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## **Sentencing in the Netherlands. Taking risk-related offender characteristics into account**

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## 7 | Summary and general discussion

### 7.1 SUMMARY

#### 7.1.1 Introduction

This study examines the sentencing decisions of judges. In most cases it is not just the final decision in the criminal proceedings, it may be the most important one as well, for it stipulates the consequences of an offense for the offender. Moreover, the public's opinion on the performance of the judiciary is mainly based on the sentences imposed (De Roos, 2000). So sentencing is not only relevant because of the impact the punishment has on the offender, it is indeed a cornerstone of the legitimacy of the entire criminal justice system. Nonetheless, there are still questions about the factors judges take into account when they make their sentencing decisions, and why they do so. In addition, it is unclear in which way these factors are interrelated, causing indirect or intermediate effects on sentencing outcomes. By addressing these questions, this study aims to improve our understanding of judges' sentencing decisions. Special attention is devoted to the effects of risk-related offender characteristics and circumstances on sentencing outcomes.

The findings of the current study are summarized below. Thereafter, I discuss the overall findings on risk-based sentencing, as well as the theoretical and practical implications of my study. I conclude with some methodological considerations and suggestions for future research.

#### 7.1.2 Effects of offender characteristics and the intermediating effects of risk-related offender circumstances

In Chapter 2 the first research question is addressed: *to what extent are the effects of demographic offender characteristics on sentencing outcomes mediated by his risk-related personal circumstances?* Using the focal concerns perspective (Steffensmeier & Demuth, 2000; Steffensmeier, Kramer, & Ulmer, 1995; Steffensmeier, Ulmer, & Kramer, 1998) as the main theoretical framework in sentencing research, offender characteristics are generally assumed to affect sentencing outcomes because judges – either consciously or unconsciously – use them to assess the offender's blameworthiness and dangerousness.

However, the focal concerns perspective does not clearly specify which factors explicitly contribute to the attribution of blameworthiness and dangerousness or precisely how they affect these attributions. Important progress on this issue can be made by linking it to prior research findings on predictors of (re)offending, that suggest which personal offender circumstances increase the risk of reoffending. Examples include homelessness (Lee, Tyler & Wright, 2010), family disruptions (Sampson, 1987), low socioeconomic status (Farrington, 2007), low educational attainment (Makarios, Steiner & Travis III, 2010), unemployment (Haynie, Weiss & Piquero, 2008; Van der Geest, Bijleveld & Blokland, 2011) and relationships with delinquent peers (Akers, 2009; Sampson & Laub, 1993; Sutherland, 1947; Warr, 1998). I address this 'missing link' in sentencing theory by investigating whether these risk-related circumstances of the offender serve as key mediators in the relation between demographic offender characteristics and sentencing. By investigating the effects of the offender's social circumstances as mediators – rather than merely including them as controls – I follow Ulmer's (2012) and Baumer's (2013) suggestion that modeling indirect or mediating effects is needed in order to improve the traditional approach to sentencing research.

In my study I find the offender's sex, age and country of birth to be related to sentencing outcomes: female and young offenders are punished more leniently, and foreign-born offenders more severely. The effects of gender and country of birth are mitigated by including detailed offender circumstances, though gender differences remain even after controlling for risk-related personal circumstances of the offender. In addition, age differences are not significantly mediated at all. This suggests that though risk-related personal circumstances of offenders are important in determining sentencing outcomes, they do not fully account for the effects of the demographic offender characteristics. So despite very detailed information on the risk of reoffending, judges still appear to be influenced by stereotypical attributions linked to the offender's sex, age and country of birth. A possible explanation is that even if judges have no information constraints, they may still be affected by time constraints. Due to limited time for the disposal of the case, the available information on the offender's blameworthiness or dangerousness may be supplemented by existing stereotypes and offender preconceptions.

### 7.1.3 Effects of structured risk-based pre-sentence reports on sentencing

In Chapter 3 the second research question is addressed: *to what extent does a structured risk-based pre-sentence report enhance risk-based sentencing?* The focus is not on the effects of characteristics and risk-related personal circumstances of the offender as in Chapter 2, but on the effects of offender's risk of reoffending as it is communicated to the judge via a pre-sentence report. By examining

the role of pre-sentence reports in sentencing, I address another factor relevant to penal decision-making that has barely been researched up to now.

According to new penological accounts (Feeley & Simon, 1992, 1994), crime is considered a risk like any other risk that needs to be managed. To do so efficiently, whatever scarce resources are available are used to keep high-risk offenders under control and – the other side of the coin – to divert low-risk offenders from prison. The risk assessment tool RISC is a textbook example of the emergence of risk assessment in Dutch criminal justice practices since it serves as the foundation for the pre-sentence report. Risk-based pre-sentence reports narratively describe offender's risks in several fields of life and conclude by classifying him as a low, medium or high-risk offender, thereby framing him as a certain risk to society.

I investigate whether a risk-based pre-sentence report enhances risk-based sentencing: are high-risk defendants with a risk-based pre-sentence report indeed more likely to be sentenced to more 'controlling' types of punishment (incarceration or suspended sentences with special conditions) and less likely to be sentenced to 'diverting' types of punishment (e.g. community service, suspended sentences) than high-risk defendants without such a report? I expect the opposite to hold true for low-risk defendants. To compare the sentencing outcomes of offenders with a structured risk-based pre-sentence report to those of similar offenders without such a report, I use extensive matching techniques (propensity score matching combined with a matching on nine additional defendant and case characteristics). With this method, I follow Baumer's (2013) call to adopt alternative estimation procedures for identifying determinants of sentencing (see also Ulmer, 2012).

The findings suggest that a pre-sentence report based on a structured clinical risk-assessment tool – a hallmark of risk managerialism in the new penology – does not enhance risk-based sentencing. It does not increase the chance of high-risk defendants being sentenced to controlling types of punishment, nor does it decrease their chance of being sentenced to diverting types of punishment. Instead, a structured risk-based pre-sentence report informing the judge about criminogenic factors in a defendant's life relates to less controlling and more diverting sentencing outcomes regardless of the risk the defendant presents.

Possibly, judges might not consider defendant's personal circumstances structurally presented in the pre-sentence report as aggravating factors indicating a need to protect society by imposing controlling types of punishment, but rather as mitigating factors indicating possibilities for rehabilitation of the defendant (see Mathiesen, 1998; Moerings, 2003). Differences in the sentencing outcomes of defendants with and without a structured risk-based pre-sentence report might then be explained by an information effect in the sense that judges without a sound grasp of a defendants' personal circumstances are less able to take them into consideration as mitigating factors. With risk factors regarded as mitigating factors, the penal welfarism account rather than the new peno-

logical one still seems prevalent in judicial decision-making in the Netherlands. This corresponds to Field and Nelken's (2010) observation that old welfarism discourses have not been replaced by new penological ones, but instead resulted in new complex and contradictory interweaving (see also Hannah-Moffat, 2005; Wandall, 2010).

#### 7.1.4 Judges' views on the risk of reoffending as a sentencing determinant

In Chapter 4 the third research question is addressed: *how is the risk of reoffending related to sentencing according to judges?* The risk of reoffending is a major feature of utilitarian sentencing goals justifying punishment and thereby also of the mixed theory alleged to be dominant in Dutch sentencing (De Keijser, 2001a; 2001b). In this mixed or hybrid theory, retribution is the essence of punishment and also constitutes its upper limit. Punishment cannot be more severe than required by the severity of the offense and blameworthiness of the offender (Von Hirsch & Ashworth, 2005). Below this upper boundary, utilitarian goals may be pursued. To justify punishment imposed with the aim of incapacitating or rehabilitating the offender, his risk of reoffending is of the utmost importance. Nevertheless, to date, the role of the risk of reoffending has barely been studied in empirical sentencing research.

Contrary to the prior chapters, I use a qualitative research method in Chapter 4 to investigate the role of the risk of reoffending in sentencing. Fifteen judges are interviewed. This research method supplements the quantitative approach in the previous chapters in several important ways. The interviews provide valuable insight into the judges' considerations about sentencing, especially regarding factors that are hard to capture with quantitative research methods such as the judges' *perceptions* of the risk of reoffending. In addition, using interviews as a research method can reveal the *motives* of judges for taking certain aspects into account when making a sentencing decision.

The findings suggest that judges attribute great importance to the offender's risk of reoffending when making their sentencing decision, but do not blindly accept how it is described in the pre-sentence report. They prefer to make their own risk assessment instead, using the information on offender's criminogenic circumstances from the pre-sentence report, as well as information on prior convictions from the offender's criminal record. The judges state that the risk of reoffending is especially relevant to their decision on the *type* of punishment. A high risk of reoffending does not make them more apt to sentence the offender to prison, but it does tend to trigger *suspended* prison sentences with behavioral interventions as a special condition, because they feel these offenders need 'fixing'. Low-risk offenders are less likely to get suspended sentences with special conditions, since they are expected to stay on the right track anyhow.

The interviews further show that the judges do not write off high-risk offenders beforehand. They always tend to look for signs that the offender is willing to turn over a new leaf. In line with the findings in the previous chapter, this implies that in sentencing practice, the penal welfarism notion of rehabilitation prevails over the new penology's idea of risk control. However, the judges note that some offenders failed to take advantage of opportunities given to them at sentencing in the past. Prior sentences, with their rising 'sentencing trend', are an important consideration for judges on this matter. If the judges feel an offender has had adequate chances, rehabilitation is no longer pursued and retribution or incapacitation become the dominant sentencing considerations. These findings are in line with Hannah-Moffat's (2005) comment that new penology has not replaced the 'old' sentencing practice of penal welfarism, but has resulted instead in hybrid and flexible strategies supporting various sentencing practices at the same time.

#### 7.1.5 Factors related to sentencing homicide offenders

Although the previous chapters broaden the scope of sentencing research by examining previously overlooked aspects of sentencing regarding offender's risk of reoffending, certain questions about determinants of sentencing still remain unanswered. Chapter 5 addresses some of the remaining and previously overlooked issues, such as how victim characteristics, victim-offender-interactions, offense characteristics (*locus delicti*, *modus operandi*), and prosecutorial sentencing recommendations affect sentencing outcomes. The Dutch Homicide Database (N=1,911) goes into great detail about these issues and provides a unique opportunity to study these little-researched factors and interactions. This chapter focuses on the fourth research question: *to what extent are offense, offender, victim and case-processing characteristics related to the sentencing of homicide offenders?* Focusing on homicide fills another gap in the existing sentencing literature, since so few studies focus on this 'ultimate' crime (Auerhahn, 2007b), even though homicide punishments play such an important role in public opinion and concerns about sentencing in general.

I test seven hypotheses on the sentencing of homicide offenders (see Table 5.4). The findings suggest that the *severity of the offense* is related to the sentencing outcome in that the more severe the offense, the more severe the punishment. Sentences involving mandatory treatment for the mentally ill (Tbs) are associated with shorter prison terms. Second, *prior convictions* are not related to the sentencing outcomes, but prior incarceration is significantly and strongly related to harsher punishment. Third, as to *offender characteristics*, sex, age and country of birth affect the sentencing outcomes. Women receive significantly shorter prison terms than men, and non-European foreigners significantly longer sentences than Dutch-born offenders. Very young and very old offenders are also treated leniently at sentencing. Fourth, as to *victim character-*

*istics*, the findings suggest that homicides involving female, Dutch-born and very young or old victims are punished more severely. Moreover, in line with the fifth hypothesis, *victim and offender characteristics interact*, yielding particularly severe sentences for male offenders who murder females or foreign-born offenders who murder Dutch-born victims. Sixth, *circumstances of the offense*, e.g. *locus delicti*, *modus operandi* and type of crime, also affect the sentencing outcome. Homicide in public spaces is associated with longer sentences than homicide in private households. Homicide involving firearms leads to particularly severe sentences, and non-family homicide to the stiffest penalties, particularly if committed in conjunction with robbery or sexual crimes. In general, incident characteristics that convey more of a danger and threat to society tend to result in longer prison terms. Lastly, although sentencing outcomes are somewhat more lenient than prosecutorial recommendations, prosecutorial sentencing recommendations are strongly related to sentencing outcomes.

Overall, my findings suggest that factors rarely studied in the past such as characteristics of the offense (*locus delicti* and *modus operandi*) and the victim as well as prosecutorial sentencing recommendations help account for differences in sentencing outcomes. To better explain the differences in sentencing outcomes, future research should therefore include these usually omitted factors as well.

#### 7.1.6 Why sentencing research should consider alternative, more complete measures of sentence severity

Chapter 6 focuses on the fifth research question: *to what extent do we need to reconsider our knowledge about offender characteristics as sentencing factors when the scope of the research is expanded to include the entire range of sanctions?* Sentencing research is generally limited to unsuspended prison sentences. This is an important flaw, since sentences typically consist of a myriad of sentencing options. Various sanction types are jointly imposed, some unsuspended (definitely carried out), others suspended (only carried out if the offender violates certain conditions). Combinations of sanction types frequently occur: in 2011 offenders were sentenced to an average of 1.4 punishment types, not including suspended sentences (Van Rosmalen, Kalidien & De Heer-de Lange, 2012). Moreover, research on perceptions of punishment severity, e.g. using surveys to establish punishment exchange rates, suggests that under certain circumstances, other sanction types are considered more severe than unsuspended prison sentences (e.g. Crouch, 1993; Spelman, 1995). Findings from prior sentencing research focusing solely on unsuspended imprisonment are thus incomplete and might be biased. This bias raises questions about the tenability of findings from prior research. Does our knowledge of sentencing



determinants need to be revised as sentencing research broadens its scope to a more complete and realistic picture of the imposed sentences?

To answer this question, I first compare the effects (i.e. outcomes of multivariate regression analyses) of offender characteristics from a model that – like sentencing research in general – only captures unsuspended prison sentences to the effects from similar models that capture other sanction types. My findings suggest that the effects of offender characteristics vary for different sanction types. The effects of unsuspended imprisonment and suspended community service are nearly mirrored. This seems logical, since suspended community service is considered a much lighter sentence than unsuspended imprisonment. Yet, these divergent effects underline the importance of broadening the scope of sentencing research to a more complete measure of the sentences imposed. After all, offenders can sometimes be punished less severely as regards one type of sanction and more severely as regards another.

Therefore, I also compare the effects of offender characteristics from the model confined to unsuspended prison sentences to those from a model including different sanction types and their combinations in one comprehensive measure of sentence severity. The results indicate that some offender characteristics have similar effects in both models. If other sanction types and combinations are taken into account, women for example are still punished less severely than men. Problems involving emotional well-being and attitude also have mitigating effects in both models. Comparable aggravating effects are observed for the offender's criminal record as an adult, problems regarding his housing or financial situation, relationships with friends and alcohol use. So a more complete measure of the sentences imposed does not affect the outcomes as regards these offender characteristics.

However, other offender characteristics do have effects that differ on the two models with regard to the statistical significance of the findings. Mitigating effects for offenders aged 31-40 and 41-50, or with problematic family ties disappear if other sanction types and combinations are taken into account. Likewise, the aggravating effects for offenders from other Western countries or with three or more juvenile convictions disappear. Conversely, there are no significant effects on sentencing outcomes in the imprisonment model for offenders with one or two prior juvenile convictions, but in the model including other sanction types, they are punished more severely than offenders without prior juvenile convictions.

Moreover, certain offender characteristics have opposite effects in the two models. If sentencing research is not limited to unsuspended imprisonment but broadened to other sanction types and combinations, offenders from non-Western countries are no longer punished *more* severely than those born in the Netherlands, but slightly *less* severely. Perhaps these offenders are more harshly punished with unsuspended imprisonment *because* they are less eligible for suspended sentences or community service. For they are more likely to have no permanent address in the Netherlands, making it difficult for pro-

bation agencies to contact them about the execution of their sentence. These reverse effects are also observed for offenders with education and employment problems. Offenders with a steady job are less likely to be sentenced to unsuspended imprisonment, possibly because judges do not want them to lose their jobs. However, this employment discount for unsuspended imprisonment sentences is overcompensated by a more punitive approach regarding other sanction types. Drug abuse also has the opposite effect: offenders with drug problems are punished *less* severely in the imprisonment model and *more* severely if other sanction types are also considered. The aggravating effect of drug abuse there can be ascribed to the ISD-measure, i.e. placement in an institution for habitual offenders, which is also factored in the sentence severity.

My study reveals that there seem to be indications of counterbalancing: Features that coincide with a more severe sanction of one type regularly coincide with a less severe sanction of another type. Therefore, my findings call for a careful interpretation of prior research conclusions, since studies limited to unsuspended prison sentences might have overlooked and misinterpreted relations between offender characteristics and sentencing outcomes. The aggravating or mitigating effects of certain characteristics either appear, disappear or are inverted if other sanction types or combinations are taken into account. Future research should therefore continue to develop new methods that present a more complete picture of sentencing practice.

## 7.2 GENERAL DISCUSSION

### 7.2.1 Taking the offender's characteristics and risk-related social circumstances into account

#### *Risk and sentencing*

Developments in criminal justice practice regarding the emergence of actuarial justice (Feeley & Simon, 1992, 1994), entailing the introduction of the risk assessment tool RISC as the foundation of the pre-sentence report, led me to focus on two related matters: the effects of risk-based pre-sentence reports and of the offender's personal characteristics on sentencing. The introduction of the risk-based pre-sentence report in Dutch criminal justice practice drew attention to the extent to which judges consider risk-related information on the offender's demographic characteristics and social circumstances when making their sentencing decision. In line with new penological discourses (Feeley & Simon, 1992, 1994) I expected the emergence of actuarial justice to steer sentencing practice towards risk-based sentencing, so that offenders with characteristics or social circumstances indicative of a high risk of harm to society in the future are punished more severely than low-risk offenders. In

other words, so that in an effort to protect society, high-risk offenders are more likely to be sentenced to prison and to longer prison terms.

The current study builds on prior sentencing research my colleagues and I conducted (Van Wingerden, Moerings, & Van Wilsem, 2011) on the role of the offender's RISC-categorization, distinguishing low, medium or high-risk offenders, in sentencing. Our findings of that prior study suggest that – controlled for various offense, case-processing and offender characteristics – offenders with a high RISC-outcome are not sentenced more severely than those with a low RISC-outcome. We conclude that, contrary to new penological discourses, the offender's risk categorization is not a major sentencing determinant. Hence, we did not find evidence of actuarial justice in Dutch sentencing practice. The present study delves deeper into the role of the offender's risk of reoffending in sentencing, focusing more on the effects of offender's risk-related social circumstances and on the effects of a risk-based pre-sentence report on the sentencing outcome.

*The importance of studying the risk of reoffending as a sentencing determinant*

It is important to note that the risk of future crimes is not to be confused with crimes committed in the past, even if a criminal record is a strong predictor of future crimes (see e.g. Wartna, Tollenaar & Bogaerts, 2009). This distinction is relevant to the scope of sentencing research. The offender's criminal record is a well-known sentencing determinant. Various sentencing studies suggest that the more extensive the offender's criminal record, the more severe the punishment (e.g. Jongman & Schilt, 1976; Kannegieter, 1994; Oomen, 1970; Timmerman & Breembroek, 1985). The effect of the risk of reoffending on sentencing has however barely been studied. With the exception of my prior study, it is uncharted territory.

Second, in theories about the justification of punishment, the offender's criminal history and the risk of reoffending are fundamentally distinct grounds for punishment. The retributivist approach leaves some room for the offender's criminal record in sentencing via the 'recidivist premium' or 'progressive loss of mitigation' (see Lee, 2009; Roberts, 1997), but from this retributivist perspective there is no justification for taking the risk of future crimes into account (Von Hirsch, Ashworth & Roberts, 2009). Conversely, from the utilitarian perspective on the justification of punishment, *prior crimes* are not relevant, but instead the *risk of reoffending in the future* is a key factor in sentencing with the goal of incapacitation or rehabilitation and justifies more intensive punishment for high-risk than low-risk offenders (De Keijser, 2001a). The theoretically distinct roles of past crimes and the risk of future ones merit particular attention to the understudied role of offender's risk of reoffending in sentencing practice.

*The dangers of risk-based sentencing*

Risk-based sentencing, aiming at the selective incapacitation (Mathiesen, 1998) of high-risk offenders, might be justified from a utilitarian perspective but there are numerous pitfalls. Legal scholars are concerned about how risk-based sentencing could affect the legal nature of the criminal justice system, changing it from a reactive system to a proactive form of intervention (Moerings, 2003; Moerings & Van Wingerden, 2007; Van de Bunt & Van Swaaningen, 2004; Van der Woude, 2010). Punishing someone not for what he has done but for what he might do in the future violates the *ultimum remedium* nature of the system. Worse still, he is not punished for what *he* might do, but for what an average offender with the same characteristics is statistically expected to do (Blokland & Nieuwbeerta, 2006; Netter, 2007). Moreover, risk assessment leads to inequality in the criminal justice system, with a disparately harsh impact on minorities and the poor (Tonry, 1987). In addition to these ethical issues, there are practical ones regarding the low accuracy levels of risk assessment tools (Gottfredson, 1987; Netter, 2007). These tools seem more objective than they actually are, it is unclear what period of time their predictions are valid for, and they do not factor in changes in the offender's environment (Van Koppen, 2008). Hannah-Moffat summarizes the issues as regards risk-based sentencing, cautioning that 'the uncritical acceptance of science and related risk technologies can jeopardize due process, produce disparities and discrimination, undercut proportionality and individuality, and escalate the severity of sentences' (Hannah-Moffat, 2013, p. 291).

*Findings regarding risk-based sentencing*

Because of the theoretical importance of the risk of reoffending to the justification of punishment and the issues pertaining to risk assessment tools for criminal sentencing, we need to know more on the role of the risk of reoffending in sentencing practice. The current study presents various findings in this connection.

Firstly, judges adjust their sentencing decision in accordance with the offender's characteristics. All the chapters describing quantitative research methods reveal that offender characteristics such as sex, age and country of birth are significantly related to sentencing outcomes. However, as Chapter 2 demonstrates, the effects of offender characteristics do not fully disappear when risk-related social circumstances are taken into account. So judges might factor in demographic characteristics, but for reasons other than risk management.

Secondly, my findings indicate that the offender's risk-related social circumstances bear a relation to the sentencing outcomes. Judges adjust the sentence to the offender's circumstances such as homelessness, unemployment or substance abuse. However, risk-related circumstances do not always affect sentencing outcomes in the expected direction. For certain social circumstances such

as the offender's attitude to criminal behavior are negatively related to sentencing outcomes, so that the more troublesome the attitude, the lighter the punishment. Here again, judges seem to take an offender's social circumstances into account in individualizing the punishment, but not in a way that social circumstances indicative of a higher risk of reoffending imply more severe punishment.

Moreover, the findings in Chapter 3 suggest that if a risk-based pre-sentence report *frames* an offender as presenting a high risk of reoffending, judges do not sentence him to more 'controlling' sentences (i.e. unsuspended imprisonment or special conditions with a suspended sentence) than comparable high-risk offenders without such a report. Instead, risk-related offender information presented in a pre-sentence report seems to *mitigate* the sentencing outcome. So pre-sentence reports based on a risk assessment tool do not seem to have caused judges to adopt risk-based sentencing.

This corresponds to findings in Chapter 4, noting that judges say they do not punish offenders more severely if the risk of reoffending is higher. Instead, a high risk of reoffending is considered a reason to impose a suspended sentence with special conditions like behavioral therapy, since they feel the offender is in need of 'fixing'. Offenders are only punished more severely for failing to take advantage of the opportunities judges gave them in the past.

Hence, judges do take the characteristics and risk-related social circumstances of the offender into account to some extent, but factors indicative of a higher risk of reoffending do not always imply harsher punishment. Though features of Garland's (2001) risk society and Feeley and Simon's (1992, 1994) actuarial justice are observed in Dutch society (Downes & Van Swaaningen, 2007; Van Swaaningen, 1996; Van der Woude, 2010), actuarial justice does not seem to dominate the practice of sentencing in the Netherlands: penal welfarism is still prevalent in Dutch judicial decision-making.

## 7.2.2 Theoretical and practical implications

### *Theoretical implications*

The current study has several theoretical implications. Nowadays the focal concerns perspective (Steffensmeier & Demuth, 2000; Steffensmeier et al., 1995, 1998) is the main theoretical framework in sentencing research. From this perspective, judges address three points of focal concern when making a sentencing decision: 1) the offender's blameworthiness; 2) his danger to society; and 3) the practical constraints. Since judges do not have unlimited information and time to address these focal points with certainty, they rely on cognitive short cuts that invoke past experiences, stereotypes and social prejudices (Albonetti, 1991). Yet the focal concerns perspective does not clearly specify

which factors explicitly contribute to attributions of blameworthiness and dangerousness or which direction they affect them in.

My study on the effects of offender characteristics on sentencing outcomes and the intermediating effects of the offender's risk-related social circumstances (Chapter 2) suggests that important theoretical progress can be made on this issue by explicitly linking the focal concerns perspective to prior research findings on predictors of (re)offending. Since the judges' attributions, stereotypical images and patterned responses are likely to be driven by the very characteristics proven to be risk factors, this offers valuable leads for constructing research models and hypotheses in sentencing research. Addressing this 'missing link' in sentencing theory also gives sentencing research new opportunities to shift the focus from identifying disparities in punishment to explaining and understanding them (Wellford, 2007).

My study also tests the applicability of contemporary sentencing theory by focusing on sentencing outcomes outside the United States. Studying sentencing outcomes in cross-national contexts can greatly broaden the knowledge on sentencing and sentencing disparity (Ulmer, 2012) and substantially advance the theorizing. My findings suggest many similarities in the factors affecting sentencing outcomes in the United States and the Netherlands, thus supporting the generalizability of the theoretical framework to contexts outside the United States. However, there are also differences between the findings from my Dutch studies and those from the United States. These differences might constitute important leads for future research on the *causes* of the differential effects on sentencing outcomes.

#### *Implications for policy and practice*

In addition to the theoretical implications, my study has important implications for sentencing policy and practice. The broad discretionary powers of judges are a major hallmark of the Dutch sentencing system and make it feasible to individualize sentencing, but my findings demonstrate that this has resulted in considerable disparity in sentencing outcomes. For example, as noted in Chapter 2, females and Dutch-born offenders are punished more leniently than male and foreign-born offenders. I further show that the offender's social circumstances such as unemployment, ties to family and friends, and addictions, cannot fully account for these differences: disparity still exists. In Chapter 5 I demonstrate a similar disparity in the sentencing of homicide offenders. Controlled for all the other factors, females are punished more leniently than males, and sentencing outcomes are more severe for offenders born outside Europe than for Dutch-born offenders. Moreover, offender and victim characteristics interact leading to additional sentencing severity for male offenders who victimize females and for foreign-born offenders who victimize Dutch-born offenders. In Chapter 6 I demonstrate that women are still punished less severely than men if the research scope is broadened from imprison-

ment to other sanction types and combinations. Even if the aggravating effects for offenders born in a non-Western country or with education and employment problems invert to a mitigating effect, they are still punished *differently* than the reference groups.

Although Dutch jurists agree that characteristics and social circumstances of the offender are to be factored in at sentencing to make the punishment fit the crime *as well the offender* (e.g. Duker, 2003; Kelk, 2001; Schuyt, 2009), the individualization of punishment has a tense relation with the equality principle, since fitting the sentence to the offender means a risk of sentencing offenders unequally. However, sentencing disparity does not necessarily imply discrimination, because there might be very legitimate reasons to sentence different cases differently. Women, for example, might be sentenced more leniently because compared to men they are more often their children's primary caregivers. Sentencing disparity is only discriminatory if the demographic characteristics or social circumstances of the offender that are objectionable – typically on moral or legal grounds – are related to sentencing outcomes when all other relevant variables are adequately controlled (Blumstein, Cohen, Martin, & Tonry, 1983). So if offenders are punished more severely *merely* because of their sex, race or employment status, this is not only undesirable, it is illegitimate as well. It conflicts with the principle of equality and the prohibition of discrimination as stipulated in Section 1 of the Dutch Constitution, Article 14 of the European Convention on Human Rights, and the Recommendation (1992 (17)) of the Council of Europe.

Yet since there is also discrimination when sentencing outcomes are affected by factors objectionable on moral grounds, the issue of individualizing punishment as it relates to the equality principle is more complicated. Moral views are not universal, they are subjective and change over time. So it can be disputed which factors are to be considered objectionable on moral grounds. For example, is a problematic childhood a factor judges can take into account as a mitigating circumstance? Is unemployment an objectionable sentencing determinant in times of recession when unemployment rates are high, but not in times of economic growth when there are plenty of jobs?

The issue of equality in sentencing is even more complicated since ignoring certain offender characteristics might diminish sentencing disparity, but it can also lead to judgments considered to be unfair. For is an offender who loses his job if he is sentenced to prison not punished more severely than unemployed offenders who are sentenced to prison? Is it not only fair then to tend to sentence an offender who stands to lose his job to non-custodial punishment types?

Yet, confronted with sentencing disparity, jurists tend to appeal to the reverse side of the equality principle and prescribe that unequal cases be treated unequally to the extent of their inequality (Duker, 2003; Schoep, 2008; Schuyt, 2009). This 'inequality principle' is usually enforced by referring to the uniqueness of each criminal case: every case has its specifics justifying

different sentencing outcomes in cases that seem comparable from a distance. And since these specifics, such as the precise provocation of the crime or the content or tone of the arguments at the trial, cannot be fully grasped by quantitative research methods, sentencing disparities found in quantitative research are generally attributed to the uniqueness of the case – not to unjustified unequal treatment.

Of course it is very legitimate to claim that disparity in sentencing outcomes is to be attributed to characteristics not adequately controlled for if at all. Yet the issue of sentencing disparity cannot be simply dismissed by this uniqueness appeal. What circumstances make a case so unique? How and why do these aspects affect the sentencing outcomes? Is it even right to take these circumstances into account at all?

Unfortunately, my study does not reconcile the equality principle and the individualization of punishment. Although it is important to note that my findings merely suggest *relations* between the offense, case-processing and offender characteristics and not *causal* relations, my findings call for an *aroused awareness* on the part of judges about the factors they consider when making a sentencing decision. My findings can contribute to a normative discussion about the desirability of taking certain offender characteristics into account at sentencing. Judges and legal scholars might refer to the uniqueness of the case to explain and legitimize a sentencing disparity, but my study will hopefully encourage them to reflect upon the reasons for taking certain characteristics into account.

In addition to the normative implications, my findings might also have practical implications. The National Consultation on Criminal Content has provided judges with non-binding orientation points for common offenses since 1998 (Landelijk Overleg Vakinhoud Strafrecht, 2013). These orientation points are based on common practice and updated regularly. The guideline states that the punishments indicated are based on standard cases, so that the special features of an offense or offender are still to be factored in by the judges themselves. However, it does not specify what these special features are. For some offenses, the orientation points explicitly cite certain ‘aggravating and/or mitigating factors’, e.g. the location of the offense of pickpocketing (‘surveyable space with many people such as a tram, bus, train, railway station and airport’), but it is not clear how these factors should affect the sentencing outcomes. Should pickpocketing in a crowded train be punished more severely or less severely than on a quiet street? Perhaps sentencing research findings can provide greater insight into how ‘special features’ of an offense or offender are related to sentencing outcomes. Including these ideas in the guidelines could add more of a direction to the orientation points, thereby contributing to a more equal sentencing practice. Moreover, since the orientation points are said to be based on common practice, their foundation and accountability could be consolidated by explicitly acknowledging findings from sentencing research.



### 7.2.3 Methodological considerations and suggestions for future research

Despite its contributions, my study has its limitations. Although the data include uniquely detailed offense and offender characteristics, even more detailed information on the offense and offender characteristics and circumstances would ideally have to be included to present a complete picture. Prior research also suggests that victim characteristics affect sentencing outcomes (Auerhahn, 2007a; Franklin & Fearn, 2008; Williams, Demuth & Holcomb, 2007), but except for the information in Chapter 5, my data do not include them. Moreover, my data lack information on earlier criminal justice processes and later case outcomes such as appellate court decisions and information on prosecutor, judge and courtroom community characteristics. So it is important for researchers to compile more complete data on factors relevant at sentencing (Wellford, 2007).

Chapter 2 raises interesting questions on the mechanisms of assessing an offender's blameworthiness and danger to society. It suggests that the stereotypical attributions judges rely on when making a sentencing decision might not be rooted in information constraints but in time constraints. Despite the availability of detailed information on the offender's risk-related social circumstances, judges still rely on stereotypical attributions based on demographic offender characteristics. Unfortunately, I was not able to take the time factor into account. Future research incorporating the judges' time constraints might develop new insight into the underlying decision-making mechanisms of the focal concerns perspective.

A different variable not included in my study pertains to previously imposed sentences. Chapter 5 suggests that it is not the offender's criminal history, but his *sentencing history* that is significantly related to the sentencing outcome. The number of years the offender has already spent in prison increases the length of the prison sentence to be imposed. The importance of the offender's sentencing history is also stressed in Chapter 4. The interviews show how much importance the judges attach to the sentencing trend when deciding whether or not non-custodial sentences are to be considered. Non-custodial sentences are not even considered for offenders previously sentenced to unsuspended imprisonment, especially quite recently, because each sentence has to be a step up on the 'sentencing ladder'. My study advocates including previous sentences in sentencing research to take the sentencing trend into account.

Another limitation of the research presented in Chapters 2, 3 and 5 is that the scope, like that of sentencing research in general (e.g. Curry, 2010; Doerner & Demuth, 2010; Wermink, 2014), is limited to unsuspended prison sentences even though sentencing typically consists of a myriad of sentencing options. Various sanction types are often jointly imposed, some unsuspended (definitely carried out), and others suspended (only carried out if the offender violates certain conditions). Sentencing research limited to unsuspended imprisonment

thus only covers a small part of all the sentences imposed and cannot properly view the severity of the sentence since it overlooks other sentencing types that are singularly or jointly imposed. Due to this imprisonment bias, sentencing research has created a large discrepancy with the reality of sentencing. I address this issue in Chapter 6. The findings suggest that although for certain offender characteristics, the effects in the model only including unsuspended imprisonment are similar to the those in the model that also includes other sanction types or combinations, for other offender circumstances aggravating or mitigating effects appear, disappear or are inverted when other sanction types or combinations are taken into account. Future research should therefore broaden its scope to include non-imprisonment sentences as well, devoting attention to both combinations of sanctions and suspended sanctions. To tackle the imprisonment bias, researchers should create innovative methods that present a more realistic approach of the practice of sentencing.

In that line I also encourage future researchers to use the available data in a more thoughtful manner. For example, with respect to measurement of the severity of the offence, sentencing researchers generally confine themselves to use merely the maximum length of imprisonment possible in the Penal Code and the type of the most severe offence. Even though the severity of the offense will always be a rough estimate when based on the official data, the accuracy of measuring the offense severity can be increased by using the available verdict data in order to take factors into account that legally aggravate or mitigate the maximum penalty. For my research, I refined the traditional method by taking all legal factors into account when calculating the maximum penalty possible: I adjusted the maximum penalty in case of recidivism (art. 43a PC), crimes committed by public servants (art. 44 PC), attempted crimes (art. 45 PC), preparatory crimes (art. 46 PC), an accessory to the crime (art. 49 PC), multiple offences (art 57 PC), and crimes committed with a terroristic aim (e.g. art. 288a PC). Given the increased accuracy, future research should also refine their measurements by considering the total legal framework regarding the maximum penalty.

A final limitation pertains to generalizing the findings. Firstly, I only examine sentencing outcomes in the Netherlands. Since the Dutch sentencing system is characterized by very broad discretionary powers on the part of judges, the findings cannot be generalized beforehand to cross-national sentencing contexts where the discretionary powers of judges are much smaller. However, comparing sentencing patterns in different countries could greatly broaden our knowledge on sentencing (Ulmer, 2012). Since many of my findings are similar to those from sentencing research in the United States, some support is provided for the generalizability of the theoretical framework to contexts outside the United States. Secondly, although my data on sentences for homicide (Chapter 5) cover all homicides, the extent to which the findings can be generalized to other crimes is unclear, especially since homicide is the 'ultimate' crime: the extreme severity of the offense might lead to different

considerations when assessing an offender's blameworthiness and danger to society than in more ordinary cases. In the other chapters, the data are not limited to homicide, but encompass all kinds of offense types. These chapters do not exhibit an offense type bias, but questions on the generalizability of the findings still remain since the data pertain to cases where the offender's risk of recidivism is assessed via the risk assessment tool RISC. There are no clear rules about when RISC is used, but it is generally not applied to offenders who had their risk assessed within the past year, nor to cases where the court session is scheduled to be held within ten or eleven weeks. Moreover, RISC is not likely to be used for minor offenses, which are thus under-represented in my sample. These selections related to the use of RISC-data may thus affect the generalizability of my results. Future research should make an effort to overcome this bias by studying the sentencing outcomes of all criminal cases. This is problematic though, since cases where RISC is not used lack valuable information on risk-related social circumstances of the offender. Since the RISC-data I use stem from the introductory period of the RISC-tool (2005-2007), future researchers might start by replicating my study with more recent data. The replication of my study in Chapter 4 would also be useful. Expanding the number of judges interviewed will contribute to the generalizability of the findings.

Last but definitely not least, I would like to note the importance for future sentencing research to shift from the traditional focus on whether or not there is sentencing disparity to explaining why and when it exists in different contexts and what the specific underlying social and psychological mechanisms are (see also Spohn, 2000; Ulmer, 2012; Zatz, 2000). Chapter 2 specifically suggests that future research disentangle the three distinct focal concerns of sentencing. In retributivist and utilitarian theories about the justification of punishment, the focal concerns of offender's blameworthiness and risk of reoffending are fundamentally distinct grounds for sentencing. The offender's blameworthiness is the key factor for sentencing from a retributivist perspective, while offender's danger to society is the key factor for sentencing from a utilitarian perspective aiming for special prevention (Von Hirsch & Ashworth, 2005; Von Hirsch e.a., 2009). The question is thus: are females for example punished more leniently because judges consider them less blameworthy or less dangerous? Or is the sentencing disparity due to the third point of focal concern? Are there more practical constraints as regards detaining women related for example to their role in taking care of children? By unraveling the specific focal concerns, greater insight can be gained into *why* certain offender characteristics are related to certain sentencing outcomes.

Despite the limitations, my study contributes to the field of sentencing research by using data with a unique level of detail, providing greater insight into the previously overlooked effects of the offender's social circumstances (Chapter 2), the risk of reoffending as reported to the judge via a structured risk-based pre-sentence report (Chapter 3), and of offense and victim character-

istics and offender-victim interactions (Chapter 5). In addition, I have interviewed judges to explore their views on the role of the risk of reoffending at sentencing (Chapter 4). I also demonstrate how important it is for sentencing research to consider alternative measures of the sentence severity, including types of punishment other than unsuspended imprisonment and combinations of sanctions (Chapter 6). My study also contributes to sentencing literature by using distinct quantitative and qualitative research methods to study sentencing outcomes. The use of qualitative research methods has proven to be valuable for understanding sentencing decisions, especially regarding factors that are hard to grasp in quantitative research such as the judges' *perceptions* of the risk of reoffending. Moreover, greater insight is gained into the judges' *motives* for imposing certain sentences, thus shifting the focus from *where* sentencing disparity exists to *why* it exists.

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