

FEDERAL OR STATE? SORTING AS A SENTENCING CHOICE

By Ronald F. Wright

For criminal defendants who plan to plead guilty—that is to say, for virtually all criminal defendants—the most pressing questions about their cases relate to sentencing. Defense lawyers can advise them about the highest and lowest available sentences, and perhaps the sentencing tendencies of particular judges. In a sentencing guidelines jurisdiction, lawyers can summarize the subissues in applying the guidelines and do their own guidelines calculations.

Another bit of sentencing knowledge, however, could prove even more valuable for a criminal defendant: whether the case will travel through the state system, the federal system, or both. The sentences available in the federal system tend to be much higher than the authorized sentences for similar crimes in the state systems, and the sentences imposed in the federal courts are usually longer than those in the state courts. Thus one of the most crucial sentencing choices in many cases is also one of the earliest: sorting cases into the state and federal systems.

Who performs this sorting? The answer differs from district to district and from one type of crime to another. In some places, investigating agents make the choices, sending some of their cases to federal prosecutors and others to state prosecutors. In other districts, the prosecuting lawyer makes the call. An individual prosecutor might decide on which system to use, or groups of law enforcement officials may choose during a well-structured monthly meeting. Informal telephone calls might determine the fate of drug cases, while more formal joint task forces may direct the flow of firearms cases.

The sorting of cases into the state and federal systems is an executive branch choice. Judges and defense counsel have no formal role in the decision. Still, a defense lawyer who knows something about the federal-state sorting process in the district can help clients predict their futures and occasionally influence this crucial sentencing factor.

What is remarkable about these “sorting structures” is not their variety but that they remain so well hidden to most criminal practitioners. Closer study of the way these

structures operate might reveal important differences in the outcomes they produce. Do informal telephone calls among prosecutors lead to more federal cases than do more structured committee meetings? Do agent-dominated structures tend to send a specific type of defendant to the federal courts? After summarizing what we know about these structures, I conclude with a proposal to pool knowledge from around the country about the sorting processes that prosecutors use.

The federal-state severity gap

Because of remarkable growth in the reach of the federal criminal code over many generations, a huge potential overlap now exists between federal and state criminal justice. Especially for narcotics and firearms crimes, precisely the same conduct could lead to criminal charges in federal court, in state court, or both.

This overlap has grown relentlessly for generations. As the American Bar Association’s Task Force on the Federalization of Criminal Law concluded in 1998, both the number of federal criminal statutes and the volume of federal criminal cases have increased over the years. (TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, SECTION OF CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION, *THE FEDERALIZATION OF CRIMINAL LAW* 53 (1998).) This growth, as Sara Sun Beale of Duke Law School has argued, results from the specialized political dynamic in the federal system that places extra value on the symbolic value of criminal legislation and the relative small budgetary consequences of an expanding federal criminal docket. (See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?* 80 B.U. L. REV. 23 (2000).)

Given this ever-more-common overlap between the federal and state systems, prosecutors more frequently may pursue charges in the system of their choice. And the choice between the systems matters enormously because a severity gap exists between federal and state sentencing. Roughly speaking, federal sentences are tougher than state sentences for most overlapping crimes.

This gap is easiest to see in the sentences that different systems authorize for comparable crimes. For instance, a defendant charged with trafficking 50 grams of methamphetamine would face a minimum sentence of 70 months

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and a maximum of 84 months under North Carolina's newly strengthened law. (N.C. GEN. STAT. § 90-95(h).) The same amount of methamphetamine would authorize a sentence between 120 months and life imprisonment in the federal system. (21 U.S.C. § 841.) Possession with intent to distribute as little as 5 grams of crack cocaine authorizes a 60-month minimum sentence in federal court, while the same amount of crack cocaine would usually authorize a sentence of five to six months under North Carolina law, or perhaps 20 to 25 months if enough aggravating circumstances were present.

This gap is not true for every comparable crime. For instance, federal manslaughter sentences under the U.S. Sentencing Guidelines were lower than the authorized sentences for manslaughter in many states for many years (treating the federal guidelines maximum as the highest "authorized" sentence). The U.S. Sentencing Commission in 2003 revised the manslaughter guidelines to match the sentences, both authorized and imposed, at the state level. Crimes such as manslaughter, however, have been the exception rather than the rule. For the narcotics and firearms cases that account for the largest number of federal-state overlaps, the authorized federal sentences are noticeably more severe than state sentences.

A second indicator of the severity gap appears in *growth rates* in the federal and state systems: the gap has been widening for years. Whatever message the public has been sending about sentence severity over the years, the federal system has amplified the message more than the state systems have.

When it comes to the overall scale of imprisonment, the federal system has grown much faster than its state counterparts. The proportion of the U.S. population serving time in federal prison has increased 286 percent over the last 20 years; the rate was 14 per 100,000 in 1985 and 54 per 100,000 in 2004. The proportion of the population in state prisons increased "only" 131 percent over the same period; 187 per 100,000 in 1985 up to 432 per 100,000 in 2004.

The proportion of federal offenders going to prison (including split sentences) went from about 60 percent before the effective arrival of the federal sentencing guidelines in 1989 to about 86 percent in 2002, an increase of over one-third. Meanwhile, state courts stayed fairly flat during the 1990s in the percentage of felony offenders sentenced to incarceration, 70 percent of all felons in 1992 compared to 69 percent in 2002.

A similar story holds true for the average length of prison terms served. In the federal system, the length of prison terms served almost tripled between 1987 and 1992, then pulled back a little between 1992 and 2002, leaving us with an overall federal increase of roughly 100 percent. The length of federal sentences started increasing

Calculating Growth Rates in Federal and State Courts

The estimates of the increasing severity of state felony sentences are drawn from statistics compiled by the Bureau of Justice Statistics (BJS), a subunit of the U.S. Department of Justice. The BJS publishes a series of reports called *Felony Sentencing in State Courts*, with a new installment appearing every two years. (See, e.g., <http://www.ojp.usdoj.gov/bjs/abstract/fssc02.htm>.) Table 4 in the most recent reports shows the mean months to be served, which is the best comparison point to federal sentences, where defendants serve over 90 percent of the sentences imposed.

The estimates for the federal system are more difficult to calculate. The arrival of the federal sentencing guidelines in November 1987, and their more complete implementation after the decision in *Mistretta v. United States*, 488 U.S. 361 (1989), brought time served much closer to time imposed, increasing both the percentage of offenders sentenced to prison and the average length of time served. Most federal data sources, however, do not use comparable measures for the periods before and after the guidelines. The estimates of the growth in federal sentences in this article are drawn from Chapter 2 of *15 Years of Guideline Sentencing*, a report of the U.S. Sentencing Commission. (See http://www.uscc.gov/15_year/15year.htm.)

Rates of imprisonment for the state and federal prison systems appear in the invaluable *Sourcebook of Criminal Justice Statistics*. (See <http://www.albany.edu/sourcebook/pdf/t6292004.pdf>.)

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again in 2003. After *United States v. Booker*, 125 S. Ct. 738 (2005), converting the federal sentencing guidelines into a set of advisory rules, the increases in sentence length continued but at a slower pace.

At this point, the overall growth in the length of federal prison terms between 1987 and 2005 is more than 100 percent. Meanwhile, on the state felony side, the mean prison sentence served for all offenses moved from 24 months in 1988 to 27 months in 2002, a 13 percent increase. For those of you keeping score at home, that's federal system 100, state systems 13.

For particular crimes, the federal system also has increased sentences more quickly than the state systems

have. Sentence length in federal drug trafficking cases more than doubled, while in the states the time served went from 20 months in 1988 to 24 months in 2002, only a 20 percent increase. For firearms crimes, the length of sentences in the federal system moved up markedly in 1992 after guideline amendments took effect, while the length of sentences stayed about the same in the states. Remarkably, the federal growth rate was also higher for violent crime sentences, the traditional priority of state criminal justice.

The severity gap between the federal and state systems is easy to see in authorized sentences (higher for the largest volume crimes in the federal system) and in the growth rate of severe sentences (again, higher in the federal system). It is not necessarily true, however, that federal judges routinely give out longer sentences than state judges would impose on identical defendants. By many measures, the federal system deals with more serious offenders than those charged with similar crimes in the state systems. For instance, the drug cases in federal court tend to involve larger amounts, and the defendants usually have more serious criminal histories. Different types of cases should produce different sentences.

It would take a detailed study of cases in specific categories to learn the real differences between the pools of defendants going into federal and state courts. With that knowledge in hand, we might then judge whether the differences in the cases justify the extra severity in federal sentences, but that is not my project here.

Putting aside the question of whether the federal sentencing premium is justified for more serious cases, federal law does not limit itself to those more serious cases. Clearly, not all cases in the federal courts are serious in comparison to state prosecutions. Indeed, programs such as Weed and Seed, emphasizing small-scale drug cases, or Project Exile, emphasizing routine handgun violations, target very ordinary crimes for federal prosecution.

Limited legal constraints

People make judgments every day about which cases deserve the federal premium, and they do so without many traditional legal constraints. For instance, constitutional doctrine does not meaningfully limit the choice of the state versus the federal system for criminal charges. Because of the “dual sovereign” exception to the double jeopardy protection, the Constitution allows both the state and the federal government to obtain a conviction and impose a sentence based on exactly the same conduct since the crime constitutes a wrong against two separate polities: the people of the state and the people of the nation. Although the threat to double jeopardy values has grown larger as the overlap between federal and state criminal justice has increased, the U.S. Supreme Court has

shown no sign of reconsidering *Bartkus v. Illinois*, 359 U.S. 121 (1959).

Granted, an internal U.S. Department of Justice policy, known as the Petite policy, discourages the filing of federal charges after a successful state prosecution. (UNITED STATES ATTORNEYS’ MANUAL § 9-2.031.) Some state legislatures have passed laws that bar state prosecution for certain types of crimes, especially narcotics crimes, after a federal conviction based on the events in question. For instance, Ohio Revised Code § 2925.50 provides that “a conviction or acquittal under the federal drug abuse control laws for the same act is a bar to prosecution in this state.” None of these laws, however, speak to the question of how to allocate cases for a single prosecution, whether it be in federal or state court. Thus far, no “as applied” federalism challenges to federal criminal charges have gained any traction in the courts.

Given that legal standards say almost nothing about the choice between federal and state prosecution, what can a lawyer say about this choice that is so critical to the outcome at sentencing? One answer lies in the structures that state and federal prosecutors use to sort the cases, hopefully in a rational way.

Agent sorting

Some of the sorting between federal and state systems occurs before prosecutors ever get involved in the case or the investigations. An agent of the Bureau of Alcohol, Tobacco, Firearms, and Explosives or the Drug Enforcement Agency will walk into the prosecutor’s office—these cases are sometimes called “walk-ins”—and present the case. If the evidence is adequate, a federal prosecutor probably will charge the case in federal court just to maintain a good working relationship with that agent.

Federal investigators may work alone or with state and local law enforcement officers during investigations. Federal agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives or the Drug Enforcement Agency in an area often will know about the larger warrants and raids taking place there and will get in on the action. During these joint enterprises, and particularly for narcotics cases, these agents sort the cases for themselves into federal and state boxes. Because it takes more time and effort to make a federal case, agents try to identify early the cases with the largest potential benefits and develop them for federal prosecution, leaving the less promising cases for state prosecution. Sometimes the potential value of a case is driven by the suspect’s record rather than the nature of the drug deal at hand. If the officers go to the trouble of placing a confidential informant into a case, that is normally enough of an investment to justify a request for federal prosecution.

Prosecutor sorting

Federal and state prosecutors also do some of the sorting. The prosecutors get involved in these choices through two types of structures: (1) individualized prosecutor choices and (2) routine collective decisions about federal sorting at the district level.

Individual prosecutor choices. Federal prosecutors do more than accept cases that federal agents present to them; they sort for themselves. They might give the local agents general standards that will justify a federal prosecution, perhaps a given amount of drugs or firearms possessed in specified situations. Prosecutors also tend to monitor at least some of the investigations under way in the area and pick out a few that best fit their priorities for federal prosecution. An assistant U.S. attorney often has previously worked as a state assistant district attorney and will therefore recognize the names of some repeat players in the local crime scene. Regardless of the seriousness of the current crime, an assistant U.S. attorney may decide that a federal sentencing premium is needed to remove this person from the area for a longer time.

This person does not act alone, of course. A federal prosecutor will consult informally with state prosecutors in the area who handle similar cases. In white collar crime and public corruption cases, federal prosecutors in some districts stay in close telephone contact with specialized prosecution units in state offices. Narcotics prosecutors at the state and federal levels also have reason to touch base from time to time.

Consultations also happen internally, within the U.S. Attorney's Office. In many districts, one or more supervisors or an "indictments committee" must approve of the decision to prosecute a case, and the allocation of effort between federal and state courts is sometimes a factor that matters for the internal reviewers. Such internal and external consultations, however, should not obscure the fact that an individual federal prosecutor holds the real power to decide whether prosecutions happen in federal or state court.

Collective decisions. When it comes to crimes that have been declared a federal priority, such as firearms under a program like Project Exile, individual federal prosecutors make very few sorting choices. It is strictly a numbers game. The prosecutor only asks whether the case file could support a conviction. If so, it becomes a federal prosecution and another number added to the tally. The relevant sorting decision happens when the whole department or a particular U.S. Attorney's Office adopts a priority and assigns prosecutors to work the cases.

Other federal sorting decisions happen in a group setting at the district level. Many U.S. Attorney's Offices establish joint task forces to address specific subjects. These days, they might include a Joint Terrorism Task Force, a Joint Task Force on Gangs, a Violent Crime Joint Task Force, or a Hurricane Katrina Fraud Task Force. The

task force typically includes members from many organizations in the area, including local police and sheriffs' departments; state prosecutors from the various offices falling within the federal district; probation or parole officers from the state; federal investigative agents from the Federal Bureau of Investigation, the Bureau of Alcohol, Firearms, Tobacco, and Explosives, the Drug Enforcement Agency, as well as Immigration and Customs Enforcement or other federal agencies; and local officials with social or technical expertise, such as social workers or urban planners.

Such groups usually meet on a regular schedule, perhaps once a week or once a month. The group might plan investigations for the future and prioritize among existing cases to get the most impact out of a limited number of federal prosecutions. Together, the group identifies the "worst of the worst" and sorts those cases into federal court. Once the group selects a priority case, an individual prosecutor has only limited power to dismiss or reduce the charges. In addition to the subject-specific joint task forces just described, a few federal districts also empower committees to make the federal-state sorting choices across all categories of crimes.

Defense lawyer input

Defense lawyers routinely account for the individual-level sorting decisions of federal prosecutors. They might informally lobby for the assistant U.S. attorney to change criteria for what qualifies as a federal case in the future. Defense lawyers commonly ask the assistant U.S. attorney to drop federal charges in favor of state charges.

Interestingly, defense lawyers also sometimes try to convince the federal prosecutor to urge the state prosecutor to drop overlapping charges. Now that Department of Justice policy discourages reduction of charges and tracks more closely the decisions by an assistant U.S. attorney to reduce or dismiss charges—this is the gist of the so-called Ashcroft Memoranda of 2003—federal prosecutors may prove more willing to bargain away the state prosecution. Reducing or dismissing state charges does not count against the informal "Ashcroft account" of an individual assistant U.S. attorney.

Defense lawyers interact less with the federal sorting choices of collective bodies such as a joint task force. Some lawyers might not even know whether these bodies exist in the district. They may be unaware of their membership composition or their decision standards and habits. Yet this is knowledge with real consequences for plea negotiations. Once the group has spoken, it cuts down on the power of an assistant U.S. attorney to reduce federal charges or to redirect the case to the state courts.

A defense lawyer needs to anticipate the likely path that a client will follow through the criminal justice system. Part of this job is to appreciate the impact of decisions about the case from a joint task force or other simi-

lar collective body. They can give clients better advice by learning more about the workings of the sorting groups.

A joint task force will not offer defense lawyers a chance to present arguments to the group, but more informal input might be possible. A defense lawyer who knows or guesses the operating principles of the group might suggest informally to the prosecutors in the group that changes to those principles would be wise. If a defense lawyer believes that a particular case fits poorly within the usual principles that the group uses, that fact might strengthen the case for reconsidering the decision to file federal charges.

Conclusion: pooling resources

None of this client counseling or advocacy is possible, however, if the lawyer knows nothing about the collective bodies that sort cases. There is no central repository of information about the groups; neither prosecutors nor defense lawyers know the full scope of their sorting work around the country. Many people know bits and pieces, but nobody can see the full national picture.

And so I end with a proposal for pooling knowledge. If you know about the work of a group with federal-state

sorting responsibilities, could you send me a brief description of how that body works? Which officials (by title, not by name) take part in the group? How often do they meet? What criteria do they appear to use? Does the group's endorsement seem to affect the bargaining power of the federal or state prosecutors after the case is filed?

A brief email to wrightrf@law.wfu.edu will suffice. After I compile responses from enough people and places, I will attempt to post them (with any identifying information about the sources removed) in some public place, such as the indispensable Sentencing Law and Policy Blog. (See <http://sentencing.typepad.com>.) Perhaps the ability to see the full range of these sorting groups across the country will reveal an important new subfield in the law of sentencing. We might get, for the first time, an accurate picture of one of our most important sentencing institutions.

It matters enormously that such decisions come into the light. In criminal justice, perhaps more than any other substantive area of law, the law on the books bears little resemblance to the law in practice. This particular gap between sentencing law and sentencing reality is too large to ignore any longer.