

FJC Staff Paper

THE EFFECTS OF SENTENCING COUNCILS ON SENTENCING DISPARITY

Federal Judicial Center





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SENTENCING DISPARITY

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This paper is based on a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the researchers who conducted the study and drafted reports of the results. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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Preface

This staff paper is the result of a substantial amount of effort on the part of many individuals. The research began in 1975, with an empirical investigation into the extent of sentencing disparity in those federal district courts that had adopted sentencing councils at that time. It was expanded into a more thoroughgoing quasi-experiment that attempted to discover more precisely the effect of the councils on disparity. We were surprised at our findings--that in one case disparity actually increased in conjunction with the implementation of the council--and as a result attempted to explain the finding by the use of a theoretical framework. At the end, we decided that there were simply too few councils for any finding to be conclusive, especially a finding as empirically mixed as is presented herein.

Because our findings are tentative, and because the framework cannot fully support the weight of the results, we have declined to state our conclusions as strongly as we might have otherwise preferred. There is a substantial amount of data and detailed analysis available for any who wish to pursue the matter further. We believe that continued research in the area of sentencing disparity and councils may be of value, but that such work must explicitly consider the council's operating structure and the attitudes of the participants, not merely the fact of the

council's existence. We welcome any researchers wishing to pursue the inquiry to share our data and observations.

Charles Phillips, then of the Research Division staff, did the initial research, the data analysis (assisted by Patricia Lombard), and the draft of the first version of the report, taking it through the discovery of the basic findings.* Joseph Firestone, working as a consultant to the Federal Judicial Center, extensively redrafted the report to add a framework that attempted to account for the findings. Michael Leavitt, of the Research Division, has been an advisor to the project since shortly after the data analysis began, and was responsible for whatever continuity remained, as well as the present form of the document. Editors Helen Moriarty and Anne Ayers have seen it through its various incarnations.

*See C. Phillips, *Sentencing Councils in the Federal Courts: A Question of Justice* (1980), which is based on the same data analysis.

Introduction

Sentencing disparity, or variation in the severity of sentences given to convicted defendants in similar circumstances, is a form of unequal treatment, a direct contradiction of the commitment to equal justice under law. Disparity is likely to be rooted in court processes--in the interactions among judges, lawyers, court personnel, and defendants. If this is true, one approach to reducing disparity is through court reform; that is, adjusting the judicial process to make it less conducive to sentencing disparity.

There have been many recent proposals to reduce unwarranted variation in criminal sentences. In fact, a technique to reduce disparity is presently being used in four United States district courts: the Northern District of Illinois (Chicago), the Eastern District of Michigan (Detroit), the Eastern District of New York (Brooklyn), and the District of Oregon. In each of these courts, judges meet as a group to consult with their colleagues concerning the sentences they impose in criminal cases. These groups, called sentencing councils, have been the primary procedural response by federal judges to the problem of sentencing disparity.

The concept of reducing disparity through the use of sentencing councils is, on the surface, a simple one. Open discussion of the rationale for particular sentences, give-and-take

among peers, the knowledge that one will have to justify explicitly one's decisions to colleagues, the development and assimilation of group sentencing standards through discussion, even group pressure to conform--all these factors can be expected to combine to produce greater consensus on sentencing philosophy and, eventually, greater uniformity in sentencing behavior.

In order to determine whether sentencing councils have had the anticipated effect of reducing disparity, the Federal Judicial Center established a project in 1976, whose purpose was to measure the effects of sentencing councils on sentencing disparity in the federal courts. This report summarizes the background, theoretical foundation, design, procedures, and outcome of that research project.

The Sentencing Process in the Council

The research described in this report examined and compared changes in three of the four courts (Chicago, Detroit, and Brooklyn) whose sentencing councils had been operating for an appreciable period of time. The period we examined encompassed the late 1950s and the 1960s. Oregon's sentencing council was created too recently to provide data comparable to those for the other three courts. The Oregon council, therefore, was used for illustrative purposes, but not as a basis for formal conclusions. The investigation was designed to compensate for the small number of council courts and the dangers of using a small sample to draw valid conclusions. The range of research approaches and methods employed include historical study, interviews and observation,

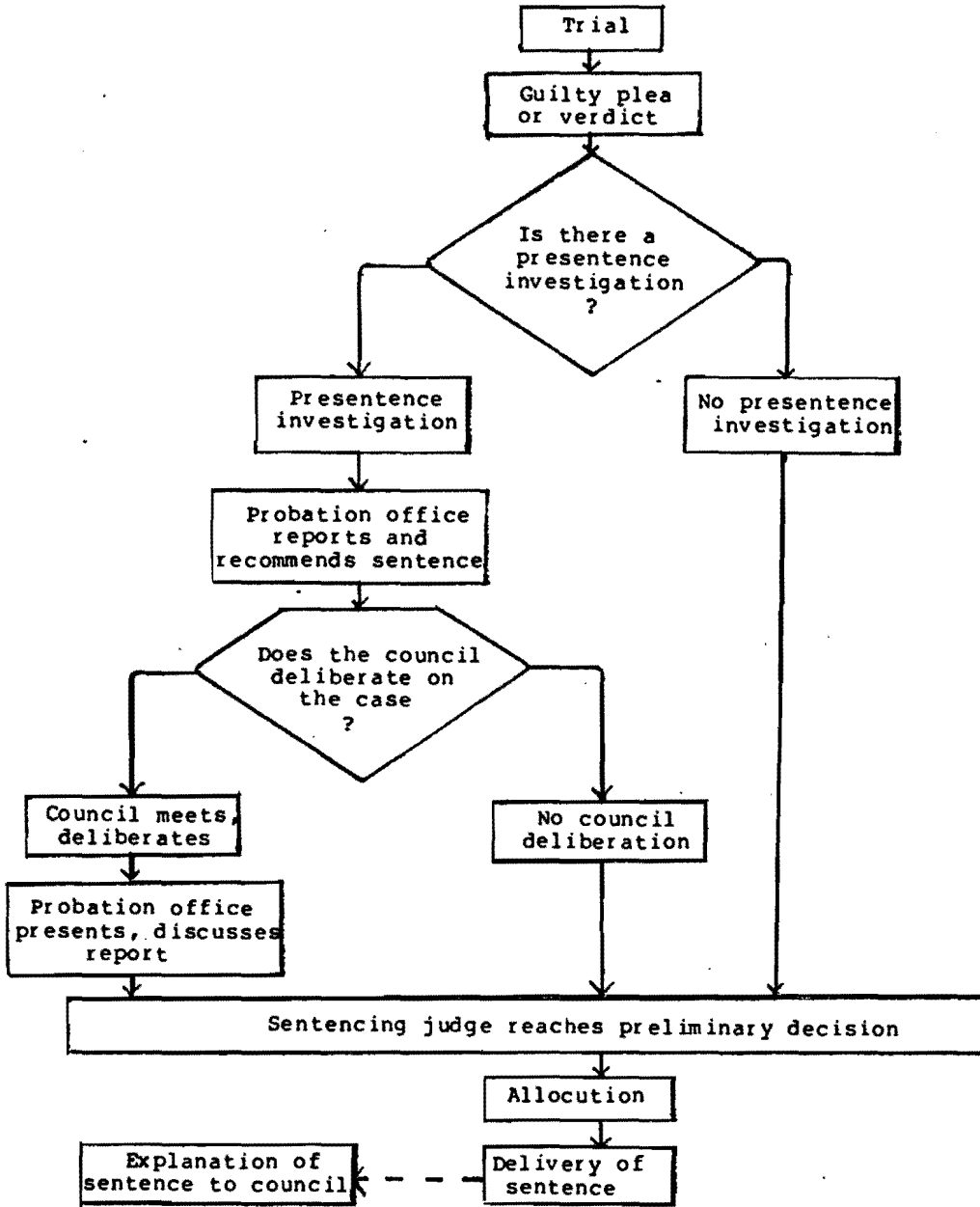
study of court records, construction of a theoretical framework, and hypothesis testing through quantitative time-series analysis and comparative case analysis.





The flow of the sentencing process we observed is diagrammed in figure 1. The first decision point on the chart reflects the fact that presentence investigations were not always conducted. Even when they did occur, they were not always accompanied by sentencing council deliberations, as is illustrated by the second decision point.

Possible sources of variation in the sentencing process and in the effectiveness of the councils are suggested by the history and operation of the four council courts. These aspects of variation are related to the role of the presentence investigation and report process and to council deliberations. Differences in organizational styles of probation offices produced variation in the number of recommendations provided to sentencing councils and in the complexity of presentence reports. For example, the Detroit probation office provided several recommendations regarding each case before the sentencing council, and this practice made the office's reports more complex than those of the Brooklyn office. Oregon's probation office provided standardized, detailed information, using formal guidelines to justify its recommendations to the councils.

The contribution of the probation staff varied among the courts. Although all courts provided presentence reports and no court provided systematic historical information on actual sen-

FIGURE 1
THE SENTENCING PROCESS IN COUNCIL COURTS



Symbol	Meaning
	Activity in the sentencing process
	Decision point in the sentencing process
	Direct flow of activities
	Occurs only occasionally and only in one court (Chicago)

tencing decisions in cases similar to those under consideration, the Chicago probation staff did provide some historical reports on sentencing patterns.

There was variation among the courts in the scope of presentence investigation recommendations. The Chicago probation office made recommendations only on the choice of incarceration or probation, not on the length of the sentence within those two categories. In contrast, the probation offices in the other courts made complete sentencing recommendations.

There was variation in the point at which the conferring judges were provided access to the probation office's sentencing recommendations. In Brooklyn, conferring judges were informed about the sentencing recommendations only during council deliberations and in response to its requests. In the other courts, recommendations were provided before the sentencing council met.

The councils themselves varied in size and in workload. Councils also varied according to whether judges' participation was voluntary, as in Chicago, or required, as in Detroit and Brooklyn. Council membership could be rotated, all judges could be members, or the roles of sentencing and conferring judge could be assigned for periods of time.

Finally, the council courts varied in the extent of their concern for consensus and in the extent to which council organization facilitated consensus. The Brooklyn court exhibited little concern when consensus was not achieved. It employed a three-judge council to handle a large number of cases in a short

period of time. The presence of a line of sentencing judges waiting for the council's deliberations reinforced the observed lack of concern for consensus. Oregon and Chicago, on the other hand, displayed a high concern for consensus. The organization of the councils in both courts allowed (in Oregon, required) sentencing judges to receive advice from all their colleagues. In Chicago, a relatively large council considered many cases per council session. In Oregon, the council was small, and relatively few cases were discussed in a typical session. Detroit exhibited no explicit concern for consensus, but its council organization facilitated give-and-take in discussion, and the sentencing judge in one case was often a conferring judge in the next.

Theoretical Approach

Any complex problem requires a framework in which analysis can take place. This theoretical framework should suggest, out of the multitude of possibilities, those questions that are worth asking, which factors are best able to determine the answers, and how the answers relate to the problem that prompted the analysis. The phenomenon of sentencing disparity is such a complex problem.

The sentencing process outlined in figure 1 and the variations in that process observed in the council courts are sufficient to establish the complexity of the problem. Each court goes about sentencing in its own way, emphasizing factors that other courts do not, using resources that other courts see as unimportant or even harmful. The propositions that sentencing

councils always reduce disparity is too simplistic, given the variations we observed.

We feel that the following proposition, developed after a careful review of the courts' operation, summarizes our view of the effect of sentencing councils. A sentencing council reduces disparity if either

the council helps articulate sentencing attitudes that are initially similar and thus moves the attitudes of the participants together, or

the council helps unify sentencing attitudes that are initially dissimilar.

Since there are many ways in which a council might operate, yet fail to fit either alternative in that proposition, it is by no means certain that councils will inevitably reduce disparity.

A further complication is that the council does not act alone in the sentencing process. Its effect may be substantially reduced if other activities, such as the preparation and presentation of the presentence report, are undertaken in a manner that undermines the council's intended purpose. Although it is not very likely that disparity-reducing procedures in a council will be accompanied by disparity-increasing activities elsewhere in the sentencing process, it must be emphasized that if such inconsistencies exist, they can work against each other.

Analytical Strategy and Procedures

The method of analysis used to examine the councils' effects had several components:

developing a measurable concept of sentencing disparity

collecting a large number of time series on sentencing disparity in the three council courts and in a comparison court that had no council

specifying the kinds of changes expected to be observed in the time series

specifying a strategy for analysis of the effects of sentencing councils (the strategy is called "interrupted time-series analysis")

developing a set of criteria for identifying sentencing council impact, following observation of several interrupted time series for different types of crimes.

In order to develop a measurable concept of sentencing disparity, we first had to define aspects of disparity that could be measured and thus systematically analyzed. The first such aspect, the length of prison terms given to similar defendants convicted of the same crime in the same court, can be easily determined and compared. The second, length of the periods of supervision (probation), can be similarly determined and compared.

The third aspect of disparity that we considered is reflected in the decision to sentence defendants to either prison or probation. With this measure, however, it is not always possible to confirm that changes in disparity have occurred. That is, we know that a longer period of imprisonment or of probation is different (disparate) from a shorter one, but we do not know how much, if any, disparity exists between a given prison term and a given probation term. We also do not know how much such disparity might change as the lengths of the two different kinds of sentences change. Because we were reluctant, as researchers, to make judgments about the relative severity of imprisonment

versus probation, this project measured primarily the first two aspects of disparity.

We rejected what might seem an obvious solution to the problem of comparing prison and probation: devising a scale that weights the relative severity of length of probation and length of prison terms. We decided not to combine the different measures of sentence severity into a single "severity scale," or to use any preexisting scale, primarily because there would be substantial disagreement with any particular weighting scheme we might adopt. We did not consider it an appropriate research task to select a single set of weights upon which to base comparisons of disparity.* Having arrived at a concept of disparity that would allow us to collect measurable data, we used interrupted time-series analysis to measure changes in sentencing disparity over time. Dummy variable regression, a technique used to implement this type of analysis, allowed us to examine both changes in the level of disparity and the overall trend, or direction, exhibited by those changes. We were thus able to examine and compare changes in disparity both before and after sentencing councils were introduced.

The comparisons ranged over five types of crimes (postal

* We did realize, however, that by not making such a judgment, we were artificially increasing the levels of disparity we observed by not directly comparing prison and probation terms that some observers would call equivalent. This is a problem particularly when equal numbers of probation and prison sentences were given. However, as long as the ratio of prison terms to probation sentences does not change greatly, increases and reductions in length of sentence can be expected to reflect actual changes in disparity.

theft, postal embezzlement, auto theft, forgery, and liquor violation), our three aspects of sentencing disparity (length of supervision, length of incarceration, and the percentage of defendants incarcerated), and five groups of increasingly homogeneous judge and defendant characteristics.

To implement the interrupted time-series analysis, we performed regressions for the four courts for which we had gathered data: Detroit, Brooklyn, Chicago, and Philadelphia. The Philadelphia court had no sentencing council: it was included as a rough means of discovering any overall trends that might have occurred independent of the creation of sentencing councils. This was clearly not a use of a classic "control group," but rather, a safeguard to help prevent our misinterpreting the findings. The time span, number of cases, and number of time series analyzed are presented in table 1.

TABLE 1

THE EXTENT OF THE DATA

<u>Court</u>	<u>Time Span</u>	<u>Number of Cases</u>	<u>Number of Time Series</u>
Brooklyn (E.D.N.Y.)	1/56 - 7/69	2,167	50
Detroit (E.D. Mich.)	11/55 - 4/69	2,707	43
Chicago (N.D. Ill.)	12/57 - 5/69	2,063	56
Philadelphia (E.D. Pa.)	11/55 - 6/69	1,583	29
Total		8,520	178

Findings

The results of the analyses were surprising. We did not expect any increases in sentencing disparity after the introduction of a council. Of thirty major categories formed by cross-classifying type of sentencing decision, type of crime, and court (Detroit, Brooklyn, or Chicago), eight categories showed that the sentencing councils increased disparity, seven showed that they reduced disparity, and fifteen showed that the councils failed to affect disparity. A summary of results is presented in table 2. In Chicago, out of nine categories, disparity decreased in four, did not change in four, and increased in one. In Detroit, out of nine categories, disparity decreased in three, did not change in five, and increased in one. In Brooklyn, disparity did not decrease in any categories, did not change in six, and increased in six.

Several considerations are relevant in interpreting the findings. First, the disparity in percentage of incarcerations is not directly related to whether disparity in lengths of sentences was increased or reduced in a particular court. High levels of disparity in lengths of incarceration and supervision are compatible with either high or low levels of disparity in percentage of incarcerations. Rather, the significance of council effects on disparity in percentages is that the council probably caused change in sentencing practices, but the change could have been either toward or away from disparity in underlying severity of sentencing.

TABLE 2

IMPACT OF SENTENCING COUNCILS ON DISPARITY

<u>Offense</u>	<u>Chicago</u>			<u>Detroit</u>			<u>Brooklyn</u>		
	I	%	S	I	%	S	I	%	S
Postal theft	-	-	0	0	0	0	0	0	+
Postal embezzle- ment	n	n	n	n	n	n	+	+	+
Auto theft	-	+	0	-	0	-	n	n	n
Forgery (U.S.)	-	0	0	n	n	n	0	0	+
IRS liquor violations	n	n	n	+	0	-	+	0	0

Symbol Meaning

I	Disparity in length of incarceration (prison)
%	Disparity in percentage of incarcerations
S	Disparity in length of supervision (probation)
+	Increase in disparity
0	No change in disparity
-	Decrease in disparity
n	No data collected

Second, the increase in sentencing disparity in Brooklyn is consistent with the theoretical framework. By bringing judges together to hear one another's views without encouraging give-and-take, under conditions in which comparatively little information is provided as an aid to a judge's decisions, a court may

create an excellent opportunity for judges to hear and to clarify the differences among themselves, without providing an environment that encourages them to view the resolution of differences as an important goal of the court. Attitude clarification accompanied by an emphasis on judicial independence may increase both heterogeneity in sentencing attitudes and disparity in sentencing practice.

Finally, of the three courts, Chicago was the most strongly oriented towards consensus. It was also the only one of the courts that did not experience an increase in disparity in length of sentences. Although data from three courts provide an inadequate basis for a conclusion, it is reasonable to suggest that changes in sentencing disparity resulting from the introduction of sentencing councils are a function of the extent to which the councils are oriented toward achieving consensus.

A result of an analysis not shown in table 2 relates to change in the pattern of change in sentencing disparity. Such a change would be evident if, for example, a court had relatively small fluctuations in disparity before its council began operation, but larger fluctuations after the council had been introduced. Pattern changes were most frequent in Brooklyn and Chicago, the two courts in which sentencing councils had the most impact (whether positive or negative) on disparity. These pattern changes may reflect the development of conflict in sentencing attitudes as a result of the councils' introduction, followed by polarization or consensus development, depending on the com-

bination of these attitude changes with the process of council deliberation.

In interpreting the significance of this study, one must keep certain of its limitations in mind. The most important limitations are: the small number of courts involved, which affects confidence in reliability; the relative brevity of the time series, which limits analytical strategy; the lack of socio-economic data to better define homogeneity among defendants; and our unwillingness to combine the distinct length of sentence measures to form a single, comprehensive sentencing severity scale. Another consideration worth noting is that this study does not reflect what is occurring today, but rather, describes activity in the late 1950s and 1960s. Finally, we must reemphasize that this was not a study of sentencing severity. Disparity and severity are two different concepts, and we deliberately minimized the influence of the one disparity measure whose effects might be confused with severity: disparity in percentage of incarcerations.

Conclusions

1. The effect of introducing a sentencing council into a court cannot be predicted without knowledge of many court characteristics, so no conclusion can be drawn regarding the general usefulness of the councils in reducing disparity.

The results of this study show three different patterns of effects in three different courts. Those effects depend on characteristics of the court, its personnel, the council itself, and the probation office. All that can be said with confidence

at this point is that in order to reduce sentencing disparity, careful study of concrete court situations and careful design of sentencing councils and their relation to probation offices and court environments are necessary.

2. Sentencing councils can reduce sentencing disparity.

A reduction in disparity was observed in the Detroit court, primarily in length of supervision sentences. It was also observed in the Chicago court, primarily in length of incarceration sentences. As shown in table 2, disparity was reduced more in Chicago than in Detroit.

3. Sentencing councils can increase sentencing disparity.

An unexpected increase in disparity was observed once in Detroit (length of incarceration sentences for liquor violations), and in five (out of eight) length-of-sentence categories in Brooklyn. The time series analyzed were too brief to allow a conclusion about whether the increases in disparity were a permanent effect of the sentencing councils. They did, however, last for the period of analysis.

4. Sentencing councils can polarize sentencing attitudes such that whatever the direction of council effects on disparity (increase or decrease), the fluctuations in level of disparity are increased.

An increase in fluctuations in the level of disparity is shown by comparing the fluctuations in pre- and post-council periods. The effect was most frequent in Chicago and Brooklyn and much less frequent in Detroit. It did not occur in the

Philadelphia comparison series. If these fluctuations are substantial, the degree of inequality in sentencing depends not only on the general level of disparity, or on the level and its rate of change, but also on the fluctuations in level from time to time.

Implications

We have found that asking whether sentencing councils reduce sentencing disparity is too simplistic. Indeed, this study provided no clear answers--either negative or positive--about whether sentencing councils in general reduce disparity. The answers that were provided indicate that other aspects of court processes, in combination with the kind of council introduced, may be just as important as the council itself in reducing disparity.

Our observations of court operations were too brief to permit us to assert causes for the above findings. Any court that is studying sentencing councils might, however, consider the following observation. If reducing disparity is the goal of the council, it is likely that both a commitment to consensus within the council and a willingness to participate in the give-and-take necessary to get that consensus will be required. If the rules and procedures under which a proposed council operates do not positively encourage such behavior, this study suggests that the council is not likely to meet its goal.

FEDERAL JUDICIAL CENTER
DOLLEY MADISON HOUSE
1520 H STREET, N.W.
WASHINGTON, D.C. 20005
