

DISCRETION AND DISPARITY UNDER SENTENCING GUIDELINES: THE ROLE OF DEPARTURES AND STRUCTURED SENTENCING ALTERNATIVES*

RODNEY L. ENGEN

North Carolina State University

RANDY R. GAINNEY

Old Dominion University

ROBERT D. CRUTCHFIELD

JOSEPH G. WEIS

University of Washington

This article examines the use of alternative sentencing provisions as mechanisms for departing from sentencing guidelines in Washington State and as structural sources of unwarranted sentencing disparity. The authors argue that these structural features of guidelines not only serve as "windows of discretion" through which disparities arise, but they also may encourage disparities by requiring consideration of substantive criteria that disadvantage certain offender groups. The analyses find that males and minority offenders are less likely to receive alternative sentences below the standard range, but that race-ethnicity and gender have inconsistent effects on departures above the standard range. Theoretical implications of the study are discussed.

KEYWORDS: Race, ethnicity, gender, sentencing guidelines and alternatives.

The issue of unwarranted disparities in criminal sentencing has long been a concern among policy makers, practitioners, and scholars. Presumptive sentencing guidelines implemented in the federal courts and in many states attempt to reduce such disparities by limiting judicial discretion, by prescribing sentence ranges based on legally defined criteria, and by prohibiting consideration of offender status characteristics in sentencing decisions (Austin et al., 1996; Tonry, 1996; von Hirsch et al., 1987). However, guidelines also include various alternatives that allow judges to sentence offenders outside the prescribed range. For example, judges may

* The authors wish to thank the Editor, the anonymous reviewers, and our colleagues Brian Payne and Stacy De Coster for their helpful comments on earlier drafts. Please direct correspondence to Rodney L. Engen, Department of Sociology and Anthropology, Box 8107, North Carolina State University, Raleigh NC 27695.

sentence above or below the prescribed range if they identify in writing the aggravating or mitigating circumstances that warrant departing from the guidelines (Miethe and Moore, 1985; Nagel, 1990; Kramer and Ulmer, 1996).¹ Similarly, judges in U.S. courts may award reduced sentences to offenders for providing “substantial assistance” (following a motion by the U.S. Attorney) or for “acceptance of responsibility” (Albonetti, 1997; Everett and Nienstedt, 1999; Steffensmeier and Demuth, 2000). Thus, even under sentencing guidelines, judges and courtroom workgroups retain substantial discretion to individualize sentences. Importantly, researchers argue that sentencing disparities persist under guidelines, in part, because these discretionary departure provisions are used in ways that disadvantage minority defendants (Albonetti, 1997, 1998; Kramer and Steffensmeier, 1993; Kramer and Ulmer, 1996; Steffensmeier et al., 1993; Steffensmeier and Demuth, 2000; Ulmer, 1997).

In addition, sentencing guidelines in several jurisdictions allow discretion in ways that research has not yet examined. For example, guidelines in North Carolina, Pennsylvania, and Washington State allow courts to order intermediate punishments, community-based sanctions, or specific rehabilitative programs as alternatives to incarceration for offenders who fit certain legally defined criteria (Tonry, 1997).² We refer to these features of guidelines as *structured sentencing alternatives* and differentiate them, for purposes of discussion and analysis, from the *discretionary departure provisions* described above. Like discretionary departures, structured sentencing alternatives provide mechanisms for sentencing outside the standard range and may, therefore, produce unwarranted sentencing disparities. Structured sentencing alternatives also differ from discretionary departures in ways that have implications for understanding sentencing and disparity.³

1. In addition, some guidelines (e.g., North Carolina and Pennsylvania) provide aggravated and mitigated ranges that judges may use at their discretion if aggravating or mitigating factors are present.

2. Pennsylvania revised its sentencing guidelines to allow intermediate sanctions in 1994. Previous research on departures in Pennsylvania has not examined the use of these more recent sentencing options.

3. We use the term *discretionary departure provisions* in reference to guideline provisions that allow judges to sentence outside the standard range only in special circumstances, including departures for substantial assistance or acceptance of responsibility in federal courts. We refer to these as “discretionary” because eligibility for these departures is determined on a case-by-case basis, based on unique aspects of the offense and/or the defendant’s subsequent conduct rather than on legally relevant factors like offense seriousness and criminal history. We use the term *structured sentencing alternatives* to refer to special sentencing options that may be considered whenever an offender meets legally defined eligibility requirements. Although the decision to use one of these alternatives is discretionary, we refer to these as “structured” alternatives because eligibility for consideration is determined by the conviction offense and/or

Structured sentencing alternatives raise empirical and theoretical questions. For instance, how important are structured alternatives in producing departures from the standard range, compared to discretionary departures? Also, do courts use structured alternatives in similar ways to the more discretionary options that have been the focus of research, and are there racial-ethnic or gender disparities in their use? Further, what are the theoretical implications of these sentencing alternatives for understanding the sentencing process under guidelines, and for understanding sentencing disparity? Research addressing these questions can contribute to understanding some general theoretical problems pertaining to guidelines-based sentencing as well. Among the most important of these problems is understanding how the substantive concerns of court actors influence sentencing in the context of guidelines (e.g., Dixon, 1995; Savelsberg, 1992; Ulmer and Kramer, 1996) and determining how structural features of guidelines can increase or decrease sentencing disparity (e.g., Albonetti, 1997; Everett and Nienstedt, 1999; Kramer and Ulmer, 1996; Moore and Miethe, 1986; Steffensmeier and Demuth, 2000).

We address these issues and contribute to the existing literature in several ways. First, we review theory and research on sentencing disparity and departures from guidelines, and we describe some important conceptual and methodological limitations in this empirical literature. Second, we provide an overview of the guidelines and sentencing alternatives in Washington State. Third, we discuss the theoretical significance of discretionary and structured sentencing alternatives. We argue that the use of these sentencing alternatives is meaningful, theoretically, because it represents individualized, substantive, decision making as opposed to the formal rationality (Weber, 1968) implicit in grid-based sentencing guidelines (Savelsberg, 1992). Furthermore, building on contemporary theories of sentencing disparity, we argue that the use of structured sentencing alternatives is likely to be a locus of racial-ethnic and gender disparities because they emphasize goals other than just-deserts, and because they require consideration of factors other than offense-related ones. This theoretical analysis leads to several tentative propositions regarding the use of discretionary and structured sentencing alternatives in producing departures from guidelines and about the likely effects of offense and offender characteristics on the use of these options. Fourth, we explore the effects of offense and offender characteristics on departures from guidelines, and on the use of particular sentencing options, using sentencing data from Washington State. Finally, we conclude with a discussion of the theoretical

criminal history. We do not assume that judges alone control the use of either discretionary departures or structured sentencing alternatives. Rather, we assume that sentencing decisions are the result of a process involving several local court actors (e.g., Eisenstein and Jacob, 1977; Ulmer, 1997).

implications of our findings and identify some directions for research and theoretical development.

THEORY AND RESEARCH ON DISPARITY AND DEPARTURES

Contemporary theories view criminal sentencing as a subjectively rational process even in the context of guidelines (Ulmer, 1997). For example, Albonetti (1991) argues that judges attempt to make rational sentencing decisions based on the offenders' dangerousness and the likelihood that they will reoffend. Similarly, Steffensmeier and his colleagues (Steffensmeier and Demuth, 2000; Steffensmeier et al., 1998) posit that sentencing decisions are driven by several *focal concerns* of judges, including blameworthiness, community protection (i.e., dangerousness and risk of future offending), and the practical constraints or consequences of the sentencing decisions. However, because court officials operate under organizational constraints and with limited information, they are likely to rely on stereotypes related to offender characteristics such as age, sex, and race-ethnicity in forming judgments about blameworthiness, risk, and other substantive concerns (e.g., Albonetti, 1991, 1997; Harris and Hill, 1984; Steffensmeier et al., 1998). These theories suggest that systematic disparities arise because minorities, males, and younger offenders are seen as more threatening or dangerous than white, female, and older offenders (e.g., Albonetti, 1991, 1997; Daly, 1994; Daly and Tonry, 1997; Spohn and Holleran, 2000; Steffensmeier and Demuth, 2000, 2001; Steffensmeier et al., 1998). From this perspective, factors such as offense seriousness, degree of harm to the victim, criminal history, and defendants' acceptance of responsibility are also important because they inform judgments about court actors' focal concerns.

Researchers extending these arguments to the analysis of sentence departures predict that legal and extralegal factors associated with blameworthiness, dangerousness, or risk of future offending increase the severity of punishment in part by affecting the use of departures from the standard range (Albonetti, 1997, 1998; Kramer and Ulmer, 1996; Steffensmeier and Demuth, 2000). In general, studies find that both legal and extralegal factors influence whether judges sentence outside the standard range, but specific findings are mixed. For instance, studies in Minnesota find that offense severity decreases the likelihood of upward departures, and increases the chances of downward departures (Frase, 1993; Moore and Miethe, 1986). The authors argue that these nonintuitive findings reflect judges' tendency to "adjust" sentences downward in many more serious cases (and to rarely adjust upward) because they perceive the prescribed ranges to be too high. In contrast, research in Pennsylvania reports the

more intuitive finding that offense severity and criminal history each decrease the likelihood of downward departure (Kramer and Ulmer, 1996). A few studies find that females and whites are more likely than males and minorities to receive downward departures in Minnesota (Moore and Miethe, 1986), Pennsylvania (Kramer and Ulmer, 1996), and U.S. courts (Everett and Nienstedt, 1999; Kempf-Leonard and Sample, 2001; Mustard, 2001). In contrast, Frase (1993) finds no effect of race on downward departures in Minnesota, but that African Americans and American Indians are more likely to receive upward departures. Studies find, consistently, that pleading guilty increases the likelihood of a downward departure (Everett and Nienstedt, 1999; Frase, 1993; Kempf-Leonard and Sample, 2001; Kramer and Ulmer, 1996; Moore and Miethe, 1986).

In addition, a number of studies test for interactions between status characteristics and departures. Importantly, studies of sentencing in U.S. courts (Albonetti, 1997, 1998; Mustard, 2001; Steffensmeier and Demuth, 2000) and in Pennsylvania (Kramer and Ulmer, 1996) find that males and minorities who receive departure sentences benefit less from them (i.e., they get smaller reductions) than do women and whites who receive departures.⁴ Further, Steffensmeier and Demuth (2000) find that the effects of race and ethnicity are greater in departure sentences than in nondeparture sentences, but only among drug offenses, and only for certain types of departures. In sum, available evidence indicates that departures are used in ways that reward those who plead guilty and that disadvantage males. Also, at least some of the time, departures are used in ways that disadvantage minority defendants. The evidence is less clear regarding the effects of offense seriousness and criminal history.

LIMITATIONS OF RESEARCH ON DISPARITY AND DEPARTURES

Research on guideline departures is limited in several ways. First, research on departures is limited to guideline systems that offer judges few options to choose from (Minnesota, Pennsylvania, and U.S. courts). To our knowledge, no research has examined the use of structured sentencing alternatives that provide intermediate, rehabilitative, or community-based sentencing options as mechanisms for departing from the standard range sentence. Second, few studies examine, simply, whether defendants' race-

4. Some studies test interaction by estimating the effects of race-ethnicity on sentencing outcomes separately for departure and nondeparture cases (Mustard, 2001; Steffensmeier and Demuth, 2000). Other studies, by contrast, test interaction by estimating the effects of receiving a departure on sentencing outcomes separately for white versus minority offenders (Albonetti, 1997) and for males versus females (Albonetti, 1998).

ethnicity or gender affect the likelihood that sentences depart from guidelines. Several studies that focus on interactions between departures and race-ethnicity or gender do not assess whether race-ethnicity or gender affect the likelihood that defendants receive departures (Albonetti, 1997, 1998; Kramer and Ulmer, 1996; Steffensmeier and Demuth, 2000; Ulmer, 1997). Third, of the few studies that assess the likelihood of departure, most differentiate between dispositional departure (based on the "in/out" decision) and durational departure (based on sentence length for incarcerated offenders) (Frase, 1993; Kramer and Ulmer, 1996; Moore and Miethe, 1986; Ulmer, 1997). Because dispositional and durational departures are examined separately, it is unclear whether race-ethnicity or gender affect the overall likelihood of a sentence above or below the standard range. Furthermore, because these studies operationalize departure in a way that reflects both the decision to depart from the standard range and the severity of the sentence imposed, the findings may reveal as much about the determinants of sentence severity as they reveal about the determinants of departure. To our knowledge, only two studies cited above examined whether race-ethnicity or gender affect the likelihood of receiving a sentence below or above the standard range, independent of the type of sentence imposed, and both of these examined data on U.S. courts (Kempf-Leonard and Sample, 2001; Mustard, 2001).

In light of these limitations, research is needed that does three things. First, we maintain that research should distinguish conceptually and empirically between the departure decision (i.e., the decision to sentence outside the prescribed range) and the sentence that results (i.e., incarceration and sentence length). Therefore, research is needed that examines whether sentences depart above guidelines or below guidelines, independently of the type of sentence imposed. Second, additional research should examine whether legal and extralegal characteristics predict the likelihood of receiving a departure sentence in states with sentencing guidelines. Third, research should examine the use of structured sentencing alternatives as mechanisms for departing from the prescribed range, and should examine whether structured alternatives are used in ways similar to the more discretionary departures that are the focus of extant research. The present study contributes to the literature by doing each of these things.

SENTENCING GUIDELINES AND ALTERNATIVES IN WASHINGTON STATE

Washington's Sentencing Reform Act (SRA) of 1981 provides determinate and presumptive guidelines for the sentencing of adult felons. The SRA requires that sentences be based principally on the offense seriousness level and the offender criminal history score, which determine the

standard range, in months, that judges must use in sentencing (see Engen and Gainey, 2000). For example, if an offender is convicted of residential burglary (seriousness level IV) and has no prior felony convictions (offender score 0), the judge is expected to order a specific term of confinement within the standard range of 3 months and 9 months. In this way, Washington's SRA represents a formal rational structure rooted in neo-classical just-deserts, much like the other guideline systems established in the early 1980s (Boerner, 1985; Tonry, 1996). The Washington legislature articulated this neoclassical orientation clearly when it identified the first three objectives of punishment under the SRA as: "(1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history; (2) Promote respect for the law by providing punishment which is just; (3) Be commensurate with the punishment imposed on others committing similar offenses" (State of Washington Sentencing Guidelines Commission (SGC), 2000).

As in other guideline systems, judges in Washington may sentence outside the standard range under "substantial and compelling" circumstances, provided they state in writing the aggravating or mitigating circumstances that make the standard range sentence inappropriate. These discretionary departures, known as "exceptional" sentences, may be above the standard range (aggravated) or below the standard range (mitigated), and they may be appealed by the state or the defendant. There are few restrictions on the terms of an exceptional sentence, but the SRA includes a nonexclusive list of acceptable reasons for issuing an exceptional sentence. These reasons include considerations such as the degree of harm inflicted, the defendant's blameworthiness, efforts by the defendant to assist or compensate the victim, and the victim's vulnerability or role in precipitating the crime (SGC, 1992).⁵ Boerner observes that, "While nonexclusive, the list includes only factors which relate to the circumstances of the crime, its relative seriousness and the culpability of the offender, all desert-based factors" (1985:2-133). Thus, exceptional sentences allow individualized sentencing, but they require an emphasis on proportional punishment (Boerner, 1985). Crutchfield et al. (1993) examined the reasons given by judges for exceptional sentences (as recorded by the sentencing guidelines commission) and found that they are consistent with this emphasis. This study found that, for both aggravated and mitigated exceptional sentences, the most common justifications referred to defendant characteristics or actions that reflect blameworthiness, the extent of damages or harm to victims, or the need to adjust sentences for legally relevant factors that were not represented appropriately in the standard range sentence.

5. Minnesota law makers provided a similar list (von Hirsch, 1987).

In addition, Washington's SRA provides several alternatives to standard-range sentences for offenders who meet certain criteria. We refer to these, collectively, as structured sentencing alternatives. These include Alternative Sentence Conversion (Conversion), the First-Time Offender Waiver (FTOW), and the Special Sex Offender Sentencing Alternative (SSOSA). Unlike the exceptional sentence provision, these options reflect the combined goals of control and rehabilitation. The Conversion option resembles intermediate sanctions available in other jurisdictions and allows judges to convert a "total confinement" sentence (i.e., continuous incarceration in jail) of 12 months or less into "partial confinement" (e.g., work release, work crew, or home detention) and/or up to 30 days community service (8 hours equal 1 day). According to Boerner (1985), this option reflects the Washington legislature's initial desire to emphasize incarceration for violent offenders while providing other, less costly, methods of control for nonviolent offenders. Thus, community protection, or incapacitation, is an implicit objective of this alternative. A Conversion sentence also resembles traditional rehabilitation designed to strengthen offenders' ties to the community.

The FTOW and the SSOSA are the only sentencing alternatives (during the period studied) that explicitly authorize judges to order treatment, and thus reflect a rehabilitative philosophy (Boerner, 1993). The FTOW is an option for sentencing offenders who have no prior felony convictions and who are not convicted of a violent, sex, or drug delivery offense. It resembles traditional probation in several ways. Under the FTOW, the standard range sentence is waived and the judge may order up to 90 days total confinement and/or community service, plus 24 months community supervision (i.e., probation) (versus the usual 12 months). The court also may require participation in treatment programs. The SSOSA allows judges to suspend the standard range sentence (up to 11 years) for nonviolent sex offenders in exchange for a sentence of up to 6 months confinement and mandatory participation in treatment. This is the only suspended sentence option available in Washington, and it virtually always results in a substantial reduction of the actual term of confinement. The SSOSA clearly reflects a rehabilitative sentencing model, and it even requires a formal assessment of the offender's amenability to treatment and a proposed treatment plan prior to sentencing.

In summary, although judicial discretion clearly is limited in Washington, considerable discretion exists for many cases, including the discretion to sentence outside the standard range via an exceptional sentence or through the use of structured sentencing alternatives. The amount and type of discretion, however, depend on the type of offense committed and on the offender's criminal history. For example, the defendant in the residential burglary case described above would be eligible for the sentence

Conversion option because, with a standard range of 3 to 9 months, the sentence necessarily would be 12 months or less. In this case, the judge might order a sentence of 9 months total confinement (i.e., jail), but then could convert the sentence to a combination of jail time, partial confinement, and community service. Alternatively, because this offender had no prior felonies, he would also be eligible for the FTOW. Using the FTOW, the judge might order 30 days in jail, or even no jail time, plus 2 years probation. Importantly, the amount of jail time can be reduced substantially, or even eliminated, through these options. Equally important, if the same offender had one prior felony, the FTOW would not be an option. If he had two prior felonies, the standard range would increase to 12 to 14 months, and he would no longer be eligible for the Conversion alternative. In addition to affecting the amount of time that must be served in confinement, the structured alternatives available in Washington emphasize goals and rationales of punishment that differ significantly from the primary objective of guidelines, which is to ensure proportional punishment. We argue that alternatives such as these have important theoretical implications, which we discuss below.

THEORETICAL SIGNIFICANCE OF DEPARTURES AND SENTENCING ALTERNATIVES

Savelsberg's analysis of sentencing guidelines provides a useful starting point for examining the theoretical significance of Washington's sentencing alternatives. Savelsberg (1992, 2001), drawing on Weber's sociology of law, argues that guidelines attempt to impose *formal rational law* in the sentencing process, and to reverse the trend toward *substantive law* that characterized criminal sentencing through most of the twentieth century. According to Weber (1968), under formal rational law, decisions are based on legally defined factors and in accordance with explicit rules. By contrast, he described substantive rational law as the adaptation of general, nonlegal, principles to decision making in the individual case. Further, substantive law is purposive, being concerned primarily with the ends served by legal decisions (Savelsberg, 2001). Thus, Savelsberg (1992) argues that guidelines emphasize formal rational law in that they require judges to sentence within ranges that are based on explicit legal criteria, and because they prohibit consideration of nonlegal factors when deciding on a sentence. A fundamental problem for research and theory on sentencing and formal social control is to understand the interplay between formal rationality and substantive justice, especially in the context of sentencing guidelines.

Within this Weberian framework, discretionary departure provisions are meaningful because they embody a commitment to substantive justice and

a rejection of formal rationality (Savelsberg, 1992; Ulmer, 1997). We argue the same is true of structured sentencing alternatives. Whereas sentencing guideline grids prescribe formal rational sentencing criteria, the departure provisions and alternatives built into these guideline systems emphasize nonlegal, individualized, substantive criteria. This is true in two ways that reflect two dimensions of formal rationality identified by Ewing (1987).⁶ First, discretionary departure provisions reject the *logically formal rationality* of guidelines by allowing individualized sentencing based on extralegal criteria (i.e., factors not defined in the law). Second, by emphasizing goals other than just-deserts, the structured sentencing alternatives described above can be seen as rejecting the *sociologically formal rationality* reflected in the neoclassicism of guideline grids. This subtle theoretical point has important implications for understanding departures and the use of structured sentencing alternatives. One implication is that the choice to use one of these alternatives is not simply a choice to sentence outside the standard range, but it is a qualitatively different kind of decision based on substantive rather than formal legal criteria. Another implication is that decision makers may reject the logical uniformity of guidelines without necessarily rejecting the principle of just-deserts implicit in guidelines. For example, departures may be deemed necessary in order to achieve “just” punishment when the legal criteria specified by guidelines do not adequately fit the case. The discretionary departure provisions (exceptional sentences) in Washington explicitly represent this type of rejection of formal rationality. Alternatively, decision makers may reject both the principle of logical uniformity and reject just-deserts as the appropriate goal of punishment. The structured sentencing alternatives in Washington are an example of this type of substantive rationality.

Practically speaking, this means that not all types of departures are alike. In rejecting formal rational sentencing criteria, judges may be seeking “just” punishment when the formally prescribed sentence is thought to be unjust, or they may be seeking a different objective altogether, such as rehabilitation. This is important for understanding disparity in departure decisions because the criteria court actors rely on are likely to depend on

6. Ewing (1987) identified two dimensions of formal rationality in Weber's sociology of law. The first, which Ewing calls “logically formal rationality of legal thought,” refers to a logical and gapless system of legal rules. The second, which she calls “sociologically formal rationality of justice,” refers to the notion of uniformity and equal treatment under the law. Savelsberg (1992) argues that sentencing guidelines reflect both of these dimensions of formal rationality. This distinction is important because it reveals that opposition to formal rationality can take two forms. Opposition to limitations on judges' ability to individualize sentences can be seen as a rejection of logically formal rationality of legal thought. Opposition to the neoclassical just-desert principles on which guidelines are based can be seen as a rejection of sociologically formal rationality (Savelsberg, 2002, personal communication).

their objectives (Hogarth, 1971). As Kramer and Ulmer (1996:102) observed, "the very goals of sentencing and how these goals are defined and interpreted have consequences for disparity." That is, they argue that the use of departures, and disparity in their use, is related to the particular goals and rationales employed by local court actors. This is especially important for understanding departures in Washington. Unlike the departures Kramer and Ulmer examined, discretionary and structured sentencing alternatives in Washington emphasize different, particular, substantive goals and rationales of punishment. Therefore, decision makers may rely on different sentencing criteria to a greater or lesser extent when they consider these different alternatives. Moreover, the subjective meaning that decision makers attach to offender attributes, such as race-ethnicity or gender, and the importance that they place on offender attributes relative to offense-based information, are likely to reflect the importance they place on goals like rehabilitation versus just-deserts, respectively. For example, characteristics of the offense (including factors not found in the official record) and offender culpability should have more influence when the dominant rationale is just-deserts than when it is offender rehabilitation. Alternatively, if rehabilitation is a primary objective, decision makers should pay more attention to the unique characteristics of the defendant and may place relatively less emphasis on offense-related criteria.⁷ Thus, sentencing alternatives are important not only because they allow departures from guidelines, but also because they encourage consideration of sentencing criteria that may make disparities by race-ethnicity or gender even more likely.

Structured sentencing alternatives differ from discretionary departures in other ways as well that may be important for understanding how they are used and for understanding their potential for producing disproportionate sentencing outcomes. Structured sentencing alternatives differ from discretionary departures in their applicability, in the amount of discretion they afford court actors, and in the degree of certainty they afford court actors, in addition to the rationales or objectives they emphasize. First, whereas virtually all cases can be considered for discretionary departures, structured alternatives are limited to defendants who meet explicit criteria that, at least in part, are based on the offense of conviction and the offenders' criminal history. Second, discretionary departures typically

7. Both legal and extralegal criteria probably are important regardless of the primary rationale. However, the relative importance of these criteria, and the significance of offender characteristics, may depend on the sentencing rationale. Further, although there is nothing inherent in substantive decision making that disadvantages minority defendants, contemporary theories of sentencing suggest that disparity is likely whenever offender characteristics are considered.

allow court actors a large degree of control over the sentence. Discretionary departure sentences may be above or below the standard range, and they often are limited only by the statutory maximum and, where applicable, mandatory minimum sentences allowed by law.⁸ By contrast, structured sentencing alternatives only allow judges to impose sentences below the standard range, and allow them only limited discretion in doing this. Third, whereas discretionary departures are subject to appeal by the defendant or the state (and frequently have been reversed in Washington), structured alternatives are much less likely to be appealed and overturned because they are not defined, legally, as departures from guidelines. Researchers argue that the management of uncertainty is an important concern of court actors (e.g., Albonetti, 1991, 1999; Ulmer, 1997). Because structured sentencing alternatives provide greater certainty, courtroom actors may be more likely to use these than discretionary departures.⁹

SUMMARY AND PROPOSITIONS

Although sentencing guidelines emphasize formal rationality, grounded in principles of just-deserts, contemporary theories argue that sentencing practices reflect substantive rationales and criteria deemed important by judges and other local court actors (Ulmer, 1997). These theories suggest the use of departure provisions, in particular, reflect decision makers' concerns with blameworthiness, dangerousness, risk of offending, and rehabilitative potential. Because judges and others have limited information, stereotypes related to offender status characteristics influence subjective assessments of offenders in relation to these focal concerns. As a result, we should expect both legal and extralegal factors to affect sentencing outcomes, generally, and to affect the use of departures in particular (e.g., Albonetti, 1997, 1998; Steffensmeier and Demuth, 2000; Ulmer and Kramer, 1996).

We extend this argument, based on our theoretical analysis of discretionary departures and structured sentencing alternatives, with the following propositions: (1) like discretionary departure provisions, structured sentencing alternatives allow sentences to depart from the standard range and provide opportunities for bias to enter the process; (2) because structured alternatives provide greater certainty, and may pose less political

8. Sentence reduction for acceptance of responsibility or substantial assistance, in U.S. courts, are an exception in that they only allow downward departures. Although we conceptualize these as discretionary departures for the purpose of discussion, there clearly are important differences among departure provisions in the discretion they allow.

9. Discretionary departures also may be insulated from appellate review if they are products of negotiated pleas.

risk to prosecutors and judges, structured alternatives will be used more often among legally eligible defendants than will discretionary departures; (3) disparity in the use of structured sentencing alternatives is likely not only because they provide “windows of discretion,” but also because they emphasize goals other than proportional punishment and because they require consideration of criteria other than offense seriousness and criminal history; (4) offender status characteristics should be especially salient in judges’ decisions to use alternatives that emphasize rehabilitative or intermediate sanctions (structured sentencing alternatives) and that produce departures below the standard range; (5) offense-related characteristics should be especially salient in judges’ decisions to use alternatives that emphasize proportional punishment (discretionary departures) and that produce departures above the standard range. Next, we examine the effects of offense and offender characteristics on the likelihood of sentences above and below guidelines in Washington State, and on the use of both discretionary departures and structured sentencing alternatives as mechanisms for departing from the standard range.

DATA AND METHODS

The superior courts of Washington are required to report all felony sentences to the Washington State Sentencing Guidelines Commission (SGC), which maintains a comprehensive and reliable database of felony sentences for research and monitoring purposes. We obtained data on offender characteristics, case characteristics, and sentencing decisions for all adult felony sentences ordered in Washington from July 1989 through June 1992 (fiscal years 1990–1992) ($N = 51,844$).¹⁰ After deletion of aggravated murder cases (in which life without parole and death are the only options), and cases missing crucial data (most often sex and/or race), complete information is available for 46,552 convictions.¹¹

DEPENDANT VARIABLES

We created two dichotomous variables indicating whether sentences depart from the standard range (departure above; departure below).

10. Data and documentation for these analyses were provided by the Washington State Sentencing Guidelines Commission. Examining sentences in these years is advantageous because the sentencing laws in Washington were relatively stable during this period. Later years saw the modification of existing alternatives and the introduction of new sentencing alternatives that would further complicate both the analyses and the interpretation of the data.

11. Missing data are most commonly demographic data: Age ($N = 1,675$ cases), race-ethnicity ($N = 2,619$), and sex ($N = 2,002$). In addition, race is coded as “other” in 66 cases, which are treated as missing. Because the number of Asian and Native Americans is small, especially in the rural jurisdictions, these cases are also excluded.

Departure above indicates whether a sentence is greater than the maximum of the standard range. Departure below indicates whether a sentence is less than the minimum of the standard range. In addition, several variables indicate whether departures were produced through the use of specific sentencing alternatives. Two variables indicate the use of discretionary alternatives to depart (exceptional above; exceptional below). Three variables indicate the use of structured sentencing alternatives to depart below the standard range (Conversion, FTOW, SSOSA).¹² Each of these dependant variables are dichotomous (coded 0 = no/not used; 1 = yes/used).

INDEPENDENT VARIABLES

We include the following legally relevant and offense-related case characteristics as independent variables in our analyses: the offense seriousness level (1–14), the criminal history score (0–9), and the type of offense (dummy coded indicating violent, drug, and sex offenses, with property offenses the excluded category). In addition, we include several variables to control for the formal guidelines structure. These are three dichotomous variables indicating whether offenders are legally eligible for the FTOW, SSOSA, and Conversion options, plus an indicator of the presumptive sentence—the midpoint of the standard sentence range (in months). Controlling for the presumptive sentence along with offense seriousness and criminal history is consistent with some previous research (Albonetti, 1998; Frase, 1993; Moore and Miethe, 1986). Also, Engen and Gainey (2000) have shown that regression models are misspecified and that the estimated effects of legal and extralegal variables on sentences are biased unless the prescribed sentence is controlled.

In addition to these legal and case characteristics, we include the following extralegal factors in the analyses: sex of the offender (coded 0 = female, 1 = male), age of the offender, the type of disposition (coded 0 = jury or bench trial, 1 = guilty plea), and two dummy variables indicating the race-ethnicity of the offender (African-American and Hispanic, with white, non-Hispanic the excluded category). Finally, a number of studies find differences in sentencing across court communities (e.g., Albonetti, 1997; Daly, 1995; Kramer and Steffensmeier, 1993; Moore and Miethe, 1986; Myers, 1987; Spohn and Delone, 2000; Steffensmeier et al., 1993;

12. These sentencing alternatives do not automatically result in a departure, but often they are used for this purpose. Because we are interested in the use of sentencing alternatives as mechanisms for departing from the standard range, we operationalize each alternative based on whether the sentencing provision was invoked and resulted in a departure. For example, FTOW is coded "1 = FTOW below the standard range." This allows us to test whether legal and extralegal factors predict the use of FTOW for this specific purpose.

Ulmer, 1997). Therefore, we include 29 dummy variables to control for differences in sentencing across Washington's 30 superior court districts.¹³ Table 1 presents descriptive statistics on all independent variables in our analyses for the sample as a whole and for subsamples of offenders based on their eligibility for downward departures and for each structured sentencing alternative.

ANALYSES AND RESULTS

We begin by examining the likelihood that sentences depart either above or below the guidelines range and the extent to which discretionary and structured sentencing alternatives were used as mechanisms for departing. The descriptive and multivariate analyses that follow for each of these outcomes are restricted to offenders who are eligible to receive these sentences. Virtually all cases in our sample could be sentenced above the standard range, so analyses of upward departures and aggravated exceptional sentences are based on the full sample. Analyses of departures below the standard range and of specific sentencing alternatives are restricted to cases where a downward departure is possible (i.e., where the minimum of the standard range is greater than 0) (see also Kramer and Ulmer, 1996). Likewise, we restrict analyses of the sentencing alternatives to cases in which offenders are eligible to receive these sanctions based on their past and current offenses.

Table 2 presents the total numbers of departures above and below the standard range, aggravated and mitigated exceptional sentences, Conversion sentences, FTOW sentences, and SSOSA sentences among the groups eligible to receive each option. Departures above the standard range are rare, occurring in only 2% of cases. Sentences below the standard guidelines range, however, are relatively common, occurring in about 20% of cases in which a downward departure is possible. Among the specific sentencing alternatives, exceptional sentences above and below guidelines are used in about 2% of eligible cases each, and they clearly are the least common types of sentences. By contrast, judges are much more likely to order sentences below the standard range via the use of sentence Conversion (12% of eligible cases), the FTOW (25%), and the SSOSA (47%). In addition to showing that structured sentencing alternatives are used more often than discretionary departures, the evidence in Table 2 reveals an important finding that is often taken for granted in research on sentencing departures. That is, departures from the standard range are produced principally through the use of sentencing options that are built into the larger structure of sentencing guidelines (i.e., built into the SRA). Indeed, 79%

13. This approach captures, fully, contextual variation in the dependent variable (see Bursik, 1996).

Table 1. Means and Standard Deviations of Independent Variables for Each Eligible Group of Offenders*

Eligible For:	Departures Above		Departures Below			
	Any Departure & Exceptional (N = 46,552)		Any Departure & Exceptional (N = 31,954)	Alternative Conversion (N = 17,923)	FTOW (N = 7,485)	SSOSA (N = 2,225)
Independent Variables						
Presumptive Midpoint (mos.)	14.66 (35.36)		20.77 (41.26)	5.09 (2.09)	6.66 (8.85)	34.61 (24.86)
Offense Seriousness Level	3.15 (2.59)		3.95 (2.76)	2.44 (1.06)	2.99 (1.38)	7.45 (2.16)
Criminal History Score	1.65 (2.21)		2.31 (2.38)	1.48 (1.36)	1.16 (1.78)	.96 (1.48)
Violent Offense	.10 (.30)		.15 (.35)	.10 (.30)	.02 (.12)	.02 (.15)
Drug Offense	.32 (.47)		.32 (.47)	.29 (.45)	.32 (.47)	.00 (.00)
Sex Offense	.06 (.23)		.08 (.27)	.02 (.14)	.00 (.05)	.97 (.17)
African-American	.19 (.40)		.22 (.41)	.21 (.41)	.12 (.32)	.06 (.24)
Hispanic	.07 (.26)		.07 (.26)	.06 (.23)	.07 (.25)	.05 (.22)
Male	.84 (.36)		.89 (.31)	.87 (.34)	.86 (.35)	.98 (.13)
Age	29.89 (8.96)		30.24 (9.11)	29.54 (8.68)	28.42 (9.33)	36.46 (12.74)
Plead Guilty	.92 (.27)		.90 (.30)	.95 (.22)	.95 (.23)	.90 (.30)

* With respect to departures above and departures below guidelines, the samples eligible for any departure have the same characteristics as those eligible for exceptional sentences.

of departures above the range are the product of exceptional sentences, and 93% of downward departures result from either exceptional sentences, Conversions, FTOW, or SSOSA sentences. Overall, 92% of all sentences that depart from the standard range are produced legitimately via one of the legally available sentencing options. Very rarely do judges in Washington disregard the sentencing laws.

Table 2. Total Departures and Alternative Sentences Ordered Among Eligible Offenders

Departures Below	<i>N</i> Eligible	<i>N</i> Departing	% of Eligible	% of Departures
Exceptional	31,954	804	2.5	12.7
Conversion	17,923	2,211	12.3	35.0
FTOW	7,485	1,847	24.7	29.3
SSOSA	2,225	1,036	46.6	16.4
Other/unknown	n.a.	411	n.a.	6.6
Total	31,954	6,309	19.7%	100%
Departures Above				
Exceptional	46,552	774	1.7	79%
Other/unknown	n.a.	206	n.a.	21%
Total	46,552	980	2.3%	100%

Next, we use logistic regression to examine the effects of case characteristics and extralegal variables on the odds of receiving departures above and below the guidelines and on the use of each of the sentencing alternatives that account for these departures. In these models, we control for jurisdictional effects (not shown) and for structural features of the guidelines (i.e., the presumptive sentence and, where appropriate, eligibility for alternative Conversion, FTOW, and SSOSA).¹⁴ We examine departures above and below the standard range separately, rather than simultaneously, because the sample of cases where a downward departure is possible is substantially smaller than the sample that could receive upward departures. Also, the stringent eligibility requirements for FTOW and SSOSA restrict the variance in several of the independent variables (see Table 1), which requires us to exclude a number of legal and extralegal factors from models predicting the use of these alternative sentences. Table 3 presents the exponents of the beta coefficients estimated in these analyses, which can be interpreted as the proportionate change in the odds of the dependent variable resulting from a unit change in the independent

14. We control for eligibility for alternative Conversion, FTOW, and SSOSA in analyses of downward departures for two reasons. First, we wish to differentiate the subjective effects of offense and offender characteristics on departures from the effects of structural constraints imposed by the guidelines. Second, judges' use of specific alternatives (e.g., Conversion and exceptional sentences) is likely to depend on whether offenders are eligible for other options.

variable. In describing the results, we first focus on whether legal and extralegal factors predict departures below and above the standard range, and then examine the factors that predict the use of specific alternatives as mechanisms for sentencing below the standard range.

Table 3. Logistic Regression (Odds Ratios) Predicting Sentences Above and Below the Standard Range and Sentencing Alternatives

Independent Variables	Departure Above	Departure Below	Sentencing Alternatives (Below)			
	Any	Any	Exceptional	Converted	FTOW	SSOSA
	Exp(B)	Exp(B)	Exp(B)	Exp(B)	Exp(B)	Exp(B)
Case Characteristics						
Offense Seriousness	1.10**	1.01	1.01	1.36**		
Criminal History Score	1.13**	.77**	.91**	.99		
Violent Offense	3.26**	.58**	1.30	.70*		
Drug Offense	1.15	.02	.98	1.26**	1.40**	
Sex Offense	2.38**	1.23	1.28	1.02		
Extralegal Factors						
African-American	.65**	.68**	.86	.69**	.53**	.32**
Hispanic	1.45*	.45**	.43**	.44**	.32**	.53*
Age	1.01**	1.02**	1.01*	1.00	1.01**	1.02**
Male	.91	.54**	.40**	.82*	.37**	
Plead Guilty	.32**	1.96**	1.30	1.19	1.46*	11.49**
Jurisdiction	..**	..**	..**	..**	..**	..**
Guidelines Structure						
Presumptive Sentence	1.00	1.00	1.00	.81**	.98**	1.00
Conversion Eligible		1.14	.13**			.21**
FTOW Eligible		5.09**	.57**	.87		
SSOSA Eligible		5.67**	1.04	.92		
Nagelkerke r-square	.15	.32	.14	.09	.14	.27
N	46,552	31,954	31,954	17,923	7,564	2,225

* Significant at $p < .01$.
** Significant at $p < .001$.
..** Total Effect of 29 Dummy variables significant at $p < .001$.

MODELS PREDICTING DEPARTURES BELOW AND ABOVE THE STANDARD RANGE

We find that offenders’ race-ethnicity, gender, age, and type of plea each have significant and strong effects on the likelihood of departure sentences below guidelines. Controlling for a number of legally relevant factors, the odds of a male receiving a departure below the standard range are 0.54 times (or 46% less than) the odds for a similarly situated female defendant. The odds of African-American or Hispanic defendants receiving downward departures, respectively, are about 32% less and 55% less

than the odds for non-Hispanic white defendants. The odds of a downward departure are twice as great for offenders who plead guilty as for those convicted by trial. Age also has a positive effect on the odds of a downward departure. Thus, downward departures appear to be used in a way that reduces the severity of sentences for whites, females, older defendants, and defendants who plead guilty, relative to minorities, males, younger defendants, and those convicted in trials. This is consistent with extant theory, which states that minorities, males, younger defendants, and those who refuse to plead guilty are perceived as more dangerous, more blameworthy, and generally more deserving of punishment.

If this interpretation is correct, then we should expect the same variables that decrease the odds of downward departures (African-American, Hispanic, male) to increase the odds of upward departures, and we should expect the variables that increase downward departures (pleading guilty, age) to decrease upward departures. The effects of status characteristics on upward departures are only partially consistent with this theoretical prediction. On the one hand, the odds of a departure sentence above guidelines are 45% greater for Hispanic offenders than for whites, and 68% less for those who plead guilty than for those who are convicted at trial. On the other hand, African Americans are much less likely (35% less) than whites to receive upward departures, and there is no difference between similarly situated male and female offenders. In addition, we find that it is older offenders, not younger offenders, who are most likely to receive upward departures. Thus, of the five extralegal factors we examine, only two (Hispanic ethnicity and pleading guilty) behave as expected with respect to both upward and downward departures. By contrast, African-American defendants and younger defendants are less likely than whites and older defendants, respectively, to receive either upward or downward departures, and gender only affects downward departures. Thus, the effects of race, age, and gender on the severity of punishment, as indicated by the use of departures, depend on the direction of the departure in question (upward or downward).

The effects of offense-related case characteristics on severity of punishment are also conditional on the direction of the departure. Extant theory leads us to predict that judges will sentence more severely (i.e., be more likely to depart above the guidelines, and less likely to depart below guidelines), when offense seriousness is greater, when defendants have more prior felony convictions, and in cases involving crimes that pose a greater threat to the community, such as violent crimes and sex offenses. Although we find strong support for this prediction with respect to upward departures, the findings regarding downward departures offer only partial support. Controlling for structural features of guidelines, criminal history and violent offenses have the expected effects; both increase the odds of a

departure above the standard range and decrease the odds of a downward departure. However, offense seriousness and sex offenses have inconsistent effects. As expected, offense seriousness and sex offenses each increase the odds of an upward departure, but they have no direct effects on the odds of a downward departure. Thus, as is the case with the effects of offender status characteristics, the effects of offense-related case characteristics appear to be partially conditional on the direction of the departure in question. Importantly, the expected effects of status characteristics obtain consistently with respect only to downward departures, whereas the expected effects of legal case characteristics obtain consistently with respect only to upward departures.

Although some of these findings appear counterintuitive initially, they make sense when we consider carefully the structure of Washington's sentencing guidelines. Most importantly, offense seriousness, prior felonies, violent offenses, and some drug offenses preclude many cases from consideration for the most commonly used sentencing alternatives. We explore the importance of these constraints by re-estimating the model predicting any downward departure, but excluding the controls for eligibility to receive Conversion, FTOW, and SSOSA sentences (not shown). We find that offense seriousness, criminal history, violent offenses, and drug offenses each decrease the likelihood of downward departures substantially, whereas sex offenses increase the odds of a downward departure. We conclude, though, that these effects on departures largely are explained by the structure of the guidelines.

MODELS PREDICTING DISCRETIONARY DEPARTURES AND STRUCTURED SENTENCING ALTERNATIVES

Next, we turn our attention to the use of specific sentencing options (discretionary departures and structured sentencing alternatives) as mechanisms for departing from the standard range. Because an aggravated exceptional sentence is the only structural avenue available for departing upward, and because nearly all upward departures are aggravated exceptional sentences, we do not perform a separate analysis of this alternative. By contrast, there are four alternatives for sentencing below the standard range: one discretionary departure (exceptional sentence) and three structured sentencing alternatives (Conversion, FTOW, and SSOSA).

With few exceptions, the findings with respect to the use of the three structured sentencing alternatives to depart below the guidelines are consistent with the model predicting any downward departure. Overall, males and minority defendants are substantially less likely than females and whites to receive these alternative sentences; older defendants, and especially those who plead guilty, are more likely to receive them than younger defendants or defendants convicted in a trial. For both black and Hispanic

offenders, the odds of receiving Conversion sentences, FTOW, or SSOSA sentences below the standard range are between 30% and 70% of the odds for comparable white offenders. Similarly, the odds that male defendants will receive Conversion sentences or the FTOW are substantially less than those of eligible females (sex is excluded from the analysis of SSOSA because 98% of defendants are male). Also consistent with the analysis of downward departures, pleading guilty increases the odds of receiving an FTOW by 46% and increases the odds of an SSOSA by a factor of 11. The effects of status characteristics on discretionary departures (exceptional sentences) below guidelines are largely consistent with their effects on structured alternatives. Hispanic and male defendants are less likely to receive them than white and female defendants, whereas age increases the odds of an exceptional sentence. However, being African American and pleading guilty do not directly affect the odds of an exceptional sentence.

Finally we look at the effects of legal case characteristics on Conversion sentences and exceptional sentences below the standard range (there is little variation on most legal variables among cases eligible for FTOW and SSOSA). As with the analysis of any downward departure, criminal history decreases the use of exceptional sentences below the standard range. However, none of the other legal/offense-related case characteristics we examine predict the use of this option.¹⁵ The effects of legal characteristics on Conversion are also somewhat surprising. Although conviction of a violent offense decreases the odds of sentence conversion, criminal history has no effect on Conversion, and offense seriousness increases the odds of a sentence Conversion. Conviction of a drug offense also increases the odds of Conversion and FTOW sentences. However, as with the counterintuitive effects of legal variables on downward departures, described above, the positive effects of seriousness and drug offenses on converted and FTOW sentences must be understood in the context of the guidelines structure. The most serious personal crimes and drug delivery offenses are ineligible for these alternatives, and so are excluded from the analyses. Thus, the unexpected positive effects of seriousness and drug offenses are among cases that are “less serious” cases by definition. This may simply mean that when judges choose to not use the available sentencing alternatives, it is because defendants are facing very short

15. Given that the structural controls we use (the presumptive sentence and eligibility indicators) are closely related to the other legal characteristics in our analyses, we tested for colinearity among these predictors in the full models. Diagnostic tests reveal that all variance inflation factors are less than 5, suggesting that colinearity is not a serious problem. We also re-estimated each of our departure models with and without controlling for the presumptive sentence. Our conclusions regarding the effects of case characteristics and extralegal variables are unchanged as a result of these sensitivity analyses.

sentences to begin with, and that they are more likely to use the alternatives when the standard sentence is great enough that using an alternative makes a significant difference.

Overall, and consistent with extant theory, we find that males, minority defendants, and younger defendants are less likely to receive downward departures than are females, whites, and older defendants. Also as predicted, those who plead guilty are both more likely to receive downward departures (including specific sentencing alternatives), and less likely to receive upward departures. However, contrary to predictions derived from extant theory, we find that males are no more likely than females to receive upward departures, and that African Americans on average are less likely than whites to be sentenced above the standard range. The direct effects of legal characteristics on departure decisions also appear to depend on the type of departure in question. Several case characteristics that increase the likelihood of departures above guidelines have little or no effect on departures below guidelines once the constraints on eligibility for structured sentencing alternatives are controlled. When we examine the use of discretionary departures (below the standard range) and structured sentencing alternatives, we find that the effects of race-ethnicity, sex, age, and guilty plea are mostly consistent with the analysis of downward departures, but the effects of offense-related case characteristics are often counterintuitive.

SUMMARY AND IMPLICATIONS

The importance of guideline departures as a source of unwarranted sentencing disparity has emerged as a critical issue in research on sentencing guidelines. Little is known, however, about the use of structured sentencing alternatives, like those in Washington, which allow departures from the standard range in the form of intermediate punishments, community-based sanctions, and specific rehabilitative programs for certain offenders. Therefore, this study examines the role that structured sentencing alternatives play in producing departures from the standard range, the legal and extralegal factors that predict their use, and whether the use of structured alternatives is a point of unwarranted sentencing disparity. In addition, we explore the theoretical implications of these sentencing alternatives for understanding the sentencing process generally, including the exercise of substantive rationality and the production of sentencing disparity in the context of formal-rational guidelines. Our analyses produced a number of important findings and raise several questions with implications for future theory and research.

First, we find that judges in Washington State are much more likely to order sentences that depart below the guidelines standard range than they

are to depart above the range, but 85% of sentences fall within the standard range. Importantly, judges do not disregard the sentencing laws when they sentence outside the range. Rather, they use sentencing alternatives that are built into the guidelines. In addition, judges are much more likely to use what we have termed “structured” sentencing alternatives than they are to use discretionary departures (i.e., exceptional sentences). This raises the question of whether structured sentencing alternatives increase the likelihood of downward departures or simply channel departures in particular ways. Some evidence supports the latter notion. In particular, offenders who are eligible for structured sentencing alternatives are less likely to receive discretionary exceptional sentences (Table 3). This suggests that, to some extent, one alternative may simply substitute for another, in which case, the availability of structured alternatives may not affect the overall rate of departures. That is, we cannot rule out the possibility that departures would occur as often even if there were no structured sentencing alternatives. This seems unlikely, though, as it would require a sevenfold increase in the number of mitigated exceptional sentences. Research could explore this issue by examining the effects of changes in the availability of structured sentencing alternatives on the likelihood of departures.

Second, our analyses reveal that offense-related characteristics play a complex role in departure decisions. Consistent with previous research (e.g., Kramer and Ulmer, 1996), we find that legal variables—offense seriousness, criminal history, violent offenses, and sex offenses—predict departures above and below the standard range. However, to a large extent, the guideline structure mediates the effects of these variables. That is, legal variables affect departures principally by determining eligibility for structured sentencing alternatives. Legal variables also have residual effects on departures (i.e., effects net of the guideline structure). Together, these findings suggest that legal variables continue to inform judges’ subjective assessments of cases and offenders under guidelines, but these subjective effects are secondary to the formal structure of the guidelines. Some of these subjective effects are consistent with predictions derived from contemporary theories (e.g., Steffensmeier et al., 1998), but others are not. Legal, offense-related characteristics consistently increase the use of upward departures, as expected, but their effects on downward departures are inconsistent.

Third, we find that the use of departures is related to offender status characteristics and to the mode of conviction. White offenders, females, older offenders, and offenders who plead guilty are substantially more likely to receive downward departures than are other offenders. This is consistent with the findings of studies in Pennsylvania (Kramer and Ulmer, 1996; Ulmer, 1997), U.S. courts (Everett and Nienstedt, 1999), and

Minnesota (Moore and Miethe, 1986; but not Frase, 1993), and it is consistent with the argument that minority offenders, males, and young offenders are perceived as more blameworthy and/or dangerous. However, findings regarding upward departures are less supportive of this interpretation. Hispanic offenders and those convicted in trials are more likely to receive departures above the standard range, but judges are less likely to sentence African Americans above the standard range, and we find no difference related to gender. Research on upward departures in Minnesota has also produced mixed findings (Frase, 1993; Moore and Miethe, 1986). Despite these inconsistencies, the findings strongly suggest that in Washington, as in other guideline jurisdictions, downward departures from guidelines are a significant source of sentencing disparities. Future research should examine the extent to which disparities in departures explain overall disparities in sentencing by race-ethnicity and gender.

A fourth finding deserves mention. We find significant differences among jurisdictions in the likelihood of departures and in the use of specific sentencing alternatives. Dummy variables representing jurisdictions explain from 2% to 6% of the variation in our models. This is consistent with research in a variety of contexts (e.g., Albonetti, 1997; Daly, 1994; Moore and Miethe, 1986; Myers, 1987; Spohn and Delone, 2000; Steffensmeier et al., 1993), and may reflect Ulmer (1997) and Ulmer and Kramer's (1998) notions regarding differential embeddedness of the guidelines across court communities and the formal and informal norms that characterize these communities. Future research should explore further the influence of court cultures, resources, and structural conditions that may affect the use of alternative sentences and departures.

THEORETICAL IMPLICATIONS

According to contemporary theories (e.g., Albonetti, 1991; Steffensmeier et al., 1998), offense and offender characteristics each affect sentencing decisions because they influence judges' subjective assessments of blameworthiness and risk of future offending. Consequently, judges punish more serious offenses, repeat offenders, minorities, and males more severely than comparable others. Researchers apply this argument to analyses of sentence departures explicitly, predicting that these offense and status characteristics will increase the severity of punishment by affecting the use of departures from the standard range (Albonetti, 1997, 1998; Kramer and Ulmer, 1996; Steffensmeier and Demuth, 2000). We extend this argument in three ways. First, we propose that, like discretionary alternatives, structured sentencing alternatives offer mechanisms for departing from the standard range and thus provide opportunities for bias to enter the process. Second, we propose that disparities in the use of

structured sentencing alternatives are likely not only because they provide “windows of discretion,” but also because they require consideration of the kinds of criteria (i.e., offender characteristics) theorists contend produce sentencing disparities. Third, we posit that legal and extralegal factors may affect the use of discretionary and structured alternatives differently, depending on the type of alternative and the sentence departure in question.

Although many of our findings are consistent with the contemporary theoretical model, a number of predictions derived from this model are directly contradicted. For instance, if males and minority offenders are perceived as more dangerous and/or blameworthy than females and whites, it is unclear why disparities obtain consistently with respect to downward departures, but not with respect to upward departures. Also, existing theories cannot explain the finding that African Americans are significantly less likely than whites to receive departures both above and below the standard range. A similar pattern appears for the effects of age. Although theories suggest that younger offenders are likely to be punished more harshly (e.g., Steffensmeier et al., 1998), we find that older offenders are more likely than younger offenders to receive departures both above and below the standard range. Support for conventional predictions about the effects of offense characteristics is mixed as well. Once guidelines are controlled, we find that offense seriousness increases the severity of punishment in some instances (upward departures), decreases the severity of punishment in others (alternative Conversions), and has no effect on other decisions (any downward departures and exceptional below). At minimum, the effects of offense and status characteristics on departure decisions appear to defy simplistic interpretations.

We suggest that the overall pattern of effects observed are not random perturbations, but instead are consistent with our proposition that the effects of legal and extralegal factors will depend on the type of sentence alternative and the type of departure in question. Our analysis of the rationales implicit in discretionary departures and structured sentencing alternatives lead us to propose that the substantive concerns and criteria that lead judges to order less severe alternative sanctions are likely to be different from the factors that lead them to order exceptionally punitive sanctions (i.e., upward departures). Therefore, the relative importance of offense versus offender characteristics may be different, and the significance of stereotypes about race-ethnicity, gender, or other status characteristics may be different as well. For instance, sentencing alternatives like the Conversion option, FTOW, and SSOSA emphasize rehabilitative goals. Although judges undoubtedly consider public safety and other “focal concerns” when making decisions about these options, they are also likely to consider factors such as the defendant’s amenability to treatment

or intervention, substance abuse or chemical dependency, employment history, and ties to the community. Consequently, the salience of offender characteristics may be greater in these kinds of decisions than in other decisions. Conversely, when deciding whether to depart above the standard range, "just" punishment and incapacitation may be stronger considerations. Offense-related characteristics like seriousness and criminal history may be more relevant to these decisions. Although our analysis does not provide a strict test of these predictions, the overall pattern of results is consistent with this interpretation. The effects of legal offense-related case characteristics are consistent, and in the expected direction, when examining departures above guidelines, but not when examining departures below guidelines. The effects of offender status characteristics are consistent and in the expected direction when examining departures below guidelines (especially structured sentencing alternatives that emphasize rehabilitation), but not when examining departures above guidelines.

There are at least two other possible theoretical explanations for these patterns of results that warrant consideration. One interpretation is that counterintuitive effects of legal variables in the context of guidelines reflect the tendency of judges to compensate for guideline ranges that they perceive to be either more or less punitive than is warranted (Frase, 1993; Moore and Miethe, 1986). The positive effects of seriousness and drug offending on the use of alternative conversions could be interpreted as this kind of "adjustment." This has intuitive appeal. It is useful to think of the effects of legal and extralegal characteristics, and the use of departures, as adjustments to what guidelines prescribe, and there is some evidence of judges using departures this way (Knapp, 1987; Savelsberg, 1992). However, this is a highly particularistic explanation that offers little by way of generalizable propositions.

A second possibility is that certain offender characteristics and certain offense-related characteristics may be relevant to the sentencing decision in part because they are more likely to generate individualized, substantive sentencing decisions. That is, judges and other court actors may be more likely to consider the unique characteristics of white and older offenders or the unique circumstances surrounding the criminal behavior of these offenders than they are to consider the unique characteristics of African-American and younger offenders and the crimes they commit. If so, this could explain the increased use of departures in either direction when defendants are older and white. Similarly, the residual effects of offense seriousness, criminal history, and offense types (i.e., the effects net of the guideline structure) may reflect a more general phenomenon wherein decision makers are more likely to consider the unique characteristics of these more serious criminal cases. In fact, an exploratory analysis

revealed that departures are most common among cases at seriousness levels 10, 11, and 13, where only 55%–65% are sentenced within the standard range. Importantly, both upward departures and downward departures are common among these very serious crimes, which include rape, child molestation, and manslaughter. There are at least three plausible arguments for why this might happen. First, judges may be more likely to individualize sentencing decisions (and to depart) when the stakes are especially high both for the defendant and for the community. Second, it may not be seriousness per se that increases the likelihood of departures but some unmeasured characteristics that appear more often among more serious cases, such as extreme aggravating or mitigating circumstances. Finally, there may be more qualitative variability among more serious crimes than among less serious crimes. Departures may reflect this greater variability in the nature of serious criminal activity.

To summarize, effects of offense and offender characteristics on departure decisions can be seen as reflecting something other than common-sense relationships between these characteristics and severity of punishment. As we argued above, different substantive concerns may underlie decisions to depart above versus below guidelines (especially via structured sentencing alternatives), and the relevance of legal and extralegal factors to these decisions may be different. The effects of offense and offender characteristics also may reflect tendencies by judges to adjust above or below guidelines with which they disagree, or they may indicate the kinds of cases in which court actors are most likely to consider the unique circumstances of the case and the consequences of their decision. These alternative interpretations of the effects of offense and status characteristics cannot account for all of our findings. However, thinking about the effects of legal and extralegal variables in these or similar ways might help us begin to explain why white and older offenders appear more likely to be treated both more leniently, and more harshly, than black defendants and younger defendants, and why variables like offense seriousness only sometimes increase the severity of punishment.

CONCLUSION

Like the discretionary departures examined in a number of studies, structured sentencing alternatives allow judges to reject the formal rationality of sentencing guidelines in certain cases. However, structured sentencing alternatives do not merely provide “windows of discretion.” Rather, because they emphasize purposive rationales like rehabilitation over the goal of proportional punishment, these alternatives actually require consideration of the kinds of subjective criteria that are likely to produce sentencing disparities. Furthermore, the relevance of offense and

offender characteristics to the use of these options is likely to depend on the type of departure decision in question. Consistent with this notion, our analyses reveal complexities that are not easily explained by prevailing notions of how it is that legal and extralegal factors influence sentencing decisions. We propose three directions for research and theory that may lead to a more complete understanding of sentencing and disparity in the context of guidelines. First, research should take into account the formal structure of guidelines and the effects that this structure may have on the nature of the decision-making process. This means not only taking into account constraints on discretion, but it also requires consideration of the particular substantive goals and rationales that are formalized in different sentencing options. Second, research should specify the substantive concerns that influence judges' decisions to depart above guidelines versus departing below guidelines, and the relevance of offender status characteristics to these different decisions. Third, certain offender and case characteristics may influence the likelihood that substantive judgments about threat, blame, or rehabilitative potential are made in individual cases. Ultimately, research should seek to understand when, and under what circumstances, individualized, substantive decision making is likely in the context of formal rational sentencing guidelines. Finally, studies reveal that charging decisions by prosecutors can affect sentencing decisions, including departures (e.g., Nagel and Schulhofer, 1992; Ulmer, 1997), but little is known about the effects of prosecutorial discretion on sentencing outcomes or on sentencing disparity under guidelines. Research examining the influence of prosecutorial discretion in this legal context should be a high priority.

REFERENCES

- Albonetti, Celesta A.
1991 An integration of theories to explain judicial discretion. *Social Problems* 38:247-266.
1997 Sentencing under federal sentencing guidelines: Effects of defendant characteristics, guilty pleas, and departures on sentencing outcomes for drug offenses, 1991-1992. *Law and Society Review* 31:789-822.
1998 The role of gender and departures in the sentencing of defendants convicted of a white-collar offense under the federal sentencing guidelines. *Crime, Law, and Deviance* 1:3-48.
1999 The avoidance of punishment: A legal-bureaucratic model of suspended sentences in federal white-collar cases prior to the federal sentencing guidelines. *Social Forces* 78:303-329.
- Austin, James, Charles Jones, John Kramer, and Phil Renninger
1996 National Assessment of Structured Sentencing (NCJ 153853). Washington, D.C.: U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance.

- Boerner, David
1985 Sentencing in Washington: A Legal Analysis of the Sentencing Reform Act of 1981. Seattle, Wash.: Butterworth.
- Boerner, David
1993 The role of the legislature in guidelines sentencing in "the other Washington." *Wake Forest Law Review* 28:381–420.
- Crutchfield, Robert D., Joseph G. Weis, Rodney L. Engen, and Randy R. Gainey
1993 Racial and Ethnic Disparities in Exceptional Sentences in Washington State. Olympia, Wash.: State of Washington Minority and Justice Commission.
- Daly, Kathleen
1994 Gender, Crime, and Punishment. New Haven, Conn.: Yale University Press.
- Daly, Kathleen and Michael Tonry
1997 Gender, race, and sentencing. In Michael Tonry (ed.), *Crime and Justice: A Review of Research*. Chicago, Ill.: University of Chicago Press.
- Dixon, Jo
1995 The organizational context of criminal sentencing. *American Journal of Sociology* 100:1157–1198.
- Eisenstein, James and Herbert Jacob
1977 Felony Justice: An Organizational Analysis of Criminal Courts. Boston: Little, Brown.
- Engen, Rodney L. and Randy R. Gainey
2000 Modeling the effects of legally relevant and extralegal factors under sentencing guidelines: The rules have changed. *Criminology* 38:1207–1230.
- Everett, Ronald S. and Barbara C. Nienstedt
1999 Race, remorse and sentence reduction: Is saying you're sorry enough? *Justice Quarterly* 16:99–122.
- Ewing, Sally
1987 Formal justice and the spirit of capitalism: Max Weber's Sociology of Law. *Law & Society Review* 21:487–512.
- Frase, Richard S.
1993 Implementing commission-based sentencing guidelines: The lessons of the first ten years in Minnesota. *Cornell Journal of Law and Public Policy* 2:278–337.
- Harris, Anthony R. and Gary Hill
1984 Bias in status processing decisions. In Anthony R. Harris (ed.), *Rationality and Collective Belief: Advances in Social Psychology*. Norwood, N.J.: Ablex.
- Hogarth, John
1971 Sentencing as a Human Process. Toronto, Canada: University of Toronto Press.
- Kempf-Leonard, Kimberly and Lisa L. Sample
2001 Have federal sentencing guidelines reduced severity? An examination of one circuit. *Journal of Quantitative Criminology* 17:111–144.

- Knapp, Kay A.
 1987 Implementation of the Minnesota guidelines: Can the innovative spirit be preserved? In Andrew von Hirsch, Kay A. Knapp, and Michael Tonry (eds.), *The Sentencing Commission and Its Guidelines*. Boston: Northeastern University Press.
- Kramer, John H. and Darrell Steffensmeier
 1993 Race and imprisonment decisions. *Sociological Quarterly* 34:357–376.
- Kramer, John H. and Jeffrey T. Ulmer
 1996 Sentencing disparity and departure from guidelines. *Justice Quarterly* 13:81–106.
- Miethe, Terence D. and Charles A. Moore
 1985 Socioeconomic disparities under determinate sentencing systems: A comparison of pre-guideline and post-guideline practices in Minnesota. *Criminology* 23:337–363.
- Moore, Charles A. and Terence D. Miethe
 1986 Regulated and unregulated sentencing decisions: An analysis of first-year practices under Minnesota's felony sentencing guidelines. *Law & Society Review* 20:253–277.
- Mustard, David B.
 2001 Racial, ethnic and gender disparities in sentencing: Evidence from the U.S. Federal courts. *Journal of Law and Economics* 44:285–314.
- Myers, Martha A.
 1987 Economic inequality and discrimination in sentencing. *Social Forces* 65:746–766.
- Nagel, Ilene H.
 1990 Structuring sentencing discretion: The new federal sentencing guidelines. *Journal of Criminal Law and Criminology* 80:883–943.
- Nagel, Ilene H. and Stephen J. Schulhofer
 1992 A tale of three cities: An empirical study of charging and bargaining practices under the federal sentencing guidelines. *Southern California Law Review* 66:501–561.
- Savelsberg, Joachim
 1992 Law that does not fit society: Sentencing guidelines as a neoclassical reaction to the dilemmas of substantivized law. *American Journal of Sociology* 97:1346–1381.
 2001 Substantivation of criminal law. In Clifton D. Bryant (ed.), *Encyclopedia of Criminology and Deviant Behavior*. Philadelphia: Brunner-Routledge.
- Spohn, Cassia and Miriam Delone
 2000 When does race matter? An examination of the conditions under which race affects sentencing severity. *Sociology of Crime, Law and Deviance* 2:3–37.
- Spohn, Cassia and David Holleran
 2000 The imprisonment penalty paid by young, unemployed black and Hispanic male offenders. *Criminology* 38:281–306.
- State of Washington Sentencing Guidelines Commission
 1992 *Sentencing Guidelines Implementation Manual*.

- 2000 The Sentencing Reform Act at Century's End: An Assessment of Adult Felony Sentencing Practices in the State of Washington.
- Steffensmeier, Darrell and Stephen Demuth
- 2000 Ethnicity and sentencing outcomes in U.S. federal courts: Who is punished more harshly? *American Sociological Review* 65:705-729.
- 2001 Ethnicity and judges' sentencing decisions: Hispanic-black-white comparisons. *Criminology* 39:145-178.
- Steffensmeier, Darrell, John H. Kramer, and Cathy Streifel
- 1993 Gender and imprisonment decisions. *Criminology* 31:411-446.
- Steffensmeier, Darrell, Jeffery Ulmer, and John Kramer
- 1998 The interaction of race, gender, and age in criminal sentencing: The punishment cost of being young, black, and male. *Criminology* 36:763-798.
- Tonry, Michael
- 1996 *Sentencing Matters*. New York: Oxford University Press.
- Ulmer, Jeffery T.
- 1997 *Social Worlds of Sentencing: Court Communities Under Sentencing Guidelines*. Albany: State University of New York Press.
- Ulmer, Jeffery T. and John H. Kramer
- 1996 Court communities under sentencing guidelines: Dilemmas of formal rationality and sentencing disparity. *Criminology* 34:383-407.
- 1998 The use and transformation of formal decision-making criteria: Sentencing guidelines, organizational contexts, and case processing strategies. *Social Problems* 45:248-267.
- von Hirsch, Andrew, Kay A. Knapp, and Michael Tonry
- 1987 *The Sentencing Commission and Its Guidelines*. Boston: Northeastern University Press.
- Weber, Max
- 1968 *Economy and Society*. New York: Bedminster Press.

Rodney Engen is Assistant Professor of Sociology at North Carolina State University. His current research examines racial and ethnic disparities in sentencing, the effects of social and organizational contexts in criminal justice processes, and the implementation of sentencing guidelines and reforms. His recent research has appeared in the *American Journal of Sociology*, *Criminology*, and *Social Problems*.

Randy Gainey is Associate Professor at the Department of Sociology and Criminal Justice at Old Dominion University. His current research interests include racial and ethnic disparities in sentencing, the use of alternative sanctions, and life course perspectives on crime and deviance. His recent articles have appeared in *Criminology*, *Justice Quarterly*, and *Sociological Focus*.

Robert Crutchfield is Professor and Chair of the Department of Sociology at the University of Washington. His current research focus is on how labor market experience and labor market variation influences crime and crime rates.

Joseph G. Weis is Professor of Sociology at the University of Washington. His research interests include child abduction murders by strangers, solvability factors in

homicide investigations, the etiology of violence, the prevention of crime, research methods, and the social development model of delinquency. His recent work includes *Murder: A Multidisciplinary Anthology of Readings*, co-edited with Robert Keppel.