

# The Evolution of Sentencing Policy in New Jersey, New York, and Pennsylvania

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*Criminal justice reform has become an important policy area in the American states and federal government due to the extremely high rates of incarceration in the United States. In addition, high and disproportionate rates of incarceration for black people is an important civil rights issue that needs attention at all levels of the criminal justice system, from policing to parole. This case study of the mid-Atlantic states generates hypotheses for a 50-state model on one aspect of this system: sentencing policy. The mid-Atlantic states of New Jersey, New York, and Pennsylvania are similar in terms of political culture and demographics and have key differences in incarceration rates that make them good choices for a comparative case study using the “most similar systems” or “comparable cases” design. Through our case study we identify policies that we believe contribute to rising incarceration levels as well as suggest reforms. Specifically, we argue that the combination of Pennsylvania’s structured sentencing guidelines and indeterminate sentencing have contributed to high levels of incarceration that have persisted even as the push for punitiveness in the criminal justice system has diminished. These factors in conjunction with political variables should be studied further in a quantitative model of the 50 states in order to provide areas for reform.*

Criticism of the United States' criminal justice system has been mounting for decades. Not only does the United States have the highest levels of incarceration in the world (Wagner and Walsh 2016), but also disproportionately higher rates of incarceration for black people (The Sentencing Project n.d.). According to the Prison Policy Initiative, "our rate of incarceration is more than five times higher than most of the countries in the world" (Wagner and Sawyer 2018). At both the state and federal levels, prison overcrowding has become a civil rights issue as well as a major financial burden to taxpayers (Alexander 2010; Dagan and Teles 2016; Gottschalk 2014).

Black people are disproportionately impacted by the criminal justice system at every level. According to The Sentencing Project (n.d.), a black man who was born in 2001 has a one-in-three chance of imprisonment at some point in his life. This is in comparison to a one-in-seventeen chance for a white man. In 2015, the national average incarceration rate for black people was 1,216.9 per 100,000, while the rate for whites was 252 per 100,000. This results in an average incarceration rate in state and local facilities that is 4.8 times higher for blacks than for whites in 2015.<sup>1</sup> Many scholars have noted the impact this has had on communities of color beyond simply the incarcerated population (Clear 2009; Gottschalk 2014; Pettit and Western 2004; Tonry and Melewski 2008). For example, Alexander (2010) argues that mass incarceration is akin to a racial caste system in which affected individuals are relegated to second class status. When people are released from prison, they experience legal discrimination in housing and jobs and are cut off from many government benefit and assistance programs.

There is considerable variation across the states with respect to overall levels of and racial disparities in incarceration. Differences between state laws and policy outcomes have been attributed to demographic and cultural differences. Elazar's (1984) seminal typology of state political culture argues that state political culture influences policy formation and outcomes because it determines the perceived purpose of politics and influences the ways that politics are conducted in the state. Every state has one dominant political culture, though some are hybrids. The three types of political culture are traditionalistic, moralistic, and individualistic. All three mid-Atlantic states, as well as many states in the northeast and midwest, are individualistic (Elazar 1984; Leckrone 2015).

Building on this work, Hero and Tolbert (1996) and Hero (1998), argue that the racial and ethnic makeup of states impact policy outcomes affecting racial and ethnic minorities. In Hero and Tolbert's typology of state demographic characteristics, all three mid-Atlantic states are classified as

heterogeneous, which means the states have both racial and white ethnic diversity (Hero and Tolbert 1996). These two research areas demonstrate that state regional and cultural development have an impact on policies, including outcomes for racial minorities. Examining regional subgroups is useful for case study research because we are able to hold constant the impact of state political culture (Elazar 1966; Mead 2004; Morgan and Watson 1991) and state racial and ethnic diversity, both of which contribute to differences in state policy outcomes (Fellowes and Rowe 2004; Hero and Tolbert 1996; Hero 1998; Hero 2003; Soss et al. 2001). In this article we explore whether or not variation in regional policy and policy processes impacts incarceration rate and racial disparities in incarceration, and build testable hypotheses for future research (Collier 1993; Gerring 2011; Levy 2008).

We focus on the development and legacy of “get-tough” era policies in the mid-Atlantic states in affecting incarceration rates. This era (Alexander 2010) began in the mid-1970s and continued until the 2000s. It coincided with the war on drugs (though the war on drugs preceded other get-tough policies) and fluctuations in crime rates. We use the mid-Atlantic as a starting point for generating hypotheses because of its high levels of black/white disparities in incarceration rates and variation in overall incarceration.<sup>2</sup> We pay close attention to the ways that the mid-Atlantic states formalized sentencing policy and the potential effect this had on both overall incarceration and racial disparities in incarceration from 1978–2015.

Our examination of the mid-Atlantic has led us to a few propositions regarding the politics and institutions surrounding sentencing policy. We argue that when states enact reforms to remedy civil rights concerns regarding mass incarceration, they should pay careful attention to the institutions that can potentially make it more challenging to reduce incarceration. First, we believe that the combination of indeterminate sentencing and a sentencing commission with sentencing guidelines is an important contributor to higher incarceration for both blacks and whites in Pennsylvania. Second, the political climate in Pennsylvania, including the election of trial court judges and a more conservative state government, has led to the implementation of more punitive policies that are tough to reverse.

## **Sentencing Policies and the Rise of Mass Incarceration**

This case study highlights major sentencing policies in the mid-Atlantic states and the structure of those policies. Literature examining the effects of some sentencing policies on overall incarceration rates seeks to identify the impact of policy shifts during the get-tough era on growing incarceration

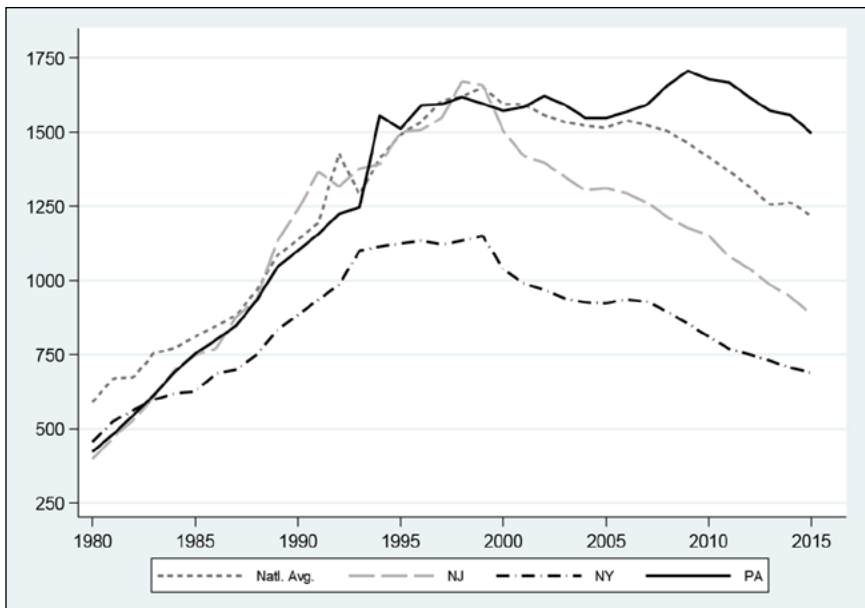
rates (Marvell 1995; Smith 2004; Spelman 2009; Stemen and Rengifo 2011). One limitation of this literature is a tendency to oversimplify policy, thereby underestimating its effects. An additional gap in the literature is that it typically examines the role of policy in growing the incarcerated population during the “tough-on-crime” era, but does not examine its effects after the war on drugs began to wane and public attitudes became less punitive (however, see Karch and Cravens 2014 and Percival 2009 for initial explanations on the causes of reforms). Building on these works, this study generates hypotheses that explore the impact of sentencing policies on black and white incarceration rates in both the get-tough and post-get-tough eras. We acknowledge that policy is one piece of a complicated puzzle and that there are many actors (the public, police, prosecutors, judges, policymakers) as well as levels of government that have an impact on incarceration. As the states and federal government shift to a focus on reform, however, it is important to identify the intended and unintended consequences of sentencing policies on incarceration rates.

Though this study speaks directly to the policy literature, there is rich literature in criminology that focuses primarily on the role of sentencing commissions and sentencing policy in judicial decision making. Specifically, it examines whether judges subject to sentencing guidelines give less attention to extra-legal factors (e.g., race, ethnicity, citizenship status) than judges without sentencing guidelines. Many studies examine how those policies create conditions that lead to differential treatment of defendants at sentencing on the basis of demographic considerations including race and ethnicity (King and Light 2019; Kutateladze et al. 2014; Ulmer, Kurlychek, and Kramer 2007; Wang et al. 2013) and gender (Blackwell, Holleran, and Finn 2008). The primary findings of these studies indicate that limiting judicial discretion through mandatory sentencing guidelines may reduce “unwarranted sentencing disparities” between defendants who have similar legal circumstances but differ in extra-legal characteristics.

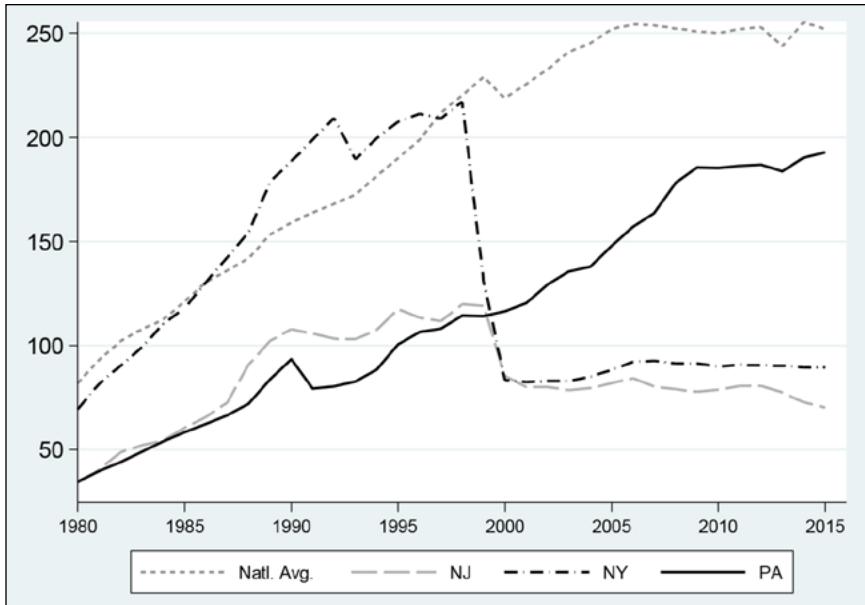
Left unanswered is whether or not sentencing guidelines have broader impacts on the criminal justice system. This study focuses on identifying those laws and institutions, including sentencing guidelines and commissions, that influence the overall incarceration rate and changes to black and white incarceration rates. The literature suggests that sentencing guidelines have the intended impact of reducing racial disparities in imprisonment (Tonry 1998a; Ulmer, Kurlychek, and Kramer 2007; Wang et al. 2013), but that the greater likelihood of the imposition of mandatory minimums and prior record enhancements may offset this trend (Fischman and Schanzenbach 2012; Hester et al. 2018).

An initial descriptive examination of the black and white incarceration rates in the mid-Atlantic reveals that there are key differences between the states in terms of incarceration and racial disparities in incarceration. The descriptive statistics displayed in Figures 1 and 2 highlight one major difference: Pennsylvania took a different trajectory than New York and New Jersey after the turn of the twenty-first century when get-tough policies became less popular and reform efforts began. New York and New Jersey experienced a large growth in their black incarceration rate and a small growth in their white incarceration rate during the get-tough era. However, by 1999 and 2000 both states began to experience a reduction in both white and black incarceration rates. The reduction in the black incarceration rate continues to decline at an accelerated rate after 2005. Pennsylvania, on the other hand, experienced sustained growth in both incarceration rates over the entire time period, with the white incarceration rate growing through 2015. The black incarceration rate showed sustained growth through 2007, with slight reductions thereafter.

Although the mid-Atlantic has higher than average racial differences in their incarceration rate, in New York and New Jersey this is driven primarily



**Figure 1.** Black Incarceration Rate in New Jersey, New York, Pennsylvania, and the National Average, 1980–2015. (Source: Compiled by the authors using data from the United States Department of Justice “National Prisoner Statistics Database.”)



**Figure 2.** White Incarceration Rate in New Jersey, New York, Pennsylvania, and the National Average, 1980–2015. (Source: Compiled by the authors using data from the United States Department of Justice “National Prisoner Statistics Database.”)

by relatively low levels of white incarceration. In Pennsylvania, where disparities are lower than New York and New Jersey, both white and black incarceration rates are higher. Many factors contribute to disproportionate black incarceration in the criminal justice system, such as disparate contact with police (Hartney and Vuong 2009; Ridgeway 2006; Tonry 2011; Walker, Spohn, and DeLone 2018) and disparate sentencing and disproportionate representation in the criminal justice system (Alexander 2010; Gottschalk 2014; Tonry 2011). This study examines whether sentencing policies may also have an impact. By looking at the mid-Atlantic, we have selected states that have many similarities but different outcomes, which is consistent with the most similar systems or “comparable cases” method of comparative case study analysis (Levy 2008; Lijphart 1975; Seawright and Gerring 2008).

One potential explanation for these differences in Pennsylvania may be the implementation of sentencing commission guidelines that institutionalize sentencing policy. This may, as some studies have argued (Gottschalk 2014; Spohn 2000), have the preferred effect of lowering disparities in treatment between sentencing judges, but may also cause a “hydraulic effect”

leading to greater levels of discretion by prosecutors or other actors in the criminal justice system (Engen and Steen 2000; Miethe 1987). We argue that guideline implementation can also have the unintended consequence of making it more difficult for states to reduce incarceration rates. Sentencing commissions and guidelines should be considered as a potential contributor to incarceration in a state alongside other policies including truth in sentencing, habitual offender laws, and mandatory minimums. In Pennsylvania, it seems that sentencing guidelines reflect a tradeoff between the lowering of disparate outcomes for blacks and whites in exchange for higher overall incarceration for blacks and whites.<sup>3</sup> This case study provides the basis for further study of sentencing commissions and guidelines as a potential driver of overall incarceration rate, depending on the structure of the guidelines. Below is a brief review of the major sentencing policies in the US states as well as the literature on sentencing commissions and guidelines. This is followed by our case study of the evolution of these policies in the mid-Atlantic states.

### **Sentencing Policy in the Pre-Get-Tough Era**

The move to standardize and codify criminal justice policy in the states began in the 1920s when the American Law Institute formed and began writing the Model Penal Code (MPC) (Robinson and Dubber 2007), first published in 1962. In response to the MPC, many states slowly began to adopt policies and create sentencing commissions to provide guidance to judges (American Law Institute 1985; Robinson and Dubber 2007). The MPC recommended a shift from indeterminate to determinate sentencing, which increased certainty in sentencing while removing individual-level variability in time served. Some states responded by creating sentencing commissions, while others passed major criminal justice legislation that served a similar purpose. The result is that starting in the 1970s, determinate sentencing increased across the states, and limitations were imposed to hinder the ways that justice had been served on a “case-by-case basis.” For example, New Jersey lawmakers summed it up by explaining that they wanted to move toward a system in which “the punishment would fit the crime, not the criminal” (New Jersey Commission to Review Criminal Sentencing 2007). In addition, a relatively broad consensus among the public that more should be done to punish drug use and crime emerged to increase the codification and punitiveness of state criminal justice systems (Enns 2014; United States Department of Justice 1998). This led to exponential increases in incarceration rate in the United States from 1980 to 2000.

## The Policies of the Get-Tough Era

Increases in incarceration have been attributed to federal and state tough-on-crime and “war on drugs” policies and the politics of criminal justice policy (Alexander 2010; Beckett and Western 2001; Gottschalk 2014; Provine 2011; Raphael 2009; Smith 2004; Spelman 2009; Western 2006). Further, economic considerations, the crime rate, and population characteristics have been found to contribute to changes in criminal justice policy (Greenberg and West 2001; Jacobs and Carmichael 2001; Michalowski and Pearson 1990; Percival 2010; Taggart and Winn 1993; Tonry 1999b). Several laws and policies of the get-tough period are thought to influence rates of imprisonment. Some also lead to greater disparities in incarceration by race, while others have the effect of diminishing them. Table 1 provides an overview of major policies implemented during the get-tough period.

<b>Table 1. Major Policies Adopted in the States during the Tough-on-Crime Era</b>		
<b>Policy</b>	<b>Description</b>	<b>Sources</b>
Mandatory Minimum Sentencing (50 States)	Laws requiring that certain charges carry a minimum sentence. They are widely used for drug sentencing but have been used for many types of crimes. Many states are currently reforming these laws.	Tonry (1998a, 2013); Subramanian and Delaney (2014)
Truth in Sentencing (27 States)	Laws that mandate that an offender must serve a certain percentage (often 85%) of their sentence before becoming eligible for release. These laws were implemented to qualify for funding under the Federal Violent Crime and Law Enforcement Act of 1994.	United States Department of Justice (1998); Sabol et al. (2002); Chen (2014)
Three Strikes Laws (25 States)	A sentence enhancement for repeat violent or felony offenders. In some states, repeat violent offenders receive long mandatory sentences or even life sentences with no possibility of parole	Dickey and Hollenhorst (1999); Tonry (2013); Chen (2014)
Sentencing Commissions (22 States) and Guidelines (17 States)	States created sentencing commissions and many used the commissions to create sentencing guidelines. Sentencing guidelines vary in the extent to which judges are required to follow them. Several states implement presumptive guidelines requiring adherence to the guidelines.	Tonry (2013); Mitchell (2017)
Determinate Sentencing (17 States)	Sentencing that has a fixed length. This is most commonly accomplished by the elimination of parole.	Rhine, Watts, and Reitz (2018)
<i>Source:</i> Compiled by authors.		



Scholars have examined the effects that these policies have had on overall incarceration, racial disparities in sentence length, and sentencing for similar crimes. Mandatory minimum sentencing shifted discretion and power from judges to prosecutors who could decide to charge individuals with crimes that carry a minimum sentence (Fischman and Schanzenbach 2012). Mandatory minimums are more likely to be used for minority offenders (Ulmer, Kurlychek, and Kramer 2007). Finally, mandatory minimums are utilized most commonly for drug crimes, where racial disparities in arrests are well documented. In recent years, states have begun to enact reforms to lessen or eliminate the punitiveness of mandatory minimums (Mauer 2010; Rorty 2010). Truth in Sentencing (TIS) laws have substantial long-term effects of increasing the incarceration rate because inmates serve a greater proportion of their sentence behind bars (Ditton and Wilson 1999). At the time of this writing, 27 states had responded to federal incentives and implemented some form of TIS. The impact of TIS is that it increases time served, which in turn increases the overall incarceration rate.

Twenty-five states have some form of a Three Strikes law. Spelman (2009) provides a systematic accounting of the effects of these policies on incarceration rates. He finds that habitual offender laws have little short- or long-term effects on state incarceration rates, because these laws only apply to a small population of offenders. However, there is evidence that Three Strikes laws are more likely to be invoked for minority defendants (Chen 2008, 2014).

While Mandatory Minimum Sentencing, TIS, and Three Strikes laws increase the severity of punishment for some offenders, determinate sentencing is thought to lower the incarceration rate by limiting or removing the discretion of a parole board, and offers more certainty for both offenders and victims in terms of length of time served and offender release dates. Determinate sentencing is associated with a decrease in incarceration rates because offenders serve shorter sentences (Greenberg and West 2001; Jacobs and Carmichael 2001; Smith 2004; Spelman 2009).

In the buildup of the prison system in the United States beginning in the 1970s, there was a demand among conservatives to make sentences more consistent among judges and a demand among liberals to make sentences more consistent among defendants (Dagan and Teles 2016). Between 1978 and 2000, 15 states created sentencing commissions with a mandate to write sentencing guidelines that would be distributed to judges.<sup>4</sup> States with presumptive (mandatory) guidelines require judges who deviate from the sentencing guidelines to explain why (either in writing or on the record), and there are opportunities for defendants and prosecutors to appeal deviations from guidelines (Engen 2009; Tonry 1999a).

In more recent years, the public and policymakers have recognized that the prison system is unsustainable, overly punitive, too expensive, and ineffective in rehabilitation (Dagan and Teles 2016; Gottschalk 2014). Reformers have looked to sentencing policy to reduce incarceration rates and to reduce racial disparities in incarceration. Since 2007, 38 states have implemented justice reinvestment reform projects, and 18 states have required corrections impact statements, which are supposed to inform policy decision and reform (Lawrence 2015). Understanding the role of sentencing policy development can help states to better target reform efforts.

The development of sentencing policy in New Jersey, New York, and Pennsylvania provides an important case study identifying themes that exist in the policy processes across eras, and their impact on incarceration and disparity rate. These cases were chosen because all three states are close to the national average for incarceration rate during the tough-on-crime era but vary thereafter. Additionally, the mid-Atlantic has higher than average racial disparities in incarceration over this period. Further, there are key similarities and differences among these states, and the effect of region and political culture can be held constant among them (Elazar 1984). State political culture (Elazar 1984) and state demographic composition (Hero and Tolbert 1996) should have some implicit influence on criminal justice policy because of the dispersion of racial groups, income inequality, and institutional and political features that matter to criminal justice outcomes (Karch and Cravens 2014; Percival 2009). Controlling for these factors, therefore, is useful for our inquiry.

### **The Mid-Atlantic Case**

Gottschalk (2009) and Raphael (2009) point out that the role of policy is likely underestimated in explaining incarceration rates because it is often simplified to a dummy variable in a statistical model. A case study approach can help us to understand the complexity and variation in policy and its importance in incarceration rate and racial disparities. From 1978 to 2015, the mid-Atlantic states followed different trajectories when it came to how they implemented get-tough policies. While all three moved toward greater punitiveness in sentencing over time, Pennsylvania utilized a sentencing commission, formed in 1978, to write extensive sentencing guidelines. On the other hand, New York only established a permanent commission on sentencing in 2010, after calls for greater clarity and structure to their sentencing policy. This New York commission does not create guidelines, however; it serves in an advisory capacity to the chief judge and provides an evaluation of sentencing laws. New Jersey does not have a permanent sentencing commission, and most of its

sentencing rules are through statute, specifically through New Jersey's Code of Criminal Justice, which has been amended numerous times since originally signed into law in 1979. The result of these three different paths is that Pennsylvania's judges have the greatest level of formal restrictions on sentencing.

To better understand the development of sentencing policy we examined major legislation and court cases in all three states. In Pennsylvania, we additionally relied on the state's Commission on Sentencing (1982–2020) guidelines. In New Jersey, we relied on a final report of the New Jersey Commission to Review Criminal Sentencing (NJCRCS),<sup>5</sup> which documents the history and case law of New Jersey sentencing policy (NJCRCS 2007). In addition, we utilized information from the "Manual on NJ Sentencing Law," (2018) published by the Appellate Division of the New Jersey Superior Court (Keagle 2018). In New York, we relied on the New York State Commission on Sentencing Reform's 2007 "The Future of Sentencing in NY State: A Preliminary Proposal for Reform" and subsequent reports.<sup>6</sup>

## Sentencing in Pennsylvania

In 1978, the Pennsylvania General Assembly created the Pennsylvania Commission on Sentencing (PACS), a legislative service agency overseen by the Pennsylvania House and Senate Judiciary Committees. According to statute, judges should follow the recommendations of the commission when they hand down sentences. The commission consists of eleven members: two House members, two members of the Senate, four state judges selected by the Chief Justice of Pennsylvania, and three gubernatorial appointees including a district attorney, a defense attorney, and either a professor of law or criminologist (PACS, "Commission Composition"). The commission issues guidelines that are open for public comment and testimony. The legislature may nullify the recommendations of the PACS, but absent opposition from the legislature and stakeholders, guidelines become the recommendations for judges (42 Pa.C.S. §2154).

Over time, the recommendations of the Pennsylvania Commission on Sentencing (1982–2020) have become more extensive, stricter, and provide less discretion to the courts. Judges not using the recommendations must provide a written explanation for why they did not follow the commission's guidelines. In addition to the guidelines, judges have to follow other statutory sentencing policies including mandatory minimum sentences and various rules and the amendment to the state's drug policy, titled the Controlled Substances, Drugs, Devices and Cosmetics Act of 1972. Commission guidelines explicitly state that judges do not have the authority to order sentences that divert

from mandatory minimum sentences (PACS 4th Edition 1994). The number and breadth of Mandatory Minimum Sentencing laws in Pennsylvania has increased since the 1970s.

The first set of guidelines was issued in 1983 after the initial formation of the Sentencing Commission in Pennsylvania. They provided a matrix of sentencing recommendations that were determined by: offense severity, the presence of aggravating or mitigating factors, criminal history, and whether or not sentencing enhancements were applicable (e.g., presence of a deadly weapon, location in a school zone).

The 4th edition of the guidelines was introduced in 1994 in part to implement intermediate and restorative sanctions programs (Kempinen 1997; Tonry 1998b). The language in the document reflects these changes and the states' willingness to engage in the goals of both retribution *and* rehabilitation for some types of offenders. "The commonwealth in wishing to salvage the contributions and dedicated work which its displaced citizens may someday offer, is seeking to explore alternative methods of incarceration which might serve as the catalyst for reducing criminal behavior" (PACS 4th Edition 1994, 3). One major change in the 4th edition was establishing levels for crimes, with minimum sentences for each level (depending on aggravating and mitigating circumstances and whether or not the defendant is a repeat offender). The commission identifies the goals of sentencing guidelines as providing "a benchmark for the judges of Pennsylvania. This established a sentencing system with a primary focus on retribution, but one in which the recommendations allow for the fulfillment of other sentencing purposes including rehabilitation, deterrence and incapacitation" (PACS 4th Edition 1994).

One of the primary purposes of the new guidelines was to include provisions from the County Intermediate Punishment Act of 1990 (Tonry 1998b), which created alternatives to incarceration for some types of offenders. The 4th edition established alternative forms of punishment including "restrictive intermediate punishments" and "restorative sanctions." A restrictive intermediate punishment is a punishment in which the person is under some form of secured custody, such as inpatient drug treatment, but is diverted from prison. Restorative sanctions are requirements like probation, drug testing, or outpatient treatment. The 4th edition also changed and potentially lengthened sentence enhancements for possession of "deadly weapons." Finally, the 4th edition established a category of offender called the Repeat Violent Offender category, which carries a minimum sentence of 120 months (PACS 4th Edition 1994).

Intermediate sanctions programs are often not adequately funded and judges are reluctant to use them. If these programs are to have an impact on levels of incarceration, diversion from prison would be the mechanism

(Petersilia 1999). Further, a study of Pennsylvania's use of intermediate punishment suggests that minority offenders are less likely to receive intermediate sanctions or probation (Franklin, Dittmann, and Henry 2017; Johnson and DiPietro 2012). As a result, we do not think that the implementation of these programs had much impact on overall incarceration in Pennsylvania. However, around this time there was a leveling off of black incarceration in Pennsylvania, though the level remains extremely high. The much lower level of white incarceration continues to rise after 1994.

Drug sentencing also became more complex during the mid-1990s in Pennsylvania. At the same time, the state recognized that some people offend because of drug addiction and created programs and guidelines to deal specifically with addiction. In the 4th edition, the most punitive drug sentences are reserved for those charged with offenses related to dealing and illegal drug manufacturing. In the years between the 4th edition and the current 7th edition, there have not been substantial changes to the structure of sentencing in Pennsylvania. In 2012, the state legislature added a few more mandatory minimum sentences.<sup>7</sup>

The Federal Violent Crime Control and Law Enforcement Act of 1994 provided states with grants to increase the capacity of corrections institutions to accommodate more prisoners if they enacted a law mandating inmates serve 85% of their sentence prior to becoming eligible for parole. Many states, including Pennsylvania, did not enact new laws but still qualify for grant money under this program because their judges impose minimum sentences for all offenders and provide a definite and consistent range (Sabot et al. 2002). While many other states during this period began to eliminate parole, Pennsylvania maintained its system of indeterminate sentencing in which eligibility for parole becomes a possibility after a certain minimum sentence is served.<sup>8</sup> The structure of Pennsylvania's sentencing rules makes Pennsylvania a state with high levels of institutionalization, indicating that judges are beholden to a strict sentencing structure.

In Pennsylvania, the tough-on-crime era produced large increases in both racial disparities and overall incarceration. Figures 1 and 2 show the incarceration rate in Pennsylvania by race and compared to the national average from 1980–2015. At the beginning of this time frame, overall incarceration in Pennsylvania is lower than the national average, but increases early on mainly through rising black incarceration.<sup>9</sup> Beginning in the early to mid-1990s, the black incarceration rate fluctuated at a high level before beginning to drop after 2011, while the white incarceration rate continues to rise throughout the time frame. The disparity in incarceration rises until the year 1994 when it begins to decline because of the increase in the white incarceration rate.

## Sentencing in New Jersey

New Jersey enacted landmark changes to its sentencing policies in the late 1970s. Unlike Pennsylvania, New Jersey changed its sentencing structure through legislation and the enactment of the New Jersey Code of Criminal Justice, known as “the Code,” which became effective September 1, 1979. According to the New Jersey Commission to Review Criminal Sentencing, “The NJ Code of Criminal Justice . . . constituted a major, if not revolutionary, advance over the scheme it supplanted. In short, the Code imposed a rational and comprehensive framework for imposing sentencing on a system that plausibly could be characterized as anarchic” (NJCRCS 2007, 3). The commission described judicial discretion prior to the Code as “unfettered” (pg. 7) and went on to explain that,

The Code established a general framework to guide judicial discretion and in a manner that promoted greater uniformity in sentencing. This entailed the abandonment of the rehabilitative model and its replacement with a system premised on “just deserts,” with the paramount goal being that the punishment fit the crime, not the criminal, and that there be a predictable degree of uniformity in sentencing. (NJCRCS 2007, 7–8)

The Code added structure where there was none, imposing some limits on judicial discretion. The Code’s structure was somewhat like the one imposed by the Pennsylvania Commission on Sentencing (1982–2020). The Code imposed a system of graded categories for crimes with sentencing ranges for each category. Crimes in the first degree or category were the most severe and carried the longest sentence ranges. The judge decides the categorization of degree under which the crime falls and whether or not there will be a sentence including imprisonment. Sentences for first- and second-degree crimes must include imprisonment. Between 1979 and 2005, the court was required to start at a presumptive term of imprisonment, which was the midpoint for each range. The sentencing court could then add or reduce time based on aggravating or mitigating circumstances (NJCRCS 2007). In *State v. Natale* (2005), the New Jersey State Supreme Court ruled that the use of presumptive terms violated the 6th Amendment right to a jury trial. As a result, judges are no longer required to use the midpoint of the sentencing range as the start of sentencing determinations (NJCRCS 2007).<sup>10</sup>

There have been few significant pieces of legislation in New Jersey’s criminal justice law. Since 1979, the laws have increased the punitiveness of New

Jersey's criminal justice system while also standardizing it so that there is less variation in sentencing. According to the Commission to Reform Sentencing in 2007, "Not once in 28 years has the legislature reduced punishment authorized by previous legislation." There was one exception to this from 1979 to 2007, and that was an amendment to the Graves Act, an act dealing with gun offenses, that allowed for an "escape mechanism" for first-time Graves offenders (NJCRCS 2007, 18–19).

The Graves Act is the second piece of legislation critical to understanding New Jersey sentencing law. It requires mandatory minimum sentences for crimes involving firearms. An amendment to the Graves Act enacted in 2008 increased the scope of the act to include possession of certain weapons even if the person or weapon was not involved in an additional crime. Also important is the New Jersey Parole Act of 1979, which lays down the rules for when to allow for parole. This law was partially subsumed by the state's "No Early Release Act" (NERA) of 1997, which requires people with certain types of convictions serve a minimum of 85% of their sentence. Finally, the Comprehensive Drug Reform Act of 1987 increased punishment for drug crimes by "imposing mandatory periods of parole ineligibility, extended terms, mandatory minimums and fiscal penalties for non-violent drug offenses" (NJCRCS 2007, 30).

New Jersey's laws relating to criminal justice have reduced judicial discretion while increasing the role that prosecutors play for many crimes. The Commission to Reform Sentencing in New Jersey noted with respect to the Comprehensive Drug Reform Act:

Put bluntly, this provision confers essentially final sentencing authority in many drug cases to prosecutors and has been the subject of significant and recurring litigation since its enactment. There is no comparable provision in the Code governing the disposition of violent crimes. Furthermore, in a 1998 decision, *State v. Brimage*, the Supreme Court of NJ directed the Attorney General to promulgate new uniform guidelines to govern plea agreements in cases implicating N.J.S.A. 2C: 35–12. The new "Brimage Guidelines" became effective on May 20th, 1998. For the purposes of this report it is sufficient and accurate to note that the Brimage Guidelines constitute a complex sentencing scheme (like the Federal Sentencing Guidelines) overlaid on an already intricate sentencing structure. (2007, 30–31)

New Jersey is a state with relatively low overall incarceration rates but very high disparities in incarceration rate. Figures 1 and 2 show New Jersey's

incarceration trends relative to the national trend. New Jersey is in a similar position to Pennsylvania in that it starts off with lower levels of incarceration that increase mainly due to the rise in the black incarceration rate coinciding with the early get-tough period. Some of this increase appears to be related to drug enforcement legislation of 1987. The late 1990s began a decline in incarceration for both blacks and whites, coinciding with the 1997 No Early Release Act, which implemented Truth in Sentencing Laws. While it is unlikely that Truth in Sentencing produced reduced incarceration, it may be that prosecutors used harsher punishments as leverage to pressure defendants to plead to charges carrying lower sentences.

### Sentencing in New York

New York also has extremely complex sentencing rules. According to 2007's "The Future of Sentencing in New York State: A Preliminary Proposal for Reform,"

The sentencing statutes have . . . endured repeated piecemeal and ad hoc alteration, ranging from minor tinkering to the revision of entire articles of law. The result today is an overly complex, Byzantine sentencing structure that is riddled with opportunities for injustice and, in some cases, is virtually unintelligible to prosecutors, defense attorneys, defendants and crime victims alike. (NYSCSR 2007, v)

The report identified six goals for reform in New York. The first was to streamline sentencing rules. The second was to review mandatory sentencing rules, particularly nonviolent, drug-related crimes. The third goal was to use evidence-based strategies to "reduce crime and enhance public safety." The fourth was to develop efficiency and cost effectiveness in the implementation of the rules. The fifth goal was to strengthen statutory schemes for crime victims, and the final goal was to create a permanent sentencing commission (NYSCSR 2007).

Like New Jersey, New York adopted the rehabilitative model in the early 1960s. It was one of more than 30 states that passed laws inspired by the American Law Institute's Model Penal Code (NYSCSR 2007). The law that New York adopted under this model was at the cutting edge for the time (NYSCSR 2007, 6). The law embraced indeterminacy in sentencing with most categories of offenses receiving eligibility for parole. The only mandatory sentences were for murder and kidnapping. This lack of structure in New York's criminal codes did not last long, particularly with respect to drug laws.



The so-called Rockefeller drug laws (passed in 1973) created sweeping mandatory minimum sentences for certain classes of drug felonies, including restrictions on plea bargaining for drug offenses (NYSCSR 2007, 8). In 1978, additional mandatory minimums were added for violent felony offenses. Though there were other reform efforts in the late 1970s, these fell short, and the sentencing rules for New York remained mostly indeterminate. Another reform effort began in 1983 when Governor Mario Cuomo created the Committee on Sentencing Guidelines. The committee recommended greater determinacy in sentencing, but the 1985 final report had more dissenters than proponents, and the sentencing bill that came out of the committee's report never left the legislative committee (NYSCSR 2007, 10).

New York's sentencing laws were hard to alter, but change needed to happen. As a result, several "back end" sentencing strategies were implemented to deal with the increasing incarceration rate and its costs (NYSCSR 2007, 11). For example, between 1985 and 1995 several programs for early release for parole were implemented, and work release programs expanded. According to the commission's report "While many of these treatment programs may have had positive impacts on offenders and saved money, they also represented a back-door approach to sentencing policy and, in some instances, raised serious public safety issues" (NYSCSR 2007, 11).

In 1995, New York enacted the Sentencing Reform Act, which created determinate sentences for repeat violent felony offenders. At the same time, the law maintained much of the discretion from the previous sentencing regime. "The sentencing ranges left prosecutors with wide discretion in plea bargaining in cases where a guilty verdict was rendered after trial, judges selected a specific determinate sentence from a broad range" (NYSCSR 2007, 11). Under this law, "Truth in Sentencing" for certain offenders was implemented wherein offenders had to serve more than 85% of their "determinate term." The act also increased minimums for 3rd-strike violent felony offenders and first-time violent felony offenders.

New York also implemented a Truth in Sentencing law in compliance with the federal guidelines. According to the New York Commission to Reform Sentencing, the state received \$25 million in 1997 and more than \$28 million in 1998 from these grants (NYSCSR 2007, 12). In 1998, another determinate sentencing provision was issued for first-time violent felony offenses (not including some domestic violence cases). More determinate sentencing was imposed in the years 2000, 2004, and 2007. In 2004, the Drug Law Reform Act created determinate 8-year sentences for first-time Class A drug offenders. This was a downgrade from a "15 to life" indeterminate sentence. In addition, the law doubled the minimum drug weight for some of these crimes. This

was in response to the backlash against the Rockefeller drug laws, which were thought to have been too harsh (NYSCSR 2007, 33).

The New York State Commission on Sentencing Reform argued that New York's sentencing scheme needed revision. In its summary of sentencing up to 2007, the commission noted that the rules were hard to decipher and not logical. There were arbitrary rules for when offenses would carry a determinate or indeterminate sentence. This type of ad hoc system applied neither a punitive nor a rehabilitative approach. As the commission notes, determinacy and a simple structure are preferred by victims and offenders because it is clearer what the sentence will be and how it will be carried out. The commission recommended simplifying sentencing rules and increasing determinate sentencing since it provides "uniformity, fairness and 'truth in sentencing'" (NYSCSR 2007, 16) and would help defendants in making plea deals because they will have more information (NYSCSR 2007, 16). A more recent report by New York's Permanent Commission on Sentencing has proposed "fully determinate" sentencing in New York to reduce complexity and increase clarity. Unlike Pennsylvania's Sentencing Commission, New York's Sentencing Commission is supervised by the chief justice, so it serves in an advisory capacity (New York Permanent Commission on Sentencing 2014).

Figures 1 and 2 show trends in incarceration rates in New York by race and compared to the national average and the other mid-Atlantic states. Despite New York's complex and punitive rules, New York had lower incarceration rates than New Jersey and Pennsylvania for both black and white offenders. The black incarceration rate in New York begins at a higher point, which was likely due to the implementation of the Rockefeller drug laws of the 1970s and 1980s (Tonry 2009). Like New Jersey, New York's incarceration rate began to decline in the mid- to late 1990s. Once again, the dip in the incarceration rate coincided with the implementation of Truth in Sentencing but the two things are likely not causally related. Some determinate sentencing rules were also implemented during the late 1990s. This may have had some impact on lowering the incarceration rate, but the results of this would not be apparent right away.

## Overview of Sentencing Policy in the Mid-Atlantic

While there are significant differences between the three mid-Atlantic states, the overall pattern is clear. There has been a move toward increasing the level of determinacy and punitiveness in sentencing while decreasing judicial discretion during the tough-on-crime period. To summarize the case studies above, Table 2 displays important policies relating to sentencing in

the three mid-Atlantic states. All three states implemented or had mandatory minimum sentences, habitual offender laws, Truth in Sentencing provisions (although Pennsylvania’s was not a true Truth in Sentencing law), and sentencing enhancements for certain crimes. All three also passed laws in the 1970s enforcing drug crimes. The two key differences between the three states during this time period are Pennsylvania’s sentencing commission with guidelines that institutionalized sentencing rules and restricted judicial discretion. Pennsylvania maintained its mostly indeterminate sentencing system, as did New Jersey, while New York moved to greater levels of determinate sentencing. These are important observations regarding potential effects of sentencing policy on incarceration.

<b>Table 2. Important Sentencing Rules and Statutes in New Jersey, New York, and Pennsylvania</b>			
	<b>New Jersey (NJCRCS 2007; Keagle 2018)</b>	<b>New York (NYSCSR 2007; New York State Permanent Commission on Sentencing 2014)</b>	<b>Pennsylvania (Pennsylvania Commission on Sentencing 1982–2020)</b>
<b>Truth in Sentencing</b>	Yes—85% (NERA 1997)	Yes—85+% for certain offenses	No—But qualifies for federal grant money from the TIS program
<b>Sentencing Commission</b>	Temporary Commission established in 2004, last reported in 2007	Yes—Serves in an advisory capacity to chief judge (2010)	Yes—Permanent commission which reports to state legislature
<b>Sentencing Guidelines</b>	“Brimage Guidelines” for drug related plea agreements from 1998 to present (presumptive sentencing from 1979–2005)	No	Yes—Judges are required to provide written explanations of any deviation.
<b>Two or Three Strikes Laws</b>	Yes—Habitual offender law and three strikes law (1994)	Yes—Two and three strikes for violent felony offenses	Yes—Two and three strikes laws, minimum sentencing for repeat felony and violent felony offenses
<b>Determinate Sentencing</b>	No—Parole eligibility after minimum served except for life without parole	Mixed system—Increased determinacy but indeterminate sentencing for many offenses	No—Except for life without parole
<i>Source:</i> Compiled by authors.			

Pennsylvania's sentencing commission institutionalized sentencing policy over the past several decades, but the more recent sentencing commissions formed in New York and New Jersey served a different purpose. New York formed a sentencing commission in 2010 to specifically deal with mass incarceration and disparities in sentencing rather than to make specific sentencing recommendations. In this case, the commission was created to mitigate the drivers of mass incarceration. The mid-Atlantic cases have allowed us to observe with a fine-toothed comb the processes that went into the get-tough period and the way different responses in the states may have led to different outcomes. The following section highlights the hypotheses that were generated by this case study. Future research on this topic will apply these hypotheses in a larger statistical model of the 50 states.

## Hypotheses and Conclusion

Examining the mid-Atlantic states leads to hypotheses regarding the role of sentencing policy and its implementation in incarceration and racial disparities in incarceration. The first general hypothesis is that *the institutionalization of sentencing policy during the tough-on-crime era leads to higher incarceration rates and can inhibit the reduction of incarceration rates*. Because of this observation, we have formulated a second hypothesis: *guidelines can increase overall incarceration but may lower racial disparities in incarceration*. The guidelines created during the tough-on-crime era increased the punitiveness of sentences generally, but also limited judicial discretion. This limited the impact of judges' implicit or explicit racial bias and required lengthier sentences regardless of a defendant's race. While reducing racial disparities is a meaningful goal, it does not always result in a reduction in black incarceration rates. The mid-Atlantic case provides an example. While New Jersey had greater disparities in incarceration in terms of race, black people were still less likely to be incarcerated there than in Pennsylvania. We believe that studying the implementation of sentencing commissions over the get-tough period and beyond will provide important insight into the ways in which states should move forward as they continue to implement criminal justice reforms to reduce overall incarceration rate and racial disparities in incarceration.

It is unlikely that sentencing guidelines alone can explain the differences in incarceration rates and racial disparities in incarceration among Pennsylvania, New York, and New Jersey. Another important piece of this puzzle is the role of the public. Public attitudes on criminal justice policy have shifted, which has in turn led to some reforms. Perhaps citizens in Pennsylvania

maintained punitive policy preferences, while citizens of New York and New Jersey were willing to allow elected and appointed officials to implement reforms. We can use public opinion data to understand the role of the public in these policy outcomes. Certainly, public attitudes are important when it comes to enforcement of criminal justice policy as well. Many scholars point out that criminal justice policy primarily operates on a local level and local elected authorities have a considerable amount of discretion in implementing criminal justice policy. Both public attitudes and degree of local autonomy in criminal justice policy enforcement should be considered in a full model explaining state incarceration rates and racial disparities. We hypothesize that *states with more punitive public attitudes will have higher incarceration rates*. As Enns (2014) demonstrates, the growth of the prison population follows a growth in punitive attitudes among the American public. We additionally hypothesize that *states that institutionalize decision making and limit judicial discretion will be less responsive to shifts in public opinion*.

This case study has led us to conclude that a broader model of the drivers of mass incarceration should include variables that account for sentencing guidelines and the structure of those guidelines and levels of determinacy in sentencing, and should also account for political variables such as party control of state government and the courts (where applicable), implementation of policy, and public opinion. In addition, controls should be put in place for state political culture and demographic characteristics that affect policy outcomes. The next steps in this research include examining the policy and nonpolicy factors that drive incarceration rates and racial disparities in incarceration rates in a quantitative case study. Using a case study design will allow us to examine different features of policy, criminal justice actor discretion, and implementation in each state. It will further allow us to evaluate the impact of public opinion on policy, incarceration rate, and racial disparities.

In this study, we examined the development of sentencing in one regional subdivision in the United States. The information that we obtained from this study provided us with a fruitful path forward. The most significant take-away from this case study is the need to examine sentencing commissions and guidelines and the effect that they had on states that implemented them.

Scholars, practitioners, and the media have called for the creation of sentencing commissions as a response to the problems of mass incarceration (Editorial Board *New York Times* 2014; Peters and Warren 2006). The case of the mid-Atlantic should inform this call. While sentencing commissions can be of use, care should be taken to implement them in a way that does not hinder reform efforts. Sentencing guidelines may be problematic if they inhibit

change when it is needed. States and the federal government have begun to use sentencing commissions as data collection agencies that can help to implement best practices and increase efficiency in corrections. It is important for lawmakers and practitioners to know the potential problems with these institutions in order to avoid them in the future.

## NOTES

1. These data were compiled from the Bureau of Justice Statistics' database titled "National Prisoners Statistics, 1978–2015" (United States Department of Justice 2017) and the U.S. Census Bureau's Intercensal County Estimates by Age, Sex, Race: 1980–1989; 1990–1999; 2000–2009; 2010–2017.

2. For more information on this, see the Sentencing Project's (n.d.) "State by State" data.

3. There is a significant body of research that examines the Pennsylvania Sentencing Commission. Most of these studies focus on the impact that the sentencing commission guidelines had on potential disparities in sentences between defendants (Kramer and Ulmer 2009). The literature on the Pennsylvania Sentencing Commission also examines the extent to which the guidelines impact disparities with respect to gender (Blackwell, Holleran, and Finn 2008) and race and ethnicity (Ulmer, Painter-Davis, and Tinik 2016). Research on the Pennsylvania Sentencing Commission also identifies how guidelines have been implemented throughout the state, examines how specific provisions of the guidelines impact sentencing, and whether particular sentences impact recidivism (Tonry 1998a; Ulmer and Johnson 2004; Ulmer and van Asten 2004; Kramer and Ulmer 2009). Generally, these studies do not explore whether the Sentencing Commission affects the overall incarceration rate.

4. More have since created commissions but most of the states that have created sentencing commissions since 2000 have not created guidelines. In addition, there are two states that have guidelines but no commissions (Mitchell 2017).

5. The New Jersey Commission to Review Criminal Sentencing was a temporary commission created in 2003 to examine state sentencing policy. The commission provided a final report in 2007.

6. The New York State Commission on Sentencing Reform was formed in 2007 by Executive Order of Governor Eliot Spitzer. A permanent Commission on Sentencing was established by New York's Chief Judge in 2010. The goal of this commission is to recommend improvements to sentencing policy.

7. Pennsylvania has over 40 mandatory minimum sentencing rules. Typically, these include enhancements for weapons and drug crimes in proximity to a school (PACS 1983–2018). Recent cases such as *Commonwealth v. Hopkins* (2015) and *Allelyne v. U.S.* (2013) have eliminated the use of mandatory minimums for some offenses in Pennsylvania.

8. The exception is that Pennsylvania also has certain crimes where a conviction means a sentence of life in prison without the possibility of parole.

9. It is worth noting that Pennsylvania's crime rate was also lower than the national average and lower than New Jersey and New York's as well (United States Department of Justice 2019).

10. It is important to note that presumptive sentencing is different than presumptive guidelines, which were not implemented in New Jersey. Despite constitutional issues

linked to presumptive sentencing, presumptive sentencing is linked to lower rates of incarceration and lower racial disparities (Tonry 1999b).

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