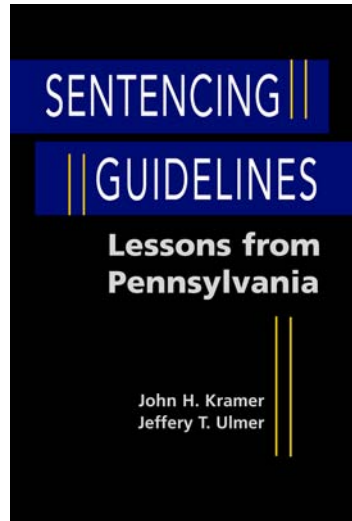


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Sentencing Guidelines: Lessons from Pennsylvania

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1

Understanding Sentencing

THE 1970S WERE a time when a wide range of committees, judges, and commentators challenged the system of sentencing in the United States. Sentencing guidelines, along with mandatory minimum sentencing laws, emerged from these challenges and their aftermath. Now, over fifteen states, as well as the federal criminal justice system, have adopted sentencing guidelines, and nearly every state has enacted mandatory minimum sentencing laws in one form or another. This book details the experience of Pennsylvania as the second state to adopt sentencing guidelines, and examines the impact of these guidelines over time. It also describes how mandatory minimums arose as an alternative, somewhat competing sentencing structure in Pennsylvania, and briefly examines how Pennsylvania's prosecutors have used their discretion to apply mandatory minimums.

The earliest states to reform their sentencing statutes were Maine, California, Illinois, and Indiana. The reforms these states adopted are generally referred to as "determinate sentencing statutes," in that they abolished indeterminate sentences and replaced them with fixed periods of confinement set by the judge, with the date of release reduced by good time. The changes in these four states may have been the first formal legislative attempts to adopt determinate sentencing, but they did not inspire similar reforms in other states. In fact, rather than adopting these first innovations, later reforms focused on creating sentencing commissions mandated to establish sentencing guidelines.

In some respects, case studies of sentencing commissions are studies of social change and organizations' ability to produce it. To this end, Pennsylvania's guideline system is a case study of one small agency that was created and caught in what David Garland calls "late twentieth-century modernity's" criminal justice climate, a period that Garland dates from 1970. He observes: "What is remarkable about the 1970s assault upon correctionalism is that far from being the culmination of existing reform programmes it was a sudden turning of progressive opinion against them." He captures the time of this transition

during the 1960s, when “televised images of urban race riots, violent civil rights struggles, anti-war demonstrations, political assassinations, and worsening street crime reshaped the attitudes of the middle-American public” (Garland 2001, pp. 53, 97). It was during this time that the sentencing reform movement took shape, merging the liberal view that reliance on incarceration was biased and excessive, with a strengthening conservative view that criminal penalties were too lenient.

In many ways, state legislatures and criminal justice systems are the engine of innovation in criminal justice policy. They are a crucible for testing the possibilities and limitations of criminal justice developments like sentencing reforms. This book adds to the literature by supplying the first relatively detailed history and empirical analysis of a sentencing commission and the development of its guidelines, based on our participant observation as well as on archival material and interviews. One of us, John Kramer, served as the original executive director of the Pennsylvania Commission on Sentencing (PCS) from 1979 until 1998 (and also served as staff director of the US Sentencing Commission from 1996 to 1998). The other, Jeffery Ulmer, worked for the PCS from 1988 to 1994 as a graduate assistant and then as a postdoctoral research associate. Since then, he has published a book (Ulmer 1997) and many articles on sentencing in Pennsylvania. Our chief challenge is to objectively study something that we (especially Kramer) were closely involved in creating and sustaining. On the other hand, the advantage of being a participant observer of the process is rarely available to social scientists, and gives the scientist access to valuable insider information. Our goal here is to be as dispassionate and objective as possible in our reporting, so that others can better understand the evolution of an agency and its decisions, and the empirical consequences of those decisions. We see this book as making at least two contributions.

First, it contributes to the empirical research literature on courts and their sentencing practices. We investigate various forms of extralegal sentencing disparity under Pennsylvania’s guidelines: disparity associated with race, ethnicity, and gender, “trial penalties” (sentencing differences between those convicted by trial and those who plead guilty), and the effect of county contexts on between-county sentencing differences. We also examine the factors that affect how Pennsylvania prosecutors use their discretion to apply or not apply mandatory minimum sentences, and analyze the impact of changes in Pennsylvania’s guidelines on courts’ sentencing practices over time.

Second, the book provides lessons on the possibilities and pitfalls of criminal justice reforms, as well as on the complexity of criminal justice discretion and the delicacy of attempting to structure it. As a detailed case study of one state’s ongoing experiences in sentencing reform, this book contributes to our understanding of broader criminal justice issues as well. These include generic issues such as the “success” or “failure” of reforms (and the many things these terms can mean), the control and use of decisionmaking discretion in criminal

justice organizations, and the relationship between such organizations and their social, organizational, and political environments.

While writing this book, several developments made our efforts all the more timely. In 2005, the US Supreme Court issued opinions in *Blakely v. Washington* (124 S. Ct. 2531 [2004]) and *United States v. Booker/Fanfan* (125 S. Ct. 738 [2005]), which have had major impact on the federal sentencing guidelines as well as on many state guideline systems (we address this in Chapters 3 and 10). Following on the logic in *Blakely* and *Booker*, at the end of 2007 the US Supreme Court issued *Kimbrough v. United States* (06-6330) and *Gall v. United States* (06-7949), which gave federal judges considerably more discretion to deviate from the US Sentencing Guidelines when deemed unreasonable for particular offenders involved in crack cocaine and ecstasy offense cases.

The US Sentencing Guidelines are thus now advisory and, we would argue, are coming to resemble Pennsylvania's guidelines in their legal status. That is, both sets of guidelines advise courts, and courts must consider them. Now, however, federal courts have more of the kind of leeway to deviate from guidelines that Pennsylvania courts have had since that state's guidelines were implemented (though it remains to be seen how much leeway federal courts will eventually have under advisory federal guidelines). This means that the potential for variation in sentencing between local courts, and disparity between individual defendants, now looms larger in the federal court system, which operates under the most visible, and arguably the most consequential, set of guidelines in the United States: the US Sentencing Guidelines. In this book, we identify the social processes that produce local court variation in sentencing, and those that can lead to individual sentencing disparity, all of which now seem to be quite relevant for federal sentencing. There will be a need for federal sentencing policy strategies to structure sentencing discretion without removing it, as well as a need for creative ways to address sentencing disparity, and we hope our discussion of these matters will help stimulate the search for such strategies.

The Social Environment of Guidelines: Court Communities and Focal Concerns

Of course, sentencing guidelines are not implemented in a vacuum. Some sociologists refer to policy formation and implementation as "the transformation of intentions" (Estes and Edmonds 1981; Hall 1997; Hall and McGinty 1997). Local communities and organizations are fully capable of transforming the formal intentions of externally imposed policies such as sentencing guidelines. Peter Hall captures the problem of policymakers versus policy implementers when he notes that, on the one hand, "policy actors dependent upon those who follow them to complete their intentions, set the terms that both limit and facilitate later actions," but on the other hand that "later actors may reinforce,

clarify, subvert, or amend initial intentions and content” (1997, p. 401). Below, we briefly review two theoretical perspectives or heuristic lenses through which to view sentencing under guidelines: court communities and focal concerns. We use these perspectives to articulate six guiding propositions that frame our analysis of sentencing under guidelines.

Local variation in the implementation of broad criminal sentencing policies, such as sentencing guidelines, is a persistent theme in research on state criminal courts (Flemming, Nardulli, and Eisenstein 1992; Myers and Talarico 1987; Nardulli, Eisenstein, and Flemming 1988; Ulmer 1997). Since political, economic, social, and cultural differences exist between counties and their courts, it is reasonable that differences could emerge between local courts in the way they interpret and use sentencing guidelines, or in the ways in which local culture, relations, and practices mesh with guidelines (or not). Furthermore, the potential complexity of interpreting and applying guidelines and the ability to depart from them in certain situations provide ample opportunity for between-court variation in guideline implementation and sentencing practices.

The *court community perspective* views courts as communities or social worlds based on participants’ shared workplace and interdependent working relations between key sponsoring agencies, such as the prosecutor’s office, judges’ bench, and defense bar (Eisenstein, Flemming, and Nardulli 1988; Flemming, Nardulli, and Eisenstein 1992; Ulmer 1997). These court communities develop distinctive social orders that produce distinctive local organizational cultures. These local social arrangements and the cultures they encompass shape formal and informal case-processing and sentencing norms (see Eisenstein, Flemming, and Nardulli 1988; Ulmer and Kramer 1998; Ulmer 1997). These court communities are said to foster their own locally varying substantive legal rationalities, which influence sentencing outcomes and processes as least as much as do formal policies and legal structures (Engen et al. 2003; Savelsberg 1992; Ulmer and Kramer 1996). Therefore, court communities are apt to have distinctive organizational cultures and distinctive relationships to external organizations and externally imposed policies.

For example, court communities typically have locally distinctive, informal, and ever-evolving case-processing and sentencing norms, or “going rates” as a key dimension of their processual order (Eisenstein, Flemming, and Nardulli 1988; Ulmer 1997; see also Sudnow 1965). These going rates often provide members of courtroom workgroups with “templates” for case-processing strategies, typical plea-bargaining terms, and sentences, and are continually open to modification based on actors’ solutions to problematic situations.

Into this mix of local court communities and their social orders come sentencing guidelines, as an attempt to manage a variety of dilemmas: between flexible discretion and rule-bound control, between uniformity and individualization, and between centralization and decentralized localism. In sociological terms, guidelines represent an attempt to impose a regime of formal rational-

ity (approximating what sociologist Max Weber called a “gapless system of rules” that are to be applied universally and uniformly, with a minimum of decisionmaker discretion—see Savelsberg 1992; Ewing 1987) onto a traditionally “substantively rational” process.

Substantive rationality in legal decisionmaking refers to criteria that are guided by, or in service of, ideological factors and goals external to the law. Substantive rationality in criminal sentencing is thus a type of rationality that is oriented toward flexible and individualized decisionmaking in service of a potentially wide variety of extralegal goals (for helpful theoretical reviews, see Savelsberg 1992; Marsh 2000; Mears and Field 2000). For example, some substantive goals could center around the welfare of either the offender, the victim, or the community (Levin 1977). Other substantive goals could center around crime control or crime suppression (Packer 1968). Still others could center around organizational goals such as efficiency, accountability, or power. On the other hand, the flexibility inherent in substantive rationality also permits the possibility of bias, discrimination, and unwarranted disparity.

In the “real world” of sentencing, then, locally interpreted substantive rationality coexists with and may even subvert such formally rational policies (Ulmer and Kramer 1998; see also Kautt 2002). Clearly, sentencing is a complex, localized, interpretive process, and formally rational sentencing policies like guidelines cannot, and do not seek to, eliminate all discretion (Savelsberg 1992; Ulmer 1997). In fact, sentencing guidelines, by definition, do not represent *pure* formal, bureaucratic rationality, since they allow downward or upward departures for offenders and offenses seen as atypical. Guidelines have “windows of discretion” (Cirillo 1986) that allow for response to atypical situations. Therefore, all guidelines intentionally present opportunity for the exercise of various substantively rational criteria in sentencing (a purely formally rational sentencing system would look like an all-encompassing set of mandatory sentences, with no departures possible). This leads to our first general guiding proposition:

Proposition 1: Sentencing severity and decision criteria (even guideline-based), use of guidelines, and compliance and departure from guidelines are all likely to vary between local court communities.

If the court community perspective orients us toward the importance of the contours of local courts and their environments in the implementation of guidelines, the *focal concerns perspective* orients us to the subjective interests and goals of individuals within the “courtroom workgroup” (a term coined by James Eisenstein and Herbert Jacob [1977]): prosecutors, judges, and defense attorneys. This perspective partly evolved out of and incorporated prior research and theorizing (Steffensmeier 1980; Wheeler, Weisburd, and Bode 1982; Albonetti 1986, 1991; Steffensmeier, Kramer, and Streifel 1993), but also it

was in large part developed inductively, out of a qualitative research project involving scores of interviews with judges, prosecutors, and defense attorneys (see Steffensmeier, Ulmer, and Kramer 1998; Ulmer and Kramer 1996; Ulmer 1997). When we asked interviewees about the criteria that drove sentencing decisions, they strongly emphasized three focal concerns, and typically spoke at length about the factors that influenced their own and others' subjective assessments of the focal concerns.

The focal concerns perspective emphasizes particular kinds of substantively rational criteria at work in sentencing decisions, which are in turn embedded in the culture and organization of court communities. In addition, the focal concerns perspective integrates key insights from other important theories of criminal justice decisionmaking. This perspective argues that three interpretively defined focal concerns of punishment—blameworthiness, protection of the community, and practical constraints—determine punishment decisions. Thus:

Proposition 2: Sentencing decisions are joint acts (often reflecting the influence of prosecutors and defense attorneys as well as judges) made on the basis of decisionmakers' definitions of blameworthiness, community protection needs, and practical constraints and consequences.

There is actually general agreement in the sentencing literature that legally prescribed factors, such as offense type and severity or prior record, are typically the strongest predictors of punishment outcomes (Spohn 2000; Zatz 2000). The question is whether these are the only meaningful influences, as law and policy intend. The focal concerns perspective (and the theories that are consistent with it) is not compatible with this strict normative/legalistic view.

The focal concerns perspective describes a punishment decisionmaking process in which such a strictly legalistic decisionmaking process is implausible. The decisionmaking process described by focal concerns is one in which both legal and extralegal considerations affect the interpretation and prioritization of focal concerns through local substantive rationality (Savelsberg 1992; Kramer and Ulmer 2002). For example, this perspective envisions court community actors making situational attributions about a defendant's character based on his or her social status as well as practical contingencies (among other factors). Moreover, punishment decisionmaking processes and interpretations of focal concerns may be locally variable because they are embedded in local court communities' organizational cultures and influences.

In sum, the focal concerns and normative/legalistic perspectives differ in the kinds of decisionmaking processes they predict. Evidence of extralegal influences on punishment *in addition to* legally prescribed influences, as well as interactions between extralegal factors themselves, would be compatible with

the focal concerns perspective but not the normative/legalistic perspective (see Steffensmeier, Ulmer, and Kramer 1998; Spohn and Holleran 2000). Key questions then arise regarding sentencing disparity, such as: How much do court actors rely on sentencing guidelines' codifications of definitions of blameworthiness and dangerousness, versus extra-guideline factors? Which extra-guideline factors influence sentencing (including decisions to depart from guidelines) in addition to guideline-related factors, and how do they do so? Thus:

Proposition 3: Definitions of blameworthiness and dangerousness are mostly determined by formal legal and policy structures such as guidelines, but are also potentially determined by local decisionmakers' substantively rational interests such as attitudes, stereotypes, and biases.

Several theories of extralegal influences on sentencing exist, each emphasizing ways in which extralegal considerations may affect punishment decisions: uncertainty avoidance and causal attribution theory, racial/ethnic threat theory, and the organizational efficiency hypothesis. We discuss these further in later chapters. We do not pit the focal concerns and court community perspectives in competition against these other theories. Rather, we use them as a heuristic framework to integrate and organize the propositions from various other theories that are compatible in principle with focal concerns, but that we view as incomplete explanations of punishment decisionmaking on their own.

According to Celesta Albonetti (1991), sentencing suffers from operating in a context of bounded rationality (March and Simon 1958). In this bounded context, court actors make highly consequential decisions with insufficient information, which produces uncertainty. Sometimes, their decisions rest on little information regarding the background and moral character of the defendant (though this lack of information is often alleviated by pre-sentence reports or information brought out at trial), and almost always the decisions have little information on outcomes such as recidivism risk of offenders. Beyond that, even when more extensive information is available, the risk and seriousness of recidivism are never fully predictable for a particular defendant, a defendant's moral character is never fully knowable, and human decisionmaking processes have built-in limitations to the amount and complexity of information that can be considered. In this context, judges and other court community actors make situational imputations about the character and expected future behavior of defendants (Steffensmeier 1980), and assess the implications of these imputed characteristics in terms of the three focal concerns: defendant blameworthiness, defendant dangerousness and community protection, and practical constraints and consequences connected to the punishment decision. Most likely, court actors make these character imputations based on legally relevant factors (like sentencing guidelines), but they may also make them on the basis of

stereotypes based on the social status of defendants, including race, ethnicity, gender, age, and social class. In fact, as we explain in Chapters 5 and 8, defendant social status characteristics are likely to influence sentencing in combination; that is, they are likely to be mutually conditional (Steffensmeier, Ulmer, and Kramer 1998; Spohn and Holleran 2000). In other words, the influence of defendant race or ethnicity on sentencing may depend on defendant gender and age. For example, racial or ethnic stereotypes of dangerousness or blameworthiness might be gender- and age-specific. As a case in point, judges or prosecutors might view the dangerousness of a young Hispanic female differently than the dangerousness of a young Hispanic male. Thus:

Proposition 4: The influence of defendant social status characteristics (race, ethnicity, gender, age, class, etc.) on sentencing outcomes is likely to be conditional. The influence of status characteristics on sentencing likely depends on a defendant's specific combination of status characteristics.

Furthermore, organizational or case-processing factors, such as caseloads or a defendant's decision to plead guilty or go to trial, can influence assessments of practical constraints and consequences. In addition, a defendant's choice to plead guilty or not also may have ramifications for how court actors define his or her blameworthiness. We return to these themes in Chapter 7.

We argue that the use of and reliance on these focal concerns tend to characterize all courts generally, but their meaning, relative emphasis and priority, and situational interpretation are embedded in the local court community's legal and organizational culture. For example, definitions of what kinds of offenses and offenders are especially blameworthy or dangerous are likely to vary according to a local court community's culture and politics. Furthermore, practical constraints and consequences are highly likely to be produced by local court community conditions. Thus:

Proposition 5: The interpretation and prioritization of the focal concerns is influenced by the local culture, politics, organization, and resources of court communities, aside from the influence of guidelines. This is especially true of practical constraints and consequences.

In fact, we see sentencing guidelines as attempts by sentencing commissions and legislatures to codify and structure judgments about blameworthiness and dangerousness, in order to achieve "just deserts" punishment and to protect the community. Guidelines that are descriptive (i.e., based on past local practices) are more likely to have a "good fit" with local views of blameworthiness and dangerousness. However, descriptive guidelines may merely codify existing disparate practices, and may not achieve the larger sentencing policy goals of sentencing commissions or legislatures. On the other hand, guidelines that

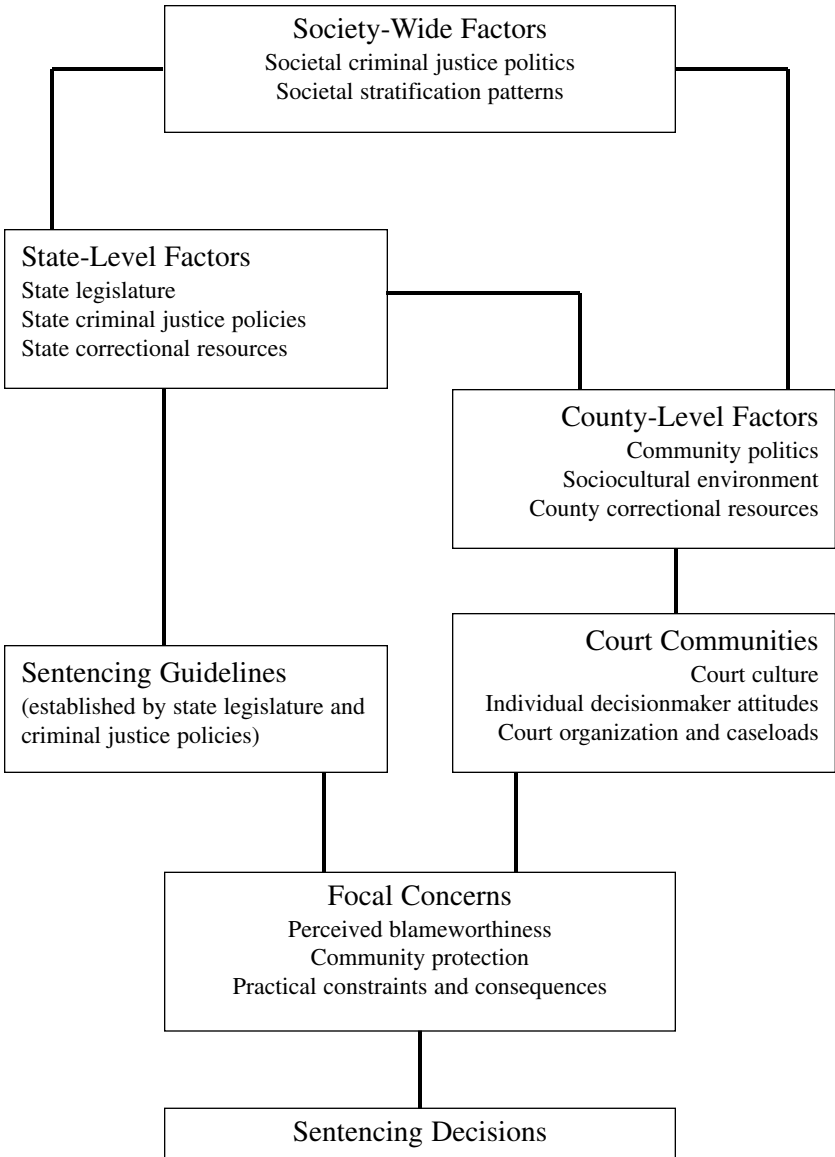
are prescriptive (i.e., based on sentencing commissions' and legislatures' definitions of appropriate punishments as matters of policy) are more likely to be discrepant from local court community definitions, resulting in higher departures (Kramer and Scirica 1986).

Our theoretical perspective thus emphasizes that sentencing guidelines meet the messy world of politics and policy processes in their development and evolution, and that guidelines are implemented in local courts within their particular organizational and social environments. Guidelines are interpreted and used (or departed from) by individuals who are part of a court community, and these individuals have their own subjective interests, goals, ideologies, and biases. Figure 1.1 summarizes the focal concerns model, and the many potential, and potentially competing, influences on definitions of blameworthiness, community protection, and practical constraints.

The figure displays the lines of influence from guidelines to the focal concerns, and also shows lines of influence from the state level to the guidelines. The other lines of influence in the figure reflect the embeddedness of the focal concerns in local court communities and their larger environments. However, the consequences of sentencing decisions can later modify court community participants' definitions of defendants and consequently the focal concerns.

The focal concerns are directly informed by the sentencing guidelines. In fact, guidelines can be seen as the state's codification and structuring of judgments about blameworthiness and community protection and practical constraints (some guideline systems, such as Minnesota's and Washington's, require consideration of prison resources). The influences on focal concerns do not stop there, however. Court community culture as well as individual decisionmaker attitudes or ideologies are quite likely to shape perceptions of what defendants and crimes are seen as more or less blameworthy and what kinds of crimes and offenders present threats to the community. Furthermore, the practical constraints and consequences entailed in any sentencing decision are directly shaped by the court's caseload characteristics, size, and resources, and also by local and state correctional resources. The salience and perceived importance of practical constraints connected to sentencing decisions are also shaped by individual views and court community culture. For example, the degree to which a court community's culture emphasizes efficiency as a goal would affect the salience of the need to move cases quickly by eliciting guilty pleas (see Chapter 7). The degree to which a judge or prosecutor's punishment decisions are influenced by the fact that a woman defendant is single and has a child will depend on that judge or prosecutor's beliefs or ideologies about gender, motherhood, and children (see Chapters 4 and 5, for example). Features of the court community are in turn reciprocally related to the sociocultural and political features of the surrounding community, which in turn are potentially related to larger state and societal patterns. In fact, Figure 1.1 is an oversimplification of the potential lines of influence on decisionmakers' definitions of focal

Figure 1.1 Factors Influencing Sentencing Decisions



concerns, and on court communities, but it does illustrate the competition that sentencing guidelines face.

Importantly, the restrictiveness or presumptiveness of guideline systems conditions the degree to which extra-guideline factors can influence sentencing. For example, more disparity (at least at the sentencing stage) is possible in Pennsylvania, whose guidelines are less restrictive and allow more discretion at the sentencing stage, than in Minnesota or in the federal system, whose guidelines are more restrictive of sentencing-stage discretion. Thus:

Proposition 6: The less that a guideline system restricts sentencing-stage discretion, the more that local interpretations of focal concerns can influence sentencing, and the greater the potential for disparity.

It would seem that, from a disparity viewpoint (as well as for achieving desired larger policy goals), more restrictive guidelines would be preferable to less restrictive guidelines. However, as we discuss later, the restrictiveness of guidelines also invokes a dilemma between formal rationality and uniformity, on the one hand, and substantive rationality, flexibility, individualized sentencing, and localized discretion on the other (see Walker 1993; Ulmer and Kramer 1996). Also, sharply restricting discretion at the sentencing stage risks displacing it to earlier criminal justice stages, such as the charging and guilty plea processes. Observers have been concerned about these issues since the earliest beginnings of sentencing guidelines (see Savelsberg 1992). We return to this theme in several places later in the book, especially in the concluding chapter. For now, we note that our theoretical framework leads us to *expect* important extra-guideline influences on sentencing to exist in Pennsylvania's sentencing system. The empirical questions, then, become what kind, and how much? At the same time, we are interested in the guidelines' capacity for structuring local actors' interpretations of blameworthiness and community protection.

Pennsylvania presents a particularly instructive context in which to study guideline sentencing—and sentencing in general—for two reasons. First, its local courts are extremely diverse in terms of size, political contexts, sociocultural features, and crime concerns. Second, as we explain below, unique features of its sentencing guidelines and their history present a situation that throws into bold relief the universal dilemma of sentencing: the dilemma between the goal of uniformity and logically formal-rational rules, on the one hand, and the goal of individualized justice, which necessitates local discretion and substantively rational considerations, on the other (see Savelsberg 1992; Ulmer and Kramer 1996). However, we would argue that the Pennsylvania context is advantageous theoretically in that the tensions and negotiations between logically formal rationality and substantive rationality in sentencing are particularly pronounced. Therefore, the Pennsylvania context is instructive as an opportunity to see how these tensions and negotiations play out empirically,

and thus advance our understanding of the interrelationship of formal and substantive rationality in sentencing.

Overview

In this book we examine in depth the history, development, and impact of sentencing guidelines in Pennsylvania. Chapters 2 and 3 review the context for Pennsylvania's sentencing reform, and present a historical overview of the development and continuing evolution of the guidelines. Next we present a variety of research examining the impact of the guidelines on sentencing patterns and disparity. Chapter 4 investigates the guidelines' impact by examining local court "corrections" to the guidelines, in the form of departures, for serious violent offenders. Chapter 5 focuses on a crucial issue for guidelines: unwarranted disparity based on race, ethnicity, and gender. Chapter 6 presents a detailed analysis of between-court variation in Pennsylvania sentencing, and how county and court characteristics affect sentencing severity. Chapter 7 discusses the nature, prevalence, and predictors of the so-called trial penalty under Pennsylvania's guidelines. Chapter 8 discusses how mandatory minimums represent a somewhat competing sentencing structure vis-à-vis the guidelines, one that is largely controlled by prosecutors. The chapter then analyzes the predictors of prosecutors' decisions to apply mandatory minimums among a sample of mandatory-eligible offenders. Chapter 9 investigates the impact of the guidelines in terms of revisions in 1994 and 1997 that changed statewide sentencing practices.

Our discussion of the history and evolution of the Pennsylvania guidelines, as well as their impact on sentencing practices, can be read as a case study illustrating the notion of policy as the transformation of intentions. Throughout the empirical chapters, we return again and again to our theme: the embeddedness of the Pennsylvania guidelines in local court communities and the focal concerns of their participants. We conclude the book with important lessons to be learned from the Pennsylvania experience with sentencing reform.