1-1-1993

Inter-District Variation under the Guidelines: The Trees May Be More Significant Than the Forest

Charles D. Weisselberg
Berkeley Law

Terrence Dunworth

INTER-DISTRICT VARIATION UNDER THE GUIDELINES: THE TREES MAY BE MORE SIGNIFICANT THAN THE FOREST

Charles D. Weisselberg* and Terence Dunworth**

The sentencing guidelines have been with us for almost six years, and by now a number of government agencies and scholars have considered the ways in which the guidelines influence the disposition of federal criminal cases. We recently published our own study of plea and trial rates among types of offenses and districts.[1] In this essay, we report some of our previous findings and offer several recommendations for future research and discussion.

1. FRAMEWORK FOR A GUIDELINES STUDY

In a first step towards assessing the impact of the guidelines upon the workload of the federal court system, we focused on the district court level. Although the guidelines have affected the time that lawyers and judges devote to other stages of the criminal process, such as plea and sentencing hearings in the district courts[2] and sentencing appeals in the circuit courts, we took the rate of trials to be the best available indicator of any change in workload.[3] Because most federal criminal trials last between two and nine days, even a small increase in the trial rate would have a powerful impact on judicial and lawyering resources.

Defendants may decide to plead guilty for a number of reasons, including what they perceive as the odds of conviction at trial and the extent to which a sentence may be higher after a trial instead of a guilty plea. Prosecutors have their own varied reasons for deciding whether to offer an attractive deal, including the defendant's criminal history, whether the case is difficult to prove, local custom, and workload in the office. Similar factors influence judicial attitudes to pleading.

Under the guidelines, which, among other things, are meant to reduce disparity, the variation in at least some of these factors may be accentuated. For example, even with a reduction for acceptance of responsibility, drugs and weapons guidelines may be so severe that defendants see little meaningful difference between a sentence after a guilty plea and a sentence after an unsuccessful trial.[4] Further, the "relevant conduct" provisions of the guidelines apply robustly for some kinds of cases, but not for others. These factors may make some sorts of plea agreements, such as charge bargains, useful for certain offense types, but not for others. Layered on top of these factors are the mandatory minimum penalties, the formal policies of the Justice Department, and the internal practices in the various U.S. Attorney's offices. All of these may restrict an individual prosecutor's ability to offer an attractive deal in certain classes of cases.[5]

Different types of cases do not have the same disposition paths under the guidelines. The case mixture also varies from district to district and over time within the same district. If one district experiences a significant increase in a particular type of case, while another district does not, the former has a particular incentive to process that type of case differently. Since speedy trial considerations make the timetable for each case critical, the willingness of the lawyers to bargain and the interest of the court to avoid trial increase with a growing caseload.

The guidelines have had a particularly large impact in drug cases due to the severity of the guidelines sentences for drug offenses and the mandatory minimums. Compounding this impact is the explosion in drug prosecutions over the last decade. From the statistical years 1981 to 1990, for example, federal drug prosecutions increased from 7,500 to more than 20,000, and moved from 18% to 34% of the district courts' criminal caseload. By 1992, more than 44% of all federal court guideline convictions were for drug offenses.[6]

While some districts have an overwhelming proportion of these drug cases, others do not. This means that, if more drug cases go to trial than other types of cases (and the evidence bears this out), it is critical to consider the workload by separately examining the experiences of the different districts. Districts that face a blizzard of drug cases may be in real need of more resources.[7]

As a consequence, in framing our guidelines study, we broke cases and districts down by type. We examined dismissal, plea and trial rates for categories of cases. In addition, we grouped selected districts into three distinct types: the ten districts with the largest proportion of drug cases; the ten districts with the largest proportion of fraud, embezzlement and counterfeiting cases; and the ten districts with the largest criminal caseloads. We then employed the two sets of data most pertinent to our analysis, both of which were developed by the Administrative Office of the U.S. Courts.

One set is the machine-readable record of the cases of all felony defendants *charged* in U.S. district courts.[8] The other set, which was created for use by the Federal Probation system, identifies guidelines cases, but contains data for *convicted* defendants only.[9] The strength of the former set is that it allows us to analyze pre-trial dismissals and acquittals at

* *Clinical Professor, University of Southern California Law Center, Los Angeles, California.*
** *Senior Operations Research Specialist, Social Policy Department, RAND Corp., Santa Monica, California.*
Special thanks to Lesley Young.

trial. Its weakness is that guidelines cases cannot be satisfactorily identified, particularly in the first few years after the guidelines went into effect. The latter set has different drawbacks. Guidelines cases can be identified, but only for convicted defendants. A further limitation of the probation system is that all data collection was terminated in August 1990.[10]

It is important to realize that an analysis of the workloads of judges or lawyers tells us nothing about whether the guidelines amount to a "good" or a "bad" innovation. We could perhaps create a system that induces virtually all defendants to plead guilty, and the burden on the courts would be much reduced. But this would not be a system that many people would want.

As part of our study, we contrasted the trial rates before and after the guidelines, and then compared rates of conviction for those defendants who opted for trial. What happens to these rates has normative implications. If both the trial and conviction rates increase, we might conclude that the guidelines are not as successful in encouraging factually guilty defendants to plead guilty as the preguidelines system was. If the trial rate increases and the conviction rate decreases, it might be that the guidelines do a better job of encouraging factually innocent defendants to opt for trial. If the trial rate falls and the conviction rate goes up, the guidelines might lead more factually innocent defendants to plead guilty. These rough observations are, of course, only hypothetical, and other explanations are certainly possible.

2. FINDINGS

We first studied data for all defendants *charged* in felony cases in statistical years 1986, 1988 and 1990.[11] Systemwide, 16.1% of the felony defendants in 1986 chose to go to trial. In 1990, that figure was almost identical, 16.2%. These overall figures, however, hide startling and very significant changes.

Most importantly, there was a large increase in the number of trials. Between statistical years 1986 and 1990, federal criminal caseloads grew significantly—from 36,451 defendants to 43,546 defendants. Consequently, the same *rate* of cases going to trial in 1986 and 1990 results in an increase in the actual number of trials from 5,856 to 7,049.

Moreover, the increase in trials was not distributed evenly across offense types. In fact, most categories of offenses experienced a net reduction in trials. Trials in fraud cases dropped from 820 in 1986 to 738 in 1990; larceny trials fell from 309 to 229. Robbery and embezzlement trials rose slightly. The only significant increase in the number of trials came in drug and firearms cases. Drug offense trials rose from 2,327 to 3,920, a 68% increase; firearms trials rose from 287 to 436, a 52% increase. Except for these two types of cases, felony trials in federal district courts dropped from 3242 to 2693. Drug and firearms offenses alone are responsible for the *entire* increase in felony trials in all federal district courts during this period. Without them there would have been a net decrease in trials.

As might be expected, these changes affect districts differently. In our group of ten districts with the largest proportion of drug prosecutions, trial rates in drug cases went up between 1986 and 1990, from 15.5% to 18.0%. This is a smaller increase than for the trial rate in districts where drug cases make up a smaller proportion of the caseload. In those districts, the rates for drug trials rose from 24% in 1986 to 29% in 1990. But given that the top ten drug districts experienced much more growth in drug cases than other districts, they experienced much larger *absolute* increases in the number of trials. The actual number of trials in drug cases in these districts increased more than 135% between 1986 and 1990 (from 234 to 554).

These kinds of changes help explain why many judges and lawyers complain that the district courts are drowning in drug cases. Drug prosecutions have indeed increased in number in most districts, and, because of the high (and increasing) rate of trials in these cases, the impact on the workload of the district courts has been substantial.

What happened to the conviction rates among defendants who opted for trial? Systemwide, for all offenses, the conviction rate increased slightly from 74.7% to 76.1% from 1986 to 1990. The rate did not move in the same direction for all categories of cases. In drug cases, the conviction rate increased less, from 79.3% to 79.6%. In firearms cases, it actually fell, from 80.5% to 78.9%.

These trends *may* be beneficial. Hypothetically, if more drug and firearms defendants opt for more trials, one would normally expect an *increase* in the conviction rate among those defendants who opt for trial, because more defendants with weaker cases would choose to go to trial. The data indicate that even though more defendants have opted for trial, the conviction rates have remained relatively stable. This *may* indicate that more defendants go to trial who *should* go to trial.

We also compared conviction rates in guidelines and non-guidelines cases during the same time period.[12] First, a higher proportion of convictions occurred at trial in drug matters than in other types of cases.[13] Second, the conviction rates went up following implementation of the guidelines. For example, of those defendants convicted in drug cases in 1986, 15.3% went to trial; 18.9% of guidelines drug defendants convicted in 1990 chose to go to trial.

3. IMPLICATIONS

Our basic conclusion is that the guidelines do not impact all cases and all districts equally. Incentives to plead guilty vary among case types and districts. Our research shows that the guidelines alter these incentives in different ways. For this

reason, *the trees may be more significant than the forest.* The trees in our forest—that is, the districts and the cases—are not homogeneous. They grow and decline at different rates. A study of only the forest—the system as a whole—masks trends in significant portions of the forest.

It is extremely difficult and, perhaps, unhelpful to draw general, systemwide, conclusions about the effect of the guidelines upon the district courts. A showing that different districts and cases are subject to different stresses is, in itself, significant, because it suggests that the guidelines mean different things in different contexts.

This finding has important implications for researchers who study the operation of the guidelines. Systemwide statistics, such as those about plea and trial rates, may be meaningless. They may disguise significant opposing trends in certain districts and with regard to particular types of cases. It is heartening that more attention is now paid to trial rates by offense type. The Sentencing Commission, for example, now reports "mode of conviction" by primary offense category. But the Commission and others should go further. They should study individual case categories by district or by groups of districts that have similar caseloads and resource profiles. There is much more detailed and sophisticated work to be done in this area.[14]

The offense and district distinctions are also important for policymakers. Legislators and administrators may often seek a short, black-and-white answer to questions such as how the guidelines influence the work of the district courts. Yet there is no such answer, for the guidelines affect districts and cases differently. And these distinctions must be kept in mind by those charged with determining, for example, the resources to be allocated to judges, prosecutors, and lawyers who are appointed to represent criminal defendants.

We have some additional observations. First, agencies and researchers should remember that many other aspects of the federal system changed at the same time the guidelines were implemented. These changes may have had at least as big an impact as the guidelines. For example, the increase in trials produced by a growing number of federal drug prosecutions may be even more significant for the workload of the courts than the fact that trial rates have risen in certain types of guidelines cases. Because of all of these concurrent changes, it is crucial to attempt to isolate the impact of the guidelines from the impact of the mandatory minimum sentences, the war on drugs and other external factors. Since this task is made all the more difficult by the fact that the Commission pegged drug and firearms guidelines to the mandatory minimums, it would be enormously aided if the data collected by the Sentencing Commission and the Administrative Office of the U.S. Courts contained a variable identifying whether the offense of conviction carries a mandatory minimum term.[15]

Second, researchers should consider using data sets that contain a broader range of records than those collected by the Sentencing Commission. The Commission's monitoring data sets generally include only data on defendants who are *sentenced.* The data sets must be considered incomplete because they omit any information about defendants who are acquitted or whose cases are dismissed prior to trial. To get a complete picture of the impact of the guidelines, it is necessary to look at trends in acquittals and pre-trial dismissals as well as convictions. Trends in acquittals indicate whether more defendants go to trial who actually have a chance of success at trial. Trends in pre-trial dismissals help us monitor the exercise of prosecutorial discretion given that the guidelines are widely believed to transfer discretion from judges to prosecutors.

One way of addressing this problem is by using the Administrative Office database that contains information, albeit limited, on all defendants, including those *acquitted* or *dismissed* prior to trial.[16] We urge the Commission and others to make use of both data sets from the Commission and the Administrative Office and perhaps merge the two. The merger would be even more useful if the Administrative Office's set of data specifically identified defendants who are charged with offenses that carry guidelines sentences and mandatory minimums.

Third, it is important not to lose sight of the normative questions. Surely it is worthwhile to study how the guidelines and other laws influence the workloads of judges and lawyers. However, workload should not be the only inquiry. Perhaps more cases *ought* to go to trial, and judges and lawyers *ought* to devote more time to sentencing. Although we need to study how the implementation of the guidelines has strained the resources of the federal criminal justice system, we must also ask how federal courts, pre- and post- guidelines, have measured up to our ideals of a criminal justice system. If the guideline system better meets our ideals, perhaps we should acknowledge that the new system may cost more. We should then provide more resources to the courts and fully fund defense counsel under the Criminal Justice Act. If, on the other hand, the guidelines are not an overall improvement, then a study showing that the guidelines system costs more may make it politically easier for Congress to change direction from the path thus far taken.

FOOTNOTES

[1] Terence Dunworth and Charles D. Weisselberg, *Felony Cases and the Federal Courts: The Guidelines Experience,* 66 S. Cal. L. Rev. 99 (1992). Unless noted otherwise, the data and findings in this essay are drawn from that article.

[2] The American Bar Association recently surveyed district court judges and lawyers. 84% of the responding

judges said that the plea process takes longer under the guidelines. *See Survey on the Impact of U.S. Sentencing Guidelines on the Federal Criminal Justice System*, 1992 A.B.A. Sect. Crim. Just., Survey—Federal District Judges at 2. The same survey reported that judges conduct evidentiary hearings at sentencing in a significant number of guidelines cases. *Id.* at 3.

[3] For a recent discussion of the rapid growth in appeals of sentencing decisions, see Cris Carmody, *Sentencing Overload Hits The Circuits*, Nat'l L. J., April 5, 1993, at 1, col. 1. As noted in this article, the number of guidelines appeals rose from fewer than 200 in 1988 (before the guidelines were fully adopted) to more than 7,500 in 1992. In all, more than 23,000 sentencing appeals were docketed between 1988 and 1992.

[4] *See, e.g.*, Michael Tonry, *GAO Report Confirms Failure of U.S. Guidelines*, 5 Fed. Sent. R. 144, 146 (1992). It will be interesting to see how the new three-level reduction for acceptance of responsibility changes this calculus.

[5] For discussions of Justice Department policies and internal practices, as well as prosecutors' motivations in general, *see* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under The Federal Sentencing Guidelines*, 99 S. Cal. L. Rev. 501 (1992); Daniel J. Freed, *Federal Sentencing in The Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1723-24 (1992). Two other articles provide particularly fine analyses of plea-bargaining and mandatory minimum sentences. *See* Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1962-66 (1992); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1991-93 (1992).

[6] In statistical year 1981, 7,509 of 41,017 defendants (18%) were charged with drug offenses; in the statistical year 1990, 20,344 of 60,240 defendants (34%) were charged with drug offenses. More recently, the Sentencing Commission reports that in fiscal year 1992, 44.3% of all defendants convicted under the guidelines were sentenced for drug offenses. *See* U.S. Sentencing Commission, *Annual Report* figure B & table 11 (1992).

[7] A snapshot of two districts in fiscal year 1992 illuminates this point. The Southern District of Florida and the Northern District of California are roughly the same size; in 1992, Florida had 20 active and senior district judges and California had 21. That same year, 1,348 defendants were convicted in guidelines cases in the Southern District of Florida. Of those 1,348 defendants, 771 (57%) were convicted in drug cases. The trial rate was 24%; 325 defendants, or 16 per judge, were convicted after trial. During the same period, 243 defendants were convicted in guidelines cases in the Northern District of California. Of those 243 defendants, 68 (28%) were convicted in drug cases. The trial rate was 8%; only 19 defendants, less than 1 per judge, were convicted after trial. *See* U.S. Sentencing Commission, *Annual Report* app. B (1992). The differences in data seem dramatic although the "per judge" data may not be entirely accurate because not all judicial vacancies are filled and senior judges do not always take criminal cases.

[8] This set is the Federal Courts Integrated Data Base (FCIDB). It is compiled from the defendant termination records sent by district court clerks to the Administrative Office of the U.S. Courts. The Administrative Office continues to collect these records.

[9] This set is the Federal Probation Sentencing and Supervision Information System (FPSSIS). The information in FPSSIS was taken from presentence reports. Unfortunately, FPSSIS data are no longer collected. The data base ends in August 1990, which is one reason why our study uses statistical year 1990 as its last year.

[10] This termination date handicaps any analysis, because the time frame of any study using the set cannot extend beyond it. Therefore, it is impossible to perform a contemporary analysis. Nevertheless, it is the only data base that has so far been available to researchers seeking to investigate workload impact issues in any comprehensive fashion. Eventually, of course, this issue will become moot because all cases will be subject to the guidelines, and the probation system data base will no longer be needed. However, this does not apply to the years immediately following the implementation of the guidelines, and at present those are the only years that can be usefully examined in assessing the possible effect of the guidelines on court operations.

[11] We chose 1986 because it was the last year prior to the guidelines and we picked 1988 as a point during which the guidelines were partially implemented. By statistical year 1990, the guidelines were fully implemented and over 70% of the defendants convicted that year were sentenced under the guidelines.

[12] This data set (FPSSIS) identifies guidelines cases. However, because it contains only *convicted* defendants, it is not possible to calculate rates of conviction for defendants who opted for trial without linking those records to other sources of information.

[13] In statistical year 1990, 18.9% of convicted guidelines drug offenders had gone to trial, as opposed to 5.1% of guidelines defendants convicted of fraud, embezzlement or counterfeiting offenses.

[14] For the Commission's recent "mode of conviction" data, *see* U.S. Sentencing Commission, *Annual Report* table 19 (1992). The Commission's working groups have also noted different trial rates for distinct offense types. *See* U.S. Sentencing Commission, *Violent Crimes/Firearms/Gangs Working Group Report* table 6 (Oct. 14, 1992) (reporting that for fiscal year 1991, the plea rate for defendants convicted of guidelines offenses against the person was 72.9%, as opposed to a plea rate of 85.6% of all defendants in guidelines cases); U.S. Sentencing Commission, *Draft Report of the Drugs/Role/Harmonization Working Group* 5 (Nov. 10, 1992) (noting conviction after plea in 78.5% of drug trafficking cases). Although both working groups perform sophisticated statistical analyses of offense levels, departures, criminal history categories, and guideline adjustments, neither group looked any more closely at trial and plea rates.

[15] Using FPSSIS data, Barbara Meierhoefer recently studied mandatory minimum offenses and guidelines sentences. She was forced to estimate which defendants were subject to mandatory minimum penalties, based upon drugs and weapons information in the data set. She was not convinced that these estimates were accurate because the FPSSIS data were taken from presentence reports and reporting problems existed. For example, some drug quantities were reported by "gross weight" and others at "100% purity". *See* Barbara S. Meierhoefer, *The Role of Offense and Offender Characteristics In Federal Sentencing*, 99 S. Cal. L. Rev. 367, 370 & 395-97 (1992).

[16] The data from both the Commission and the Administrative Office are available to outside researchers through the Inter-University Consortium for Political and Social Research (ICPSR) at Ann Arbor, Michigan.