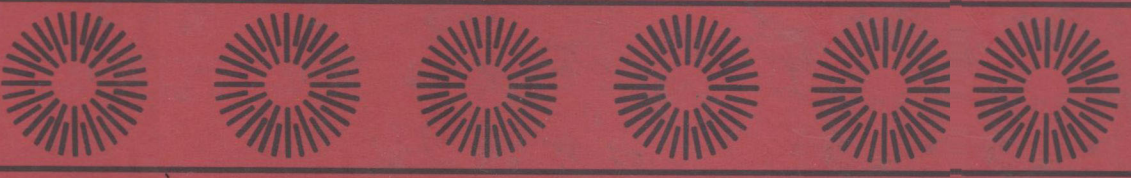
Sentencing Councils in the Federal Courts

Charles David Phillips



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To
Willie Everette Phillips, Sr.,
and
Dr. Dick Smith,
in memory

List of Figures

List of Tables

Acknowledgments

The research presented in this book is now in its third incarnation. In each of its incarnations, large and numerous debts have been incurred. In its first life, this research was a project that I developed and directed while a member of the research staff of the Federal Judicial Center in Washington, D.C. I would like to thank William Eldridge, the director of research, for his interest in and support for this project. A number of other members of the research staff provided indispensable assistance. Among them are Mark Bacon, Rodney Dobbins, Emily Fenn, Robert Friedman, Alfred Kleindienst, and Patricia Lombard. Special thanks must go to Anthony Partridge and Charles Nihan. They had great patience with and much encouragement for a Washington neophyte. The statements and conclusions that follow should not, of course, be considered the views of the Federal Judicial Center or its staff.

In its second incarnation, this research was submitted as my doctoral dissertation to the Department of Government at the University of Texas at Austin. Dr. Herbert Hirsch of Austin was kind enough to adopt a doctoral student orphaned in a faculty diaspora, and he served as chair of my doctoral committee. Joe Oppenheimer, of the Department of Government and Politics of the University of Maryland, provided incisive and much too frequent criticism of the dissertation, which, along with his constant encouragement, was an immense help.

For this, its last life, I owe a debt to Simon Dinitz of the Department of Sociology at Ohio State University. While a colleague at the Academy for Contemporary Problems in Columbus, he read the dissertation and suggested that this research deserved publication in another form. I wish to thank him for this encouragement and his assistance.

Ms. Catherine Hawes has been a constant source of support in all phases and stages of this endeavor. I thank her for that and much more.

The main entrance . . . —the only entrance for convicts, their visitors and the staff—was crowned by an escutcheon representing Liberty, Justice and, between the two, the sovereign power of government. . . . Justice was conventional; blinded, vaguely erotic in her clinging robes and armed with a headsman's sword. —John Cheever, *Falconer*

Introduction

On the third day of January in 1666, Pope Alvey, a cooper in St. Mary's County in the Maryland Colony of the Americas, was indicted for theft of a cow. For such an act the law of the colony demanded the most final and irrevocable of punishments. When convicted, Alvey threw himself on the tender mercies of the court. However, Pope Alvey was no stranger to the court. He had previously been convicted, and punished, for beating to death one of his servants. This time the magistrate ordered that Alvey himself should suffer death for his felony.

But the cooper's neck felt neither a hangman's noose nor a headsman's blade. On pronouncement of the sentence, several of Alvey's influential friends fell to their knees before the bench, beseeching the judge to show compassion. In the face of these pleas, the judge relented. He suspended the sentence for so long as Pope Alvey remained on good behavior. A decade later Alvey received a full pardon.[1] Not all defendants in colonial Maryland had influential friends who would fall to their knees begging before the bench, and the only pardons that these less fortunate defendants received were bestowed in the hereafter.

Three centuries later the United States of America was engaged in a war that, unlike many wars, emphasized and exacerbated, rather than masked and ameliorated, the deep cultural and ideological conflicts in our society. Near the height of that war, the prosecutor's office for the largest federal trial court in the country prepared a report expressing concern over judges' sentencing in selective-service cases. During one year, a judge in that court sentenced ten defendants convicted of draft violations: he jailed them all. Another judge in that court sentenced six draft offenders: all received probation.[2]

A cooper in seventeenth-century colonial Maryland and draft evaders in twentieth-century Manhattan obviously have little in common. What they do share is that their fates depended on the discretion of individual judges. Those decisions, whether Pope Alvey was to die at the hands of the state executioner and whether those young men were to suffer prison, did not rest with the law. Instead, they depended on the individual judgements of judicial officials, largely unbridled by statutes and courts of appeal. A criminal defendant sentenced today in federal court or in almost any state court would have his fate decided in the same way.

If one accepts, as I do, Madison's statement that "justice is the end of government; in fact, it is the end of all society,"[3] or, if one accepts John Rawl's restatement of that idea, "Justice is the first virtue of social institutions," then this arrangement is troublesome.[4] How well can the requirements of justice be met by an institutional arrangement that allows

punishment to be distributed so that the nature of an offender's transgressions may be less important in determining his or her punishment than the personal idiosyncrasies of the official before whom that offender stands?

I can draw no clear, detailed picture of a just society, so it may seem presumptuous to speak of what is just or unjust. I speak because I agree with Lon Fuller's assertion, "We can . . . know what is plainly unjust without committing ourselves to declare with finality what perfect justice would be."[5] We have no exhaustive list of necessary and sufficient conditions for just allocations of social costs and benefits, but a few necessary conditions are widely recognized. Among these necessary conditions is the requirement that public officials treat similar situations similarly. As Edmond Cahn pointed out, dissimilar decisions under similar conditions are unjust because "If decisions differ, some discernible distinction must be found bearing an intelligible difference in result. The sense of injustice revolts against whatever is unequal by caprice."[6] What is troublesome about the present sentencing system is that the discretion available to a judge results in sentencing disparity—dissimilar sentences for similar criminal defendants. Social costs, punishments, are distributed by public officials in a system that allows those penalties to be "unequal by caprice."

But it is not only justice that we require from public institutions; we require effectiveness and efficiency as well. Criminal sentences are instruments of public policy, governmental responses to crime. With criminal penalties, courts attempt to reduce crime by deterring, incapacitating, or rehabilitating offenders. Criminal courts can also be used to force offenders to atone for their sins against the social order. No matter what the exact function we see for criminal penalties, the resources available to carry out this function are limited. Demands for efficiency and effectiveness require that these resources be used where they will generate the greatest return—the most retribution or greatest crime reduction. If we consider this a reasonable demand and try to picture a sentencing system that would best allocate our limited resources, it would not be a system like that in operation today. Our ideal system would require decisions made on the basis of uniform rules, not the personal predilections of the decision makers. Such a system would necessitate severe restrictions on the judicial discretion that breeds sentencing disparity.

The shortcomings of the present system have not gone unnoticed. Commentators have long lamented disparity's existence, and some reformers have proposed alternative institutional arrangements aimed at reducing the inequities in criminal sentencing. This book reports on the effectiveness of one of those alternatives. In the early 1960s judges in three federal trial courts implemented a procedure whereby judges formally consulted with their colleagues prior to sentencing each defendant coming before them. These consultation sessions were dubbed *sentencing councils*, and their

express purpose was to increase the uniformity of the sentences imposed. These consultations are not binding; no judge can be required to follow the advice of his brethren. These councils operate today in four U.S. district courts.

As with all reforms, in the remedy is a vision of the malady, a picture that identifies causes and locates agents of correction. In sentencing councils, with their nonbinding consultation, one finds the belief that disparity springs from a lack of communication. Differences in the behavior of judges in the same court are simply differences of opinion among reasonable men. After communication, some mutually satisfactory sentencing policy will appear, and these initial differences will dissolve. Free exchange among the judges is all that is required.

Sentencing councils also serve as a fine example of voluntary reform. No one forced these federal judges to initiate sentencing councils so that punishments meted out in their courts would be distributed in a more equitable fashion. Councils were something that they themselves felt necessary; this is one of those instances in which the reformers and the reformees are the same individuals. Like most other voluntary reforms, councils do not greatly alter the prerogatives of those doing the reforming. No outside will is imposed; sentencing is the business of trial judges, and it is the trial judges who will perform any necessary regulation. Noticeably, one finds no effort to correct another form of disparity, differences among the courts rather than within them.

What we find ourselves with is a conjecture, or a hypothesis, stating that disparity is a problem in communication solvable by judges themselves. The decrease, or lack of it, in disparity after the councils began operation can either disconfirm or fail to disconfirm these implicit conjectures about the nature of disparity and who can best remedy it.

The specific research strategy chosen to investigate the councils' effectiveness was quasi-experimentation. In a rough hierarchy of possible policy or program-evaluation strategies, quasi-experimental work is surpassed only by true experimentation in its ability to provide unequivocal findings. The specific quasi-experimental design chosen to investigate the councils' effectiveness is an interrupted time-series with a nonequivalent control group. This means that some quantity must be plotted over time, the introduction of some intervention into the process generating this quantity must be noted, and a decision must be made as to whether the process was altered by the intervention. At the same time, this same quantity is plotted in an environment not subject to the treatment, so that some more universal change is not seen as an effect attributable to the treatment.

In this instance, all that means is that data were gathered in three federal district courts using a sentencing council (Detroit, Brooklyn, and Chicago) and in one similar court sentencing without a council. These data include

information on all individuals convicted of selected offenses in these courts. This information indicates their criminal background, demographic characteristics, and the sentences they received. For groups of offenders matched on offense and prior criminal record, the level of inconsistency in the sentences imposed was plotted across time. These plots were examined to determine whether they significantly changed at the time a council was introduced. Consistency in the length of prison sentences, in the length of supervision sentences, and in the rates at which judges imprison offenders was investigated.

The results are not heartening for sentencing council advocates. The Brooklyn council had, in this study, twelve opportunities to display its effectiveness (three sentencing decisions in four offense categories). The Brooklyn council may have decreased disparity in the prison sentences imposed on defendants sentenced for one offense, forgery. It may have increased disparity in the prison sentences imposed for two offenses, postal theft and postal embezzlement. However, the Brooklyn council probably increased disparity in the supervision sentences imposed in three of four offense categories.

This study gave the Detroit council nine opportunities to show its usefulness. It is possible that the Detroit council increased disparity in prison sentences for one offense and decreased disparity in supervision sentences for two offenses. Chicago's council, in nine opportunities, produced only one decrease large enough to be classified as nonrandom; disparity in prison sentences imposed for auto theft may have decreased.

Looking at the results for each sentencing decision, rather than for each court, is no more heartening. No effect on differences in the rates at which judges imprison offenders, either positive or negative, is discernible. One possible decrease in disparity in prison sentences is outweighted by four possible increases. In analyzing the councils' impacts on disparity in supervision sentences, three probable increases in Brooklyn go on the balance with a single probable decrease in Detroit.

The idea of councils' increasing disparity seems puzzling until one realizes that council meetings represent the first time a judge is expected to express a sentencing philosophy. In some courts this process may result in some judges' moving closer in sentencing philosophy and behavior. These meetings may also serve as opportunities for judges to meet, for the first time, opposition to their ideas. Such opposition may result in movement to a more extreme position. Also, more extreme judges may convince moderate judges to follow their more lenient or harsher sentencing patterns.

What do these findings imply? Before answering that question, one must consider the nature of the findings. These results are not the product of a controlled laboratory experiment. This analysis did not involve a question ensconced in a cocoon of well-developed theory and tried-and-true

operationalizations and research techniques. These results can be considered no more than a piece of evidence in a continuing dialogue about alternatives to the present sentencing structure: they must be considered in conjunction with earlier and future research. If one accepts the implications of this analysis, one must do so with full consideration of the social and human costs of accepting them and later discovering that they were incorrect.

The councils seem to serve as catalysts for the intensification of latent disagreements as frequently as they bring some consensus to life. Whether a council in this study decreases or increases disparity seems to depend heavily on which council is considering what type of sentencing decision. Such a reform cannot be highly recommended.

These results have implications for larger concerns as well. The council procedure assumes that disparity is largely a problem in communication. The council meetings are to facilitate the sharing of information and perspectives. If council meetings enhance disagreement as frequently as consensus, then the belief that disparity results from a lack of communication seems to miss the mark. Possibly, disparity results from judges' holding very different views about the roles of punishment, deterrence, and rehabilitation. It may even grow out of differing views on the nature of man and his inherent "goodness" or lack thereof. Such differences will not disappear at the point at which a council is implemented.

The efficacy of judicial self-reform in sentencing may also be called into question by ineffective councils. If disparity is not a problem in communication, then it may be that the broad discretion that allows these divergent sentencing philosophies such free field is troublesome. Judges place high value on their ability to make discretionary decisions. It may be quite unreasonable to expect them to provide successful reform programs for conditions arising from the fact that they alone hold certain powers. A number of alternative sentencing-reform packages are available, and none is completely satisfactory. Most still allow relatively broad judicial discretion, especially in the decision whether to imprison, and they fail to deal with prosecutorial discretion. Some system of guideline sentences, in which a judge must justify any deviation from the norm, seems, despite its flaws, to be the best we can do for the present.

However, we must be concerned. What if this new sentencing structure follows the path of another great reform in the administration of the criminal law—the development of the prison? Imprisonment became the punishment of choice as the result of a reform movement guided by an abhorrence of corporal punishment and a belief in gradations in punishment to match gradations in criminal activity. The result of this humanitarian reform movement is Attica. Good intentions will not save us from dreadful error.