

COMUNITÀ INTERNAZIONALE

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Brock turner: sorting through the noise

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.¹ That seemed compounded by the fact that college athletes, including African-American stars like Jameis Winston,² appear to get a free pass when they engage in sexually inappropriate conduct.³ Combine that with the insensitive 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.”⁴

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.⁵ The recall efforts have kept the case in the public’s eye. While some members of the public and profession have spoken out against the recall,⁶ it seems to be on pace to get on the ballot in

¹ See, e.g., *Racial Disparity*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/issues/racial-disparity/> (last visited Feb. 20, 2017) (on file with *The University of the Pacific Law Review*).

² Marc Tracy, *Jameis Winston and Woman Who Accused Him of Rape Settle Lawsuits*, NEW YORK TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/sports/football/jameis-winston-ericakinsman-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*).

⁴ Michael E. Miller, *‘A Steep Price to Pay for 20 Minutes of Action’: Dad Defends Stanford Sex Offender*, WASHINGTON 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 (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 (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 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 JUSTICE PROJECT

the fall of this year.⁷ One website, not limited to eligible voters, reports well over a million signatures supporting recall.⁸

As troubling as Turner's sentence is for many observers, issues posed by a judicial recall are quite distinct. That is one focus of this article. 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. While the sentence seems far too short in light of Turner's conduct, an examination of California sentencing criteria, as well as the probation report that Judge Persky relied on in determining Turner's sentence, makes the case more complicated than widely reported in the media.⁹ Part II turns to the larger point: even assuming that one disagrees with Judge Persky's sentencing decision, recall is inappropriate.¹⁰ Many states have begun to reform the criminal sentencing laws that have resulted in mass incarceration. 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.¹¹ 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.¹²

Even apart from recall, California judges are subject to possible impeachment

(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*).

⁷ 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*).

⁸ *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*).

⁹ *Infra* Part I.

¹⁰ *Infra* Part II.

¹¹ See, e.g., Michael Vitiello, *Alternatives to Incarceration: Why is California Lagging Behind?*, 28 GA. ST. U. L. REV. 1275 (2012).

¹² Vitiello, *supra* note 11, at 1313; 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).

for improper conduct,¹³ review by the California Commission on Judicial Performance,¹⁴ and periodic reelection.¹⁵ Further, among the relatively few states that allow judicial recall, California subjects recall petitions to almost no checks, other than submission of a 200-word statement explaining why the proponents urge recall and compliance with signature-gathering requirements.¹⁶ Many commentators see judicial elections as eroding the integrity of the judicial system as money pours into those elections.¹⁷ Recall only invites more mischief, something especially true in light of a judge's limited ability to defend himself in the public arena.¹⁸

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*¹⁹ holding that 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 increase.²⁰ 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.²¹

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;"²²

¹³ *Judicial Selection in the States - Methods of Judicial Selection*, NATIONAL CENTER FOR STATE COURTS, 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*).

¹⁴ *Id.*; *California Commission on Judicial Performance*, CALIFORNIA COMMISSION ON JUDICIAL PERFORMANCE, <https://cjp.ca.gov/> (last visited Feb. 22, 2017) (on file with *The University of the Pacific Law Review*).

¹⁵ NATIONAL CENTER FOR STATE COURTS, *supra* note 13.

¹⁶ *Procedure for Recalling State and Local Officials*, California Secretary of State, <http://www.sos.ca.gov/elections/recalls/procedure-recalling-state-and-local-officials/> (on file with *The University of the Pacific Law Review*).

¹⁷ 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*).

¹⁸ See Adam Skaggs, *Judges and Politics Don't Mix*, BRENNAN CENTER FOR JUSTICE (Feb. 12, 2010), <https://www.brennancenter.org/blog/judges-and-politics-dont-mix> (on file with *The University of the Pacific Law Review*).

¹⁹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

²⁰ *Infra* Part II(b).

²¹ *Infra* Part II(b).

²² Kory Grow, *Stanford Rapist Brock Turner Registers as Sex Offender*, ROLLING STONE (Sept. 6,

“Brock Turner Will Serve the Rest of His Rape Sentence in This Unsuspecting Town;”²³ “Brock Turner’s Stanford Rape Case: Everything You Need to Know;”²⁴ “Stanford Rape Case: Inside the Court Documents;”²⁵ and “The Brock Turner Rape Case: A Complete Injustice.”²⁶ A *Los Angeles Times* website provides links to “Court Documents: Stanford Rape Case.”²⁷ 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.”²⁸

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 almost certainly had no evidence that Turner achieved penetration.²⁹ What were the facts of the case?

Early in the morning on January 18, 2015, two Swedish international students at Stanford confronted Turner, who was lying on top of an unconscious woman behind a dumpster.³⁰ Turner ran when the men confronted him, but they tackled and detained him until campus police arrived.³¹ A Deputy Sheriff stated that the victim was unconscious and unable to communicate effecti-

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*).

²³ 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*).

²⁴ 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*).

²⁵ 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*).

²⁶ *The Brock Turner Rape Case: A Complete Injustice*, THE PROFESSIONAL, <http://www.theprofessional.net/brock-turner-rape-case-injustice/> (last visited Feb. 25, 2017) (on file with *The University of the Pacific Law Review*).

²⁷ *Court Documents: Stanford Rape Case*, LOS ANGELES TIMES, <http://documents.latimes.com/stanford-brock-turner/> (last visited Feb. 25, 2017) (on file with *The University of the Pacific Law Review*).

²⁸ Liam Stack, *Light Sentence for Brock Turner in Stanford Rape Case Draws Outrage*, NEW YORK TIMES (June 6, 2016), https://www.nytimes.com/2016/06/07/us/outrage-in-stanford-rape-case-over-dueling-statements-of-victim-and-attackers-father.html?_r=0 (on file with *The University of the Pacific Law Review*).

²⁹ *See generally* Police Report, *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*).

³⁰ *Id.* at 8-9.

³¹ *Id.*

vely until 4:15 a.m.³² A nurse administered a rape detection test, indicating “significant trauma,” including “penetrating trauma.”³³ The accounts of how Turner and the victim ended up behind the dumpster conflict. In fact, Turner gave conflicting accounts at various times.³⁴ The victim’s sister and the victim, neither of them Stanford students, attended a fraternity party on the Stanford campus.³⁵ The victim’s sister told police that Turner tried to kiss her on a couple of occasions, but she did not see him with her sister.³⁶ Turner, who told the police that he consumed a large amount of alcohol, made inconsistent statements to them.³⁷ At first he indicated that he met the victim outside the fraternity house and left with her.³⁸ He acknowledged that he did not know her name.³⁹ After his arrest, he said that he and the victim met at the party, drank beer together, and left holding hands.⁴⁰ He claimed that he and the victim engaged in some foreplay, at which point he got sick and left to vomit.⁴¹ Turner claimed that he heard someone speaking to him at that point, but was not able to understand what the person was saying.⁴² That person turned out to be one of the Swedish graduate students.⁴³ Turner’s trial testimony varied still 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.⁴⁴ He got down on the ground and asked and received permission to engage in sexual activity.⁴⁵ According to Turner, “[a]t no time did I see

³² *Id.* at 18.

³³ 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*).

³⁴ 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*, *Stanford 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*).

³⁵ 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*).

³⁶ *Id.* at 47-48.

³⁷ *Id.* at 29.

³⁸ *Id.* at 27-28.

³⁹ *Id.* at 28.

⁴⁰ *Id.* at 27-28.

⁴¹ *Id.* at 28.

⁴² *Id.* at 28-29.

⁴³ *Id.* at 9.

⁴⁴ Xu, *supra* note 34.

⁴⁵ *Id.*

that she was not responding. If at any time I thought that she was not responding, I would have stopped immediately.”⁴⁶ The prosecutor contended at trial that Turner’s testimony was a fabrication.⁴⁷

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%.⁴⁸ The victim stated that she did not remember anything that occurred after 12:00 midnight.⁴⁹ 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.⁵⁰ Further, she was able to lift herself and vomit without assistance.⁵¹ Several hours later, her blood alcohol was .12%;⁵² thus, at the time of the incident, her alcohol level was somewhere between .22-249%.⁵³

The prosecutor charged Turner with five counts: rape of an intoxicated person;⁵⁴ rape of an unconscious person;⁵⁵ assault with intent to rape an intoxicated person;⁵⁶ sexually penetrating an intoxicated person with a foreign object;⁵⁷

⁴⁶ Prob. Report at 6, *People v. Turner*, No. B1577162 (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*).

⁴⁷ 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/>.

⁴⁸ 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*).

⁴⁹ Police Report at 30-31, *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*).

⁵⁰ 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*).

⁵¹ *Id.*

⁵² Wilson, *supra* note 48.

⁵³ *Id.*

⁵⁴ Complaint, *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*); see CAL. PENAL CODE § 261(a)(3) (West 2016).

⁵⁵ Complaint, *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*); see CAL. PENAL CODE § 261(a)(4) (West 2016).

⁵⁶ Complaint, *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*); see CAL. PENAL CODE § 220(a)(1) (West 2016).

⁵⁷ Complaint, *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*

and sexually penetrating an unconscious person with a foreign object.⁵⁸ Prior to trial, the state dropped the two rape charges because DNA evidence failed to reveal any evidence of penetration.⁵⁹ The jury convicted Turner of the remaining three charges.⁶⁰

In reliance on the probation report, Judge Persky sentenced Turner to six months in county jail, followed by three years of probation and life-time registration as a sex offender.⁶¹ Turner was released after serving only three months of his sentence.⁶² Upon release, he was required to participate in a sex offender rehabilitation program.⁶³

Obviously, claims that Turner committed rape find no support in the evidence. But what is wrong with headlines decrying Turner as a rapist? In an era of “alternative facts”⁶⁴ and “fake news,”⁶⁵ I would think that the answer is obvious: words matter. Certainly, lawyers understand the importance of precise use of language: subtle distinctions matter.⁶⁶

Clearly, headlines identifying Turner as a rapist who received a short sentence trouble the public. Most legislatures, courts, and members of the public

University of the Pacific Law Review); see CAL. PENAL CODE § 289(e) (West 2016).

⁵⁸ Complaint, *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*); see CAL. PENAL CODE § 289(d) (West 2016).

⁵⁹ Veronica Rocha and Richard Winton, *Light Sentence for Stanford Swimmer in Sexual Assault ‘Extraordinary,’ Legal Experts Say*, LOS ANGELES 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*).

⁶⁰ Hannah Knowles, *Brock Turner Found Guilty on Three Felony Counts*, STANFORD 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*).

⁶¹ Matt Hamilton, *Brock Turner to be Released From Jail After Serving Half of Six-Month Sentence in Stanford Sexual Assault Case*, LOS ANGELES 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*).

⁶² *Id.*

⁶³ 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*).

⁶⁴ 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*).

⁶⁵ 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*).

⁶⁶ See, e.g., The Write House, *Subtle Distinctions*, THE 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*).

rightly include rape among the most serious offenses on the books.⁶⁷ Historically, the law has treated rape differently from sexual assault.⁶⁸ Early in our history, the distinction no doubt was 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.⁶⁹ But even in a more enlightened era, the distinction continues.⁷⁰

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.⁷¹

(b) Okay, but Sixth 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 justice system."⁷² Even more important is an assessment of whether the judge's sentence was inappropriate. That requires a good bit 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 sen-

⁶⁷ 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 (on file with *The University of the Pacific Law Review*).

⁶⁸ 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 (on file with *The University of the Pacific Law Review*).

⁶⁹ 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 (on file with *The University of the Pacific Law Review*).

⁷⁰ See Palmer, *supra* note 68.

⁷¹ 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*).

⁷² Kaplan, *supra* note 6.

tence was illegal. For example, the *Recall Judge Aaron Persky* campaign website states that the judge sentenced “ignor[ed] the statutory minimum sentence of two years” when he sentenced Turner to only six months in prison and three years of probation.⁷³ 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.⁷⁴ Some media stories took the same slant.⁷⁵

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.⁷⁶ California Penal Code section 1203 provides that, except in unusual circumstances, certain offenders are not eligible for probation.⁷⁷ But the crimes Turner committed were not listed in that provision.⁷⁸ 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.⁷⁹

The California Commission on Judicial Performance said as much.⁸⁰ 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.”⁸¹ The Commission rejected other claims, including an assertion that Judge Persky’s sentence reflected bias based on gender, race, or socioeconomic status.⁸² I take up the latter question below.

⁷³ *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*).

⁷⁴ *Id.*

⁷⁵ 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*).

⁷⁶ 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*).

⁷⁷ CAL. PENAL CODE § 1203 (West 2016).

⁷⁸ CAL. PENAL CODE § 1203.065 (amended by 2016 Cal. Stat. Ch. 863).

⁷⁹ CAL. PENAL CODE § 1203.065(b) (West 2016).

⁸⁰ *Commission on Judicial Performance Closes Investigation of Judge Aaron Persky*, COMMISSION ON JUDICIAL PERFORMANCE (Dec. 19, 2016), available at https://cjp.ca.gov/files/2016/08/Persky_Explanatory_Statement_12-19-16.pdf (on file with *The University of the Pacific Law Review*).

⁸¹ *Id.* at 2.

⁸² *Id.* at 6-9.

While not stating whether she agreed with the Commission's conclusion that the sentence was lawful, Professor Dauber responded to the report by attacking the Commission's credibility and, more importantly, arguing that the judge abused his discretion.⁸³ 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.⁸⁴ 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, but instead, many prominent scholars and legislatures often end up with a system that focuses on multiple theories.⁸⁵ 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.⁸⁶

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

⁸³ 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*).

⁸⁴ 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* 22-28 (11th ed. 2012).

⁸⁵ 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).

⁸⁶ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 22-23 (6th ed. 2012).

situated.”⁸⁷

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.⁸⁸ 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 focus on in assessing the appropriate sentence.⁸⁹ 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.”⁹⁰ 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.⁹¹

The probation report included a risk assessment score, as required by the Penal Code.⁹² Commonly used in many jurisdictions, such actuarial assessment tools offer empirically meaningful measurement of an offender’s future risk.⁹³ Turner’s score “placed him in the Low-Moderate Risk Category for being charged or convicted of another sexual offense.”⁹⁴ The report referred to a separate set of risk assessment criteria and needs. The Correctional Assessment and Intervention System measures the needs of an offender in or-

⁸⁷ People v. Superior Court (Du), No. B063918 (2d. Dist., Apr. 21, 1992).

⁸⁸ 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.

⁸⁹ Prob. Report at 11-12, People v. Turner, No. B1577162 (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*).

⁹⁰ *Id.* at 7.

⁹¹ *Id.*

⁹² *Id.* at 8-9.

⁹³ See generally Kevin Baldwin, *Sex Offender Risk Assessment*, UNITED STATES DEPARTMENT OF JUSTICE (July 2015), <https://www.smart.gov/pdfs/SexOffenderRiskAssessment.pdf> (on file with *The University of the Pacific Law Review*).

⁹⁴ Prob. Report at 9, People v. Turner, No. B1577162 (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*).

der to reduce the risk of recidivism.⁹⁵ Consistent with that assessment, the probation report provides other recommendations to reduce Turner’s risk of reoffending, including treatment for substance abuse.⁹⁶

The report focused on Turner’s lack of a criminal history and the absence of other aggravating circumstances surrounding the crime.⁹⁷ The report also included several statements from the victim, pointing towards a short jail sentence, rather than the six years recommended by the prosecutor.⁹⁸ 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.”⁹⁹

The probation officer’s recommendation was based in “myriad factors,” which included “impact of the crime on the victim and safety of the community.”¹⁰⁰ She also noted Turner’s youth, remorse, and lack of criminal history, as well as the victim’s wishes as to the outcome.¹⁰¹ The probation officer also distinguished his case from some other cases where the offender was not intoxicated; implicitly, the probation officer found that intoxication reduced Turner’s culpability.¹⁰² 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.¹⁰³ Judge Persky’s sentence largely tracked the probation officer’s recommendations.¹⁰⁴

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 – the standard to establish an abuse of discretion.¹⁰⁵ Indeed, one could defend the

⁹⁵ *Id.*; see also *Correctional Assessment and Intervention System*, NATIONAL COUNCIL ON CRIME & DELINQUENCY, <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*).

⁹⁶ Prob. Report at 10, *People v. Turner*, No. B1577162 (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*).

⁹⁷ *Id.*

⁹⁸ *Id.* at 5.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 12.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 13.

¹⁰⁴ *Id.*

¹⁰⁵ *Response to the Commission on Judicial Performance*, RECALL JUDGE AARON PERSKY, http://www.recallaaronpersky.com/response_to_the_commission_on_judicial_performance (last visited

sentence as entirely justified. I return to the length of Turner’s sentence below when I address the potential cost of judicial recall.

(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 by his opponents or that might be made 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 that prosecutor who argued that “the defendant was untruthful in his testimony regarding the victim being unconscious during the instant offenses.”¹⁰⁶ 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.¹⁰⁷ 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 level of intoxication, 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.¹⁰⁸ 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 on Turner’s behalf.¹⁰⁹ A psychologist testified, for example, that someone who is legally unconscious might otherwise appear to be engaging in

Feb. 28, 2017) (on file with *The University of the 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.”).

¹⁰⁶ Prob. Report at 8, *People v. Turner*, No. B1577162 (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*).

¹⁰⁷ *Id.*

¹⁰⁸ See Robert Rosenthal, *Suggestibility, Reliability, and the Legal Process*, ELSEVIER SCIENCE, http://ncrj.org/_Rosen/ (last visited Feb. 26, 2017) (on file with *The University of the Pacific Law Review*).

¹⁰⁹ *Supra* Part I(b).

purposeful conduct.¹¹⁰ While the emergency medical technician described the victim in ways that seem to undercut that testimony, he observed her at about 1:00 a.m.¹¹¹ The evidence did not pinpoint precisely when Turner “fingered” the victim.¹¹² The only other point of reference is midnight, when, apparently, based on her testimony, the victim had some recollection.¹¹³ 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.¹¹⁴ 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.¹¹⁵ The recommended sentence made a “mockery of the seriousness of his assaults....”¹¹⁶ Similarly, the victim disagreed with reliance by the probation officer on Turner’s youth and lack of a prior record.¹¹⁷ As she stated, “He is young, but old enough to know better.”¹¹⁸ 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.¹¹⁹ And as indicated above, the probation report tracks those criteria.¹²⁰ Further, the law has typically treated an offender’s youth as legally relevant.¹²¹ Indeed, in the past decade, the Supreme Court has found that youth is relevant to the Court’s interpretation of the

¹¹⁰ Elena Kadavy, *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*).

¹¹¹ Lee, *supra* note 50.

¹¹² 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*).

¹¹³ *Id.* at 30-31.

¹¹⁴ 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 (on file with *The University of the Pacific Law Review*).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See CAL. R. CT. 4.410(a) (2017).

¹²⁰ *Supra* Part I(b).

¹²¹ See Bary C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 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).

Eighth Amendment's Cruel and Unusual Punishment Clause.¹²² 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.¹²³

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."¹²⁴ Similarly, she stated that the sentence must be appropriate to change the rape culture.¹²⁵ 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.¹²⁶

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, and death threats and public contempt.¹²⁷ Further, empirical data is largely uncontested: offenders are far more likely to be deterred by the certainty of punishment, rather than its severity.¹²⁸ 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.¹²⁹ Again, think back to the point about the multiple factors relevant to fixing a term of imprisonment under California law. The legislature has directed the responsible actors to balance the kinds of factors discussed in this section.¹³⁰

¹²² *Miller v. Alabama*, 132 S.Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).

¹²³ *Miller*, 132 S.Ct. 2455; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551. Granted, Turner was 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.

¹²⁴ *Baker*, *supra* note 114.

¹²⁵ *Id.*

¹²⁶ CAL. R. CT. 4.410(a)(4) (2017).

¹²⁷ 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 28.

¹²⁸ See Michael Vitiello, *Reforming California Sentencing Practice and Policy: Are We There Yet?*, 46 MCGEORGE L. REV. 685, 689 (2014).

¹²⁹ *See id.*

¹³⁰ CAL. R. CT. 4.410(a)(4) (2017).

One might object that sex offenders are not susceptible to rehabilitation. That is certainly the impression held by many law makers and members of the public.¹³¹ Indeed, that stereotype helps explain various punitive laws imposed on sex offenders, including life time registration requirements.¹³² The problem is that the stereotype is not true.

In *An American Travesty: Legal Responses to Adolescent Sex Offenders*, Frank Zimring stated, “[P]olicy toward sex offenders is often based on monolithic images of alien pathologies; it is rarely based on facts.”¹³³ While Zimring focused on adolescent sexual offenders, his point applies equally to laws punishing adult sex offenders.¹³⁴ Many sex offenders do not suffer from sexual pathologies. Empirical studies, although flawed in design as is often the case in criminal justice matters, may be imperfect.¹³⁵ But researchers have found that “[s]exual offenders are relatively unlikely to commit future sexual offenses....”¹³⁶ Studies have identified particular factors that correlate with higher recidivism rates – paraphilia and an antisocial orientation.¹³⁷ 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.¹³⁸

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.¹³⁹ That is, for low-risk offenders, prison may be criminogenic.¹⁴⁰

One cannot read the victim’s statement without pain and a good bit of empa-

¹³¹ 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*).

¹³² See, e.g., FED. R. EVID. 413-15; ARIZ. REV. STAT. ANN. §§ 13-3821 to -3827 (West 2017); CAL. PENAL CODE §§ 290, 645 (West 2017).

¹³³ FRANKLIN E. ZIMRING, *AN AMERICAN TRAVESTY* xiii (2004).

¹³⁴ *Id.*

¹³⁵ 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).

¹³⁶ *Id.*

¹³⁷ Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 678 (2008).

¹³⁸ *Id.* at 676.

¹³⁹ *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).

¹⁴⁰ Vitiello, *supra* note 137, at 678; Lowenkamp & Latessa, *supra* note 139, at 264.

thy for her. Especially in California, where victims' rights organizations have made a major impact on criminal justice policy,¹⁴¹ the law requires judges to consider victims' statements as relevant to sentencing.¹⁴² But, as developed throughout this section, judges must consider other factors as well.¹⁴³

(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.¹⁴⁴ Some critics allege that he is racially biased as well.¹⁴⁵ 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.¹⁴⁶

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.¹⁴⁷ I am unable to find information about Smith's social status. His attendance at a California community college is not evidence of privilege.¹⁴⁸ Further, Smith's race undercuts the Persky-as-racist narrative.

The most case most commonly cited to demonstrate Persky's supposed bias

¹⁴¹ See, e.g., *Crime Victims United of California*, CRIME VICTIMS UNITED, <http://crimevictimsunited.com/> (last visited Feb. 27, 2017) (on file with *The University of the Pacific Law Review*).

¹⁴² CAL. CONST. art I, § 28, sec. (b)(8).

¹⁴³ *Supra* Part I(c).

¹⁴⁴ See, e.g., Nancy Dillon, *Judge Aaron Persky, Under Fire for Brock Turner's Sentencing, Ruled in Favor of College Baseball Players Accused of Gang Raping Intoxicated 17-Year-Old Girl*, NEW YORK 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*).

¹⁴⁵ See, e.g., David Palumbo-Liu, *Stanford Sexual Assault Case Revealed Racial Bias. We Must Recall the Judge*, THE 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*).

¹⁴⁶ 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*).

¹⁴⁷ 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*).

¹⁴⁸ *Id.*

involves Raul Ramirez, a lower income Hispanic man.¹⁴⁹ 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.¹⁵⁰ Persky's critics assert that Ramirez's case was "very similar" to Turner's.¹⁵¹

One must be naïve to assert that race and class do not factor into criminal sentences.¹⁵² Many of us who favor sentencing reform see inequality as one of the major criminal justice issues.¹⁵³ 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.¹⁵⁴

As developed above, Turner was nineteen years old at the time of the incident, and he and the victim were both intoxicated and may have left a party together.¹⁵⁵ 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.¹⁵⁶ By contrast, Ramirez was thirty-two years old, and both he and his roommate, the victim in his case, were sober.¹⁵⁷ He gave her a love letter of some sort and then fingered her against her will for five to ten minutes, until she started crying.¹⁵⁸ The victim then called 911. Ramirez did appear to the police to be remorseful.¹⁵⁹

The recall campaign website applauds Ramirez for accepting responsibility by pleading guilty, unlike Turner.¹⁶⁰ But the website, as well as other articles ci-

¹⁴⁹ See, e.g., Jason Silverstein, *Judge Who Gave Brock Turner 6-Month Sexual Assault Sentence Delivers Harsher Punishment to Immigrant in Similar Case*, 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*).

¹⁵⁰ RECALL JUDGE AARON PERSKY, *supra* note 146.

¹⁵¹ *Id.*

¹⁵² See David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2013).

¹⁵³ *Id.*

¹⁵⁴ See, e.g., RECALL JUDGE AARON PERSKY, *supra* note 146.

¹⁵⁵ 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*).

¹⁵⁶ Wilson, *supra* note 48.

¹⁵⁷ 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*).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ RECALL JUDGE AARON PERSKY, *supra* note 105.

ting 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.¹⁶¹ That crime had no option for probation, which Turner's did at the time of his sentencing.¹⁶² 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...."¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵ In addition, California law directs a sentencing judge to consider the probation report submitted in the case.¹⁶⁶ In three of the four cases put before the Commission, the judge had a probation report before him.¹⁶⁷ In each instance, his sentence aligned with the probation report.¹⁶⁸

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.¹⁶⁹ As discussed extensively above, California, like many other states, treats first time offenders more leniently than repeat offenders.¹⁷⁰ Worse, in this case, the anecdotes cited by Persky's critics simply do not support the lar-

¹⁶¹ CAL. PENAL CODE § 289(a)(1)(A).

¹⁶² 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).

¹⁶³ *Commission on Judicial Performance Closes Investigation of Judge Aaron Persky*, COMMISSION ON JUDICIAL PERFORMANCE 8 (Dec. 19, 2016), *available at* https://cjp.ca.gov/files/2016/08/Persky_Explanatory_Statement_12-19-16.pdf (on file with *The University of the Pacific Law Review*).

¹⁶⁴ *Id.* at 8-9.

¹⁶⁵ *Id.* at 9.

¹⁶⁶ *Id.*; *see* CAL. PENAL CODE § 1203(b)(3) (West 2017).

¹⁶⁷ *Id.* at 8-9.

¹⁶⁸ *Id.*

¹⁶⁹ *See* CAL. R. CT. 4.423(b)(1) (identifying lack of a criminal record as a mitigating factor to be considered during sentencing).

¹⁷⁰ *See supra* Part I(b).

ger 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.¹⁷¹

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.¹⁷² 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.¹⁷³

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.¹⁷⁴

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 appropriate.¹⁷⁵ 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.¹⁷⁶ Thus, if the Assembly votes to impeach a judge, the Senate may convict by a two-thirds vote of that house.¹⁷⁷ Granted, the California legislature has seldom impeached a state judge.¹⁷⁸

¹⁷¹ Susan Svrluga et al., *'Repugnant' - or 'Fair'? Debate Erupts Over Judge's Decision in Stanford Sexual Assault Case*, WASHINGTON 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 (on file with *The University of the Pacific Law Review*).

¹⁷² See generally Prob. Report, *People v. Turner*, No. B1577162 (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*).

¹⁷³ See *supra* Part I(c).

¹⁷⁴ *Infra* Part II.

¹⁷⁵ Kaplan, *supra* note 6.

¹⁷⁶ CAL. CONST. art. IV, § 28.

¹⁷⁷ *Id.*

¹⁷⁸ Wilbank J. Roche, *Judicial Discipline in California: A Critical Re-Evaluation*, 10 LOY. L.A. L. REV. 192, 193-95 (1976), available at

As discussed above, California has in place a commission to review judicial performance. Anyone may file a complaint against a California judge.¹⁷⁹ The complaint must state misconduct to which the complainant objects.¹⁸⁰ The Commission requires that the complaint include specific allegations, not merely a disagreement with a judge's ruling.¹⁸¹ The Commission's website includes a list of kinds of misconduct sanctioned in the past. That list is quite broad.¹⁸² The Commission has in place an elaborate procedural scheme that may culminate in a trial-like hearing.¹⁸³ 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.¹⁸⁴ A judge may appeal the Commission's sanctions to the California Supreme Court.¹⁸⁵

California trial judges are also subject to retention elections.¹⁸⁶ Initially, the governor appoints an attorney to the bench to fill a judicial vacancy.¹⁸⁷ 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.¹⁸⁸

In addition to conviction after impeachment, dismissal by the Commission, and non-retention, judges are subject to a recall vote.¹⁸⁹ California is one of

<http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1249&context=llr> (listing the only two state judges that have ever been impeached in California).

¹⁷⁹ *Filing a Complaint*, COMMISSION ON JUDICIAL PERFORMANCE, https://cjp.ca.gov/file_a_complaint/ (last visited Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

¹⁸⁰ *Id.*

¹⁸¹ *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.")

¹⁸² *Types of Misconduct*, COMMISSION ON JUDICIAL PERFORMANCE, 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*).

¹⁸³ *Commission Proceedings*, COMMISSION ON JUDICIAL PERFORMANCE, 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*).

¹⁸⁴ *Overview of Commission Proceedings*, COMMISSION ON JUDICIAL PERFORMANCE, https://cjp.ca.gov/complaint_process/ (last visited Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

¹⁸⁵ *Id.*

¹⁸⁶ *Fact Sheet: California Judicial Branch*, JUDICIAL COUNCIL OF CALIFORNIA 3 (Jan. 2015), http://www.courts.ca.gov/documents/Calif_Judicial_Branch.pdf (on file with *The University of the Pacific Law Review*).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Procedure for Recalling State and Local Officials*, CALIFORNIA SECRETARY OF STATE, <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*).

eight states that allow for judicial recall.¹⁹⁰ A recall election may occur as part of a regularly scheduled election or a special election.¹⁹¹ California’s constitution establishes “the power of the electors to remove an elective officer.”¹⁹² 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.”¹⁹³

That power is substantial. A person or group seeking a recall election need only submit a 200-word statement of the reason for recall.¹⁹⁴ Thereafter, the county 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.¹⁹⁵ The absence of any review concerning the adequacy of reasons for recall sets California apart from the other states that allow recall.¹⁹⁶

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.¹⁹⁷ Proponents of recall may believe that waiting for the next judicial election allows a poorly performing judge to decide cases for too long before being held accountable.¹⁹⁸ After all, Judge Persky successfully ran for re-election in November 2016.¹⁹⁹ Some have commented that the Commission on Judicial Performance’s own demonstrated bias makes its protection against judicial abuse meaningless.²⁰⁰

¹⁹⁰ *Fact Sheet on Judicial Selection Methods in the States*, AMERICAN BAR ASSOCIATION 1, available at http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited Feb. 28, 2017) (on file with *The University of the Pacific Law Review*).

¹⁹¹ *Id.*

¹⁹² CAL. CONST. art. 2, § 13 (West 2017).

¹⁹³ CAL. CONST. art. 2, § 14(a) (West 2017).

¹⁹⁴ CALIFORNIA SECRETARY OF STATE, *supra* note 189.

¹⁹⁵ *Id.*

¹⁹⁶ Eli Hager, *How Easy Would It Be to Recall the Judge in the Brock Turner Case?*, The 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*).

¹⁹⁷ *Id.*

¹⁹⁸ See Katherine Seligman, *Recalling Judges in California May Become Easier, But is that Better?*, LOS ANGELES DAILY NEWS (Aug. 27, 2016, 3:15 PM), <http://www.dailynews.com/government-and-politics/20160827/recalling-judges-in-california-may-become-easier-but-is-that-better> (on file with *The University of the Pacific Law Review*).

¹⁹⁹ 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*).

²⁰⁰ Robert B. Gunnison, *California Gets C- Grade in 2015 State Integrity Investigation*, CENTER FOR PUBLIC INTEGRITY (Nov. 9, 2015, 12:01 AM),

The *Recall Judge Persky* website complains about the Commission's decision to not sanction Judge Persky.²⁰¹ It dismissed the Commission with more than a hint of contempt.²⁰² The Commission, according to the website, is "one-sided" and "has a long history of protecting judges."²⁰³ It suggested that the fact that the Commission imposes discipline in only 3% of all cases demonstrates its pro-judge bias.²⁰⁴ It also cites a finding by the Center for Public Integrity that criticizes the Commission for its supposed lack of transparency.²⁰⁵ The theory supporting recall and retention elections is obvious enough – both are grounded in principles of democracy.²⁰⁶ Supporters point to the need to hold public officials accountable.²⁰⁷ That is certainly the dominant theme struck by supporters of Judge Persky's recall.²⁰⁸

(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 in place in states around the country.²⁰⁹ 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 unelected judges and the virtues of judicial independence.²¹⁰ On occasion, researchers attempt to measure different judicial performance empirically.²¹¹

In December 2015, the Brennan Center for Justice at New York University Law School published a study on state court judicial sentencing practices.²¹²

<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*).

²⁰¹ RECALL JUDGE AARON PERSKY, *supra* note 160.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* (citing Gunnison, *supra* note 200).

²⁰⁶ Hager, *supra* note 196.

²⁰⁷ *Id.*

²⁰⁸ See RECALL JUDGE AARON PERSKY, *supra* note 160.

²⁰⁹ See, e.g., Jeri Zeder, *Elected vs. Appointed?*, HARVARD LAW 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*).

²¹⁰ *Id.*

²¹¹ See, e.g., Steven G. Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction*, 32 FLA. ST. U. L. REV. 1001 (2005).

²¹² Kate Berry, *How Judicial Elections Impact Criminal Cases*, Brennan Center for Justice (Dec. 2015), *available at*

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.²¹³ Much of the funding is from outside groups that typically fund negative ads.²¹⁴ Those ads fall into one of two categories: attacking opponents as soft on crime or touting one's candidate as tough on crime.²¹⁵ The report also explored the impact of such advertising on judges.²¹⁶ 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.²¹⁷ 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.²¹⁸ Judges in two states that researchers focused on sentenced defendants convicted of serious felonies to longer sentences as those judges' reelections got closer.²¹⁹

Anyone familiar with the Willie Horton ad that the first President Bush aired during the 1988 Presidential campaign recognizes that such ads often have as a not-so-subtle appeal to racial prejudice.²²⁰ 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.²²¹

When judges lose election bids, their positions on criminal justice issues are often at the center of the dispute over their qualifications.²²² Most notably,

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*).

²¹³ *Id.* at 3-7.

²¹⁴ *Id.* at 3-6.

²¹⁵ *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*, THE 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 (on file with *The University of the Pacific Law Review*); Maurice Chammah, *These Prosecutors Campaigned for Less Jail Time - and Won*, THE 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*).

²¹⁶ Berry, *supra* note 212, at 3-6.

²¹⁷ *Id.* at 2.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See* John Sides, *It's Time to Stop the Endless Hype of the 'Willie Horton' Ad*, WASHINGTON 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 (on file with *The University of the Pacific Law Review*).

²²¹ IAN HANEY LÓPEZ, DOG WHISTLE POLITICS (2014).

²²² *See* Billy Corriher, *Partisan Judicial Elections and the Distorting Influence of Campaign Cash*, AMERICAN PROGRESS (Oct. 25, 2012, 3:08 AM), <https://www.americanprogress.org/issues/courts/reports/2012/10/25/42895/partisan-judicial-elections->

although other interest groups opposed retention of Chief Justice Rose Bird in the mid-1980s,²²³ the primary attack on the three California Supreme Court justices who were ousted during that election was focused on the judges' votes on criminal justice issues.²²⁴ This focus on liberal criminal justice policies is common in other California cases where judges have not been retained or have faced close reelection battles.²²⁵

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, obviously not coincidentally, jobs for its members).²²⁶

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.*²²⁷ offer an almost grotesque example of the influence of money in judicial elections. And has anyone forgotten the effects of *Citizens United v. FEC*²²⁸ and its corrosive effect on politics in the United States?²²⁹

The federal judiciary has its critics.²³⁰ Depending on the current composition of the Court, critics often attack its members' lack of accountability.²³¹ As I

and-the-distorting-influence-of-campaign-cash/ (on file with *The University of the Pacific Law Review*).

²²³ See Patrick K. Brown, *The Rise and Fall of Rose Bird*, CSU FULLERTON 8-9 (2007), available at http://www.cschs.org/wp-content/uploads/2014/03/CSCHS_2007-Brown.pdf (on file with *The University of the Pacific Law Review*).

²²⁴ 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).

²²⁵ See generally *id.*

²²⁶ 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. ___ (2017).

²²⁷ 556 U.S. 868 (2009).

²²⁸ 558 U.S. 310 (2010).

²²⁹ See, e.g., David Cole, *The Supreme Court's Billion-Dollar Mistake*, NEW YORK 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*, THE 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*).

²³⁰ See, e.g., Richard A. Posner, *What Is Obviously Wrong With the Federal Judiciary, Yet Eminently Curable*, 19 GREEN BAG 2D 187 (2016).

²³¹ See, e.g., Nancy Smith, *What? Accountability for U.S. Supreme Court Justices...Finally?*, SUNSHINE STATE NEWS (Apr. 22, 2015, 6:00 PM), <http://www.sunshinestatenews.com/story/what-accountability-us-supreme-court-justices-finally> (on file with *The University of the Pacific Law Review*).

write 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.²³² Some liberals and conservatives alike have proposed a constitutional amendment limiting Supreme Court justices' terms of service to a period of years.²³³ But even those proposals do not favor judicial elections for federal judges.²³⁴

Although measuring the effect of lifetime tenure versus reelection poses problems, there is a good deal of scholarly support that Article III judges are more independent than their elected counterparts.²³⁵ Studies like the one published by the Brennan Center strongly support that conclusion.²³⁶

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.²³⁷ 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.²³⁸

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.²³⁹ If the recall fails, he will face a bitter reelection in several years.²⁴⁰ In the meantime, judicial ethics severely limit his ability to defend

²³² 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*).

²³³ See, e.g., S.M., *Is It Bad to Have a Bunch of Old Judges?*, THE 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*).

²³⁴ 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*, THE 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.

²³⁵ See generally Berry, *supra* note 212.

²³⁶ *Id.*

²³⁷ *Id.* at 3-7.

²³⁸ See, e.g., Kaplan, *supra* note 6.

²³⁹ COMMISSION ON JUDICIAL PERFORMANCE, *supra* note 184.

²⁴⁰ *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.²⁴¹ He has a limited ability to raise money to fight the recall efforts, and countering the massive attacks on social media is nearly impossible.²⁴² Currently, at least initial polls suggest overwhelming support for Judge Persky's recall.²⁴³

To date, Californians have seldom recalled judges, despite a number of high-profile attempts.²⁴⁴ But the current recall efforts sends 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.²⁴⁵ 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.²⁴⁶ Such efforts can only add to the pressure to avoid a sentence that the public may view as too lenient.²⁴⁷

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 judicia-

²⁴¹ See CAL. CODE JUDICIAL ETHICS, available at http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf (on file with *The University of the Pacific Law Review*).

²⁴² *Id.* at 1 ("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.")

²⁴³ Elena Kadvany, *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*).

²⁴⁴ SCOCABLOG, *supra* note 240.

²⁴⁵ Seligman, *supra* note 198.

²⁴⁶ 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*).

²⁴⁷ For most of California and the nation's history, claims of being tough on crime were red meat for the public.

ry. 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.”²⁴⁸ Alexander Hamilton described additional benefits, including concerns about “serious oppressions of the minor party in the community.”²⁴⁹ 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.²⁵⁰ 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.²⁵¹ 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.²⁵²

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.²⁵³ Some politicians have used “dog whistle” politics to make a not-too-subtle appeal to racial bias.²⁵⁴ 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.²⁵⁵ In California, legislators piled on one enhancement on top of another, often motivated by the most recent headline.²⁵⁶ 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

²⁴⁸ THE FEDERALIST NO. 78 (Alexander Hamilton).

²⁴⁹ *Id.*

²⁵⁰ Some seem particularly troubling in light of two recent presidential elections where the less popular candidate won an Electoral College victory. Further, the undemocratic structure of the Senate has put the citizens in populous states at a distinct disadvantage.

²⁵¹ FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* 204-09 (2001).

²⁵² *Id.*

²⁵³ See, e.g., Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POLICY INITIATIVE (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2016.html> (on file with *The University of the Pacific Law Review*).

²⁵⁴ LÓPEZ, *supra* note 221.

²⁵⁵ See, e.g., *Conservative Agendas and Campaign: The Rise of the Modern “Tough on Crime” Movement*, PUBLIC EYE, 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*).

²⁵⁶ Vitiello & Kelso, *supra* note 12, at 919.

sentences for theft and armed robbery.²⁵⁷ When the media reported (ultimately falsely)²⁵⁸ about young “super predators,”²⁵⁹ legislatures gave prosecutors greater latitude to treat juvenile offenders as adults and to send them away, possibly for life without the possibility of parole.²⁶⁰

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.²⁶¹ 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 produce much in the way of social protection and are exceedingly expensive.²⁶² For example, the authors found that the Three Strikes law accounted for marginal deterrence, if any.²⁶³ 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.²⁶⁴

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.²⁶⁵ A variety of alternatives to incarceration may be far most cost effective than imprisonment, including drug treatment and close parole supervision.²⁶⁶ And as widely recognized, at least with re-

²⁵⁷ CAL. PENAL CODE § 215; see, e.g., Charles Fleming, *Car Thieves Love L.A.: California Leads the Nation (Again) in Auto Thefts*, LOS ANGELES 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*).

²⁵⁸ *Clinton Regrets 1996 Remark on ‘Super-Predators’ After Encounter with Activist*, WASHINGTON 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 (on file with *The University of the Pacific Law Review*).

²⁵⁹ *Id.*

²⁶⁰ 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*).

²⁶¹ ZIMRING ET AL., *supra* note 251, at 105; Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 437-40 (1997).

²⁶² ZIMRING ET AL., *supra* note 251, at 105.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Vitiello, *supra* note 128, at 689.

²⁶⁶ See, e.g. Greg Berman, *Alternatives to Incarceration are Cutting Prison Numbers, Costs and Crime*, THE GUARDIAN (July 4, 2013, 12:30 PM),

gards to violent crime, age correlates with criminality: as offenders reach their thirties and beyond, they are more likely to phase out of criminality.²⁶⁷

As the Brennan Center report indicates, judicial elections already result in longer prison sentences than the judges would have imposed otherwise.²⁶⁸ Not only is it unfair that a criminal sentence depends on the fortuity of how close the sentencing judge's retention election is, but such sentences are likely longer than necessary for assuring the safety of the public.²⁶⁹

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 about the case 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.²⁷⁰ And examining widely reported "facts" about the case should erode one's confidence in what we "know" about it.²⁷¹

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.²⁷² California has in place checks on improper judicial conduct.²⁷³ Indeed, as argued above, retention elections carry great risk.²⁷⁴ 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

<https://www.theguardian.com/commentisfree/2013/jul/04/alternatives-incarceration-prison-numbers> (on file with *The University of the Pacific Law Review*).

²⁶⁷ 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).

²⁶⁸ Berry, *supra* note 212, at 6.

²⁶⁹ ZIMRING ET AL., *supra* note 251, at 105; Vitiello, *supra* note 261, at 437-40.

²⁷⁰ *Supra* Part I(a).

²⁷¹ *See supra* Part I.

²⁷² *See generally* Prob. Report, *People v. Turner*, No. B1577162 (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*).

²⁷³ NATIONAL CENTER FOR STATE COURTS, *supra* note 13.

²⁷⁴ *Supra* Part II.

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.”²⁷⁵

²⁷⁵ *Orange County Judge M. Marc Kelly: Recall Effort is an Injustice*, LOS ANGELES 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*).