The Legal Spin

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Civil and Criminal Trial Lawyers Practicing in all State and Federal Courts

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What's *Inside:*

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CONNECTICUT'S CRIMINAL SENTENCING PROCEDURE IS OVERDUE FOR REFORM: defendants, judges, and the public deserve a transparent sentencing process

No criminal justice system can be fair, consistent, and race-neutral without open access to a comprehensive, transparent criminal sentencing database. Here in Connecticut, we struggle with a flawed system in need of open access to easily-obtainable data.

Where do Connecticut judges get sentencing data? They don't. Generally, they hear it through the grapevine or they rely on their own experiences which vary greatly.

In writing about the disparity in sentences for similar offenses across the country, New York Federal Judge Irvin R. Kaufman said the following:

> *If the hundreds of American judges who sit on criminal cases were polled as to what was the most trying facet of their jobs, the vast majority would almost certainly answer "Sentencing." In no other judicial function is the judge more alone, no other act of his carries greater potentialities for good or evil, than the determination of how society will treat its transgressors.*

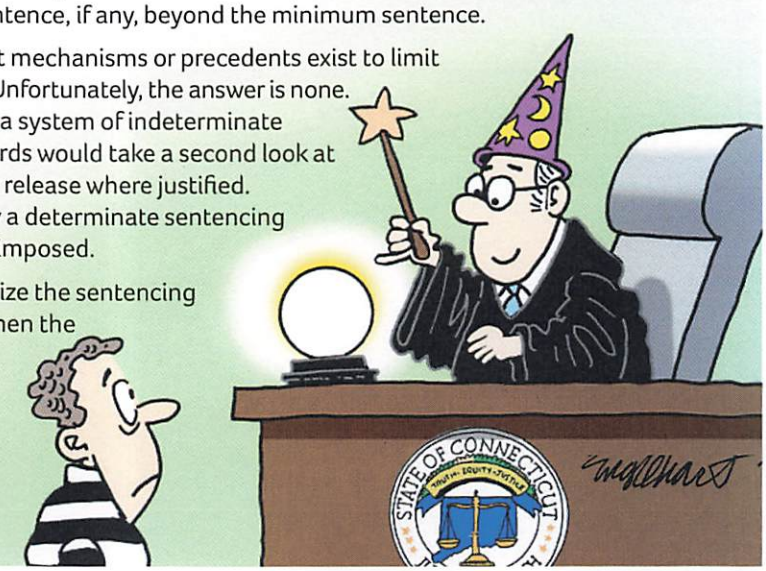
In Connecticut, sentences are imposed by trial judges acting with absolute authority and discretion

More than 95% of Connecticut citizens charged with a crime are convicted. For this reason, the act of sentencing is the single most important event for most people who become ensnared in the criminal process. In Connecticut, like most states, sentencing decisions in non capital cases are made solely by a trial judge, who has nearly limitless discretion to order the defendant confined, supervised, or simply released (in capital cases, a jury decides because, according to our case law, death differs in gravity from all other forms of punishment).

Connecticut requires judges to individualize sentences to fit the defendant as well as the crime. The legislature accords broad sentencing ranges for each statutory offense, which invest individual judges full sentencing discretion, free of any procedure to structure that discretion. Even in cases involving mandatory minimum sentences, the court still retains discretion as to the length of time of the sentence, if any, beyond the minimum sentence.

The natural question is what mechanisms or precedents exist to limit judges' sentencing power? Unfortunately, the answer is none. Previously, Connecticut had a system of indeterminate sentences where parole boards would take a second look at sentences and provide early release where justified. This system was replaced by a determinate sentencing model with fixed sentences imposed.

Another attempt to rationalize the sentencing process occurred in 1957 when the legislature established the Sentence Review Division (SRD), a special three-judge tribunal authorized to review sentences on appeal.



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Connecticut's sentencing system

Before this, sentences could not be appealed unless they were clearly illegal. The SRD came about when the governor appointed a committee to investigate prisoner grievances, particularly prison unrest caused by the imposition of unequal sentences for similar crimes by similar offenders. The intended goal of the SRD was to eliminate sentence disparities and develop uniform sentencing standards by articulating clear grounds for sentencing decisions.

Unfortunately, the expectation that the SRD would rationalize and clarify sentencing never materialized. This outcome is a direct result of the rules and processes by which the SRD reviews sentences. To begin with, the SRD only hears cases where sentences are imposed for three or more years. Moreover, review is unavailable when the sentence imposed is less than the plea agreement. In addition to having no clear justification, these threshold requirements preclude a significant number of sentences from ever being reviewed. Perhaps more troubling, the SRD can—and does—increase sentences after review, thereby deterring defendants from seeking review at all.

Because of a statutory amendment that made publishing its decisions discretionary, there is virtually no written record of SRD opinions. As a result, the SRD effectively operates in secrecy, obviating the original hope and need for a meaningful written record of sentencing principles, standards, and guidelines.

In addition to the absence of statutory sentencing guidelines, the courts themselves provide little help except in outrageous situations. In *Salem v. Helm*, a 1983 United States Supreme Court decision, the Court held that a sentence must be "proportionate" to the crime committed. In that case, the Court held that a life sentence for a habitual offender convicted of several non-violent crimes was not "proportionate" to the crimes committed and, therefore, violated the Eighth Amendment. Beyond ambiguous language of this type, the courts have provided little or no guidance.

In Connecticut, criminal defendants have no access to a comprehensive sentencing database.

The most troubling aspect of Connecticut's criminal sentencing system—and the most difficult to understand—is the wholesale absence of basic data, which should be easily available to all stakeholders in the sentencing process. Presently, when a criminal judge faces a convicted defendant for sentencing, he has no way of knowing what sentences have been handed down for criminal cases across the state for similar crimes. Instead of a system run on hard data, we rely on oral history, much like an aboriginal tribe, to pass on essential information to each generation of judges.

In Connecticut, courts unanimously agree that similarly situated defendants should receive equivalent sentences. Yet, this does not happen. It leaves our system vulnerable to unequal sentences; it allows trial judges unchecked sentencing power; and it denies a criminal defendant fair notice of what to expect should he or she reject a plea bargain and is found guilty after trial.

So where can a judge, go to learn what a baseline sentence should look like for a particular crime as compared to other cases? Basically, this information can only be learned through the grapevine. In the absence of sentencing data judges must rely on their own past experience (as a criminal defense lawyer or prosecutor) or on consultation with other judges.

Things are bad if the judge knows nothing about criminal cases, without prior experience as a practicing lawyer or wthout contact with other experienced judges. As a young lawyer, I bumped heads with a judge newly appointed to the criminal side after a career as a business lawyer and then a family law judge. For months, he instilled fear and loathing in the criminal defense bar by imposing draconian sentences, which had no relation to sentences previously imposed within memory for similar crimes. At the end of his term, an experienced criminal law judge took his place and assumed a surge of cases that had been previously continued by desperate criminal defense lawyers hoping for an experienced jurist.

The lack of sentencing data seriously hobbles every criminal defense lawyer when providing advice to clients desperate

for reliable information. In all criminal cases, a plea offer is presented by a prosecutor either involving a sentencing recommendation or the right to argue to the judge for a more lenient sentence, usually within a certain range. The client is then faced with the dilemma of accepting the plea deal or risk going to trial and receiving an enhanced sentence if he loses (otherwise known as the "trial penalty," where the court is allowed to impose a greater sentence after trial than was offered by the prosecutor before trial). If he risks going to trial, it is always unknown how much of a "trial penalty" will be imposed. In every case, this is an educated guess only. Without published data available to all interested parties—defense counsel, prosecutors, policymakers, and judges themselves—there can be no transparency, consistency, or equality in the sentences imposed.

In a time when data is more present than ever in our lives, the entire issue seems impossible: How does a modern system of criminal justice lack a basic statistical sentencing database? In Connecticut, we know that this problem has been recognized but not adequately addressed. This has been recognized at least

since 1958 with the installation of the SRD previously discussed. Resolving this issue requires a system that provides comprehensive IT infrastructure, a coordinated process across jurisdictions to compile meaningful sentencing data (including demographic, racial, gender, and other related facts), and a commitment to full transparency.

Reform push growing

The push for comprehensive sentencing databases is beginning to take place across the country. There is a growing recognition that this data is needed to assist judicial discretion, not eliminate it. Once everyone has shared access to this essential information, judges can make informed, proportionate sentencing decisions. Additionally, prosecutors can make fair sentencing recommendations and defense attorneys can guide their clients to a rational, strategic result that is no longer just a roll of the dice.

Some states, such as Florida, have taken important steps in this area. In 2016, the Sarasota Herald-Tribune conducted an investigation, which revealed widespread racial disparities in Florida's sentencing system. In one case, the same judge sentenced a white defendant to two years and a black defendant to 26 years for the same offense; both were approximately the same age with similar records. In response, the Florida state legislature passed legislation in 2018 imposing mandatory sentencing data collection with open access to all stakeholders. This bill required the state's 67 counties to collect data from arrest to sentencing as reported by court clerks, prosecutors, public defenders, county jails, and the department of corrections. Once in effect, it will make Florida a national model in establishing transparency in the criminal justice system.

In Ohio, the state's Chief Justice is developing a felony sentencing database that will be shareable and portable. Ohio state Appellate Court Justices Pierce H. Bergoren and Michael P. Donnelly have vigorously advocated for data based sentencing reform after the imposition of a 65-year sentence for a 55-year-old Ohio woman convicted for stealing personal property from nursing home residents. As argued by the justices, she will die in prison, after receiving a sentence greater than many rapists and murderers. Had relevant sentencing information been available, her defense lawyer could have shown an appeals court that her sentence was grossly out of proportion to similar cases.

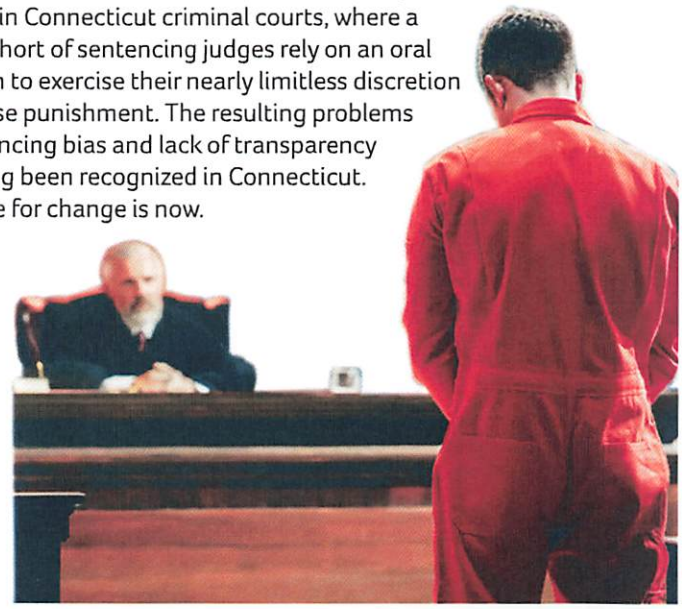
The State of Massachusetts has also begun collecting and analyzing sentencing data. Their analysis clearly revealed that similarly situated black defendants get greater sentences than white defendants convicted of the same crime.

Measures for Justice, a non-profit designed to gather criminal justice data from every county in the U.S., has focused national attention on sentencing and other areas where there is a complete absence of data, such as bail, incarcerated populations, ethnicity and wealth of convicted defendants, rates of recidivism, and every other important criminal justice metric, all made available in an open, electronic format.

In the federal system, the establishment of the United States Sentencing Commission in 1984 created a model for sentence data collection. Following its statutory mandate, the Commission is responsible for "collecting, analyzing, and reporting sentencing data systemically to detect criminal trends, issue federal sentencing policies, and serve as a clearinghouse for federal sentencing statistics." Originally created to develop sentencing guidelines for federal courts, it has created a sophisticated repository of sentencing data to reduce sentencing disparities and promote transparency and proportionality. It is an important resource for anyone convicted in federal court, with information on every federal criminal sentence broken down by race, gender, and background of every defendant. It also keeps a record of the range of sentences imposed, guilty pleas, and trials for each type of crime for every offense in every federal court. It tracks incarceration rates of offenders eligible for non-prison sentences; and probation lengths by the type of crime and many more categories.

When it comes to sentencing, data is powerful. We saw this in the highly publicized sentencing of Paul Manafort, Donald Trump's former campaign manager. After Manafort's conviction for tax evasion and related crimes, including the rarely prosecuted violation of the Foreign Agents Registration Act, the government advocated for a sentence of 19.5 to 24 years after conviction. Manafort's lawyers were able to produce sentencing data available in the federal system to show that similar defendants convicted for similar crimes received much lesser sentences. The judge ultimately imposed a significantly lesser sentence of 47 months despite the public clamor for Manafort's head on a platter. When confronted by data showing a history of cases that could not be distinguished, the judge was constrained to impose a lesser sentence; unfortunately, this could not have occurred in our state court system in view of the absence of similar data.

At long last, it is time to reform the sentencing process in Connecticut criminal courts, where a small cohort of sentencing judges rely on an oral tradition to exercise their nearly limitless discretion to impose punishment. The resulting problems of sentencing bias and lack of transparency have long been recognized in Connecticut. The time for change is now.



A. Paul Spinella is a Hartford trial lawyer litigating on behalf of individuals in all state and federal civil and criminal courts. He is the author of Connecticut Criminal Procedure.

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