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No Time Like the Present, Except the Past Fifty Years: Why California Should Finally Adopt the Model Penal Code Sentencing Provisions

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2018; B.A., Psychology, San Francisco State University, 2014. First, I would like to thank my mom and sister, Mary and Marilyn, for always taking care of me and supporting me in everything I do—law school would not be possible without them. I also want to thank Distinguished Professor of Law Michael Vitiello both for all of his help with this Comment and for being able to look past my vegetarianism to provide amazing support and guidance throughout law school. Thank you also to Rosemary Deck for being such a great Primary Editor on this Comment, and for her enthusiasm and mentorship. Finally, thanks to my best friend, Wiemond Wu, for always making me laugh, keeping me in check, and inspiring me to be a better person.

I. INTRODUCTION

Everyone has heard something about the Brock Turner case—virtually every news source has covered it, and new articles are still published each day.[1] However, how much of that information is accurate? Do these articles give readers the full story? Unfortunately, these articles often mislead readers by providing facts out of context and misrepresenting legal issues.[2] For example, much, if not most, of the information online on *People v. Turner*[3] refers to the defendant as a "rapist,"[4] when in fact he was convicted of sexual assault—not rape.[5] Further, articles often overemphasize Turner's privileged background,[6] ignoring legally relevant mitigating factors like his level of intoxication and

1. *See, e.g.*, KRON Staff Reports, *How Brock Turner's Case Sparked Nationwide Outrage*, WISHTV.COM (Dec. 28, 2016, 2:19 PM), http://wishtv.com/2016/12/28/how-brock-turners-case-sparked-nationwide-outrage/ (on file with *The University of the Pacific Law Review*) (providing an example of an article about the case); Scott Herhold, *Top 10 2016 Stories: Ghost Ship, Brock Turner, Loma Fire, and Others*, MERCURY NEWS (Dec. 27, 2016, 12:33 PM), http://www.mercurynews.com/2016/12/27/the-top-ten-stories-of-2016/ (on file with *The University of the Pacific Law Review*) (same); Shenequa Golding, *Brock Turner, David Becker and the Other Deplorables of 2016*, VIBE (Dec. 16, 2016, 11:33 AM), http://www.vibe.com/2016/12/ brock-turner-rape-culture/ (on file with *The University of the Pacific Law Review*) (same).

2. *Infra* Parts II–V (describing how this issue pervades California's criminal justice system).

3. People v. Turner, No. B1577162 (Cal. Super. Ct. 2016).

4. *See, e.g.*, Kory Grow, *Stanford Rapist Brock Turner Registers as Sex Offender*, ROLLING STONE (Sept. 6, 2016), http://www.rollingstone.com/culture/news/stanford-rapist-brock-turner-registers-as-sex-offender-w438111 (on file with *The University of the Pacific Law Review*) (titled "Stanford Rapist Brock Turner Registers as Sex Offender"); Sarah Volpenhein, *Brock Turner Will Serve the Rest of His Rape Sentence in This Unsuspecting Town*, DAILY BEAST (Sept. 1, 2016), http://www.thedailybeast.com/articles/2016/09/02/brock-turner-will-serve-the-rest-of-his-rape-sentence-in-this-unsuspecting-town.html (on file with *The University of the Pacific Law Review*) (titled "Brock Turner Will Serve the Rest of His Rape Sentence in This Unsuspecting Town" and referring to Turner as "[o]ne of America's most famous rapists").

5. Jacqueline Lee, *Stanford Sex Case: Brock Turner Found Guilty of Assault on Unconscious Woman*, MERCURY NEWS (Mar. 30, 2016, 10:46 AM), http://www.mercurynews.com/2016/03/30/stanford-sex-case-brock-turner-found-guilty-of-assault-on-unconscious-woman/ (on file with *The University of the Pacific Law Review*).

6. *See, e.g.*, Zeba Blay, *Let's Not Ignore the Importance of Brock Turner's Whiteness*, HUFFINGTON POST (June 7, 2016, 4:14 PM), http://www.huffingtonpost.com/entry/lets-not-ignore-the-importance-of-brock-turnerswhiteness_us_5756d791e4b0b60682dee518 (on file with *The University of the Pacific Law Review*) (arguing that Turner received only a six month sentence because he is white and was a college athlete).

absence of a criminal history.[7] Perhaps the fact most often overlooked by the media is that the victim specifically told Turner's probation officer that she "do[esn't] want [Turner] to rot away in jail" and believes he "doesn't need to be behind bars."[8] Ultimately, Santa Clara Superior Court Judge Aaron Persky sentenced Turner to six months in jail, a lawful sentence based in part on the recommendations of Turner's probation officer.[9] In December 2016, the California Commission on Judicial Performance officially announced that the sentence was "within the parameters set by law and . . . within the judge's discretion."[10] Despite the lawfulness of the sentence, *People v. Turner* sparked a recall campaign[11] to take Judge Persky off the bench and inspired two pieces of legislation in direct response to public outrage over the case.[12] The first new law, Chapter 848, expands the definition of rape to include all forms of nonconsensual sexual assault—if Turner had been charged under this law, he would have been convicted of rape.[13] The second, Chapter 863, prohibits a judge from granting probation or lowering a sentence if an individual is convicted of certain types of sexual assault, including those Turner committed.[14] Taken together, these provisions effectively provide a three year mandatory minimum sentence for all offenders convicted of nonconsensual sexual assault.[15] Governor Jerry Brown signed both bills into law less than four months after Judge Persky handed down Turner's sentence.[16] Governor Brown did so despite his recent statement in

7. Probation Report at 11–12, People v. Turner, No. B1577162 (Cal. Super. Ct. 2016), *available at* https://assets.document cloud.org/documents/2858997/Probation-officer-s-report-in-Brock-Turner-case.pdf (on file with *The University of the Pacific Law Review*).

8. *Id.* at 5. In her later statement at Turner's sentencing, the victim claimed that these statements were taken out of context and that Turner had changed his story throughout the trial. However, it remains to be shown what context her statements were removed from, and Turner arguably only added details to his side of the story that did not actually change the facts. Comparing Turner's first statement to the police the night of the incident with what he told his probation officer shows that the two are compatible. Police Report at 27, People v. Turner, No. B1577162 (filed Jan. 28, 2015), *available at* https://assets.documentcloud.org/documents/1532973/complaint-brock-turner.pdf (on file with *The University of the Pacific Law Review*) (providing his initial statement to the police); Probation Report at 6, People v. Turner, No. B1577162 (Cal. Super. Ct. 2016), *available at* https://assets.documentcloud. org/documents/2858997/Probation-officer-s-report-in-Brock-Turner-case.pdf (on file with *The University of the Pacific Law Review*) (showing what Turner ultimately said to his probation officer).

9. Veronica Rocha, *Judicial Panel Clears California Judge Who Gave Lenient Sentence in Stanford Sexual Assault*, L.A. TIMES (Dec. 19, 2016, 4:00 PM), http://www.latimes.com/local/lanow/la-me-ln-judge-aaron-persky-no-judicial-misconduct-20161219-story.html (on file with *The University of the Pacific Law Review*).

10. *Id.*

11. *Recall Judge Aaron Persky*, RECALL AARON PERSKY, http://www.recallaaronpersky.com/ (last visited Dec. 23, 2016) (on file with *The University of the Pacific Law Review*).

12. CAL. PENAL CODE § 263.1 (enacted by 2016 Cal. Stat. Ch. 848), 1203.065 (amended by 2016 Cal. Stat. Ch. 863).

13. *Id.* § 263.1 (enacted by 2016 Cal. Stat. Ch. 848).

14. *Id.* § 1203.065 (amended by 2016 Cal. Stat. Ch. 863).

15. *Id.* § 263.1 (enacted by 2016 Cal. Stat. Ch. 848), 1203.065 (amended by 2016 Cal. Stat. Ch. 863).

16. Daniel Kreps, *California Governor Signs Law Enforcing Mandatory Prison for Sexual Assaults*,

response to legislators' attempts to establish mandatory minimum sentences for certain other offenses: in vetoing those bills, Governor Brown wrote, "[b]efore we keep going down this road, I think we should pause and reflect on how our system of criminal justice could be made more human, more just and more cost-effective."[17]

Given the prevalence of the substantial inaccuracies in many people's understandings of *People v. Turner*, many of them do not have all the important facts and lack an understanding of the legal nuances surrounding the decision when they demand Judge Persky's recall or support reactive legislation like Chapters 848 and 863.[18] Yet, as California's criminal justice system is currently structured, public sentiment—even if misinformed—can have dramatic effects on the legislature and the judiciary.[19] While the government should be responsive to the public, some amount of insulation from political pressure is necessary to protect the integrity of the criminal justice system and ensure that individuals are not punished more harshly than they deserve because of inaccuracies in media hype.[20] Even beyond injustice to individual offenders, California's decades of reactive legislation have led to severe prison overcrowding, to the point that the state is under a federal court order to reduce its prison population.[21]

The Model Penal Code ("MPC") is a nonbinding criminal code promulgated by the American Law Institute ("ALI"), a group of legal scholars including law professors, judges, and practicing attorneys.[22] States may choose to model their laws after the MPC, or adopt it verbatim.[23] The MPC covers substantive criminal law, and defines specific offenses including their sentencing.[24] Each MPC draft goes through substantial revisions and discussions among ALI members, resulting in a well-balanced document with clearly explained justifications for

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ROLLING STONE (Sept. 30, 2016), http://www.rollingstone.com/culture/news/california-passes-law-enforcing-mandatory-prison-for-sexual-assaults-w442950 (on file with *The University of the Pacific Law Review*).

17. Letter from Edmund. G. Brown, Jr., Governor, to the Members of the Cal. State Assembly (Oct. 3, 2015) (on file with *The University of the Pacific Law Review*).

18. *Supra* Part I (describing the misleading articles that provide many people with information on the case).

19. FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 177–80, 182–87 (2001).

20. *Id.* at 182–87; *see also* KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 3 (2015), *available at* https://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf (on file with *The University of the Pacific Law Review*) (describing how state judges running for election or retention are often targeted by opponents for being "soft on crime").

21. Coleman v. Brown, No. 2:90-cv-0520 LKK DAD (PC), 2014 WL 2889598 (E.D. Cal. Feb. 10, 2014), *available at* http://www.cdcr.ca.gov/News/docs/3jp-Feb-2014/Three-Judge-Court-opinion-2-20-2014.pdf (on file with *The University of the Pacific Law Review*); Brown v. Plata, 563 U.S. 493 (2011).

22. JOSHUA DRESSLER, CRIMINAL LAW 30–31 (6th ed. 2012).

23. *Id.*

24. *Id.*

each provision.[25] Former Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit referred to the ALI's deliberation process as a "model of legal reform—the joint, exhaustive deliberation of lawyers, judges, and law professors meeting as it were on neutral ground."[26] The ALI's neutrality ensures that the MPC provisions are tied to philosophical justifications, not enacted in response to political issues.[27]

In May 2017, the ALI published a revised version of the MPC Sentencing ("MPCS") provisions.[28] Described in more detail below,[29] these revisions establish a sentencing commission to promulgate guidelines for sentencing judges to follow, including factors for judges to consider like individual offender characteristics.[30] The ALI's promulgation of new MPC provisions is an ideal time for state legislatures to adopt those parts of the Code.[31] Since California needs a solution to the issues pervading its criminal justice system,[32] the state should adopt the 2017 Model Penal Code Sentencing revisions to address those issues.[33] The legislature's political games have gotten California to the place where it is today, and it needs the MPC to get it out.[34] "[T]he dynamics of local criminal law politics make it very difficult, if not impossible, to achieve general criminal law recodification without the kind of outside help provided by the Model Penal Code."[35] There is no time like the present for California to finally do so.[36]

II. CALIFORNIA'S CURRENT SENTENCING SYSTEM

This section will give a brief history of how California arrived at its current sentencing system, including the state's philosophical choice towards a retributive focus in the 1970s and how that has, in part, led to its current dysfunctional system.[37]

25. *See, e.g.*, MODEL PENAL CODE: SENTENCING xiii (AM. LAW INST., Tentative Draft No. 4 2016) [hereinafter "MPCS"] ("This project has been previously discussed at nine Annual meetings.").

26. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 303 (2002).

27. *See id.* (commending the ALI's neutrality).

28. MPCS, *supra* note 25, at xiii.

29. *Infra* Part IV (detailing the proposed MPCS revisions).

30. MPCS, *supra* note 25, § 6B.06(4)(a).

31. Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 177 (2003).

32. *Infra* Part III (describing current issues with California's criminal justice system).

33. *Infra* Part IV (proposing that the MPCS revisions could help alleviate California's current issues in its criminal justice system).

34. *Infra* Part II (detailing the politics that in part created problematic legislation in California).

35. Robinson & Cahill, *supra* note 31, at 173.

36. *Infra* Parts II–IV (analyzing why California needs the MPCS revisions).

37. *Infra* Parts II.A–D (laying out California's current sentencing system and some of its history).

A. The Move from Indeterminate to Determinate Sentencing

Before the 1970s, most states, including California, utilized an indeterminate sentencing system.[38] These systems held rehabilitation as their primary purpose of punishment.[39] The length of an offender's incarceration would not be determined on the day of sentencing based on the offense committed, but rather would be set for an indefinite duration and revisited after some time to measure whether the offender showed signs of rehabilitation.[40] Whether the offender successfully responded to rehabilitation was a determination not for the judge to make in advance on the day of sentencing, but for a correctional officer or parole board familiar with the individual's behavior in jail.[41]

Although some amount of judicial discretion is essential to a properly functioning criminal justice system, this indeterminate sentencing system ultimately leaves too much room for interpretation both with judges at sentencing and with correctional authorities in determining prisoner release dates.[42] A further criticism of this purely rehabilitative model is that it could lead to disproportionate sentences, with some too severe and others too lenient.[43] For example, a person could end up in prison for an extended period of time for a minor crime if the prison authorities did not believe he had responded to rehabilitation, while another person convicted of murder could show signs of rehabilitation sufficient to warrant early release far sooner than would be considered appropriate for such a crime.[44] This wide disparity, led states to abandon the indeterminate sentencing model during the 1970s.[45]

These states, including California, established a determinate sentencing structure instead and refocused criminal punishment on retribution, rather than rehabilitation.[46] Whereas the indeterminate sentencing system focused on the offender and his individual ability to be rehabilitated and reintegrated into society, the new determinate sentencing system focused on the offense itself and took far fewer of the defendant's personal characteristics into account.[47] In 1976, Governor Jerry Brown, then in his first term in office, signed Senate Bill 42 into

38. Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 918 (2004); Sheldon L. Messinger & Phillip E. Johnson, *California's Determinate Sentencing Statute: History and Issues*, 1 DETERMINATE SENTENCING: REFORM OR REGRESSION 13, 15 (1978) (noting that California first introduced indeterminate sentencing in 1917).

39. Vitiello & Kelso, *supra* note 38, at 918.

40. *Id.*; DRESSLER, *supra* note 22, at 24.

41. DRESSLER, *supra* note 22, at 24.

42. Vitiello & Kelso, *supra* note 38, at 919.

43. *Id.* at 918–19.

44. *Id.*

45. *Id.* at 919.

46. *Id.*

47. *Id.*; Messinger & Johnson, *supra* note 38, at 13–14.

law, thus redirecting California's criminal justice system.[48] That bill added section 1170(a)(1) to the California Penal Code, which has since stated its retributive purpose: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment."[49] This first sentence of the statute clearly responded to the dissatisfaction with the rehabilitative focus by reinstating retribution as the primary goal of California's system.[50] The statute also responded to the disparity of sentencing among individuals that committed the same offense:[51] "This purpose is best served by terms . . . with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances."[52]

California's determinate sentencing law did not take away all discretion from the sentencing judge, but left some—at least in the law's original 1976 form.[53] It established maximum, middle, and minimum presumptive terms of imprisonment for individual crimes, and allowed the court to deviate from the middle sentence if it found aggravating or mitigating factors supporting that decision.[54] In its original form, the statute required that "the court . . . order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime," circumstances found by the court and not the jury.[55] Although these three sentences were based on the average time offenders ended up serving for the same crimes under the indeterminate system, the drafters of the statutes still "had to make a conscious choice about how to allocate prison terms."[56] In its current form, the statute vests the decision between the three sentences "within the sound discretion of the court" without requiring distinct factfinding by the judge.[57]

California Rule of Court 4.410 instructs judges to consider multiple objectives when determining individual sentences.[58] All traditional theories of criminal punishment are present in this statute:[59] rehabilitation ("[e]ncouraging the defendant to lead a law-abiding life in the future"[60]), retribution ("[p]unishing

48. Messinger & Johnson, *supra* note 38, at 21.

49. CAL. PENAL CODE § 1170(a)(1) (West 2017).

50. *Id.* § 1170(a)(1); Vitiello & Kelso, *supra* note 38, at 919.

51. Vitiello & Kelso, *supra* note 38, at 919.

52. CAL. PENAL CODE § 1170(a)(1) (West 2017).

53. Vitiello & Kelso, *supra* note 38, at 919.

54. *Id.* at 920.

55. Cunningham v. California, 549 U.S. 270, 278 (2007).

56. Vitiello & Kelso, *supra* note 38, at 920 n.75.

57. CAL. PENAL CODE § 1170(b) (West 2017). The statute was revised in 2007 to its current form in response to a Supreme Court decision holding its prior language unconstitutional. The statute previously allowed the judge to engage in factfinding to decide between the range of sentences, the Court in *Cunningham v. California*, found this violative of a defendant's Sixth Amendment right to a jury trial. 549 U.S. 270 (2007).

58. CAL. R. CT. 4.410(a).

59. *Id.*

60. *Id.* 4.410(a)(3).

the defendant"[61]), incapacitation ("[p]reventing the defendant from committing new crimes by isolating him or her for the period of incarceration"[62]), and deterrence ("[d]eterring others from criminal conduct by demonstrating its consequences"[63]). Of course, not all theories can be furthered in every case, so the Rule provides that the judge must decide which is of paramount importance in each case, and in doing so should be "guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case."[64]

The sentencing provisions of the California Penal Code have not remained as relatively straightforward as they might have initially been when the state passed the Uniform Determinate Sentencing Act of 1976.[65] Since then, hundreds of often arbitrary sentence enhancements were enacted, which "eroded whatever coherence was achieved in 1976."[66] Whatever coherence existed in 1976 was limited at least in part because the "common ground" for the new system was merely "opposition to a previous regime."[67] The system "never had articulate defenders."[68] In 1998, then-state senator Adam Schiff introduced Senate Bill 1794 in an attempt to organize the enhancements that had been "added to the Penal Code in a haphazard fashion for decades."[69] He stated, "[e]nhancements are the most abused . . . [and] most complex and chaotic provisions in the Penal Code."[70] Most of these enhancements were added to the Code during the "tough on crime" era that peaked during the 1980s and 1990s—in fact, over 1,000 crime bills passed in the California legislature between 1984 and 1991 alone.[71] Governor Brown spoke to this issue in his recent letter cited above: "[t]his multiplication and particularization of criminal behavior creates increasing complexity without commensurate benefit."[72]

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61. *Id.* 4.410(a)(2).

62. *Id.* 4.410(a)(5).

63. *Id.* 4.410(a)(4).

64. *Id.* 4.410(b).

65. Vitiello & Kelso, *supra* note 38, at 920.

66. *Id.* at 919.

67. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 215.

68. *Id.*

69. *Should All Sentence Enhancements Be Listed in One Penal Code Section and Be Categorized by Length of Term for Reference Purposes Only?: Hearing on S.B. 1794 Before the Subcomm. on Public Safety*, 1998 Leg., 1997–1998 Sess. 1 (Cal. 1998) (statement of Adam Schiff, Senator) (on file *with The University of the Pacific Law Review*).

70. *Id.*

71. Vitiello & Kelso, *supra* note 38, at 921.

72. Letter from Edmund. G. Brown, *supra* note 17.

B. California Gets "Tough on Crime"

After making the move to determinate sentencing in 1976,[73] California embraced the "tough on crime" era of the 1980s and 1990s with open arms.[74] Politicians throughout the country based their campaign platforms on the slogan and vilified opponents for being "soft on crime."[75] One political-consulting firm that created mail advertisements for candidates during the 1990s usually printed at least eight "tough on crime" ads out of every ten general ads for each client.[76] In California, then-Governor Pete Wilson based his 1994 re-election campaign on a "tough on crime" platform, in large part, by vouching his support for the Three Strikes Law, which was ultimately passed in response to twelve-year-old Polly Klaas' kidnapping and murder.[77] California's Three Strikes Law is the poster child of impulsive "tough on crime" legislation.[78] It was enacted when when "anti-crime sentiment was inflamed" by Polly Klaas' death and the general public believed the "misperception that the crime rate was on the rise."[79]

Although the "tough on crime" era peaked in the 1990s,[80] it remains a popular slogan among politicians seeking to win elections by promising a heavy-handed approach to crime, and capitalizes on public fears by making examples out of recent high-profile crimes.[81] The "tough on crime" promise also comes into play in judicial elections.[82] While judges are appointed federally and in some states, many state judges must run for election and periodically hold retention campaigns as well.[83] California is one of those states that requires a judge to be

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73. Messinger & Johnson, *supra* note 38, at 21.

74. Stephen Stock, Michael Bott & Mark Villareal, *Enhancements Leave Thousands of California Inmates with Extraordinarily Long Sentences*, NBC (Feb. 26, 2016), http://www.nbcbayarea.com/investigations/Thousands-of-California-Inmates-Face-Extraordinarily-Long-Sentences-Because-of-Enhancements-370335951.html (on file with *The University of the Pacific Law Review*).

75. Paul Waldman, *When Everyone Wanted to Be "Tough on Crime"*, AM. PROSPECT (Aug. 13, 2013), http://prospect.org/article/when-everyone-wanted-be-tough-crime (on file with *The University of the Pacific Law Review*). *See also* BERRY, *supra* note 20 (describing how state judges running for election or retention are often targeted by opponents for being "soft on crime").

76. Waldman, *supra* note 75.

77. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 6–8; *see infra* Part III.A.1 (describing the impetus for Three Strikes).

78. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 3–5.

79. Vitiello & Kelso, *supra* note 38, at 931.

80. Arit John, *A Timeline of the Rise and Fall of 'Tough on Crime' Drug Sentencing*, ATLANTIC (Apr. 22, 2014), http://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/ (on file with *The University of the Pacific Law Review*).

81. BERRY, *supra* note 20; *see, e.g.*, Jon Swaine, *Law Enforcement Officials Warn Against Trump's 'Tough on Crime' Policy*, GUARDIAN (July 13, 2016, 12:35 PM), https://www.theguardian.com/us-news/2016/jul/13/donald-trump-crime-policy-law-enforcement-officials-letter (on file with *The University of the Pacific Law Review*) (describing how Republican candidate Donald Trump emphasized his "tough on crime" approach to criminal justice and labeled himself the "law and order candidate" during the 2016 Presidential election).

82. BERRY, *supra* note 20, at 5–6.

83. AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES 1, *available at*

elected by voters.[84] Not only do these judges running for election often utilize a "tough on crime" platform, but a recent study done by the Brennan Center for Justice at the New York University School of Law shows that judges tend to hand down harsher sentences, and are more likely to uphold death penalty convictions on appeal when they have retention elections approaching.[85] Explained more fully below, the "tough on crime" mentality threatens judicial impartiality because it pervades and skews a neutral justice system in both the legislative and judicial branches.[86]

Beyond its adverse effects on individual offenders, California's "tough on crime" legislation has created systematically excessive sentences that have led to severe overcrowding in prisons.[87] At a certain point, these long sentences are unjustified, unnecessary for public protection, and only serve to drain the state's resources, no longer furthering any punishment purpose.[88] In 1980, California had 23,264 individuals in prison.[89] As the "tough on crime" era gained traction and California piled on its reactive legislation, the prison population increased to a high of 173,942 individuals in 2006,[90] and remains around 130,000 at the start of 2017—a little over 133% of capacity.[91] In 2009, a three-judge panel of the United States District Court for the Eastern District of California held that the medical services in the state's prisons were so inadequate due to overcrowding that they violated prisoners' Eighth Amendment rights.[92] The panel ordered California to reduce its prison population to 137.5% of design capacity—effectively ordering the release of 33,000 prisoners.[93] The Supreme Court upheld this order: "[t]he overcrowding is the primary cause of the violation of a Federal right, specifically the severe and unlawful mistreatment of prisoners through

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http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited Dec. 29, 2016) (on file with *The University of the Pacific Law Review*).

84. *Id.*

85. BERRY, *supra* note 20, at 7–11.

86. *Infra* Part III.B (detailing California's threats to judicial impartiality).

87. *California Radically Revamping Prison System*, S.F. CHRON. (Mar. 15, 2016, 11:35 AM), http://www.sfchronicle.com/opinion/editorials/article/California-radically-revamping-prison-system-6885920.php (on file with *The University of the Pacific Law Review*).

88. Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 437–40 (1997) [hereinafter "Vitiello *Three Strikes*"].

89. *State-By-State Data*, SENT'G PROJECT, http://www.sentencingproject.org/thefacts/#detail?state1Option=California&state2Option=0 (last visited Jan. 20, 2017) (on file with *The University of the Pacific Law Review*).

90. *Id.*

91. CAL. DEP'T OF CORR. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT JANUARY 18, 2017 (2017), *available* at http://www.cdcr.ca.gov/Reports_Research/Offender_ Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad170118.pdf (on file with *The University of the Pacific Law Review*).

92. CAL. DEP'T OF CORR. & REHAB., THREE-JUDGE PANEL AND CALIFORNIA INMATE POPULATION REDUCTION 2 (2011), *available at* http://www.cdcr.ca.gov/News/docs/2011-05-23-Three-Judge-Panel-Background.pdf (on file with *The University of the Pacific Law Review*).

93. *Id.*

grossly inadequate provision of medical and mental health care."[94]

C. California and Sentencing Commissions

A sentencing commission is an organization with delegated administrative or judicial authority to promulgate sentencing guidelines.[95] It consists of legal experts who set sentencing guidelines for specific crimes, with a certain window of discretion for judges to vary sentences for individual defendants.[96] There are several benefits to a well-structured sentencing commission.[97] First, it serves to insulate sentencing laws and decisions from the public's reactions to highly publicized crime, as well as from political pressure in the legislature.[98] Second, it decreases direct accountability for judges to the constituency, which is particularly important in a state like California where judges face periodic elections.[99] If judges have a specified amount of discretion within reasonable guidelines set by a sentencing commission, public backlash against a judge for a sentencing decision within those guidelines would be sorely misplaced and fruitless.[100]

California currently has no sentencing commission.[101] State lawmakers have made at least nine attempts to establish one since the state moved to determinate sentencing in 1976, yet all of those attempts have failed.[102] According to one commentator, these repeated failures are due at least in part to the perception that sentencing commissions are "nefarious attempts on the part of prison abolitionists to release dangerous criminals from prison."[103] This is a typical sentiment of the "tough on crime" mindset that currently plagues California's criminal justice system.[104] This Comment proposes in more detail below that the sentencing commission provisions of the 2017 Model Penal Code Sentencing revisions would serve as a perfect foundation for California to finally foray into the world of sentencing commissions—a change it so desperately needs.[105]

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94. Brown v. Plata, 563 U.S. 493, 502 (2011) (internal citations omitted).

95. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 212–13.

96. *Id.*

97. *Id.*

98. *Id.* at 184.

99. *Id.*

100. *See id.* at 215 ("New institutions like the sentencing commission are one part of the answer; restoring faith in the authority and expertise of sentencing judges is another.").

101. Kara Dansky, *A Blueprint for a California Sentencing Commission*, 22 FED. SENT'G. REP. 158, 158 (2010).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Infra* Part IV (applying the MPCS revisions to California's problems).

D. How Sentence Enhancements Are Added to California's Penal Code

Most legislation, including sentencing enhancements, can either be added to California's law through the initiative process or through the legislature.[106] Provided that certain procedural requirements are met, the initiative process allows any person in California to propose legislation.[107] An online guide published by the Secretary of State details the required format for initiatives.[108] The basic requirements are that proposed statutes gather 365,880 signatures, and constitutional amendments 585,407 signatures.[109] The Secretary of State validates the signatures, and if the number is at least 110% of the required amount, the measure is qualified to be on the ballot in the next statewide election.[110] California initiatives appear on the ballot as "yes-or-no" options.[111] In reality, initiatives are often funded by special interest groups that capitalize on public sentiment and "push the terms of a proposition beyond" what voters would actually prefer, assuming the constituency would prefer this more extreme version to the alternative of no change at all.[112] The initiative process is responsible for some of the "crime of the month" sentence enhancements.[113]

Alternatively, statutes can be added to the books through the legislative process, which is more conducive to properly nuanced legal provisions than the simple "yes-or-no" ballot initiatives.[114] Ideally, the laws produced through this method are the product of legislative compromise inherent in the system, including contributions from legal experts and scholars in the field.[115] However, some of California's sentence enhancements, notably the Three Strikes Law passed in 1994, were enacted through the legislative process with little to no input from these experts.[116] Instead, these statutes were the result of political pressure, often enacted in response to public reaction to highly publicized crime—even when existing law was already sufficient to address the offense.[117] With this setup, California's sentencing laws are subject to public whim, who

106. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 192–93.

107. CAL. SEC'Y OF STATE, 2017 STATEWIDE INITIATIVE GUIDE, *available at* http://elections.cdn.sos.ca.gov/ballot-measures/pdf/statewide-initiative-guide.pdf (on file with *The University of the Pacific Law Review*).

108. *Id.*

109. *Id.* at 5.

110. *Id.* at 11.

111. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 192–93.

112. *Id.*; Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REF. 707, 736 (1998) [hereinafter "Vitiello *Proposition 215*"].

113. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 192-93.

114. *Id.*

115. *Id.* at 3, 192-93; Vitiello *Proposition 215*, *supra* note 112, at 729.

116. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 3.

117. Vitiello & Kelso, *supra* note 38, at 921; ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 192–93.

generally do not understand the intricacies of the law.[118] The politicians advocating for new sentence enhancements "bear few costs from enacting or developing poorly organized and drafted criminal codes," and the voting public would be aware of the underlying issues of such legislation "only if it understood the inner workings of the criminal justice system in a way that typically only judges, lawyers, and other frequent participants do."[119] As developed in the following section, excessive sentence enhancements are the result of the confluence of California's non-insulated legislative system and the "tough on crime" mentality of the era.[120] Establishing a sentencing commission would provide a more insulated system and better protect the integrity of California's criminal justice system—where the voice of the people is still heard, but through the filter of a politically neutral, expert sentencing commission.[121]

E. California's State Judges

Not only is California's legislative process conducive to precipitous laws, but the state's judicial branch is vulnerable to politics as well.[122] The majority of California state judges are elected and must periodically run for retention, which in and of itself subjects them to the political system.[123] Electing judges is not unique to California.[124] What is unique to California, however, is how relatively easy it is for the public to initiate a recall election and remove a judge from the bench for virtually any reason.[125] Recall is an option in many states for the constituency to remove elected government officials from office before their natural terms are up.[126] It is most commonly used against local public officials,

118. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 182–87; Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 2 (2000).

119. Robinson, Cahill & Mohammad, *supra* note 118, at 2.

120. *Infra* part I.C.1 (discussing the Three Strikes and 10-20-Life laws as examples of California's "tough on crime" reactive legislation).

121. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 182–87.

122. Tracey L. Meares, *If You Want Independent Judges, Don't Elect Them*, N.Y. TIMES (June 8, 2016), http://www.nytimes.com/roomfordebate/2016/06/08/should-an-unpopular-sentence-in-the-stanford-rape-case-cost-a-judge-his-job/if-you-want-independent-judges-dont-elect-them (on file with *The University of the Pacific Law Review*).

123. *Judicial Selection in the States: California*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/index.cfm?state=CA (last visited Dec. 29, 2016) (on file with *The University of the Pacific Law Review*).

124. AM. BAR ASS'N, *supra* note 83.

125. *Procedure for Recalling State and Local Officials*, CAL. SECRETARY ST., http://www.sos.ca.gov/elections/recalls/procedure-recalling-state-and-local-officials/ (last visited Dec. 29, 2016) (on file with *The University of the Pacific Law Review*).

126. *Recall of Local Officials*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/ research/elections-and-campaigns/recall-of-local-officials.aspx (last visited Jan. 2, 2017) (on file with *The University of the Pacific Law Review*).

often at the school board or city council level.[127] Although judges are elected to the bench in many states, only a few of these states allow for their recall.[128]

While other states will review the merits of the recall petition, California's constitution prohibits this—the proponents of the recall need only provide a 200-word statement of the reasons for the recall, but "the sufficiency of this reason is not reviewable."[129] In contrast, other states evaluate the merits of recall petitions.[130] Essentially, California judicial recall petitions need only meet formatting requirements and the gathering of enough votes, specifically the equivalent of 20% of the last vote for the office if the petition seeks to recall the judge of a superior court or the Justice of a Court of Appeal, and the recall will be on the ballot in the next statewide election.[131] The people's vote on the recall is the final say in whether the judge will be removed from the bench.[132]

III. ISN'T MOB RULE A THING OF THE PAST? IN CALIFORNIA, NOT REALLY

A basic tenet of every self-help article is that heightened emotions cloud rational decision-making.[133] It should follow, then, that if it is not ideal for one individual to make personal decisions while upset, the entire voting body of a state should not make far-reaching legal decisions in the wake of and in reaction to a highly publicized, particularly tragic crime.[134] People understandably want to see justice served when their communities are struck by a tragic crime.[135] It is human nature to "exaggerate the seriousness of an offense that affects one personally," so when crime strikes close to home, people are more likely to overreact and seek vindication through the legislature.[136] However, the

127. *Id.*

128. *Id.*

129. *Procedure for Recalling State and Local Officials*, *supra* note 125.

130. Eli Hager, *How Easy Would It Be to Recall the Judge in the Brock Turner Case?*, MARSHALL PROJECT (June 7, 2016), https://www.themarshallproject.org/2016/06/07/how-easy-would-it-be-to-recall-the-judge-in-the-brock-turner-case#.9EHGmBdkt (on file with *The University of the Pacific Law Review*).

131. *Procedure for Recalling State and Local Officials*, *supra* note 125.

132. *Id.*

133. *See, e.g.*, Katie, *Why You Shouldn't Make Decisions When You're Emotional*, RESILIENT (July 5, 2016), http://resilientapp.com/growth/shouldnt-make-decisions-youre-emotional/ (on file with *The University of the Pacific Law Review*) (arguing that "sharp emotion in the heat of the moment" can "cloud[] your judgment"); Jennifer S. Lerner & Katherine Shonk, *How Anger Poisons Decision Making*, HARV. BUS. REV. (Sept. 2010), https://hbr.org/2010/09/how-anger-poisons-decision-making (on file with *The University of the Pacific Law Review*) (describing studies where participants were more punitive towards fictional tort defendants after seeing an "anger-inducing video" than participants who viewed a neutral video).

134. Katie, *supra* note 133; Lerner & Shonk, *supra* note 133.

135. Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 U. PAC. L. REV. 243, 256 (1996) (warning of the dangers of "direct sentimental governance" like California's Three Strikes Law and advocating for a "culture of responsibility as a defense against the next panic.").

136. Robinson & Cahill, *supra* note 31, at 171.

appropriate solution is not to enact unnecessary laws targeted at the specific crime, when existing law is already sufficient to punish the wrongful conduct.[137] Nor is the solution to demand recall of a judge who imposes a sentence the public happens to find problematic, when that sentence was entirely lawful and within the judge's authority.[138] These two behaviors erode the integrity of the criminal justice system, and they run rampant in California's current structure.[139] In the following two sections, this Comment will address the issues with precipitous legislation and judicial recall in turn.[140]

A. Reactive Legislation Might Feel Good in the Moment, But It Does Not Feel Good for the Criminal Justice System

As discussed above, there are several issues with reactive legislation, especially in California: it is not conducive to producing well-nuanced law, and it has overcomplicated our state's penal code by piling up unnecessary "barnacles"[141] of sentence enhancements that were enacted in response to the public outcry over the "crime of the month."[142] Aside from these threats to the integrity of the criminal justice system, reactive legislation generally proves to be ultimately unjustifiable in light of its practical costs on society.[143] This section will cover a few examples of such legislation in California and detail the issues with each provision: the Three Strikes Law; 10-20-Life; and Chapters 848 and 863, the recent laws enacted in response to public dissatisfaction with the sentence in *People v. Turner*.[144]

1. Three Strikes

On October 1, 1993, twelve-year-old Polly Klaas was kidnapped at knifepoint from her Petaluma home while she was having a slumber party with two of her friends.[145] Polly was missing for over two months.[146] FBI detectives traced the crime to Richard Allen Davis, who ultimately confessed and led them to the location in the woods where he buried her.[147] Polly's tragic death inspired

137. Vitiello & Kelso, *supra* note 38, at 921–25.

138. Hager, *supra* note 130.

139. *Infra* Parts III.A–B (describing those two issues).

140. *Infra* Parts IIIA–B (describing those two issues).

141. Robinson & Cahill, *supra* note 31, at 172.

142. *Supra* Part II.C (describing the initiative process).

143. Vitiello & Kelso, *supra* note 38, at 959 n. 305.

144. *Infra* Parts IIIA.1–3 (detailing those laws).

145. *A 12-Year-Old Girl is Kidnapped*, HISTORY.COM, http://www.history.com/this-day-in-history/a-12-year-old-girl-is-kidnapped (last visited Feb. 6, 2017) (on file with *The University of the Pacific Law Review*).

146. *Id.*

147. *Id.*

public outrage in its own right.[148] However, what provided the momentum for the passage of the Three Strikes initiative into law one year later was Davis' prior convictions.[149] Before he kidnapped Polly, Davis had previously been convicted of burglary, kidnapping, and assault, and was sentenced to sixteen years in prison but released early on parole.[150] Polly's father initially lobbied for Three Strikes as a legislative response to his daughter's death, but ultimately distanced himself from it upon realizing issues with the bill's drafting—although he eventually returned to lobbying for "tough on crime" legislation.[151] Even so, over 70% of California voted the Three Strikes initiative into law in November 1994.[152]

Three Strikes is a repeat-offender statute,[153] giving second-time offenders increased sentences and third-time offenders life imprisonment, if the third offense is an enumerated violent felony.[154] In its original form, the third strike 25-years-to-life term would have activated at any felony, be it a marijuana possession charge or murder.[155] However, California voters opted to lessen the extremity of the provision in 2012 when they approved Proposition 36.[156] Now, the third strike must be one of the "violent" felonies enumerated in section 667.5 of the California Penal Code.[157] Despite this change, however, Three Strikes remains ultimately unjustifiable and draining on the state's resources, even in the face of an order from the United States Supreme Court itself that the state reduce its prison population.[158]

In adopting the Three Strikes law, the California legislature shifted its primary goal in punishing recidivists from the retribution embodied in the 1976 Uniform Determinate Sentencing Act to deterrence and incapacitation, goals that necessitate longer sentences.[159] Because Three Strikes focuses entirely on the offense and turns a blind eye to the offender, it leaves no room for considerations

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*; *see* Marc Klaas, *Prop. 57 Would Release Violent Criminals and Undermine Victims' Rights*, SACRAMENTO BEE (Oct. 24, 2016, 3:00 PM), http://www.sacbee.com/opinion/op-ed/soapbox/article 110211372.html (on file with *The University of the Pacific Law Review*) (arguing against Proposition 57, which voters ultimately did pass in the November 2016 election and provides for increased parole opportunities for inmates).

152. *California Proposition 184, The Three Strikes Initiative (1994)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_184,_the_Three_Strikes_Initiative_(1994) (last visited Feb. 6, 2017) (on file with *The University of the Pacific Law Review*).

153. CAL. PENAL CODE § 667 (West 2017).

154. *Id.* § 667.5.

155. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 8 Table 1.1.

156. CAL. PENAL CODE § 667.5 (amended by 2012 Cal. Stat. Ch. 43).

157. *Id.*

158. Brown v. Plata, 563 U.S. 493 (2011).

159. Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1066 (2004) [hereinafter "Vitiello *Judicial Activism*"].

of rehabilitation.[160] Further, a purely retributive punishment would only punish the offender for the current crime, rather than considering recidivism in determining the deserved punishment.[161] The law merits a much deeper discussion than what is to follow here, but at root, it is ultimately unjustified by either deterrence or incapacitation.[162] Three Strikes "provides marginal deterrence at best,"[163] and any evidence of that marginal result is "weak."[164] As for incapacitation, it is only a supported justification so long as the offender poses an actual threat to society.[165] Many third strike offenders serve more time than is necessary for adequate rehabilitation.[166] With such long sentences, many of these offenders will ultimately join the geriatric prison population, which costs about three times as much to incarcerate as younger inmates.[167] Not only is this unfair for the offenders themselves, but it is incredibly draining on California's resources.[168]

Despite the lack of clarity surrounding Three Strikes' penological purpose, especially in light of the excessively long punishments it creates, California appellate courts have not paid much heed to challenges to the law.[169] Unfortunately, the main reason behind the courts' blind eye is the same phenomenon that gave us this flawed provision in the first place: its "overwhelming voter support."[170] Rather than critically examining Three Strikes sentences, the California courts of appeal have taken a result-oriented approach, either consciously or subconsciously, and have deferred to public sentiment surrounding the law.[171] Three Strikes was enacted in response to highly publicized crime, and it likely "would not have passed but for the kidnapping and murder of Polly Klaas."[172] Now, California is stuck in a stalemate with an excessively punitive law, largely unjustified by any theory of punishment, that its own courts will not examine with a critical eye because of the same public sentiment that passed the reactive law in the first instance.[173]

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160. JOSHUA DRESSLER & ALAN C. MICHAELS, CRIMINAL PROCEDURE VOLUME 2: ADJUDICATION 349 (4th ed. 2006); Vitiello *Judicial Activism*, *supra* note 159, at 1066.

161. DRESSLER & MICHAELS, *supra* note 160, at 346.

162. Vitiello *Judicial Activism*, *supra* note 159, at 1070.

163. *Id.*

164. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 105.

165. DRESSLER & MICHAELS, *supra* note 160, at 348–49.

166. Vitiello *Judicial Activism*, *supra* note 159, at 1069–70.

167. Vitiello *Three Strikes*, *supra* note 88, at 437–40.

168. *Id.*

169. Vitiello *Judicial Activism*, *supra* note 159, at 1070.

170. *Id.*

171. *Id.*

172. *Id.* at 1071.

173. *Id.* at 1070–71.

2. 10-20-Life

10-20-Life is a sentence enhancement activated if the defendant used a gun during the commission of certain crimes.[174] Although not enacted in response to a particular instance of crime, it was part of the general "tough on crime" movement and was passed on the momentum of the Three Strikes Law.[175] Also known as the "Use a Gun and You're Done" law, this provision was passed in the Legislature in 1997.[176] The law was the product of the "tough on crime" sentiment, as embodied by statements by its author to the Assembly Committee on Public Safety: "[f]or far too long, criminals have been using guns to prey on their victims. [This law] will keep these parasites where they belong . . . in jail . . . [W]e are sending . . . [a] clear message: [i]f you use a gun to commit a crime, you're going to jail, and you're staying there."[177]

The law adds a mandatory sentence enhancement depending on how the offender utilized a gun during commission of a crime.[178] Depending on whether the defendant "personally use[d] a firearm," "personally and intentionally discharge[d] a firearm," or all of the above and "cause[d] great bodily injury . . . or death," his sentence will increase by ten years, twenty years, or life imprisonment, respectively.[179] Notably, the 10-20-Life law specifically prevents judicial discretion in sentencing.[180] If the enhancements apply, the sentencing judge cannot lower them even if the ultimate sentence is disproportionate to the offender's actual culpability.[181] This law is one of many California's sentence enhancements that often results in arbitrary increases in prison terms.[182] These extended sentences are ultimately unjustified for reasons similar to those listed above regarding Three Strikes.[183]

3. Chapters 848 and 863

In direct response to public outrage over *People v. Turner*, Governor Brown signed into law Chapters 848 and 863—two recent examples of precipitous

174. CAL. PENAL CODE § 12022.53 (West 2017).

175. *See* Vitiello & Kelso, *supra* note 38, at 921 (discussing the tough on crime era in California during the 1990s).

176. CAL. PENAL CODE § 12022.53 (enacted by 1997 Cal. Stat. Ch. 503).

177. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 4, at 2 (Apr. 15, 1997) (quoted in Gregory L. Maxim, *Moving Beyond Three Strikes Through California's Firearm Sentencing Enhancements*, 29 U. PAC. L. REV. 531, 534 n.23 (1997)).

178. CAL. PENAL CODE § 12022.53 (West 2017).

179. *Id.*

180. *Id.*

181. *Id.*

182. Stock, Bott & Villareal, *supra* note 74.

183. *Supra* Part IIA.1 (discussing why Three Strikes is ultimately unjustifiable).

legislation.[184] Chapter 848 added another section to the California Penal Code, section 263.1, which provides that "all forms of nonconsensual sexual assault may be considered rape for purposes of the gravity of the offense and the support of survivors."[185] At first glance, this may seem like a beneficial provision in that it gives the sentencing judge more discretion to increase a sexual assault sentence, if necessary, to match the severity of a rape sentence.[186] However, when considered in light of the issues developed below[187] that face judges in a state like California, where they are not only elected, but face the possibility of unchecked recall efforts,[188] the likelihood appears greater that this provision may not always be used in the best interests of either society or the victim.[189] In the wake of the public outrage and backlash over *People v. Turner*, a judge may be prone to applying this provision to more sexual assault offenders than necessary for fear of becoming the next Judge Persky.[190] Further, the characterization of the law surrounding *People v. Turner* and the function of this bill in many articles was misleading, as is typical of the media's contribution to reactive legislation.[191]

Chapter 863 removes a sentencing judge's discretion, providing that "probation shall not be granted to, nor shall the execution or imposition of a sentence be suspended for," any individual convicted of specified sexual assault crimes.[192] Further, it effectively imposes a three year mandatory minimum sentence on any offender in conjunction with Chapter 848 described above: Chapter 848 equates all forms of sexual assault with a conviction of rape, and Chapter 863 takes away the judge's discretion to impose probation instead of imprisonment for rape.[193] Certainly, some sexual assault offenders deserve a three year prison term or longer, but their culpability does not mean that all individuals in violation of that statute merit the same sentence.[194]

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184. CAL. PENAL CODE §§ 263.1 (enacted by 2016 Cal. Stat. Ch. 848), 1203.065 (amended by 2016 Cal. Stat. Ch. 863); Kreps, *supra* note 16.

185. CAL. PENAL CODE § 263.1 (enacted by 2016 Cal. Stat. Ch. 848).

186. *Id.*

187. *Infra* Part III.B (discussing threats to judicial impartiality in California).

188. *Infra* Part III.B (discussing threats to judicial impartiality in California).

189. *See* BERRY, *supra* note 20, at 7–8 (describing how elected judges tend to sentence more punitively the closer they get to a retention election).

190. *See id.* at 3–5 (detailing the pressures judges face in media portrayals of their decisions).

191. *See, e.g.*, Lonni Rivera, *Brock Turner Inspires CA Bill That Would Close Loophole on Sex Assault Cases*, ABC 7 NEWS (Sept. 2, 2016), http://abc7news.com/news/brock-turner-inspires-ca-bill-that-would-close-loophole-on-sex-assault-cases/1496715/ (on file with *The University of the Pacific Law Review*) (referring to existing law before the bill as providing a "loophole" for sexual assault offenders); Sonam Sheth, *California Bill Closes Major Sexual-Assault Loophole Days Before Brock Turner's Release*, BUS. INSIDER (Aug. 31, 2016, 2:04 PM), http://www.businessinsider.com/california-bill-closes-major-sexual-assault-loophole-before-brock-turners-release-2016-8 (on file with *The University of the Pacific Law Review*) (same).

192. CAL. PENAL CODE § 1203.065 (amended by 2016 Cal. Stat. ch. 863).

193. *Id.* §§ 263.1 (enacted by 2016 Cal. Stat. ch. 848), 1203.065 (amended by 2016 Cal. Stat. ch. 863); *see also id.* § 264(a) (providing that the minimum sentence for a rape conviction is three years imprisonment).

194. *See* ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 195 (discussing the unfair sentences that result from basing legislation off of the "worst case scenario" crime).

Even if reforms did need to be made to California's sexual assault laws, this was not the way to do it—basing legislation off of the "worst case scenario," the "crime of the month" that sparked public outrage calling for new laws, ensures bad policy and overly punitive statutes.[195] It almost inevitably leads to the imposition of longer sentences than is necessary for many offenders who did not commit the equivalent of the "worst case scenario" crime that set the bar for punishment.[196]

B. Judges Cannot be Impartial Arbiters of the Law When Their Job Security Depends on Public Satisfaction

The judicial branch of any American government, state or federal, should be neutral and detached, removed from politics.[197] In fact, the first canon of California's Code of Judicial Ethics provides, "[a] judge shall uphold the integrity and independence of the judiciary."[198] However, two facets of the law in some states, both of which are present in California, seriously threaten the impartiality of the judicial branch: the availability to the public of recall to take a judge off the bench and the system of electing judges to the bench.[199] Former Los Angeles County Superior Court Judge Joyce Karlin said it well in her controversial decision giving probation and no jail time to a woman convicted of voluntary manslaughter: "[J]ustice is never served when public opinion, prejudice, revenge or unwarranted sympathy are considered by a sentencing court in resolving a case."[200] Unsurprisingly, Judge Karlin was the subject of an ultimately unsuccessful recall campaign in response to that decision.[201]

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195. *Id.*

196. *Id.*

197. *See, e.g.*, *Code of Conduct for United States Judges*, UNITED STATES COURTS, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#b (last visited Jan. 1, 2017) (on file with *The University of the Pacific Law Review*) ("An independent and honorable judiciary is indispensable to justice in our society."); CAL. COURTS, CALIFORNIA CODE OF JUDICIAL ETHICS 1 (2016), *available at* http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf (on file with *The University of the Pacific Law Review*) ("A judge shall uphold the integrity and independence of the judiciary. . ..[I]ndependence means a judge's freedom from influence or control other than as established by law.").

198. CAL. COURTS, *supra* note 197, at 1.

199. *Supra* Parts III.B.1–2 (describing those issues).

200. People v. Du, No. BA037738 (Super. Ct. L.A. County, 1991) (available in JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW 54 (6th ed. 2012)).

201. Sheryl Stolberg, *Candidate Karlin Lashes Out at Criticism Over Sentence*, L.A. TIMES (Feb. 27, 1992), http://articles.latimes.com/1992-02-27/local/me-4249_1_suspended-sentence (on file with *The University of the Pacific Law Review*).

1. Judicial Recall[202]

California has seen several judicial recall attempts, including a few in recent years that came close to gathering enough votes to get on the ballot.[203] One recent attempt from 2015 targeted Judge M. Marc Kelly of Orange County, who gave a sentence below the statutory minimum, but within his discretion, out of constitutionality concerns.[204] Although that campaign ultimately failed, it still gathered around 85,000 signatures—not an insignificant number.[205] Currently, Stanford law professor Michele Dauber, a family friend of the victim in *People v. Turner*,[206] is leading a campaign to recall Judge Persky for the six-month sentence he gave Brock Turner.[207] These campaigns gather much of their momentum from social media; for example, the Persky recall campaign is very active on Twitter[208] and Facebook.[209] Further, many online articles tend to take the facts of high-profile cases like, *People v. Turner*, out of context and inflame passions based on inaccurate reports, where many of the people becoming inflamed by such misinformation are the same people who will end up voting on reactive ballot initiatives or judicial recalls.[210] One law professor at the University of San Diego said that the complex issues that actually go into judicial deliberations are "too cerebral for Facebook," and that he "hopes voters understand what's at stake," not only in the Persky campaign, but with any

202. *See supra* Part II.D (explaining the law of recall in California).

203. *Recall History in California*, CAL. SECRETARY ST., http://www.sos.ca.gov/elections/ recalls/recall-history-california-1913-present/ (last visited Jan. 1, 2017) (on file with *The University of the Pacific Law Review*).

204. *Orange County Judge M. Marc Kelly: Recall Effort is an Injustice*, L.A. TIMES (May 19, 2015, 5:00 AM), http://www.latimes.com/opinion/editorials/la-ed-orange-county-judge-recall-campaign-20150519-story.html (on file with *The University of the Pacific Law Review*).

205. Hager, *supra* note 130; *Orange County Judge M. Marc Kelly: Recall Effort is an Injustice*, *supra* note 204.

206. Katy Murphy, *Stanford Professor Michele Dauber Leads Effort to Recall Judge*, SANTA CRUZ SENTINEL (June 9, 2016, 7:31 PM), http://www.santacruzsentinel.com/article/NE/20160609/NEWS/160609736 (on file with *The University of the Pacific Law Review*).

207. *Recall Judge Aaron Persky*, *supra* note 11.

208. Recall Persky (@RecallPersky), TWITTER, https://twitter.com/recallpersky (last visited Dec. 29, 2016) (on file with *The University of the Pacific Law Review*).

209. Recall Aaron Persky (@recallaaronpersky), FACEBOOK, https://www.facebook.com/ recallaaronpersky/ (last visited Dec. 29, 2016) (on file with *The University of the Pacific Law Review*).

210. *See, e.g.*, Bradford Richardson, *Social Media Turns Stanford Sexual Assault Victim's 'Tiny Fire' Into a Blaze of Fury*, WASH. TIMES (June 7, 2016), http://www.washingtontimes.com/news/2016/jun/7/ brock-turners-rape-victim-ignites-social-media-fur/ (on file with *The University of the Pacific Law Review*) (emphasizing that the statutory maximum sentence for Turner's crime was fourteen years in prison, without giving any information on the statutory minimum or what factors go into a judge's discretionary determination); Elias Leight, *Brock Turner to be Free After Three Months for 'Good Behavior,'* ROLLING STONE (Aug. 30, 2016), http://www.rollingstone.com/culture/news/brock-turner-to-be-released-from-jail-for-good-behavior-w436997 (on file with *The University of the Pacific Law Review*) (same). *See also* Grow, *supra* note 4 (referring to Turner as a "rapist," when in fact he was not actually convicted of rape but rather of a form of sexual assault); Volpenhein, *supra* note 4 (same).

attempt at judicial recall.[211] Snippets and sound bytes on Facebook and other social media sites cannot adequately educate the general population about complex issues that take a law school education and decades of experience to fully understand.[212] Judges must carefully balance different and often conflicting purposes of punishment when deciding individual sentences.[213] They are also in a unique position that can never be replicated; for example, the judge sees witnesses first-hand to determine their credibility, and sees the defendant, often interacting with him or her personally, and can determine the sincerity of any statement the defendant makes at sentencing.[214] An article on Facebook cannot give the average reader the full picture of what went into a judge's decision.[215]

These articles describing the case are not the only misleading information surrounding *People v. Turner*—the campaign to recall Judge Persky has contributed to the misinformation as well.[216] The campaign website lists a few cases that Judge Persky decided around the same time as *People v. Turner* in attempt to show that he is biased in favor of college athletes like Turner.[217] However, the campaign generally fails to describe important differences between Turner and other defendants it compares him to; for example, the campaign uses *People v. Ramirez* to argue that Judge Persky gave a supposedly similar offender a longer sentence because he is a minority.[218] What the campaign does not describe are the numerous legally significant differences between Ramirez and Turner—Ramirez was 32 and Turner 20 years old at the time of sentencing, and Turner was intoxicated during commission of the crime, while Ramirez was not.[219] Youth and intoxication are legally relevant mitigating factors that Turner's

211. Katherine Seligman, *Judging the Judges: Recall May Become Easier, But Is That Better?*, CALMATTERS (Aug. 25, 2016), https://calmatters.org/articles/judging-the-judges-recalls-may-become-easier-but-is-that-better/ (on file with *The University of the Pacific Law Review*).

212. *Id.*; Robinson, Cahill & Mohammad, *supra* note 118, at 2.

213. CAL. R. CT. 4.410(a) (2017).

214. John L. Kane, *Judging Credibility*, 33 LITIGATION 31, 31 (2007).

215. Seligman, *supra* note 211.

216. *Infra* Part III.B.1.

217. *Response to the Commission on Judicial Performance*, RECALL JUDGE AARON PERSKY, http://www.recallaaronpersky.com/response_to_the_commission_on_judicial_performance (last visited Feb. 7, 2017) (on file with *The University of the Pacific Law Review*).

218. *Id.*; Harry Cockburn, *Judge Who Sentenced Stanford Rape Case's Brock Turner to Six Months Gives Latino Man Three Years for Similar Crime*, INDEP. (June 30, 2016), http://www.independent.co.uk/news/world/americas/stanford-rape-case-judge-aaron-persky-brock-turner-latino-man-sentence-a7110586.html (on file with *The University of the Pacific Law Review*).

219. Jason Silverstein, *Brock Turner Judge Gives Harsher Sentence to an Immigrant*, N.Y. DAILY NEWS (June 27, 2016, 10:05 AM), http://www.nydailynews.com/news/national/brock-turner-judge-harsher-sentence-immigrant-article-1.2689471 (on file with *The University of the Pacific Law Review*); Probation Report at 11–12, People v. Turner, No. B1577162 (Cal. Super. Ct. 2016), *available at* https://assets.documentcloud.org/documents/2858997/Probation-officer-s-report-in-Brock-Turner-case.pdf (on file with *The University of the Pacific Law Review*).

probation officer included in her report recommending the light sentence.[220] Further, the two defendants were convicted of different crimes: Ramirez pled guilty to sexual penetration by force, for which Judge Persky gave him the minimum statutory sentence of three years, while Turner never pled guilty and went to trial on different charges altogether.[221]

Social media and the availability of recall, as a reaction to unpopular but lawful sentences, is a volatile combination that poses a serious threat to the impartiality of the judicial branch.[222] Most scholars and commentators agree that judicial recall should be a backup measure used in cases of actual judicial malfeasance, not mere public dissatisfaction with a lawful sentence.[223] If the campaign to recall Judge Persky is successful, the public might begin to see judicial recall campaigns as an appropriate and effective solution to whatever criminal case they are dissatisfied with.[224] While this Comment does not necessarily propose a change to the structure of California's judicial branch, this active threat to judicial impartiality further highlights the necessity of insulating the criminal justice system from public reaction wherever possible.[225]

A judicial recall campaign, like the one to recall Judge Persky, is ideal fodder for groups like the California Correctional Peace Officers Association ("CCPOA") who have a vested interest in keeping the prison population high.[226] The CCPOA is California's state prison guard union.[227] The union has put large amounts of money into California's "tough on crime" movement, including over $100,000 behind the Three Strikes Law in 1994, making it the second-largest contributor to that initiative.[228] The CCPOA has been behind several more "tough on crime" efforts: it has provided over $120,000 to victims' rights groups; spent

220. Probation Report at 11–12, People v. Turner, No. B1577162 (Cal. Super. Ct. 2016), *available at* https://assets. documentcloud.org/documents/2858997/Probation-officer-s-report-in-Brock-Turner-case.pdf (on file with *The University of the Pacific Law Review*).

221. Silverstein, *supra* note 219; Cockburn, *supra* note 218.

222. Seligman, *supra* note 211 (predicting that "growing mistrust in the justice system and the rise of social media" could lead to more frequent judicial recalls).

223. Meares, *supra* note 122 ("[P]oliticized judging undermines the legitimacy of the criminal justice system. . . . . If we want to have an independent judiciary we must stop electing it."); *Orange County Judge M. Marc Kelly: Recall Effort is an Injustice*, *supra* note 204 ("The essence of the American justice system is that rulings are made by judges who are shielded from the heat of public emotion and pressure of politics. . . . Convicted criminals are not sentenced by mob decision.").

224. Seligman, *supra* note 211.

225. *See supra* Part II.B–D (describing the various ways in which California's criminal justice system is particularly susceptible to impulsive reactions in public sentiment).

226. Tim Kowal, *The Role of the Prison Guards Union in California's Troubled Prison System*, UNION WATCH (June 15, 2011), http://unionwatch.org/the-role-of-the-prison-guards-union-in-californias-troubled-prison-system/ (on file with *The University of the Pacific Law Review*).

227. *CCPOA–About Us*, CAL. CORRECTIONAL PEACE OFFICERS ASS'N, https://www.ccpoa.org/about-us/ (last visited Feb. 5, 2017) (on file with *The University of the Pacific Law Review*).

228. Ray Downs, *Corporations Are Cashing in on California's Prison Overcrowding Crisis*, VICE (Oct. 3, 2013, 6:00 AM), https://www.vice.com/en_us/article/corporations-are-cashing-in-on-californias-prison-overcrowding-crisis (on file with *The University of the Pacific Law Review*).

over one million dollars in opposition to Proposition 66, which would have restricted the scope of Three Strikes if it had passed in 2004; gave over $75,000 to opponents of Proposition 36, which ultimately was successful despite CCPOA's efforts and passed in 2000, increasing offenders' substance abuse treatment opportunities; and successfully opposed Governor Schwarzenegger's rehabilitation-focused method of reducing the state's prison population.[229] The CCPOA is of course doing so to benefit its members, whose jobs "depend on prisons being open for business . . . . More prisoners lead to more prisons."[230] As discussed throughout this Comment, sentence enhancements and other "tough on crime" legislation is often borne from the combination of misinformation, public overreaction to isolated incidents of crime, and politicians' ability to capitalize on that sentiment to pass new laws.[231] The CCPOA has already supported many of California's "tough on crime" laws, notably Three Strikes.[232] Whether the CCPOA ends up contributing to the campaign to recall Judge Persky, or has already done so, the perceived availability of such a measure as a solution to public dissatisfaction with a lawful sentence is an ideal time for such an organization to take advantage of public sentiment and support an opportunity for more "tough on crime" legislation to ultimately secure more jobs for its members.[233]

2. Judicial Elections

As mentioned above, this Comment does not go so far as to recommend states stop electing judges in favor of appointing them, as is done in the federal system.[234] Rather, in this section, this Comment analyzes current issues with the electoral system[235] and later describes how the MPC Sentencing revisions could help alleviate those problems in California.[236]

The recent Brennan Center study, noted above,[237] details the effect that elections have on judges presiding over criminal cases.[238] The paper summarized several studies done on the interplay between judicial decision-making and judicial elections.[239] It found that elected trial judges tend to give more punitive

229. *Id.*

230. *Id.*

231. *Supra* Part III (examining these conditions and how they give rise to overly punitive legislation).

232. *Id.*

233. *Id.*; *see supra* Part III (detailing how many "tough on crime" laws arise from these societal situations).

234. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 182–87.

235. *Infra* Part III.B.2 (describing issues with electing judges).

236. *Infra* Part IV (analyzing how the Model Penal Code Sentencing revisions would help California).

237. *Supra* Part II.B (mentioning the Brennan Center study and its findings on judicial impartiality).

238. BERRY, *supra* note 20.

239. *Id.* at 7.

sentences and appellate judges tend to vote to uphold capital sentences more frequently the closer they are to a retention election.[240] These increases are not warranted by any need to protect the public from the offenders.[241] The authors of one of the individual studies included in the Brennan Center report stated, "[a]ll judges, even the most punitive, increase their sentences as re-election nears."[242] Such an influence on sentencing decisions is a threat to the integrity of the criminal justice system—should it be relevant to an individual defendant's rights whether the decision will look good in the judge's next campaign or put the judge at risk for a "soft on crime" attack ad?[243]

This finding goes hand-in-hand with the actual campaigns judges run during elections.[244] Television ads are a popular medium for candidates to connect with voters, and many of them attack the competition.[245] Unsurprisingly, "tough on crime" is an ever-popular platform, as is vilifying opponents for being "soft on crime."[246] Negative attack ads tend to choose a few particularly "incendiary issues" from the judge's past rulings, and portray those decisions in such a way to give viewers the impression that the judge is on the criminal's side.[247] These ads give no context to the case, such as any mitigating factors that would have called for a lesser sentence or anywhere close to the whole factual story.[248] Rather, similar to many of the recent articles on *People v. Turner* discussed above,[249] these ads give an extremely brief, misleading characterization designed to appeal to viewers' most basal emotions.[250] For example, one television ad in an Illinois Supreme Court race told viewers that the judge in question "gave easy bail to a woman later found guilty of murdering her 4-year-old stepson," a claim that in reality tells the viewer virtually nothing about the judge's ability to serve on the bench or even the propriety of his decision in the case.[251] A judge's past criminal defense work is another area attacked by opposing candidates.[252] One ad attacking judicial candidate Bridget McCormack for her past criminal defense work circulated during the 2012 Michigan Supreme Court election cycle.[253] The

240. *Id.* at 7, 9–10.

241. Vitiello *Judicial Activism*, *supra* note 159, at 1069–70.

242. Adam Liptak, *Judges Who Are Elected Like Politicians Tend to Act Like Them*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts.html (on file with *The University of the Pacific Law Review*).

243. *Supra* Part III.B.2; *infra* Part III.B.2.

244. BERRY, *supra* note 20, at 3–6.

245. *Id.*

246. *Id.*

247. *Id.* at 3.

248. *Id.* at 3–4.

249. *Infra* Part I (giving examples of articles discussing the case).

250. BERRY, *supra* note 20, at 3–4.

251. *Id.* at 4.

252. *Id.* at 4–5.

253. *Id.*

ad featured the mother of a soldier who had been killed in Afghanistan saying, "[M]y son's a hero and fought to protect us. Bridget McCormack volunteered to help free a terrorist … [H]ow could you?"[254]

One former justice of the Mississippi Supreme Court stated, "[j]udges who are running for reelection do keep in mind what the next 30-second ad is going to look like."[255] It should come as no surprise, then, that judges' sentencing decisions can be influenced by upcoming elections, either consciously or subconsciously.[256] If these inaccurate ads are the main way by which voters make their decisions, and if judges want to acquire and maintain their seats on the bench, they would be hard-pressed to not have at least a fleeting thought about how their decisions in particularly contentious cases might come back to haunt them come election season.[257]

IV. THE MODEL PENAL CODE SENTENCING REVISIONS AND WHY CALIFORNIA NEEDS THEM

California remains one of the "few hinterland states . . . that seem to live in a parallel universe untouched by the [Model Penal] Code."[258] Its sentencing provisions are no exception.[259] This section first summarizes the major changes in the 2017 Model Penal Code Sentencing ("MPCS") provisions and examines sentencing commission models the ALI considered from around the country—both as what to emulate and what to avoid.[260] Next, it analyzes how California might have fared differently under the circumstances that gave rise to legislation like Three Strikes and Chapters 848 and 863 if the state had the MPCS provisions in place.[261] Finally, this Comment speculates as to potential issues the state might face if it does adopt the MPCS provisions.[262]

A. The revised Model Penal Code Sentencing provisions

The revision of the MPCS is the ALI's "most senior ongoing project."[263] Most relevant for this Comment are the revisions of sections 1.02(2) and 7.09,

254. *Id.*

255. *Id.* at 7.

256. *Id.*

257. *Id.*

258. Joshua Dressler, *The Model Penal Code: Is It Like a Classic Movie in Need of a Remake?*, 1 OHIO ST. J. CRIM. L. 157, 157 (2003).

259. *Id.*

260. *Infra* Part IV.A (summarizing the 2017 Model Penal Code Sentencing revisions).

261. *Infra* Part IV.B (applying the provisions to California's history of reactive legislation).

262. *Infra* Part IV.C (describing potential issues that the state might face in adopting the Model Penal Code Sentencing provisions).

263. MPCS, *supra* note 25.

laying out the purposes of sentencing and the scope of appellate review, respectively, and articles 6 and 7, establishing a sentencing commission and providing guidelines for it to work within.[264]

1. Section 1.02(2)—Purposes of Sentencing

In this section, the revised MPCS provisions establish two punishment tiers: those that must be followed, and those that must be followed when "reasonably feasible."[265] In every individual sentencing decision, "all official actors in the sentencing system" must "render sentences . . . within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders."[266] Next, whenever "reasonably feasible," these actors must attempt to "achieve offender rehabilitation, general deterrence, incapacitation of dangerous offenders, restitution to crime victims, preservation of families, and reintegration of offenders into the law-abiding community," so long as these goals can be achieved within the boundaries enunciated in the previous mandatory section.[267] Finally, the third subsection is particularly relevant in light of California's issues discussed above: sentences must be "no more severe than necessary to achieve the applicable purposes" in the first two subsections.[268] This section further provides that in the administration of the state's sentencing system, one of the primary purposes is to "preserve judicial discretion to individualize sentences within a framework of law."[269]

Already, this first section addresses many of the problems described earlier in this Comment.[270] One of the main issues with short-sighted, reactive legislation imposing mandatory minimum sentences is that the bar for sentencing is set by the "worst case scenario" crime, and all offenders are punished as if they had committed that worst case scenario crime.[271] Such unjustified mandatory minimums have no place in an MPC-based sentencing system, particularly in conjunction with the provision that the overall administrative structure of the sentencing system "preserve judicial discretion to individualize sentences within a framework of law."[272] The commentary following proposed MPCS section 1.02(2) provides that the revisions "incorporate[] meaningful proportionality limitations," such that "no crime-reductive or other utilitarian purpose of sentencing may justify a punishment outside the 'range of severity'

264. *Id.* §§ 1.02(2), 7.09, arts. 6, 7 (including those sections).
265. *Id.* § 1.02(2)(2)(a)(i)–(ii).
266. *Id.* § 1.02(2)(2)(a)(i).
267. *Id.* § 1.02(2)(2)(a)(ii).
268. *Id.* § 1.02(2)(2)(a)(iii).
269. *Id.* § 1.02(2)(2)(b)(i).
270. *Supra* Parts I–III (describing current issues in California's criminal justice system).
271. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 195.
272. MPCS, *supra* note 25, § 1.02(2)(2)(b)(i).

proportionate" to the three goals enunciated in section 1.02(2)(a)(i).[273] The commentary also addresses the issue of public resource preservation by avoiding unnecessarily long sentences: The principle "that sentences should be 'no more severe than necessary' to serve their authorized purposes . . . guards against the needless expenditure of correctional resources."[274]

2. Section 7.09—Scope of Appellate Review

The MPC's focus on proportionality does not end with the trial court, but remains central to appellate review as well.[275] Section 7.09(1) specifies that the appellate court must work within the purposes of punishment laid out in section 1.02(2), one of which is to "render sentences . . . within a range of severity proportionate to the gravity of offenses,"[276] and to further the goal of preserving "substantial judicial discretion to individualize sentences within a framework of law."[277] This section also establishes an important foundation for proportionality review.[278] The appellate court is allowed to engage in "subconstitutional" proportionality review to address sentences that would not reach the extremely high threshold required to violate the Eighth Amendment's Cruel and Unusual Punishment Clause, but are nonetheless unjustifiably severe.[279] This section provides that the appellate court may modify any sentence in any way—even if the trial court imposed the sentence as required by a mandatory minimum statute—if the appellate court finds it "disproportionately severe."[280] Further, the appellate court is to "use its independent judgment" in subconstitutional proportionality review.[281] This section ensures that proportionality in sentencing is furthered beyond the trial court into appellate review, and importantly gives appellate courts the grounds to review sentences for subconstitutional disproportionality.[282]

3. The Structure of the Sentencing Commission

The MPCS provisions establishing a sentencing commission are nuanced.[283] Regarding the commission's membership, the MPCS requires judges of each

273. *Id.* § 1.02(2) cmt. at 2.
274. *Id.* § 1.02(2) cmt. at 11.
275. *Id.* § 7.09(5)(b).
276. *Id.* § 1.02(2)(2)(a)(i).
277. *Id.* § 7.09(1).
278. *Id.*
279. *Id.*, § 7.09(5)(b) cmt.
280. *Id.* § 7.09(5)(b).
281. *Id.*
282. *Id.*
283. *Infra* Part IV.A.2 (summarizing the sentencing commission provisions of the MPCS).

level of state court to be a part of the body, as well as an equal number of prosecutors and defense attorneys, a chief of police, an academic "with experience in criminal-justice research," and members of the public, one being "a victim of a crime defined as a felony, and one of whom shall be a rehabilitated ex-inmate of a prison in the state."[284] Clearly, the ALI intends for sentencing commissions created under the guide of the MPC to consist of a well-rounded body able to intelligently discuss issues in criminal justice.[285] Presumably, such a commission would be more likely to promulgate well-nuanced laws with less political influence than the legislature.[286] Importantly, none of the members are elected to the commission, but rather are appointed— the judges appointed by the chief justice of the state supreme court, and the others appointed by the state governor.[287] This further insulates the guideline-establishing process from public sentiment.[288]

In its first few years of existence, the commission is charged with several tasks, including researching the state's current sentencing and measuring its effectiveness against the purposes of punishment laid out in section 1.02(2).[289] Further, the MPC provides the commission with "ongoing responsibilities" intended to heighten accountability and transparency, as well as to ensure that all sentences remain justified: among other duties, the commission must regularly revise sentencing guidelines as necessary and develop programs to track criminal cases to watch for discriminatory effects and other issues.[290] The commission would also be responsible for informing the legislature and the public about the impact existing and proposed legislation has on state resources.[291]

The structure of the MPC-designed sentencing commission addresses several issues California struggles with today.[292] The commission's diverse makeup, as well as appointing rather than electing members, helps ensure that the guidelines will be well-balanced, and be impervious to the influence of special interests or political parties.[293] Legislators' political deference to the public's reaction to the crime of the month, as well as funds from special interests both in the legislature and with ballot initiatives, are responsible for much of the overly punitive and complex legislation California struggles with today.[294] The sentencing commission provides the sentencing system with more political insulation than

284. MPCS, *supra* note 25, § 6A.02.

285. *Id.*

286. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 184.

287. MPCS, *supra* note 25, § 6A.02.

288. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 184.

289. MPCS, *supra* note 25, § 6A.04(3)(a).

290. *Id.*

291. *Id.* § 6A.07.

292. *Supra* Part III (detailing California's current issues in its criminal justice system).

293. MPCS, *supra* note 25 § 6A.02; ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 192–93.

294. *Supra* Part II.C (describing California's legislative process).

does California's current system.[295] Further, because the commission is charged with checking its guidelines against the purposes of punishment outlined in MPC section 1.02(2), it would ideally not come up with the next Three Strikes Law that scholars call "a choice made in a vacuum" with no articulable penological philosophy.[296]

4. The Sentencing Guidelines Promulgated by the Commission

The ALI decided that the sentencing commission should promulgate presumptive, rather than advisory, guidelines: "Presumptive-guidelines systems, where provision has been made for appellate sentence review, have generally succeeded in promoting this longstanding law-reform goal [of meaningful appellate review of the substance of sentencing decisions]."[297] This insulates judicial discretion within the guidelines; if the guidelines are presumptive and their application is not optional to the judge, a sentence properly within those guidelines does not merit public backlash.[298] Importantly, the ALI emphasizes that the commission must base these guidelines on its "collective judgment for *ordinary cases* of the kind governed by each presumptive sentence."[299] This provision directly addresses the "worst-case scenario" problem by ensuring that the presumptive guidelines are based on the "ordinary case," not the particularly tragic one garnering the most media attention.[300] Finally, one provision is the antithesis of unjustified mandatory minimum legislation: "The guidelines should invite sentencing courts to individualize sentencing decisions in light of the purposes in section 1.02(2)(a), and the guidelines may not foreclose the individualization of sentences in light of those considerations."[301] The ALI was sure to be as explicit as possible to that point, providing in the same section that guidelines the commission promulgates "shall not reflect or incorporate the terms of statutory mandatory-penalty provisions."[302]

The MPCS provisions also detail what factors the commission should consider, or allow the judge to consider, in handing down sentences.[303] The commission has flexibility to consider any factor relevant to the section 1.02(2) purposes of punishment.[304] Notably, the section provides for consideration of

295. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 184.
296. *Id.* at 185.
297. MPCS, *supra* note 25, § 1.02(2) cmt. at 34.
298. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 184.
299. MPCS, *supra* note 25 § 6B.03(2).
300. *Id.*; ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 195.
301. MPCS, *supra* note 25, § 6B.03(4).
302. *Id.* § 6B.03(6).
303. *Id.* § 6B.06.
304. *Id.* § 6B.06(1).

individual offender characteristics but "only as grounds to reduce the severity of sentences that would otherwise be recommended," when they indicate "circumstances of hardship, deprivation, vulnerability, or handicap."[305]

In contrast, the MPCS provisions are stacked against considering criminal history.[306] "It is well established in criminology that criminal record is a useful predictor of future criminality, perhaps the most powerful of all variables, but is not as good as actuarial, multi-factor risk-assessment instruments that incorporate criminal history along with other predictive factors."[307] Section 6B.07 provides that a sentencing commission must "explain and justify any use of criminal history" within the purposes of punishment enumerated in section 1.02(2).[308] Overall, section 6B.07 discourages against any use of criminal history, requiring the commission to keep in mind "offenders have already been punished for their prior convictions," and that "the use of criminal history by itself may over-predict" an offender's risk of recidivism, and finally that the use of criminal history provisions in general may have discriminatory effects on disadvantaged groups.[309] The commentary to this section notes that criminal history can be useful in determining a proper sentence, but only when it accompanies other predictive factors in a "well-constructed" risk-assessment tool.[310] In fact, the report cites Virginia's Criminal Sentencing Commission as an example – using multi-factor tests that the commission identifies as low-risk offenders who could be safely "diverted from incarceration."[311] These totaled about half of the nonviolent offender population.[312]

Finally, the MPCS provisions preserve judicial discretion.[313] Although the commission's guidelines have presumptive force of law, the sentencing judge may depart from them "on the existence of one or more aggravating or mitigating factors enumerated in the guidelines or other factors grounded in the purposes of § 1.02(2)(a), provided the factors take the case outside the realm of an ordinary case."[314] The MPCS also provides a solution for one issue contributing to California's prison overcrowding: geriatric prisoners who pose no threat to society.[315] "An offender under any imprisonment sentence shall be eligible for judicial modification of sentence in circumstances of the prisoner's advanced age, physical or mental infirmity . . . or other compelling reasons warranting

305. *Id.* § 6B.06(4)(a).
306. *Id.* § 6B.06(2)(b).
307. *Id.* § 6B.07 cmt. at 375.
308. *Id.* § 6B.07(1).
309. *Id.* § 6B.07(1)(a)-(c).
310. *Id.* § 6B.07 cmt. at 368.
311. *Id.* § 6B.07 cmt. at 375.
312. *Id.* § 6B.07 cmt. at 375.
313. *Id.* § 6B.03(4).
314. *Id.* § 7.XX(2)(a).
315. *Id.* § 305.7(1); Vitiello *Judicial Activism*, *supra* note 159, at 1069–70.

modification of sentence."[316] The MPCS then outlines the procedures for such a modification.[317]

5. Other Sentencing Commission Models

The ALI based the MPC sentencing commission structure not merely on conjecture, but rather on several successful models from throughout the country.[318] One area of influence is the MPC commission's focus on proportionality, among other purposes of punishment.[319] The ALI cited successful state sentencing commissions that similarly focus on proportionality; for example, Minnesota's guidelines provide, "[t]he purpose of the Sentencing Guidelines is to . . . ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense and the offender's criminal history."[320] Virginia's guidelines are similar—the statutory purpose of its sentencing commission is in part to "achieve the goals of certainty, consistency, and adequacy of punishment with due regard to the seriousness of the offense, [and] the dangerousness of the offender. . . ."[321] In recognizing the importance of setting guidelines based on ordinary cases, rather than the "worst-case scenario" situation, the ALI acknowledged states that have implemented that policy.[322] Kansas is one of these states, and its guidelines are intended to "establish equity among like offenders in typical case scenarios."[323] In short, the theoretical underpinnings of the MPC sentencing commission are modeled after successful sentencing commissions throughout the country.[324]

The ALI also adopted resource management tools of successful sentencing commissions.[325] It looked to sentencing commissions whose prison growth rates over several years were slower than the national average, including Minnesota, North Carolina, and Virginia.[326] The ALI found that one "important tool" utilized in these states is the "correctional-population forecasting model," and thus

316. MPCS, *supra* note 25, § 305.7(1).

317. *Id.* § 305.7.

318. *Id.*§ 1.02(2) cmt. at 19–20.

319. *Id.* § 1.02(2)(2)(a)(i).

320. MINN. SENTENCING GUIDELINES AND COMMENTARY § 1(A) (MINN. SENTENCING GUIDELINES COMM'N 2016), *available at* http://mn.gov/msgc-stat/documents/2016%20Guidelines/11_17_2016_Update_August2016_Guidelines.pdf (on file with *The University of the Pacific Law Review*).

321. VA. CODE. ANN. § 17.1-801 (West 2017).

322. MPCS, *supra* note 25, § 6B.03(2); *id.* § 1.02(2) cmt. at 25.

323. KANSAS SENTENCING GUIDELINES DESK REFERENCE MANUAL 31 (KAN. SENTENCING COMM'N 2015), *available at* https://sentencing.ks.gov/docs/default-source/2015-DRM/2015-desk-reference-manual-(text-only).pdf?sfvrsn=0 (on file with *The University of the Pacific Law Review*).

324. *Supra* Part VI.A.4 (discussing sentencing philosophies of states the ALI looked to in designing the MPC sentencing commission).

325. MPCS, *supra* note 25, § 1.02(2) cmt. at 16.

326. *Id.* § 1.02(2) cmt. at 16.

incorporated that tool into section 6A.07 of the new MPCS.[327] Generally, having a sentencing commission promulgating effective guidelines and actively reviewing the state's criminal justice system tends to reduce or stop prison population growth trends in these states.[328] The ALI incorporated this process of review and analysis by requiring that the MPC commission periodically analyze the effectiveness of its sentencing guidelines against the enumerated purposes of punishment and compare its data to other jurisdictions.[329]

Victim restitution is another area where the influence of other sentencing commissions is apparent in the MPCS provisions.[330] Restitution is an explicit purpose for the MPC sentencing commission, but is only to be pursued "when reasonably feasible," so as not to entirely drain a defendant of his resources and prevent him from effectively reentering society.[331] In its commentary, the ALI listed several states that consider the offender's financial circumstances when deciding whether an order to pay restitution is appropriate, including Minnesota[332] and Massachusetts.[333]

The ALI was similarly cognizant of less successful sentencing commission models and made deliberate choices to not incorporate those into the MPC revisions.[334] For example, MPCS considers a victim "any person who has suffered physical, emotional, or financial harm as the direct result of the commission of a criminal offense."[335] In contrast, the United States Sentencing Guidelines allow "victim" to be interpreted as broadly as an entire community, even if only a few were actually harmed by the individual's crime.[336] Given the MPC's focus on proportionality, the ALI rejected that "broad and amorphous conception of victims entitled to restitution as part of the criminal sentence."[337] California also has an extensive listing of who or what may be considered a victim for purposes of restitution: a corporation, a person living in the same house as the actual victim, family members of the actual victim, and governmental entities tasked with restoring property the individual defaced.[338]

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327. *Id.*; *id.* § 6A.07.

328. *Id.* § 1.02(2) cmt. at 37–38.

329. *Id.* § 6A.04(3)(a).

330. *Id.* § 6.04A cmt. at 62–63.

331. *Id.* § 1.02(2)(2)(a)(ii).

332. MINN. STAT. § 611A.045(1)(a)(2) (2017) "[I]n determining whether to order restitution and the amount of the restitution, [the court] shall consider the following factors. . .(2) the income, resources, and obligations of the defendant.").

333. MASS. GEN. LAWS ch. 276, § 92A ("In so determining, the court shall consider the financial resources of the defendant and the burden restitution will impose on the defendant. The defendant's present and future ability to make such restitution shall be considered.").

334. MPCS, *supra* note 25, art. 6 cmt. at 106.

335. *Id.* § 6.04A(3).

336. 18 U.S.C. § 3663(c)(2)(A); MPCS, *supra* note 25, art. 6 cmt. at 106.

337. MPCS, *supra* note 25, art. 6 cmt. at 106.

338. CAL. PENAL CODE § 1202.4(k) (West 2017).

For similar reasons, the ALI rejected California's elaborate listing.[339] The ALI also rejected California's approach to restitution—as described below, California not only requires that the court order full restitution, but also expressly proscribes consideration of the defendant's financial situation when deciding whether to order restitution and determining the restitution amount.[340]

B. How Might an MPC California Have Dealt with Polly Klaas' Murder or Brock Turner's Sentence?

As described above, the kidnapping and murder of twelve-year-old Polly Klaas provided the momentum for the enactment of the Three Strikes Law, and public outrage over Brock Turner's relatively short sentence inspired two bills and a judicial recall campaign.[341]Three Strikes has proven problematic in California for many reasons, including its lack of a focused penological purpose—the only conceivable justifications are incapacitation and deterrence, but as previously discussed, even those fade away in light of the excessive social cost of imprisoning offenders far longer than necessary.[342] An MPC-designed sentencing commission, had it been in place at the time, would have helped California in at least two distinct ways: the commission's sheer existence would have provided more of a buffer from public sentiment and politics that provided the impetus for such a far-reaching legislation;[343] and the requirement that the commission promulgate all of its guidelines within the clear penological purposes laid out in section 1.02(2) of the MPC would have reigned in Three Strikes' excesses and ensured a more justifiable law.[344] Further, the commission's presumption against considering criminal history would have lessened much of the severity of the focus on recidivism in the Three Strikes Law.[345]

The sentencing commission would have provided much of the same protection to California's sentencing system in the wake of public outrage over *People v. Turner*.[346] Rather than swiftly adopting two bills that effectively impose a three-year mandatory minimum prison term and strip the sentencing judge's discretion,[347] the commission would have neutrally, and intelligently,

339. MPCS, *supra* note 25, art. 6 cmt. at 107.

340. CAL. PENAL CODE § 1202.4(g) (West 2017).

341. *Supra* Part III.A (summarizing instances of reactive legislation in California).

342. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 215; Vitiello *Three Strikes*, *supra* note 88, at 437–40.

343. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 182–87.

344. MPCS, *supra* note 25, §§ 1.02(2)(a), 6A.04(3)(a).

345. *See id.* § 6B.07(1)(a)–(c) ("The commission shall explain and justify any use of criminal history in the guidelines with reference to the purposes in § 1.02(2)").

346. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 182–87.

347. CAL. PENAL CODE §§ 263.1 (enacted by 2016 Cal. Stat. Ch. 848), 1203.065 (amended by 2016 Cal. Stat. Ch. 863); *see also id.* § 264(a) (providing that the minimum sentence for a rape conviction is three years

discussed the existence of any potential "loopholes" and whether any need exists for additional legislation.[348] In short, an MPC sentencing commission would have forced California to legislate with its brain, not with its emotions.[349]

C. Potential Issues California Might Face In Adopting the MPCS Provisions

Aside from resistance to the magnitude of adopting a new sentencing system, one argument that opponents could make against adopting the MPCS revisions is that doing so will override many of the victims' rights protections that California currently has in place.[350] California's state constitution includes a Victim's Bill of Rights, which in part provides that victims have an unequivocal right to restitution whenever the victim "suffers a loss"—this right is not affected by the "sentence or disposition imposed."[351] Because the MPC requires that "decisions affecting the sentencing of individual offenders" and "all matters affecting the administration of the sentencing system" be carried out within its three enumerated purposes of punishment, no one goal can take unbridled precedence over the others.[352] However, in response to this argument, the MPCS does provide for specific consideration of restitution as a goal of sentencing.[353] The MPCS' secondary tier of punishments explains one of its purposes: "When reasonably feasible, to achieve . . . restitution to crime victims . . . provided these goals are pursued within the boundaries of proportionality in [section 1.02(2)(a)(i)]."[354] Therefore, victims would not go unprotected if California adopted the MPCS provisions; rather, their rights would still be upheld and restitution considered an important goal of punishment; it would just be within a proportional sentencing structure for the betterment of society as a whole.[355]

V. CONCLUSION

California faces two serious problems threatening the integrity of its criminal justice system: precipitous legislation with no clear penological purpose, and a judicial system that provides little protection for judges to exercise the discretion

imprisonment).

348. *See* MPCS, *supra* note 25, § 6A.02 (laying out the makeup of the commission and its deliberations).

349. *Supra* Parts I–III (describing how reactive legislation got California the overly complex penal code that now plagues its criminal justice system).

350. *Compare* CAL. CONST. art. I § 28(b)(13) (providing an absolute right to restitution to victims who have suffered a loss) and MPCS, *supra* note 25, § 1.02(2) (requiring that all individual sentencing decisions be made in light of the enumerated purposes of punishment).

351. *Id.*

352. MPCS, *supra* note 25, § 1.02(2).

353. *Id.* § 1.02(2)(2)(a)(ii).

354. *Id.*

355. *Id.*

necessary to hand down fair and just sentences.[356] It is fine that legislators listen to current public sentiment, but capitalizing on public outrage over the crime of the month to quickly pass sentence enhancements does nothing to further the state's criminal justice system.[357] Rather, it erodes the justifications that must be constantly upheld if we are to have a respectable criminal justice system.[358] Further, California not only elects its judges to the bench, but also allows its residents to initiate recall campaigns for literally any reason; the state constitution actually proscribes any review of the merits of a recall petition.[359] Judges—the actors in the American legal system we depend on to be independent, neutral arbiters of the law—are politically vulnerable in California.[360] California's recall system goes far beyond any plausible need for judicial accountability, enough of which is already provided in the normal election process.[361] Combined with a legislative system untied to any coherent penological philosophy, the judicial vulnerability to public sentiment is a dangerous threat to our criminal justice system.[362]

California's problems are real, beyond the four corners of this Comment.[363] The problems are so real, in fact, that the federal courts, including the United States Supreme Court, have gotten involved.[364] The state is currently under a 2009 federal court order to reduce its prison population to 137.5% of its design capacity; however, as of February 2014, the population remained at 144% capacity.[365] The Supreme Court upheld this order,[366] and the District Court for the Eastern District of California continues to demand a "'durable' solution to California prison overcrowding."[367] With this pressure, California may finally

356. *Supra* Part III (describing those two issues in detail).

357. *Supra* Part III.A (discussing issues with reactive legislation).

358. *Supra* Part III.A (discussing issues with reactive legislation).

359. *Procedure for Recalling State and Local Officials*, *supra* note 125.

360. Hager, *supra* note 130.

361. *See generally* Wiemond Wu, Comment, *Tackling the Crocodile from the Judge's Bathtub: Why "Unregulated" Judicial Recall Should End in California in Light of* People v. Turner, 49 U. PAC. L. REV. 699 (2018) (explaining that the system of electing judges already provides enough accountability, and that this argument does not justify unchecked judicial recall).

362. *Supra* Part III.B (describing current threats to judicial impartiality in California).

363. *Supra* Part III (analyzing the problems in California's criminal justice system).

364. Coleman v. Brown, No. 2:90-cv-0520 LKK DAD (PC), 2014 WL 2889598 (E.D. Cal. Feb. 10, 2014), *available at* http://www.cdcr.ca.gov/News/docs/3jp-Feb-2014/Three-Judge-Court-opinion-2-20-2014.pdf (on file with *The University of the Pacific Law Review*); Brown v. Plata, 563 U.S. 493 (2011).

365. *Id.*

366. Brown v. Plata, 563 U.S. 493 (2011).

367. Coleman v. Brown, No. 2:90-cv-0520 LKK DAD (PC), at *2, 2014 WL 2889598 (E.D. Cal. Feb. 10, 2014), *available at* http://www.cdcr.ca.gov/News/docs/3jp-Feb-2014/Three-Judge-Court-opinion-2-20-2014.pdf (on file with *The University of the Pacific Law Review*).

"be open to adoption of a sentencing commission as part of long-term reforms."[368]

The 2017 Model Penal Code Sentencing revisions could be California's fresh start.[369] The state must find a way to trust judges and their discretion, keep its sentencing laws tied to justified purposes of punishment, and maintain transparency through the process.[370] The "tough on crime" movement may have peaked in the 1990s, yet it is still an essential campaign platform and thus remains a threat to the impartiality of the criminal justice system.[371] A well-structured sentencing commission modeled after the MPCS design would insulate California's criminal justice system from politics, prevent future injustice, and help alleviate the problems that decades of "tough on crime" legislation have created in the state.[372]

368. Michael Vitiello, *Reforming California Sentencing Practice and Policy: Are We There Yet?*, 46 U. PAC. L. REV. 685, 729 (2014).

369. *Supra* Part IV (summarizing the MPCS provisions).

370. ZIMRING, HAWKINS & KAMIN, *supra* note 19, at 214–15; *supra* Part III (describing these as some as California's current criminal justice issues).

371. For example, during the 2016 presidential election, candidate Donald Trump labeled himself the "law and order" candidate and often utilized "tough-on-crime rhetoric" on the campaign trail. Michelle Mark, *Where Donald Trump Stands on Criminal Justice*, BUS. INSIDER (Oct. 8, 2016, 10:03 AM), http://www.businessinsider.com/where-donald-trump-stands-on-criminal-justice-2016-10 (on file with *The University of the Pacific Law Review*).

372. *Supra* Parts I–IV (describing California's issues and how the MPCS provisions could alleviate those problems).