

# Discretion and Disparity under Sentencing Guidelines Revisited: The Interrelationship between Structured Sentencing Alternatives and Guideline Decision-making

Journal of Research in Crime and  
Delinquency  
1-31

© The Author(s) 2019

Article reuse guidelines:

[sagepub.com/journals-permissions](http://sagepub.com/journals-permissions)

DOI: 10.1177/0022427819874862

[journals.sagepub.com/home/jrc](http://journals.sagepub.com/home/jrc)



Noah Painter-Davis<sup>1</sup>  and Jeffery T. Ulmer<sup>2</sup>

## Abstract

*Objectives:* We argue that the reasons court actors conform to or depart from sentencing guideline recommendations likely vary depending on whether the decision involves an alternative sanction or incarceration and that these reasons may have consequences for ethnoracial disparities in the sentencing of defendants and how these disparities are understood. *Method:* We use recent (2012–2016) Pennsylvania sentencing data to examine (1) the relationship between defendant race/ethnicity and court actors' decisions to depart downward and upward from the guidelines and (2) whether such relationships vary depending on whether they involve

<sup>1</sup> Department of Sociology, The University of New Mexico, Albuquerque, NM, USA

<sup>2</sup> Department of Sociology and Criminology, The Pennsylvania State University, University Park, PA, USA

## Corresponding Author:

Noah Painter-Davis, Department of Sociology, The University of New Mexico, MSC05 3080, 1915 Roma NE Ste. 1103, Albuquerque, NM 87131, USA.

Email: [npf26@unm.edu](mailto:npf26@unm.edu)

an alternative sanction, namely intermediate punishments (IPs). *Results:* We find that the association of defendant race/ethnicity with decisions to conform to the guidelines or to depart is greatly impacted by whether the sentence involves an IP. Blacks and, to a lesser extent, Latinos experienced greater disadvantage in guideline decision-making, whether conformity or departures, when the sentence involved an IP. *Conclusions:* Results suggest that the integration of IP into guideline systems may have (1) mobilized ethnoracial disparities in sentencing, (2) focused the location of sentencing disparities to sentences involving IP, and (3) changed the applicability of common interpretations of guideline decisions and disparities in their imposition.

### **Keywords**

sentencing guidelines, sentencing, race/ethnicity, policy, criminal justice

Sentencing guidelines were a major policy intervention designed to increase uniformity in sentencing and reduce unwarranted disparities. To date, at least 20 states, the District of Columbia, and the federal system have implemented sentencing guidelines (Frase 2019). Sentencing guidelines structure judicial decision-making and restrict the possibility of disparity by providing sentencing recommendations based on offense severity and criminal history. An abundance of research has shown that while ethnoracial disparities have declined under sentencing guidelines (King and Light 2019), disparities remain (Frase 2013; Mitchell 2005; Spohn 2000; Ulmer 2012).

Scholarship has identified judicial departures *from* guidelines as a primary locus of remaining ethnoracial disparities in guideline systems (Albonetti 1997; Kramer and Steffensmeier 1993; Mustard 2001). Although judges must consider sentencing guidelines, they can depart from the guideline recommendation downward to impose a more lenient sentence or upward for added severity. This body of research has found that Blacks and Latinos tend to be disadvantaged at departure decisions, being less likely to receive downward departures to nonincarceration sentences (e.g., Kramer and Ulmer 1996; Moore and Miethe 1986; Ulmer 1997) or to shorter incarceration sentences (e.g., Johnson, Ulmer, and Kramer 2008; Kramer and Ulmer 1996, 2002; Ulmer 1997) and more likely to receive upward departures that result in longer sentence lengths than Whites.

Over the past three decades, sentencing guideline systems have increasingly adopted alternative sanctions, such as intermediate punishments (IPs), community-based sentences, and/or rehabilitative programs as diversions

from incarceration (Frase 2013; Tonry 1998). Depending on the guideline system, alternative sanctions can be imposed as a guideline-conforming sentence and/or as either a downward or upward departure from the guidelines. Few studies, however, have examined the interplay between alternative sanctions and departure decisions and the consequences for ethnoracial disparity and how it is understood (for exception, see Engen et al. 2003).

In the current study, we use recent Pennsylvania sentencing data (2012–2016) to examine how defendant race/ethnicity influences judicial decisions to conform to the guideline-recommended sentence or to depart and whether such relationships vary depending on if the decision involves an alternative sanction. Like several other states and the federal government, Pennsylvania incorporates sentencing alternatives through a “zones of discretion” approach, which allows judges to impose sentencing alternatives in certain zones of the guidelines either as guideline-conforming sentences in lieu of incarceration or as departures downward or upward from the guidelines (Tonry 1998).

The central premise of our study is that the use of alternative sanctions in guideline systems may affect the extent of ethnoracial disparities and their locus in both guideline-conforming and departure sentences. We argue that the reasons court actors conform to or depart from the guideline recommendation likely vary depending on whether the decision involves an alternative sanction or incarceration and that these reasons may have consequences for how we understand ethnoracial disparities in guideline decision-making. When court actors give an incarceration-based sentence that either conforms with or departs from guidelines, they are likely doing so to calibrate the sentence to be proportional and/or to address concerns regarding incapacitation and deterrence (Engen et al. 2003; Gainey, Steen, and Engen 2005; Kaiser and Spohn 2014; Savelsberg 1992). However, a sentence (guideline conforming or not) involving an alternative sanction almost inherently entails rehabilitative considerations. Ethnoracial minorities may be less likely to receive such rehabilitation-centered sentences because assessments of rehabilitative capacity often involve considerations of extra-guideline factors (e.g., employment history, social ties) that may penalize minorities (see Engen et al. 2003; Ulmer and Kramer 1996; also see Johnson and DiPietro 2012).

## **Guideline Sentencing and Alternative Sanctions**

Originally, the key goal of sentencing guideline systems was to increase uniformity in sentencing and decrease disparities by providing punishment

recommendations based on the offender's offense severity and criminal history. The emphasis on offense severity reflected retributive or "just deserts" goals of crafting proportional sentences, while the focus on prior record accounted for the utilitarian, crime-control goals of incapacitation and deterrence (Boerner and Lieb 2001; Kramer and Ulmer 2009). Guideline systems were, and several still are, incarceration centric: the majority focused on only felony offenders, incarceration was allowed as a guideline-conforming sentence in most guideline cells, and decisions often centered on whether to incarcerate and the length of incarceration (Boerner and Lieb 2001; Frase 2013; Kramer and Scirica 1986).

Although guidelines increase uniformity and reduce disparity, their early iterations were problematic: their heavy emphasis on incarceration was costly and often ineffective, particularly for nonviolent offenders (Boerner and Lieb 2001; Kramer and Ulmer 2009; Tonry 1998). In response, in the 1990s, guideline systems began incorporating alternative sanctions which use IPs, community-based sanctions, and/or rehabilitative programs, often as diversions from incarceration (Tonry 1998). Although some research indicates that alternative sanctions are cost-effective and reduce recidivism (see review in MacKenzie and Farrington 2015), they may increase extralegal disparities in sentencing (Engen et al. 2003; Johnson and DiPietro 2012).

### *Research on the Interplay between Guideline Decision-making and Alternative Sanctions*

Drawing on sentencing data for 1989 to 1992, Engen et al. (2003) examined the implications of sentencing alternatives for guideline decision-making and disparity. A key element of their study involved contrasting two different mechanisms for sentencing outside of the guideline recommendation. The first, discretionary departures, involved decisions to sentence defendants below or above the guideline-recommended sentence length but did not include alternative sanctions. The second involved sentencing alternatives which used IPs, community-based sanctions, and/or rehabilitative programs to divert legally eligible offenders from incarceration or to reduce sentence lengths. The authors found that ethnoracial disparities were both larger and more consistently observed for sentencing alternatives than for discretionary downward departures. For example, compared to their White counterparts, Black defendants had a statistically similar likelihood of receiving a discretionary downward departure but were significantly less

likely to receive alternative sanctions (also see Boerner and Lieb 2001; Gainey et al. 2005).

Boerner and Lieb (2001:128) argue that in Washington, alternative sanctions may increase the likelihood of disparities because they allow for a greater level of “unstructured and unreviewed discretion” than discretionary departures. The sentencing alternatives are “unstructured” because they are permissive, not presumptive, as “they authorize, but do not direct, judges to disregard otherwise applicable sentencing ranges if offenders meet specified criteria” (Tonry 1998:209) and “unreviewed” as the decision to use them is not subject to appeal or review (Boerner and Lieb 2001). More importantly, this discretion permits assessments of rehabilitative capacity which often entails considerations of nonlegal factors (e.g., employment history, social ties) that may penalize ethnoracial minorities (Engen et al. 2003; Johnson and DiPietro 2012).

These dynamics also help explain a second key finding of Engen and colleagues (2003): Although Black defendants were less likely than Whites to receive an alternative sanction below the guidelines, they were not more likely to receive an upward departure to a harsher sentence. The authors speculated that a key to explaining these differences may be the punishment goals guiding departure decisions. When deciding whether to depart upward, judges may give a greater consideration to proportionality and incapacitation. Here, legal criteria may matter more for sentencing decisions and extralegal criteria, like race/ethnicity, less. By contrast, because most involved a rehabilitative sentencing alternative, sentences that are below the guideline recommendation may involve a greater consideration of extralegal factors related to rehabilitative potential, considerations which may disadvantage ethnoracial minorities.

### *Importance of Additional Research on the Interplay between Alternative Sanctions and Guideline Decision-making*

There is a critical need for additional research which examines the interplay between alternative sanctions and guideline decision-making. First, addressing this issue touches upon the growing tension between balancing the goal of uniformity at sentencing with the goal of increasing sentencing effectiveness in reducing recidivism and fostering rehabilitation (Engen et al. 2003; Frase 2013; Kramer and Ulmer 2009). The use of alternative sanctions in guideline systems embodies this tension, as guidelines were designed to increase uniformity but can lead to ineffective sentences, while

alternative sanctions were designed to increase sentencing effectiveness but can result in disparity (Engen et al. 2003; Frase 2013; Tonry 1998).

Second, understanding how the structure of sentencing policy influences disparity is a central task of sentencing researchers (Engen et al. 2003). Research has shown that much ethn racial disparity arises via departures *from* the guidelines rather than as a result of differential sentencing *within* the guidelines. Engen and colleagues' (2003) study demonstrated that alternative sanctions are a more important driver of disparity than discretionary downward departures. In several guideline systems, alternative sanctions are available both as departures from the guidelines and as conforming sentences in lieu of incarceration. These dynamics may change the locus of disparities in guideline systems: Rather than resulting primarily as departures *from* the guidelines, disparity could also arise *within* the guidelines, connected to the choice between alternative sanctions and incarceration.

Third, there is a need to examine whether the integration of alternative sanctions into guideline systems changes the interpretation of departures and of ethn racial disparity in their imposition. Analyses of guideline departures have been fundamental for achieving a better understanding of sentencing because departures (a) communicate the punishment philosophies and focal concerns of court actors as contrasted with criminal justice policy makers (Kaiser and Spohn 2014; Kramer and Ulmer 2009), (b) are a site of disparity and shape how disparity is understood, and (c) reflect tensions between formal rationality and substantive rationality in court actor decision-making, a central issue in sentencing research (Engen et al. 2003; Ewing 1987; Savelsberg 1992; Ulmer and Kramer 1996). The presence of alternative sanctions in guideline systems, and the rehabilitative philosophies they often entail, may fundamentally alter conventional understandings of departures.

## **Sentencing Guidelines and IPs in Pennsylvania**

Pennsylvania's guidelines and the punishment goals they pursue have evolved dramatically over the past 35 years. The guidelines were originally designed to fulfill the punishment goal of proportionality, providing sentences that "fit" the severity of the offense and the criminal history of the offender (Cirillo 1986; Kramer and Scirica 1986; Kramer and Ulmer 2009). They heavily emphasized retribution, and to a lesser extent incapacitation and deterrence, through incarceration, and aside from probation, there were few, if any, alternative sanctions or treatment-based approaches. In 1994, Pennsylvania began incorporating IPs (henceforth "IPs") as sentencing

options into the guidelines. IPs are viewed as rehabilitative alternatives to retributive penalties that are designed both to protect the community by reducing recidivism and to address practical constraints such as limited prison and jail capacity. IPs integrate alternative sanctions such as drug treatment, electronic monitoring, community service, and probation into punishment regimens that serve as diversions from incarceration.<sup>1</sup> Although today the guidelines retain “a primary focus on retribution” (Pennsylvania Commission on Sentencing [PCS] 2012:9), the use of IPs has increasingly allowed for individualized sentences that pursue other goals such as victim restoration and offender treatment.

Pennsylvania incorporates alternative sanctions through a “zones of discretion” approach, as do several contemporary guideline systems (Tonry 1998). The guidelines have five different zones or levels which specify different types of sentences that are presumptively appropriate for offenders with similar criminal histories and current offenses (see Online Appendix A). Within certain zones of the guidelines, judges have the discretion to choose between different sentences, such as IP in lieu of incarceration (Tonry 1998). Any sentence that falls within the lower and upper bound of the guideline range is guideline conforming, while “sentences other than those authorized by the applicable zone are departures for which reasons must be given that are subject to review on appeal” (Tonry 1998:207).

There are two primary forms of IPs in Pennsylvania: restrictive intermediate punishments (RIP) and restorative sanctions (RS). RIP were developed as alternatives to incarceration that monitor offender’s compliance with programing, provide housing to the offender full- or part time, or limit the offender’s movement (PCS 2012). Examples of RIP include drug and alcohol treatment, house arrest, or combinations of sanctions (including probation) that provide surveillance and hold the offender accountable. For purposes of setting presumptive sentencing recommendations, the PCS has established a “rough equivalency between RIP programs and incarceration,” whereby one day of participation in the programming is considered equal to one day of total confinement (PCS 2012:161).

Pennsylvania has both a County Intermediate Punishment (CIP) program and a State Intermediate Punishment (SIP) program. Both involve an emphasis on rehabilitation and often entail treatment for substance use or abuse.<sup>2</sup> CIP is imposed by the county and can be given as a guideline-conforming sentence in lieu of incarceration for offenders in levels 2–4 of the guidelines or as an upward or downward departure (depending on the conditions and length of the CIP term).<sup>3</sup> Although CIP sentences do not involve institutional confinement, they are designed to be “equivalent” to

incarceration by ensuring sufficient surveillance and offender accountability. SIP is a step-down program for drug- or alcohol-dependent offenders involving a short term of incarceration and intensive treatment followed by community-based treatment. SIP can be given as a guideline-conforming sentence in exchange for a term in state prison for level 5 offenders or as an upward departure for offenders in the lower levels of the guidelines.

RS are less severe than RIP, as they are the “least restrictive, nonconfinement intermediate punishments” and often emphasize victim restoration (PCS 2012:12). RS often include a term of probation alone or coupled with community service programs, fines, mandatory restitution, outpatient treatment, and drug-testing programs. Although they do not always involve treatment, they have a “rehabilitative focus” (PCS 2012:171). RS are available as guideline-conforming sentences for level 1 and 2 offenders but can also be given as downward departures for more serious offenders.

### *Research on Disparity and Departures*

The bulk of research on departures in Pennsylvania (PA) took place before a “zones of discretion” approach was implemented. These guidelines provided rules on decisions to incarcerate and length of incarceration. Judges could depart to a nonincarceration sentence when incarceration was recommended (dispositional downward departures) or could impose shorter (downward durational departures) or longer sentence lengths (upward durational departures) than the guideline recommendation. Using data from the late 1980s and early 1990s, Kramer and Ulmer (1996) found that Black and Latino defendants were less likely than Whites to receive dispositional or durational downward departures and that Latinos, but not Blacks, were more likely to receive upward durational departures. Other research from PA has found that downward dispositional departures drive much of the Black–White disparity in incarceration (Kramer and Steffensmeier 1993). These patterns are largely replicated in other jurisdictions, with research from several guideline systems suggesting that disparity is driven primarily by departures from the guidelines “rather than differential sentencing within the guidelines” (Albonetti 1997; Mustard 2001:285).

Under the newer guidelines that feature zones of discretion, the court can choose between different sentence types (e.g., incarceration vs. IP) that are guideline conforming as long as they fall within the lower and upper bounds of the applicable guideline range; sentences below the lower bound are departures downward, whereas those above the upper bound are departures upward. A few studies have examined guideline departures under PA’s

newer “zones of discretion” guidelines. Johnson (2003; also Johnson 2005), for example, found that Blacks and Latinos are less likely than Whites to receive a downward departure and more likely to receive an upward departure. Later studies, such as Kramer and Ulmer (2002, 2009), found similar results. However, none of the studies under the later guidelines addressed the choice between IP and incarceration within the zones of discretion.

There is an important need to more closely examine the implications of the zones of discretion approach for ethnoracial disparity in guideline decision-making. In particular, it is critical to examine guideline decisions, including both conformity and departures, disaggregated by whether IP or incarceration is imposed. Studying guideline conformity and departures without considering sentence type may conceal important ethnoracial disparities in guideline decision-making. For example, a White defendant and Black defendant with the same presumptive sentence could receive very different guideline-conforming sentences; the White defendant may receive a treatment-based IP sentence, while the Black defendant receives a term of incarceration. These guideline-conforming disparities have a high likelihood of occurring because (1) zones of discretion approaches, including those in PA, rarely provide presumptive recommendations for choosing between alternative sanctions and incarceration (Tonry 1998) and (2) although PA does not allow social status and stability factors (e.g., educational attainment, current employment, employment history, and residential stability) to inform the guideline-recommended sentence, the “judge can use status and stability factors when appropriate to decide the specific sentence which should be imposed from the available ranges” (PCS 2012:117). These later considerations, which are often used as markers of rehabilitative potential, can disadvantage racial/ethnic minorities.

### *Focal Concerns, Guideline Decision-making, and Departures*

The focal concerns perspective (FCP) of court actor decision-making (Steffensmeier, Ulmer, and Kramer 1998) has become the primary lens for examining sentencing decisions and disparities. FCP contends that court actors are guided by three key concerns in reaching sentencing decisions (see review in Steffensmeier and Painter-Davis 2018; Steffensmeier, Painter-Davis, and Ulmer 2017). *Blameworthiness* is associated with assessments of a defendant’s culpability, *protection of the community* entails assessments of offender’s dangerousness and recidivism risk, and *practical constraints and consequences* include concerns about the costs and consequences of the decision. These concerns are primarily influenced

by the offender's present offense and criminal history. However, because sentencing decisions are often characterized by uncertainty and complexity, stereotypes linked to defendant's race/ethnicity may shape the focal concerns and sentencing. Extralegal disparities may arise because ethnoracial minorities may be viewed as more blameworthy and as greater risks to the community.

Scholars have argued that sentencing guidelines reflect formal definitions of the focal concerns of policy makers (Kramer and Ulmer 2002, 2009). The guidelines' emphasis on the current offense and, to a lesser extent criminal history, reflects codified rankings of *blameworthiness* and is grounded in the goal of proportionality that punishment should correspond to the "harm" the crime caused. The emphasis on criminal history also reflects concerns with *protecting the community* and serves the crime-control goals of incapacitation and deterrence.

As noted above, departures from the guidelines have been interpreted as disagreements between court actors and policy makers regarding the focal concerns in a particular case (Kaiser and Spohn 2014; Kramer and Ulmer 2002, 2009). These disagreements can be used to better understand the decision-making and focal concerns of court actors. For example, departures are often interpreted as a sign that the sentence is too harsh (downward) or too lenient (upward) relative to the blame and risk posed by the defendant (Ulmer 2014). Departure decisions have also been used to glean insights on the possible sources of ethnoracial disparity. Disparities in departure decisions are often interpreted as suggesting that Blacks and Latinos are viewed as more blameworthy and deserving of harsher punishments and as more dangerous and in need of incarceration sentences to deter and incapacitate (e.g., Johnson 2003).

*Offender needs and rehabilitation.* Rehabilitative potential has also been viewed as a concern that affects guideline decision-making (Engen et al. 2003; Kramer and Ulmer 1996; Ulmer and Kramer 1996). When sentencing, court actors assess whether the "offender is likely to be a good or bad risk for rehabilitation" (Kramer and Ulmer, 1996:98). However, in their original incarnations, guideline systems rarely had explicitly rehabilitative sentencing options like IP. As a result, judges often invested in offender's rehabilitative potential by departing downward not necessarily to impose a rehabilitation-centered sentence but to avoid any debilitating effects of incarceration (Kramer and Ulmer 1996). Rehabilitation, however, was never explicitly incorporated into FCP and was not fully developed as a focal concern.

Offender needs and rehabilitation emphasize identifying offender needs (risk factors for crime that can be changed) and the provision of opportunities capable of changing these needs (Andrews and Bonta 2003; PCS 2012).<sup>4</sup> For at least three reasons, it is essential to more fully incorporate a consideration of offender needs and rehabilitation into theorizing guideline decisions. First, the increased availability of rehabilitation-oriented alternative sanctions in guideline systems reflects a growing policy prioritization of offender needs and rehabilitation. Second, offender needs and rehabilitation are driven by different formally recognized sanctioning goals than the typical focal concerns. Blameworthiness is tied to the legal principle of just deserts and proportionality, often realized by imposing the right amount of “punishment” (von Hirsch 1976). Protection of the community is grounded in the punishment goals of incapacitation and deterrence, objectives traditionally achieved via incarceration (Nagel 1990). The focal concern of offender needs and rehabilitation, by contrast, entails an emphasis on treating pathology, teaching skills, an ethic of support, and a goal of reintegration. These goals are important to consider as they shape predictions regarding guideline decision-making.

Third, understanding the objectives of court actors at sentencing is important for predicting disparity in guideline decision-making because court actor objectives shape the sentencing criteria they consider (Engen et al. 2003; Hogarth 1971). Legal factors are likely to matter more and extralegal factors less when proportionality is the guiding objective. By contrast, extralegal factors may matter more and legal factors less when rehabilitation is the goal. Compared to the typical focal concerns, assessments of offender needs and rehabilitation are likely shaped to a larger extent by nonlegal factors as effective rehabilitative sentences require court actors to individualize sentences to the defendant’s unique needs and, thus, often involve considerations of extralegal status and stability factors (e.g., socioeconomic status, employment history, available social support, and willingness to participate).<sup>5</sup> These considerations may disadvantage racial/ethnic minorities (Engen et al. 2003; Gainey et al. 2005; Johnson and DiPietro 2012; Wood and May 2003).

Assessments of offender needs and rehabilitation may also involve implicit biases that disadvantage racial/ethnic minorities at sentencing. Research suggests that court actors often view Black and Latino offenders as having internal deficits, such as being threatening, prone to violence, and criminal in their lifestyles (e.g., Bridges and Steen 1998; Steffensmeier et al. 1998). These stereotypes may heighten attributions of racial/ethnic minorities as blameworthy and risks to the community and may negatively

shape assessments of rehabilitative capacity. By contrast, criminal behavior of Whites may be neutralized as driven more by external conditions; thus, Whites may be viewed as more salvageable, worthy of sympathy, and amenable to rehabilitation (Spohn and Brennan 2011).

*Hypotheses.* Based on the above discussion, we test the following predictions. Overall, we argue that the extent of ethnoracial disparity in guideline departures will be conditioned by the choice between IP and incarceration. First, the extent of disparities in downward departures will depend on whether an IP sentence is imposed. Compared to White defendants, Black and Latino defendants will be less likely to receive a downward departure overall (Hypothesis 1A), but these disparities will be greater for downward departures to IP than for downward departures to incarceration (Hypothesis 1B). Second, the degree of ethnoracial disparities in upward departures will depend on whether an IP sentence is imposed. Compared to White defendants, Black and Latino defendants are more likely to receive an upward departure overall (Hypothesis 2A). However, although they will be more likely to receive an upward departure to a lengthier incarceration sentence (Hypothesis 2B), they will be less likely to receive an upward departure to IP (Hypothesis 2C). Third, Black and Latino defendants will be disadvantaged in receiving IP sentences within the guideline-conforming range. Among guideline-conforming sentences, Blacks and Latinos will be less likely than Whites to receive an IP sentence (Hypothesis 3A).

We make somewhat different predictions regarding the influence of defendant race/ethnicity on downward departures versus those upward because the reasons for these decisions are likely qualitatively different (also see Engen et al. 2003; Kramer and Ulmer 1996). Because downward departures reflect greater leniency, regardless of the sentence they entail, we predict that racial/ethnic minorities will be disadvantaged for all downward departure decisions. Assessments of blame, risk, and amenability to rehabilitation will disadvantage Blacks and Latinos across the spectrum of downward departure decisions, but particularly for decisions involving IP. By contrast, we predict that Blacks will only be more likely to receive an upward departure for sentences involving incarceration and not for sentences involving IP. We make this prediction because although upward departures generally reflect increased severity, in some cases, they are used to impose rehabilitative IP sentences. Considerations of rehabilitative potential will make Blacks and Latinos less likely to receive these rehabilitation-oriented upward departures.

## Data and Method

To assess these hypotheses, we analyze guideline decisions in Pennsylvania for 2012 to 2016 using data from the Pennsylvania Commission on Sentencing. Covering felony and misdemeanor convictions, these data offer rich information on sentencing. We limit cases to the most serious offense per judicial proceeding and to non-driving under the influence and nontraffic offenses.

### Variables

*Dependent variable.* Our primary analysis uses two separate sets of dependent variables. The first focuses on departures from the standard guideline-conforming range. Downward departures are measured as sentences that fall below the lower bound of the standard guideline range, while upward departures are measured as any sentence that falls above the upper bound of the standard guideline range. Standard sentences are measured as any sentence that falls between the lower and upper bound of the standard guideline range.<sup>6</sup> This measurement is consistent with prior research which has examined departure decisions under PA's "zones of discretion" guidelines (Johnson 2003, 2005).<sup>7</sup>

Our second set of dependent variables disaggregates conforming and departure decisions by the type of sentence imposed. We distinguish between incarceration-based sentences (i.e., jail or prison) versus sentencing alternatives, including RIP and RS. As detailed earlier, RIP include sentences to CIP or SIP, while RS include a term of probation alone or coupled with one or more of the following: community service programs, fines, mandatory restitution, outpatient treatment, and drug-testing programs. In the analysis of downward departures, for example, we examine the following outcomes: downward departure to a shorter incarceration sentence, downward departure to RIP, downward departure to RS, standard sentence of incarceration (reference), standard sentence of RIP, upward departure to incarceration, and upward departure to RIP.

We disaggregate departures decisions by type of sentences for three reasons. First, this operationalization best captures the dynamics judges face in guideline systems featuring a "zones of discretion approach": they decide whether to depart or to conform and the type of sentence imposed. Second, this measurement allows us to answer our key questions regarding the interplay between IP and guideline decision-making. For example, is disparity primarily a function of departures *from* the guidelines and/or have

IP that are guideline conforming introduced disparity *within* the guidelines? Third, comparing guideline decisions disaggregated by sentence type to overall guideline decisions (our first dependent variable) allows us to examine whether previous approaches (Johnson 2003, 2005) to examining guideline decision-making in zones of discretion systems may have masked ethnorracial disparity. We use the standard sentence of incarceration as the reference category because it allows us to examine how other guideline options are used in relation to the guideline-recommended incarceration sentence.

Following previous research (Johnson 2003; also see Kramer and Ulmer 1996), we limit our analyses of downward departures to cases that are eligible for downward departures. Departures below the guidelines are not possible in levels 1 or 2 of the guidelines where the lower bound of the guideline range recommends an RS. All cases were included for the upward departure analysis because an upward departure is possible for any case. We use multinomial logistic regression to analyze our dependent variables and cluster standard errors by judicial districts.

**Independent Variables.** Race and ethnicity are measured using dummy variables for Whites (reference), Blacks, and Latinos. We include as Latino those defendants who are identified as “Hispanic” in the PCS database and those whose surnames the U.S. Census Bureau classifies as “Heavily Hispanic” (Word and Perkins 1996). Gender is measured using a dummy variable with female defendants as the reference category. We control for defendant age using both a linear age variable and age measured with a quadratic term to account for curvilinearity (Steffensmeier, Kramer, and Ulmer 1995).

In terms of legally relevant variables, we include prior record score to account for the defendant’s criminal history and dummy variables for number of current convictions (multiple vs. “a single conviction” as *reference*) and type of offense (violent, property, drug, and “other” as *reference*). We include several measures to account for guideline structure. We control for the presumptive sentence, which is the guideline-recommended incarceration sentence in months based on offense severity and the offender’s criminal history. We also include dummy variables for whether the offender was eligible for RIP (not eligible as *reference*) and a mandatory sentence (not eligible as *reference*) based upon their criminal history and current offense.<sup>8</sup> Case processing controls include mode of conviction (guilty plea, “missing,” and trial as *reference*) and fixed effects for judicial districts to

**Table 1.** Means and Standard Deviations of Independent Variables.

	Downward Departure Analysis (N = 123,245)	Upward Departure Analysis (N = 321,305)
Black	0.406 (0.491)	0.295 (0.456)
Latino	0.100 (0.300)	0.080 (0.272)
Male	0.867 (0.340)	0.771 (0.420)
Age	34.621 (11.239)	32.881 (11.003)
Age <sup>2</sup>	1,324.945 (883.423)	1,202.227 (853.357)
Prior record score	3.087 (2.154)	1.717 (1.996)
Drug offense	0.319 (0.466)	0.309 (0.462)
Person offense	0.217 (0.412)	0.183 (0.386)
Property offense	0.314 (0.464)	0.359 (0.480)
Multiple convictions	0.479 (0.500)	0.366 (0.482)
Pleas	0.942 (0.234)	0.964 (0.186)
Presumptive sentence	15.329 (20.299)	5.880 (14.615)
Mandatory eligible	0.100 (0.300)	0.039 (0.193)
Restrictive intermediate punishment eligible	0.814 (0.389)	0.922 (0.268)

Note: Standard deviations in parentheses.

account for court community characteristics.<sup>9</sup> The means and standard deviations of the independent variables are displayed in Table 1.

### Results

We begin with Table 2 by examining the percentage of cases that received departures and guideline-conforming sentences both overall and disaggregated by sentence type. Nearly 22 percent of cases eligible for a downward departure receive a sentence below the guideline recommendation. These departures are primarily produced through a shorter incarceration sentence than the guidelines recommend (46 percent) or RS (49 percent), with a small fraction (4 percent) involving RIP. Only about 2.5 percent of all cases receive an upward departure. Over 80 percent of these involve incarceration, with the rest entailing RIP. Nearly 90 percent of all cases receive a guideline-conforming sentence. Most of these involve a sentencing alternative (56 percent RS, 4 percent RIP), while over 40 percent entail incarceration.

Next, we turn to Table 3 as we use multivariate regression to examine the correlates of downward departures and upward departures “overall,” that is,

**Table 2.** Departure Decisions Overall and Disaggregated by Sentence Type.

Departures Overall	Disaggregated by Sentence Type			
	Incarceration	Restrictive Intermediate Punishment	Restorative Sanction	
Downward departure analysis, $N = 123,245$				
Downward	26,647 (21.62)	12,342 (46.32)	1,163 (4.36)	13,142 (49.32)
Standard	92,855 (75.34)	71,916 (77.45)	7,145 (7.69)	13,794 (14.86)
Above	3,743 (3.04)	3,118 (83.30)	625 (16.70)	0 (0.00)
Upward departure analysis, $N = 321,305$				
Above	7,762 (2.42)	6,317 (81.38)	1,444 (18.60)	0 (0.00)
Standard	286,143 (89.06)	114,499 (40.01)	11,364 (3.97)	160,280 (56.01)
Below	27,400 (8.53)	12,654 (46.18)	1,227 (4.48)	13,519 (49.34)

Note: Percentages are in parentheses.

not disaggregated by the type of sentence imposed. We begin by examining the influence of our control variables. Males are disadvantaged in guideline decision-making as their odds of receiving a downward departure are about 37 percent less than females, while their odds of an upward departure are about 74 percent greater. Those who plead guilty are nearly three times more likely than those who go to trial to receive a downward departure and are over 35 percent less likely to receive an upward departure.

Regarding legal variables, those with multiple current convictions and those convicted of crimes against persons or property offenses (*reference* “other offenses”) are less likely to receive a downward departure and more likely to receive an upward departure. Defendants with longer criminal histories are more likely to receive downward departures and less likely to receive departures upward. Last, those who are eligible for a mandatory sentence are more likely to receive an upward departure, while those who are eligible for a RIP are less likely.

Turning to the main focus of our analysis, we find that Black and Latino defendants have a statistically similar likelihood of receiving a sentence below the guideline recommendation as Whites. These findings are inconsistent with our hypothesis predicting that Blacks and Latinos would be disadvantaged for downward departure decisions overall (Hypothesis 1A). We, do however, find strong support for our hypothesis (Hypothesis 2A) that Black and Latino defendants will be more likely to receive an upward

**Table 3.** Multinomial Logistic Regressions Predicting Downward Departures Overall and Upward Departures Overall Compared to Standard Guideline-Conforming Sentences.

Independent Variables	Downward Departures Overall			Upward Departures Overall		
	<i>b</i>	OR	SE	<i>b</i>	OR	SE
Black	−0.025	0.975	.063	0.181	1.199*	.091
Latino	−0.102	0.903	.066	0.225	1.253**	.084
Males	−0.318	0.728***	.029	0.551	1.735***	.092
Age	−0.005	0.996	.005	0.041	1.042***	.010
Age <sup>2</sup>	0.000	1.000***	.000	0.000	1.000***	.000
Prior record	0.403	1.497***	.035	−0.098	0.907**	.035
Drug offense	0.053	1.054	.095	0.169	1.184	.117
Person offense	−0.226	0.798*	.103	0.690	1.994***	.078
Property offense	−0.494	0.610***	.072	0.501	1.650***	.088
Multiple conviction	−0.134	0.875***	.025	0.474	1.606***	.062
Plead guilty	1.034	2.813***	.124	−0.463	0.629**	.154
Presumptive sentence	0.016	1.016***	.004	0.009	1.009**	.003
Mandatory eligible	0.037	1.038	.107	1.042	2.835***	.289
Restrictive intermediate punishment eligible	0.072	1.075	.105	−0.298	0.742**	.087
<i>R</i> <sup>2</sup>	.198			.274		
<i>N</i>	123,245			321,305		

Note: Fixed effects for judicial districts and years are included in the model but not shown. Each dependent variable has three categories. However, the results for upward departures for the downward departure analysis and the results for downward departures for the upward departure analysis are not shown. OR = odds ratio; SE = standard error. ORs were obtained by exponentiating *b* coefficients.

<sup>†</sup>*p* < .1. \**p* < .05. \*\**p* < .01. \*\*\**p* < .001 (two-tailed tests).

departure than Whites. The odds of a departure above the guidelines are, respectively, about 20 percent greater for Blacks and 25 percent greater for Latinos than for Whites.

A key point of our argument, however, is that analyses like those in Table 3 conceal an important part of the story of disparity in contemporary sentencing guidelines. This analysis of departures versus conforming sentences, so central to prior studies of guideline departures, may mask ethnic-racial disparities, particularly in guideline systems featuring a zones of discretion approach. To assess this possibility, we turn to Table 4 which examines downward departure decisions disaggregated by the sentence imposed. For reference, we include the results for downward departures

overall (i.e., not disaggregated by sentence type) from Table 3 in the shaded right column of Table 4.

We find that the association of defendant's race/ethnicity with decisions to depart downward from the guidelines varies considerably depending on the sentence imposed. With one important exception, the results are consistent with our hypothesis that disparities will be greater for downward departures to IP than for downward departures to incarceration (Hypothesis 1B). Offering strong support for this hypothesis, Black disadvantage in guideline decision-making is amplified when the decision involves an IP sentence. Whereas Black defendants have a statistically similar likelihood as Whites of receiving a downward departure to a shorter incarceration sentence, they are significantly less likely to receive downward departures to IP sentences. Compared to White defendants, Black defendants have roughly 37 percent reduced odds of receiving a downward departure to RIP and 18 percent lesser odds of a departure to RS. Supplemental analyses indicate that these Black–White disparities in the imposition of IP (i.e., downward RS, downward RIP) versus incarceration (i.e., downward incarceration) are statistically significant.

The findings for Latinos offer only partial support for our hypothesis that ethnoracial minorities will experience greater disadvantage when departure decisions involve IP (Hypothesis 1B). Consistent with this hypothesis, whereas Latino defendants have a statistically similar likelihood as Whites of receiving a downward departure to a shorter incarceration sentence, they are significantly and substantially (about 30 percent) less likely to receive a downward departure to RS. However, at odds with our hypothesis, Latinos have a statistically similar likelihood as Whites of receiving a downward departure to RIP. Notably, the results above demonstrate that analyses that focus on downward departures overall conceal important ethnoracial disparities in guideline decision-making that emerge when departures are disaggregated by sentence type.

Turning to Table 5, we examine upward departure decisions disaggregated by the type of sentence imposed. For reference, we include the results for upward departures overall (i.e., not disaggregated by sentence type) from Table 3 in the shaded right column of Table 5. Consistent with expectations, we find that the effect of defendant race/ethnicity on decisions to depart upward from the guideline recommendation varies considerably depending on whether the sentence involves incarceration or RIP. Relative to a guideline-conforming incarceration sentence (reference category), the odds of a departure above the guidelines to a longer term of incarceration are about 26 percent greater for Blacks and 24 percent greater for Latinos

**Table 4.** Downward Departure Analysis: Multinomial Logistic Regressions Predicting Guideline Decision by Sentence Type (Standard Sentence of Incarceration as Reference Category).

Independent Variables	Downward		Downward		Downward		Downward		Standard		Standard		Downward	
	Incarceration		RIP		RS		RIP		RIP		RS		Overall	
	OR	SE	OR	SE	OR	SE	OR	SE	OR	SE	OR	SE	OR	SE
Black	0.956	.048	0.621**	.144	0.819**	.058	0.559***	.066	0.742***	.052	0.975	.063	0.975	.063
Latino	0.917	.083	1.093	.180	0.710***	.068	0.784†	.145	0.638***	.056	0.903	.066	0.903	.066
Males	0.775***	.059	0.485***	.123	0.520***	.045	0.524***	.054	0.652***	.056	0.728***	.029	0.728***	.029
Age	0.988*	.006	1.006	.033	1.002	.011	0.987	.021	0.978*	.011	0.996	.005	0.996	.005
Age <sup>2</sup>	1.000***	.000	1.000	.000	1.000*	.000	1.000	.000	1.000***	.000	1.000***	.000	1.000***	.000
Prior record	1.456***	.037	1.371**	.119	1.375***	.023	0.869***	.017	0.794**	.072	1.497***	.035	1.497***	.035
Drug offense	0.894	.122	1.761†	.326	1.270*	.110	2.190***	.116	0.658**	.145	1.054	.095	1.054	.095
Person offense	0.615***	.119	0.410*	.389	0.939	.082	0.666***	.090	0.588***	.119	0.798*	.103	0.798*	.103
Property offense	0.520***	.065	0.500**	.237	0.666***	.072	1.180	.114	0.551***	.145	0.610***	.072	0.610***	.072
Multiple conviction	0.772***	.035	0.596***	.140	0.839*	.074	0.754**	.091	0.750***	.071	0.875***	.025	0.875***	.025
Plead guilty	2.872***	.076	6.781**	.608	2.090***	.146	0.626	.534	0.933	.228	2.813***	.124	2.813***	.124
Presumptive sentence	1.019***	.004	1.017†	.009	0.989**	.004	0.957**	.014	0.685***	.022	1.016***	.004	1.016***	.004
Mandatory eligible	1.329**	.104	1.597	.437	0.606***	.099	1.381	.241	0.964	.122	1.038	.107	1.038	.107
Restrictive intermediate punishment eligible	0.824†	.109	18.797***	.350	1.751***	.094	5.825***	.191	1.690***	.126	1.075	.105	1.075	.105
R <sup>2</sup>	.251													
N	123,245													

Note: Fixed effects for judicial districts and year are included in the model but not shown. Results for upward departures not shown. ORs were obtained by exponentiating *b* coefficients. OR = odds ratio; SE = standard error; RIP = restrictive intermediate punishments; RS = restorative sanctions.

†  $p < .1$ . \* $p < .05$ . \*\* $p < .01$ . \*\*\* $p < .001$  (two-tailed tests).

than for Whites. By contrast, the odds of departure above the guidelines to RIP are about 65 percent less for Blacks and 53 percent less for Latinos than for Whites. These findings offer strong support for our hypotheses that Black and Latino defendants will be more likely to receive an upward departure to a lengthier incarceration sentence (Hypothesis 2B), but less likely when the sentence involves IP (Hypothesis 2C). These findings suggest that judges are more likely to depart upward for Blacks and Latinos when retribution is the goal, but less likely when the objective is rehabilitation. These nuances are concealed in analyses that focus on upward departures overall.

The results from Table 5 indicate that the association of defendant race/ethnicity with decisions to conform to the guidelines also varies considerably by the type of sentence imposed. Relative to a guideline-conforming incarceration sentence (reference category), the odds of receiving a guideline-conforming RIP sentence are about 44 percent less for Blacks than for Whites. The Latino–White difference is also sizable (19.5 percent) but not statistically significant. The odds of receiving a guideline-conforming RS sentence, in lieu of a guideline-conforming incarceration sentence, are about 25 percent less for Blacks and 29 percent less for Latinos than for Whites. These patterns are largely replicated in the analysis of downward departures (see Table 4). These findings are generally consistent with Hypothesis 3 that relative to a guideline-conforming incarceration sentence, Blacks and Latinos will be less likely than Whites to receive a guideline-conforming sentence that involves IP. These within-guideline disparities are largely concealed in analyses that focus on departures without disaggregating the sentence type involved.

The effects of case process and legal variables on departure decisions also vary depending on the type of sentence involved. Defendants who plead guilty have higher odds of receiving every type of downward departure but are particularly likely to receive a downward departure to RIP. Those who plead guilty are also less likely to receive an upward departure involving incarceration. Drug offenders are more likely than those convicted of “other offenses” to receive RIP sentence as either a downward departure (marginally significant) or via guideline conformity. Also, although drug offenders are more likely than those who have been convicted of other offenses to receive an upward departure to incarceration, they are significantly more likely to receive an upward departure to RIP or a standard sentence involving RIP. It appears that considerations of rehabilitative potential are especially salient for drug offenders.

**Table 5.** Upward Departure Analysis: Multinomial Logistic Regressions Predicting Guideline Decision by Sentence Type (Standard Sentence of Incarceration as Reference Category).

Independent Variables	Upward Incarceration		Upward RIP		Standard RIP		Standard RS		Upward Overall	
	OR	SE	OR	SE	OR	SE	OR	SE	OR	SE
Black	1.255***	.041	0.345***	.162	0.562***	.059	0.749***	.031	1.199*	.091
Latino	1.242**	.075	0.473***	.156	0.805	.159	0.716***	.040	1.253***	.084
Males	1.587***	.068	0.738**	.107	0.636***	.049	0.665***	.035	1.735***	.092
Age	1.046***	.012	1.022	.015	0.984	.015	0.982**	.006	1.042***	.010
Age <sup>2</sup>	1.000**	.000	1.000	.000	1.000*	.000	1.000***	.000	1.000***	.000
Prior record	0.739***	.046	0.874**	.052	0.902***	.019	0.771***	.024	0.907**	.035
Drug offense	1.389*	.134	2.130***	.132	2.014***	.115	1.227**	.062	1.184	.117
Person offense	1.965***	.161	1.271	.210	0.783***	.066	0.520***	.057	1.994***	.078
Property offense	1.570***	.130	1.764***	.134	1.064	.077	0.688***	.053	1.650***	.088
Multiple conviction	1.192*	.087	1.165	.100	0.883	.088	0.639***	.045	1.606***	.062
Plead guilty	0.512***	.105	1.473	.268	0.567	.520	1.092	.132	0.629**	.154
Presumptive sentence	0.998	.002	.916**	.026	0.969**	.011	0.616***	.033	1.009**	.003
Mandatory eligible	1.514*	.198	1.013	.351	1.619*	.225	0.712***	.075	2.835***	.289
Restrictive intermediate punishment eligible	1.259**	.080	20.487***	.406	6.275***	.148	2.172***	.148	0.742**	.087
R <sup>2</sup>	.333									
N	321,304									

Note: Fixed effects for judicial districts and year are included in the model but not shown. Results for downward departures not shown. ORs were obtained by exponentiating *b* coefficients. OR = odds ratio; SE = standard error; RIP = restrictive intermediate punishments; RS = restorative sanctions.

\**p* < .1. \*\**p* < .05. \*\*\**p* < .001 (two-tailed tests).

## **Discussion and Conclusion**

We used 2012 to 2016 Pennsylvania sentencing data to study the interrelationship between alternative sanctions and decisions to depart from guidelines and the consequences for disparity. Using the work of Engen and colleagues (2003) as a guide, we built on prior research by examining how guideline decisions are conditioned by the presence of alternative sanctions. Our major argument is that the reasons court actors conform to or depart from the guideline recommendation likely vary depending on whether the decision involves an alternative sanction or incarceration and that these reasons may have consequences for ethnoracial disparities in guideline decision-making and how these disparities are understood. We predicted that the extent of ethnoracial disparity in guideline departures would be conditioned by the choice between IP and incarceration. Sentences involving an IP almost inherently entail rehabilitative considerations. Ethnoracial minorities may be less likely to receive such rehabilitation-centered sentences because assessments of rehabilitative capacity often involve considerations of extra-guideline factors that may penalize minorities. Ethnoracial minorities may be less likely to receive rehabilitatively oriented alternatives to incarceration either as guideline-conforming sentences or as departures from the guidelines. We indeed found that the influence of defendant race/ethnicity on guideline departure decisions varies greatly depending on the type of sentence imposed. Blacks and, to a lesser extent, Latinos experienced greater disadvantage in guideline decision-making, whether conformity or departures, when the sentence involved an IP.

Several findings stand out for elaboration. First, our results suggest that the integration of IP into guideline systems may mobilize extralegal disparities in sentencing. The emphasis on rehabilitation inherent in IP seems to move sentencing decisions beyond a consideration of legal factors to assessments of individual characteristics seen to be associated with rehabilitative potential (e.g., educational or employment history) and that may disadvantage ethnoracial minorities at sentencing. Second, the increased presence of IP in guideline systems may have focused the location of sentencing disparities to sentences involving IP. Our results suggest that sentencing inequalities are connected to judges' decisions to sentence White defendants to IP via either departures from the guidelines or as guideline-conforming sentences. That these disparities are pronounced within the guideline-conforming range indicates that departures may not be the primary site of ethnoracial inequality. Rather, IP sentences seem to condition such disparities to a greater extent, whether conforming to or departing

below or above the guidelines. In fact, with the exception of upward departure sentences to incarceration, ethnoracial disparities here seem to be specific to IP sentences, whether conforming or departing from guidelines.

Third, that judges can individualize sentences and impose rehabilitative options without departing has important implications for understanding the meaning of departures. Departure decisions are typically viewed as signals by court actors that the sentence did not fit the blame or risk posed by the defendant. However, the meaning of departures is becoming more complicated, as in several sentencing systems judges can now conform to or depart from sentencing guidelines within zones of discretion by either imposing a sentence that emphasizes retribution and incapacitation (incarceration) or that prioritizes rehabilitation (IP). Judges can avoid incarceration sentences they see as not fitting the defendant's needs and pursue rehabilitative ideals without departing. Thus, it is important to study what guideline departures and conforming sentences actually entail (i.e., incarceration or IP) and what they might signify.

The finding that disparity is specific to IP sentences both as guideline-conforming sentences and as departures reveals a structural tension within guideline systems. From their inception, a key goal of guidelines was to reduce disparity (von Hirsch 1976). Others note that though this remains a core goal there is a growing focus on crafting effective sentences that reduce recidivism, are cost-effective, and mitigate unwanted consequences of punishment (Kramer and Ulmer 2009). These goals can conflict. Considering offender needs and rehabilitation requires individualization, a consideration of nonlegal factors, and discretion, but such discretion can lead to disparity. IPs were incorporated into guidelines in order to more effectively rehabilitate offenders and reduce recidivism. However, in pursuit of this goal, it appears that guidelines may have compromised another, older objective, decreasing sentencing disparities.

The study should have broad generalizability to other sentencing systems, as several guideline systems have adopted "alternative sanctions" with a rehabilitative emphasis.<sup>10</sup> Our findings and our call for greater attention to offender needs and rehabilitation as a focal concern are also applicable to states without guidelines, as these states are increasingly using alternative sanctions, including community-based and rehabilitative programs (Clear and Frost 2014). If contemporary criminal justice reforms continue to emphasize rehabilitative alternatives, courts and court actors will increasingly have to balance the goal of proportionality, and the formal-rational logic it implies, with the goal of rehabilitation and the substantive concerns it inheres.

Like all research, this study has limitations. Perhaps most importantly, our data are limited to those convicted and to postconviction decisions. It is well known that offenders' exposure to punishment is shaped by prosecutors' charging decisions and plea bargaining practices. We cannot directly address prosecutorial behavior regarding the consideration of IPs and/or departures in plea bargaining. However, since about 95 percent of the cases in our analyses are guilty pleas, and because pleas have a strong effect on guideline decisions involving IP it is highly likely that IP sentences (see Kramer and Ulmer 2009) are a key aspect of plea bargaining. If there is ethnoracial disparity in these earlier processes involving prosecutorial discretion, our lack of data on preconviction decisions and the contents of plea agreements likely means that we may be understating the overall amount of disparity.

Future research should build upon our framework to further examine the interplay between the formal rationality of policies like guidelines and the substantive rationality associated with goals of rehabilitation. First, there is a need for research which identifies the characteristics of the focal concern of offender needs and rehabilitation and contrasts it with the other focal concerns. As a number of sentencing researchers have noted (e.g., Steffensmeier and Painter-Davis 2018; Ulmer 2012), to unpack mechanisms articulated in FCP requires measuring how court actors think about defendants and how such thoughts might influence their decisions. Such research may discover that offender needs and rehabilitation are more central to contemporary sentencing than prior statements of FCP have supposed.

Second, there is a need to examine the extent to which IPs really reflect the focal concern of offender needs and rehabilitation. Many IPs in certain jurisdictions involve rehabilitative components as they entail individualized assessments of offenders' needs and implementation of programs most responsive to these needs. However, IPs and other diversions from incarceration vary in the extent to which they emphasize rehabilitation (Gainey et al. 2005). Some involve a mix of rehabilitation with goals of control. Some IPs, scholars argue, are not primarily concerned with rehabilitating the offender but rather are geared toward managing risk through control and reflective of net widening in which the criminal justice system is further intervening into individuals' lives (see reviews in Johnson and DiPietro 2012; Phelps 2013). To gauge the extent to which IPs are rehabilitative in practice, there is a need for research to connect the punishment goals of court actors to their sentencing decisions and to actionable outcomes associated with offender change (e.g., recidivism). Likewise, there is a need for additional research which identifies other factors that drive court actors' use

of IP's (see, e.g., Johnson and DiPietro 2012). Factors other than court actor's punishment philosophies (e.g., plea deals, resource availability, desire to avoid prison, cost savings, and defendant's willingness to participate) likely motivate decisions to pursue sentences that have rehabilitative elements.

Third, research should more fully examine the conflicts between substantive and formal rationality amid the growing changes in criminal justice policy (Engen et al. 2003; Ewing 1987; Kramer and Ulmer 2009; Savelsberg 1992). Sentencing guidelines have traditionally been thought to represent formal rationality as they encourage uniformity and proportionality by structuring sentencing decisions around formal rules and legal criteria and discourage consideration of nonlegal factors (Savelsberg 1992). However, formal rationality coexists with substantive rationality on the part of court actors, as sentencing decisions are almost inherently individualized, influenced by nonlegal factors, and guided by purposes other than proportionality.

Critics argued that indeterminate sentencing systems tend to focus more on the offender instead of the crime and lead to "unjust and unwarranted disparities" (Tonry 2019: vii). Sentencing guidelines attempted to curb this discretion by refocusing the punishment goals of sentencing on proportionality, by structuring decisions to consider legal factors, and by discouraging consideration of nonlegal factors. Although guidelines in a variety of jurisdictions may have reduced disparities at sentencing (King and Light 2019), rigid adherence to formal-rational rules may have contributed to social inequalities (e.g., recidivism, racially disproportional punishment, and consequences for communities). To ameliorate these consequences, substantive considerations are again gaining traction in sentencing policy discourse. However, as our research suggests, these considerations may lead to disparities that formal rationality was intended to reduce (Ulmer and Kramer 1996).

### **Declaration of Conflicting Interests**

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

### **Funding**

The author(s) received no financial support for the research, authorship, and/or publication of this article.

**ORCID iD**

Noah Painter-Davis  <https://orcid.org/0000-0002-2149-0681>

**Supplemental Material**

Supplemental material for this article is available online.

**Notes**

1. Some have defined intermediate punishments (IPs) as punishments that are harsher than probation, but less severe than incarceration (Morris and Tonry 1990). Probation in PA often involves conditions such as community service, fines, and treatment, all considered IP. However, the Pennsylvania Commission on Sentencing (PCS 2012) considers probation a form of IP regardless of whether it involves conditions.
2. To determine restrictive intermediate punishment eligibility, offenders often have “a diagnostic assessment of dependency on alcohol or other drugs” and, if dependent, have a treatment recommendation crafted (PCS 2012:12). These assessments, however, are not required for level 2 offenders.
3. Whether a County Intermediate Punishment (CIP) sentence is a departure depends on whether the conditions of the CIP program conform with the presumptive sentence (PCS 2012). For offenders who are not deemed drug dependent, the “numeric range” specified by the guidelines reflects the number of days the offender is required to participate in the program (PCS 2012:170). Sentences outside of these ranges are departures. For offenders classified as drug dependent, departures are sentences that do not conform with the clinician’s treatment recommendation.
4. The focal concern of offender needs and rehabilitation may overlap with and be informed by other focal concerns, including (a) protection of the community, as assessments of risk inform evaluations of needs and provide insights into the offender’s ability to reform (Andrews and Bonta 2003; Cirillo 1986); (b) blameworthiness, as determinations of rehabilitative capacity are influenced by assessments of culpability and the degree to which behavior is externally motivated and malleable; and (c) practical constraints and consequences, as considerations of offender needs and rehabilitation reflect the move to be “smart on sentencing”: to impose punishments that are more effective, have fewer consequences, and are less expensive (Clear and Frost 2014; Kramer and Ulmer 2009).
5. The Pennsylvania Guidelines explicitly require court actors to consider the “rehabilitative needs of the offender” (PCS 2012:200). While structuring court actor discretion, they require “individualized sentencing” (PCS 2012:199) and

- allow court actors to “craft sentences to the particular needs of the offender and the interests of justice” (PCS 2012:83).
6. PA’s guidelines provide for “mitigated” and “aggravated” regions that allow judges to adjust sentences for mitigating and aggravating circumstances without departing from the guidelines. We code these sentences as standard sentences because PCS treats these as guideline-conforming sentences.
  7. Some research defines departures “strictly” as deviations from the sentence recommended by law (e.g., Johnson 2003; Kramer and Ulmer 2002), while others use an incarceration-centric definition which focuses on judicial decisions either to “circumvent” incarceration sentences or to give shorter or longer sentence lengths than recommended by law. The later often but do not always entail deviations from the law (see, e.g., Kramer and Ulmer 1996: upward dispositional departures and Engen et al. 2003: alternative sanctions as “downward departures”). We follow a “strictly” legal definition of departures because (a) prior theorizing on departures largely centers around judges decisions to deviate from legally defined rules (Kramer and Ulmer 1996; Savelsberg 1992), (b) departures are viewed as signals that court actors disagree with the law and sentencing commissions monitor departures based on the legal definition, (c) the “strictly” legal definition makes more sense today given that judges in guideline systems featuring a “zones of discretion” approach increasingly have options other than incarceration for imposing guideline-conforming sentences, and (d) the prior research that we use as our primary point of reference (Johnson 2003, 2005) uses the legal definition.
  8. Presumptive sentence accounts for restorative sanction eligibility. We did not include a measure of eligibility for State Intermediate Punishment as it was highly collinear with CIP eligibility.
  9. Only 1.1 percent of cases were missing mode of conviction.
  10. These include, for example, the Federal System, North Carolina, Arkansas, and Washington. Others (e.g., Oregon) are developing IPs to be incorporated into guidelines (Robina 2010).

## References

- Albonetti, Celesta A. 1997. “Sentencing under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992.” *Law and Society Review* 31:789-821.
- Andrews, D. A. and James Bonta. 2003. *The Psychology of Criminal Conduct*. Cincinnati, OH: Anderson.
- Boerner, David and Roxanne Lieb. 2001. “Sentencing Reform in the Other Washington.” *Crime and Justice* 28:71-138.

- Bridges, George S. and Sara Steen. 1998. "Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms." *American Sociological Review* 63:554-70.
- Cirillo, Vincent A. 1986. "Windows for Discretion in the Pennsylvania Sentencing Guidelines." *Villanova Law Review* 31:1309-49.
- Clear, Todd R. and Natasha A. Frost. 2014. *The Punishment Imperative*. New York: New York University Press.
- Engen, Rodney L., Randy R. Gainey, Robert D. Crutchfield, and Joseph G. Weis. 2003. "Discretion and Disparity under Sentencing Guidelines: The Role of Departures and Structured Sentencing Alternatives." *Criminology* 41:99-130.
- Ewing, Sally. 1987. "Formal Justice and the Spirit of Capitalism: Max Weber's Sociology of Law." *Law and Society Review* 21:487-512.
- Frase, Richard S. 2013. *Just Sentencing: Principles and Procedures for a Workable System*. Oxford: Oxford University Press.
- Frase, Richard S. 2019. "Forty Years of American Sentencing Guidelines: What Have We Learned?" *Crime and Justice* 48:79-135.
- Gainey, Randy R., Sara Steen, and Rodney Engen. 2005. "Exercising Options: An Assessment of the Use of Alternative Sanctions for Drug Offenders." *Justice Quarterly* 22:488-520.
- Hogarth, John. 1971. *Sentencing as a Human Process*. Toronto, Canada: University of Toronto Press.
- Johnson, Brian D. 2003. "Racial and Ethnic Disparities in Sentencing Departures across Modes of Conviction." *Criminology* 41:449-90.
- Johnson, Brian D. 2005. "Contextual Disparities in Guideline Departures: Courtroom Social Contexts, Guideline Compliance, and Extralegal Disparities in Criminal Sentencing." *Criminology* 43:761-96.
- Johnson, Brian D. and Stephanie M. Dipietro. 2012. "The Power of Diversion: Intermediate Sanctions and Sentencing Disparity under Presumptive Guidelines." *Criminology* 50:811-50.
- Johnson, Brian D, Jeffery T. Ulmer, and John H. Kramer. 2008. "The Social Context of Guidelines Circumvention: The Case of Federal District Courts." *Criminology* 46:737-83.
- Kaiser, Kimberly A. and Cassia Spohn. 2014. "'Fundamentally Flawed?' Exploring the Use of Policy Disagreements in Judicial Downward Departures for Child Pornography Sentences." *Criminology and Public Policy* 13:271-81.
- King, Ryan D. and Michael T. Light. 2019. "Have Racial and Ethnic Disparities in Sentencing Declined?" in *Crime and Justice: A Review of Research*. Vol. 48, edited by M. H. Tonry. Chicago, IL: University of Chicago Press.
- Kramer, John H. and Anthony J Scirica. 1986. "Complex Policy Choices: The Pennsylvania Commission on Sentencing." *Federal Probation* 50:15-23.

- Kramer, John H. and Darrell Steffensmeier. 1993. "Race and Imprisonment Decisions." *The Sociological Quarterly* 34:357-76.
- Kramer, John H. and Jeffery T. Ulmer. 1996. "Sentencing Disparity and Departures from Guidelines." *Justice Quarterly* 13:81-106.
- Kramer, John H. and Jeffery T. Ulmer. 2002. "Downward Departures for Serious Violent Offenders: Local Court "Corrections" to Pennsylvania's Sentencing Guidelines." *Criminology* 40:897-932.
- Kramer, John H. and Jeffrey Ulmer. 2009. *Sentencing Guidelines: Lessons from Pennsylvania*. Boulder, CO: Lynne Rienner.
- MacKenzie, Doris L. and David P. Farrington. 2015. "Preventing Future Offending of Delinquents and Offenders: What We Have Learned from Experiments and Meta-analyses?" *Journal of Experimental Criminology* 11:565-95.
- Mitchell, Ojmarrh. 2005. "A Meta-analysis of Race and Sentencing Research: Explaining the Inconsistencies." *Journal of Quantitative Criminology* 21:439-66.
- Moore, Charles A. and Terence D Mieth. 1986. "Regulated and Unregulated Sentencing Decisions: An Analysis of First Year Practices under Minnesota's Felony Sentencing Guidelines." *Law and Society Review* 20:253-77.
- Morris, Norval and Michael Tonry. 1990. *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System*. New York: New York University Press.
- Mustard, David B. 2001. "Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts." *Journal of Law and Economics* 44: 285-315.
- Nagel, Ilene H. 1990. "Structuring Sentencing Discretion: The New Federal Sentencing Guidelines." *The Journal of Criminal Law and Criminology* 80:883-943.
- Pennsylvania Commission on Sentencing. 2012. *Sentencing Guidelines Implementation Manual*. 7th ed. State College, PA: Pennsylvania Commission on Sentencing.
- Phelps, Michelle. 2013. "The Paradox of Probation: Community Supervision in the Age of Mass Incarceration." *Law Policy* 35:51-80.
- Robina Institute. 2010. Sentencing Guideline Resource Center. In-depth Jurisdiction Profiles. Retrieved from <https://sentencing.umn.edu/profiles/alabama>
- Savelsberg, Joachim J. 1992. "Law That Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law." *American Journal of Sociology* 97:1346-81.
- Spohn, Cassia. 2000. "Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process." *Criminal Justice: The National Institute of Justice Journal* 4:427-501.

- Spohn, Cassia and Pauline K. Brennan. 2011. "The Joint Effects of Offender Race/Ethnicity and Gender on Substantial Assistance Departures in Federal Court." *Race and Justice* 1:49-78.
- Steffensmeier, Darrell and Noah Painter-Davis. 2018. "Focal Concerns Theory as a Conceptual Tool for Studying Intersectionality in Sentencing Disparities: Focus on Gender and Race along with Age." Pp. 189-210 in *Punishment Decisions: Locations of Disparity, the ASC Division on Corrections and Sentencing's Handbook on Corrections and Sentencing*. Vol. 2, edited by J. T. Ulmer and M. Bradley. New York: Routledge.
- Steffensmeier, Darrell, Jeffrey 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* 36:763-97.
- Steffensmeier, Darrell, John Kramer, and Jeffrey Ulmer. 1995. "Age Differences in Sentencing." *Justice Quarterly* 12:583-602.
- Steffensmeier, Darrell, Noah Painter-Davis, and Jeffery Ulmer. 2017. "Intersectionality of Race, Ethnicity, Gender, and Age on Criminal Punishment." *Sociological Perspectives* 60:810-33.
- Tonry, Michael. 1998. "Intermediate Sanctions in Sentencing Guidelines." *Crime and Justice* 23:199-253.
- Tonry, Michael. 2019. "Preface." Pp. vii-viii in *American Sentencing. What Happens and Why?* Vol. 48. Chicago, IL: The University of Chicago Press.
- Ulmer, Jeffrey. 1997. *Social Worlds of Sentencing: Court Communities under Sentencing Guidelines*. Albany: State University of New York Press.
- Ulmer, Jeffrey T. 2012. "Recent Developments and New Directions in Sentencing Research." *Justice Quarterly* 29:1-40.
- Ulmer, Jeffery T. 2014. "Mismatch of Guidelines and Offender Danger and Blame-worthiness Departures as Policy Signals from the Courts." *Criminology and Public Policy* 13:271-80.
- Ulmer, Jeffery T. and John H. Kramer. 1996. "Court Communities under Sentencing Guidelines. Dilemmas of Formal Rationality and Sentencing Disparity." *Criminology* 34:383-408.
- Von Hirsch, Andrew. 1976. *Doing Justice: The Choice of Punishments*. New York: Hill & Wang.
- Wood, Peter B. and David C. May. 2003. "Racial Differences in Perceptions of the Severity of Sanctions: A Comparison of Prison with Alternatives." *Justice Quarterly* 20:605-31.
- Word, David L. and Colby R Perkins. 1996. "Building a Spanish Surname List for the 1990's—A New Approach to an Old Problem." Pp. i-25 in *U. S. Bureau of the Census*, edited by D. L. Word and R. Colby Perkins Jr. Washington, DC: U.S. Census Bureau Technical Working Paper.

**Author Biographies**

**Noah Painter-Davis** is an associate professor in the Department of Sociology at the University of New Mexico. His research interests center on how social changes and community contexts shape race-gender-age differences in crime and social control.

**Jeffery T. Ulmer** is professor of Sociology and Criminology at the Pennsylvania State University. His research interests include inequalities in criminal punishment and how social contexts shape criminal justice, as well as criminological theory and religion and crime.