Guidelines Sentencing: The Washington Experience

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INTRODUCTION

Criminal justice doctrine consists of three components: a criminal code setting forth the definitions of specific crimes; procedural rules that govern the actions of those who enforce the criminal code; and a set of authorized sanctions that may be imposed upon persons adjudged guilty of violating the criminal code. At the heart of the criminal justice system is the list of crimes contained in the criminal code. Too short a list fails to protect the public against real harms; too long a list dilutes or diverts scarce enforcement and correctional resources. A code that criminalizes innocent or inconsequential behavior cannot be redeemed by the most elaborate procedural system nor by the most humane correctional measures. For these reasons, when the former Governor of Washington introduced a symposium devoted to the correctional process, he emphasized his belief that "there are . . . activities, now considered criminal, which demand inordinate amounts of time from both the police and the courts" and that there is a need to "continue to redefine criminal activity and enable police to focus more extensively on the control of crimes of violence and those crimes truly damaging to the fabric of society."[1]

Criminal codes and the processes by which they are enforced were transformed in the early 1960s as the result of events that had begun in the previous decade. In the 1950s, the American Law Institute undertook its examination of the criminal law that culminated in the promulgation, in 1962, of the Proposed Official Draft of the Model Penal Code. In 1949, the United States

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[1] Daniel J. Evans, *Symposium: Law and the Correctional Process in Washington, Introduction*, 51 WASH. L. REV. 493, 493-94 (1976).

Supreme Court's decision in *Wolf v. Colorado*[2] laid the groundwork for the application of nearly all of the Bill of Rights' protections to state criminal prosecutions, yielding, in the 1960s, such landmark decisions as *Mapp v. Ohio*,[3] *Gideon v. Wainwright*,[4] and *Miranda v. Arizona*,[5] to name only the highest peaks.

The combined effect of the wave of reform patterned on the Model Penal Code and the Supreme Court's decisions profoundly changed the character of the criminal justice system. The central task of a criminal code is to determine the weight to be accorded to the harm caused by criminal conduct, on the one hand, and the culpability of the offender, on the other. By rejecting "strict [criminal] liability"[6] in all of its forms, the drafters of the Model Penal Code demonstrated their conviction that harm alone was never a sufficient basis for criminal liability. The Code's emphasis on subjective mental states manifested the view that culpability was to be the *sine qua non* of criminal liability.[7] At the same time, the effect of the Supreme Court's decisions was to accord a higher priority to the protection of individual privacy, dignity, and equality by excluding evidence and barring conviction of otherwise "guilty" persons whose constitutional rights had been violated by the police.

During this transformation of the substantive and procedural aspects of the criminal process, sentencing and corrections received little attention. Indeterminate sentencing had been the norm since early in the century,[8] and neither the Model Penal Code[9] nor the subsequent efforts to draft a new federal criminal code[10] proposed abandoning that tradition. By the time the neglected third pillar of the criminal justice system came under scrutiny in the 1970s, the pendulum of reform had already begun to react to the perceived consequences of the previous decade. The public was plainly dissatisfied with a system that seemed to

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2 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

3 367 U.S. 643 (1961).

4 372 U.S. 335 (1963).

5 384 U.S. 436 (1966).

6 MODEL PENAL CODE § 2.05 cmt. 1 (1985).

7 *See id.* § 2.02 cmt. 1.

8 Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893-95 (1990).

9 *See* MODEL PENAL CODE §§ 301.1-306.6 (Proposed Official Draft 1962).

10 NATIONAL COMM'N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT 271-94 (1971).

show more solicitude for the criminal than for the victim, that freed the criminal because the constable had blundered, and that saw prisoners returned to the community through "revolving door" sentencing policies.[11]

I. The Role of Sentencing

Before undertaking a more detailed comparison and assessment of the Washington and federal versions of guidelines sentencing, it may be useful to consider the role of sentencing in a criminal justice scheme. Although sentencing may perform a variety of functions, its essential task is to recalculate the gravity of the offense of conviction, employing a much more delicate scale than is provided by the definition of that offense found in the criminal code.

Criminal codes typically sort crimes into several classes of felonies and two classes of misdemeanors, assigning maximum limits of imprisonment for each class.[12] These classifications are based upon a legislative determination of the relative harm caused or threatened by the crime and the degree of individual culpability demonstrated by the defendant. Thus, an intentional homicide will be ranked in a higher class than a negligent one, and a killing in self-defense will be no crime at all. Similarly, taking the property of another will be classified as a felony or misdemeanor (depending on the amount taken), but only if the taking was done with an intent to permanently deprive.

Limited by the legislative maximum for the offense, sentencing schemes are designed to refine the sentence to be imposed upon the convicted defendant by considering a larger range of circumstances than those included in the definition of the offense. Chief among these circumstances are those that reassess the harm caused by the particular offense and the culpability of the particular defendant. This correlation between the gravity of the offense and the sentence to be imposed is a feature of every sentencing scheme, ancient and modern, determinate and indeterminate, whether implemented by legislative directive, judicial discretion, or administrative guidelines, and is, at one extreme, enforced by the Eighth Amendment's prohibition against cruel and unusual punishment.

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[11] *See, e.g.*, Christopher T. Bayley, *Good Intentions Gone Awry—A Proposal for Fundamental Change in Criminal Sentencing*, 51 Wash. L. Rev. 529 (1976).

[12] *See, e.g.*, Wash. Rev. Code Ann. §§ 9A.20.010-.021 (West 1988).

A sentencing scheme may also be used to advance other objectives that have little or nothing to do with the proportionality of the sentence to the gravity of the offense of conviction. The standard list of these subordinate functions includes incapacitation of dangerous persons, demonstration to other potential offenders of the consequences of detection and conviction, and redemption of the offender by punitive or rehabilitative means.

Sentencing according to guidelines generated by an administrative agency does not, by its nature, imply a judgment about the legitimacy or priority of these several sentencing objectives. A system that assigned sentences according to a grid that measured, for example, culpability on one axis and treatability on the other would still be a guidelines system. Nor does the process for formulating and applying guidelines sentences imply a judgment about the absolute or relative lengths of sentences. Administratively created and monitored sentencing guidelines are simply a vehicle for implementing political judgments about the bases for—and the nature and duration of—the deprivation of liberty to be imposed for violation of the criminal code. It follows that guidelines sentencing schemes may be described, assessed, and compared by reference to (l) the relative importance assigned to achieving the functions of proportionality, uniformity, incapacitation, general deterrence, and rehabilitation, and (2) the relative authority to determine these priorities and implement that determination assigned to the legislature, the guidelines commission, the sentencing judge, and the prosecutor.

Speaking very generally, guidelines sentencing gives greatest weight to current and past offenses and crime-related circumstances and, within that framework, proportionality and uniformity of sentences. Guidelines give least weight to the reformation of the offender and, of necessity, no weight to individual differences among offenders and their circumstances that are not recognized by the formulas for computing sentences under the guidelines. Guidelines systems by their nature transfer sentencing power to an administrative agency and, to that extent, diminish the authority of the sentencing judge. By specifying a determinate sentence range based largely upon the offense of conviction and the defendant's prior conviction record, such systems greatly enhance the authority of the prosecutor to determine the ultimate sentence. Behind these general similarities of the federal and Washington systems lie several instructive differences, to which we now turn.

II. A Comparison of Washington and Federal Guidelines Sentencing

To compare Washington and federal guidelines sentencing requires a uniform vocabulary for describing the two systems. They are alike in general outline but different in many details. Each rates the seriousness or gravity of offenses on one axis of a sentencing grid and the offender's record of convictions on the other. Subject to a variety of other manipulations, particularly under the federal scheme, the "presumptive sentence range" is determined by the intersection of these two variables. Because each system labels these features differently, this article will refer to them by the generic terms "gravity of the offense" and "prior conviction record."

For purposes of this article, two other modifications are required to render the federal and state grids comparable. Because the Washington system applies only to felonies while the federal system applies also to misdemeanors, I have arbitrarily excluded federal misdemeanor sentences from concern, but have defined federal crimes as felonies if a sentence of more than one year is authorized. Second, because the federal scheme ranks felony offenses into twenty-three seriousness categories, while the state system contains only fourteen categories, I refer to the gravity of offenses in more general terms, such as "least," "most," or "middle" severity. I follow the same pattern in describing prior conviction record to accommodate both Washington's nine and the federal system's six categories.

Each system takes into account certain circumstances of the offense that aggravate or mitigate the presumptive sentence prescribed for that offense. This modification is accomplished in the federal system by specifying the increase or decrease in the gravity of the offense attributable to a given characteristic, whereas in the state system, such characteristics derive from the definition of the offense. To conflate the two systems, it is necessary to somewhat arbitrarily create a standard version of the offense in order to test the relative effects of offense circumstances that render it more or less serious under each system.

Similarly, each of the sentencing schemes takes into account convictions concurrent with the offense for which a sentence is to be imposed, and each distinguishes between related and unrelated concurrent convictions. For comparative purposes, it is

again necessary to submerge certain differences in the manner by which concurrent convictions are accounted for in each system.

Finally, each of the systems mandates or authorizes sentences that fall outside the "presumptive" range. Mandatory departures occur when the governing statutes specify minimum sentences for particular crimes or for offender- or crime-related circumstances.[13] Authorized departures occur when the sentencing court is granted discretion to impose a sentence outside the presumptive range. The two schemes differ with respect to both the kind and degree of authorized and mandatory departures they include.

With this generic vocabulary, the remainder of this Part examines the differential sentences generated by the federal and Washington guidelines with respect to several common offenses. I start with the simple form of each offense and add variations based on prior conviction record, concurrent convictions, and aggravating and mitigating offense and offender characteristics.

A. Establishing the Gravity of the Offense of Conviction

Calculating a sentence under either the Washington or the federal guidelines begins with the "offense of conviction." Under both systems, all felony offenses are assigned a seriousness level.[14] In Washington, the levels are wholly based on the statutory definition of the offense. For example, burglary in the second degree (unlawful entry of a building with intent to commit a crime) is a level III offense; residential burglary (unlawful entry of a dwelling) is a level IV offense; and burglary in the first degree (unlawful entry of a dwelling and assault of a person or unlawful entry while armed with a deadly weapon) is a level VII offense. Similarly, rape in the first degree (forcible, aggravated) is a level XI offense, while rape in the third degree (without consent) is a level V offense. Assaults in the first, second, and third degrees are, respectively, level XII, IV, and III offenses. Thus, in the Washington sentencing scheme, seriousness levels are assigned by the guidelines commission, but the criteria for determining the levels derive entirely from the legislature's determination of the

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[13] *See, e.g.*, 21 U.S.C. § 841(b)(1) (1988); WASH. REV. CODE ANN. § 9.94A.120(4) (West Supp. 1992).

[14] *See* WASH. REV. CODE ANN. § 9.94A.320 (West Supp. 1992); UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 1B1.1 (Nov. 1991) [hereafter U.S.S.G.].

factors that aggravate a crime as expressed in the definition of the offense.

In contrast, under the federal sentencing scheme, the United States Sentencing Commission has created, for each generic offense, a list of "specific offense characteristics"[15] that are commonly associated with its commission. Such lists include factors that are typically used to define a higher degree of the crime, such as the use of a weapon or injury to the victim. Some of these offense "characteristics," however, such as "more than minimal planning,"[16] have never figured into the definition of offenses, but might well have been considered by a judge under previous sentencing regimes. Significantly, unlike the Washington system, where one or more of several aggravating features of the offense (such as use of a deadly weapon, injury to the victim, or felonious entry) simply raise the degree—and thus the sentence level—of the offense, the effect of "special offense characteristics" on a federal defendant's sentence is additive. Each "characteristic" carries a Commission-assigned numerical value that specifies the increase in the gravity of the offense attributable to that factor. In a sense, under the Washington scheme, aggravating circumstances are "concurrent," whereas in the federal courts they are "consecutive."

Two consequences flow from these differences in the federal and Washington modes of calculating the gravity of the offense of conviction. First, relative to the legislature, the United States Sentencing Commission exercises much greater authority over the determination of the seriousness level (and thus of the presumptive sentence) than does its Washington counterpart. Second, under the federal guidelines, a particular offense of conviction can produce a vastly greater variety of possible seriousness levels than under the Washington guidelines. The charts below present concrete illustrations of this effect. Figure 1[17] compares the presumptive sentence midpoint for forcible rape under the federal and Washington guidelines as influenced by the defendant's prior conviction record.

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[15] U.S.S.G. § 1B1.1(b).

[16] *Id.* § 2B2.2(b)(1).

[17] Data extrapolated from U.S.S.G. §§ 2A3.1, 5A; WASH REV. CODE ANN. §§ 9.94A.310(1), .320, 9A.44.050 (West Supp. 1992).

Figure 1

Fig. 1. Midpoints of standard range sentences for forcible rape according to conviction record under Washington and federal guidelines.

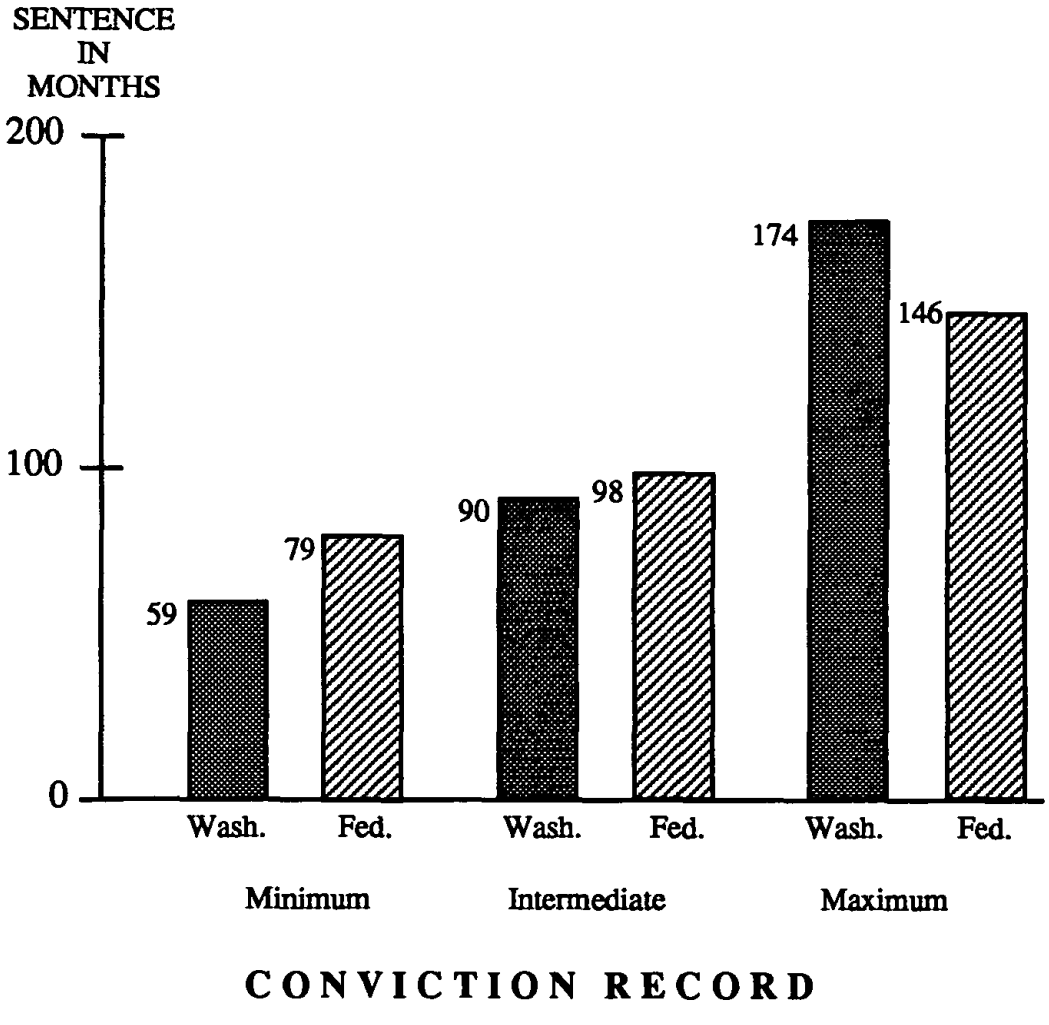
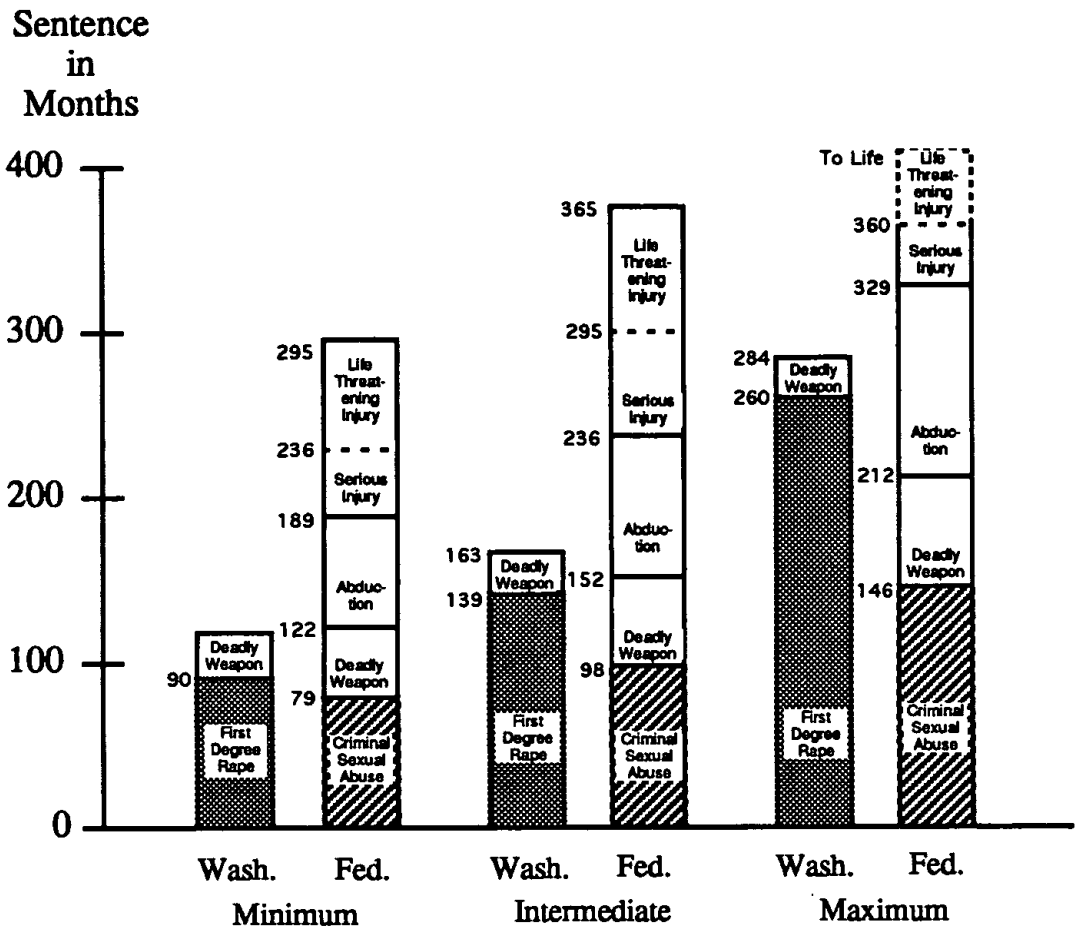


Figure 2

Fig. 2. Midpoints of standard range sentences for aggravated rape involving use of deadly weapon, abduction, and injury to the victim.



CONVICTION RECORD

Figure 2[18] illustrates the changes in the presumptive sentence for forcible rape caused by the addition of aggravating circumstances. In Washington, any or all of these elements raise the crime to the first degree[19] and thus elevate the gravity of the offense by one level. However, the use of a deadly weapon automatically adds twenty-four months to the presumptive sentence.[20] Under the federal guidelines, each aggravating circumstance adds its own assigned weight to the calculation of the gravity of the

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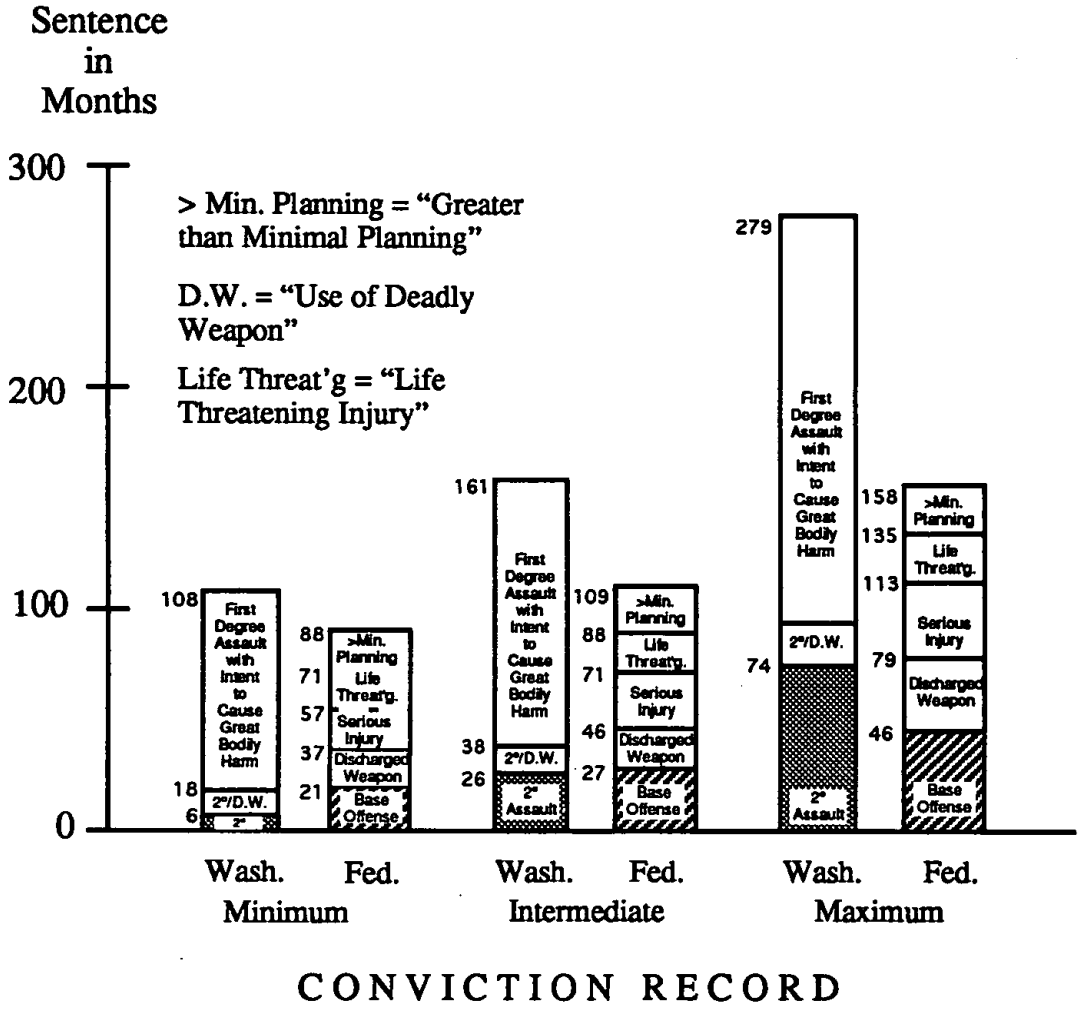
[18] Data extrapolated from WASH REV. CODE ANN. §§ 9.94A.310(1), .310(3)(a), .320, 9A.44.040 (West 1988 & Supp. 1992); U.S.S.G. §§ 2A3.1, 5A.

[19] WASH. REV. CODE ANN. § 9A.44.040.

[20] *Id.* § 9.94A.310(3)(a) (West Supp. 1992).

Figure 3

Fig. 3. Midpoints of standard range sentences for aggravated assault.



offense,[21] producing increasingly longer sentences.

Figures 3,[22] 4,[23] 5,[24] and 5A[25] depict the same comparison for three other typical offenses: assault, residential burglary, and transfer of cocaine. Theft and drug crimes demonstrate another difference between the two sentencing systems. When the degree of harm is quantifiable, as in drug transactions and economic harms, the federal scheme specifies, in multiple steps, the increase in the gravity of the offense attributable to increases in the magnitude of the drugs transferred or property taken.[26] In Figures 4, 5, and 5A, typical magnitudes have been selected to show the comparative impact of this difference.

B. Establishing the Prior Conviction Record

As the previous discussion illustrates, both the federal and Washington guidelines use the defendant's prior conviction record as a primary determinant of the presumptive sentence range, although the systems differ significantly in the way in which that record is calculated. The federal scheme weights prior convictions based solely on the sentence imposed for each conviction, assigning three points for convictions that carried sentences over thirteen months, two points for those that were two months or longer, and a single point (but not more than a total of four) for some, but not all, convictions that carried sentences of less than two months.[27] Juvenile convictions are counted if the defendant's current offense occurred within five years of release from confinement.[28] A federal defendant earns "career offender status" when

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[21] *See, e.g.*, U.S.S.G. § 2A3.1(b)(1) (use of weapon adds four levels); *id.* § 2A3.1(b)(4)(A) ("life threatening" bodily injury adds four levels); *id.* § 2A3.1(b)(4)(B) (serious bodily injury adds two levels).

[22] Data extrapolated from U.S.S.G. §§ 2A2.2, 5A; WASH REV. CODE ANN. §§ 9.94A.310(1), .310(3)(c), .320, 9A.36.011, .021 (West 1988 & Supp. 1992).

[23] Data extrapolated from U.S.S.G. §§ 2B2.1, 5A; WASH REV. CODE ANN. §§ 9.94A.310(1), .310(3)(b), .320, 9A.52.020, .025 (West 1988 & Supp. 1992).

[24] Data extrapolated from U.S.S.G. §§ 2D1.1(c), 2D1.2, 5A; WASH REV. CODE ANN. §§ 9.94A.310(1), .320, 69.50.401, .406 (West Supp. 1992).

[25] Data extrapolated from U.S.S.G. §§ 2D1.1(c)(9), 5A; 21 U.S.C. § 841(b)(1) (1988); WASH REV. CODE ANN. §§ 9.94A.310(1), .320, 69.50.401(a)(1)(i) (West Supp. 1992).

[26] *See* U.S.S.G. § 3D1.2(d).

[27] *Id.* §§ 4A1.1, 4A1.2(c).

[28] *Id.* § 4A2.2(d)(2).

Figure 4

Fig. 4. Midpoints of standard range sentences for residential burglary including use of deadly weapon.

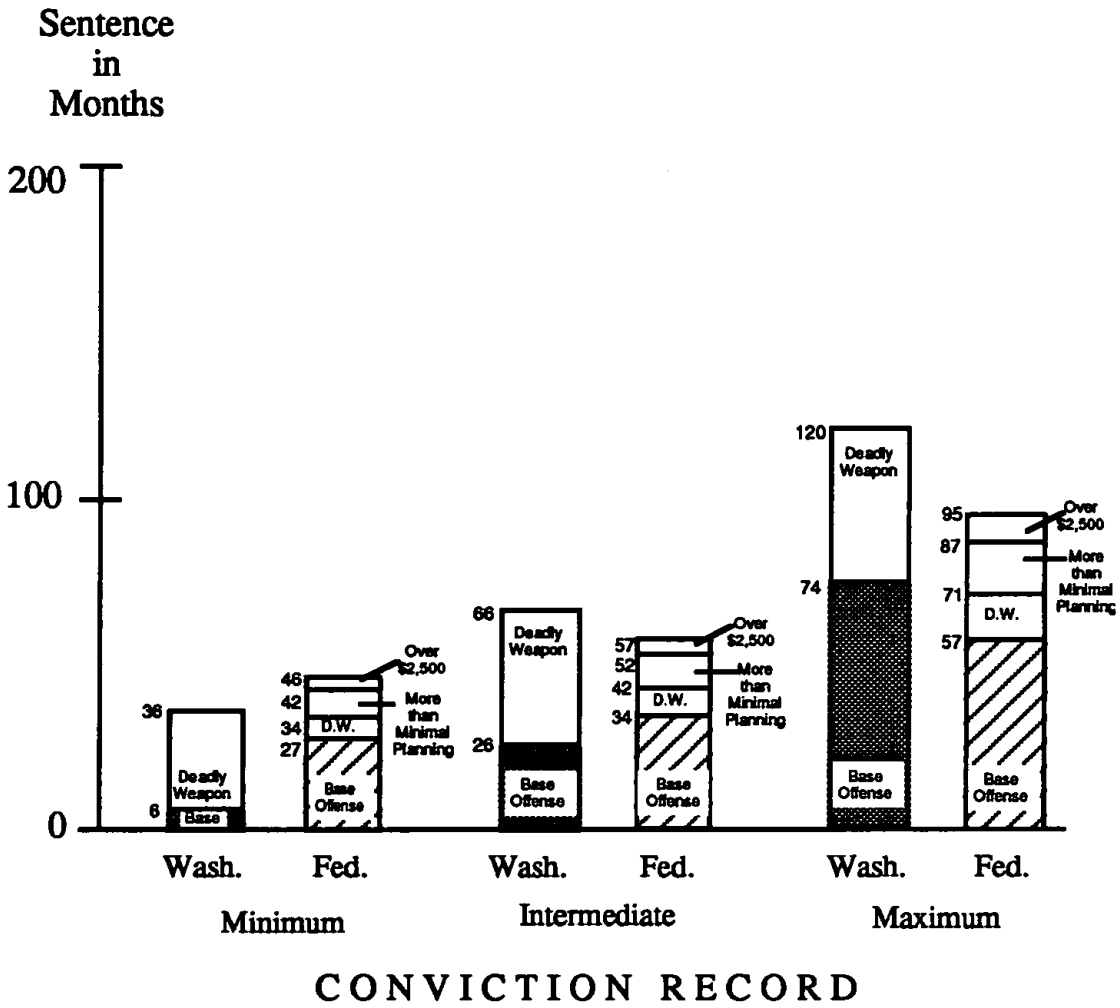


Figure 5

Fig. 5. Midpoints of standard range sentences for distribution of cocaine including sale to a minor.

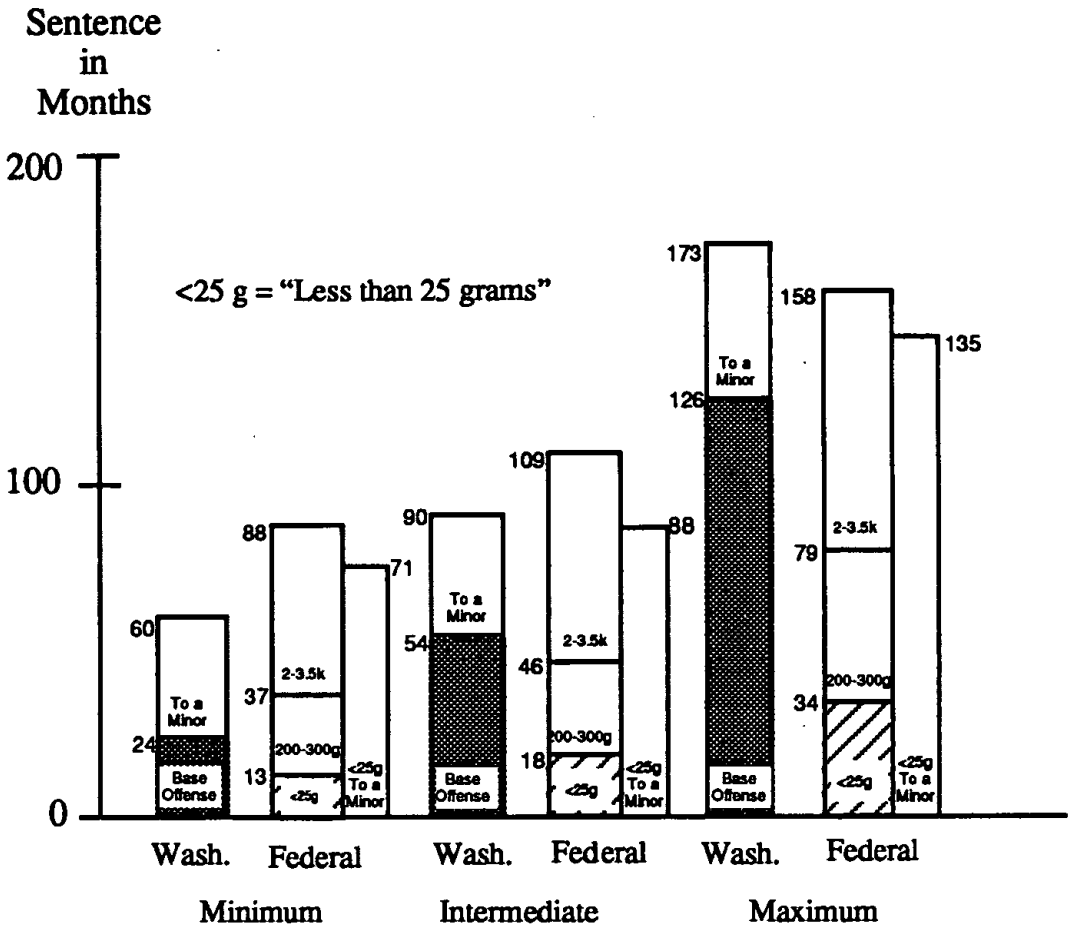
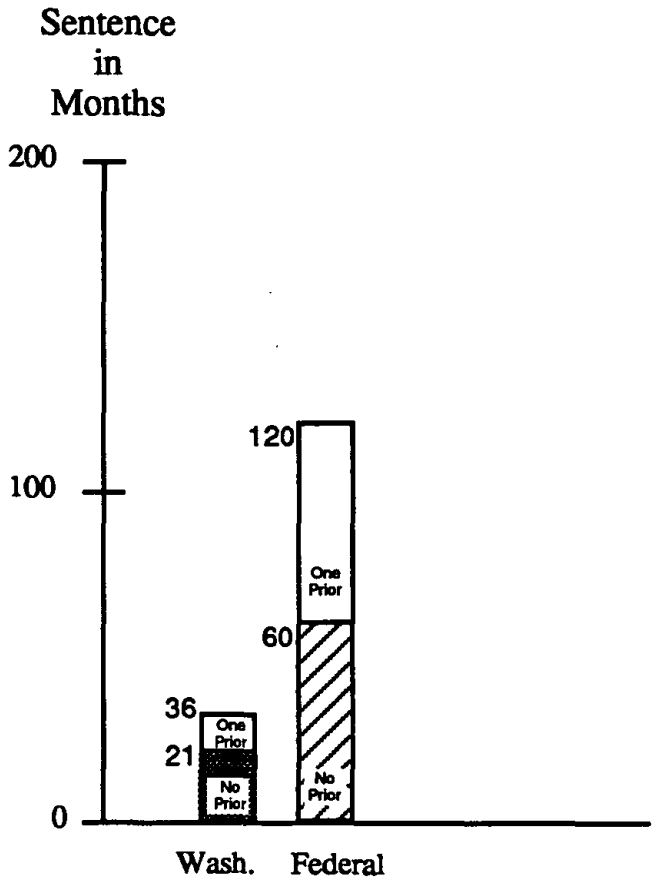


Figure 5A

Fig. 5A. Standard sentences for selling 500 grams of cocaine with either no or one prior drug-related felony conviction.



a current conviction is for a drug or violent crime and the defendant has two prior convictions for such crimes.[29] Under this status, the defendant will automatically be assigned a maximum prior conviction record and a default current offense sentence at or near the statutory maximum for that crime.[30]

In Washington, however, a defendant's presumptive sentence is increased only for previous felony convictions.[31] The increase reflects both the similarity and the gravity of the current and previous conviction. The Washington guidelines place the current offense in one of eight categories and provide an "offender score matrix" to match each previous conviction by type against the category of the current offense.[32] By consulting the chart, the sentencing judge finds the applicable point value for the previous conviction.[33] A prior first degree burglary, for example, earns two points if the current conviction is for first or second degree burglary or a violent crime and one point if the current conviction is a drug-related or non-violent crime. The maximum enhancement occurs when a defendant being sentenced for a violent crime has a criminal record of serious violent crimes.[34]

The Washington guidelines also provide for the "decay" of some classes of prior convictions.[35] That is, a defendant's previous conviction for a Class B or C felony will be ignored if she has spent ten or five years, respectively, in the community following release from confinement for such offense without any further felony convictions. Prior juvenile "felony" convictions are counted only if the defendant was at least fifteen years old when the juvenile offense was committed and twenty-two or younger when the current offense was committed.[36] Thus, the Washington guidelines seek to assess more sensitively the penological significance of a defendant's prior conviction record, muting its effect for unrelated, remote convictions while amplifying its effect for a criminal history that seems to portend more serious violations.

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29 *Id.* § 4B1.1.
30 *Id.*
31 WASH. REV. CODE ANN. § 9.94A.360 (West Supp. 1992).
32 *Id.* § 9.94A.360(7)-(18).
33 *Id.* § 9.94A.310.
34 *Id.* § 9.94A.360(10).
35 *Id.* § 9.94A.360(2).
36 *Id.* § 9.94A.360(4).

C. Related and Unrelated Concurrent Convictions

When a defendant is charged with multiple criminal offenses, their effect on the presumptive sentence depends upon whether the offenses are deemed to be related or unrelated to the "offense of conviction." Related charges that are part of the same criminal transaction as the dominant charge do not increase either the gravity of the basic offense under federal law or the defendant's criminal history under Washington law.[37] Unrelated current convictions that involve different times, places, or victims (such as a series of burglaries or drug transactions) enhance the defendant's presumptive sentence for the "offense of conviction"[38] under both sentencing schemes,[39] but neither scheme simply imposes the sum of the presumptive sentences for each unrelated conviction. Instead, although this result is reached by different routes, both systems use unrelated concurrent convictions to add time to the sentence length of the most serious "offense of conviction."

Under the federal scheme, the offense score is calculated for each offense according to the crime and its specific offense characteristics, as outlined above. The offense with the highest numerical value is selected as the "offense of conviction."[40] The other offenses will contribute to the ultimate presumptive offense according to the gravity of those offenses compared with the core offense, with values closer in magnitude adding more time than those much less severe.

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[37] Under federal law, "When a defendant has been convicted of more than one count," the court is required to determine whether any of the counts are "closely related." U.S.S.G. § 3D1.1(a). For counts that are closely related because they "involve the same victim and the same act or transaction" or are multiple transactions "connected by a common criminal objective or . . . plan," only the most serious count is used to create an offense score. *Id.* §§ 3D1.2(a)-(b), 3D1.3(a). Such related counts may, however, figure into the calculation of an offense score as "adjustment[s]" or "specific offense characteristic[s]." *Id.* § 3D1.2(c). Washington law reaches the same result by counting, for sentencing purposes, "all of the current offenses [that] encompass the same criminal conduct" as a single offense. WASH. REV. CODE ANN. § 9.94A.400(1)(a) (West Supp. 1992). As to what constitutes the "same criminal conduct," see DAVID BOERNER, SENTENCING IN WASHINGTON: A LEGAL ANALYSIS OF THE SENTENCING REFORM ACT OF 1981 § 5.8(a), at 5-16 to -18 (1985).

[38] U.S.S.G. § 3D1.4.

[39] U.S.S.G. §§ 3D1.1, 3D1.4; WASH. REV. CODE ANN. § 9.94A.400 (West Supp. 1992).

[40] U.S.S.G. § 3D1.4.

The Washington system, on the other hand, uses unrelated charges to increase the defendant's "prior" criminal record rather than the severity of the current offense. As in the federal scheme, the most serious offense is selected as the "offense of conviction."[41] Concurrent unrelated offenses affect the sentence for that crime just as prior convictions would.[42] The defendant is also sentenced concurrently for the secondary offenses.[43] Because these sentences are by definition shorter than the sentence for the primary offense, they do not lengthen the defendant's commitment, but they will be included as part of the defendant's prior conviction record in any future sentencing proceeding. More severe enhancement occurs when the unrelated concurrent convictions are for violent or drug-related offenses. In such a case, the convictions are sentenced consecutively, with the secondary convictions calculated with a zero prior conviction record.[44]

Figure 6[45] illustrates the differential effects of concurrent convictions for three unrelated burglaries with varying offense characteristics. Figure 7[46] compares the impact of concurrent unrelated drug and violent convictions under the Washington and federal guidelines.

D. Offense and Offender Characteristics

As we have seen, the federal guidelines color in the details of generic crimes by reference to specific offense characteristics that enhance the gravity of the offense. The federal scheme extends this idea by specifying certain offense and offender characteristics (called "adjustments") that increase or decrease the gravity of all offenses.[47] Typical federal adjustments occur, for instance, where the victim was especially vulnerable or where the defendant abused a position of trust. Each of these factors yields a two-level

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41 WASH. REV. CODE ANN. § 9.94A.400(1) (West Supp. 1992).

42 *Id.* § 9.94A.400(1).

43 *Id.* § 9.94A.400(1)(a).

44 *Id.* § 9.94A.400(1)(b).

45 Data extrapolated from U.S.S.G. §§ 2A2.2, 2B2.2, 3D1.4, 5A; WASH REV. CODE ANN. §§ 9.94A.310(1), .320, 360(11) (West Supp. 1992).

46 Data extrapolated from U.S.S.G. §§ 2A1.2, 2A4.1, 4A1.1, 4B1.1, 5A; WASH REV. CODE ANN. §§ 9.94A.310(1), .320, .360(10), 9A.32.050, 9A.40.020 (West 1988 & Supp. 1992).

47 *See* U.S.S.G. §§ 3A.-C.

Figure 6

Fig. 6. Midpoints of standard range sentences for a defendant with no previous record concurrently convicted of three unrelated burglaries.

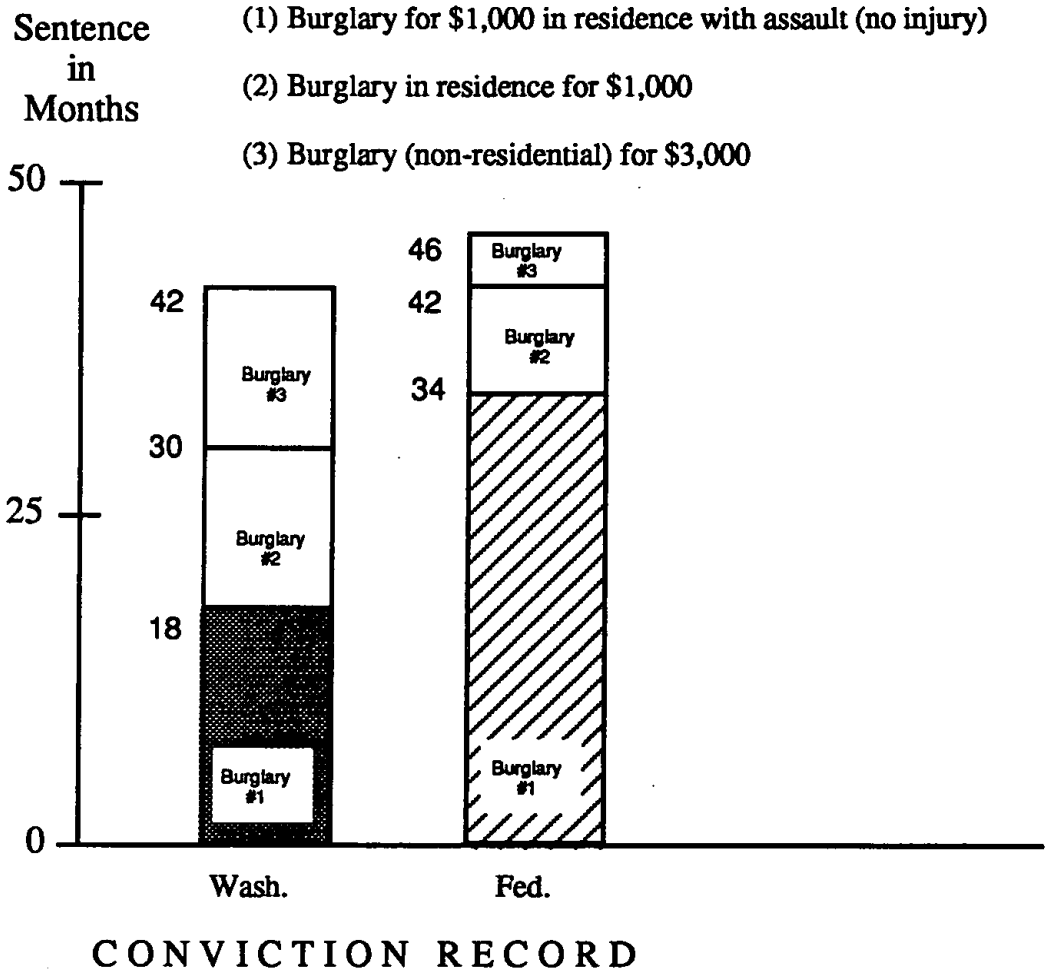
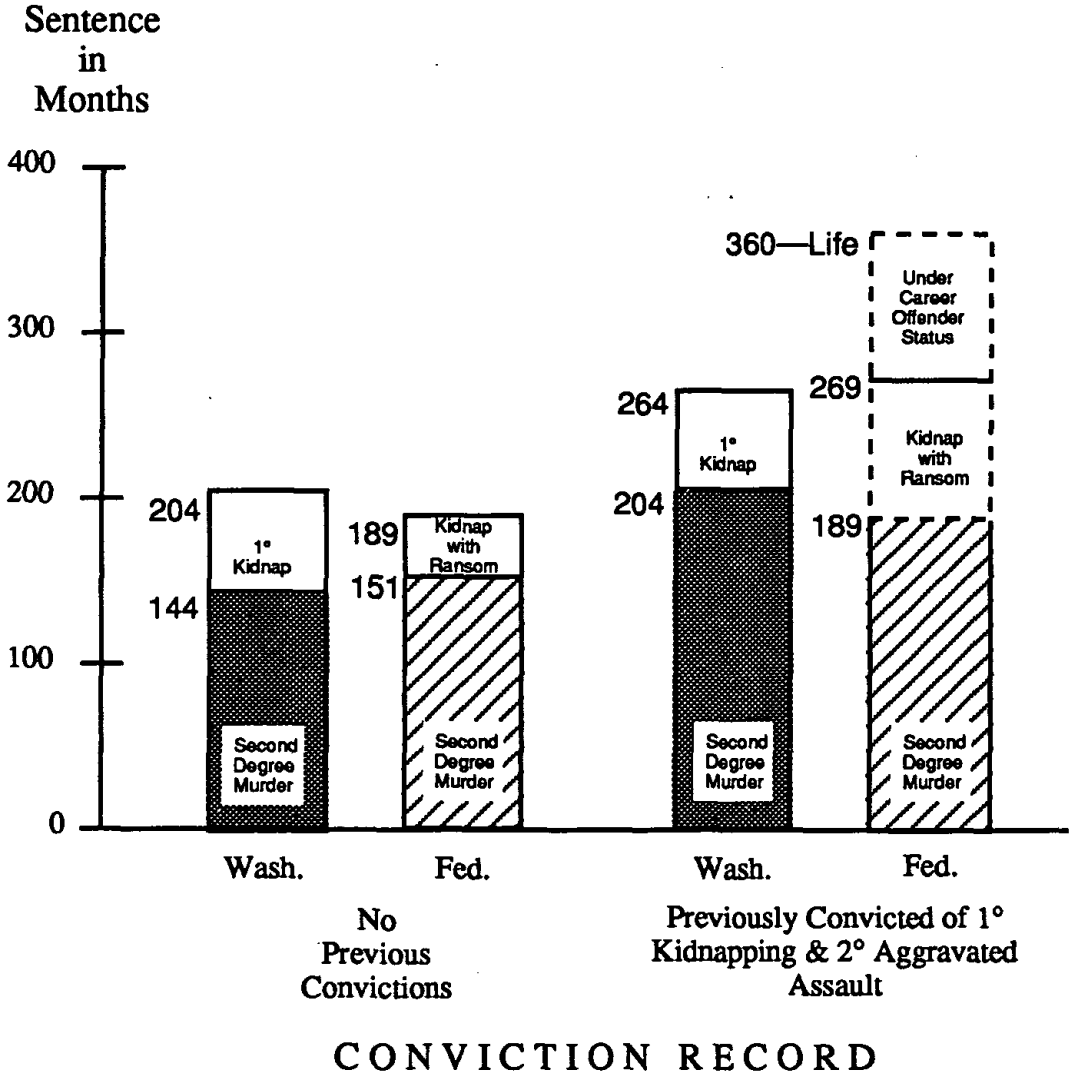


Figure 7

Fig. 7. Midpoints of standard range sentences for a defendant concurrently convicted of unrelated counts of 2° murder and kidnapping involving a ransom demand.



enhancement.[48] If the crime involved more than one participant, the defendant's role may enhance or diminish the offense by as much as four levels.[49] A defendant's behavior after the commission of the offense may also affect the sentence; obstruction of justice and acceptance of responsibility earn two levels in opposite directions.[50]

No such automatic, across-the-board adjustments are found in the Washington scheme, with the exception of an automatic enhancement for crimes committed with deadly weapons.[51] Washington law addresses most of these offense and offender variables, but it treats them as appropriate grounds for a departure from the presumptive sentence, rather than as a standard component of that sentence.[52] This difference illustrates a major distinction between the two systems. The federal scheme exerts stringent control over the sentencing authority of the judge by assigning specific sentence increases and decreases to a wide variety of "specific offense characteristics" and "adjustments" based on facts about the offense and the offender. In contrast, by treating these same factors simply as bases for a judge's exercise of her discretion to "depart" from the presumptive range and impose an "exceptional" sentence, the Washington scheme appears to preserve a large area of judicial responsibility for sentencing decisions.

A measure of the actual divergence of the two systems is suggested by Table 1, which matches the federal "characteristics" and "adjustments" with data indicating the frequency with which those factors have influenced Washington judges to impose exceptional sentences. A more striking demonstration of the degree to which the two systems differ in their treatment of commission-generated offense and offender characteristics, however, derives from the fact that "exceptional" sentences are imposed in only four percent of the Washington cases. The presence of these factors will, by design, affect the sentencing range in all federal convictions. By contrast, in ninety-six percent of Washington convictions, they will affect only the sentence imposed *within* the sentencing range.

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48 U.S.S.G. §§ 3A1.1, 3B1.3.

49 *Id.* §§ 3B1.1, 3B1.2.

50 *Id.* §§ 3C1.1, 3E1.1.

51 WASH. REV. CODE ANN. § 9.94A.310(3) (West Supp. 1992).

52 WASH. REV. CODE ANN. § 9.94A.390 lists eight illustrative mitigating circumstances and seven aggravating circumstances.

TABLE 1.
COMPARISON OF FACTORS EXPLICITLY INCLUDED IN THE FEDERAL GUIDELINES WITH FACTORS THAT ARE USED TO JUSTIFY AN EXCEPTIONAL SENTENCE IN WASHINGTON.

Type of Adjust. or Characteristic	Listed in U.S.S.G.	Adjust. Factor	Wash. Equivalent Mit./Agg. Factor	Listed in 9.94A.390	Ratio*
Vulnerable victim	3A.1.1	2 levels	Vulnerable victim	(2)(b)	82/313
Aggravating role (leadership)	3B1.1	2-4	High position in drug hierarchy	(2)(d)(iv)	17/313
Abuse of trust	3B1.3	2	Abuse of trust	(2)(c)(iv)	82/313
Planning (more than minimal)	often	2	Sophistication/ premeditation	(2)(d)(v)	53/313
				No	5/313
Injured victim	often	2-6	Injuries greater "than typical"	No	22/313
Large monetary loss by victim	often	1-11	Monetary loss greater "than typical"	(2)(c)(ii)	29/313
Large quantity of drugs involved	often	6-36	Quantity more than personal consumption	(2)(d)(ii)	26/313
Career offender/	4B.1.1	varies	Factors in crim. record	(2)(g)	81/313
Crim. livelihood	4B.1.3	varies	Seriousness of offense	No	73/313
			Threat to community	No	99/313
Mitigating role (minor role)	3B1.2	−2 to −4	Principally accomplished or induced by others	(1)(f)	20/308
				(1)(d)	28/308
Acceptance of resonsibility	3E1.1	−2	Assist law enforcement	No	41/308
			Shows remorse	No	16/308
			Effort to change	No	9/308

* Ratio refers to the number of times the justification was used compared to the number of enhanced (313) or reduced (308) sentences given in Washington for fiscal 1990. Most exceptional sentences cite multiple justifications. Enhanced sentences average 3.7 justifications; reduced sentences average 3.3.

III. DEPARTURE AUTHORITY UNDER THE WASHINGTON GUIDELINES

If the inherent uniqueness of every case is the assumption of indeterminate, discretionary sentencing, the underlying assumption of guidelines sentencing is the opposite: in the typical case, persons with similar prior conviction records who commit similar crimes are deemed morally and penologically indistinguishable. To accommodate the atypical case, both the federal and the Washington guidelines permit the judge to depart from the sentencing grid. Under federal law, the judge may do so when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration" in the

guidelines.[53] Washington law appears to grant a somewhat broader authority, allowing the judge to sentence outside the standard sentence range "if [the judge] finds, considering the purpose of [Washington's Sentencing Reform Act] . . . substantial and compelling reasons justifying an exceptional sentence."[54]

Under both systems, the judge who departs from the sentencing grid must identify the grounds for the departure and make findings of fact supporting the existence of such grounds.[55] Although Washington's reference to "the purpose" of the act would appear to allow greater freedom to impose an exceptional sentence than the federal standard's deference to the Sentencing Commission's judgments, the appellate courts in both systems have adopted very similar methodologies to monitor such departures. The circumstances relied upon by the sentencing judge are compared with an explicit or implicit stereotype of the typical offense, and only if the particular case is truly unusual will a sentence outside the grid be affirmed. Because federal case law developments have been thoroughly and recently treated elsewhere,[56] this discussion focuses on Washington law with occasional references to the federal experience.

Washington's Sentencing Reform Act (SRA) created three distinct bases for departures from the grid: one for certain first-time offenders,[57] another for certain sex offenders,[58] and a third generic category of "exceptional sentences" applicable to all offenses,[59] subject to statutory maximum and (for a few crimes) minimum sentences.

Whether to invoke the first-time or sex offender sentencing option in an eligible case is a decision left to the discretion of the sentencing judge, and that decision is reviewable only for an "abuse of discretion."[60] Moreover, a sentence imposed under the first-time offender option is "deemed to be within the standard

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53 18 U.S.C. § 3553(b).

54 WASH. REV. CODE ANN. § 9.94A.120(2) (West Supp. 1992).

55 U.S.S.G. § 5K1.1 cmt; WASH. REV. CODE ANN. § 9.94A.120(3).

56 *See* Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1 (1991).

57 WASH. REV. CODE ANN. § 9.94A.120(5) (West Supp. 1992).

58 *Id.* § 9.94A.120(7).

59 *Id.* § 9.94A.120(2).

60 State v. Boze, 735 P.2d 696, 697 (Wash. Ct. App. 1987); State v. Welty, 726 P.2d 472 (Wash. Ct. App. 1986).

range for the offense and shall not be appealed."[61] Similarly, the length of treatment imposed under the sex offender provisions is limited by the upper end of the presumptive sentence range and therefore is also not appealable.[62] Thus, these two alternatives are limited survivors of the predecessor system, allowing unguided sentencing in the judge's discretion. In contrast, a court's exercise of the general authority to impose an "exceptional sentence" is subject to appeal by the defendant or the prosecutor and is reviewed on the merits by the appellate court.

A. First-Time Offender Option

In Washington, a judge may choose to sentence a first-time offender outside the grid unless the offense of conviction is a "violent" offense, a sex offense, or an offense involving a Schedule I or II narcotic.[63] Three kinds of sentences are permitted under this option. The judge may impose a sentence of up to ninety days in jail, order the defendant to undergo in-patient treatment up to the maximum of the standard range, or require up to two years of community supervision.[64] The latter is defined as the "functional equivalent of probation" and may include requiring the defendant to undergo out-patient treatment.

Although the first-time offender option is employed in more than a third of the eligible cases,[65] its actual impact on sentencing is not great. For persons sentenced under the option whose presumptive minimum term would have been zero, jail sentences averaged about one month for both first-time offender and guidelines sentences.[66] Where the presumptive range fell between 1 and 12 months, defendants sentenced as first-time offenders averaged 1.6 months compared with 2.6 months for those serving standard sentences.[67]

The major distinction, then, between first-time and standard sentencing involves the nature, not the duration, of the sentence. For example, more than half of those receiving first-time offender

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61 WASH. REV. CODE ANN. § 9.94A.210(1) (West Supp. 1992).

62 *Id.* § 9.94A.120(7)(a)(ii).

63 *Id.* § 9.94A.030(20).

64 *Id.* § 9.94A.120(5).

65 WASHINGTON SENTENCING GUIDELINES COMM'N, REPORT OF JUNE 2, 1991, at 3 [hereafter WASHINGTON COMM'N REPORT].

66 *Id.*

67 The difference may reflect the fact that the first-time offender option is commonly applied to the least serious offenders.

sentences were ordered to undergo treatment, compared with four percent of eligible defendants sentenced under the guidelines.[68] For a small number of first-time offenders, the option has a marked durational effect. Defendants whose guideline minimum is greater than one year must serve that sentence in prison.[69] If sentenced under the first-time offender option, however, such a defendant's sentence is limited to not more than three months in jail. In 1990, only 130 defendants were eligible for this reduction, and less than one-third of those were sentenced under the option.[70]

B. Special Sex Offender Sentencing Alternative

In response to criticisms by mental health professionals and the Superior Court Judges Association,[71] the Washington Sentencing Commission altered the SRA to include a Special Sex Offender Sentencing Alternative (SSOSA).[72] This option applies to first-time sex offenders except those convicted of rape in the first or second degree or any sex crime that is also a "serious, violent offense."[73] It permits the sentencing court to order an examination of an eligible offender "to determine whether the defendant is amenable to treatment."[74]

After weighing the examination report against the threat the offender poses to the community (and, if solicited, the victim's views on these matters),[75] the court may impose a sentence under the SSOSA "within the sentence range."[76] The sentencing court may suspend the execution of the sentence, impose community supervision, order participation in a treatment program, and impose up to six months' confinement.[77] Violation of a condition of the sentence and failure to make satisfactory progress in treatment are grounds for revocation of the suspended sentence.[78]

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68 WASHINGTON COMM'N REPORT, *supra* note 65, at 5.

69 WASH. REV. CODE ANN. § 9.94A.190(1) (West Supp. 1992).

70 WASHINGTON COMM'N REPORT, *supra* note 65, at 4.

71 BOERNER, *supra* note 37, § 8.1.

72 WASH. REV. CODE ANN. § 9.94A.120(7) (West Supp. 1992).

73 *Id.* § 9.94A.120(7)(a)(i). The effect of this limitation is to add attempt, solicitation, and conspiracy to commit first-degree rape to the list of SSOSA-ineligible offenses.

74 *Id.*

75 *Id.* § 9.94A.120(7)(a)(ii).

76 *Id.*

77 *Id.* § 9.94A.120(7)(a)(ii)(A)-(B).

78 *Id.* § 9.94A.120(7)(a)(v).

Although federal law contains no general authority to sentence sex offenders differently from other offenders, a federal judge may impose a treatment-centered sentence by granting probation with treatment stipulations when the presumptive sentence minimum is ten months or less.[79] Among the federal sex crimes, however, only "criminal sex abuse of a ward"[80] and "transporting obscene matter"[81] earn sufficiently short presumptive sentence ranges to qualify for such treatment. All other federal sex offenders must serve a full presumptive sentence and may receive treatment only as part of a post-sentence supervised release program.[82]

C. Exceptional Sentences

If the heart of a criminal justice system is the criminal code, its conscience resides in the power of the jury to acquit against the evidence and the power of the sentencing judge to look beyond the definition of the offense in fashioning an appropriate sanction for a particular defendant. Although jury nullification is an "invisible" process, Kalven and Zeisel's examination of jury behavior suggests that the jury prefers a just result to a technically correct one in about twenty percent of the cases.[83] Under the voluntary guidelines adopted by the Superior Court Judges Association prior to the SRA, Washington judges imposed sentences outside the guidelines in about one-third of the cases.[84] These data suggest that judges and juries view twenty to thirty percent of the cases that come before them to be atypical. By contrast, under the SRA, Washington judges in 1990 imposed sentences below the standard range in 6.4 percent of the cases and above the standard range in 2.2 percent of the cases.

All guidelines systems recognize some authority in the sentencing judge to depart from the presumptive sentence, subject to appellate review. The departure power necessarily subordinates some goals of the sentencing system to promote others. Proportionality and uniformity, as measured by the guidelines' generic criteria, are sacrificed to individualized criteria. Moreover, the

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79 U.S.S.G. § 5C1.1.

80 *Id.* § 2A3.3.

81 *Id.* § 2G3.1.

82 *Id.* § 5D.

83 HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 58 (Midway Reprint ed. 1986).

84 BOERNER, *supra* note 37, § 2.2(d).

substantive goals of sentencing have new significance in the context of "exceptional" sentencing. The importance of offense-based objectives such as just deserts and general deterrence diminishes, while the significance of offender-based goals of incapacitation and reformation increases.

If the standard sentence does not promote general deterrence, there is no likelihood that uncommon exceptional sentences will fill the void. The punishment deserved for the offense will by design be reflected in the standard sentence. Neither the threat posed to society by the defendant nor the probable efficacy of rehabilitative measures, however, is readily derivable from the elements that determine the standard sentence. Thus, the power to depart from the grid to respond to the judge's estimate of the defendant's dangerousness or her amenability to treatment is crucial to the success of a guidelines system.

Neither the federal nor the Washington guidelines grant the judge the power to opt out of the guidelines; each limits, more or less rigorously, whether and to what extent a judge may depart from the standard sentence.[85] Both federal and Washington appellate courts have assiduously monitored the use of the departure power, deriving limitations on that power from the nature and structure of guidelines sentencing. Because of its importance to the coherence and justice of sentencing, Washington case-law limitations on the departure power will be examined in some detail.

The governing statute in Washington provides three grounds for reversing an exceptional sentence: (1) that the reasons given by the trial court do not "justify a sentence outside the standard range for that offense"; (2) that those reasons, although sufficient, are not supported by the record; or (3) that although the reasons are sufficient and adequately supported, "the sentence imposed was clearly excessive or clearly too lenient."[86] Each of these bases is subject to a different standard of review. The sufficiency of the reasons on which the departure was based is "determined" as a matter of law by the reviewing court.[87] The adequacy of the record is judged by a "clearly erroneous" standard.[88] Whether

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85 U.S.S.G. § 5K; WASH. REV. CODE ANN. § 9.94A.120(2) (West Supp. 1992).

86 WASH. REV. CODE ANN. § 9.94A.210(4) (West Supp. 1992).

87 State v. Nordby, 723 P.2d 1117, 1119 (Wash. 1986).

88 *Id.*; *see also* State v. Allert, 815 P.2d 752, 756 (Wash. 1991). The Washington guidelines provide that the record on which this judgment is

the sentence is excessively harsh or lenient is reviewed under a "reasonable judge" standard.[89]

Using their power to substitute judgment when they disagree with the reasons relied upon by the trial courts, the Washington appellate courts have identified a variety of prohibited grounds for an exceptional sentence. In general, the sentencing court may not impose an exceptional sentence for reasons that are already calculated into the standard sentence.[90] The defendant's criminal history, for example, cannot justify an exceptional sentence since it is used to compute the standard range.[91] Similarly, circumstances of the crime, such as cruelty, infliction of injury, or the use of a weapon, are not permissible bases for an exceptional sentence if they figure into the definition of the offense.[92]

Moreover, if the aggravating factor could have been charged as a separate offense, it may not be the basis for an exceptional sentence.[93] Nor may the judge impose an exceptional sentence on

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made may include "no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing . . . . Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point." WASH. REV. CODE ANN. § 9.94A.370(2); *see, e.g.*, State v. Young, 754 P.2d 147, 149 (Wash. Ct. App. 1988). The statute does not limit "the sources . . . of information to which a sentencing court may look . . . ." State v. Handley, 796 P.2d 1266, 1270 (Wash. 1990). However, the sentencing court may not consider evidence of uncharged criminal acts that "the prosecutor could not, or chose not to, prove." State v. Harp, 717 P.2d 282, 284 (Wash. Ct. App. 1986).

89 State v. Oxborrow, 723 P.2d 1123 (Wash. 1986) (upholding exceptional sentence fifteen times maximum standard range, and rejecting "Minnesota rule" limiting exceptional sentences to twice the standard maximum); State v. Pascal, 736 P.2d 1065 (Wash. 1987) (upholding exceptional sentence one-tenth the minimum of standard range).

90 State v. Rogers, 770 P.2d 180, 181 (Wash. 1989).

91 State v. Nordby, 723 P.2d 1117, 1119 n.4 (Wash. 1986).

92 *See* State v. Vandervlught, 784 P.2d 546, 548 (Wash. Ct. App. 1990) (shooting victim in back does not constitute exceptional cruelty because encompassed in first degree assault conviction); State v. Armstrong, 723 P.2d 1111, 1114 (Wash. 1986) (first degree burns within definition of second degree assault); State v. Pittman, 772 P.2d 516, 519 (Wash. Ct. App. 1989) (use of firearm does not justify exceptional sentence when offense qualifies for automatic enhancement under § 9.94A.310(3) of the guidelines).

93 *See* State v. Ratliff, 731 P.2d 1114, 1115-16 (Wash. Ct. App. 1987) (post-trial threats to witnesses constitute basis for new charges, not exceptional sentence); State v. McAlpin, 740 P.2d 824, 828 (Wash. 1987)

the ground that the standard range is, in general, too harsh or too lenient.[94] In sum, the Washington courts have appropriately insisted that sentencing courts defer to the commission's judgment as to the appropriate standard range and have barred "double-counting" of any of the factors from which that range is calculated.

A review of the appellate cases suggests that exceptional sentences are commonly approved when they are based on crime-related facts about the offense. Deliberate cruelty, torture, multiple wounds, and exposure to the AIDS virus have been judged to justify an increased sentence,[95] as have the vulnerability of the victim, abuse of trust, sophisticated planning, and violation of privacy in the commission of the crime.[96] The magnitude of an eco-

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(arrests and confessions not resulting in convictions may not be considered).

94 *See* State v. Pascal, 736 P.2d 1065, 1072 (Wash. 1987) (sentencing judge's view that ranges are unwise does not justify exceptional sentence); State v. DeMara, 812 P.2d 898, 901 (Wash. Ct. App. 1991) (assertion that standard sentence is "clearly too lenient" not an adequate basis for exceptional sentence); State v. Fisher, 739 P.2d 683, 688 n.6 (Wash. 1987) (sentence may not be increased in anticipation of good-time reduction).

95 *See* State v. Holyoak, 745 P.2d 515, 517 (Wash. Ct. App. 1987) (deliberate cruelty requires "gratuitous violence . . . significantly more serious or egregious than typical"); *see also* State v. Farmer, 805 P.2d 200, 209 (Wash. 1991) (exposing victims to AIDS virus constituted deliberate cruelty and justified exceptional sentence); State v. Hawkins, 769 P.2d 856, 860 (Wash. Ct. App. 1989) (defendant's "gratuitous violence manifested cruelty 'of a kind not usually associated with the offense in question' " (quoting State v. Payne, 726 P.2d 997, 999 (Wash. Ct. App. 1986)).

96 Courts typically deem victims over seventy or under six years of age as "vulnerable victims." *See* State v. Stuhr, 794 P.2d 1297, 1300 (Wash. Ct. App. 1990) (eighty year old victim); State v. Davis, 734 P.2d 500 (Wash. Ct. App. 1987) (seventy-four year old victim); *see also* State v. Stevens, 794 P.2d 38, 50-51 (Wash. Ct. App. 1990) (victim under six years of age); State v. Tunnell, 753 P.2d 543, 547-48 (Wash. Ct. App. 1988) (victims were six years of age and under). For examples of abuses of trust, see State v. Handley, 796 P.2d 1266, 1271-72 (Wash. 1990) (housepainters used position to facilitate burglary-murder of employer); *Stevens*, 794 P.2d at 49-50 (baby-sitter abused relationship of trust); State v. Bissell, 767 P.2d 1388, 1389 (Wash. Ct. App. 1989) (fired employee used knowledge of security system to accomplish burglary); State v. Shephard, 766 P.2d 457 (Wash. Ct. App. 1988) (uncle of victim abused family trust relationship). "Invasion of a victim's zone of privacy" is not listed as a statutory aggravating factor, but was first upheld as a justification for an exceptional sentence in State v. Ratliff, 731 P.2d 1114, 1115-16 (Wash. Ct. App. 1987) (slashing tires at witness's home violated her zone of privacy and created emotional distress

nomic or controlled substance crime, and the infliction of multiple harms in homicide, assault, and rape crimes are typical grounds for a sentence beyond the standard range.[97] Exceptionally lenient sentences have been approved when based on duress,[98] inability to appreciate wrongfulness that is not the result of drug or alcohol use,[99] and inducement by others of a participant not otherwise predisposed.[100]

Data collected by the Washington Sentencing Guidelines Com-

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exceptional for offense of intimidation of witness). The doctrine has since been applied to rape cases that occurred in the victim's home. *See, eg.*, State v. Hicks, 812 P.2d 893, 896 (Wash. Ct. App. 1991); State v. Falling, 747 P.2d 1119, 1124 (Wash. Ct. App. 1988). *But cf.* State v. Hernandez, 740 P.2d 374, 377 (Wash. Ct. App. 1987) (abducting rape victim at her front door not a substantial and compelling reason for exceptional sentence).

97 *See* WASH. REV. CODE ANN. § 9.94A.390(2)(c)(ii). This provision aggravates an economic offense when the "loss [is] substantially greater than typical . . . ." *See also* State v. Oxborrow, 723 P.2d 1123, 1128 (Wash. 1986) (upholding exceptional sentence for theft of over $1,000,000). A parallel provision applies to drug-related offenses for attempted or actual sale or transfer of controlled substances in quantities significantly larger than for personal use. WASH. REV. CODE ANN. § 9.94A.390(2)(d)(ii) (West Supp. 1991); *see* State v. Gunther, 727 P.2d 258, 261 (Wash. Ct. App. 1986) (involving one-half pound of cocaine); State v. Stalker, 707 P.2d 1371, 1373 (Wash. Ct. App. 1985) (involving 43 pounds of marijuana).

Multiple harms, listed as an aggravating factor for economic crimes, has been analogized to other offenses. *See* State v. Armstrong, 723 P.2d 1111, 1113-14 (Wash. 1986) (multiple injuries in assault upheld as justification for imposing exceptional sentence); State v. Butler, 766 P.2d 505, 511-12 (Wash. Ct. App. 1989) (several kicks to head of child constituted aggravated assault). This doctrine has appeared frequently in rape cases, often sharing supporting facts with a finding of deliberate cruelty. *See, e.g.*, State v. Hicks, 812 P.2d 893, 895-96 (Wash. Ct. App. 1991) (multiple sexual attacks); State v. Hernandez, 740 P.2d 374, 377 (Wash. Ct. App. 1987) (abduction, physical blows, threats with a gun over two hours "are not circumstances contemplated within the definition of first degree rape"); State v. Dennis, 728 P.2d 1075, 1077 (Wash. Ct. App. 1986) (multiple penetrations by two offenders constituted deliberate cruelty).

98 *See* State v. Pascal, 736 P.2d 1065, 1071-72 (Wash. 1987) (unsuccessful "battered woman" defense may support exceptional sentence based on victim's provocation and defendant's duress and diminished capacity). *But see* State v. Rogers, 770 P.2d 180, 182 (Wash. 1989) (duress must arise from external source and "cannot be established by evidence of internal emotional and psychological stress").

99 *See Pascal*, 736 P.2d at 1071-72.

100 *See* State v. Nelson, 740 P.2d 835, 839-40 (Wash. 1987) (no predisposition to commit crime where defendant had no planning role in robberies and no prior record with police).

mission, however, establish that the majority of exceptional sentences, both enhanced and diminished, are based on facts about the offender, not the offense. Of the ten reasons most frequently given by sentencing judges for imposing a sentence below the standard range, seven refer to the defendant's characteristics, two are ambiguous, and only one is crime-related.[101] Judges' reasons for aggravated sentences tend to be more crime-related (six of the ten most frequently given reasons), but the most common ground, that the "[d]efendant is a threat to the community," rests on an assessment of the offender, not simply the current offense.[102]

Although crime-related facts enlarge the sentencing judge's perspective on the defendant, the resulting picture is only a snapshot of one episode on one day of the defendant's life. A conscientious judge urged by the prosecution or defense to consider an exceptional sentence will want to know more. Chief among the judge's concerns will be whether this defendant poses an intolerable danger to the community and, if not, whether she is amenable to rehabilitative treatment available in the community. Thus, judges have most often rested their decision to impose an exceptional sentence on the bases of dangerousness and rehabilitation.[103] However, recent decisions by the Washington Supreme Court, discussed below, have barred or drastically limited exceptional sentences aimed at reforming or incapacitating an offender.

1. Rehabilitation

In *State v. Estrella*,[104] the defendant was arrested when he broke into a farm supply store and stole cash and cigarettes. Because the defendant had a twenty year history of burglaries and a maximum criminal history score, the prosecutor recommended the maximum sentence within the standard range—fifty-seven months. The defense counsel argued that the defendant's history of incarceration showed the futility of prison and that what his client "needed" was a job, together with some sort of community supervision or work-release program. During a continuance, the defense counsel in fact arranged for the defendant's placement in

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101 WASHINGTON SENTENCING GUIDELINES COMM'N, A STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 1990, at 33 (1991).

102 *Id.* at 35.

103 *Id.* at 32-36.

104 798 P.2d 289 (Wash. 1990).

a program designed to aid offenders in making "a successful and permanent transition from prison to the community," and enlisted a local businessman to help the defendant find a job. Finding that the defendant had never been involved in any program to assist him in finding employment and "appear[ed] to be a good risk not to reoffend," the trial judge concluded that the defendant "should be afforded an opportunity at gradual release and reintegration into society."[105] Accordingly, the judge imposed an exceptional sentence of one year in jail, followed by one year of work release if the defendant had a job and two years of community supervision.

The Washington Supreme Court's unanimous reversal casts serious doubt on whether rehabilitation can ever be a sufficient basis for an exceptional sentence. The supreme court reversed the trial court's decision, characterizing it as a "legal conclusion" that was irrelevant to whether the exceptional sentence was "justified."[106] Concluding that "the SRA has a far lesser commitment to rehabilitation than did the previous indeterminate sentencing system" and that its "paramount purpose" is punishment,[107] the court conceded that rehabilitative conditions could be imposed as part of an exceptional sentence, but "only if the reasons for doing so are substantial and compelling."[108] Wittingly or otherwise, the court applied this standard in a way that makes it virtually impossible to "justify" a rehabilitative sentence, holding that "an exceptional sentence is appropriate *only when the circumstances of the crime distinguish it from other crimes of the same statutory category*."[109] Since neither party contended "that the circumstances of the defendant's burglary distinguish[ed] it in any way from other second degree burglaries," the court reversed and remanded for resentencing within the standard range.[110]

Regardless of one's view of the place of rehabilitation in a sentencing scheme, the *Estrella* opinion leaves much to be desired. The authority on which it rested its view that rehabilitation is a

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105 *Id.* at 290.

106 *Id.* at 292.

107 *Id.*

108 *Id.* at 293; *see also* WASH. REV. CODE ANN. § 9.94A.120(2) (West Supp. 1992) (stating that court may impose sentence outside offense's standard range if it finds "there are substantial and compelling reasons justifying an exceptional sentence").

109 *Estrella*, 798 P.2d at 293 (emphasis added).

110 *Id.*

"far lesser commitment" of the SRA[111] does not support that proposition.[112] Moreover, the opinion provides no basis for ignoring the Act's stated purpose to "[o]ffer the offender an opportunity to improve him or herself."[113] The opinion's most eggregious omission, however, is the absence of any statutory or analytic rationale for the court's ruling that offender-related circumstances may never be the basis for an exceptional sentence.

Because facts about the offense are likely to aggravate the sentence while facts about the offender are likely to mitigate the sentence, it might have appeared that *Estrella* was designed to set the stage for the court's endorsement of incapacitative exceptional sentences based on "future dangerousness." However, the *Barnes* decision, decided one year later, precluded even this possible use of exceptional sentencing, as discussed below.

2. Incapacitation

In *State v. Barnes*,[114] the Washington Supreme Court reviewed three consolidated cases in which the sentencing judges had imposed exceptionally long prison terms based in part on the defendants' "future dangerousness." The court had previously held in *State v. Pryor*[115] that a sex offender could be sentenced to a prison term beyond the standard range with proof of a history of similar acts and lack of amenability to treatment based on an evaluation by a mental health professional.[116] In *Barnes*, the court held that "neither prong of the *Pryor* test is sufficient to justify an exceptional sentence in nonsexual offense cases."[117]

Each of the cases before the court in *Barnes* involved a homicidal assault with a deadly weapon. Defendant Worl was convicted of attempted second degree murder and malicious harassment based on a racially motivated knife attack. The trial court

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111 *Id.* § 2.5(c), at 292; *see also id.* at n.15 (citing BOERNER, *supra* note 37, § 2.5(c) at 2-35-36; WASHINGTON SENTENCING GUIDELINES COMM'N, SENTENCING GUIDELINES IMPLEMENTATION MANUAL I-34 to I-41 (1988); DAVID L. FALLEN, SENTENCING PRACTICES UNDER THE SENTENCING REFORM ACT 30-43 (1987)).

112 *See infra* notes 126-30 and accompanying text (analyzing authorities cited in *Estrella*).

113 WASH. REV. CODE ANN. § 9.94A.010(5).

114 818 P.2d 1088 (Wash. 1991).

115 799 P.2d 244 (Wash. 1990).

116 *Id.* at 247-50.

117 818 P.2d at 1090.

imposed an exceptional sentence, citing the multiple injuries inflicted, the defendant's "deliberate cruelty," and his "future dangerousness." The latter conclusion came from a defense expert's testimony on cross examination that the defendant was "manipulative and untrustworthy, with an antisocial personality."[118]

Defendant Barnes was convicted of first degree murder and first degree assault when he killed his wife by stabbing her ten times in the back as he held her down.[119] The trial court imposed an exceptional sentence because the killing was committed in front of the victim's young children and because the defendant's "complete lack of remorse, willingness to perjure himself, and a general obsessive personality . . . make him extremely dangerous to any family members alive upon his release . . . ."[120]

Defendant Smith pleaded guilty to second degree assault for the sniper shooting of a passing motorist. The trial court imposed an exceptional sentence based on the defendant's history of prior violence not reflected in his offender score and because "the defendant poses a high risk of reoffending and presents a danger to the public."[121]

The supreme court held that the ingredients for an exceptional sentence recognized in sex offense cases—criminal history and unamenability to treatment—are inapplicable to nonsexual offense cases. The court reasoned that criminal history is already taken into account in computing the offender score and that a history of general criminality (as opposed to sexually motivated crimes) provided no basis for targeted treatment.[122] Interpreting the SRA as having "punishment as its primary purpose,"[123] and concerned that incapacitative sentences would subvert the principle of proportionality and grant too much discretion to the sentencing judge, the court concluded that "if future dangerousness is to be considered an aggravating factor in determining the sentence for nonsexual offense cases, it is the Legislature's province to make such a decision."[124]

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118 State v. Worl, 794 P.2d 31, 37 (Wash. Ct. App. 1990).

119 State v. Barnes, 794 P.2d 52, 53 (Wash. Ct. App. 1990).

120 *Id.* at 56-57.

121 State v. Smith, 794 P.2d 541, 543-44 (Wash. Ct. App. 1990).

122 State v. Barnes, 818 P.2d 1088, 1090 (Wash. 1991).

123 *Id.* at 1093.

124 *Id.*

3. The Future of Exceptional Sentencing

Are there larger lessons to be learned from the Washington Supreme Court's rejection, with narrow exceptions, of rehabilitation and future dangerousness as legitimate bases for exceptional sentences? The SRA proclaims that its purpose is "accountability"; the sentencing scheme is designed not only to ensure that punishment is "proportionate," "just," and "commensurate," but also to "[p]rotect the public" and "[o]ffer the offender an opportunity to improve him or herself."[125] Why, then, has punishment been crowned the primary purpose of guidelines sentencing by the Washington Supreme Court? Let me suggest a few answers to these questions, in declining order of certitude.

First, I am quite certain that the court's position is not simply an inevitable, or even a fair, interpretation of the legislature's intent as expressed in the SRA. The low priority assigned to rehabilitation ignores the express terms of the Act, and is not supported by the authorities cited in *State v. Estrella*.[126] It is true, as Professor Boerner concludes, that "the Act carefully and emphatically denies the authority to require participation in rehabilitative programs."[127] It does not follow, however, that a rehabilitative sentence cannot be crafted in conformity with this stricture by using, as did the sentencing judge in *Estrella*, a combination of confinement, work-release, and community supervision. The fact that the Act contemplates rehabilitation for first-time and sex offenders is not persuasive evidence that its drafters intended that rehabilitation be forbidden to all other offenders.[128] The court's repeated assertion that the "paramount purpose of the SRA is punishment" rests on even weaker doctrinal support. It was derived from dictum in a prior case,[129] and from the flawed conclusion that because "[t]he first three [of six] . . . purposes [of the SRA] articulate principles of punishment"[130] the Act's other

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[125] WASH. REV. CODE ANN. § 9.94A.010.

[126] 798 P.2d 289, 292 n.15 (Wash. 1990); *see supra* notes 104-13 and accompanying text (discussing *Estrella* opinion).

[127] BOERNER, *supra* note 37, § 2.5(c).

[128] The *Estrella* court suggests the contrary by citing the Washington Sentencing Commission's descriptions of the first-time and sex offender options. *See* 798 P.2d at 292 n.15.

[129] *See* State v. Rice, 655 P.2d 1145, 1150-52 (Wash. 1982) (construing Juvenile Justice Act of 1977 (codified as amended at WASH. REV. CODE ANN. §§ 13.40.010-.450 (West Supp. 1992))).

[130] *Estrella*, 798 P.2d at 292.

purposes may be conveniently ignored.

On less certain ground, I believe that the Washington Supreme Court's strained interpretation of the Act is a product of what Professor Alschuler has called "the move to a harm-based penology."[131] This approach, he asserts, "has led to the substitution of crime tariffs for the consideration of situational and offender characteristics . . . . The focus has been on harms, not people."[132] Citing similarly crabbed interpretations of federal[133] and state[134] guidelines sentencing statutes, Professor Alschuler concludes that "[s]entencing commissions can quantify harms more easily than they can quantify circumstances. Commissions count the stolen dollars, weigh the drugs, and forget about more important things. . . . The reasons for a harm-based system are more linguistic than penological. The medium has become the message."[135] What remains to be explained is why courts, which have the responsibility to promote *all* of the goals of the statute, including those that may entail exceptional sentences based on personal characteristics and circumstances that are not easily quantified, have instead mimicked the grid-locked mindset of the commission.

Perhaps the reason for the judiciary's eagerness to embrace the simple world of punishment stems from the judges' knowledge that the rehabilitation of an offender is more a hope than a prediction and that future dangerousness is difficult if not impossible to predict. The efforts of courts to defy those odds under the predecessor system led, in the view of the Act's most prominent analyst, "to a groundswell of dissatisfaction."[136] Thus, the courts may have been tempted to let the commission take its turn at solving the intractable problems of reducing crime and protecting the public. Such an attitude may have influenced Justice Guy's statement in *Barnes* that "[i]t would be a disservice for this court to impose upon trial courts a duty of evaluating whether a convicted felon will be dangerous in the future *without an adequate foundation in our sentencing statutes for making such determinations* . . . ."[137]

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131 Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 908 (1991).

132 *Id.* at 908-09.

133 *Id.* at 910-12.

134 *Id.* at 913-14.

135 *Id.* at 915.

136 BOERNER, *supra* note 37, at 1-1.

137 818 P.2d at 1094 (concurring opinion) (emphasis added).

CONCLUSION

Despite variations in process and result between federal and Washington guidelines sentencing, it is clear that the two schemes are far more alike than different. By narrowly focusing the sentencing inquiry on crime related circumstances, both systems exalt the process goals of determinacy, proportionality, and uniformity over the substantive goals of social defense and rehabilitation. Both federal and Washington State courts have extended the shadow of the sentencing grid over decisions left by the guidelines statutes to the discretion of the sentencing judge.[138]

By reducing most sentencing decisions to legislatively mandated calculations of harm, the judiciary's role in corrections has been dramatically subordinated. Stripped of their authority to affect most sentencing decisions, elected judges may understandably seek to avoid responsibility for the social and political consequences of guidelines sentencing by narrowly construing the vestige of discretionary power they retain. For it is plain that in the new order of guidelines sentencing, the legislature, the commissions, and the prosecutor are the dominant players. The power of the commissions to dictate the weight assigned to offenses and to offense and offender characteristics, combined with the prosecutor's "great discretion in determining which charges are to be filed against a defendant,"[139] leaves only a small role to be played by the sentencing judge—and much of that, as we have seen, the appellate courts have abjured.

The role of the legislatures, on the other hand, has been significantly enlarged. Under the predecessor systems, the legislatures' sentencing functions were limited to setting maximum and minimum prison terms and prescribing discrete enhancements for recidivist or, more recently, armed offenders. The structure of guidelines sentencing, however, not only thrusts the legislature into the process of designing a detailed sentencing calculus, it seems to invite and facilitate legislative "tweaking" of the sentencing system. Since 1986, the Washington Legislature has passed eleven bills amending the SRA. Almost all of these were in the direction of increasing the weight of offenses or prior con-

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[138] *See* Selya & Kipp, *supra* note 56; *cf.* State v. Rogers, 770 P.2d 180 (Wash. 1989).

[139] State v. Lewis, 797 P.2d 1141, 1143 (Wash. 1990).

victions, adding enhancements for crime-related circumstances, or eliminating lenient sentencing options.

Thus, one consequence of guidelines sentencing appears to have been to make the system far more responsive to prevailing—and apparently insatiable—public demands for a more punitive criminal justice system. When sentencing authority resided in an independently elected and decentralized judiciary, those views could find no forum. Under a guidelines structure, a politically sensitive legislature cannot escape responsibility for attempting, through the sentencing system, to respond to those demands.

Ultimately, guidelines sentencing will be judged by its effects on crime and public safety. The Washington experience thus far provides no basis for optimism. Figure 8[140] charts the Washington violent crime rate for males age 18-39 during 1980-90. Figure 9[141] shows incarceration rates in Washington during the same period for several categories of crimes. Unless the guidelines system is perceived as having an effect on crime as well as punishment, it will be swept away by the same public frustration that doomed its predecessor.

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[140] Source: OFFICE OF FIN. MGMT., FELONY SENTENCING 1971-1991, at 22 (1991).

[141] Source: OFFICE OF FIN. MGMT., FELONY SENTENCING 1971-1991, at 25 (1991).

Fig. 8. Violent crime rate per 1,000 males age 18-39 in Washington 1980-1990

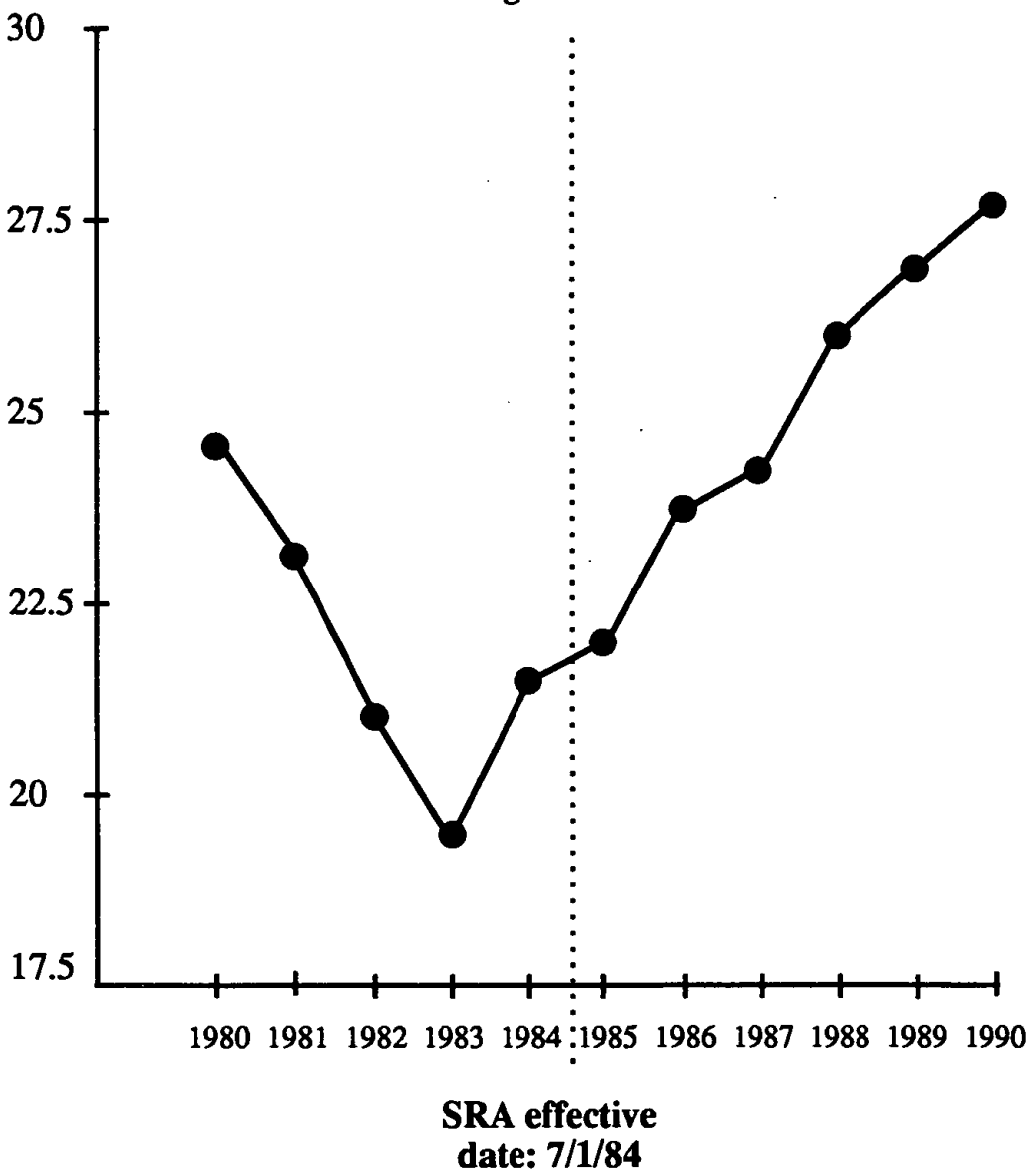

Fig. 9. Admissions to prison in Washington by type of crime 1980-1990