

Viewpoint: How Persky Case Shows the Need for More Data on Judicial Decision-Making

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The Stanford rape case rocked the public's confidence in the fairness of the courts, ignited activist groups, and divided the legal and academic communities across the country.irate California legislators passed a bill to establish a minimum sentence of three years for the sexual assault of an unconscious person, and ordered an audit of the state judicial oversight agency—the Commission on Judicial Performance (CJP).

Despite public outrage at the lenient sentence issued by Judge Aaron Persky, he did not resign and the CJP decided not to discipline him after publishing an explanatory statement that was heavily criticized for containing numerous factual errors. A recall election appears imminent and both sides will spend enormous amounts of time and money on their campaigns.

Those calling for Persky's resignation allege bias and misconduct. Those coming to his defense argue that judges require independence and shielding from public opinion and political pressure. Unless measures are implemented that balance accountability and independence, firestorms will continue to erupt long after Persky's fate is decided in a recall election.

Determining bias is difficult, but we know it exists. Absent an inappropriate remark from a judge that

demonstrates obvious bias against a particular class of person, the only way to determine bias is by tracking decisions over time. If prejudicial patterns appear then bias becomes evident.

The simplest solution is to track judges' sentencing and other decisions by demographic—gender, race, ethnicity, religion, sexual orientation, and socioeconomic status. Demographic information would be voluntary.

Transparency and judicial independence are not mutually exclusive. In fact, the sentencing history of a fair and consistent judge would shield him or her from public attack on a single case. Red flags would only be raised if patterns of bias emerged over time or if a judge were to become an outlier when compared to peers. In such instances, an oversight agency should intervene to correct the problem and voters should be able to exercise their right at the ballot box to hold a wayward judge accountable.

Persky's attorney stated during a recent interview that the commission did not interview Persky or request additional information about his prior sentencing decisions when conducting its investigation, which would have been necessary to assess bias.

Activists in support of recalling Persky were forced to spend hundreds of hours conducting their own research and digging through paper court files to find bias in his sentencing decisions. Given the importance of the rights to due process and equal protection such information should be more accessible.

Many states have put measures in place to aid the assessment of bias. Arizona's judicial oversight agency publicly discloses complaints against judges. Utah courts use electronic document filing to provide easy access to court records. Colorado and 16 other states have established independent agencies that conduct performance evaluations of judges after receiving input from surveys filled out by attorneys, litigants and others. California has not implemented any of these practices.

California prides itself on setting progressive policy, which is often followed by the rest of the country. But it has failed to set such policy in its judicial branch. California's Judicial Council and CJP have routinely fought against transparency. As a result, the Pulitzer Prize-winning Center for Public Integrity gave California an "F" in the category of "Judicial Accountability" in its 2015 State Integrity Report.

The Stanford case has served a crucial purpose—to bring fairness and judicial accountability centerstage. California's 2,400 judges wield their power and discretion over 7 million cases annually. Whether through decisions in individual cases, or through the establishment of case law, judicial decisions intimately impact the life of every resident. Californians deserve to know if judicial bias is violating their rights to due process and equal protection.

Passing a new sexual assault law and ordering an audit of the CJP were vital responses by state lawmakers to restore the shattered public trust in the courts, but these actions do not solve the underlying problem of bias and resulting public distrust of the courts. Policy that requires courts to record data on sentencing decisions would be a good first step.