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An Analysis of Factors Related to Prosecutor Sentencing Preferences

Gerard Rainville
American University

Three types of variables have been identified as related to prosecutor decision making in the screening and settlement stages of criminal case-processing—legal, extralegal, and resource variables. The current analysis examines the degree to which these classes of variables affect prosecutor sentence preferences. Ordinary least squares regression is used to relate factors that prosecutors regard as germane to forming sentence preferences to a measure of sentence restrictiveness. Analyses reveal a diminished reliance on legal and extralegal variables in the determination of preferred sentences. In their stead, the available correctional placement options within a prosecutor’s jurisdiction as well as the personal values of prosecutors appear to determine the level of sentence restrictiveness that prosecutors desire.

The scholarly attention devoted to the policy decisions of prosecutors is negligible relative to the importance of the prosecutor’s role in the administration of justice (Forst & Brosi, 1977; McDonald, 1979a). In the United States, the prosecutor is regarded as the “chief law enforcement officer” of their jurisdiction (American Bar Association, 1971; Jacoby, 1979) and has become a central figure in determining the outcome of criminal complaints (Adams & Cutshall, 1987; McDonald, 1979b).

Although the amount of research devoted to prosecutors has been inadequate, a small body of empirical research has examined several aspects of the prosecutor’s decision making. Variables affecting prosecutor decision making in regard to filing charges, in accepting a plea, and in other decision-making areas such as in admitting evidence (Spohn & Horney, 1992) and opting whether to prosecute juvenile offenders in adult courts (Bishop, Frazier, & Henretta, 1989; Schiraldi & Ziedenberg, 1999) have all been examined. One area that has not been examined extensively is the prosecutors’ decision

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making in regard to sentencing.¹ The purpose of this study is to present an analysis of variables that prosecutors regard in their conception of an appropriate criminal sentence.

**REVIEW OF PROSECUTOR DECISION-MAKING STUDIES**

To guide the current analysis, a brief consideration is made of variables that have been shown empirically to affect prosecutor decision making at various case-processing stages. For example, it has been noted that variations in the seriousness of the offense are correlated with both a prosecutor’s decisions to file charges (Albonetti, 1987; Frase, 1980; Jacoby, Mellon, Ratledge, & Turner, 1982) and to expend greater resources on a case (Albonetti, 1986; Landes, 1971; McDonald, Rossman, & Cramer, 1979). As such, it may be likely that such a variable informs the prosecutor’s preference for the nature of a criminal sentence.

There are three broad classes of variables that have been identified in the prosecutor decision-making literature:

*Resource-oriented variables.* Such variables are not related to any particular case at hand, but rather are environmental considerations that prosecutors must regard in determining their available courses of action in all cases. For instance, the absence of pretrial detention facilities in a prosecutor’s district may affect a prosecutor’s preference for the denial of bail. When such a resource is scarce, it may be reserved only for those cases that most urgently demand pretrial detention. A very basic resource-oriented variable is the average caseload per prosecutor. The number of cases that prosecutors are expected to handle should determine the decisions of the prosecutor as to how to handle their respective volume of cases.

*Legal variables.* Legal variables are clearly case related. Such variables generally provide justifiable grounds for opting to pursue cases in a particular way. For example, if a case involves a serious crime, a repeat offender and/or the evidence is strong, it should not be screened out.

*Extralegal variables.* These are variables for which gray areas exist in regard to the propriety of their use. For example, it is not just for prosecutors to fail to pursue a case because they object to the lifestyle, language, or manner of a victim or witness. However, when the aforementioned variables clearly affect the reliability of the evidence in a case, such as they would if
the evidence in the case consisted mainly of the testimony of this sole witness, then seemingly irrelevant “extralegal” variables may become legally relevant (Adams & Cutshall, 1987). Prejudicial variables are an extreme form of extralegal variables and are rarely appropriate to consider in deciding how to pursue a case. Considerations of the offender’s or victim’s race and/or gender, for example, should not affect the diligence of prosecutors in pursuing justice in a given case.

What has not been examined is the degree to which prosecutors’ personal preferences serve as a source of variation in case-processing decisions. Jacoby (1979, p. 77) contends that “personal considerations” of prosecutors certainly weigh on their decisions, but empirical pursuit of the interaction between these considerations, including “the prosecutor’s philosophy of law and his (sic) perception of the prosecutor’s purpose” and their preferred case outcomes have been generally lacking.

A review of the variables that have been shown, empirically, to affect prosecutor screening and case settlement decisions are presented below in Table 1. The main feature of this review is the ability to classify most case-processing variables into three general classes—resource, legal, and extralegal/prejudicial variables.

### PROSECUTORIAL SENTENCING PREFERENCES

Although judges pronounce criminal sentences, the prosecutor often recommends sentences to the judge, especially in cases settled by pleas (Alschuler, 1983). The privilege of recommending sentences, however, does not represent the chief mechanism through which prosecutors affect sentencing. In the 1980s, legislatures began to limit the discretionary power of judges by introducing sentencing guidelines to structure the sentencing process. Additionally, legislatures imposed three-strike laws and mandatory add-ons for particular charges. The net effect of sentencing reforms was a transfer of discretion from judges to prosecutors in regard to sentencing (Morris & Tonry, 1990; Tonry, 1996). Under such conditions, the prosecutor has great latitude to (effectively) determine the sentence that offenders serve by choosing which charge to file (in full awareness of the presumptive penalty and the presence of add-ons or three-strike stipulations). Thus, prosecutors may bargain with offenders both by sentence-bargaining (recommend leniency) and charge-bargaining (filing charges with lower presumptive sentences). Furthermore, the power of prosecutors to affect sentences has not been significantly altered under conditions in which plea bargains are banned (Carns & Kruse, 1992) or constrained by legislatures
In light of these enduring powers, the dearth of research into the sentencing preferences of prosecutors is a gross oversight of criminal justice researchers. The current study makes an initial attempt to identify variables that affect prosecutors’ preferences for sentences. There has been some theoretical but

<table>
<thead>
<tr>
<th>Table 1: Variables Related to Prosecutor Decision Making at Various Stages of Case-Processing (sources of empirical support)</th>
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<tr>
<td>Case screening</td>
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<tr>
<td>Resource variables</td>
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<tr>
<td>Screening policy due to caseload (Boland &amp; Forst, 1985).</td>
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<tr>
<td>Legal variables</td>
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<td>Quality of police evidence (Albonetti, 1987; Boland, Mahanna, &amp; Sones, 1992; Feeney, Dill, &amp; Weir, 1983; Forst, Lucianovic, &amp; Cox, 1977; Spears &amp; Spohn, 1997).</td>
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<td>Seriousness of the offense (Albonetti, 1987; Frase, 1980; Jacoby, Mellon, Ratledge, &amp; Turner, 1982).</td>
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<td>Prior criminal record (Adams &amp; Cutshall, 1987; Albonetti, 1987; Neubauer, 1974).</td>
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<td>Extralegal or prejudicial variables</td>
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<td>Summary (Plea) or full extent (trial-ready) prosecution</td>
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<td>Resource variables</td>
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<td>Defendant’s costs for trial (Emmelman, 1996; Landes, 1971; Rhodes, 1974).</td>
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<td>Size of the pool of eligible defendants for trial (Boland &amp; Forst, 1985).</td>
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<td>Legal variables</td>
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<td>Aggravating/mitigating circumstances related to crime (Albonetti, 1986; Emmelman, 1996; Forst &amp; Brosi, 1977; McDonald et al., 1979)</td>
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<td>Prior criminal record (Albonetti, 1986; McDonald et al., 1979; Pritchard, 1986).</td>
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<td>Extralegal or prejudicial variables</td>
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<td>Mitigating circumstances related to defendant (Emmelman, 1996; McDonald et al., 1979).</td>
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<tr>
<td>Demographics of defendant (McDonald et al., 1979; Pritchard, 1986).</td>
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<tr>
<td>Victim relation to offender (Albonetti, 1986; McDonald et al., 1979).</td>
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a. Includes age, race, and gender.
b. Includes the seriousness of the crime, in general, but also the presence of codefendants, provocation by victims, and other variables related to the criminal event that diminish or increase culpability.
c. Includes any favorable quality or action on the part of the defendant that defense attorneys may emphasize to decrease the “value of the case” for prosecutors.

(McCoy, 1993). In light of these enduring powers, the dearth of research into the sentencing preferences of prosecutors is a gross oversight of criminal justice researchers.

The current study makes an initial attempt to identify variables that affect prosecutors’ preferences for sentences. There has been some theoretical but
very little previous empirical work on prosecutor sentencing preferences, particularly in regard to chief elected prosecutors—those who determine sentencing policy in their jurisdictions.

METHOD

The current study seeks to determine, within the context of a given case, the rationales given by district attorneys for seeking (or not seeking) more restrictive sentences. Scholars have suggested that prosecutors regard “getting time” as perhaps the only suitable form of punishment (Irwin & Austin, 1994; Zimring & Hawkins, 1994). Diversion or other less-restrictive sanctions may be regarded as “a break” for the offender. In the current study, it is not assumed that prosecutors prefer restrictive sentences, but that they recognize and can articulate the degree to which they desire more-restrictive sentences. Some rationale for their preferred level of restrictiveness exists and may also be identified.

Sample and Method

The current study utilizes a survey instrument that elicits district attorneys’ assessments of a suitable sentence for an offender presented in a vignette (reproduced in the appendix). The survey was conducted by the Institute for Law and Justice. Survey responses are presented for a nationwide sample of 77 district attorneys.

After the presentation of the vignette, respondents are asked to identify case factors that inform their preferred sentences. After doing so, district attorneys are asked to conceive of the criminal sentence as consisting of 100 units. The number of units that district attorneys claim the defendant should spend in a restrictive setting serves as the dependent variable in the current study. The relationships between the factors that prosecutors identify as important in forming their preferred sentence and the degree of restrictiveness of their preferred sentence are examined below. A single variable—the number of restrictive placement options available to district attorneys—is not self-reported as it is an environmental variable that respondents are not likely to self-report as a factor in their conception of a preferred sentence.

Bivariate Results—Difference of Means

Attempts were made to code district attorneys’ narrative responses into the broad categories of legal, extralegal/prejudicial, and resource-oriented
factors. Several legal rationales were reported as relevant to sentencing preferences, including the defendant’s use of drugs, his or her recidivist nature, and the potential harm associated with the nature of his or her crime. Two extralegal rationales were commonly cited—the age of the defendant and his or her work history. A resource consideration that affected sentencing preferences was the availability of restrictive placement options in the respondent’s jurisdiction. Finally, three factors that are difficult to categorize were commonly reported. The first was a common claim that some component of a less restrictive sentence would benefit the defendant. A second was the statement that probation had failed in the past to achieve its desired results. The final was a somewhat tautological claim that any other approach (beyond the one preferred by the respondent) was destined to fail. These variables are discussed more extensively in the concluding section.

Table 2 presents how often variables were reported as important in determining a sentence. Means in independent sample t tests reveal the direction (and significance) of preferences for restrictive sentences of district attorneys for each of the identified variables. For instance, the mean number of sentence units that should be devoted to restrictive settings for respondents who regard the defendant’s recidivism as an important consideration in sentencing is higher than the mean for those who do not. As such, recidivism, in the present case, serves to inform a preference for a more restrictive sentence among the study respondents.

The variable that was identified by the largest number of district attorneys as important in sentencing was the drug use of the defendant. Somewhat surprisingly, those who cited drug use as a variable in sentencing desired no more or less of a restrictive sentence than those who did not. Though cited often, drug use does not appear to be linked to a preference for more restrictive sentences, possibly reflecting a split among district attorneys in their conception of suitable criminal justice approaches to dealing with drug use.

There were three rationales for which significant differences were found between differing groups of respondents:

- District attorneys in jurisdictions with a greater number of restrictive placement options felt that significantly more units of a sanction should be spent in a restrictive setting than those with fewer restrictive placement options,
- district attorneys who identified the defendant’s recidivism as a consideration in sentencing felt that significantly more units of a sanction should be spent in a restrictive setting than those who did not, and
district attorneys who identified a belief that the defendant would benefit from a less restrictive placement devoted significantly fewer units of the sanction to restrictive placements than those who did not identify such a belief.

**Multivariate Results**

The extent to which the variables identified in Table 2 account for the variation in the restrictiveness of preferred sentences may be determined through regression. Additionally, variables that remain or become significant determinants of preferred sentences, controlling for all others, may be revealed through regression. For each of the variables, a dummy is created.
that is consistent with the coding in Table 2 (0 if “X is not important”; 1 if “X is important in sentencing”). Table 3 presents the regression results on the dependent variable of the number of units of the sanction that district attorneys prefer that the defendant spend in a restrictive setting.

The overall regression model is significant and explains about 35% of the variation in the dependent variable. Three variables were significant when controlling for all others: The resource variable measured as the number of restrictive placement options available to district attorneys, the belief that some benefit to the defendant would be gained more readily in a less restrictive setting, and the statement that approaches other than that preferred by the respondent were destined to fail.9

It is surprising to note that no legal or extralegal variables were significant in the regression model.10 The legal variable relating to the recidivist nature of the defendant failed to attain significance in the regression, yet was nearly significant at the $p < .01$ level in the previous bivariate analysis.
DISCUSSION

The limitations of the current study should be acknowledged to temper the credence given to the study’s findings and their implications. It is granted that the design and sample size could be dramatically improved, but the method and data generated are suitable for the purposes of conducting a preliminary analysis of sentencing preferences.

The first limitation is in the lack of variability of case factors. The vignette did not present a White offender to one set of respondents and a Black offender to others, nor were cases with evidence of differing strength presented to respondents, and so on. What may appear as a limitation, however, actually helps to underscore the type of variation this study seeks to find—variation among prosecutors. The research question is not, Do prosecutors want longer sentences when evidence is stronger? but rather, Presented with the same case, what factors are regarded as important by different prosecutors and how does this affect sentencing preferences?

A second criticism of the study may be that sentencing preferences identified through a case vignette methodology do not reveal the real world preferences of prosecutors. First of all, a tradition of using vignettes to discern prosecutors’ preferences (for a review of this literature see McDonald, Rossman, & Cramer, 1979) exists and has been regarded as an acceptable means of studying those areas of prosecutors’ case-processing decisions where no official data exist (Spohn & Horney, 1992).

In regard to the specifics of the vignette presented in this study, the defendant in the vignette is not an atypical defendant. As a repeat offender with a crime modality that may be charged as a misdemeanor or felony, the defendant may be the median defendant—or, in the words of several respondents, “Not the worst guy in the world, but not the best either.” As such, the ambiguities of the presented case may elicit a wider variety of attitudes, rationales, and justifications for sentencing preferences than more extreme cases (that are clearly suited for more- or less-restrictive placements). Nonetheless, there are cases, at the poles, for which the current case vignette will not extend.

A final criticism is that a sample of 77 district attorneys from across the country may not be representative of the larger population of elected prosecutors. There are two distinct criticisms. The first is that of sample size. The sample employed is not particularly low by convention. Studies with prosecutors as respondents commonly sample fewer prosecutors (Bishop, Frazier, & Henretta, 1989; Lagoy, Senna, & Siegel, 1976) or respondents from fewer sites (McDonald et al., 1979). Such studies often employ
samples of convenience as well, owing to the noted avoidance of research collaborations on the part of prosecutors (Forst, in press) and nonresponse to mail surveys. More important than the size of the sample is whether nonresponse to the survey led to a nonrepresentative sample. The initial sample of district attorneys included three population strata (i.e., the “representativeness” of the sample was with regard to the size of jurisdictions that district attorneys served). The proportion of the total sample that each stratum represents is matched in the final sample of actual respondents. As such, no clear, systematic nonresponse with regard to the size of jurisdictions was noted. Needless to say, results should be regarded with some degree of caution.

The current study suggests that two classes of variables—legal and extralegal variables—that have been correlated in countless examinations of other case-processing decisions, are not major determinants of prosecutors’ preferences in regard to sentencing. Ideally, those variables that should inform other prosecutor decisions—that is, legal variables (cf. James, 1995, for the duty of prosecutors to attend solely to legal case variables)—should serve to inform the preferred case outcomes of prosecutors. However, this does not appear to be the case. In the multivariate analysis in the current study, the recidivist nature of the defendant nearly attained significance as a legal variable related to sentencing preference. However, no legal or extralegal variables led to significantly more- or less-restrictive sentencing preferences, controlling for other variables. This finding suggests that further analysis of sentencing preferences may focus on other classes of variables that are not indigenous to specific cases, such as resource variables and, as Jacoby (1979) noted, the personal values of prosecutors.

The current study finds that the choice set of the prosecutor, in regard to the nature of available placement options, serves as the most significant determinant of sentencing preferences, when controlling for other variables. The normative implications of this finding then are that those sentenced in jurisdictions with a greater array of restrictive placements are more likely to be placed in restrictive settings. If this were, in fact, the case, there are grounds to object to such a justice system (believing that justice should be uniform across jurisdictions). However, it would be naïve to imagine that resources are distributed across jurisdictions in a uniform manner. As such, the finding that prosecutors’ preferences are subject to the resource constraint of their available choices is hardly surprising or novel (see Mellon, Jacoby, & Brewer, 1981), though it may be regarded as
problematic. It is perhaps obvious, though the implications are grand, that increasing the placement options of prosecutors may increase the level of refinement in their sentencing preferences.

Three variables were identified that are neither legal, extralegal, nor resource variables. Two of these variables led to significant differences in preferred sentences between district attorneys who did and did not identify them:

- For district attorneys who expressed a belief that the defendant could benefit from a less restrictive setting, not surprisingly, less restrictive sentences were preferred. District attorneys commonly cited a need for drug treatment and an educational component for the offender and opted to devote fewer units of the sentence to restrictive settings. Both of these treatment components were equated with a rehabilitative correctional approach that was, in turn, equated with less-restrictive placements.

- A second significant variable was the belief that correctional approaches that differ from the respondents’ preferred approach were bound to fail. Respondents who identify such a rationale prefer restrictive sentences over less restrictive ones. Unlike the previous variable that identified a component associated with less-restrictive approaches as a justification for a less-restrictive sentence, this variable is relatively self-reflective in nature. Respondents rarely made a pretense of identifying a justifying virtue within their preferred approaches. Many simply claim that they believe in punishment, which is linked intimately with more-restrictive correctional approaches.

Both of these variables link preferred correctional approaches with particular levels of restrictiveness. Such an unquestioned linkage may lead district attorneys to fail to recognize correctional options with regard to two distinct correctional dimensions—the level of restrictiveness and the degree of availability of treatment components. Such thought leads to a binary regard for sentencing outcomes of “hard time” versus “beating a rap.” Though such an approach may maximize the district attorney’s political capital as a “tough on crime” official, it may undermine crime prevention, failing to match offenders with appropriate correctional resources.

Related more to the second variable, tautological justifications may also serve as a convenience to district attorneys but could ultimately prompt legislatures and criminal justice reformers to seek to structure sentencing outcomes around more concrete principles (as has been done already in response to, arguably, unprincipled sentencing on the part of the judiciary).
CONCLUSION

In conclusion, the sentencing preferences of district attorneys are determined chiefly by the array of correctional options available in jurisdictions. Additionally, the manner in which district attorneys conceive of these placement options bears on the refinement of their placement decisions. Some evidence of a polar regard for less-restrictive/rehabilitative approaches and more-restrictive/punitive approaches was noted. Generating correctional options that combine these two distinct dimensions—level of restrictiveness and level of treatment components—in a less stereotypical manner, should refine prosecutors’ sentencing preferences.

Legal and extralegal variables that emanate from the particulars of a case, though chief determinants of screening and case settlement decisions, were not found to be determinants of sentencing preferences. As such, sentencing preferences seem to be informed by identifiable principles related to correctional resources but also to variables that are neither indigenous to the case at hand nor informed by resource constraints. Precise identification of these variables and whether they relate to just or efficient case outcomes is critical undone business for scholars of prosecution.

APPENDIX

Joe A. is a nighttime burglar of residences. He does not carry a gun or a knife. He has a pattern of breaking into houses when no one is home. He has one previous conviction for burglary of a house. He also has a juvenile offense for burglary. He has been on probation before and the probation agent reports that he generally complied with reporting requirements. He has also paid the majority of his fines.

Joe A. has a part-time job in a printing shop and is a fairly reliable employee. He has tried to get full-time work but no position is available at his current employers. He has lived at the same apartment for the past 2 years with two other friends and the landlord reports that he is fairly reliable on rent payments. His parents live in the area and he helps support them when he can. Joe A. dropped out of school in the 11th grade.

Joe A. is single and 22 years old. He frequently uses drugs and alcohol with his friends. Although he had a positive urinalysis for cocaine at the time of his arrest, Joe A. does not feel that his drug and alcohol use affects his behavior.
NOTES

1. One reviewer noted that several state statutes explicitly limit the role of the prosecutor in the determination of sentences. I do agree that the prosecutor is not empowered with a “sentencing function.” Judges traditionally impose sentences, but prosecutors may establish case-processing policies or advise the court in such ways as to influence sentencing outcomes. In this, there are ends (in regard to the sentences imposed) that prosecutors hope to affect in any given criminal case. The focus of this examination is, therefore, on the ends district attorneys would seek if they were the central arbiters of a criminal case.

2. A liberal conception as to what is deemed as empirical evidence of variables being related to the decision to screen a case, accept or offer a plea, or go to trial is employed. Empirical methods to demonstrate relationships include quantitative analyses with suitable controls applied, ethnographic descriptions, and prosecutor self-report of variables they deem as central to their decision making.

3. Notable exceptions are evaluations of mandatory sentencing reforms that consistently find no initial or lasting modification of the going rate for criminal offenses and rarely an effect on the rate of targeted crimes (Dickey & Hollenhurst, 1999; Loftin, Heumann, & McDowall, 1983; Stolzenberg & D’Alessio, 1994). Such findings suggest that changes in the seriousness of the offense as reflected by changes in the law do not alter prosecutors’ preferences for sentences. Another exception is McDonald, Rossman, and Cramer (1979), who found that the seriousness of the defendant’s prior record was found to be unrelated to the sentence recommendation.

4. A similar method, using vignettes, was employed by McDonald et al. (1979) who used a decision simulation method in which assistant prosecutors choose from an array of cards with labels such as “basic facts of the case,” “aggravating/mitigating circumstances,” and so on, and are asked to assist a less experienced prosecutor in deciding on a “bottom-line” plea and sentence arrangement. Unlike the current study, respondents in McDonald et al. (1979) are to suppose they are in a hypothetical jurisdiction (the nature of which is specified) so that jurisdictional differences are held constant.

5. Survey responses were returned between the summer of 1994 and January 1995. The original sample consisted of 112 district attorneys. The response rate was 68.8% with no indicators of systematic nonresponse from jurisdictions within specific population strata. Though the data set contains several features that make it particularly suitable for examining sentencing preferences, one reviewer commented on potential generalizability problems associated with the age of the data. A few factors may mitigate these problems. First, responses were provided well after the main wave of legislative structuring of criminal sentences had occurred (Tonry, 1996). As such, the prosecutor’s level of discretion has remained, in relative terms, constant since the time of the survey. Additionally, the expansion of nontraditional prosecutorial approaches throughout and after the response period (such as neighborhood and community prosecution approaches) is unlikely to shift sentencing preferences in cases such as those presented in the vignette. Such approaches generally seek informal solutions to low level crime and public order problems. The vignette features a crime modality (nighttime breaking and entering) that may not be dealt with informally.

6. Respondents are asked to identify what they regard as important in determining the sentence for the offender.
7. Such a formulation of the dependent variable, rather than eliciting a preferred sentence length, avoids a reflection of the average sentence length within a jurisdiction.

8. This resource measure consisted of the number of various forms of incapacitative sanctions—jail, prison, boot camp, intensive supervision, and so on, that were available in the respondent’s jurisdiction.

9. In a stepwise regression, these same three variables entered in the following order: (a) “all other approaches would fail,” (b) the number of restrictive placements, and (c) the need for a less restrictive setting for the defendant. No additional variables entered the stepwise regression. This three-variable model accounted for 27% of the variation in sentence preferences.

10. In F-bloc tests, the addition of the two extralegal variables failed to significantly improve on a model that initially included only legal variables. The addition of the three “other” variables (as a bloc) significantly improved a model including only legal variables.

REFERENCES


Gerard Rainville is a doctoral candidate and dissertation fellow at American University, Washington, DC. His main research interests are prosecution, sentencing, and the accountability of criminal justice officials.