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## DAVID BOERNER

**THE USE OF OFFENDER CHARACTERISTICS IN GUIDELINE SENTENCING—A LABORATORY REPORT FROM WASHINGTON STATE****David Boerner\***

At the core of opposition to guideline sentencing is the diminished role such systems give to offender characteristics unrelated to the crime. While indeterminate sentencing systems typically allowed judges and parole boards almost unlimited discretion in determining whether and to what extent the individual circumstances of offenders should affect sentences imposed and served, guidelines have drastically curtailed such discretion. The purpose of this article is to describe how one state—Washington—addressed the policy dispute surrounding the relevance of offender characteristics. Since sentencing is primarily a state issue, the benefits of Brandeis's "laboratory" are available to those who examine how various states have resolved this issue.

**A. Initial Legislative Judgments**

Sentencing reform in Washington began in the mid-1970s as part of the national movement to replace sentencing based on the "rehabilitative ideal" with sentencing based on "just deserts." The argument of reformers in Washington mirrored the national debate.<sup>1</sup> They were sharply critical of individualized sentencing based on personal characteristics as severing the link of proportionality between crime and punishment. They saw judicial discretion with its resulting disparity as inconsistent with the goal of just and deserved sentences. In addition, they challenged the ability of judges to diagnose the causes of crime and tailor sentences to cure these causes.

The reformer's solution was a fundamental change in which judicial discretion would be confined within boundaries set by law. While the initial proposal called for those boundaries to be determined "by the nature of the particular crime and the criminal history of the defendant,"<sup>2</sup> it recognized the necessity of discretion in individual cases.

Those committed to the existing sentencing system countered each of the arguments. They argued that the reformers' call for treating like cases alike begged the question of what made cases alike; that a just system of punishment must take into account all the circumstances of an offender's life, not just the narrow facts of crime and criminal history.

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They argued that denying judges the ability to take full account of all the circumstances of an offender would impoverish the sentencing process and result in harsher sentences for those most deserving of leniency, the truly disadvantaged. In their view the problem of "just deserts in an unjust world" required that all life circumstances of defendants be considered in sentencing.

The debate continued until 1980 when a bipartisan Select Committee of the House of Representatives produced a comprehensive proposal. Adopted in 1981 with overwhelming bipartisan support, the Sentencing Reform Act was both radical and complex. Its complexity was dictated by the legislature's desire to integrate the multiple—and inconsistent—traditional purposes of sentencing into a structure of principled co-existence. Just deserts was the primary, but not exclusive principle. The Act abolished parole and established a sentencing system which "structures but does not eliminate discretionary decisions affecting sentences."<sup>3</sup> This was to be accomplished through a structure that sought the right mix of rule and discretion by confining discretion both by criteria that justified its exercise and by limitations in its scope. The legislature did not totally reject individual factors unrelated to the crime. Instead, it restricted them to prescribed areas where it believed them relevant.

The legislature prescribed ranges determined by the offense and the offender's convictions, past and present, as the starting point in sentencing. Other offender characteristics were deemed not relevant to this initial determination. The legislature went on to provide, however, that "[t]he court may impose any sentence within the range that it deems appropriate,"<sup>4</sup> and prohibited appellate review of sentences within the range.<sup>5</sup> These provisions meant that judges could continue their prior practice of considering individual factors; but the degree to which those considerations could influence the sentence was limited by the width of the range, which the legislature restricted in percentage terms.<sup>6</sup> Thus, the legislature both affirmed and confined the relevance of non-crime related offender characteristics.

Recognizing the impossibility of designing general rules to justly determine all individual cases, the legislature made the ranges presumptive rather than mandatory. Seeking a method to allow the necessary individualization of sentences while insuring consistency with the legislature's policy judgments, the legislation authorized judges to depart from the presumptive range when "substantial and compelling reasons"<sup>7</sup> existed. However, judges were required to set forth reasons for the decision to depart in written findings of fact and conclusions of law, and exceptional sentences were made subject to substantive appellate review. Initially, the legislature did not identify what types of factors it saw as "substantial and compelling." It awaited recommendations from

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the Sentencing Guidelines Commission.

Since it recognized that the strongest case for sentencing based on individual characteristics was for first offenders, the legislature created an optional sentencing system for "first-time offenders"<sup>8</sup> who were being sentenced for their first non-violent felony offense. Judges could either sentence eligible offenders within the applicable sentence range or impose a sentence similar to that authorized for probationary sentences under Washington's former sentencing system. The legislature was intentionally silent as to the factors that should guide judges' discretion in using this alternative and did not require judges to state their reasons. In addition, it specifically provided that first-time offender sentences were not subject to appellate review<sup>9</sup> because the legislature believed that sentences for this class of offenders should continue to be individualized to the particular circumstances of each defendant. It confined the impact of the discretion granted, however, by limiting the length of confinement to a maximum of 90 days.

#### B. The Recommendations of the Guidelines Commission

The Commission<sup>10</sup> worked from 1981 through 1983 on a series of recommendations to flesh out the structure of the Act. All its recommendations were adopted, including the three that are relevant to the use of offender characteristics. *First*, the Commission recommended a non-discrimination provision providing that "[t]he Sentencing Guidelines . . . will apply equally to offenders in all parts of the state, without regard to race, ethnicity, creed, gender, sexual preference, or socio-economic status." However, legislative concern over some of the factors resulted in the subsequent replacement of this provision with a more general—and sweeping—statement of purpose: "The sentencing guidelines . . . apply equally to offenders in all parts of the state, without discrimination as to any element that does not relate to the crime or the previous record of the defendant."<sup>11</sup> This re-affirmation of the primacy of current and past crimes in determining sentences was to influence the appellate courts as they undertook the new task of substantively reviewing exceptional sentences.

*Secondly*, the Commission developed a set of aggravating and mitigating factors which it considered appropriate for exceptional sentences. While it was careful to make explicit that the factors were "illustrative only and are not intended to be exclusive reasons for exceptional sentences,"<sup>12</sup> only factors relating to the crime were listed. Offender characteristics unrelated to the crime were noticeably absent. In one instance the Commission made its intent clear. It included as a mitigating factor situations where "[t]he defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was signifi-

cantly impaired" but stated that "voluntary use of drugs or alcohol is excluded."<sup>13</sup> The legislature adopted the recommended list without change, thus reinforcing its original decision to make crime and criminal history the primary factors and indicating that other factors were relevant only where the legislature deemed them to be. Exceptional sentences were imposed in 3.5% of all sentences the first year and have ranged between 3% and 4% of all sentences ever since.

The third recommendation exemplified the pragmatism which has characterized sentencing reform in Washington from the beginning. Responding to concerns of victim advocates, judges and treatment professionals, the Commission recommended and the legislature adopted an optional sentence for first-time sex offenders. Victim advocates argued that presumptive prison sentences for intra-family sexual abuse of children would discourage victims from reporting crimes and assisting in their prosecution, and thus they favored an option allowing community-based sentences requiring treatment. Judges and treatment professionals pointed to the compulsive nature of these crimes and argued that without treatment these offenders would continue their criminal conduct after release. The Commission responded by crafting an optional provision that allowed judges to suspend the presumptive prison sentence conditioned in part upon the offender's participation in sexual offender treatment in the community. Before using this alternative, the judge must consider an evaluation of the offender's amenability to treatment and "determine whether the offender and the community will benefit" from an alternative sentence.<sup>14</sup>

No other restrictions were placed on the factors the judge may consider, and no provision was made for appellate review. Thus, just as with the first offender provision, the legislature departed from the desert-based principles that guided its reform when, in its judgment, compelling considerations justified continuing some features of the former sentencing system. Nevertheless, the legislature carefully limited the eligibility of offenders and imposed restrictions on the nature and length of conditions of the suspended sentence.

The combination of the first-time offender and sex offender options meant that non crime-related factors remained of major importance in a significant number of sentencings. Initially 48% (3,844 of 7,961) of all defendants were eligible for the first offender option, and 47% (1,809 of 3,844) of those received an optional sentence. Thus, 23% (1,809 of 7,961) of all sentences were first-time offender option sentences, although in nearly 80% of these sentences the sentencing judge used only the power to impose additional non-incarcerative conditions. The confinement portion of these sentences was within the standard sentence range. Similarly 36% of sex

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offenders (178 of 496) received optional sentences. Thus, in the first year of the guidelines, 25% (1,987 of 7,961) of all sentences were optional sentences in which individual characteristics of defendants could have been determinative.

### C. Subsequent Legislative Changes

The legislature has revisited the Sentencing Reform Act every year since its adoption, but it has never altered the basic structure of the Act or the fundamental policy judgments on which it was based. In 1987 it narrowed eligibility for the first-time offender option by excluding convictions for delivery or possession with intent to deliver drugs, except marijuana, regardless of quantity. This change significantly reduced the number of first-time offender sentences. In 1995 only 14% (2,958 of 21,421) of all sentences were made pursuant to the first-time offender option, a drop from 23% a decade earlier. On the other hand, the legislature later continued its pragmatic approach to categorical exceptions when it authorized the department of corrections, on the recommendation of the sentencing judge, to convert certain short prison sentences for non-violent offenses to "work ethic camp" sentences,<sup>15</sup> and when it expanded the alternative sentence methodology of the first-time offender and sex offender sentencing alternatives to drug offenders who have no prior felony convictions and whose offenses involve a "small quantity" of drugs.<sup>16</sup> While both of these alternatives were carefully limited by eligibility criteria, no restrictions were placed on the discretion of the sentencing judge in determining whether or not to use the alternative once the defendant is statutorily eligible. Judges are not prohibited from considering any information, including offender characteristics, and no provision is made for appellate review of these discretionary decisions.

Since its initial foray into sentencing guidelines, the legislature has never varied its decision that the primary factors which should determine sentence ranges are crime and criminal history. The only additions to the list of aggravating and mitigating factors consisted of crime related factors.

### D. Judicial Response

Judges in Washington, as most judges across the nation, initially opposed the Sentencing Reform Act and have continued to chafe under its restrictions. Even though Washington's judges would not have adopted the reform initially and would repeal it now, by and large they have accepted the legislature's primacy in establishing sentencing policy. Indicative are statements such as "the presumptive ranges established for each crime represent the *Legislature's judgment* as to how best to accommodate" the multiple purposes of sentencing<sup>17</sup> and "[o]ur responsibility is to apply the SRA as written."<sup>18</sup> The

appellate courts, with one significant exception, have read the Sentencing Reform Act to prohibit consideration of offender characteristics where not expressly or impliedly authorized by the legislature. Thus, where a sentencing judge exercised the authority to reduce the length of a standard range work release sentence because the costs of the work release program were threatening the defendant's ability to maintain her business and pay restitution, a unanimous Washington Supreme Court held that no such authority existed, stating "[w]e have allowed trial court's discretion in sentencing only where the SRA so authorized, and have crafted careful guidelines to contain those limited circumstances."<sup>19</sup> Similarly appellate courts have consistently rejected departures from the standard range for offender characteristics such as alcohol or drug dependence,<sup>20</sup> educational level,<sup>21</sup> young age,<sup>22</sup> good conduct following the commission of the crime,<sup>23</sup> and parental status.<sup>24</sup>

While frequently expressing disagreement with the legislature's policy judgments, the courts do not see themselves as free to ignore those judgments. Typical is this recent statement by a unanimous Washington Supreme Court:

While we recognize the harshness of a rule that precludes the trial court from considering a defendant's altruistic past during the sentencing phase, the . . . Act requires this result. . . . Although sentencing within the standard range may at times appear unnecessary or even unjustified, it is the function of the judiciary to impose sentences consistent with legislative enactment.<sup>25</sup>

Ironically, the one departure from this line of cases authorized upward departures. It began with a series of Court of Appeals decisions upholding such departures from the standard range in sex offender cases for "predicted future dangerousness" when that prediction was based on "a history of similar acts or other corroborating evidence."<sup>26</sup> Subsequent cases required that the history of similar acts be accompanied by evidence of lack of amenability to treatment.<sup>27</sup> The Supreme Court approved exceptional sentences for sex offenders based on future dangerousness where the record contains "a history of similar acts of sexual deviancy" and "the opinion of a mental health professional that the defendant would likely not be amenable to treatment."<sup>28</sup>

The Supreme Court rejected an expansion of this exception to non-sexual offense cases in which future dangerousness had been relied upon to justify exceptionally long sentences. After reviewing the legislative history of sentencing reform in Washington, the court stated:

The extension of the future dangerousness factor to non-sexual offense cases violates the certain purpose of sentencing reform. It disrupts the proportionality policy of imposing sentences in accordance with the seriousness of the crime and

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the criminal record. Finally, it allows too broad a grant of discretion to the sentencing judge, which discretion the Legislature intended to limit.<sup>29</sup>

The court juxtaposed this finding with its continued approval of exceptional upward departures for sex offenders based on their future dangerousness. "Because the SRA distinguishes between sexual and non-sexual offenses, there is authority for this court to consider a defendant's amenability to treatment in sexual offenders cases."<sup>30</sup> While this conclusion is a doubtful reading of legislative intent,<sup>31</sup> it significantly limits the scope of the exception. In recent years exceptional sentences for sex offenders have been imposed in less than twenty cases per year.

With this single exception Washington's judges have respected the allocation of powers to the different branches of government and have been faithful to the legislature's intent even though most of them would have resolved many of the policy issues—and specifically those regarding offender characteristics—quite differently.

### E. Conclusion

Whether Washington's resolution of the contentious issue of the relevance of offender characteristics to sentencing is correct is, of course, a subjective judgment. It is, however, one way to resolve the tensions inherent in crafting sentencing systems which incorporate multiple inconsistent purposes. The value of examining the different resolutions of the same issue in different jurisdictions is the insight gained from examining what other "reasonable" people see as best for them, at a given time. This report from Washington's "laboratory" is offered in that spirit.

### NOTES

<sup>1</sup> See Christopher T. Bayley, *Good Intentions Gone Awry—A Proposal for Fundamental Change in Criminal Sentencing*, 51 WASH. L. R. 529 (1976).

<sup>2</sup> *Id.* at 554.

<sup>3</sup> RCW 9.94A.010.

<sup>4</sup> RCW 9.94A.370.

<sup>5</sup> RCW 9.94A.210(1).

<sup>6</sup> RCW 9.94A.040(4). Where the top of the range is over one year, the bottom must be not less than 75% of the top; where the top of the range is between 90 days and one year, the bottom must be not less than 1/3 of the top; sentence ranges up to 90 days are unrestricted.

<sup>7</sup> RCW 9.94A.120(2).

<sup>8</sup> RCW 9.94A.120(5).

<sup>9</sup> RCW 9.94A.210(1).

<sup>10</sup> It was composed of four judges, two prosecutors, two defense attorneys, the heads of the state correctional agency, parole board and fiscal planning agency, a local police official, two citizens and four non-voting legislators. Unlike in other states and on the federal level, the Commission's role was purely advisory. The legislature retained and has

continued to retain policy making authority over all aspects of sentencing.

<sup>11</sup> RCW 9.94A.340.

<sup>12</sup> RCW 9.94A.390.

<sup>13</sup> RCW 9.94A.390(1)(e).

<sup>14</sup> RCW 9.94A.120(8).

<sup>15</sup> RCW 9.94A.137 enacted in 1993.

<sup>16</sup> RCW 9.94A.120(6) enacted in 1995.

<sup>17</sup> *State v. Allert*, 117 Wn.2d 156, 169, 815 P.2d 752 (1991) (emphasis in original).

<sup>18</sup> *State v. Harper*, 62 Wn.App. 69, 79, 813 P.2d 593 91991).

<sup>19</sup> *State v. Shove*, 113 Wn.2d 83, 89, fn.3, 776 P.2d 132 (1989).

<sup>20</sup> *State v. Gaines*, 122 Wn.2d 502, 859 P.2d 36 (1993).

<sup>21</sup> *State v. Sanchez*, 69 Wn.App. 225, 259, 848 P.2d 208 (1993), *rev. den.* 122 Wn.2d 1007 (1993). "... Sanchez presented no evidence that his limited education impaired his ability to conform his conduct to the requirements of the law..." a statutorily authorized mitigating factor. RCW 9.94A.390(1)(e).

<sup>22</sup> *State v. Scott*, 72 Wn.App. 207, 866 P.2d 1258 (1993).

<sup>23</sup> *State v. Roberts*, 77 Wn.App. 678, 685, 894 P.2d 1340 (1995) ("A defendant's good conduct following the commission of a crime is not a factor which relates to the crime itself or the defendant's criminal record. Therefore, it is not an appropriate factor to consider in sentencing")

<sup>24</sup> *State v. Hodges*, 70 W.App. 821, 825-6, 855 P.2d 291 (1993), *rev. den.* 124 Wn.2d 1013 (1994) ("The courts of this state have consistently declined to impose exceptional sentences below the standard range in the absence of factors or circumstances related to the defendant's commission of a crime that makes commission of the crime less egregious. The fact that Hodges enjoys community support, has taken great strides toward self-improvement, and is needed by her children does not in any way distinguish her possession and delivery of cocaine. . . . Clearly there was logic and compassion in the sentencing approach taken by the trial judge. However, until the legislature authorize the use of non-offense related factors, such factors cannot be relied upon to justify an exceptional sentence.")

<sup>25</sup> *State v. Freitag*, 127 Wn.2d 141, 896 P.2d 1254 (1995).

<sup>26</sup> *State v. Olive*, 47 Wn.App. 147, 150, 734 P.2d 36 (1987); *rev. den.* 109 Wn.2d 1017 (1987).

<sup>27</sup> See, e.g., *State v. Shepard*, 53 Wn.App. 194, 766 P.2d 467(1988).

<sup>28</sup> *State v. Pryor*, 115 Wn.2d 445, 455, 799 P.2d 244 (1990).

<sup>29</sup> *State v. Barnes*, 117 Wn.2d 701, 711, 818 P.2d 1088 (1991).

<sup>30</sup> *Id.* at 708.

<sup>31</sup> As a court of appeals judge, Mary Kay Becker, co-chair of the House Select Committee which crafted the Sentencing Reform Act and legislative member of the Sentencing Guidelines Commission in the early years, characterized the approval of future dangerousness as a justification for an exceptional sentence as "a major departure from the statutory framework." *In Re Rama*, 73 Wn.App. 503, 514, 869 P.2d 1122 (1994) (Becker, J. concurring).