties (Ulmer & Bradley, 2006; Ulmer & Johnson, 2004). Schulhofer and Nagel (1989, p. 287) argue for the importance of caseload pressure in shaping plea negotiations in federal court: "The case pressure variable, as evaluated by individual prosecutors, contains almost unbounded potential for perpetuating sentencing disparities." However, the role of caseload pressure in conditioning trial penalties has not, to our knowledge, been systematically examined in federal sentencing. We hypothesize that trial penalties will increase as caseload pressure increases.

In addition, federal court trial rates may also be related to sentencing differences between guilty pleas and trials. Trial rates may have a negative (and reciprocal) relationship to plea/trial sentencing disparity. That is, low trial rates may be found among jurisdictions with relatively high sentencing costs for convicted trial defendants, deterring defendants (and locally knowledgeable defense attorneys) from taking cases to trial. Conversely, higher trial rates are likely found among jurisdictions with comparatively lower sentencing costs of going to trial and losing (see Eisenstein & Jacob's, 1977, discussion of case processing in Baltimore, a high trial rate city in their research).

Trials serve important symbolic functions, particularly in the federal court system (Wright, 2005). For example, trials symbolically demonstrate the full machinery of due process and the exercise of the U.S. Constitution's Sixth Amendment. However, courts likely vary in the degree to which their individual actors and organizational culture value these symbolic functions. Research on state courts indicates that the organizational cultures of some courts exhibit greater tolerance for trials than others. If courts vary in their tolerance for trials, they likely also vary in the degree to which they penalize those who exercise their right to trial and lose. There is scant research on this question. Ulmer and Johnson (2004) found no evidence that trial rates influenced either overall sentencing severity in Pennsylvania courts or that they conditioned trial penalties in Pennsylvania courts (see also Kramer & Ulmer, 2009). However, Johnson (2005) found that high trial rates mitigated trial penalties associated with downward departures. To our knowledge, the relationship between trial rates and trial penalties has never been explored in federal sentencing. For the reasons stated above, we hypothesize that higher trial rates will be associated with lower trial penalties in federal courts. The present study uses recent federal data on a broad sample of offenses to provide the first systematic examination of these issues in U.S. District Courts.

Data and Methods

Our analysis uses sentencing data from the USSC's Standardized Research Files on case processing and sentencing outcomes for fiscal years 2000–02. We supplement this with caseload and trial rate data from the Federal Judicial Center's (FJC) Federal Court Management Statistics (averaged across

years 2000–02). We restricted our analysis to the 89 federal court districts within the USA (minus the District of Columbia). We focus on sentence length as a dependent variable first because the vast majority (about 83%) of federal defendants is incarcerated for some period of time.[5] More importantly, we are interested in the effects of trial conviction on sentencing, and very few convicted by trial (just 5%) avoid imprisonment. Supplemental analyses revealed that trial conviction very strongly increased the odds of federal imprisonment.[6]

Sentence length is the minimum number of months of incarceration imposed. We natural log-tranformed sentence length to address its skewed distribution, and to give us a proportional interpretation of predictors' effects. Logging the sentence length and then re-transforming the regression coefficient by taking its antilog (Hannon, Knapp, & DeFina, 2005)[7] allows us to examine the proportional rather than absolute differences in sentence lengths associated with our variables of interest. This also allows us to avoid findings that are artifacts of between-offense differences in the sentences that are legally possible. This also addresses the problem that small plea/trial differences are relatively more important for shorter than for very long sentences.

Predictor Variables

The offense categories we focus on are violence, drug, property, firearms, and white collar/fraud (the reference category). We omit immigration cases from our analysis, since these are processed quite differently from other federal

5. Because not all federal offenders receive incarceration, analyses of sentence length risk the introduction of selection bias (Bushway, Johnson, & Slocum, 2007). We therefore performed additional analyses using the Heckman command in Stata 10.0 to calculate the inverse Mills ratio, which was then imported into HLM and included in the models for sentence length. Supplemental investigation, however, demonstrated high degrees of collinearity between the correction factor and other covariates, making its inclusion problematic. We therefore report the uncorrected estimates. This decision is unlikely to significantly affect our substantive conclusions given the relatively low degree of censoring in the federal sentencing data (about 83% of cases are sentenced to prison) (Stolzenberg & Relles, 1997). Models with the Heckman correction included produced substantively similar estimates for the trial penalty and its interactions, although these effects were generally of smaller magnitude. In addition, we also examined censored two-stage models with non-imprisonment sentences coded as zero months of imprisonment (Bushway et al., 2007). We also replicated our individual level findings regarding trial penalties using Tobit regression. In both cases, results were very similar to those we present. Results are available from the first author.

6. In a logistic regression model of imprisonment identical to that presented in Model 1, Table 3 (not controlling for 5K1, acceptance, obstruction, or departures), the imprisonment odds for trial conviction are 3.01. In a model identical to Model 3, Table 2 (controlling for 5K1, acceptance, obstruction, and departures), the imprisonment odds for trial conviction are 2.45.

7. Researchers in criminology commonly interpret the effects in a semi-logged model directly as a proportional effect rather than re-transforming the effect by taking the antilog of the regression coefficient, and usually it makes little substantive difference (Hannon et al., 2005). However, although there is some controversy about the issue, some argue that the antilog re-transformation is the more technically correct procedure for providing a proportional interpretation (Hannon et al., 2005; see also http://www.biostat.ucla.edu/course/200a/ for a useful tutorial on interpreting logged and semi-logged models).

crimes. We include the Guideline minimum sentence variable provided in the USSC data, which reflects the presumptive sentence for each case. The Guideline minimum also accounts for statutory minimum sentences (mandatory minimums) that "trump" the Guideline recommendations (Hofer & Blackwell, 2001). Albonetti (1998) and Engen and Gainey (2000) argue for including the presumptive Guideline sentence recommendation as a further control when examining extra-Guideline effects (but see Bushway & Piehl, 2001). Similar to sentence length, we also logged this variable to address its skewed distribution, which would potentially result in distorted effects and inaccurate standard errors. Because the Guideline minimum variable is highly correlated with the Guidelines final offense level (r =.89), and because the Guideline minimum variable accounts for statutory "trumps" of the Guidelines where final offense level does not, we include the logged Guideline minimum, but not the final offense level. This is in fact the procedure followed by USSC research staff (Hofer & Blackwell, 2001; U.S. Sentencing Commission, 2006).[8]

The defendant's Guideline *criminal history score*, ranges from 0 to 6 (6 being most serious). Because criminal history is not as highly correlated with Guideline minimum (r =.29) as is the case with final offense level, and because we are interested in how criminal history might condition trial penalties, we include criminal history in our models (a procedure also followed in USSC research, see U.S. Sentencing Commission, 2006). We also include measures of the Guidelines two to three point "acceptance of responsibility" reduction, and also include whether the Guidelines sentencing enhancement for "obstruction of justice" is imposed.

It is important to note that the acceptance of responsibility and obstruction of justice Guideline adjustments are not inherently isomorphic with pleading guilty or conviction by trial. While the large majority of those pleading guilty receive either the two or three point acceptance of responsibility reduction, it is important to note that it is possible for a defendant to receive this reduction after conviction by trial, and it is possible for a defendant to not receive it even if he or she pleads guilty. About 7% of guilty plea defendants received no acceptance of responsibility reduction and about 18% of them received only the two point reduction. On the other hand, 3% of trial defendants received the two point acceptance of responsibility reduction and 2% of them received the full three point reduction. Presumably, judges decided that these trial defendants expressed adequate acceptance of responsibility for their offenses even though they exercised their rights to trial. Similarly, it is not necessary to be convicted by trial to receive the obstruction of justice enhancement, and most defendants

8. In some Guideline cells, the minimum sentence recommendation is zero, yet it is still possible for defendants to be imprisoned for some length of time. There were 918 cases where the guideline minimum was zero, but the defendant received a prison sentence. We reasoned that these cases should not be deleted, since defendants did receive a valid sentence length that was above the guideline minimum. Since zero cannot be logged, we assigned a guideline minimum of .5 to these cases before logging Guideline minimum, making their logged guideline minimum value −.69.

convicted by trial do not receive it. Only 22% of trial defendants received this enhancement and 4% of those who pleaded guilty received it.

Our prime focus is on the effects of *trial conviction* (and its interactions), measured by a dummy variable (1 = trial conviction, 0 = guilty plea). We also include dummy variables for 5K1 (substantial assistance) downward departures and for judge-initiated departures (downward or upward). It is possible, though very unusual, for defendants convicted by trial to receive substantial assistance departures (about 2% of trial defendants received them). On the other hand, 80% of those pleading guilty do not receive substantial assistance departures.

Because pretrial detention may disadvantage defendants at sentencing (Demuth, 2003; Demuth & Steffensmeier, 2004; Wooldredge & Thistlethwaite, 2004), we also control for whether the defendant was held in *pretrial detention* with a dummy variable (1 = detained pretrial). Another dummy variable measures *type of defense attorney* (1 = private attorney, 0 = public- or court-appointed defender). Since nearly 50% of cases lack information on type of attorney, we included a dummy variable for whether it was missing to control for attorney type and yet not lose a large number of cases to listwise deletion. This variable is not shown in the results. Other dummy variables used include *race/ethnicity* (white as a reference category, black, Hispanic, and other), *gender* (female = 1), *age*, and *education*. Another measure reflects the offenders' *number of dependents*, a factor that might mitigate sentences in that lengthy imprisonment might present an unwanted practical sentencing consequence, or might reduce defendants' perceived threat.

Finally, we measured *district criminal caseload size* as the annual average number of criminal cases filed in a district divided by the number of authorized judgeships. Districts' criminal *trial rate* is measured by the annual average number of criminal trials per judge divided by the number of criminal cases filed per judge.

Analytical Techniques

Our hypotheses necessitate simultaneously examining individual-level and district-level effects. The importance of inter-court variation in sentencing outcomes and the factors that affect them, and the desirability of using hierarchical linear models (HLM) for analyses of sentencing and case-processing outcomes has by now been well established in a number of studies (e.g., Britt, 2000; Fearn, 2005; Johnson, 2005, 2006; Kautt, 2002; Kramer & Ulmer, 2009; Ulmer & Bradley, 2006; Ulmer & Johnson, 2004; Weidner, Frase, & Schultz, 2005; Wooldredge & Thistlethwaite, 2004).

The analytic strategy for our HLM analysis utilizes random coefficient models, with all variables centered around their grand means, to examine variation in trial penalties across case and district contexts. Random coefficient models allow us to examine variation in individual predictors, such as the effect of

trial conviction, across aggregate court contexts, and grand mean centering facilitates model estimation and provides for a meaningful interpretation of model intercepts (Raudenbush & Bryk, 2002, pp. 31–35).

Findings

Our analysis proceeds as follows: (1) we assess models focusing on the main effect of trial conviction on sentence length, then assess whether a trial effect persists net of substantial assistance to law enforcement, other downward or upward departures, acceptance of responsibility, and obstruction of justice; (2) we examine how the trial effect varies according to offense and defendant characteristics; and (3) we investigate interdistrict variation in trial effects by evaluating variance components associated with trial conviction along with our hypothesized cross-level interactions.

Table 1 presents descriptive statistics for our variables (correlation matrices of variables are available on request).

One immediate point of interest is the relative scarcity of trials—only 5% of sentenced defendants went to trial, confirming Wright's (2005) observation that federal trial rates have been declining since the early 1980s. Almost 90% defendants who plead guilty get a reduction for acceptance of responsibility, and about one in five benefit from a substantial assistance departure (5K1) motion.

Before estimating our main models, we estimated unconditional models for logged length (available on request). The unconditional model showed modest but significant interdistrict variation in logged sentence length. The Level 2 variance component was.08 (SD =.28), and the intraclass correlation was.061, indicating that 6% of the variance in sentence length existed between district courts, a small but statistically significant amount.[9]

Table 2 shows a series of models of the effects of trial conviction on sentence length. In preliminary analyses, we investigated additional district-level predictors, but do not present them here because they are not of theoretical interest and did not alter our substantive findings.[10]

9. We also examined three-level models that controlled for federal circuits as a third level of analysis. In the three-level unconditional model, federal circuits accounted for a statistically significant but small (less than two percent) amount of the overall variance in sentence lengths. Once district level predictors were included, however, the circuit level variation in sentence lengths was explained away. This indicates that between-circuit variation was fully accounted for by our district-level covariates. In the interest of parsimony, we report results from the two-level model specifications. Results from the three-level specifications were substantively similar to those we present here.

10. Additional district level predictors included: mean base offense level, percent drug, violent, property, fraud, and firearms cases, district size, percent black population, percent Hispanic. We also used alternative measures of district caseload size, such as sentencing caseload size and dispositions per judge. None of these alternative models performed better than or substantively altered the results reported here.

Table 1 Descriptive statistics: U.S. District Court cases receiving federal prison sentences, 2000–02

Dependent variable	Frequency (%)	Mean (SD)
Sentence length (capped at 470 months)		62.4 (72.0)
Sentence length (logged)		3.56 (1.16)
Trial conviction		
Guilty plea	109,668 (95.0)	
Trial	5,772 (5.0)	
Obstruction of justice enhancement	5,598 (4.8)	
Acceptance of responsibility reduction		
No points	13,276 (11.5)	
Two points	20,087 (17.4)	
Three points	82,077 (71.1)	
Substantial assistance departure (5K1)		
Yes	21,933 (19.0)	
No	93,507 (81.0)	
Downward departure (5K2)		
Yes	15,007 (13.0)	
No	100,433 (87.0)	
Upward departure		
Yes	1,154 (1.0)	
No	114,286 (99.0)	
Offense type		
Violent	6,926 (6.0)	
Property	4,618 (4.0)	
Drugs	68,110 (59.0)	
Fraud	24,242 (21.0)	
Firearms	11,544 (10.0)	
Criminal history		2.4 (1.7)
Guideline minimum or mandatory statutory minimum "trump" (logged)		3.7 (1.24)
Pretrial detention		
Detained	75,382 (65.3)	
Released or missing	40,058 (34.7)	
Gender		
Male	100,433 (87.6)	
Female	15,007 (13.0)	
Race		
Black	35,786 (31.0)	
White/other	79,654 (69.0)	
Hispanic ethnicity		
Hispanic	35,784 (31.0)	
Non-Hispanic	79,652 (69.0)	
Education		11.2 (2.8)
Number of dependents		1.5 (1.7)

Table 1 (*Continued*)

Dependent variable	Frequency (%)	Mean (SD)
US citizen		
Yes	86,580 (75.0)	
No	28,860 (25.0)	
Type of defense counsel		
Private	12,698 (11.0)	
Government provided or missing	102,742 (89.0)	
Average case filings per judge		75.4 (67.8)
Average trial rate per judge		24.4 (9.1)

In Part A, Model 1 shows the effect for trial conviction without controlling for substantial assistance, acceptance of responsibility, obstruction of justice, or other Guideline departures.

In this model, trial defendants' sentence lengths are 45% greater than those convicted by guilty plea (antilog of.37:1). Compared to an offender who would have received the grand mean sentence of 62 months after pleading guilty, this translates into a predicted sentence length that is nearly 28 months longer, or about 90 months total, if convicted at trial.

In Model 2 of Table 2, we examine how much of the trial effect in Model 1 is attributable to substantial assistance departures, acceptance of responsibility, and obstruction of justice, all reasons for trial-plea sentence differences explicitly provided for in the Guidelines. Controlling for these factors, trial sentences are 16% greater than for guilty pleas, a 64% reduction of its size in Model 1. Substantial assistance departures reduce sentences by 59%, and each acceptance of responsibility point reduces sentences by 1%. Obstruction of justice enhancements augment sentence lengths by about 12%. Thus, almost two-thirds of the the trial effect on sentence length is attributable to substantial assistance, acceptance of responsibility, and obstruction of justice.

Model 3 shows the degree to which the trial effect is attributable to other downward or upward departures under Rule 5K2. After controlling for such departures, trial defendants' sentence lengths are still 15% greater than those who plead guilty. Thus, about 2% of the original trial penalty in Model 1 is due to other Guideline departures. Downward departures reduce sentences by an average of 37%, while upward departures (which only occur in 1% of cases) increase them by on average 77%.

Thus, a significant 15% sentence length difference still remains after accounting for Guideline-approved factors that are connected to pleading guilty, and after controlling for upward departures and downward departures that are not related to substantial assistance to law enforcement. For an "average" offender who would have received the mean sentence of 62 months by pleading guilty, this translates into a trial penalty of about nine additional months of imprisonment if convicted by trial.

Table 2 Hierarchical models of sentence lengths (logged) in U.S. District Courts (2000–02): trial effects under different model specifications

Part A

	Trial effect (*b*)		
	Model 1	Model 2	Model 3
Level 1 (individual) predictors			
Constant (b_0, G_{00})	3.57***	3.57***	3.55***
Trial	.37***	.15***	.14***
Substantial assistance (5K1) departure		−.52***	−.58***
Acceptance of responsibility		−.01***	−.003
Obstruction of justice		.11***	.10***
Other downward departure (5K2)			−.46***
Upward departure (5K2)			.58***
Criminal history	.06***	.04***	.04***
Guideline minimum (logged)	.70***	.79***	.81***
Offense type (Fraud = reference category)			
Violent	.27***	.14***	.15***
Property	.10***	.08***	.06***
Drug	.16***	.12***	.13***
Firearms	.13***	.04**	.05***
Offender age	.001***	.0002	.0003
Black offender	.05***	.04***	.03***
Hispanic offender	.02**	.03***	.02***
Other race/ethnicity	−.02	−.01	−.01
Female offender	−.18***	−.15***	−.12***
Education	−.004***	−.002***	−.002**
Number of dependents	−.004***	.001*	.002*
Private defense counsel	.02***	.04***	.03***
US citizen	−.06***	.001	−.01*
Pretrial detention	.21***	.20***	.18***
Level 2 (district) predictors			
Average case filings per judge	−.001**	−.001***	−.0002*
Average trials per judge	.002*	.001	.003
Level 1 R^2	.77	.82	.83
Level 2 R^2	.85	.85	.85
Level 1 *N*	115,440		
Level 2 *N*	89		

*$p < .05$; **$p < .01$; ***$p < .001$.

Part B

Random effects	Variance component	SD of variance component
Trial	.003***	.05
Substantial assistance departure	.03***	.17

Table 2 (*Continued*)

Part B

Random effects	Variance component	SD of variance component
Downward departure	.012***	.11
Violent offense	.005***	.07
Drug offense	.01***	.10
Firearms offense	.008***	.09

Other notable individual-level influences on sentence length in Model 3 include criminal history, Guideline minimum, offense types, gender, and pretrial detention. Not surprisingly, Guideline-recommended minimums Guideline strongly and cumulatively increase sentence lengths, and criminal history increases sentence lengths independently of the influence of Guideline minimum recommendations as well. Violence, property, firearms, and drug offenses also have significantly greater sentence lengths relative to frauds, the reference category, with violent offenses sentenced most severely.

In addition, a meaningful gender effect appears, with females receiving 13% shorter sentences on average than males. Pretrial detention appears to have very real consequences for eventual sentence lengths if people are later convicted—those detained pretrial have percent longer prison terms than their non-detained counterparts. Interestingly, controlling for Guideline departures reduces the effect sizes of race (black), education, age, citizenship, number of dependents, and pretrial detention. This suggests that the effects of these variables on sentence length, even though some are relatively small to begin with, are partially attributable to substantial assistance and downward departures.

Two significant district-level differences in sentence severity appear in Model 3. Since the statistical tests for the district-level effects are based on an *N* of 89, rather than 115,440, significance levels of $p < .05$ and below are much more meaningful. Caseload size (average case filings per judge) is associated with slight but significant cumulative decreases in district average sentence lengths. An increase of 1 SD in caseload (67 cases per judge) is associated with a 1.3% decrease in district average sentence lengths.

Part B of Table 2 shows the effects that exhibit significant interdistrict variation in Model 3. Most notably for our purposes, the effects of trial conviction, substantial assistance departures, and downward departures vary substantially between district courts. The standard deviation of the variance component indicates that the trial coefficient varies by $\pm .05$ among two-thirds of the districts. This means that the trial coefficient (based on Model 3) would be .20 in districts whose trial effects are 1 SD above the mean effect, but only .10 in districts with trial effects 1 SD below the mean effect. In other words, across two-thirds of the districts, there can be as great as a 22% sentence length difference between guilty pleas and trials, or as little as an 11% difference, all

net of the influence of substantial assistance, acceptance, obstruction, or other departures. Substantial assistance departures also show a considerable degree of interdistrict variation—the substantial assistance coefficients vary from -.41 in districts whose 5K1 effects are 1 SD below the mean effect, to -.75 in those 1 SD above the mean effect. The coefficient for other downward departures also varies significantly, by ±.10 between district courts. These latter findings are consistent with recent research on federal sentencing by Johnson et al. (2008) who found that the size of Guideline departures varies widely between district courts. Also, the sentences of different types of offenses (violence, drug, property, firearms) vary significantly between districts.

Table 3 shows significant individual and cross-level interactions involving trial conviction.

We discussed two possibilities for how trial penalties might vary with criminal history—criminal history might either exacerbate or dampen trial penalties. Table 3 shows that criminal history is associated with modestly decreased trial penalties. The trial coefficient declines by .01 with each increase in criminal history, indicating that trial defendants with more pronounced criminal histories experience comparatively smaller trial penalties.

We also discussed two possibilities for how trial penalties might vary with exposure to punishment—exposure to more severe guideline sentence recommendations might be associated with either greater or lesser trial penalties. We therefore estimated an interaction term for trial * Guideline minimum. Trial penalties significantly increase, rather than decrease, with exposure to punishment. Since increases in criminal history are actually associated with lesser trial

Table 3 Cross-level and individual-level interactions with trial effect on sentence length: U.S. District Courts, 2000-02[1]

	Trial effect (*b*)
Individual-level interactions[1]	
Trial * criminal history	−.01**
Trial * Guideline minimum	.02**
Trial * black offender	−.03**
Trial * black male	−.03**
Cross-level interactions[2]	
Intercept (trial coefficient)	.16***
Average case filings per judge	.0003**
Average number of trials per judge	−.002*

*$p < .05$; **$p < .01$; ***$p < .001$.

[1]Each of the individual-level interaction terms are added separately to full models that include all individual- and district-level predictors show in Model 3 of Table 2.

[2]Interaction terms are random effects—that is, allowed to vary between districts. Their statistical tests are therefore based on 89 cases (districts as units of analysis) instead of 115,440 individual cases.

penalties, the guideline minimum * trial effect is likely driven by offense severity. Thus, offenders convicted of more severe offenses, and who thus face more severe sentence recommendations under the Guidelines, actually experience proportionately greater trial penalties. We also expected trial penalties to vary between types of offenses, but that expectation was not born out. We also expected trial penalties to be mitigated for women defendants, but this expectation was not supported. An interaction term for female * trial was not significant.

However, trial effects are conditioned by race in an unexpected way. We expected African American defendants to face a higher trial penalty, but the opposite holds. Moreover, this pattern largely involves black males, since there are only 217 trials in our data involving black females (versus 2,268 black male trials). To explore this further, we estimated separate models for blacks and whites. This indicated that the trial coefficient for blacks was indeed .11, while the trial effect for all other offenders was .16. Trial effects for whites, Hispanics, and other races/ethnicities were not significantly different. To further explore this interaction, we estimated separate models of sentence length for guilty pleas and trials. Interestingly, race differences in sentence length were smaller among trial cases (where the race effect was a non-significant.02) than among guilty pleas where the race effect was .06. This supports the notion that trials do not seem to be situations that exacerbate black/white sentencing differences.

As expected by organizational efficiency and focal concerns perspectives, trial penalties modestly but significantly increase with court caseloads (the statistical tests for cross-level interaction effects are based on an *N* of 89). The coefficient for the effect is small in an absolute sense, but since the effect is cumulative, it produces meaningful differences in trial penalties between districts with very different caseloads. The mean caseload per judge is 75, with an SD of 67. A difference of 1 SD in caseload would be associated with about a.02 difference in the trial coefficient. The minimum per judge caseload is 20, and the maximum is 475. This difference would be associated with a.14 difference between the trial coefficients of these districts at the extremes of the caseload distribution.

On the other hand, higher trial rates are associated with reduced trial penalties. Each increase of one trial per judge is associated with a .004 decrease in the trial coefficient. Thus, a 1 SD increase in trial rate would yield almost a .04 decrease in the trial coefficient. Furthermore, the trial coefficient in the district with the highest trial rate (49 per judge) would be about .15 less than that in the district with the lowest trial rate (12 per judge).

These analyses suggest that meaningful plea/trial sentence length differences remain *after* accounting for Guideline-based factors, and that these effects vary according to court caseload and trial rates, as well as criminal history, exposure to Guideline punishment, and race. However, the quantitative analysis does not tell the whole story. The qualitative data presented below shed some light on possible reasons behind the trial penalties we find above,

and also suggest that penalties for going to trial emerge earlier in the disposition process, *before* the imposition of sentence.

Qualitative and Survey Evidence on Trial Penalties

The imposition of sentence culminates a long and intricate disposition process. Since comparatively little quantitative information exists about the many decisions made prior to sentencing, analyses of sentencing data cannot capture other ways in which defendants incur a penalty for going to trial. However, many of the 308 interviews we conducted with federal judges, prosecutors, defense attorneys, and probation officers in eight districts provide insights into this largely invisible realm. The interview data highlight common rationales for trial penalties discussed earlier, provide insights into federal court actors' perceptions of trial penalties and the guilty plea process, and identify additional ways the decision to go to trial is deterred that cannot be captured with the sentencing outcomes data. We supplement this information from our survey data from 642 respondents (federal judges, defense attorneys, and probation officers).

When asked, respondents typically indicated that defendants who went to trial received longer sentences than those who pled guilty. A former federal prosecutor, now a private defense attorney told us: "The reality is, if you roll the dice [by going to trial], you're going to get whacked." A Criminal Justice Act (CJA) Panel defense attorney from a different district answered the question "If you go to trial do you pay a price?" with "Yeah. Absolutely. And not in every case, but yeah." A probation officer in the same district was asked: "[If you] were my defense attorney … do you think, that if I went to trial you'd be able to get me as good a deal as if we went into a plea agreement?" He replied emphatically, "Never." A probation officer elsewhere explained that

> [I]f you go to trial here anyway, the Assistant U.S. Attorney who put their risk in a trial, takes that case to trial, is going to give everything in his or her power to ensure that you get the most severe penalty under the Guidelines....What's that old saying... Hell hath no fury?

Federal prosecutors often attribute plea/trial sentencing differences solely to the Guidelines' 5K1 and acceptance of responsibility provisions. For example, asked what his sense of the trial penalty was, a prosecutor in a large district court replied: "There isn't one." However, he went on to qualify this statement, saying "[Except for] Two points for acceptance of responsibility." A colleague in the same office gave a similar response, asserting that *aside* from 5K1 dispositions and acceptance of responsibility, trial defendants don't get stiffer penalties. However, our earlier sentencing analysis showed that trial defendants still received longer sentences even after accounting for acceptance of responsibility, substantial assistance, and obstruction of justice

considerations. Our interviews offer insights into the origins and nature of these trial penalties.

Reasons for "Residual" Trial Penalties

"Bad facts" about the defendant and crime that emerge during a trial seem to result in longer sentences. A CJA attorney observed:

> But what happens is in the development of the trial some facts come out that wouldn't have been there at the plea bargain stage that enhance the Guidelines. The relevant conduct goes up because there's a 404B [a Guideline adjustment], there's other bad things, other bad acts that pop up and become relevant conduct.

This explanation would not account for our quantitative findings, since we controlled for "relevant conduct" via the Guideline minimum, which incorporates it such adjustments to the final offense level.

However, a more subjective side to the "bad facts" explanation was suggested by a former U.S. Attorney turned defense attorney:

> Sometimes you think [when] we're pleading guilty, we're cutting our losses because [that way the judge] is not going to see my client. He's not going to understand just how pernicious this little scheme was and so forth. There's no question about that.

Another private defense attorney explained:

> There are those occasional few where you just sit here and think, 'You know what? You really should plead guilty because you're just such a jerk, you know? And you're so greedy and you're so arrogant and you're so unappreciative of the fact that you have nobody to blame but yourself, okay? Let's plead guilty, get up, cross your fingers behind your back, tell him [the judge] you're sorry, and cut your losses. Because the more he gets to see into your soul, the darker it's going to look for you.'

A related set of explanations for trial penalties rests not so much on "bad facts" as on the impact of a trial on the level of judicial and prosecutorial scrutiny of the case and defendant. A former federal prosecutor, now a defense attorney, explained that trials ratchet up the level of scrutiny:

> [W]hen a judge hears the facts of the case, he or she is going to take it more personally, be more engaged in it, and react more strongly to it than if it's cold on paper proper....as the trial proceeds, factors come out, and the prosecutors get engaged, to the point that enhancement factors that would not have been sought or would have even been apparent if you had a deal now come into play once you go to trial.

Other interviews suggested a combination of *organizational efficiency* and *remorse* as partial explanations for why those who plead guilty receive lesser sentences than those convicted by trial. For example, one federal public defender's answer combined a theme of organizational efficiency with one of heightened blameworthiness:

> I think that they really do believe that it's wasting their time, first and foremost, and that there is somehow—that people maybe are not redeemable because they're not contrite, because they're not accepting of what they did, that they behave as conmen.

Our federal survey data support this view. Sixty-five percent of the federal judge respondents viewed pleading guilty as a signal of remorse and rehabilitative potential. In addition, 34% of judges agreed or strongly agreed with the statement, "efficient case processing is an end in itself."

Dimensions of Trial Penalties that cannot be Captured with Sentencing Outcome Data

The interviews suggested that dimensions of trial penalties occur *prior to* conviction that cannot be measured by sentencing outcome data. In some districts, defendants faced a variety of incentives to plead guilty, and to do so quickly. In particular, the plea process appears to help determine the final offense level, and therefore exposure to punishment. Thirty-five percent of our survey respondents stated that "specifications of the final offense level" were "frequently" or "almost always" part of plea agreements. Similarly, 40% of respondents stated that "stipulations on elements of relevant conduct" were "frequently" or "almost always" part of plea agreements. Furthermore, respondents estimated that on average 20% of all cases involved plea agreements to lesser charges to avoid federal mandatory minimums.

Federal prosecutors' practice of filing *superseding indictments* when defendants do not enter a timely plea appears to be a subtle and effective way to deter going to trial. Twenty-eight percent of our survey respondents agreed or strongly agreed that federal prosecutors' "plea agreement offers routinely become less generous," the longer cases continued past indictment. Defendants in some districts were confronted with "drop dead" dates to accept plea agreements, after which they would face more serious charges filed in *superseding indictments*. A CJA attorney asked if the USAO filed superseding indictments if his defendant intended to go to trial, replied: "All the time. … They'll basically say you can plead to this now, or we're going to supersede and add charges." He explained when a drug defendant faces an enhancement that doubles the sentence, "they'll say, 'Hey, if you plead, we won't file the … enhancement.' … They use it as kind of a lever to force you to

plead." Another defense attorney in this district provided another glimpse into this practice:

> [The prosecutor will say] Okay. Guess what? We're at a crossroads. Today these are my numbers and this is the deal. Make me keep investigating, I'll guarantee you the numbers are going to get worse and I'm probably going to add more charges.

A public defender in another district echoed this point: "If you choose to take something to trial, they will at that point start charging everything." A probation officer in a different district explained that

> … maybe in a plea agreement they'll [federal prosecutors] negotiate away or just look the other way on an enhancement that might possibly be applicable….Every time they're going for that enhancement if the case went to trial.

A defense attorney in yet another district, asked if prosecutors can affect the sentence, replied: "Oh, absolutely. Absolutely. Because you're basically forced either to cooperate or do something for them so you can get… points off. And it's such an incentive not to go to trial."

"Fact bargaining" during plea negotiations is another way defendants are deterred from going to trial. A judge referred to negotiations over facts like the amount or drugs or money in an excellent summary of how trials are discouraged:

> Guidelines have accomplished without a constitutional amendment the virtual limitation of the Sixth Amendment [right] to trial by jury….The deal goes like this. You want to take a plea? We'll charge you with this and only one count, not 16. And you only have to accept responsibility for the uncharged conduct of this and this, [but] not this. We'll agree that the amount of the drugs, the money, the whatever, is this, not this. Now, you don't want that plea? Go ahead and go to trial. You will lose your substantial assistance. We will seek 16 counts. We will seek to have the amount of money, drugs, whatever, at this number, not this number. And we'll give you nothing. So the difference is not just a few months. The difference can be double.

Some respondents noted that trial penalties varied by judge, another dimension of variation that the USSC data do not allow us to measure. When asked if there was a trial tax or not, a federal prosecutor responded "I think it depends on the judge." A federal public defender, asked if trial penalties exist, replied: "Yes, but only with some judges." A colleague agreed, and went on to describe a judge who was generally sympathetic to defendants. "But if you go to trial in front of him… he becomes a third prosecutor. He won't give you anything… at sentencing, he's gonna hurt you." A defense attorney in another district also reported that trial penalties "depend on the judge," then said of one judge: "I don't think he's ever penalized anybody for going to trial in his life. I don't think he ever will."

Discussion

Our study addresses three research questions: (1) To what extent are trial penalties evident among convicted federal defendants, and to what extent are they attributable Guidelines-approved factors of substantial assistance, acceptance of responsibility, or obstruction of justice? (2) To what extent trial penalties vary by federal court caseloads and trial rates? (3) To what extent do trial penalties vary according to defendant and offense characteristics?

First, we confirm both that a substantial trial penalty exists in federal sentencing. While just under two-thirds of it is attributable to Guideline-based factors, a significant 15% sentence length difference on average separates those who plead guilty and those convicted by trial. Trial penalties are also conditioned by court context and defendant-related factors. Our findings mostly coincide with Ulmer and Bradley's (2006) analysis of trial penalties in state courts (see also Kramer & Ulmer, 2009). Interestingly, trial penalties substantially increase as the Guideline recommendations increase, which is similar to Ulmer and Bradley's (2006) finding that trial penalties increased with offense severity. Like Ulmer and Bradley (2006), we also found that trial penalties are significantly less for defendants with more serious criminal histories, and also that trial penalties were not conditioned by gender. Unlike Ulmer and Bradley (2006), we found that trial penalties were less, not greater, for black male offenders.

As Ulmer and Bradley (2006) argued, trials might give defendants with substantial criminal history scores a chance to present themselves in a more sympathetic light, to encourage judges to look beyond the criminal history score to the individual defendant. If so, trials would provide opportunities to mitigate the effects of criminal history on perceived blameworthiness or dangerousness. Alternately, perhaps federal prosecutors offer less generous plea agreement terms to defendants with more substantial criminal histories. That is, perhaps it is the sentencing benefits of pleading guilty that decline with prior record, not the costs of conviction by trial. Our findings are congruent with both of these explanations, but unfortunately, we cannot adjudicate between them here. Either way, it is interesting that criminal history is associated with lesser trial penalties in spite of the finding that trial penalties increase proportionately with Guideline-recommended punishment.

Our findings also support Ulmer and Bradley's (2006) logic that trials seem to enhance the perceived blameworthiness of those convicted of more severe offenses and thus facing more severe Guideline punishment. It may be that guilty pleas obscure "bad facts" about offenses and offense-related behavior, but trials can dramatize a defendant's criminality and negative moral standing (Emmelman, 2003; Ulmer & Bradley, 2006). Interestingly, our findings suggest that criminal history and offense severity might have opposite conditioning effects on trial penalties/plea rewards, since overall exposure to Guideline punishment (which is mostly driven by the Guidelines final offense level) increases trial penalties but criminal history decreases them. Trials might foster

the visibility and consideration of "bad facts" about offense behavior, but the consideration of "good facts" that mitigate criminal histories.

Another intriguing possibility is that federal prosecutors' plea agreement offers in terms of sentencing recommendations might become more generous and attractive as Guideline punishment exposure increases, just as plea agreement offers might become less generous for those with serious criminal histories. Federal prosecutors might offer more lenient sentencing recommendations as a way to induce defendants facing relatively severe Guideline sentences to plead guilty, and to not take their chances of an acquittal at trial. Future research should continue to unravel the complex relationship between criminal history, exposure to guideline punishment, and plea/trial sentencing differences.

The lesser trial penalties for blacks, specifically black males, were unexpected. In fact, this finding contrasts with the pattern found by Ulmer and Bradley (2006) in Pennsylvania, where blacks appeared to receive greater trial penalties. One possibility is that nationally publicized controversies surrounding racial disparities in federal drug sentencing may have heightened concern about racial disparity in federal courts. Federal judges may be more careful about appearing to penalizing black male defendants offenders following trials, which attract more publicity than guilty pleas. Alternately, black male defendants may be viewed negatively in the abstract when they are less personally visible to the court in guilty pleas compared to trials. Recall that the interview material presented earlier noted that guilty pleas allow the defense to sometimes make "bad facts" or "bad character" less salient to the court. Perhaps the reverse sometimes happens with black male defendants—trials might present the opportunity for the court to see and sympathize with such defendants as complex individuals, rather than as racially-based one-dimensional stereotypes.

Another explanation may be that prosecutors might offer less generous plea agreements to black defendants. If so, plea-trial sentence differences may be less pronounced among them. Unfortunately, our data are limited in what they can tell us about what causal processes lie behind potential racial differences in trial penalties. More detailed data and future research on plea-negotiation and trial processes is needed to investigate these possibilities.

We also found that trial penalties vary noticeably between district courts, as indicated by the substantial between-district variation in trial coefficients. Trial penalties increase with district caseload pressure, supporting the proposition that a district court's trial penalties stem in part from considerations of organizational efficiency (Dixon, 1995; Engen & Steen, 2000). It also coincides with the findings of Ulmer and Bradley's (2006) research on Pennsylvania sentencing. Although this effect is moderate in size, it lends credence to Schulhofer and Nagel's (1989) suspicions that caseload pressure contributes to sentencing disparity between guilty pleas and trials.

On the other hand, districts with higher trial rates have less severe trial penalties, suggesting they might be more tolerant of trials, and therefore penalize trials less. The causal direction of trial rates and trial penalties is

likely reciprocal. If courts tolerate more trials and penalize trial defendants less, this would encourage the local defense bar to go to trial more often. This would indicate that courts that tolerate more trials *per se*, rather than just tolerating trials in severe cases, impose lesser trial penalties. Thus, in contrast to research on Pennsylvania sentencing by Ulmer and Johnson (2004) and Kramer and Ulmer (2009), trial rates appear to condition smaller trial penalties in federal courts.

Our survey data provide some intriguing suggestions in this regard. In response to the question, "Protecting the rights of criminal defendants outweighs the possibility that defendants might do harm in the community," 2% of the federal judges in our sample strongly disagreed, 14% disagreed, 30% were neutral, 35% agreed, and 16% strongly agreed. In response to the question, "Handling cases efficiently is an end in itself," 12% of the judges strongly disagreed, 22% disagreed, and 27% were neutral, 32% agreed, and 4% strongly agreed. It may be that some federal courts, and judges, value the symbolic due process functions of trials to a greater extent than others, whereas other judges in other courts place greater value on organizationally efficient case processing. This may be somewhat reflected in variation in trial penalties between courts.

Conclusion

Our study has at least two important limitations. First, our findings are based on cases sentenced before the Supreme Court's decision in *U.S. v. Booker/Fanfan*. Post-Booker, the Guidelines became advisory, and federal sentencing patterns are now evolving in light of this fact. Plea/trail sentencing differences may also therefore evolve—a possibility worth additional research. The USSC's report on sentencing in the near-term aftermath of Booker concluded that sentences did not stray much from Pre-Booker patterns (U.S. Sentencing Commission, 2006). Post-Booker, we see no reason to believe that the change in the legal status of the Guidelines will lead to *lesser* trial penalties. In fact, given our findings and our understanding of the importance of district court culture in shaping sentencing and case processing, we suspect that trial penalties might increase in federal courts now that the Guidelines are less legally constraining. Future research should investigate the extent and variation in trial penalties in the Post-Booker era of the guidelines.

Second, we cannot account for the odds of conviction/acquittal among trial defendants, since trial penalties may be offset by the possibility of acquittal (Bushway & Piehl, 2007; Klepper, Nagin, & Tierney, 1983; LaFree, 1985; Smith, 1986; Zatz & Hagan, 1985). To accomplish this, one would need to incorporate the likelihood of conviction, treating it as a selection process into sentencing (Bushway & Piehl, 2007; Klepper et al., 1983; Smith, 1986). Unfortunately, data on acquittals are unavailable in the federal sentencing data. This likely results in an overstatement of the degree of plea/trial sentencing differences in the population of *all* offenders who go to trial (including acquittal). Our results must therefore be taken as conditional post-conviction estimates of the trial

penalty.[11] Future research that corrects these limitations would help unravel these questions. Data on pre-conviction decisions and processes are difficult to obtain, however.

As Wright (2005) notes, though, acquittals in federal court are relatively rare, and they have been decreasing since the early 1980s. In the time period of our data (FYs 2000–02), the ratio of convictions to acquittals was 3.5:1, or about 28% (Wright, 2005, p. 105). On the other hand, some observers might argue that this reported 28% chance of acquittal might offset the 20–28% sentence length trial penalty we found (see Smith, 1986). If so, it may be rational for defendants to opt for trial, reasoning that the chances of acquittal might cancel out any trial penalty if convicted. This logic, however, does not take into account the kinds of pre-conviction deterrents to trials (and incentives to plead) described in our interview data, such as superseding indictments and fact bargaining.

The inability to statistically assess the impact of charging decisions or plea agreements containing negotiated stipulations about relevant conduct and offense-specific behavior, themes that were prominently featured in the interview and survey data discussed above, constitutes a third limitation. Others (Nagel & Schulhofer, 1992; Schulhofer & Nagel, 1989) also found these types of negotiations to be common. Guilty pleas can contain stipulations about charges, relevant conduct and offense-specific behavior that shape final offense levels and hence the sentence, which represent additional benefits that defendants opting for trial do not receive. In a sense, then, the trial penalty we identify in our statistical analysis represents only a small portion of the total difference in pled and tried cases that likely characterizes earlier stages of the punishment process in federal court.

As the qualitative and survey evidence suggests, federal prosecutors impose trial penalties in two ways: (1) by refusing to stipulate to relevant conduct and offense-specific behavior that might have otherwise reduced punishment exposure as part of a plea agreement and (2) by filing superseding indictments against defendants who fail to plead guilty, thus exposing the defendant to more severe charges. Both constitute unmeasured penalties that discourage trials. Furthermore, charging decisions and plea agreements reflect the outcome of negotiations over stipulations regarding relevant conduct and

11. In a partial attempt to address Klepper et al.'s (1983) point about selection bias affecting guilty plea and trial cases, and the channeling of cases into one category or the other, we replicated the analyses presented in Tables 2 and 3 with Heckman two-step corrections for the likelihood of membership in the trial conviction category (trial versus guilty plea). As predictors of trial conviction in the selection equation, we used offense type, base offense level (and, alternately, final offense level), criminal history, pretrial detention, race, ethnicity, age, and gender. Thus, within the limits of our data, we attempted to control for the likelihood of membership in one mode of conviction category versus another. The results were substantively the same as those we present above. For example, the trial coefficient in the version of Model 3 of Table 2 corrected for membership in the trial conviction category is .20 (p <.001). The Heckman corrections were performed in STATA 10, and the inverse Mills ratio was saved and entered as a Level 1 predictor in our HLM models.

offense-specific behavior. This affects the final offense level and thus exposure to Guideline-recommended punishment. Trial defendants typically do not receive the benefits such negotiated stipulations provide to those pleading guilty. Future research is therefore needed that further investigates the additive and cumulative differences associated with different case-processing strategies from initial arrest through to final sentence disposition. In addition, future qualitative research on the guilty plea process and on sentencing hearings following trials in federal court would be very valuable additions to our understanding of plea rewards and trial penalties.

That trial penalties exist after accounting for Guideline-relevant factors, and that they vary across offenders and courts raises important questions for understanding federal sentencing. Our findings regarding caseload pressure suggest that trial penalties may be in part driven by organizational efficiency considerations. They also suggest that federal courts may have different levels of normative tolerance for trials, in that courts with higher trial rates exert lesser trial penalties. Finally, pleading guilty versus trial conviction appears to color federal court actors' subjective assessments of blameworthiness (and perhaps the need for community protection) in complex ways. Whereas pleading guilty is seen in court communities as a signal of remorse, rehabilitative potential, and decreased blameworthiness, trial conviction may be seen as heightening an offender's blameworthiness and signaling his/her recalcitrance.

Finally, our findings will probably raise serious normative concerns among some readers. The existence of a substantial residual (or "pure") trial penalty suggests that the guarantee of the right to trial established by the Sixth Amendment may be compromised in federal courts. We hope that our findings might spur renewed discussion in the sentencing policy community, and among advocates of sentencing Guidelines in particular, about whether plea-trial sentencing differences are unwarranted disparity, and about appropriate and inappropriate grounds for sentencing those convicted by trial more severely than those who plead guilty.

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References

Albonetti, C. A. (1991). An integration of theories to explain judicial discretion. *Social Problems, 38*, 247–266.

Albonetti, C. A. (1997). Sentencing under the federal sentencing Guidelines: Effects of defendant characteristics, guilty pleas, and departures on sentence outcomes for drug offenses, 1991–1992. *Law and Society Review, 31*, 789–822.

Albonetti, C. A. (1998). The role of gender and departures in the sentencing of defendants convicted of a white collar offense under the federal sentencing Guidelines. In J. T. Ulmer (Ed.), *Sociology of crime, law, and deviance* (Vol. 1, pp. 3–48). Greenwich, CT: JAI Press.

Alschuler, A. (1978). Sentencing reform and prosecutorial power: A critique of recent proposals for fixed and presumptive sentencing. In *Determinate sentencing: Reform or regression* (pp. 59–84). Washington, DC: U.S. Government Printing Office.

Barkan, S. E., & Cohn, S. F. (2005). Why whites favor spending more money to fight crime: The role of racial prejudice. *Social Problems, 52*, 300–314.

Beim, A., & Fine, G. A. (2007). The cultural frameworks of prejudice: Reputational images and the postwar disjuncture of Jews and communism. *Sociological Quarterly, 48*, 373–398.

Blumstein, A., Cohen, J., Martin, S., & Tonry, M. (Eds.). (1983). *Research on sentencing: The search for reform*. Washington, DC: National Academy Press.

Bontrager, S., Bales, W., & Chiricos, T. (2005). Race, ethnicity, threat and the labeling of convicted felons. *Criminology, 43*, 589–622.

Brereton, D., & Casper, J. (1982). Does it pay to plead guilty? Differential sentencing and the functioning of criminal courts. *Law and Society Review, 16*, 45–70.

Britt, C. L. (2000). Social context and racial disparities in punishment decisions. *Justice Quarterly, 17*, 707–732.

Bushway, S., Johnson, B., & Slocum, L. A. (2007). Is the magic still there? The relevance of the Heckman two-step correction for selection bias in criminology. *Journal of Quantitative Criminology, 23*(2), 151–178.

Bushway, S. D., & Piehl, A. M. (2001). Judging judicial discretion: Legal factors and racial discrimination in sentencing. *Law and Society Review, 35*, 733–764.

Bushway, S. D., & Piehl, A. M. (2007). Social science research and the legal threat to presumptive sentencing Guidelines. *Criminology and Public Policy, 6*(3), 461–482.

Curry, T. R., Lee, G., & Rodriguez, S. F. (2004). Does victim gender increase sentence severity? Further explanations of gender dynamics and sentencing outcomes. *Crime & Delinquency, 50*, 319–343.

Demuth, S. (2003). Racial and ethnic differences in pretrial release decisions and outcomes: A comparison of Hispanic, black, and white felony arrestees. *Criminology, 41*, 873–908.

Demuth, S., & Steffensmeier, D. (2004). The impact of gender and race-ethnicity in the pretrial release process. *Social Problems, 51*, 222–242.

Dixon, J. (1995). The organizational context of criminal sentencing. *American Journal of Sociology, 100*, 1157–1198.

Eisenstein, J., Flemming, R. B., & Nardulli, P. F. (1988). *The contours of justice: Communities and their courts*. Boston: Little, Brown.

Eisenstein, J., & Jacob, H. (1977). *Felony justice: An organizational analysis of criminal courts*. Boston: Little, Brown.

Emmelman, D. (2003). *Justice for the poor: A study of criminal defense work*. Burlington, VT: Ashgate.

Engen, R. L., & Gainey, R. R. (2000). Conceptualizing legally relevant factors under Guidelines: A reply to Ulmer. *Criminology, 38*, 1245–1252.

Engen, R. L., Gainey, R. R., Crutchfield, R. D., & Weis, J. G. (2003). Discretion and disparity under Guidelines: The role of departures and structured sentencing alternatives. *Criminology, 38*, 1207–1230.

Engen, R. L., & Steen, S. (2000). The power to punish: Discretion and sentencing reform in the war on drugs. *American Journal of Sociology, 105*, 1357–1395.

Farr, K. A. (1984). Maintaining balance through an institutionalized plea negotiation process. *Criminology, 22*, 291–319.

Fearn, N. E. (2005). A multilevel analysis of community effects on criminal sentencing. *Justice Quarterly, 22*, 452–487.

Flemming, R. B., Nardulli, P. F., & Eisenstein, J. (1992). *The craft of justice: Politics and work in criminal court communities*. Philadelphia: University of Pennsylvania Press.

Griffin, T., & Wooldredge, J. (2006). Sex-based disparities in felony dispositions before and after sentencing reform in Ohio. *Criminology, 44*, 893–924.

Hagan, J. (1975). The social and legal construction of criminal justice: A study of the presentence process. *Social Problems, 22*, 620–637.

Hannon, L., Knapp, P., & DeFina, R. (2005). Racial similarity in the relationship between poverty and homicide rates: Comparing retransformed coefficients. *Social Science Research, 34*, 893–914.

Hofer, P. J., & Blackwell, K. (2001, November). *What are we learning from multiple regression studies of federal sentencing decisions?* Paper presented at the American Society of Criminology Meeting, Atlanta, GA.

Holmes, M., Daudistel, H., & Taggart, W. (1992). Plea bargaining policy and state district court caseloads: An interrupted time series analysis. *Law and Society Review, 26*, 139–159.

Johnson, B. D. (2003). Racial and ethnic disparities in sentencing departures across modes of conviction. *Criminology, 41*, 449–490.

Johnson, B. D. (2005). Contextual disparities in Guidelines departures. *Criminology, 43*, 761–797.

Johnson, B. D. (2006). The multilevel context of criminal sentencing: Integrating judge and county level influences in the study of courtroom decision making. *Criminology, 44*, 259–298.

Johnson, B., Ulmer, J., & Kramer, J. (2008). The social context of Guideline circumvention: The case of federal district courts. *Criminology, 46*, 711–783.

Kautt, P. M. (2002). Location, location, location: Interdistrict and intercircuit variation in sentencing outcomes for federal drug-trafficking offenses. *Justice Quarterly, 19*, 633–671.

King, N., Soule, D., Steen, S., & Weidner, R. (2005). When process affects punishment: Differences in sentences after guilty plea, bench trial, and jury trial in five Guideline states. *Columbia Law Review, 105*, 960–1009.

Klepper, S., Nagin, D., & Tierney, L.-J. (1983). Discrimination in the criminal justice system: A critical appraisal of the literature. In A. Blumstein, J. Cohen, S. E. Martin, & M. H. Tonry (Eds.), *Research on sentencing: The search for reform* (pp. 55–128). Washington, DC: National Academy Press.

Koons-Witt, B. (2002). The effect of gender on the decision to incarcerate before and after the introduction of sentencing Guidelines. *Criminology, 40*, 297–328.

Kramer, J. H., & Ulmer, J. T. (2002). Downward departures for serious violent offenders: Local court "corrections" to Pennsylvania's sentencing Guidelines. *Criminology, 40*, 897–932.

Kramer, J. H., & Ulmer, J. T. (2009). *Sentencing guidelines: Lessons from Pennsylvania*. Boulder, CO: Lynne Rienner.

Kurlychek, M. C., & Johnson, B. D. (2004). The juvenile penalty: A comparison of juvenile and young adult sentencing outcomes in criminal court. *Criminology, 42*, 485–515.

LaFree, G. (1985). Adversarial and nonadversarial justice: A comparison of guilty pleas and trials. *Criminology, 23*, 289–312.

Mather, L. (1979). Comments on the history of plea bargaining. *Law and Society Review, 13*, 281–285.

Meeker, J., & Pontell, H. (1985). Court caseloads, plea bargains, and criminal sanctions: The effects of section 17 P.C. in California. *Criminology, 23*, 119–143.

Miller, L. L., & Eisenstein, J. (2005). The Federal/state criminal prosecution nexus: A case study in cooperation and discretion. *Law and Social Inquiry, 30*(2), 239–268.
Nagel, I. H., & Schulhofer, S. J. (1992). A tale of three cities: An empirical study of charging and bargaining practices under the federal sentencing Guidelines. *Southern California Law Review, 66*, 501–566.
Nardulli, P. F., Eisenstein, J., & Flemming, R. B. (1988). *The tenor of justice: Criminal courts and the guilty plea process.* Chicago: University of Illinois Press.
Peterson, R. D., & Hagan, J. (1984). Changing conceptions of race: Towards an account of anomalous findings of sentencing research. *American Sociological Review, 49*, 56–70.
Raudenbush, S. W., & Bryk, A. S. (2002). *Hierarchical linear models: Applications and data analysis methods* (2nd ed.). Thousand Oaks, CA: Sage.
Rhodes, W. (1979). Plea bargaining: Its effect on sentencing and convictions in the District of Columbia. *Journal of Criminal Law and Criminology, 70*, 360–375.
Savelsberg, J. J. (1992). Law that does not fit society: Sentencing Guidelines as a neoclassical reaction to the dilemmas of substantivized law. *American Journal of Sociology, 97*, 1346–1381.
Schulhofer, S., & Nagel, I. H. (1989). Negotiated pleas under the federal sentencing Guidelines: The first fifteen months. *American Criminal Law Review, 27*, 231–288.
Smith, D. A. (1986). The plea bargaining controversy. *Journal of Criminal Law and Criminology, 77*, 949–968.
Spohn, C., Gruhl, J., & Welch, S. (1982). The effect of race on sentencing: A reexamination of an unsettled question. *Law and Society Review, 16*, 71–88.
Spohn, C., & Holleran, D. (2000). The imprisonment penalty paid by young unemployed Black and Hispanic male offenders. *Criminology, 38*, 281–306.
Steen, S., Engen, R., & Gainey, R. (2005). Images of danger and culpability: Racial stereotyping, case processing, and criminal sentencing. *Criminology, 43*, 435–468.
Steffensmeier, D., & Demuth, S. (2000). Ethnicity and sentencing outcomes in U.S. federal courts: Who is punished more harshly? *American Sociological Review*, 65, 705–729.
Steffensmeier, D., & Demuth, S. (2001). Ethnicity and judges' sentencing decisions: Hispanic-black-white comparisons. *Criminology, 39*, 145–178.
Steffensmeier, D., & Hebert, C. (1999). Women and men policymakers: Does the judge's gender affect the sentencing of criminal defendants? *Social Forces, 77*, 1163–1196.
Steffensmeier, D., Kramer, J. H., & Streifel, C. (1993). Gender and imprisonment decisions. *Criminology, 31*, 411–446.
Steffensmeier, D., Ulmer, J., & Kramer, J. (1998). The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, Black, and male. *Criminology, 36*, 763–798.
Stolzenberg, R. M., & Relles, D. A. (1997). Tools for intuition about sample selection bias and its correction. *American Sociological Review, 62*, 494–507.
Uhlman, T., & Walker, N. D. (1979). A plea is no bargain: The impact of case disposition on sentence. *Social Science Quarterly, 60*, 218–234.
Uhlman, T., & Walker, N. D. (1980). "He takes some of my time, I take some of his:" An analysis of judicial sentencing patterns in jury cases. *Law and Society Review, 14*, 323–341.
Ulmer, J. (2005). The localized uses of federal sentencing guidelines in four U.S. District Courts: Evidence of processual order. *Symbolic Interaction, 28*, 255–279.
Ulmer, J. T. (1997). *Social worlds of sentencing: Court communities under sentencing Guidelines.* Albany, NY: State University of New York Press.
Ulmer, J. T., & Bradley, M. S. (2006). Variation in trial penalties among serious violent offenses. *Criminology, 44*, 631–670.

Ulmer, J. T., & Johnson, B. (2004). Sentencing in context: A multilevel analysis. *Criminology, 42*, 137–177.

Ulmer, J. T., & Kramer, J. H. (1996). Court communities under sentencing Guidelines: Dilemmas of formal rationality and sentencing disparity. *Criminology, 34*, 383–408.

Ulmer, J. T., & Kramer, J. H. (1998). The use and transformation of formal decision making criteria: Sentencing Guidelines, organizational contexts, and case processing strategies. *Social Problems, 45*, 248–267.

Ulmer, J. T., Kurlychek, M., & Kramer, J. (2007). Prosecutorial discretion and the imposition of mandatory minimums. *Journal of Research in Crime and Delinquency, 44*, 427–458.

U.S. Sentencing Commission. (2006). *Final report on the impact of United States v. Booker on federal Sentencing*. Washington, DC: U.S. Sentencing Commission.

Weidner, R. R., Frase, R. S., & Schultz, J. S. (2005). The impact of contextual factors on the decision to imprison in large urban jurisdictions: A multilevel analysis. *Crime & Delinquency, 51*, 400–424.

Wooldredge, J. (1989). An aggregate level examination of the caseload pressure hypothesis. *Journal of Quantitative Criminology, 5*, 259–270.

Wooldredge, J., & Thistlethwaite, A. (2004). Bi-level disparities in court dispositions for intimate assaults. *Criminology, 42*, 417–456.

Wright, R. F. (2005). Trial distortion and the end of innocence in federal criminal justice. *University of Pennsylvania Law Review, 154*, 79–156.

Zatz, M. (1984). Race, ethnicity, and determinate sentencing: A new dimension to an old controversy. *Criminology, 22*, 147–171.

Zatz, M., & Hagan, J. (1985). Crime, time, and punishment: An exploration of selection bias in sentencing research. *Journal of Quantitative Criminology, 1*(1), 103–126.