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## Brock Turner: Sorting Through the Noise

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## Brock Turner: Sorting Through the Noise

Michael Vitiello\*

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Take a quick test. Spend a few moments reacting to “Brock Turner.”

Like many others who have read about the case, no doubt you thought, “Stanford rapist,” “white privilege,” “special treatment for an elite college athlete,” and perhaps, “illegal sentence.”

Certainly, my first reaction to reading about the case was similar. Indeed, it was a gut check. Any student of criminal law knows about racial bias in sentencing.<sup>1</sup> That seemed compounded by the fact that college athletes, including African-American stars like Jameis Winston,<sup>2</sup> appear to get a free pass when they engage in sexually inappropriate conduct.<sup>3</sup> Combine that with the insensitive

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\* Distinguished Professor of Law, the University of Pacific, McGeorge School of Law; University of Pennsylvania, J.D., 1974; Swarthmore College, B.A., 1969. I want to extend my thanks to Professor Margaret Russell for comments on this draft and to my research assistant Kendall Fisher for her excellent work on this article.

1. See, e.g., *Racial Disparity*, SENT’G PROJECT, <http://www.sentencingproject.org/issues/racial-disparity/> (last visited Feb. 20, 2017) (on file with *The University of the Pacific Law Review*); THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), available at <http://www.sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> (on file with *The University of the Pacific Law Review*).

2. Marc Tracy, *Jameis Winston and Woman Who Accused Him of Rape Settle Lawsuits*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/sports/football/jameis-winston-erica-kinsman-lawsuit.html> (on file with *The University of the Pacific Law Review*).

3. See, e.g., B. David Ridpath, *The Attitude Toward Sexual and Athlete Violence in College Sports Must Change*, FORBES (Sept. 15, 2016, 9:04 PM), <http://www.forbes.com/sites/bdavidridpath/2016/09/15/the-attitude-toward-sexual-and-athlete-violence-in-college-sports-must-change/#d3e7c36451d1> (on file with *The University of the Pacific Law Review*).

comment Dan Turner, Brock's father, made, now widely disseminated to the effect that a prison sentence urged by the prosecutor was too severe "for twenty minutes of action."<sup>4</sup>

The public response to Judge Aaron Persky's sentence was quite negative even before Stanford Law Professor Michele Landis Dauber, a family friend of the victim, began a recall effort.<sup>5</sup> The recall efforts have kept the case in the public's eye.<sup>6</sup> While some members of the public and legal profession have spoken out against the recall,<sup>7</sup> it seems to be on pace to get on the ballot in the fall of this year.<sup>8</sup> One website, not limited to eligible voters, reports well over a million signatures supporting recall.<sup>9</sup>

As troubling as Turner's sentence is for many observers, a judicial recall poses distinct concerns. That is one focus of this article.<sup>10</sup> Closely related to that theme is a second point: in calling for Judge Persky's recall, are members of the public well-informed about the legality of the sentence that the judge imposed? Has the media offered a fair assessment of the issues in this case?

Part I of this article focuses on the media's role in inflaming public opinion about the case.<sup>11</sup> While the sentence seems far too short in light of Turner's conduct, an examination of California sentencing criteria, as well as the

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4. Michael E. Miller, 'A Steep Price to Pay for 20 Minutes of Action': Dad Defends Stanford Sex Offender, WASH. POST (June 6, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/?utm\\_term=.a7ed5b75f806](https://www.washingtonpost.com/news/morning-mix/wp/2016/06/06/a-steep-price-to-pay-for-20-minutes-of-action-dad-defends-stanford-sex-offender/?utm_term=.a7ed5b75f806) (on file with *The University of the Pacific Law Review*).

5. See, e.g., Dominique Mosbergen, *Ex-Stanford Swimmer Found Guilty of Sexually Assaulting Unconscious Woman on Campus*, HUFFINGTON POST (Mar. 31, 2016, 2:15 AM), [http://www.huffingtonpost.com/entry/brock-turner-stanford-guilty-sexual-assault\\_us\\_56fcacfae4b0a06d5804ce5a](http://www.huffingtonpost.com/entry/brock-turner-stanford-guilty-sexual-assault_us_56fcacfae4b0a06d5804ce5a) (on file with *The University of the Pacific Law Review*) (giving an account of the case and the public reaction before Professor Dauber began the recall campaign after Turner's sentencing on June 3, 2016).

6. Tracey Kaplan, *Brock Turner Case: Judge Orders Persky Recall Campaign to Stop Collecting Signatures for At Least 12 days*, MERCURY NEWS (Aug. 26, 2017), <http://www.mercurynews.com/2017/08/11/brock-turner-case-judge-persky-takes-legal-action-to-block-recall/> (on file with *The University of the Pacific Law Review*).

7. For example, nearly one-third of the graduating class at Stanford Law School wrote an open letter to Professor Dauber urging that she reconsider the recall campaign. *Stanford Law School Graduates Submit Letter to Reconsider Recall Effort of Judge Persky*, ALBERT COBARRUBIAS JUST. PROJECT (June 22, 2016), <https://acjusticeproject.org/2016/06/22/stanford-law-school-graduates-submit-letter-to-reconsider-recall-effort-of-judge-persky/> (on file with *The University of the Pacific Law Review*). Forty-six law professors, including myself, wrote a separate letter similarly questioning the value of the recall. See Tracey Kaplan, *Brock Turner: Leading Law School Professors Issue Letter Opposing Judge's Recall*, MERCURY NEWS (July 27, 2016, 10:04 AM), <http://www.mercurynews.com/2016/07/27/brock-turner-leading-law-school-professors-issue-letter-opposing-judges-recall/> (on file with *The University of the Pacific Law Review*).

8. Elena Kadwany, *Survey of Voters Reveals Support for Recall of Brock Turner Judge*, MOUNTAIN VIEW VOICE (June 28, 2016, 10:08 AM), <http://www.mv-voice.com/news/2016/06/28/survey-of-voters-reveals-support-for-recall-of-brock-turner-judge> (on file with *The University of the Pacific Law Review*).

9. *Remove Judge Aaron Persky From the Bench for Decision in Brock Turner Rape Case*, CHANGE.ORG, <https://www.change.org/p/california-state-house-impeach-judge-aaron-persky> (last visited Feb. 20, 2017, when the petition showed 1,323,516 online signatures) (on file with *The University of the Pacific Law Review*).

10. *Infra* Part II.

11. *Infra* Part I.

probation report that Judge Persky relied on in determining Turner's sentence, makes the case more complicated than widely reported in the media.<sup>12</sup> Part II turns to the larger point: even assuming that one disagrees with Judge Persky's sentencing decision, recall is inappropriate.<sup>13</sup> Many states have begun to reform the criminal sentencing laws that have resulted in mass incarceration.<sup>14</sup> California has been slow to join the national trend, and only did so largely because of a federal court order forcing the state to reduce prison overcrowding.<sup>15</sup> In part, mass incarceration is the result of all-too-familiar tough-on-crime rhetoric, and in California it has led the state to spend unnecessary billions of dollars warehousing offenders who do not represent a serious public safety risk.<sup>16</sup>

Apart from recall, California judges are subject to possible impeachment for improper conduct,<sup>17</sup> review by the California Commission on Judicial Performance,<sup>18</sup> and periodic reelection.<sup>19</sup> Further, among the relatively few states that allow judicial recall, California subjects recall petitions to little oversight, other than submission of a 200-word statement explaining why the proponents urge recall and compliance with signature-gathering requirements.<sup>20</sup> Many commentators see judicial elections as eroding the integrity of the judicial system as money pours into those elections.<sup>21</sup> Recall only invites more mischief, something especially true in light of a judge's limited ability to defend himself or herself in the public arena.<sup>22</sup>

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12. *Infra* Part I.

13. *Infra* Part II.

14. Jeffrey Toobin, *The Milwaukee Experiment: What Can One Prosecutor Do About the Mass Incarceration of African-Americans?*, NEW YORKER (May 11, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> (on file with *The University of the Pacific Law Review*).

15. See, e.g., Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?*, 28 GA. ST. U. L. REV. 1275, 1295–96 (2012).

16. Vitiello, *supra* note 15, at 1281; Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. LA. L. REV. 903, 945–46 (2004).

17. *Judicial Selection in the States - Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., [http://www.judicialselection.com/judicial\\_selection/methods/removal\\_of\\_judges.cfm?state](http://www.judicialselection.com/judicial_selection/methods/removal_of_judges.cfm?state) (last visited Feb. 22, 2017) (on file with *The University of the Pacific Law Review*).

18. *Id.*; *California Commission on Judicial Performance*, CAL. COMMISSION ON JUD. PERFORMANCE, <https://cjp.ca.gov/> (last visited Feb. 22, 2017) (on file with *The University of the Pacific Law Review*).

19. *Judicial Selection in the States*, *supra* note 17.

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

21. See, e.g., AJ Vicens, *How Dark Money is Taking Over Judicial Elections*, MOTHER JONES (Nov. 2014), <http://www.motherjones.com/politics/2014/10/judicial-elections-dark-money> (on file with *The University of the Pacific Law Review*).

22. See Adam Skaggs, *Judges and Politics Don't Mix*, BRENNAN CTR. FOR JUST. (Feb. 12, 2010), <https://www.brennancenter.org/blog/judges-and-politics-dont-mix> (on file with *The University of the Pacific Law Review*).

Ask yourself whether the flow of money into the electoral process is a good thing. Most Americans rebel against the Supreme Court's *Citizens United*<sup>23</sup> holding because it has opened the money floodgates. To date, recall efforts have been infrequent in California, but a successful recall in this instance increases the chances that such efforts will escalate.<sup>24</sup> Californians will all suffer in such a case: sensitizing judges to the anticipated public response to an otherwise lawful sentence will result in unnecessary additional years of imprisonment for criminal defendants.<sup>25</sup>

## PART I. THE MEDIA'S ROLE

### A. *Six Months for Rape?*

A quick Google search suggests the typical media and public response to Turner's case: "Stanford Rapist Brock Turner Registers as a Sex Offender;"<sup>26</sup> "Brock Turner Will Serve the Rest of His Rape Sentence in This Unsuspecting Town;"<sup>27</sup> "Brock Turner's Stanford Rape Case: Everything You Need to Know;"<sup>28</sup> "Stanford Rape Case: Inside the Court Documents;"<sup>29</sup> and "The Brock Turner Rape Case: A Complete Injustice."<sup>30</sup> A *Los Angeles Times* website provides links to "Court Documents: Stanford Rape Case."<sup>31</sup> Even the *New York Times* repeated the charge that Turner committed rape, for example, in this headline: "Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage."<sup>32</sup>

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23. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

24. *Infra* Part II.B.

25. *Infra* Part II.B.

26. 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*).

27. Sarah Volpenhein, *Brock Turner Will Serve the Rest of His Rape Sentence in This Unsuspecting Town*, DAILY BEAST (Sept. 1, 2016, 10:15 PM), <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*).

28. Stephanie Webber, *Brock Turner's Stanford Rape Case: Everything You Need to Know*, US WEEKLY (June 7, 2016, 4:33 PM), <http://www.usmagazine.com/celebrity-news/news/brock-turners-stanford-rape-case-everything-you-need-to-know-w209237> (on file with *The University of the Pacific Law Review*).

29. Ray Sanchez, *Stanford Rape Case: Inside the Court Documents*, CNN (June 11, 2016, 5:00 PM), <http://www.cnn.com/2016/06/10/us/stanford-rape-case-court-documents/> (on file with *The University of the Pacific Law Review*).

30. *The Brock Turner Rape Case: A Complete Injustice*, BROFESSIONAL, <http://www.thebrofessional.net/brock-turner-rape-case-injustice/> (last visited Feb. 25, 2017) (on file with *The University of the Pacific Law Review*).

31. *Court Documents: Stanford Rape Case*, L.A. TIMES, <http://documents.latimes.com/stanford-brock-turner/> (last visited Feb. 25, 2017) (on file with *The University of the Pacific Law Review*).

32. Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, N.Y. TIMES (June 6, 2016), <https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling->

The simple fact is that Brock Turner did not commit rape. Initially, the prosecution did charge Turner with two counts of rape, but dropped those charges because it had questionable evidence Turner actually committed that crime.<sup>33</sup> What were the facts of the case?

At about 1:00 a.m. on January 18, 2015, two Swedish-international students at Stanford confronted Turner, who was lying on top of an unconscious woman off a bike path.<sup>34</sup> Turner ran when the men confronted him, but they tackled and detained him until campus police arrived.<sup>35</sup> A Deputy Sheriff stated that the victim was unconscious and unable to communicate effectively until 4:15 a.m.<sup>36</sup> The victim was examined soon after, and indicated “significant trauma,” including “penetrating trauma.”<sup>37</sup>

The accounts of how Turner and the victim ended up on the ground, off the bike path, conflict.<sup>38</sup> The victim’s sister and the victim, neither of them Stanford students, attended a fraternity party on the Stanford campus.<sup>39</sup> The victim’s sister told police that Turner tried to kiss her on a few occasions, but she did not see him with her sister.<sup>40</sup> Turner, who told the police that he consumed a large amount of alcohol, made inconsistent statements to them.<sup>41</sup> At first he indicated that he met the victim outside the fraternity house and then left with her.<sup>42</sup> He acknowledged that he did not know her name.<sup>43</sup> After his arrest, he said that he and the victim met at the party, drank beer together, and left holding hands.<sup>44</sup> He claimed that he and the victim engaged in some foreplay, at which point he got sick and left to vomit.<sup>45</sup> Turner claimed that he heard someone speaking to him at

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statements-of-victim-and-attackers-father.html?\_r=0 (on file with *The University of the Pacific Law Review*).

33. See generally Police Report, *People v. Turner*, No. B1577162 (Cal. Super. Ct. 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*).

34. *Id.* at 8–9.

35. *Id.*

36. *Id.* at 18.

37. Elena Kadwany, *Woman Testifies in Brock Turner Trial*, PALO ALTO ONLINE (Mar. 18, 2016, 6:05 PM), <http://www.paloaltoonline.com/news/2016/03/18/alleged-victim-testifies-in-brock-turner-trial> (on file with *The University of the Pacific Law Review*).

38. Compare Police Report at 27–29, *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*), with Victor Xu, *Brock Turner’s Statement in Trial and at His Sentencing Hearing*, STAN. DAILY (June 10, 2016), <http://www.stanforddaily.com/2016/06/10/brock-turners-statement-in-trial-and-at-his-sentencing-hearing/> (on file with *The University of the Pacific Law Review*).

39. Police Report at 47, *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*).

40. *Id.* at 47–48.

41. *Id.* at 29.

42. *Id.* at 27–28.

43. *Id.* at 28.

44. *Id.* at 27–28.

45. *Id.* at 28.

that point, but was not able to understand what the person was saying.<sup>46</sup> That person turned out to be one of the Swedish graduate students.<sup>47</sup> Still, Turner's trial testimony varied further. At trial, he said that he and the victim agreed to go back to his room and ended up on the ground when she fell.<sup>48</sup> He got down on the ground and received permission to engage in sexual activity.<sup>49</sup> According to Turner, "[a]t no time did I see that she was not responding. If at any time I thought that she was not responding, I would have stopped immediately."<sup>50</sup> The prosecutor contended at trial that Turner's testimony was a fabrication.<sup>51</sup>

No one seriously disputes that both Turner and the victim consumed a large quantity of alcohol. At 1:00 a.m., Turner's blood alcohol exceeded .17%.<sup>52</sup> The victim stated that she did not remember anything that occurred after midnight.<sup>53</sup> A medic who treated the victim at the scene said that she was unresponsive when he shook her and shouted at her, but that she did respond when he pinched her nail beds.<sup>54</sup> Further, she was able to lift herself and vomit without assistance.<sup>55</sup> Several hours later, her blood alcohol was .12%;<sup>56</sup> thus, at the time of the incident, her alcohol level was somewhere between .220–249%.<sup>57</sup>

The prosecutor charged Turner with five counts: rape of an intoxicated person,<sup>58</sup> rape of an unconscious person,<sup>59</sup> assault with intent to rape an

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46. *Id.* at 28–29.

47. *Id.* at 9.

48. Xu, *supra* note 38.

49. *Id.*

50. Probation Report at 6, *People v. Turner*, No. B1577162 (Cal. Super. Ct. June 2, 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*).

51. Will Garbe, *Prosecutor: Brock Turner Ran From Police During Prior Run-In With Law*, DAYTON DAILY NEWS (June 9, 2016), <http://www.daytondailynews.com/news/crime—law/prosecutor-brock-turner-ran-from-police-during-prior-run-with-law/J483g42KMiu47rHAClGhK/> (on file with *The University of the Pacific Law Review*).

52. Grace Wilson, *Brock Allen Turner Case: All the Facts From Assault to Sentencing*, ODYSSEY (June 13, 2016), <https://www.theodysseyonline.com/brock-allen-turner-case-facts-from-assault-sentencing> (on file with *The University of the Pacific Law Review*).

53. Police Report at 30–31, *People v. Turner*, No. B1577162 (Cal. Super. Ct. 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*).

54. Jacqueline Lee, *Witness: Stanford Rape Defendant Brock Turner had Victim's DNA on Hands*, MERCURY NEWS (Mar. 21, 2016, 8:36 AM), <http://www.mercurynews.com/2016/03/21/witness-stanford-rape-defendant-brock-turner-had-victims-dna-on-hands/> (on file with *The University of the Pacific Law Review*).

55. *Id.*

56. Sanchez, *supra* note 29.

57. Wilson, *supra* note 52.

58. Complaint, *People v. Turner*, No. B1577162 (Cal. Super. Ct. 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*); see CAL. PENAL CODE § 261(a)(3) (West 2016).

59. Complaint, *People v. Turner*, No. B1577162 (Cal. Super. Ct. 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*); see CAL. PENAL CODE § 261(a)(4) (West 2016).

intoxicated person;<sup>60</sup> sexually penetrating an intoxicated person with a foreign object (his finger);<sup>61</sup> and sexually penetrating an unconscious person with a foreign object (again, his finger).<sup>62</sup> Prior to trial, the state dropped the two rape charges because DNA evidence failed to reveal any evidence of penetration.<sup>63</sup> The jury convicted Turner of the remaining three charges.<sup>64</sup>

In reliance on the probation report, Judge Persky sentenced Turner to six months in county jail, followed by three years of probation and lifetime registration as a sex offender; if Turner ever fails to comply with the sex offender registry, he could end up in jail or prison.<sup>65</sup> Turner was released after serving only three months of his sentence.<sup>66</sup> Upon release, he was required to participate in a sex offender rehabilitation program.<sup>67</sup>

Obviously, claims that Turner committed rape find no support in the evidence. So what is wrong with headlines decrying Turner as a rapist? In an era of “alternative facts”<sup>68</sup> and “fake news,”<sup>69</sup> I would think that the answer is obvious: words matter. Certainly, lawyers understand the importance of precise

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60. Complaint, *People v. Turner*, No. B1577162 (Cal. Super. Ct. 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*); see CAL. PENAL CODE § 220(a)(1) (West 2016).

61. Complaint, *People v. Turner*, No. B1577162 (Cal. Super. Ct. 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*); see CAL. PENAL CODE § 289(e) (West 2016).

62. Complaint, *People v. Turner*, No. B1577162 (Cal. Super. Ct. 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*); see CAL. PENAL CODE § 289(d) (West 2016).

63. Veronica Rocha and Richard Winton, *Light Sentence for Stanford Swimmer in Sexual Assault ‘Extraordinary,’ Legal Experts Say*, L.A. TIMES (June 8, 2016, 7:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-stanford-sexual-assault-sentence-20160607-snap-story.html> (on file with *The University of the Pacific Law Review*).

64. Hannah Knowles, *Brock Turner Found Guilty on Three Felony Counts*, STAN. DAILY (Mar. 30, 2016), <http://www.stanforddaily.com/2016/03/30/brock-turner-found-guilty-on-three-felony-counts/> (on file with *The University of the Pacific Law Review*).

65. Matt Hamilton, *Brock Turner to be Released From Jail After Serving Half of Six-Month Sentence in Stanford Sexual Assault Case*, L.A. TIMES (Aug. 30, 2016, 12:05 AM), <http://www.latimes.com/local/lanow/la-me-ln-brock-turner-release-jail-20160829-snap-story.html> (on file with *The University of the Pacific Law Review*); Bridgette Dunlap, *How California’s New Rape Law Could Be a Step Backward*, ROLLING STONE (Sept. 1, 2016), <http://www.rollingstone.com/culture/news/how-californias-new-rape-law-could-be-a-step-backward-w437373> (on file with *The University of the Pacific Law Review*).

66. *Id.*

67. Tracey Kaplan, *Brock Turner: A Sex Offender for Life, He Faces Stringent Rules*, MERCURY NEWS (Sept. 2, 2016, 12:52 AM), <http://www.mercurynews.com/2016/09/02/brock-turner-a-sex-offender-for-life-he-faces-stringent-rules/> (on file with *The University of the Pacific Law Review*).

68. Eric Bradner, *Conway: Trump White House Offered ‘Alternative Facts’ on Crowd Size*, CNN (Jan. 23, 2017, 12:38 PM), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/> (on file with *The University of the Pacific Law Review*).

69. Danielle Kurtzleben, *With ‘Fake News,’ Trump Moves From Alternative Facts to Alternative Language*, NPR (Feb. 17, 2017, 8:27 PM), <http://www.npr.org/2017/02/17/515630467/with-fake-news-trump-moves-from-alternative-facts-to-alternative-language> (on file with *The University of the Pacific Law Review*).

use of language, and subtle distinctions matter.<sup>70</sup> Still, one needs to be careful not to ignore the real harm that sexual assault, even if not rape, causes.

At the same time, headlines identifying Turner as a rapist who received a short sentence trouble the public. Most legislatures, courts, and members of the public rightly include rape among the most serious offenses on the books.<sup>71</sup> Historically, the law has treated rape differently from sexual assault.<sup>72</sup> Early in our history, the distinction was no doubt based on sexist justifications, including the view that a woman's chastity was an important commodity, in part, out of concerns of her father who wanted to marry her off or of a husband who had a property interest in his wife.<sup>73</sup> But even in a more enlightened era, the distinction continues.<sup>74</sup>

One might question whether the law should treat sexual assault and rape differently. I suspect that most courts, legislatures, and members of the public would continue to see the two crimes as distinct offenses. Penetration with a penis carries a host of risks not present when a person penetrates with a finger, as Turner did. An unwanted pregnancy is one obvious difference, as is the transmission of a variety of sexually transmitted diseases. Common sexual expectations reflect the reality that digital penetration is different from penile penetration: women often willingly agree to foreplay, but not intercourse.<sup>75</sup>

#### B. *Okay, But Six Months for Sexual Assault?*

As indicated above, I am certainly ambivalent about the suitable sentence in Turner's case. Indeed, in signing the letter opposing Judge Persky's recall, I focused on the following language, which summarizes how many of us who signed the letter felt about the case: "Californians can grieve the injustices suffered by the victim in this case and mobilize to prevent sexual assault while rejecting a recall movement that threatens the integrity of the state's criminal

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70. See, e.g., *Subtle Distinctions*, WRITE HOUSE: LEGAL WRITING CONSULTANTS & TRAINERS (July 1, 2015), <http://writehouseng.com/blogs/subtle-distinctions/> (on file with *The University of the Pacific Law Review*).

71. See generally Charles Montaldo, *Types of Criminal Offenses*, ABOUT NEWS (Aug. 28, 2016), [http://crime.about.com/od/Crime\\_101/a/Types-Of-Criminal-Offenses.htm](http://crime.about.com/od/Crime_101/a/Types-Of-Criminal-Offenses.htm) (on file with *The University of the Pacific Law Review*).

72. Brian Palmer, *What's the Difference Between "Rape" and "Sexual Assault"?*, SLATE (Feb. 17, 2011, 3:59 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2011/02/whats\\_the\\_difference\\_between\\_rape\\_and\\_sexual\\_assault.html](http://www.slate.com/articles/news_and_politics/explainer/2011/02/whats_the_difference_between_rape_and_sexual_assault.html) (on file with *The University of the Pacific Law Review*).

73. Allie Conti, *A Brief and Depressing History of Rape Laws*, VICE (June 8, 2016, 1:07 PM), [https://www.vice.com/en\\_us/article/for-context-heres-how-various-societies-punished-rapists](https://www.vice.com/en_us/article/for-context-heres-how-various-societies-punished-rapists) (on file with *The University of the Pacific Law Review*).

74. See Palmer, *supra* note 72.

75. See generally *Foreplay*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Foreplay> (last visited Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

justice system.”<sup>76</sup> Even more important is an assessment of whether the judge’s sentence was inappropriate. That requires more information than what the media has focused on in almost all of the stories about the case.

Start with stories and claims by Judge Persky’s detractors that suggest the sentence was illegal. For example, the *Recall Judge Aaron Persky* campaign website states that the judge’s sentence “ignor[ed] the statutory minimum sentence of two years” when he sentenced Turner to only six months in prison and three years of probation.<sup>77</sup> The website also states that Turner was “presumptively not eligible for probation under the law” and therefore should have served the mandatory minimum of two years in prison.<sup>78</sup> Some media stories took the same slant.<sup>79</sup>

Those claims are inaccurate. Although the California legislature changed the law in response to the Turner case, his offenses were not among those for which probation was unavailable when he was convicted.<sup>80</sup> California Penal Code section 1203 provides that, except in unusual circumstances, certain offenders are not eligible for probation.<sup>81</sup> But the crimes Turner committed were not listed in that provision.<sup>82</sup> Indeed, another section of the California Penal Code, section 1203.065(b), instructs the sentencing judge to consider mitigating circumstances, which both Turner’s probation officer and Judge Persky did.<sup>83</sup>

The California Commission on Judicial Performance said as much.<sup>84</sup> Contrary to the insinuations on the recall campaign’s webpage, the Commission concluded that the sentence Judge Persky gave Turner was “within the parameters set by the law and therefore within the judge’s discretion.”<sup>85</sup> The Commission rejected other claims, including an assertion that Judge Persky’s sentence reflected bias based on gender, race, or socioeconomic status.<sup>86</sup> I take up the latter question below.<sup>87</sup>

While not stating whether she agreed with the Commission’s conclusion that the sentence was lawful, Professor Dauber responded to the report by attacking

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76. Kaplan, *supra* note 7.

77. *Why Recall Judge Aaron Persky?*, RECALL JUDGE AARON PERSKY, <http://www.recallaaronpersky.com/about> (last visited Feb. 25, 2017) (on file with *The University of the Pacific Law Review*).

78. *Id.*

79. *See, e.g., How Ousting the Judge in the Stanford Sexual Assault Case Could Impact Future Cases*, NPR (June 11, 2016, 8:49 AM), <http://www.npr.org/2016/06/11/481656710/how-ousting-the-judge-in-the-stanford-sexual-assault-case-could-impact-future-ca> (on file with *The University of the Pacific Law Review*).

80. Dunlap, *supra* note 65.

81. CAL. PENAL CODE § 1203(e) (West 2016).

82. CAL. PENAL CODE § 1203.065 (amended by 2016 Cal. Stat. Ch. 863).

83. CAL. PENAL CODE § 1203.065(b) (West 2016).

84. *Commission on Judicial Performance Closes Investigation of Judge Aaron Persky*, COMMISSION ON JUD. PERFORMANCE (Dec. 19, 2016), available at [https://cjp.ca.gov/files/2016/08/Persky\\_Explanatory\\_Statement\\_12-19-16.pdf](https://cjp.ca.gov/files/2016/08/Persky_Explanatory_Statement_12-19-16.pdf) (on file with *The University of the Pacific Law Review*).

85. *Id.* at 2.

86. *Id.* at 6–9.

87. *Infra* Part I.D.

the Commission's credibility and, more importantly, argued that the judge abused his discretion.<sup>88</sup> But did Judge Persky abuse his discretion?

Answering that question requires an examination of the relevant criteria that a judge must follow in fixing a sentence. Probably every law student has studied the factors relevant to determining a criminal sentence. Virtually every modern criminal law casebook includes a chapter on the purposes of punishment.<sup>89</sup> Many students believe in the retributive equivalency principle (an "eye for an eye") when they begin discussing the issue, but abandon that as the only governing purpose of punishment by the end of the discussion. Often, the equivalency principle produces a seemingly counterintuitive sentence—almost no student will insist that a suitable sentence for an offender who steals \$50 is the return of \$50, and few members of a civilized society would advocate that the sentence for a rapist should be rape.

Few commentators adhere to a single justification for punishment; instead, many prominent scholars and legislatures often end up with a system that focuses on multiple theories.<sup>90</sup> They come to a similar assessment when the question is not whether an offender deserves to be punished, but rather how much punishment is appropriate.<sup>91</sup>

The media and Judge Persky's critics seldom refer to the dictates of California's sentencing law. As summarized by one judge, tracking with the requirements of California's Penal Code:

[T]he sentencing judge must consider several objectives in setting a sentence: (a) the protection of society; (b) the punishment of the offender; (c) the encouragement of the offender to lead a law-abiding life; (d) the deterrence of other potential offenders; (e) the isolation of the offender so that he cannot commit other crimes; (f) the opportunity for the victim to receive restitution from the offender; and (g) the requirement that the offender receive a sentence similar to those who are similarly situated.<sup>92</sup>

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88. Lucy Arnold, *State Commission Clears Judge of Wrongdoing in Turner Sentence*, STAN. DAILY (Dec. 22, 2016), <http://www.stanforddaily.com/2016/12/22/state-commission-clears-judge-of-wrongdoing-in-turner-sentence/> (on file with *The University of the Pacific Law Review*).

89. See, e.g., JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 30–48 (6th ed. 2012); SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 89–106 (9th ed. 2012); JOEL SAMAHA, *CRIMINAL LAW* 24–29 (11th ed. 2012).

90. See, e.g., CAL. R. CT. 4.410(a) (2017) (instructing judges to consider rehabilitation, retribution, incapacitation, and deterrence in each sentencing decision); MODEL PENAL CODE § 1.02(2)(a)(ii) (2007) (listing rehabilitation, deterrence, incapacitation, and victim restitution as goals of punishment to be achieved within proportionate sentences); Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 443 (2004).

91. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 22–23 (6th ed. 2012).

92. *People v. Superior Court (Du)*, No. B063918 (2d. Dist. Apr. 21, 1992).

The difficulty in such a sentencing scheme is that some of the factors point in inconsistent directions. For example, evidence may support a conclusion that release of an offender presents a very low risk to public safety. And yet, a short sentence or probation may not be proportionate to the harm caused by the offender.<sup>93</sup> A long prison term might be justified because of the social harm to the victim, but could prevent the offender from making restitution for the harm that he caused.

The probation report that Judge Persky relied on demonstrates that point. In addition to a factual summary, largely consistent with the account cited above, the report contained several facts that the Penal Code required the probation officer and the judge to focus on in assessing the appropriate sentence.<sup>94</sup> The report included several of Turner's statements about his contrition, including his statement, "Having imposed suffering on someone else and causing someone else pain—I mean, I can barely live with myself."<sup>95</sup> In response to criticism that his attorney degraded the victim during cross examination, he said that was his attorney's way to approach the case and that he regretted putting the victim through the pain of the trial.<sup>96</sup>

The probation report included a risk assessment score, as required by the Penal Code.<sup>97</sup> Commonly used in many jurisdictions, such actuarial-assessment tools offer empirically meaningful measurement of an offender's future risk.<sup>98</sup> Turner's score "place[d] him in the Low-Moderate Risk Category for being charged or convicted of another sexual offense."<sup>99</sup> The report also referred to a separate set of risk assessment criteria and needs.<sup>100</sup> The Correctional Assessment and Intervention System measures the needs of an offender in order to reduce the risk of recidivism.<sup>101</sup> Consistent with that assessment, the probation report

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93. That certainly seems to be the case in Turner's case: according to the probation report, Turner is a low risk for reoffending; but the recall efforts have focused on the harm to Turner's victim.

94. Probation Report at 11–12, *People v. Turner*, No. B1577162 (Cal. Super. Ct. June 2, 2016), available at <https://assets.documentcloud.org/documents/2858997/Probation-officer-s-report-in-Brock-Turner-case.pdf> (referencing California Rule of Court 4.410, which instructs judges to consider multiple purposes of punishment when determining a sentence) (on file with *The University of the Pacific Law Review*).

95. *Id.* at 7.

96. *Id.*

97. *Id.* at 8–9.

98. See generally KEVIN BALDWIN, U.S. DEP'T OF JUSTICE, SEX OFFENDER RISK ASSESSMENT (2015), available at <https://www.smart.gov/pdfs/SexOffenderRiskAssessment.pdf> (on file with *The University of the Pacific Law Review*).

99. Probation Report at 9, *People v. Turner*, No. B1577162 (Cal. Super. Ct. June 2, 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*).

100. *Id.*

101. *Id.*; see also *Correctional Assessment and Intervention System*, NAT'L COUNCIL ON CRIME & DELINQ., <http://www.nccdglobal.org/assessment/correctional-assessment-and-intervention-system-cais> (last visited Feb. 25, 2017) (on file with *The University of the Pacific Law Review*).

provides other recommendations to reduce Turner's risk of reoffending, including treatment for substance abuse.<sup>102</sup>

The report focused on Turner's lack of a criminal history and the absence of other aggravating circumstances surrounding the crime.<sup>103</sup> The report also included several statements from the victim, pointing towards a short jail sentence rather than the six years recommended by the prosecutor.<sup>104</sup> For example, despite continued anger for what Turner put her through at trial, the victim said:

I want him to know it hurt me, but I don't want his life to be over. I want him to be punished, but as a human, I just want him to get better. I don't want him to feel like his life is over and I don't want him to rot away in jail; he doesn't need to be behind bars.<sup>105</sup>

The probation officer's recommendation was based on a "myriad [of] factors," which included "impact of the crime on the victim and safety of the community."<sup>106</sup> She also noted Turner's youth, remorse, and lack of criminal history, as well as the victim's wishes as to the outcome.<sup>107</sup> The probation officer also distinguished his case from other cases where the offender was not intoxicated; implicitly, the probation officer found that intoxication reduced Turner's culpability.<sup>108</sup> In the end, the report recommended a suspended sentence, a term of three years probation, a term of incarceration in county jail, and sex offender registration, along with other conditions.<sup>109</sup> Judge Persky's sentence largely tracked the probation officer's recommendations.<sup>110</sup>

In light of the probation report, Judge Persky's sentence was not irrational. That is, the judge's critics, like Professor Dauber, who claim that the judge abused his discretion, must show that the sentence was unreasonable based upon facts and circumstances known to the court at the time—the standard to establish an abuse of discretion.<sup>111</sup> Indeed, one could defend the sentence as entirely

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102. Probation Report at 10, *People v. Turner*, No. B1577162 (Cal. Super. Ct. June 2, 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*).

103. *Id.* at 11.

104. *Id.* at 5.

105. *Id.*

106. *Id.* at 12.

107. *Id.*

108. *Id.*

109. *Id.* at 13–14.

110. Stack, *supra* note 32.

111. Lucy Arnold, *State Commission Clears Judge of Wrongdoing in Turner Sentence*, *Stanford Daily* (Dec. 22, 2016), <http://www.stanforddaily.com/2016/12/22/state-commission-clears-judge-of-wrongdoing-in-turner-sentence/> (on file with *The University of the Pacific Law Review*); *Response to the Commission on Judicial Performance*, RECALL JUDGE AARON PERSKY, [http://www.recallaaronpersky.com/response\\_to\\_the\\_commission\\_on\\_judicial\\_performance](http://www.recallaaronpersky.com/response_to_the_commission_on_judicial_performance) (last visited Feb. 28, 2017) (on file with *The University of the*

justified. I return to the length of Turner's sentence below when I address the potential cost of judicial recall.<sup>112</sup>

*C. But Vitiello, You Are Cherry-Picking the Facts*

Above, I focused on the information that supported Judge Persky's sentence. Here, I want to focus on various arguments made, or that could be made, by his opponents for why a longer sentence was necessary.

One item in the probation report that I did not focus on was the brief statement summarizing the prosecutor's position. There, the report quoted the prosecutor who argued that "the defendant was untruthful in his testimony regarding the victim being unconscious during the instant offenses."<sup>113</sup> That surely would seem to be relevant to whether Turner's other statements, for example, about remorse, were credible. At first blush, given the victim's high blood alcohol and the statements by the emergency medical technician about her unresponsiveness, one might conclude without more that Turner lied at trial.<sup>114</sup> To be clear though: the critical issue was not whether the victim was unconscious, but whether Turner believed that she was conscious. He was lying only if he said that he thought that she consented when in fact he knew that she was unconscious. Even if his mistaken view resulted from his high intoxication levels, also largely undisputed, he would not have been lying as long as he honestly believed that she consented.

I have difficulty assessing whether Turner was worthy of belief. Credibility is almost always based on personal observations of the person while he is making the statements.<sup>115</sup> One might doubt, though, that Turner was telling the truth. Beyond the natural fear that a guilty defendant will lie to avoid conviction, his story seems counterintuitive: how could someone so intoxicated have appeared to give consent? Seldom did media coverage mention trial testimony given on Turner's behalf.<sup>116</sup> A psychologist testified, for example, that someone who is legally unconscious might otherwise appear to be engaging in purposeful conduct.<sup>117</sup> While the emergency medical technician described the victim in ways

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*Pacific Law Review*); see, e.g., *People v. Cooper*, 148 Cal. App. 4th 731, 742 (2007) ("A ruling resting on a demonstrable error of law constitutes an abuse of discretion.").

112. *Infra* Part II.B.

113. Probation Report at 8, *People v. Turner*, No. B1577162 (Cal. Super. Ct. June 2, 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*).

114. *See id.*

115. See Robert Rosenthal, *Suggestibility, Reliability, and the Legal Process*, ELSEVIER SCI., [http://ncrj.org/\\_Rosen/](http://ncrj.org/_Rosen/) (last visited Feb. 26, 2017) (on file with *The University of the Pacific Law Review*).

116. *Supra* Part I.B.

117. Elena Kadvaný, *Prosecution Questions Integrity of Witness in Turner Trial*, PALO ALTO ONLINE (Mar. 22, 2016, 5:36 PM), <http://www.paloaltoonline.com/news/2016/03/22/prosecution-questions-integrity-of-witness-in-turner-trial> (on file with *The University of the Pacific Law Review*).

that seem to undercut that testimony, he observed her at about 1:00 a.m.<sup>118</sup> The evidence did not pinpoint precisely when Turner digitally penetrated the victim.<sup>119</sup> The only other point of reference is midnight, when, apparently, based on her testimony, the victim had some recollection.<sup>120</sup> That leaves open whether the victim might have been functioning well enough to allow Turner to believe that she consented.

A second and powerful counter-narrative focuses on the victim's full impact statement. It went viral and is powerful.<sup>121</sup> A few points that she raised are particularly important. Notably, she states that the probation officer took her statements about not wanting Turner to rot behind bars out of context—she claims she said only that she did not want him to rot behind bars, not that he should not spend any time behind bars.<sup>122</sup> The recommended sentence made a “mockery of the seriousness of his assaults . . . .”<sup>123</sup> Similarly, the victim disagreed with reliance by the probation officer on Turner's youth and lack of a prior record.<sup>124</sup> As she stated, “[h]e is young, but old enough to know better.”<sup>125</sup> One cannot lightly dismiss the pain expressed in the victim's statement; despite that, the legislature, not the probation officer and judge, set out the criteria relevant to assessing a lawful sentence.<sup>126</sup> And as indicated above, the probation report tracks those criteria.<sup>127</sup> Further, the law has typically treated an offender's youth as legally relevant.<sup>128</sup> Indeed, in the past decade, the Supreme Court has found that youth is relevant to the Court's interpretation of the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>129</sup> Recognizing the fact that the brains of young offenders are not yet fully developed, the Court has held, for example, that a true life sentence, even for murder, may be excessive if imposed on a juvenile offender.<sup>130</sup>

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118. Lee, *supra* note 54.

119. Police Report at 27–29, *People v. Turner*, No. B1577162 (Cal. Super. Ct. 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*).

120. *Id.* at 30–31.

121. Katie J.M. Baker, *Here is the Powerful Letter the Stanford Victim Read Aloud to Her Attacker*, BUZZFEED (June 3, 2016, 2:17 PM), [https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm\\_term=.uhK7v1nkD#.mle2LqAbo](https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.uhK7v1nkD#.mle2LqAbo) (on file with *The University of the Pacific Law Review*).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. See CAL. R. CT. 4.410(a).

127. *Supra* Part I.B.

128. See Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 107 (2013); see, e.g., MODEL PENAL CODE: SENTENCING § 6B.07(2) (AM. LAW INST., Tentative Draft No. 4, 2016); N.C. GEN. STAT. ANN. § 15A-1340.16(e) (West 2017).

129. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012); *Graham v. Florida*, 560 U.S. 48, 76 (2010); *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

130. *Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 69–70; *Roper*, 543 U.S. at 569. Granted, Turner was

The victim also stated that the sentence for sexual assault should be “severe enough that people feel enough fear to exercise good judgment even if they are drunk, severe enough to be preventive.”<sup>131</sup> Similarly, she stated that the sentence must be appropriate to change the rape culture.<sup>132</sup> I interpret the point to be that a longer prison sentence is necessary to deter similar criminal conduct. Indeed, deterrence is one of the factors listed in the Penal Code for consideration by both the probation officer and sentencing judge.<sup>133</sup>

The suggestion that Turner’s sentence was inadequate to deter is certainly questionable. Ask college students whether they would take a six-month prison term, three years of probation, and the possibility of being a lifetime registered sex offender in exchange for a drunken sexual act. Add to that formal punishment expulsion from an elite college, loss of a scholarship, death threats, and public contempt.<sup>134</sup> Further, empirical data is largely uncontested: offenders are far more likely to be deterred by the certainty of punishment, rather than its severity.<sup>135</sup> Colleges and law enforcement can have a greater impact on changing the rape culture by increasing efforts to assure more frequent responses to occurrences of sexual abuse than by imposing long sentences on many offenders—especially those who represent a low risk of recidivism.<sup>136</sup> Again, think back to the point about the multiple factors relevant to fixing an imprisonment term under California law. The legislature has directed the responsible actors to balance the kinds of factors discussed in this section.<sup>137</sup>

One might object that sex offenders are not susceptible to rehabilitation. That is certainly the impression held by many lawmakers and members of the public.<sup>138</sup> Indeed, that stereotype helps explain various punitive laws imposed on sex offenders, including lifetime registration requirements.<sup>139</sup> The problem is that the stereotype is not true.

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not a juvenile, but the same neuroscience that the Supreme Court relied on indicates that brain formation is not complete until an individual is 26 years old.

131. Baker, *supra* note 121.

132. *Id.*

133. CAL. R. CT. 4.410(a)(4).

134. Christopher Carter, *Public’s Reaction to Turner’s Release*, ODYSSEY (Sept. 12, 2016), <https://www.theodysseyonline.com/publics-reaction-turners-release> (on file with *The University of the Pacific Law Review*); Stack, *supra* note 32.

135. See Michael Vitiello, *Reforming California Sentencing Practice and Policy: Are We There Yet?*, 46 MCGEORGE L. REV. 685, 689 (2014).

136. *See id.*

137. CAL. R. CT. 4.410(b).

138. See, e.g., Ludwig Lowenstein, *The Sorry Truth is that Many Sex Offenders CAN’T be Rehabilitated*, DAILY MAIL (Mar. 12, 2010, 3:15 PM), <http://www.dailymail.co.uk/debate/article-1256779/Some-offenders-like-Jon-Venables-Peter-Chapman-CANT-rehabilitated.html> (on file with *The University of the Pacific Law Review*).

139. See, e.g., FED. R. EVID. 413–15; ARIZ. REV. STAT. ANN. §§ 13-3821–3827 (West 2017); CAL. PENAL CODE §§ 290, 645 (West 2017).

In *An American Tragedy: Legal Responses to Adolescent Sex Offenders*, Frank Zimring states, “[P]olicy toward sex offenders is often based on monolithic images of alien pathologies; it is rarely based on facts.”<sup>140</sup> While Zimring focused on adolescent sexual offenders, his point applies equally to laws punishing adult sex offenders.<sup>141</sup> Many sex offenders do not suffer from sexual pathologies.<sup>142</sup> Empirical studies, although flawed in design as is often the case in criminal justice matters, may be imperfect.<sup>143</sup> But, researchers have found that “[s]ex offenders are relatively unlikely to commit future sexual offenses ....”<sup>144</sup> Studies have identified particular factors that correlate with higher recidivism rates—paraphilia and an antisocial orientation.<sup>145</sup> Thus, treating all sex offenders as “a breed apart” results in unnecessary punishment if the goal of punishment is to avoid future assaultive sexual acts.<sup>146</sup>

Consistent with these findings, Judge Persky’s sentence made sense. Data suggests that placing a low-risk offender in a facility with high-risk offenders may increase his chance of committing additional offenses.<sup>147</sup> That is, for low-risk offenders, prison may be criminogenic.<sup>148</sup>

One cannot read the victim’s statement without pain and a good bit of empathy for her. Especially in California, where victims’ rights organizations have made a major impact on criminal justice policy,<sup>149</sup> the law requires judges to consider victims’ statements as relevant to sentencing.<sup>150</sup> But, as developed throughout this section, judges must consider other factors as well.<sup>151</sup>

#### D. But Judge Persky Showed Bias, Racial or Otherwise

Or did he? Judge Persky’s detractors have dominated the narrative. Most articles have adopted his critics’ portrayal of him as biased unfairly in favor of privileged defendants, particularly college athletes.<sup>152</sup> Some critics allege that he

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140. FRANKLIN E. ZIMRING, *AN AMERICAN TRAGEDY* xiii (2004).

141. *Id.*

142. John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L. J. 559, 570 (2006).

143. *Id.* at 569–70.

144. *Id.* at 570.

145. Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L. J. 651, 678 (2008).

146. *Id.* at 676.

147. *Id.* at 678; Christopher T. Lowenkamp & Edward J. Latessa, *Increasing the Effectiveness of Correctional Programming Through the Risk Principle: Identifying Offenders for Residential Placement*, 4 CRIMINOLOGY & PUB. POL’Y 263, 264 (2005).

148. Vitiello, *supra* note 145, at 678; Lowenkamp & Latessa, *supra* note 147, at 264.

149. See, e.g., CRIME VICTIMS UNITED OF CALIFORNIA, <http://crimevictimsunited.com/> (last visited Feb. 27, 2017) (on file with *The University of the Pacific Law Review*).

150. CAL. CONST. art I, § 28(b)(8).

151. *Supra* Part I.C.

152. See, e.g., Nancy Dillon, *Judge Aaron Persky, Under Fire for Brock Turner’s Sentencing, Ruled in*

is racially biased as well.<sup>153</sup> In some instances, these accounts—like those on the recall campaign website—lack sufficient detail for a reader to determine whether they support the broader claim that Persky is biased against less privileged offenders.<sup>154</sup>

Persky's critics cite a domestic battery case involving an African-American community college football player, Keenan Smith, as evidence of Persky's bias in favor of privileged, college-athlete defendants.<sup>155</sup> I am unable to find information about Smith's social status. His attendance at a California community college is not evidence of privilege.<sup>156</sup> Further, Smith's race undercuts the Persky-as-racist narrative.

The case most commonly cited to demonstrate Persky's supposed bias involves Raul Ramirez, a lower income Hispanic man.<sup>157</sup> According to the recall campaign website, Judge Persky's handling of the Ramirez case proves that he does not show "the same level of solicitude" for less privileged defendants.<sup>158</sup> Persky's critics assert that Ramirez's case was "very similar" to Turner's.<sup>159</sup>

One must be naïve to assert that race and class do not factor into criminal sentences.<sup>160</sup> Many of us who favor sentencing reform see inequality as one of the major criminal justice issues.<sup>161</sup> But Persky's critics have not shown that Persky is racially biased or that he favors privileged individuals over non-privileged offenders. The cases cited by his detractors do not prove bias.

Start with the Ramirez case. Here are a few facts that do not appear on the recall campaign website or in articles citing that case as proof against Persky.<sup>162</sup>

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*Favor of College Baseball Players Accused of Gang Raping Intoxicated 17-Year-Old Girl*, N.Y. DAILY NEWS (June 9, 2016, 5:47 PM), <http://www.nydailynews.com/news/national/persky-ruled-favor-college-baseball-players-accused-rape-article-1.2667813> (on file with *The University of the Pacific Law Review*).

153. See, e.g., David Palumbo-Liu, *Stanford Sexual Assault Case Revealed Racial Bias. We Must Recall the Judge*, GUARDIAN (June 28, 2016, 7:00 AM), <https://www.theguardian.com/us-news/2016/jun/28/stanford-sexual-assault-judge-aaron-persky-recall-effort> (on file with *The University of the Pacific Law Review*).

154. See, e.g., *Frequently Asked Questions*, RECALL JUDGE AARON PERSKY, <http://www.recallaaronpersky.com/factsheet> (last visited Feb. 27, 2017) (on file with *The University of the Pacific Law Review*).

155. Tracey Kaplan, *Brock Turner: Recall Leader Claims Judge Too Lenient on Another Student Athlete*, MERCURY NEWS (Oct. 17, 2016, 7:00 AM), <http://www.mercurynews.com/2016/10/17/brock-turner-recall-leader-claims-judge-too-lenient-on-another-student-athlete/> (on file with *The University of the Pacific Law Review*).

156. *Id.*

157. See, e.g., Jason Silverstein, *Judge Who Gave Brock Turner 6-Month Sexual Assault Sentence Delivers Harsher Punishment to Immigrant in Similar Case*, 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*).

158. *Frequently Asked Questions*, *supra* note 154.

159. *Id.*

160. See David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347, 350 (2013).

161. *Id.*

162. See, e.g., *Frequently Asked Questions*, *supra* note 154.

As developed above, Turner was 19 years old at the time of the incident, and he and the victim were both intoxicated and may have left a party together.<sup>163</sup> Despite the victim's denial that she consented to any contact with Turner, at trial, she could not recall whether she consented because of her level of intoxication.<sup>164</sup> By contrast, Ramirez was thirty-two years old, and both he and his roommate, the victim in his case, were sober.<sup>165</sup> He gave her a love letter of some sort and then digitally penetrated her against her will for five to ten minutes until she started crying.<sup>166</sup> The victim then called 911. Ramirez did appear to the police to be remorseful.<sup>167</sup>

The recall campaign website applauds Ramirez for accepting responsibility by pleading guilty, unlike Turner.<sup>168</sup> But the website, as well as other articles citing the Ramirez case as evidence against Persky, ignores critical differences between the two cases: Ramirez pled guilty to sexual penetration by force, which carries a three year mandatory minimum sentence of imprisonment.<sup>169</sup> That crime had no option for probation, which Turner's did at the time of his sentencing.<sup>170</sup> Persky's critics fail to mention even more significant reasons why the Ramirez case fails to prove his bias. As summarized in the report from the Commission on Judicial Performance, "[A]lthough Judge Persky handled proceedings earlier in the case, it was not Judge Persky who handled the hearing at which Ramirez entered his guilty plea, but another trial judge . . . ."<sup>171</sup>

Similar problems appear with regard to other cases that Persky's critics contend show his bias. Again, as summarized by the Commission on Judicial Performance, in two domestic violence cases, the judge accepted plea deals negotiated by the parties.<sup>172</sup> In the third case, involving child pornography, Judge Persky discussed the case with the attorneys and imposed a sentence to which the prosecution did not object.<sup>173</sup> In addition, California law directs a sentencing

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163. Police Report at 27–29, *People v. Turner*, No. B1577162 (Cal. Super. Ct. 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*).

164. Wilson, *supra* note 52.

165. Sam Levin, *Stanford Trial Judge Overseeing Much Harsher Sentence for Similar Assault Case*, GUARDIAN (June 27, 2016), <https://www.theguardian.com/us-news/2016/jun/27/stanford-sexual-assault-trial-judge-persky> (on file with *The University of the Pacific Law Review*).

166. *Id.*

167. *Id.*

168. *Response to the Commission on Judicial Performance*, *supra* note 111.

169. CAL. PENAL CODE § 289(a)(1)(A) (West 2017).

170. CAL. PENAL CODE §§ 263.1 (enacted by 2016 Cal. Stat. Ch. 848), 1203.065 (amended by 2016 Cal. Stat. Ch. 863); *see also* CAL. PENAL CODE § 264(a) (West 2017) (providing that the minimum sentence for a rape conviction is three years imprisonment).

171. COMM'N ON JUDICIAL PERFORMANCE, COMMISSION ON JUDICIAL PERFORMANCE CLOSES INVESTIGATION OF JUDGE AARON PERSKY 8 (2016), available at [https://cjp.ca.gov/files/2016/08/Persky\\_Exploratory\\_Statement\\_12-19-16.pdf](https://cjp.ca.gov/files/2016/08/Persky_Exploratory_Statement_12-19-16.pdf) (on file with *The University of the Pacific Law Review*).

172. *Id.* at 8–9.

173. *Id.* at 9.

judge to consider the probation report submitted in the case.<sup>174</sup> In three of the four cases put before the Commission, the judge had a probation report before him.<sup>175</sup> In each instance, his sentence aligned with the probation report.<sup>176</sup>

Anecdotal evidence, like that cited by Persky's critics, always carries a risk of lacking statistical validity. Small samples supposedly identifying disparate treatment may be explained by other variables. For example, seemingly different treatment may be the result of different criminal histories among offenders.<sup>177</sup> As discussed extensively above, California, like many other states, treats first time offenders more leniently than repeat offenders.<sup>178</sup> Worse, in this case, the anecdotes cited by Persky's critics simply do not support the larger thesis that Persky is biased. Indeed, many members of the bar, notably prosecutors and defense attorneys alike, offer a different view of the judge as fair-minded.<sup>179</sup>

As I stated earlier, I am agnostic about the appropriate sentence for Turner. The probation report makes a plausible case for the sentence that the judge imposed.<sup>180</sup> At the same time, we should not discount concerns about harm to sexual assault victims. But importantly, my concern is that the public has bought into the narrative developed by Judge Persky's opponents, in large part because most portrayals of the case in the media track his opponents' position.<sup>181</sup>

For a moment, assume that after reading my arguments above and reading the probation report that Judge Persky relied on, you still believe that the sentence that the judge imposed was woefully inadequate. Should you join the *Recall Judge Persky* effort? That is the focus of my next discussion.<sup>182</sup>

## PART II: TAKING THE WRONG PATH TOWARDS RECALL

As indicated above, I was among a group of law professors who signed a letter opposing judicial recall in this case. Some of the signatories disagreed with Judge Persky's sentence; others were undecided or believed that the sentence was

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174. *Id.*; see CAL. PENAL CODE § 1203(b)(3) (West 2017).

175. *Id.* at 8–9.

176. *Id.*

177. See CAL. R. CT. 4.423(b)(1) (identifying lack of a criminal record as a mitigating factor to be considered during sentencing).

178. See *supra* Part I.B.

179. Susan Svrluga et al., 'Repugnant'—or 'Fair'? Debate Erupts Over Judge's Decision in Stanford Sexual Assault Case, WASH. POST (June 8, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/06/08/repugnant-or-fair-debate-erupts-over-judges-decision-in-stanford-sexual-assault-case/?utm\\_term=.ff45530eb759](https://www.washingtonpost.com/news/grade-point/wp/2016/06/08/repugnant-or-fair-debate-erupts-over-judges-decision-in-stanford-sexual-assault-case/?utm_term=.ff45530eb759) (on file with *The University of the Pacific Law Review*).

180. See generally Probation Report, *People v. Turner*, No. B1577162 (Cal. Super. Ct. June 2, 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*).

181. See *supra* Part I.C.

182. *Infra* Part II.

appropriate.<sup>183</sup> That raises the question in this section: what is wrong with recalling a judge when one disagrees with his sentencing decisions?

A. *Existing Checks on Judicial Misconduct*

Start with other checks on state court judges in California. The state constitution includes an impeachment provision that largely tracks the United States Constitution.<sup>184</sup> Thus, if the Assembly votes to impeach a judge, the Senate may convict by a two-thirds vote of that house.<sup>185</sup> Granted, the California legislature has seldom impeached a state judge.<sup>186</sup>

As discussed above, California has in place a commission to review judicial performance.<sup>187</sup> Anyone may file a complaint against a California judge.<sup>188</sup> The complaint must state misconduct to which the complainant objects.<sup>189</sup> The Commission requires that the complaint include specific allegations, not merely a disagreement with a judge's ruling.<sup>190</sup> The Commission's website includes a list of sanctionable conduct.<sup>191</sup> That list is quite broad.<sup>192</sup> The Commission has in place an elaborate procedural scheme that may culminate in a trial-like hearing.<sup>193</sup> The Commission can impose no discipline; but if a judge's misconduct does warrant discipline, the Commission has a wide array of sanctions at its disposal, from an advisory letter to dismissal from the bench.<sup>194</sup> A judge may appeal the Commission's sanctions to the California Supreme Court.<sup>195</sup>

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183. Kaplan, *supra* note 7.

184. CAL. CONST. art. IV, § 18.

185. *Id.*

186. Wilbank J. Roche, *Judicial Discipline in California: A Critical Re-Evaluation*, 10 LOY. L.A. L. REV. 192, 193–95 (1976), available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1249&context=llr> (listing the only two state judges that have ever been impeached in California).

187. *Id.*

188. *Filing a Complaint*, COMMISSION ON JUD. PERFORMANCE, [https://cjp.ca.gov/file\\_a\\_complaint/](https://cjp.ca.gov/file_a_complaint/) (last visited Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

189. *Id.*

190. *Id.* (“A complaint should not simply state conclusions, such as ‘the judge was rude’ or ‘the judge was biased.’ Instead, the complaint should fully describe what the judicial officer did and said.”)

191. COMM’N ON JUDICIAL PERFORMANCE, TYPES OF MISCONDUCT, available at [http://cjp.blogs.ca.gov/files/2016/09/Chart\\_-\\_Types\\_of\\_Misconduct.pdf](http://cjp.blogs.ca.gov/files/2016/09/Chart_-_Types_of_Misconduct.pdf) (last visited Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

192. *Id.*

193. COMM’N ON JUDICIAL PERFORMANCE, COMMISSION PROCEEDINGS, available at [http://cjp.blogs.ca.gov/files/2016/09/Chart-CN\\_Proceedings\\_4-09.pdf](http://cjp.blogs.ca.gov/files/2016/09/Chart-CN_Proceedings_4-09.pdf) (last visited Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

194. *Overview of Commission Proceedings*, COMMISSION ON JUD. PERFORMANCE, [https://cjp.ca.gov/complaint\\_process/](https://cjp.ca.gov/complaint_process/) (last visited Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

195. *Id.*

California trial judges are also subject to retention elections.<sup>196</sup> Initially, the governor appoints an attorney to the bench to fill a judicial vacancy.<sup>197</sup> Thereafter, a trial court judge serves six-year terms and must be reelected in a non-partisan election in the county where the judge serves.<sup>198</sup>

In addition to conviction after impeachment, dismissal by the Commission, and non-retention, judges are subject to a recall vote.<sup>199</sup> California is one of eight states that allow for judicial recall.<sup>200</sup> A recall election may occur as part of a regularly scheduled election or a special election.<sup>201</sup> California's constitution establishes "the power of the electors to remove an elective officer."<sup>202</sup> More specifically, the constitution states, "Recall of a state officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. Sufficiency of reason is not reviewable."<sup>203</sup>

That power is substantial. A person or group seeking a recall election need only submit a 200-word statement of the reason for recall.<sup>204</sup> Thereafter, the Governor must schedule a recall vote if the proponents of recall collect sufficient signatures from eligible voters, which in Persky's case are voters in Santa Clara County.<sup>205</sup> The absence of any review concerning the adequacy of reasons for recall sets California apart from the other states that allow recall.<sup>206</sup>

One might ask what is wrong with such a system, including the right to seek recall of a judge. A possible argument is that recall is necessary because other remedies for judicial misconduct are insufficient. Instances of impeachment in California are extremely rare.<sup>207</sup> Proponents of recall may believe that waiting for the next judicial election allows a poorly performing judge to continue deciding cases before being held accountable.<sup>208</sup> After all, Judge Persky successfully ran

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196. JUDICIAL COUNCIL OF CAL., FACT SHEET: CALIFORNIA JUDICIAL BRANCH 3 (2015), available at [http://www.courts.ca.gov/documents/Calif\\_Judicial\\_Branch.pdf](http://www.courts.ca.gov/documents/Calif_Judicial_Branch.pdf) (on file with *The University of the Pacific Law Review*).

197. *Id.*

198. *Id.*

199. *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 Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

200. *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 Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

201. *Id.*

202. CAL. CONST. art. 2, § 13 (West, Westlaw through 2017 Reg. Sess.).

203. CAL. CONST. art. 2, § 14(a) (West, Westlaw through 2017 Reg. Sess.).

204. *Procedure for Recalling State and Local Officials*, *supra* note 200.

205. *Id.*

206. 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*).

207. *Id.*

208. See Katherine Seligman, *Recalling Judges in California May Become Easier, But is that Better?*, L.A. DAILY NEWS (Aug. 27, 2016, 3:15 PM), <http://www.dailynews.com/government-and-politics/>

for re-election in November 2016.<sup>209</sup> Some have commented that the Commission on Judicial Performance's own demonstrated bias makes its protection against judicial abuse meaningless.<sup>210</sup>

The *Recall Judge Persky* website complains about the Commission's decision to not sanction Judge Persky.<sup>211</sup> It dismisses the Commission with more than a hint of contempt.<sup>212</sup> The Commission, according to the website, is "one-sided" and "has a long history of protecting judges."<sup>213</sup> It suggested that the fact that the Commission imposes discipline in only 3% of all cases demonstrates its pro-judge bias.<sup>214</sup> It also cites a finding by the Center for Public Integrity that criticizes the Commission for its supposed lack of transparency.<sup>215</sup>

The theory supporting recall and retention elections is obvious enough—both are grounded in principles of democracy.<sup>216</sup> Supporters point to the need to hold public officials accountable.<sup>217</sup> That is certainly the dominant theme struck by supporters of Judge Persky's recall.<sup>218</sup>

#### B. What's Not to Like About Recall?

Before turning to that specific question, I want to raise a more fundamental inquiry: What is wrong with judicial elections?

Long debated is whether a healthy judicial system should follow the Article III model of unelected judges—subject only to impeachment—or one of the various election models adopted by states around the country.<sup>219</sup> One can find a substantial theoretical literature debating whether federal judges are better than state judges, highlighting a central tension between a lack of accountability with

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20160827/recalling-judges-in-california-may-become-easier-but-is-that-better (on file with *The University of the Pacific Law Review*).

209. See John Bacon, *Judge Under Fire in Stanford Rape Case Gets New Term*, USA TODAY (June 7, 2016, 10:22 AM), <http://www.usatoday.com/story/news/nation/2016/06/07/judge-stanford-sex-assault-case-draws-outrage/85543204/> (on file with *The University of the Pacific Law Review*).

210. Robert B. Gunnison, *California Gets C- Grade in 2015 State Integrity Investigation*, CTR. FOR PUB. INTEGRITY (Nov. 9, 2015, 12:01 AM), <https://www.publicintegrity.org/2015/11/09/18342/california-gets-c-grade-2015-state-integrity-investigation> (on file with *The University of the Pacific Law Review*).

211. *Response to the Commission on Judicial Performance*, *supra* note 111.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* (citing Gunnison, *supra* note 210).

216. Hager, *supra* note 206.

217. *Id.*

218. See *Response to the Commission on Judicial Performance*, *supra* note 111.

219. See, e.g., Jeri Zeder, *Elected vs. Appointed?*, HARV. L. BULLETIN (July 1, 2012), <https://today.law.harvard.edu/book-review/in-new-book-shugerman-explores-the-history-of-judicial-selection-in-the-u-s/> (on file with *The University of the Pacific Law Review*).

unelected judges and the virtues of judicial independence.<sup>220</sup> On occasion, researchers attempt to measure different judicial performances empirically.<sup>221</sup>

In December 2015, the Brennan Center for Justice at New York University Law School published a study on state court judicial sentencing practices.<sup>222</sup> More specifically, the report measured the effect of an upcoming reelection on a judge's sentencing practices and discussed the increased cost of judicial elections.<sup>223</sup> Outside groups provide much of the funding, especially for negative ads.<sup>224</sup> Those ads fall into one of two categories: attacking opponents as soft on crime or touting one's candidate as tough on crime.<sup>225</sup> The report also explored the impact of such advertising on judges.<sup>226</sup> The report's conclusions seem intuitively sound. Notably, the report findings include that state supreme court justices are less likely to rule in favor of criminal defendants as attack ads air more frequently.<sup>227</sup> In judicial retention states where the public strongly supports the death penalty, appellate judges are more likely to affirm death sentences than their peers elsewhere.<sup>228</sup> Researchers also found that judges in two states "sentenced defendants convicted of serious felonies to longer sentences" as their reelections got closer.<sup>229</sup>

Anyone familiar with the Willie Horton ad the first President Bush aired during the 1988 presidential campaign recognizes that such ads often have a not-so-subtle appeal to racial prejudice.<sup>230</sup> As Berkeley law professor Ian Haney López characterized it, such appeals are like a "dog whistle," sending a coded message to a subgroup of the electorate.<sup>231</sup>

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220. *Id.*

221. *See, e.g.*, Steven G. Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction*, 32 FLA. ST. U. L. REV. 1001 (2005).

222. KATE BERRY, BRENNAN CTR. FOR JUSTICE, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES (2015), available at [https://www.brennancenter.org/sites/default/files/publications/How\\_Judicial\\_Elections\\_Impact\\_Criminal\\_Cases.pdf](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*).

223. *Id.* at 3–7.

224. *Id.* at 3–6.

225. *Id.* at 3. Given attention to the problem of mass incarceration and a prolonged period of lower crime rates, an occasional candidate has bucked this trend. *See, e.g.*, Eli Hager, *Against the Trump Tide*, MARSHALL PROJECT (Jan. 25, 2017, 10:00 PM), [https://www.themarshallproject.org/2017/01/25/against-the-trump-tide?utm\\_medium=social&utm\\_campaign=sprout&utm\\_source=facebook#.8ywsDt2mk](https://www.themarshallproject.org/2017/01/25/against-the-trump-tide?utm_medium=social&utm_campaign=sprout&utm_source=facebook#.8ywsDt2mk) (on file with *The University of the Pacific Law Review*); Maurice Chammah, *These Prosecutors Campaigned for Less Jail Time – and Won*, MARSHALL PROJECT (Nov. 9, 2016, 6:14 AM), <https://www.themarshallproject.org/2016/11/09/these-prosecutors-campaigned-for-less-jail-time-and-won#.J67YFMtp0> (on file with *The University of the Pacific Law Review*).

226. BERRY, *supra* note 222, at 3–6.

227. *Id.* at 2.

228. *Id.*

229. *Id.*

230. *See* John Sides, *It's Time to Stop the Endless Hype of the 'Willie Horton' Ad*, WASH. POST (Jan. 6, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/06/its-time-to-stop-the-endless-hype-of-the-willie-horton-ad/?utm\\_term=.4ec7e6a404b5](https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/06/its-time-to-stop-the-endless-hype-of-the-willie-horton-ad/?utm_term=.4ec7e6a404b5) (on file with *The University of the Pacific Law Review*).

231. IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS*, 3–4 (2014).

When judges lose election bids, their positions on criminal justice issues are often at the center of the dispute over their qualifications.<sup>232</sup> Most notably, although other interest groups opposed retention of Chief Justice Rose Bird in the mid-1980s,<sup>233</sup> the primary attack on the three California Supreme Court justices ousted during that election focused on the judges' votes on criminal justice issues.<sup>234</sup> This focus on liberal criminal justice policies is common in other California cases where judges have not been retained or have faced close re-election battles.<sup>235</sup>

One ought to ask who is likely to fund such campaigns. As Kendall Fisher points out in her comment in this volume, one obvious group in California is California Correctional Peace Officers Association, a well-funded organization that has supported numerous candidates and causes that have expanded the prison population (and, not coincidentally, jobs for its members).<sup>236</sup>

Look at some of the more extreme examples where state judges have raised campaign contributions and ask yourself whether giving incentive to outside groups to fund judicial campaigns is a good thing. The facts of *Caperton v. A.T. Massey Coal Co.*<sup>237</sup> offer an almost grotesque example of the influence of money in judicial elections. And has anyone forgotten the effects of *Citizens United v. FEC*<sup>238</sup> and its corrosive effect on politics in the United States?<sup>239</sup>

The federal judiciary has its critics.<sup>240</sup> Depending on the current composition of the Court, critics often attack its members' lack of accountability.<sup>241</sup> As I write

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232. See Billy Corriher, *Partisan Judicial Elections and the Distorting Influence of Campaign Cash*, AM. PROGRESS (Oct. 25, 2012, 3:08 AM), <https://www.americanprogress.org/issues/courts/reports/2012/10/25/42895/partisan-judicial-elections-and-the-distorting-influence-of-campaign-cash/> (on file with *The University of the Pacific Law Review*).

233. See PATRICK K. BROWN, CSU FULLERTON, THE RISE AND FALL OF ROSE BIRD 8–9 (2007), available at [http://www.cschs.org/wp-content/uploads/2014/03/CSCHS\\_2007-Brown.pdf](http://www.cschs.org/wp-content/uploads/2014/03/CSCHS_2007-Brown.pdf) (on file with *The University of the Pacific Law Review*).

234. See Shaun Hoting, *The Crocodile in the Bathtub: An Examination of California's System for Judicial Selection*, 4 AM. U. CRIM. L. BRIEF 1, 2 (2009).

235. See generally *id.*

236. Kendall Fisher, Comment, *No Time Like the Present, Except the Past Fifty-Five Years: Why California Should Finally Adopt the Model Penal Code Sentencing Provisions*, 49 U. PAC. L. REV. \_\_\_\_ (forthcoming 2018).

237. 556 U.S. 868 (2009).

238. 558 U.S. 310 (2010).

239. See, e.g., David Cole, *The Supreme Court's Billion-Dollar Mistake*, N.Y. REVIEW DAILY (Jan. 19, 2015, 8:20 PM), <http://www.nybooks.com/daily/2015/01/19/citizen-united-billion-dollar-mistake/> (on file with *The University of the Pacific Law Review*); Adam Skaggs, *Thanks, Citizens United, for This Campaign Finance Mess We're In*, ATLANTIC (Jul. 27, 2012), <https://www.theatlantic.com/politics/archive/2012/07/thanks-citizens-united-for-this-campaign-finance-mess-were-in/260389/> (on file with *The University of the Pacific Law Review*).

240. See, e.g., Richard A. Posner, *What Is Obviously Wrong With the Federal Judiciary, Yet Eminently Curable*, 19 GREEN BAG 2D 187 (2016).

241. See, e.g., Nancy Smith, *What? Accountability for U.S. Supreme Court Justices... Finally?*, SUNSHINE ST. NEWS (Apr. 22, 2015, 6:00 PM), <http://www.sunshinestateneews.com/story/what-accountability-us-supreme-court-justices-finally> (on file with *The University of the Pacific Law Review*).

this article, the White House staff members, including Trump adviser Steven Miller, have launched a particularly ugly attack on the Seattle federal district court judge and panel of the Ninth Circuit Court of Appeals who overturned Trump's executive order on immigration.<sup>242</sup> Some liberals and conservatives alike have proposed a constitutional amendment limiting Supreme Court justices' terms of service to a period of years.<sup>243</sup> But even those proposals do not favor judicial elections for federal judges.<sup>244</sup>

Although measuring the effect of lifetime tenure versus re-election poses problems, there is a good deal of scholarly support that Article III judges are more independent than their elected counterparts.<sup>245</sup> Studies like the one published by the Brennan Center strongly support this conclusion.<sup>246</sup>

Based on arguments like those outlined above, many of us question the soundness of judicial elections. That is especially true in partisan judicial elections where there are few controls on advertising, as has been the modern trend.<sup>247</sup> But that is true even when judicial elections are nonpartisan. Given grave doubts about judicial elections, not surprisingly, many of us also disfavor judicial recall elections.<sup>248</sup>

Even in jurisdictions with some limits on grounds for recall, the threat of recall is unacceptable. But the risk in California, where there is virtually no restraint on the process, is too great. As in Judge Persky's case, a judge must be prepared to defend himself in proceedings before the Commission on Judicial Performance.<sup>249</sup> If the recall fails, he will face a bitter re-election in several years.<sup>250</sup> In the meantime, judicial ethics severely limit his ability to defend

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242. See, e.g., Susan Jones, *Trump Adviser Steven Miller: 'A District Judge in Seattle Cannot Make Immigration Law for U.S.'*, CNS NEWS (Feb. 13, 2017, 5:37 AM), <http://www.cnsnews.com/news/article/susan-jones/trump-adviser-stephen-miller-district-judge-seattle-cannot-make-immigration> (on file with *The University of the Pacific Law Review*).

243. See, e.g., S.M., *Is It Bad to Have a Bunch of Old Judges?*, ECONOMIST (Aug. 20, 2015), <http://www.economist.com/blogs/democracyinamerica/2015/08/term-limits-and-supreme-court> (on file with *The University of the Pacific Law Review*); Christopher Ingraham, *Why It's Time to Get Serious About Supreme Court Term Limits*, WASH. POST (Feb. 13, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/13/why-its-time-to-get-serious-about-supreme-court-term-limits/> (on file with *The University of the Pacific Law Review*).

244. Scholars disagree whether changing the law to impose fixed terms would require a constitutional amendment. Stuart Taylor Jr., *Life Tenure is Too for Supreme Court Justices*, ATLANTIC (June 2005), <https://www.theatlantic.com/magazine/archive/2005/06/life-tenure-is-too-long-for-supreme-court-justices/304134/> (on file with *The University of Pacific Law Review*). But allowing judicial elections would obviously require a constitutional amendment. U.S. CONST. art. 3, § 1.

245. See generally BERRY, *supra* note 222, at 10–11.

246. *Id.*

247. *Id.* at 3–7.

248. See, e.g., Kaplan, *supra* note 7.

249. *Overview of Commission Proceedings*, *supra* note 194.

250. *What Does California's Experience with Recall of Judges Teach Us*, SCOCABLOG (Nov. 10, 2016), <http://scocablog.com/what-does-californias-experience-with-recall-of-judges-teach-us/> (on file with *The University of the Pacific Law Review*).

himself in the public arena.<sup>251</sup> He has a limited ability to raise money to fight the recall efforts, and countering the massive attacks on social media is nearly impossible.<sup>252</sup> Currently, initial polls suggest overwhelming support for Judge Persky's recall.<sup>253</sup>

To date, Californians have seldom recalled judges, despite a number of high-profile attempts.<sup>254</sup> But the current recall efforts send two bad messages. First, imagine judges facing sentencing decisions like what Judge Persky faced in Turner's case. One need only to frame the question to answer it: Will that judge impose a short sentence for the offender, even if the judge believes that the sentence is lawful and otherwise appropriate in light of relevant sentencing criteria? Without disparaging judges' integrity, forcing a judge to choose between the potential loss of one's livelihood and the addition of a few years to a guilty offender's sentence poses an unfair dilemma. Second, will a successful recall effort embolden members of the public to seek recall of other judges who impose unpopular sentences? Social media allows widespread dissemination of these ideas, including appeals for funding, with virtually no check on the accuracy of claims made by a judge's opponents.<sup>255</sup> Beyond that, successful recall efforts may embolden groups that favor increased prison sentences. California has an unfortunate history of powerful moneyed interest groups shaping criminal justice policy in ways that favor their sponsors or members.<sup>256</sup> Such efforts can only add to the pressure to avoid a sentence that the public may view as too lenient.<sup>257</sup>

One might still raise the argument based on democratic theory. After all, why shouldn't all public officials be accountable to the voters? That sounds so seductive; and yet, not all temptation is good.

The Founding Fathers laid out arguments in favor of an independent judiciary. As stated in Federalist Paper 78, the independent judiciary is "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws."<sup>258</sup> Alexander Hamilton described

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251. See CAL. CODE JUDICIAL ETHICS 1, 30, available at [http://www.courts.ca.gov/documents/ca\\_code\\_judicial\\_ethics.pdf](http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf) (on file with *The University of the Pacific Law Review*).

252. *Id.* at 1, 30 ("A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.")

253. Elena Kadavy, *Survey of Voters Reveals Support for Recall of Brock Turner Judge*, MOUNTAIN VIEW VOICE (June 28, 2016, 10:08 AM), <http://www.mv-voice.com/news/2016/06/28/survey-of-voters-reveals-support-for-recall-of-brock-turner-judge> (on file with *The University of the Pacific Law Review*).

254. *What Does California's Experience with Recall of Judges Teach Us*, *supra* note 250.

255. Seligman, *supra* note 208.

256. See, e.g., 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*).

257. For most of California and the nation's history, claims of being tough on crime were red meat for the public. See Hoting, *supra* note 234.

258. THE FEDERALIST NO. 78 (Alexander Hamilton).

additional benefits, including concerns about “serious oppressions of the minor party in the community.”<sup>259</sup> That is, an independent judiciary helps protect a society in which individual rights count.

On a more general level, our system of government does not entrust all decisions to the democratic process.<sup>260</sup> Apart from those found in the Constitution itself, lawmakers have at times created undemocratic institutions when strong policies dictated that result. As argued in *Punishment and Democracy: Three Strikes and You’re Out in California*, every Western democracy insulates monetary policy from popular control.<sup>261</sup> The United States has relied on the Federal Reserve since 1913 to insulate monetary policy from the electorate because of the fear that a democratically responsive institution in this context would “produce undesirable levels of inflation.”<sup>262</sup>

Is criminal sentencing more like monetary policy than other matters rightly left to the democratic process? Criminal justice scholars recognize how the United States ended up with mass incarceration, only now a matter of public concern.<sup>263</sup> Some politicians have used “dog whistle” politics to make a not-too-subtle appeal to racial bias.<sup>264</sup> For a long period of time, once the call for “law and order” demonstrated its staying power, legislators tripped over themselves to appear tough-on-crime.<sup>265</sup> In California, legislators piled on one enhancement on top of another, often motivated by the most recent headline.<sup>266</sup> Thus, if the media reported cases of carjacking, the legislature added an enhancement for that crime, despite the fact that the state already had in place sentences for theft and armed robbery.<sup>267</sup> When the media reported (ultimately falsely)<sup>268</sup> about young “super

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259. *Id.*

260. Some seem particularly troubling in light of two recent presidential elections where the less popular candidate won an Electoral College victory. See Drew DeSilver, *Trump’s Victory Another Example of How Electoral College Wins are Bigger than Popular Vote Ones*, PEW RES. CTR. (Dec. 20, 2016), <http://www.pewresearch.org/fact-tank/2016/12/20/why-electoral-college-landslides-are-easier-to-win-than-popular-vote-ones/> (on file with *The University of the Pacific Law Review*). Further, the undemocratic structure of the Senate has put the citizens in populous states at a distinct disadvantage. See Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, N.Y. TIMES (Mar. 11, 2013), <http://www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html> (on file with *The University of the Pacific Law Review*).

261. FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* 204–09 (2001).

262. *Id.* at 204–05.

263. See, e.g., Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POL’Y INITIATIVE (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2016.html> (on file with *The University of the Pacific Law Review*).

264. LÓPEZ, *supra* note 231, at 3–4.

265. See, e.g., PUB. EYE, *CONSERVATIVE AGENDAS AND CAMPAIGN: THE RISE OF THE MODERN “TOUGH ON CRIME” MOVEMENT* 45, available at <http://www.publiceye.org/defendingjustice/pdfs/chapters/toughcrime.pdf> (last visited Mar. 1, 2017) (on file with *The University of the Pacific Law Review*).

266. Vitiello & Kelso, *supra* note 16, at 920–21.

267. CAL. PENAL CODE § 215 (West 1993); see, e.g., Charles Fleming, *Car Thieves Love L.A.: California Leads the Nation (Again) in Auto Thefts*, L.A. TIMES (June 6, 2016, 5:00 AM), <http://www.latimes.com/business/autos/la-fi-hy-vehicle-theft-report-20160603-snap-story.html> (on file with *The University of the Pacific Law Review*).

predators,”<sup>269</sup> legislatures gave prosecutors greater latitude to treat juvenile offenders as adults and to send them away, possibly for life without the possibility of parole.<sup>270</sup>

One might ask, what is wrong with that kind of legislation? The answer depends on why a society punishes an offender. Critics of Three Strikes have argued that many severe punishments under that law could not be justified by resort to retributive principles.<sup>271</sup> But put aside for purposes of argument niceties of criminal law theory. As the authors of *Punishment and Democracy* demonstrated, laws like Three Strikes do not provide much social protection and are exceedingly expensive.<sup>272</sup> For example, the authors found that the Three Strikes law accounted for marginal deterrence, if any.<sup>273</sup> Further, the authors undercut any effort to explain the historic downturn in crime occurring in California, by comparing it with other states that did not spend extra billions of dollars on their prison systems but experienced similar sharp downturns in crime rates.<sup>274</sup>

There are many reasons why long prison sentences may not be worth the cost. Notably, as mentioned above, certainty of punishment is more important than severity of punishment.<sup>275</sup> A variety of alternatives to incarceration may be far more cost effective than imprisonment, including drug treatment and close parole supervision.<sup>276</sup> And as widely recognized, at least with regards to violent crime, age correlates with criminality: as offenders reach their thirties and beyond, they are more likely to phase out of criminality.<sup>277</sup>

As the Brennan Center report indicates, judicial elections already result in longer prison sentences than the judges would have imposed otherwise.<sup>278</sup> Not only is it unfair that a criminal sentence depends on the fortuity of how close the

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*Pacific Law Review*).

268. Clinton Regrets 1996 Remark on ‘Super-Predators’ After Encounter with Activist, WASH. POST (Feb. 25, 2016), [https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/?utm\\_term=.030b763553f2](https://www.washingtonpost.com/news/post-politics/wp/2016/02/25/clinton-heckled-by-black-lives-matter-activist/?utm_term=.030b763553f2) (on file with *The University of the Pacific Law Review*).

269. *Id.*

270. See, e.g., *The “Superpredator” Myth and the Rise of JLWOP*, FAIR PUNISHMENT PROJECT (Apr. 12, 2016), <http://fairpunishment.org/the-superpredator-myth-and-the-rise-of-jwlop/> (on file with *The University of the Pacific Law Review*).

271. ZIMRING ET AL., *supra* note 261, at 105; Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 437–40 (1997).

272. ZIMRING ET AL., *supra* note 261, at 15, 105.

273. *Id.* at 105.

274. *Id.* at 20.

275. Vitiello, *supra* note 135, at 689.

276. See, e.g. Greg Berman, *Alternatives to Incarceration are Cutting Prison Numbers, Costs and Crime*, GUARDIAN (July 4, 2013, 12:30 PM), <https://www.theguardian.com/commentisfree/2013/jul/04/alternatives-incarceration-prison-numbers> (on file with *The University of the Pacific Law Review*).

277. Michael Vitiello, *California’s Three Strikes and We’re Out: Was Judicial Activism California’s Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1069–70 (2004).

278. BERRY, *supra* note 222, at 13.

sentencing judge's retention election is, but such sentences are likely longer than necessary for assuring the safety of the public.<sup>279</sup>

### III. CONCLUDING THOUGHTS

How long should an offender like Brock Turner spend in jail or prison? I remain agnostic on that question, despite my gut sense that three months is too short a sentence. But I do know that my views about the case evolved once I stopped reading headlines and instead looked at relevant legal documents, including the probation report. But as long as members of the public rely primarily on media, including social media, they will have a severely limited understanding of the complex legal questions posed by Turner's case.<sup>280</sup> Additionally, examining widely reported "facts" about the case should erode one's confidence in what we "know" about it.<sup>281</sup>

More importantly, even if I were convinced that Turner deserved a longer term of incarceration, I see nothing but mischief in recalling Judge Persky. His sentence was lawful, based on a detailed probation report.<sup>282</sup> California has in place checks on improper judicial conduct.<sup>283</sup> Indeed, as argued above, retention elections carry great risk.<sup>284</sup> Recall only adds to the risk of unnecessary punishment, because even the threat of a recall presents judges with the untenable options of either risking their livelihoods or adding unwarranted time in prison for an offender already found guilty of a crime. One should be mindful of a fundamental principle of the rule of law: "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."<sup>285</sup>

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279. ZIMRING ET AL., *supra* note 261, at 105; Vitiello, *supra* note 271, at 437–40.

280. *Supra* Part I.A.

281. *See supra* Part I.

282. *See generally* Probation Report, *People v. Turner*, No. B1577162 (Cal. Super. Ct. June 2, 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*).

283. *Judicial Selection in the States*, *supra* note 17.

284. *Supra* Part II.

285. *Orange County Judge M. Marc Kelly: Recall Effort is an Injustice*, L.A. TIMES, <http://www.latimes.com/opinion/editorials/la-ed-orange-county-judge-recall-campaign-20150519-story.html> (last visited Mar. 1, 2017) (on file with *The University of the Pacific Law Review*).