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# Punishing Terrorists

## A Re-Examination of U.S. Federal Sentencing in the Postguidelines Era

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The empirical literature on the theory and practice of sentencing politically motivated offenders such as terrorists in U.S. federal courts is limited. Thus, we know relatively little about the dealings between terrorist offenders and the criminal justice system or how these interactions may be influenced by changes in American legal or political context. This study summarizes previous findings relative to sentencing disparity among terrorists and nonterrorists in U.S. federal courts prior to the imposition of the U.S. Sentencing Guidelines. We then identify events occurring after the advent of the guidelines, including the early acts of terrorism on American soil. We evaluate the sentencing of terrorists versus nonterrorists following the confluence imposition of the guidelines and these events. We determine whether and how the sentencing disparity between terrorist and nonterrorist has changed since the implementation of the U.S. Sentencing Guidelines and the terrorist events of the early 1990s. Based on our findings, we put forth suggestions as to the possible ways these conditions may have affected sentencing outcomes.

**Keywords:** *police training; police perceptions; youth-related incidents; police work; law enforcement*

### Introduction

Investigations of interactions between justice agencies and terrorists may often be hindered by political, legal, practical, and public safety concerns. As a result, research on this issue is often limited by the unavailability of data. Thus, although the growing body of literature on terrorism investigates patterns of global terrorism (e.g., LaFree, Morris, Dugan, & Fahey, 2006), terrorist networks (e.g., Asal, Nussbaum, & Harrington, 2007), media coverage (Chermak & Gruenewald, 2006), and societal responses to terrorism (e.g., McCauley, 2006), relatively less attention has centered on correlates of punishment

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of convicted terrorists. In a notable exception, the U.S. Sentencing Commission did provide sufficiently detailed records involving defendants in terrorism trials during the 1980s that allowed researchers to derive a comparative sample of terrorists and nonterrorists convicted of the same lead offenses during the presentencing guidelines era. These results were reported in a series of articles (Smith & Damphousse, 1996, 1998).

This research revealed at least three important findings. First, terrorists received substantially longer sentences than similarly situated nonterrorists. Smith (1994) and Smith and Damphousse (1996) found that for terrorists, governmental response is significantly more severe and uncompromising than for traditional federal offenders convicted of similar federal crimes. Terrorist sentences during the study era (1980–1987) were, on average, about 4½ times longer than those for nonterrorists matched by year and primary offense code. Second, they found that political motive—whether the polity “labeled” the offender as a terrorist or not—was the best predictor of sentence length, despite controls for numerous demographic variables, offense severity, and disposition.

Finally, Smith and Damphousse (1998) found that the ability to predict the sentences of terrorists appeared to be substantially better than the ability to predict the sentences of nonterrorists. Explained variance was approximately four times higher among a terrorist sample than among a matched nonterrorist sample using the same predictor variables. Furthermore, they found that the level of explained variance was highest under conditions reflective of Hagan’s (1989a) structural-contextual theory and the “liberation hypothesis,” that is, under conditions of a proactive political environment (as in terrorism) and where crime severity was “high” (Smith & Damphousse, 1998, p. 81).

Whether these findings remain relevant, however, is questionable. While the 1998 article found support for both structural-contextual theory and the liberation hypothesis, it is not known whether these models remain useful predictors. The findings may be mere artifacts—relevant only in the presentence guidelines era. The criminal justice processes that lead to sentencing outcomes for terrorists are not static. In the current study, we hope our re-examination of prior research questions can provide new insight into criminal justice responses to terrorism in light of historical and legal events.

## Literature Review

Currently, we do not know whether and/or how the sentencing of terrorists may have changed since earlier studies during the pre-guidelines era. In addition, we do not know whether the variables that explained sentence disparity between terrorists and nonterrorist in the presentence guidelines era remain the same or have become more or less important as a result of implementation of the federal sentencing guidelines. Perhaps more importantly, the effect of the confluent implementation of the federal guidelines and the public’s emergent fear of extremism following the terrorist attacks of the 1990s suggest that the previously found sentencing disparities between convicted terrorists and their nonterrorist counterparts may have substantially changed. That is, although earlier studies did provide information on the sentencing of terrorists then, the sentencing patterns of terrorists versus nonterrorists may be very different now.

Thus, although previous research found significant disparity in the punishment of terrorists and similarly situated nonterrorists convicted during the 1980s (Smith & Damphousse,

1996, 1998), the implementation of the federal guidelines in the context of a number of significant events in the 1990s warrant a re-examination of these issues. First, concern over sentencing disparity in federal criminal cases led to passage of the *Sentencing Reform Act of 1984* and subsequent implementation of federal sentencing guidelines in the late 1980s (Albonetti, 1997, 1998). Although these reforms had several goals, including but not limited to, serving the just desserts philosophy and management of prison populations (Hofer, Blackwell, & Ruback, 1999), the primary goal of the sentencing guidelines was the reduction of unwarranted disparity. While the definition of “unwarranted” disparity has been debated, the 1990s was a watershed era during which guidelines were critiqued, modified, and ultimately tested to determine whether this goal was being met (Albonetti, 1997; Bureau of Justice Assistance, 1996; Kempf-Leonard & Sample, 2001; Koons-Witt, 2002; McDonald & Carlson, 1993; Mustard, 2001; Nagel & Johnson, 1994; Rhodes, 1991; Spohn, 2005; U.S. Sentencing Commission [USSC], 1991; see Spohn, 2000, for an excellent review).

In addition, the 1990s was a period when state and federal legislatures were modifying the application principles of American criminal law. Motive, generally considered irrelevant as an essential element in criminal law except to help establish intent (LaFave, Wayne & Scott, 1986), emerged as a new criminal justice tool that could be used to determine sentencing. Expression of this change is seen in the advent of hate crime legislation that provided prosecutors the opportunity to seek longer sentences based on the motivation for the attack (Colomb & Damphousse, 2004; Jacobs & Potter, 1998).<sup>1</sup>

Moreover, terrorism, the ultimate expression of politically motivated crime, thrust itself into American consciousness during that decade. Although America had experienced its share of terrorism in previous decades (Smith, 1994), Americans generally felt insulated from the effects of terrorism, at least in comparison to its European neighbors. Although the effect of the September 11, 2001, attacks awakened many Americans to the danger of Islamic extremism, the psychological transition from immunity to terrorism to vulnerability began with the first bombing of the World Trade Center (WTC) in 1993; perceptions of vulnerability dramatically increased with the bombing of the Murrah Federal Building in Oklahoma City 2 years later (Damphousse, Hefley, & Smith, 2003). Passage of the *Antiterrorism and Effective Death Penalty Act of 1996* followed swiftly. Prior to these attacks, there was no “public will” that would enable the government to create such an act. Just as the 9/11 attacks created an atmosphere that allowed the implementation of the *USA PATRIOT Act of 2002*, the bombing of the WTC and the Murrah Building created a context that allowed for major shift in investigative and prosecutorial strategies, tactics, and rules (Damphousse & Shields, 2007). Public opinion clearly supported more severe punishment for perpetrators of politically motivated violence as terrorism became a top concern of the American people (Harris Interactive, 2001).

It may seem axiomatic that terrorists should be treated differently by the criminal justice system than punished nonterrorist criminals. Closer examination, however, suggests several problematic philosophical and complex legal issues. First, it is not clear whether a society that prides itself on rights of free speech and assembly should be allowed to punish politically motivated bank robbers (for example) more severely than bank robbers with only pecuniary motivation. Should the offender’s motive be allowed to significantly influence the extent of the punishment?

The issue of punishing terrorist motivation is source of considerable debate for a number of reasons. For one, America traditionally has avoided the concept of “political crime”

(Hagan, 1989a; Ingraham & Tokoro, 1969; Turk, 1982). Consequently, it has only been in recent years that the United States has even addressed the issue of terrorism in the federal criminal code. Although other types of criminality, such as hate crimes, now include motive, the creation of these statutes has not been without considerable initial constitutional debate (Grattet & Jenness, 2005, Jacobs & Henry, 1996; Jenness & Grattet, 2001). Such debates, in addition to the inherent ambiguity in defining terrorism, inhibited the creation of specific federal offenses called “terrorism” for many years—opposition to such laws was only overcome because of increased fear of terrorism on American soil.

Second, the focus on a political motivation may hinder successful prosecution by making criminal cases more difficult to establish and by increasing public scrutiny of the subsequent trials. The failure of several high-profile seditious conspiracy cases against terrorists in the late 1980s confirmed to federal prosecutors that the most effective strategy in prosecuting terrorists was to treat these offenders as “common” criminals, rather than to explicitly politicize their behavior (Smith, 1994; Turk, 1979). Some have suggested that jurors are hard-pressed to seriously consider “seditious conspiracy” charges against seemingly feckless terrorist groups, and efforts to so charge these individuals may be seen as overkill on the part of the government (Smith, Damphousse, Jackson, & Sellers, 2002). In addition, jurors may be sympathetic toward antifederal government and antitax groups (Smith, Damphousse, & Karlson, 2001).

Thus, the preferred strategy by prosecutors appears to have been to try terrorists more like “traditional” offenders. For example, defendants are charged with bank robbery and possession of explosive material, instead of terrorism-specific statutes (Shields, Damphousse, & Smith, 2006). Upon conviction for “simple” criminal counts, prosecutors influence judicial decision making at the sentencing phase, where uncharged and unconvicted conduct could be introduced.<sup>2</sup> During sentencing hearings, the lack of jury influence, the absence of cross-examination, and the decreased standard of proof to “preponderance of the evidence” gave prosecutors the opportunity to introduce terrorist information. This tactic resulted in federally indicted terrorists receiving sentences that were more than three times longer than nonterrorists for the same offense (Smith & Damphousse, 1996). Prosecutors appear to have been motivated to charge terrorist offenders using lesser statutes (which ultimately results in greater certainty of conviction and longer sentence lengths) rather than having to obtain convictions under more serious statutes that require a higher burden of proof during the trial phase (Smith, Damphousse, Yang, & Ginther, 2005).

These findings suggest investigative agency priorities with regard to terrorism may subvert a main goal of sentencing guidelines (i.e., reducing sentencing disparities) by differentially offering incentives for cooperation. The Attorney General’s (AG) guidelines for Federal Bureau of Investigation (FBI) terrorism enterprise investigations, for example, call for a focus on dismantling terrorist organizations.<sup>3</sup> It is possible that these investigative guidelines run counter to sentencing guideline efforts to reduce disparity for “similarly situated defendants.” From April 1983 to June 2002, for example, persons investigated and indicted as a result of a “domestic security/terrorism” investigation by the FBI were treated differently from those who were investigated under a “general crimes” investigation.<sup>4</sup> Investigators were instructed to focus upon “beheading” the terrorist group to prevent or deter further organizational planning and growth. The AG guidelines were quite specific: terrorism investigations are “concerned with the investigation of *entire* enterprises, *rather*

than individual participants and specific criminal acts” (emphasis added; Office of the Attorney General [OAG], 1983a, 13).

When these AG Guidelines were in effect (1983–1987), it was not uncommon for the specific perpetrators of terrorist acts to receive lighter sentences or more desirable plea bargains in exchange for testimony against group leaders (Smith, 1994; Smith & Damphousse, 1996). From all indications, the AG Guidelines were being followed in an attempt to “decapitate” terrorist groups active during this period. Evidence of this pattern was visible in several ways, the most notable being (a) the disparity between the sentences of group leaders and their subordinates and (b) the percentage of terrorists who pleaded guilty to one or more charges in their indictments (Smith & Damphousse, 1998). It is not clear whether sentencing guidelines affected the ability or willingness of prosecutors, for example, to offer significant reductions in exchange for cooperation.

Federal guidelines allow for downward departures within the sentencing grid for offenders that have provided substantial assistance to the prosecution. However, the changing public sentiment may make prosecutors recommend smaller reductions for assistance from terrorist defendants. Following the first WTC and Oklahoma City bombings, public perceptions of vulnerability may make jurors more willing to convict terrorists than in years past, even in “weaker” cases. Prosecutors may feel more confident in taking terrorist cases to trial and have more power during plea bargaining. Public sentiment may discourage prosecutors from recommending reductions for even low-level defendants, for fear of appearing “soft on terrorism.”

Thus, our reinvestigation is warranted by a number of grounds. First, we do not know whether and/or how the sentencing of terrorists may have changed since earlier studies during the preguidelines era. In addition, we do not know whether the variables that explained sentence disparity between terrorists and nonterrorists in the presentence guidelines era remain the same or have become more or less important as a result of implementation of the guidelines. Perhaps more importantly, the effect of the confluence of the implementation of the federal guidelines and the public’s emergent fear of extremism following the terrorist attacks of the 1990s suggest that the previously found sentencing disparities between convicted terrorists and their nonterrorist counterparts may have substantially changed. That is, although earlier studies did provide information on the sentencing of terrorists then, the sentencing patterns of terrorists versus nonterrorists may be very different now.

## Research Questions

This article informs the discussion regarding the punishment of terrorists by addressing two main questions. These research questions lend themselves to a quasiexperimental design where the sentences of matched samples of terrorists and nonterrorists can be examined in both the presentencing and postsentencing guidelines eras.

1. *Has the disparity in sentencing among terrorists and similarly situated nonterrorists noted in previous research (Smith & Damphousse, 1996, 1998) changed in the postguidelines (and post–first WTC and Oklahoma City bombing) era?*

One effect of the introduction of sentencing guidelines has been that federal defendants have received longer sentences in the postguidelines era (Anderson, Kling, & Stith, 1999). Therefore, we hypothesize that both federally convicted terrorists and nonterrorists would

be more likely to receive incarceration sentences (*hypothesis 1a* and *hypothesis 2a*) as well as longer mean sentences (*hypothesis 1b* and *hypothesis 2b*) during the postguidelines era than in the preguidelines era. Because previous research suggested that terrorists received sentences that were approximately 4½ times longer than the sentences given to nonterrorists (Smith & Damphousse, 1996), we hypothesize that terrorists will continue to receive longer sentences than nonterrorists in the postguidelines era (hypothesis 3).

*Hypothesis 1a.* Terrorists will be more likely to receive incarceration sentences in the postguidelines era than in the preguidelines era.

*Hypothesis 1b.* The mean sentence length for terrorists will be significantly longer in the postguideline era than in the preguideline era.

*Hypothesis 2a.* Nonterrorists will be more likely to receive incarceration sentences in the postguidelines era than in the preguidelines era.

*Hypothesis 2b.* The mean sentence length for nonterrorists will be significantly longer in the postguideline era than in the preguideline era.

*Hypothesis 3.* Terrorists will continue to receive longer sentences than nonterrorists in the postguidelines era.

## 2. Has our ability to explain the variance in these sentences improved since implementation of the sentencing guidelines?

Hagan, Nagel, and Albonetti (1980) suggested that sentence outcomes can be better predicted under certain conditions or for certain crimes. Subsequent tests of this “structural-contextual” approach using drug and white collar crime prosecutions revealed a decreased disparity in sentences for offenses where the polity had concentrated its resources than was observed for crimes that avoided such scrutiny. Hagan (1989a, b) hypothesized that studies of “general” federal cases (those which do not elicit intense attention) are likely to explain low proportions of variance in sentence outcomes. “The single finding that is consistent throughout the large research literature on judicial sentencing is that whether legal or extralegal factors are the focus of analysis, the unexplained variance in sentencing looms large” (Hagan, 1995, p. 143-144). This occurs because the American justice system tends to be “loosely coupled,” with low levels of explained variance in outcomes across subsystems (Hagan, 1989b). However, when “political power is directed toward particular crime-linked goals,” the justice system “tightens” through the use of “proactive techniques” (Hagan, 1989b, p. 118).

A more tightly coupled system results in greater cooperation and communication among law enforcement and court officials. Certain historical contexts allow for this greater coupling—the creation of a proactive political environment where “the surrounding political environment has mandated departures from normal criminal justice operations . . . [involving] the imposition of political power, sometimes targeting the prosecution of a particular form of crime and criminal” (Hagan, 1989b, p. 130). Within this heightened political environment, the level of discretion available to justice actors decreases, allowing for increased ability of legal variables to explain sentence length variation.

Counterterrorism efforts provide an excellent example of how “proactive” environments can affect the operation of the criminal justice system—especially in the post-9/11 era. Terrorism investigations are not “general” criminal justice operations and they focus political power on the prosecution of a specific type of offender—key characteristics of a “proactive political environment.” When an act is officially labeled as “terrorism” by the government, proactive justice procedures are set in motion. This change increases the

likelihood of a successful arrest and conviction of the terrorist offender—not to mention the amount of punishment. Thus, a “tightened” justice system should result in greater levels of explained variance in sentence outcomes for terrorists than for nonterrorists, controlling for the severity of offenses.

We expect to find continued support for structural contextual theory’s argument that crimes prosecuted in a “proactive political environment” will lead to “tighter coupling” of the justice system. Furthermore, we hypothesize that this effect will manifest itself in greater amounts of explained variance for terrorists than for nonterrorists in the postguidelines era. In particular, the structural contextual model predicts that significant terrorist events such as the 1993 WTC bombing and the Oklahoma City bombing would result in a more proactive political environment and a resulting increase in explained variance among terrorist cases.

*Hypothesis 4.* In the presentence guidelines era, explained variance in predicting sentence length is higher among defendants in terrorism cases than among similarly situated defendants in nonterrorism cases.

*Hypothesis 5.* In the postsentence guidelines era, explained variance in predicting sentence length is higher among defendants in terrorism cases than among similarly situated defendants in nonterrorism cases.

By systematizing sentencing decisions, the guidelines should reduce the influence of extralegal factors. The federal guidelines attempt to eliminate disparities across cases by making cases more uniform and therefore predictable. This implies that there should be less variation in outcomes for all similarly situated defendants; by reducing the total amount of variation to be explained, models in the postguidelines era should explain a higher proportion of the variation in sentencing outcomes. Thus, for both terrorism and nonterrorism cases, we hypothesize that explained variance would have increased in the postsentence guidelines era.

*Hypothesis 6.* When comparing presentence and postsentence guidelines terrorism cases, explained variance should be greater in postsentence guidelines cases.

*Hypothesis 7.* When comparing presentence and postsentence guidelines nonterrorism cases, explained variance should be greater in postsentence guidelines cases.

These hypotheses are tested by comparing the explained variance between presentence and postsentence guidelines terrorism cases and the explained variance between presentence and postsentence guidelines nonterrorism cases.

More importantly, we examine the impact of the guidelines on sentence disparities between terrorists and nonterrorists. The postguidelines era follows the co-occurrence of events that can increase disparity with those aimed to reduce disparity. Thus, one may reasonably expect either of these outcomes. In the following paragraphs, we put forth both competing hypotheses. We then discuss how each of these findings suggests different potential underlying justice processes.

Events such as the first WTC bombing and the bombing of the Murrah Federal Building in Oklahoma City could have resulted in considerable public pressure to investigate, prosecute, and punish these types of offenders very harshly (Hagan, 1989b). Other scholars (e.g., Chermak, 2002) make similar contentions with reference to the impact of the Oklahoma City bombing on federal “sweeps” of the militia movement. Consistent with the

structural contextual perspective, these events may have prompted a “tight coupling” of the criminal justice system (Hagan, 1989b).

During this increased coordination, prosecutors may better communicate their evidentiary needs to law enforcement and investigators, these agencies may be more motivated to meet AG needs, judges may be more easily persuaded to authorize warrants, and so on. This “tight coupling” could strengthen the quality and quantity of evidence in terrorism cases. It is also likely that those investigators and law enforcement agencies, in reward for their efforts, would expect prosecutors to seek more severe sentences of convicted offenders. The expectation of fellow criminal justice agents, combined with the increased strength of evidence, dissuades prosecutors from negotiating reduced sentences. Thus, the position that sentence disparity between terrorists and nonterrorists would have increased in the postsentencing guidelines era would appear to be justified.

One of the goals of guidelines, however, was to *eliminate* such disparities across similarly situated defendants. By this notion, we predict that the advent of guidelines resulted in decreased amounts of the judicial discretion that may have explained previous disparities (Smith & Damphousse, 1996, 1998). It is reasonable to expect the impact of the federal sentencing guidelines on disparity among similarly situated defendants to mitigate the effects of historical events such as the Oklahoma City bombing.

*Hypothesis 8.* The sentencing disparity between terrorist and nonterrorists will be smaller in the postguideline era than it was in the preguideline era.

Testing of the hypotheses requires the implementation of a quasiexperimental design that uses both pretest and posttest groups and comparison or control groups.

## Method

Data for this project were extracted from two main sources. The terrorists in our study were drawn from the American Terrorism Study (ATS).<sup>5</sup> This study tracks the federal criminal cases of persons indicted as the result of an official FBI investigation opened as part of “intelligence investigation for terrorism-related activities,” as distinguished from a “general crimes” investigation under the AG Guidelines. The ATS database includes information on over 500 terrorists from about 65 terrorist groups. These persons were indicted for approximately 7,000 violations of federal criminal law from 1980 to 2002. Data on each case were extracted from the federal criminal case files at either the district court where the case was tried or the regional federal records facility where the case has been archived.

Data for each terrorist were supplemented with sentence specific information provided by the Administrative Office of the U.S. Courts. Each terrorist was matched with a sample of “traditional” offenders extracted from the Federal Judicial Center’s Federal Court Cases: Integrated Data Base.

## Sample Selection

The terrorists in the ATS database were divided into presentencing guidelines and post-sentencing guidelines cases. Of the 213 terrorists who were indicted during the preguideline



time period, 129 were convicted. Complete data were available on 111 convicted terrorists and 482 convicted nonterrorists. Results from analyses of these samples have been previously reported elsewhere (Smith & Damphousse, 1996, 1998).

Terrorists and nonterrorists were matched by year of indictment and offense code. Then a random sample of nonterrorists within year and offense code categories was selected via a random numbers table. The matched sample of nonterrorists uses a 5:1 ratio; that is, for each terrorist convicted of A.O Code 7611 (kidnapping, hostage), 5 nonterrorists convicted of the same lead offense the same year were randomly selected for inclusion.

One important change that was implemented under the federal sentencing guidelines is a mandate that felons serve a substantial portion of their sentence. These changes prevent a simple comparison of “time served” in the preguidelines and postguidelines eras as an indicator of changes in severity or disparity. Consequently, a comparative sample of “similarly situated” defendants convicted in the postsentencing guidelines era was required. Supplemental information on each of the terrorists convicted during the postguidelines era (1988–1998) was obtained from the U.S. Sentencing Commission. The basic sample selection process used with the preguidelines data was repeated for these cases with one modification. While terrorists charged in the preguidelines era were matched by year of indictment, terrorists in the postsentencing guidelines era were matched by year of conviction. This was necessitated by changes in USSC coding strategies. Complete data are available for 83 terrorists convicted during the postguideline era and 518 nonterrorists who were convicted of similar offenses in federal courts from 1988 through 1998.

## Measures

Our models measure sentencing severity using two dependent variables. Consistent with previous research (e.g., see Kurlychek & Johnson, 2004; Spohn & Holleran, 2000; Steffensmeier et al., 1998; Ulmer & Bradley, 2006; Ulmer & Kramer, 1996), we model both the likelihood of receiving incarceration and the length of incarceration. The first outcome is measured by the dichotomous variable *incarceration*, indicating whether the defendant received a sentence of incarceration. Those who received an incarceration sentence were scored as 1 (0 = *not incarcerated*, 1 = *incarcerated*). The second dependent variable, *sentence length*, reflects the length of incarceration as measured in months, ranging from 0 to 756.

Recent research has questioned the use of the total incarceration variable, finding empirical support for differentiating between prison and jail sentences (Holleran & Spohn, 2004). Unfortunately, the incarceration length variable in the ATS database does not distinguish between jail and prison incarceration. We applied the same approach to the U.S. Sentencing Commission data for consistency across databases. Frequency diagnostics suggest, however, that this approach may be less problematic in our current models. Over 83% of cases in which incarceration was ordered received sentences over 1 year. Thus, it seems likely that most of these sentences were served in a prison setting, rather than a jail setting (which is usually reserved for shorter periods of confinement). This finding suggests that our data probably contain relatively few of the short-term jail inmates that make the use of the total incarceration variable questionable.

As is typical with much of criminological outcomes, the distribution of the sentence length variable is skewed (e.g., Osgood, Finken, & McMorris, 2002). Thus, we conducted our analyses using both sentence length and the natural logarithm of the sentence length

(Bushway & Piehl, 2001; Osgood & Rowe, 1994). This also allows us to discuss findings in terms of the *percentage change* of the dependent variable. Thus, our analyses recognize that the impact of increasing a sentence by a few months is relative to the base sentence length. That is, adding 2 or 3 months to a 3-month sentence can effectively double sentence length but may be much less meaningful for longer sentences (Kurlychek & Johnson, 2004; Sellin & Wolfgang, 1964; Ulmer & Bradley, 2006).

We created two dummy dichotomous (0/1) variables as key independent variables. The dummy variable *terrorist* differentiates between those indicted as a result of a terrorism investigation (coded as 1) and those in our matched nonterrorist sample. The dummy variable *postguideline* differentiates between cases taking place prior to federal sentence guidelines implementation and those taking place afterward (1 = *postguideline status*). Aggregation of cases into two eras provides a sufficient number of cases in each era for multivariate analyses.

Consistent with prior research, our analyses included individual demographic variables as well as case-related variables as control variables. *Trial conviction* is coded as a dummy variable, such that those who pleaded guilty were coded 0, while those who were convicted as the result of a trial were coded 1. Federal sentencing data, however, also provide an intermediate category known as “initial plea-not guilty, final plea-guilty.” To be consistent with previous research, the middle category was combined with “initial plea-guilty” to create the dummy variable. *Crime severity* reflects a combined ranking of maximum punishments available as indicated by the *Federal Criminal Code and Rules, 1993* and *The National Survey of Crime Severity (NSCS; Wolfgang, Figlio, Tracey, & Singer, 1985)*.<sup>6</sup> For the pre-guidelines data, we removed “treason/sedition” and “national defense” categories from the severity variable (there were no matches in nonterrorist data). There were no “treason/sedition” or “national defense” cases in the postguidelines data. For both the preguideline and postguideline cases, we created a crime severity scale, ranking severity from 1 (least severe) to 31 (most severe), consistent with NSCS rankings (Wolfgang et al., 1985).

Some may contend that a more accurate assessment of crime severity is the indicator of seriousness formulated in the sentencing guidelines (i.e., Offense Gravity Score [OGS]). However, because the OGS is a product of the sentencing guidelines, it did not exist in the preguidelines era. A pre versus post comparison necessitates including the same variables in all models. Because this variable is only available in the postguideline sample, it seems illogical if not empirically unsound to include them in the postmodels and then make a pre versus post conclusion. Rather, we more appropriately include a measure of offense severity consistently calculated across both eras. Admittedly, this measure is not perfect (although it is vetted in the literature); it is nonetheless the same across both models—thus whatever flaws it may have are the same in both models as well.

The exogenous variables of race, gender, education, and age are included as indicators of extralegal predictors of sentence length. In the following analyses, race is coded as a dummy variable (1 = *non-white*). Gender is dummy coded (1 = *male*). Education is coded on a scale ranging from 1 (less than eighth grade) to 6 (bachelor’s degree or higher).

Although these variables were included as controls, other important potential variables (such as prior record) are not available in ATS data and thus not included in our analyses. For example, prior research has debated the use of prior record scores and presumptive sentence recommendation on modeling sentencing outcomes (Engen & Gainey, 2000). Unfortunately, our preguideline data did not have any information regarding prior record,

as is typically available in sentencing research. Because our primary focus is on preguideline and postguideline comparisons, we could not include this variable in our models. However, pre versus post guideline comparisons necessitate including the same variables in all models. Variables such as prior record score, OGS, and presumptive sentence were created by the federal guidelines and, therefore, did not exist prior to the imposition of the federal guidelines. Because these variables are only available in the postguideline sample, it seems illogical if not empirically questionable to include them in the postmodels.

Prior research has revealed jurisdictional variation on sentencing outcomes (e.g., see Johnson, 2006; Ulmer & Johnson, 2004). However, in the postguidelines era, the relatively few terrorism cases and the limited distribution of terrorism cases across districts limited our power to detect meaningful variation across districts. As the bulk of the cases were in a limited number of districts, there was not sufficient jurisdiction variation to warrant these comparisons. Moreover, the preguideline data does not include information regarding the district in which the offender was convicted. Thus, we did not include jurisdiction information in the current study.

Analyses presented are listwise deleted. Three variables had high numbers of missing cases: mode of conviction (20%), education (18%), and race (12%). Although not Missing Completely At Random (MCAR), cases seem Missing At Random (MAR). That is, they tend to be missing primarily among terrorists (all missing mode of conviction cases are from the terrorist sample). We created “missing” variables for education, mode of conviction, and race. Supplemental regression analyses showed that the missing cases tended to be MAR in the terrorist sample. We opted to drop rather than impute cases for multivariate analyses, as imputation can distort association coefficients and correlation relating variables (Kalton & Kasprzyk, 1982; Schafer, 1997). Regression analyses, available on request, show that, among terrorists, cases with missing data are not significantly different from those without missing data. The listwise deletion model was also the best fit. We acknowledge that this technique, like all missing data strategies, is not without limitations (Allison, 2003).

Furthermore, although conducting analyses with omitted variables limits our ability to assess every possible influence, the effect of guideline-specific variables should be subsumed by the inclusion of the guideline variable. Acknowledging the limitations of underspecified models, these omissions should not hinder accomplishing our primary objective of assessing change in disparity between terrorists and nonterrorists over time. That is, rather than predicting sentencing specifically, our goal is to examine the sentencing *differential* between similar groups over time, focusing on the interaction effect between time and terrorist label. Underspecified models can be problematic in the event of spuriousness or interaction effects between predictors and the missing variables over time, yet there is no prior evidence to suggest this is the case. For example, for the omitted variable of prior record, the effect of time and terrorist status would have to both interact with prior record for this omission to be substantially problematic for our analyses. We would have to believe: terrorists in the postguideline era have different prior records than nonterrorists, preguideline terrorists have different prior records than postguideline terrorists, or both the influence of prior record is different between terrorists and nonterrorists and the amount of this difference in impact between terrorists and nonterrorist changes across guideline eras. To date, we have found no empirical research suggesting these things.

Moreover, our four comparison subsamples (preguideline terrorists, postguidelines terrorists, preguideline nonterrorists, and postguideline nonterrorists) are essentially the same

with regard to gender, crime severity, and so on (particularly comparing terrorist defendants across eras or comparing nonterrorist defendants across eras). One of the advantages of the matched sample design is the reduced likelihood that the comparison groups will differ substantially in unmeasured characteristics. This suggests an omitted variable, although not ideal, is not overly problematic. Any bias due to the omission of such variables as prior record score should be constant. Terrorist demographics did not substantially vary across eras. There has been no empirical study nor theoretical model put forth to suggest that the samples would be essentially the same in all other ways but differ in regard to any of the potential unspecified variables present in the literature. Furthermore, although our data do have limitations, we know of no other available database with more detail regarding the prosecution and sentencing of federal terrorist cases than the one currently used.

Finally, it is also important to note that we are comparing cases that were identified by the FBI as terrorism cases with similar nonterrorism federal cases. The data do not include terrorism incidents that did not come to the attention of the FBI or those federal cases that included political motivations but did not fall into the FBI's definition of terrorism (e.g., the Unabomber case). The ATS has relied on the same FBI definition of terrorism for over 20 years but we recognize we are indeed relying on the FBI to identify which cases are terrorism cases. Still, the data allow us to compare cases that were "labeled" as terrorism cases by the federal government with those that were not so labeled.

## Findings

Table 1 presents the descriptive analyses for both the terrorist and nonterrorist samples. Consistent with prior studies, the information reported in Table 1 suggests that terrorists and nonterrorists are relatively similar in a number of ways. Both groups are predominantly White and male, with comparable crime severity scores. The similarity between the groups is not surprising, due to the matching technique used in sampling. We did find, however, that federally indicted terrorists were slightly older and more educated relative to their similarly situated, nonterrorist counterparts. The mean age of the terrorists was approximately 39 years compared to 35 years for nonterrorists. Likewise, the mean level of education for terrorists was 4.2, as compared to 3.8 among nonterrorists.<sup>7</sup>

Table 1 reveals major differences between the groups with regard to mode of conviction and sentence length. Whereas trials represent just 19.2% of nonterrorist cases, over 36% of the terrorist sample was convicted via trial. Furthermore, the average sentence length for terrorists was over twice the mean sentence length among nonterrorists. These findings are similar to preguidelines studies (Smith, 1994; Smith & Damphousse, 1996).

Examining preguideline era data, we found that 80% of convicted terrorists received incarceration, compared to 64% of preguideline nonterrorists. Following the imposition of the guidelines, however, the frequency of incarceration sentences increased substantially across both groups. In the postguideline era, all convicted terrorists and 82% of nonterrorists received incarceration.

Table 1 also shows the output from *t* test comparisons of mean sentence length for both groups before and after the imposition of sentencing guidelines to assess *hypothesis 1* through *hypothesis 3*. We observed that, on average, nonterrorists received significantly *longer* sentences in the postguideline era than they had received previously. However,

**Table 1**  
**Descriptive Statistics<sup>a</sup>**

Categories		Nonterrorists, <i>n</i> = 1,000 (481 preguideline)	Terrorists, <i>n</i> = 194 (108 preguideline)
<b>Independent variables</b>			
Age (years)	Mean	34.99	38.69
Sex	Male	863 (86.3%)	174 (89.7%)
	Female	95 (9.5%)	20 (10.3%)
	Unknown	42 (4.2%)	0
Race	Non-White	224 (22.4%)	22 (11.3%)
	White	654 (65.4%)	156 (80.4%)
	Unknown	122 (12.2%)	16 (8.2%)
Education	Mean (range 1–6)	3.77	4.24
Crime severity	Mean (range 1–31)	15.16	15.66
Trial conviction	Trial	192 (19.2%)	71 (36.6%)
	Guilty plea	588 (58.8%)	102 (52.6%)
	Unknown	220 (22%)	21 (10.8%)
Postguideline status	Preguideline	482 (48.2%)	111 (57.2%)
	Postguideline	518 (51.8%)	83 (42.8%)
<b>Dependent variables</b>			
Incarceration	Preguideline	308 (64.0%)	86 (79.6%)
	Postguideline	424 (81.7%)	83 (100%)
Sentence length (months)	Mean (range 0–756)	47.05	130.13
	Preguideline	40.9**	150.4*
	Postguideline	52.8	104.3

<sup>a</sup> Percentages shown are valid percentages to accommodate cases with missing variables. Thus, they may not add up to 100%.

\*  $p < .05$ . \*\*  $p < .01$ .

although terrorists received longer sentences than nonterrorists in both eras, average sentence length among terrorists significantly *decreased* in the postguideline era.

To more fully test *hypothesis 3* and our remaining hypotheses, subsequent analyses incorporate these potential influences. Furthermore, we logged sentence length in all the analyses that follow to accommodate the skew of the dependent variable. The mean for logged sentence length among terrorists was 4.25, with a standard deviation of 1.31. The mean logged sentence length among nonterrorists was 3.53, with a standard deviation of 1.26. Thus, logging sentence length considerably normalizes the distribution.<sup>8</sup>

To determine whether the predictors of sentence length had significantly changed with the implementation of the sentencing guidelines, we partitioned the data by terrorist status and guideline status. That is, we ran linear regression techniques, running separate models for preguideline and postguideline terrorists and nonterrorists. To make appropriate across-group comparisons, we calculated *z* tests, consistent with Paternoster, Brame, Mazerolle, and Piquero (1998), for testing the equality of coefficients across models. The results of these analyses are presented in Table 2.

Table 2 suggests that the predictors of sentence length have changed little for both terrorists and nonterrorists following the imposition of the guidelines. Specifically, among terrorists, *crime severity* and *trial conviction* remained significant predictors of sentence

**Table 2**  
**Regression of Sentence Length (Logged), Comparing Predictors Across Eras**

	Preguidelines				Postguidelines						
	B	Standard error	$\beta$	t	Significance	B	Standard error	$\beta$	t	Significance	Z
<b>Terrorists</b>											
Sex	0.42	0.66	.07	0.64	.53	0.73	0.39	.16	1.86	.07	-0.40
Race	0.38	0.62	.07	0.61	.54	-0.47	0.33	-.13	-1.42	.16	1.20
Education	-0.08	0.18	-.05	-0.42	.67	-0.12	0.07	-.15	-1.58	.12	0.20
Age	0.03	0.02	.18	1.69	.10	0.00	0.01	-.02	-0.17	.86	1.58
Crime severity	0.06	0.02	.27	2.36	.02	0.07	0.01	.58	6.73	.00	-0.65
Trial conviction	1.63	0.39	.50	4.23	.00	1.09	0.24	.43	4.61	.00	1.19
$R^2$ (adjusted $R^2$ )	.421	(.358)				.502	(.458)				
<b>Nonterrorists</b>											
Sex	0.03	0.68	.00	0.04	.97	0.53	0.18	.14	2.94	.00	-0.72
Race	0.21	0.43	.05	0.48	.63	0.30	0.11	.13	2.65	.01	-0.21
Education	-0.07	0.10	-.08	-0.73	.47	-0.02	0.05	-.02	-0.51	.61	-0.45
Age	-0.02	0.01	-.17	-1.55	.12	-0.01	0.01	-.09	-1.75	.08	-0.90
Crime severity	0.02	0.02	.13	1.18	.24	0.03	0.01	.25	5.46	.00	-0.50
Trial conviction	0.71	0.31	.24	2.28	.02	1.00	0.14	.33	7.08	.00	-0.85
$R^2$ (adjusted $R^2$ )	.094	(.032)				.236	(.223)				

length; similarly, those variables that were nonsignificant in the preguidelines era remained nonsignificant. With the exception of *crime severity*, this pattern was repeated for nonterrorists as well. While the significance of *crime severity* changed for nonterrorists between the two eras, the *z* test suggests that there was no significant change in the size of the coefficient. It seems the factors that predict sentence length in the preguidelines era have continued to remain important influences since the implementation of the guidelines.

*Hypothesis 4* through *hypothesis 7* related to differences in the explained variance of the models between both terrorists and nonterrorists across guideline eras. In supplemental analyses (not shown), we tested models using the same individual and case-related predictors for terrorists and nonterrorists separately—both before and after the guidelines.<sup>9</sup> Thus, Table 2 also shows the explained variance across all four models.

The analyses confirm that our ability to predict sentence length is substantially higher among terrorists than nonterrorists *in both eras*. Our comparisons among nonterrorists, however, are revealing. We find that although our ability to predict sentence length for nonterrorists was relatively low in the preguideline era ( $R^2 = .094$ ), our explained variance substantially improved after the imposition of the sentencing guidelines. Our postguideline model explained 23.6% of the variation in logged sentence length. Among terrorists, the increase was more modest; our model explained 50% of the variance in the postguideline era, as compared to 42% of the variance in the preguideline era.

Our next task was to determine whether disparity associated with the “terrorist” label changed across guideline era, using logistic regression models predicting incarceration sentences and linear regression models of logged sentence length. Admittedly, predicting sentence length among convicted offenders brings up issues of selection bias, as we do not have a sample of all individuals who could potentially receive sentences (Bushway, Johnson, & Slocum, 2007; Winship & Mare, 1992). Indeed, nearly 20% of our sample did not receive incarceration sentences. For this reason, we ran separate models (not shown) including the conventional Heckman two-step correction for selection bias. Models that did include a hazard rate (see Berk, 1983; Peterson & Hagan, 1984) did not substantively differ from those shown.

Table 3 presents models of both sentencing outcomes on our predictors. Specifically, Models 1 and 2 include the individual and case-related variables consistent with prior sentencing research while Models 3 and 4 focus specifically on our predictors of interest, *terrorist status* and *guideline era*. First, our analyses reveal that, across models, sex, education, severity, and mode of conviction remained significant predictors of receiving incarceration. We focus on the predictors of incarceration for Model 4 to calculate predicted probabilities. Importantly, the terrorist label is associated with a 13% increase in the odds of receiving a sentence of incarceration. Among guilty pleas of defendants of average age, education, and crime severity, nonterrorists before the guidelines had a .52 predicted probability of receiving incarceration, compared to a .86 predicted probability after the guidelines. Similarly situated terrorists had 76% probability of incarceration before the guidelines; all terrorists were incarcerated during the postguidelines era. Overall, offenders during the postguidelines era had a 96% probability of receiving incarceration. Our findings provide support for *hypothesis 1a* and *hypothesis 2a*.

In Models 1 and 2, we find that race and sex remain important predictors of sentence length across models. These effects remain, even after controlling for case-related predictors. Furthermore, we find that mode of conviction and crime severity are important

**Table 3**  
**Logistic and Linear Regression (Natural Logarithm) Models of Sentencing Outcomes**

	Model 1			Model 2			Model 3			Model 4		
	Incarcerated		Ln sentence length	Incarcerated		Ln sentence length	Incarcerated		Ln sentence length	Incarcerated		Ln sentence length
	<i>b</i>	<i>SE</i>	<i>b</i>	<i>SE</i>	<i>b</i>	<i>SE</i>	<i>b</i>	<i>SE</i>	<i>b</i>	<i>SE</i>	<i>b</i>	<i>SE</i>
Constant	0.76 (logit)	3.44	0.29	0.94	2.97	0.28	-0.79	2.50	0.29	-0.67	2.27	0.30
Age	1.00	0.00	0.00	0.99	-0.01	0.00	0.99	-0.01	0.00	0.99	-0.01	0.00
Sex (male = 1)	3.14***	0.34 <sup>†</sup>	0.12	2.95***	1.08	0.38*	3.54***	1.27	0.38*	3.44***	1.24	0.16
Race (non-White = 1)	1.57*	0.45	0.30	1.56†	0.45	0.26**	1.32	-	0.28**	1.34	-	0.10
Education (1 to 6)	0.85*	1.16	-0.02	0.81*	-0.22	0.04	0.78*	-0.25	0.04	0.78*	-0.25	0.04
Case-level predictors												
Trial conviction (trial = 1)				2.82**	1.04	0.81***	5.35***	1.68	0.98***	5.16***	1.64	1.02***
Crime severity				1.02*	0.03	0.03***	1.04**	0.04	0.04***	1.04**	0.43	0.04***
Terrorist status							4.56***	1.52	0.65***	3.09***	1.13	1.06***
Postguideline status							7.11***	1.96	0.51***	5.98*	1.79	0.76***
Interaction term												
Terrorist × postguideline							n.v.	-		n.v.	-	-0.74**
<i>R</i> <sup>2</sup>				.012			.238			.251		

Note: n.v., the interaction term for in/out could not be tested, as all postguideline terrorists received incarceration.

<sup>†</sup>  $p < .10$ . \*  $p < .05$ . \*\*  $p < .01$ . \*\*\*  $p < .001$ .



influences on sentence length. As noted in Model 2, a 1-point increase in crime severity corresponds with a 3% increase in sentence length. Notably, conviction by trial, as compared to a guilty plea, increases sentence length over 80%. Moreover, these effects remain significant and strong across models and controlling for other factors.

In Models 3 and 4, we explore the influence of terrorist status and the impact of the guidelines on sentence length. In both models, terrorists receive significantly longer sentences than nonterrorists, after controlling for other individual and case-related factors (demographics, crime severity, and mode of conviction). For example, Model 3 shows that terrorists received, on average, sentence lengths that are approximately 65% longer than similarly situated nonterrorists. Furthermore, Model 3 reveals that offenders sentenced in the postguideline era received 50% longer sentences than those sentenced previously. This finding lends considerable support to *hypothesis 1* and *hypothesis 2*.

*Hypothesis 8* predicted that the sentencing guidelines would moderate the relationship between terrorist status and sentence length. In Model 4, we examine the impact of the sentencing guidelines on the sentencing differential between terrorists and nonterrorists. In this model, we see that the postguidelines and terrorist main effects continue to be positive, while our introduced interaction effect is negative. Model 4 reveals an overall increase in sentence length for terrorists and for all offenders during the guidelines era, providing further support of *hypothesis 1* and *hypothesis 2*. However, our significant negative terrorist by postguidelines interaction effect reveals that the impact of terrorist status on sentence length significantly decreases after the imposition of the guidelines. Whereas terrorists sentenced in the preguidelines era received sentences that were roughly twice those of nonterrorist, terrorists sentenced in the postguidelines era received roughly 32% longer than nonterrorists (1.06 terrorist – 0.74 terrorist × postguideline), independent of other factors.

Thus, although terrorists continue to receive longer sentences relative to nonterrorists, the gap between these groups appears to be closing. Importantly, we find that much of the reduction in disparities may be due to significant increases in sentence lengths for nonterrorists rather than large changes for terrorists. Nonterrorists received 76% longer sentences after the imposition of guidelines; terrorists received 2% longer sentences in the postguideline era (0.76 main effect, –0.74 interaction effect).

## Discussion

Although our findings are generally consistent with our hypotheses, there were some important surprises. Predictors of sentence length did not change appreciably following implementation of the guidelines. In addition, our ability to explain the variance in sentence length among these two groups of offenders increased in the postguidelines era, albeit the increase was more dramatic for nonterrorists. Despite this increase in explained variance, we continue to be able to explain over twice as much variance in sentence length for terrorists than for nonterrorists. This is consistent with our predictions and structural contextual theory's notion that a "highly politicized environment" (like that created by terrorism) lends itself to greater predictability in sentencing outcomes.

In the postguidelines era, we saw a decline in sentence disparity among the two groups. Although terrorists continued to receive longer sentences than nonterrorists in the postguidelines era, the difference in their average sentence lengths has declined significantly.

Why? As judges typically (although not always) follow prosecutors' recommendations, changes in the size of the sentence disparity most likely speak more toward changes in prosecutorial strategies (Engen, Gainey, Crutchfield, & Weis, 2002; Everett & Nienstedt, 1999). Collectively, the implication of our findings is that although the terrorist label still matters (we noted a significant positive main effect), being a terrorist as opposed to non-terrorist is less deleterious for offenders as compared to nonterrorists now than previously (suggested by our negative interaction effect). It is possible that while prosecutors (and judges) were more punitive toward terrorists in the prior era (although the percentage increase is modest), they are now also even more punitive toward nonterrorists than in the preguidelines era.

We predicted that, despite the increase in American fear of extremism, the advent of federal sentencing guidelines could have resulted in decreased amounts of the judicial discretion that may have explained previous disparities (Smith & Damphousse, 1996, 1998) and resulted in federally indicted terrorists and nonterrorists to be punished more similarly prior to the guidelines. That is, the impact of the federal sentencing guidelines on disparity would mitigate the effects of historical terrorist events. In the postguidelines era, sentences for nonterrorists were significantly higher and thus more similar to those for terrorists. This implies that guidelines probably did eliminate the disparity between similarly situated offenders. This is consistent with prior examinations of sentence guideline effects and suggests that those effects extend to our types of cases as well.

Importantly, nesting the imposition of the guidelines within the structural contextual perspective's model of "proactive political environment" offers possible implications worth future examination. We found a significant positive main effect of the guidelines, but the size of that increase was small relative to the increase for nonterrorists. One possibility is that rather than guidelines mitigating the effect of these events, for terrorists, these events mitigated the effect of the guidelines. Although sentences for all offenders are longer in the postguidelines era, the events of the WTC Bombing and Oklahoma City limited the size of the sentence increase for terrorists by heightening the urgency for obtaining convictions and preventing future terrorist events.

In the "proactive political environment" (Hagan, 1989a) following the terrorist attacks of the 1990s, prosecutors may negotiate sentencing reductions in exchange for terrorist defendant cooperation in larger investigations. Although the original sentence may be substantially longer than it would have been during the preguidelines era (i.e., as a product of the guidelines), sentence reductions limit the amount of that increase for terrorists. Sentencing reductions may be essential to collect the evidence and testimony necessary to "decapitate" the organization and protect the public from future harm. Few comparable incentives (reducing an initially longer sentence during the postguidelines era) may exist for nonterrorists. Thus, sentences increased for all offenders after the imposition of the guidelines, but increased motivation for prosecutors to "behead organizations" by obtaining cooperation from defendants may be mitigating some of the overall trend for terrorists.

We found significant differences across mode of conviction. Although beyond the scope of the current study, the connection between offense severity and mode of conviction cannot be overstated and certainly warrants further investigation. Research has suggested that those who lose at trial are punished more severely (Johnson, 2003; Uhlman & Walker, 1979; Ulmer & Bradley, 2006; Zatz & Hagan, 1985). A relevant concept here is organizational efficiency (Dixon, 1995; Holmes, Hosch, Daudistel, Perez, & Graves, 1993; Uhlman

& Walker, 1980). This perspective explains sentencing disparities across conviction mode as the product of rewarding defendants who plead guilty and penalizing those who go to trial. Case processing is a primary goal for courtroom work groups, and those who keep cases moving smoothly and avoid docket backlogs by avoiding trials are rewarded. Our findings warrant future examination of presentencing processes and the impact of disposition among terrorist and nonterrorist defendants. Although we found significant differences across defendants after controlling for mode of conviction, comparisons across these groups is further complicated by possible variations in the willingness to plead guilty as well as prosecutors' willingness to plea bargain. Terrorism cases may be particularly harder to prove and require more time and cost to try than less politically involved cases. Consequently, prosecutors may offer substantial incentives to avoid taking them to trial.

Furthermore, the court's ability to consider "uncharged and unconvicted conduct" at sentencing can have a significant impact on sentence length in terrorism cases. Prior to 1994, the guidelines did not include the possibility of enhancement for terrorism-related offenses.<sup>10</sup> During this time, defendants could be subject to a departure above the guideline range for terrorism offenses. That said, upward departures were used sparingly against terrorism defendants during this era.<sup>11</sup>

## Conclusion

Sentence disparity between terrorists and nonterrorists has changed over time; this suggests that the previously investigated processes that lead to sentencing outcomes are changing in meaningful ways. It may be that disparity across defendants may be more difficult to ascertain, as guidelines may have shifted discretion from judges to prosecutors (Walker, 1993). Although guidelines may limit judges' power in determining sentences, prosecutors have considerable discretion in how cases will be charged and how guidelines may be applied. Relevant here are the possible effects of "hidden departures" through "charge bargaining" and "fact bargaining," which may circumvent the guidelines.

One obvious question is whether the sentencing patterns we revealed persist subsequent to the second WTC Bombing (9/11). The focus on terrorism brought about by the events of 9/11 may give prosecutors considerable discretion and incentive to negotiate sentence reductions for defendants in terrorist cases not only to increase the likelihood of conviction for terrorist leaders but also to prevent future terrorist attacks. Unfortunately, there have been very few cases sentenced post 9/11. Future research should explore the federal prosecution and sentencing of politically motivated offenders as data become available.

## Notes

1. Recent state laws state that the perpetrator's act of discrimination, not hate or hate speech, is punishable. This approach has been upheld by the U.S. Supreme Court (see Phillips & Grattet, 2000).

2. See, for example, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986); *United States v. Romano*, 825 F.2d 715 (2d Cir. 1987); *United States v. Garcia*, 698 F.2d 31 (1st Cir. 1983).

3. See Attorney General Guidelines on General Crimes, Racketeering Enterprises, and Domestic Security/Terrorism Investigations (1983a) and subsequent editions in 1989 and 2002. In the case of international terrorists, data include those persons indicted in federal courts as a result of investigation under the *Attorney*

*General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations* (1983b) and its subsequent edition in 2002.

4. Although Attorney General John Ashcroft established new guidelines on May 30, 2002, the new guidelines exacerbate, rather than mitigate, the difference between “general crimes investigations” and “terrorism enterprise investigations” (as they are now called). See The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigation, Office of the Attorney General, May 30, 2002.

5. See Smith (1994), Smith and Orvis (1993), Smith and Damphousse (1996, 1998) for a more detailed discussion of the terrorists included in this database.

6. The offense of record in the data set is the offense of which the person was convicted (as opposed to the actual offense committed). Of course, plea bargaining often results in discrepancies between the two offenses. The original charge of the nonterrorists in the sample is not available, so we can only rely on the offense of conviction. This does muddy the analyses, however, because we know that terrorists are less likely to plead guilty for reduced charges to gain attention to their cause via a public trial (Smith & Damphousse, 1998).

7. Recent research has raised the issue of censored and skewed distributions (see Kurlychek & Johnson, 2004; Osgood et al., 2002). Thus, although logging the dependent variable considerably normalized the distribution, we also replicated our models using Tobit regression in Stata. The results did not differ substantively from those shown. The results of these models are available on request.

8. The analyses are available on request. These models were run to examine difference in explained variance only. The results from the terrorist  $\times$  postguideline interaction model, found in Model 4 of Table 3, parallel these findings. This implies that a test for the equality of regression coefficients across models, such as the Paternoster test (Paternoster et al., 1998) is not necessary.

9. See Sentencing Memorandum Opinion, CR-06-60069 et al., U.S. District Court, District of Oregon, May 21, 2007 for an excellent history of the “terrorism enhancement.”

10. The Commentary to the Federal Sentencing Guidelines (2000) specified crimes that constitute “federal crime of terrorism” and conditions, where enhancement could be applied. Changes occurred after cases were included in the data used here; thus this is less problematic for the current study. Similarly, “lag time” between the passage of the Antiterrorism and Effective Death Penalty Act of 1996 and completed prosecution of cases suggests there are too few cases to warrant investigation of enactment impact per se.

11. See Hofer et al. (1999) for a discussion of these issues.

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