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## RECENT ELECTION

### SEXUAL ASSAULT LAW — JUDICIAL RECALL — CALIFORNIA JUDGE RECALLED FOR SENTENCE IN SEXUAL ASSAULT CASE.

Judges inhabit what is often considered the most independent branch of government. Unlike officials of other branches, who are democratically accountable, judges are thought to be insulated from popular influence. In many states, however, judges are elected officials, and in California, the state constitution allows for their recall.<sup>1</sup> On June 5, 2018, Judge Aaron Persky of the Santa Clara County Superior Court became the first California judge to be recalled in over eighty years.<sup>2</sup> The recall campaign, which arose from Judge Persky's sentencing decision in the 2016 case *People v. Turner*,<sup>3</sup> demanded an end to the improper use of judicial discretion to benefit privileged defendants convicted of sexual assault.<sup>4</sup> As the public rallied to recall, the California State Legislature instituted sweeping mandatory minimums for sexual assault cases.<sup>5</sup> Although derived from the same event, these responses were distinct: the recall is best understood as a call to take sexual assault allegations seriously through responsive sentencing and not a call to uniformly increase carceral punishment for sexual assault offenders, as is the case with mandatory minimums.

*People v. Turner* involved the sexual assault of a young woman, known as Emily Doe, after a Stanford University fraternity party.<sup>6</sup> The defendant/assailant was Brock Turner,<sup>7</sup> a “well groomed” young white man who was a freshman athlete at Stanford.<sup>8</sup> After midnight on January 18, 2015, two graduate students observed Turner on top of Doe, thrusting his hips into her while she lay motionless behind a dumpster.<sup>9</sup> Both Doe and Turner were intoxicated — Doe to the point of being

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<sup>1</sup> CAL. CONST. art. II, §§ 13–19.

<sup>2</sup> Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), <https://nyti.ms/2M1stmg> [<https://perma.cc/6LXC-EMWA>].

<sup>3</sup> Verdict of the Jury, *People v. Turner*, No. B1577162 (Cal. Super. Ct. May 30, 2016), 2016 WL 3442307 [hereinafter Verdict].

<sup>4</sup> See Bridget Read, *Rape Culture Is on the Ballot in California: Inside the Movement to Recall Judge Aaron Persky*, VOGUE (May 23, 2018), <https://www.vogue.com/projects/13543901/brock-turner-judge-aaron-persky-recall-election-california/> [<https://perma.cc/8DUH-3H9A>] (“[Judge Persky] didn’t see what was before him. He saw, instead, an image that was untrue and refracted through the lens of bias and privilege.” (quoting Professor Michele Dauber)).

<sup>5</sup> See Astor, *supra* note 2.

<sup>6</sup> People’s Sentencing Memorandum at 2, *Turner*, No. B1577162 [hereinafter Sentencing Memorandum]. Court documents refer to her as Jane Doe. See *id.*

<sup>7</sup> Felony Complaint Case Summary at 2, *Turner*, No. B1577162 [hereinafter Felony Complaint].

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 13–14.

unconscious and lacking memory of what took place.<sup>10</sup> When the graduate students yelled, Turner attempted to flee.<sup>11</sup> They chased him, pinning him to the ground.<sup>12</sup> When the police arrived, they found Doe “in [the] fetal position,” “unresponsive” and exposed.<sup>13</sup> Her dress had been “pulled up to her waist,” her underwear removed, and her sweatshirt taken half off,<sup>14</sup> exposing her breast.<sup>15</sup> Detectives found evidence indicating Turner may have sent a photo of Doe’s breasts to friends.<sup>16</sup> Turner said that he had had a good time with Doe<sup>17</sup> and admitted to digitally penetrating her vagina, but said that his “intentions were not to try and rape a girl without her consent.”<sup>18</sup> Doe did not consent.<sup>19</sup> The police report indicated that Turner’s pants were “disheveled”<sup>20</sup> and dirt on his face and shirt was consistent with a physical struggle.<sup>21</sup> At trial, the jury found Turner guilty on three counts: (1) assault with the intent to commit rape of an intoxicated or unconscious person, (2) sexual penetration when the victim was intoxicated, and (3) sexual penetration where the victim was unconscious of the nature of the act.<sup>22</sup>

The maximum sentence was fourteen years in prison.<sup>23</sup> Conviction on count one required Turner to register as a sex offender<sup>24</sup> and precluded probation except where “justice would best be served.”<sup>25</sup> The Probation Department recommended a “moderate” sentence in county jail, “sexual offender treatment,” and “formal probation” on the bases that Turner was less culpable due to his own intoxication, he had not recently committed similar crimes, and other imposed sanctions would sufficiently burden his once-promising future.<sup>26</sup> The prosecution opposed, highlighting a “pattern of behavior” undeserving of leniency.<sup>27</sup> It listed

<sup>10</sup> Sentencing Memorandum, *supra* note 6, at 5–7.

<sup>11</sup> *Id.* at 6.

<sup>12</sup> *Id.* Turner ran over thirty yards from where he left Doe, and required restraint. *Id.*

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.*

<sup>15</sup> Felony Complaint, *supra* note 7, at 21.

<sup>16</sup> See Sentencing Memorandum, *supra* note 6, at 9.

<sup>17</sup> See Report of Probation Officer at 5, *People v. Turner*, No. B1577162 (Cal. Super. Ct. May 30, 2016).

<sup>18</sup> Felony Complaint, *supra* note 7, at 34. Doe’s sister described fending off an aggressive Stanford athlete matching Turner’s description earlier that night. *Id.* at 52–53.

<sup>19</sup> *Id.* at 36.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.* at 11–12. The report also indicated that he had a visible erection. *Id.* at 11.

<sup>22</sup> Verdict, *supra* note 3, at 1–3.

<sup>23</sup> Sentencing Memorandum, *supra* note 6, at 25.

<sup>24</sup> CAL. PENAL CODE § 290(c) (West 2012); Felony Complaint, *supra* note 7, at 2. Counts two and three also required sex offender registration. Felony Complaint, *supra* note 7, at 2–3.

<sup>25</sup> PENAL § 1203.065(b)(1) (West 2009); Felony Complaint, *supra* note 7, at 3.

<sup>26</sup> Report of Probation Officer, *supra* note 17, at 12. The Probation Department also considered the impact of the crime on the victim, community safety, and the defendant’s youth and demonstration of remorse. *Id.*

<sup>27</sup> Sentencing Memorandum, *supra* note 6, at 12.

a pending case for underage intoxication;<sup>28</sup> testimony from women who had experienced Turner's unwanted advances;<sup>29</sup> and photo evidence of drug and alcohol use, contradicting his claim that he had not engaged with either prior to coming to Stanford.<sup>30</sup> The prosecution argued that a light sentence would not "effectively punish" him, ensure community safety, or serve as a deterrent in a community where "campus sexual assault[] is an epidemic,"<sup>31</sup> and recommended a six-year prison sentence.<sup>32</sup>

On June 2, 2016, following a statement from Doe relating the impact the assault had on her life,<sup>33</sup> Judge Persky sentenced Turner to six months in county jail and three years of probation along with the requisite sex offender registration.<sup>34</sup> Judge Persky noted his responsibility to "consider rehabilitation and probation for first-time offenders"<sup>35</sup> and his concern that prison would have a "severe impact" on Turner.<sup>36</sup>

People across the country were outraged.<sup>37</sup> Over the next two days, 55,000 people signed a petition calling for Judge Persky's removal from office.<sup>38</sup> In the following week, running unopposed,<sup>39</sup> Judge Persky won reelection, and Professor Michele Dauber of Stanford Law School

<sup>28</sup> *Id.* at 8–9. This case also involved an attempt to flee. *Id.*

<sup>29</sup> *Id.* at 7–8.

<sup>30</sup> Compare *id.* at 10–11, with Report of Probation Officer, *supra* note 17, at 30.

<sup>31</sup> Sentencing Memorandum, *supra* note 6, at 12.

<sup>32</sup> *Id.* at 25. This was an expected sentence given the jury verdict as compared to other sentences for similar offenses in Santa Clara County. See *Bench Notes: We Talk to Retired Judge Ron Del Pozzo About Bail, Plea Bargaining, and the Campaign to Recall a Judge*, AIDER & ABETTOR, at 50:30 (Oct. 12, 2017), <https://aiderandabettorpod.com/2017/10/12/bench-notes-we-talk-to-retired-judge-ron-del-pozzo-about-bail-plea-bargaining-and-the-campaign-to-recall-a-judge/> [<https://perma.cc/FS6E-KUGA>].

<sup>33</sup> See Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17 PM), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra> [<https://perma.cc/J94X-92TX>].

<sup>34</sup> See Sam Levin, *Stanford Sexual Assault: Read the Full Text of the Judge's Controversial Decision*, THE GUARDIAN (June 14, 2016, 6:00 PM), <https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky> [<https://perma.cc/V2YA-36XD>]; see also Astor, *supra* note 2. Of the six-month sentence, Turner served three months. Astor, *supra* note 2. "Stanford forced him to withdraw and barred [his return to] campus." *Id.*

<sup>35</sup> Tracey Kaplan, *Judge Persky Speaks Out in Anti-Recall Statement Filed with Registrar*, MERCURY NEWS (July 5, 2017, 3:18 PM), <https://www.mercurynews.com/2017/06/30/judge-persky-files-response-to-recall-statement/> [<https://perma.cc/TG4B-XAJX>].

<sup>36</sup> Astor, *supra* note 2.

<sup>37</sup> See Nickie D. Phillips & Nicholas Chagnon, "Six Months Is a Joke": *Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case*, FEMINIST CRIMINOLOGY (forthcoming 2020) (manuscript at 10–11), <https://doi.org/10.1177/1557085118789782> [<https://perma.cc/R9KX-5XRM>].

<sup>38</sup> Tobias Salinger, *Recall Petition Started Against California Judge Who Sentenced Former Stanford Swimmer to Six Months for Rape*, N.Y. DAILY NEWS (June 6, 2016, 2:25 PM), <http://www.nydailynews.com/news/crime/recall-petition-started-judge-stanford-rape-case-article-1.2663260> [<https://perma.cc/LQF6-GW49>].

<sup>39</sup> See *Student Who Helped Stop Stanford Sexual Assault Describes What He Saw*, CBS NEWS (June 7, 2016, 6:59 AM), <https://www.cbsnews.com/news/stanford-university-sexual-assault-former-swimmer-brock-turner-witnesses/> [<https://perma.cc/PM9F-ETLW>].

launched the campaign to recall him.<sup>40</sup> Within four months, California lawmakers passed mandatory minimum sentences for sexual assault<sup>41</sup> and closed a prior loophole that had allowed for lighter sentences in cases where the victim was too intoxicated to physically resist.<sup>42</sup>

Although the sentence was widely regarded as improper, advocates were divided as to whether Judge Persky's jurisprudence reflected a pattern of bias and what the collateral impacts of the recall and new mandatory minimums might be. Law professors across California signed a letter opposing the recall, seeing it as a threat to judicial independence and believing recalls should be used only in cases where "judges are corrupt or incompetent or exhibit bias that leads to systematic injustice."<sup>43</sup> They predicted recall actions would push judges to ratchet up sentences, particularly against the poor and people of color.<sup>44</sup> The district attorney disagreed with both the sentence and the recall, insisted that Judge Persky had made a mistake, and supported mandatory minimums.<sup>45</sup> Meanwhile, proponents of the recall viewed it as a vote against the normalization of rape culture.<sup>46</sup> Campaign leaders did not advocate for mandatory minimums or lifetime criminalization for all defendants in sexual assault cases.<sup>47</sup> They insisted on "justice and equality for *all* people of color" — victims and defendants alike,<sup>48</sup> as

<sup>40</sup> See Read, *supra* note 4.

<sup>41</sup> See A.B. 701, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

<sup>42</sup> See A.B. 2888, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

<sup>43</sup> Law Professors' Statement for the Independence of the Judiciary and Against the Recall of Santa Clara County Superior Court Judge Aaron Persky (Aug. 17, 2017) [hereinafter Law Professors' Statement], <https://www.paloaltoonline.com/news/reports/1503112952.pdf> [<https://perma.cc/N3K8-QPGT>]. Judicial independence for elected judges is fiction. See Jeannie Suk Gersen, *The Unintended Consequences of the Stanford Rape-Case Recall*, NEW YORKER (June 17, 2016), <https://www.newyorker.com/news/news-desk/the-unintended-consequences-of-the-stanford-rape-case-recall> [<https://perma.cc/U5SF-JTVS>]. Even when appointed, judges are expected to "respect rather than defy the people's will" and abide by "the proper limits of their authority." RONALD DWORKIN, FREEDOM'S LAW 5 (1996). Further, only nineteen states and Washington, D.C., allow any state officials to be recalled; "only eight allow it for judges." Eli Hager, *How Easy Would It Be to Recall the Judge in the Brock Turner Case?*, MARSHALL PROJECT (June 7, 2016, 6:16 PM), <https://www.themarshallproject.org/2016/06/07/how-easy-would-it-be-to-recall-the-judge-in-the-brock-turner-case> [<https://perma.cc/Q4UH-B3GJ>]. Where judicial recall is a reality, it is not clear that it poses any greater threat to judicial independence than do general elections.

<sup>44</sup> Law Professors' Statement, *supra* note 43.

<sup>45</sup> Evan McMorris-Santoro, *Inside the \$1 Million Campaign to Recall Judge Who Sentenced Brock Turner*, VICE NEWS (June 6, 2018), [https://news.vice.com/en\\_us/article/kzkne/judge-faces-recall-for-giving-brock-turner-light-sentence-in-stanford-rape-case](https://news.vice.com/en_us/article/kzkne/judge-faces-recall-for-giving-brock-turner-light-sentence-in-stanford-rape-case) [<https://perma.cc/B5D8-QVXN>].

<sup>46</sup> Read, *supra* note 4. Professor Anita Hill and Senator Kirsten Gillibrand were prominent supporters of the recall. Astor, *supra* note 2.

<sup>47</sup> See Tracey Kaplan, *Brock Turner: A Sex Offender for Life, He Faces Stringent Rules*, MERCURY NEWS (Sept. 14, 2016, 11:31 AM), <https://www.mercurynews.com/2016/09/02/brock-turner-a-sex-offender-for-life-he-faces-stringent-rules/> [<https://perma.cc/W26G-7W8W>] (paraphrasing Dauber's belief that "lifetime registration is too long"); Read, *supra* note 4.

<sup>48</sup> Sita Stukes, *Enough Is Enough*, MEDIUM (Sept. 28, 2017), <https://medium.com/@SitaStukes/the-case-to-recall-judge-aaron-persky-744576de4863> [<https://perma.cc/WT5R-JVKU>].

women of color are disproportionately victimized by sexual violence.<sup>49</sup> Although the sentence did not amount to judicial misconduct, many felt it cast doubt on Judge Persky's judgment in rape cases.<sup>50</sup> On June 5, 2018, with mandatory minimums already in place, Santa Clara County voters recalled Judge Persky.<sup>51</sup>

The public effort to recall Judge Persky and the legislative imposition of mandatory minimums are distinct responses to Turner's sentence that are improperly conflated. The recall targeted a single judge within a system that has demonstrated a pattern of delivering nonresponsive sentences to privileged men accused of sexual assault and was a declaration that those sentences would no longer be tolerated. At no point did the recall campaign advocate for harsher penalties for all defendants or for an end to judicial discretion.<sup>52</sup> By contrast, the California State Legislature's misguided imposition of mandatory minimums has removed judicial discretion. Rather than ensuring responsive sentences, harsher penalties will disproportionately impact the poor and people of color, while privileged defendants will continue to evade accountability.

Lack of prosecution of and nonresponsive sentences for privileged white men and athletes who have committed gender-based violence have a long history in the United States,<sup>53</sup> and knowledge of the criminal system's failure to respond adequately reinforces victims' beliefs that their claims will not be taken seriously.<sup>54</sup> In the United States, nearly 22 million women have experienced rape.<sup>55</sup> Only 31% of victims report to the police, and of those reports, 18% lead to arrest, only 3% are referred

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<sup>49</sup> See SHARON G. SMITH ET AL., NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010-2012 STATE REPORT 20-21 (2017). Emily Doe's race is unknown.

<sup>50</sup> See, e.g., Mark Lemley, *Recall Persky over Brock Turner-Stanford Case*, MERCURY NEWS (Dec. 19, 2016, 2:47 PM), <https://www.mercurynews.com/2016/06/23/lemley-recall-persky-over-brock-turner-stanford-case/> [<https://perma.cc/9GEZ-MT74>]; Veronica Rocha, *Judicial Panel Clears California Judge Who Gave Lenient Sentence in Stanford Sexual Assault*, L.A. TIMES (Dec. 19, 2016, 4:00 PM), <http://www.latimes.com/local/lanow/la-me-ln-judge-aaron-persky-no-judicial-misconduct-20161219-story.html> [<https://perma.cc/QK55-CLAJ>].

<sup>51</sup> See Astor, *supra* note 2.

<sup>52</sup> However, studies show that judges act punitively when anticipating political accountability. See E. Lea Johnston, *Modifying Unjust Sentences*, 49 GA. L. REV. 433, 493 & n.279 (2015).

<sup>53</sup> See, e.g., Joint Status Report at § 3, *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253 (N.D. Ala. 2018) (No. 15-cv-02193) (describing the unprosecuted rape of Recy Taylor by six white men in 1944). See generally JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015) (detailing a series of rape cases involving college football players).

<sup>54</sup> Approximately 69% of sexual assaults go unreported; 15% of victims believe that the police would not or could not help. See *The Criminal Justice System: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/WM7G-U2R5>].

<sup>55</sup> WHITE HOUSE COUNCIL ON WOMEN & GIRLS, *RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 1* (2014), [https://obamawhitehouse.archives.gov/sites/default/files/docs/sexual\\_assault\\_report\\_1-21-14.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf) [<https://perma.cc/7PQ5-8FLX>].

to prosecutors, and 2% lead to felony conviction or incarceration.<sup>56</sup> Studies show that the decision not to prosecute is usually contrary to the victim's preference.<sup>57</sup> When college athletes are accused, schools often prioritize their playing seasons over community safety in a coordinated effort to minimize the consequences of sexual assault.<sup>58</sup> These measures illustrate how privileged perpetrators evade responsibility.

This pattern bears out in Judge Persky's judicial record: he used his discretion for the benefit of athletes accused of gender-based violence prior to *Turner*.<sup>59</sup> On two occasions, he gave college football players charged with felony domestic violence or battery sentences that ensured their plans to play football would not be interrupted.<sup>60</sup> Prior to his arrival on the criminal bench, Judge Persky presided over a civil case in which nine members of the De Anza College baseball team were accused of sexually assaulting an unconscious seventeen-year-old named Jessica Gonzalez.<sup>61</sup> In that case, Judge Persky made the questionable decision to allow prejudicial photo evidence of Gonzalez to be admitted in order to rebut her PTSD claim.<sup>62</sup> While the exercise of discretion is fundamental to a judge's role and necessary to achieve responsive sentencing, Judge Persky repeatedly treated privileged perpetrators with leniency, handing down sentences to accommodate their careers as athletes.

The recall's goal was to hold Judge Persky accountable and was directed at what the voters determined to be an impermissible use of discretion in cases involving violence against women.<sup>63</sup> His sentences were improper not because of leniency measured by length or lack of carceral punishment, but because they did not adequately respond to

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<sup>56</sup> See *The Criminal Justice System: Statistics*, *supra* note 54. This piece does not argue that incarceration is the appropriate responsive outcome.

<sup>57</sup> See Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 438 n.27 (2016) (summarizing findings of WHITE HOUSE COUNCIL ON WOMEN & GIRLS, *supra* note 55).

<sup>58</sup> See E.J. Sansone, *Flagrant Foul: An Examination of Domestic Violence and Sexual Assault Involving Collegiate Athletes*, 10 DARTMOUTH L.J. 24, 27–30 (2012) (reporting instances in which colleges insufficiently addressed sexual assaults committed by student athletes).

<sup>59</sup> *Contra* Public Statement, Comm'n on Judicial Performance, Commission on Judicial Performance Closes Investigation of Judge Aaron Persky 8–9 (Dec. 19, 2016) (finding no bias).

<sup>60</sup> See Katie J.M. Baker, *Stanford Sex Assault Judge Went Easy on Another Student Athlete*, BUZZFEED NEWS (Aug. 26, 2016, 2:59 PM), <https://www.buzzfeednews.com/article/katiejmbaker/stanford-sex-assault-judge-went-easy-on-another-student-athl> [<https://perma.cc/7K3T-Z5ZU>]; Elena Kadwany, *Analysis of Judge Persky's "Pattern" Cases*, PALO ALTO ONLINE (May 15, 2018, 10:28 AM), <https://paloaltoonline.com/news/2018/05/11/analysis-of-judge-perskys-pattern-cases> [<https://perma.cc/Z2CV-SWEG>].

<sup>61</sup> Gabriel Baumgaertner, *Brock Turner, the "Athlete Bias," and the Movement that Produced the Recall of Judge Aaron Persky*, SPORTS ILLUSTRATED (June 6, 2018), <https://www.si.com/more-sports/2018/06/06/aaron-persky-brock-turner-california-recall-election> [<https://perma.cc/T48Q-N7GR>]; Karina Rusk, *Accuser in De Anza Rape Case Talks to ABC7*, ABC7 NEWS (Aug. 10, 2011, 12:00 AM), <https://abc7news.com/archive/8300480/> [<https://perma.cc/XPF9-MV3Q>].

<sup>62</sup> Baumgaertner, *supra* note 61.

<sup>63</sup> Astor, *supra* note 2 (quoting Dauber saying, "[w]e voted that sexual violence . . . must be taken seriously by our elected officials, and by the justice system").

California's sentencing objectives,<sup>64</sup> were not victim centered, and failed to hold defendants accountable through any potentially restorative approach.<sup>65</sup> The positions of criminal justice reformers and advocates against sexual assault are not mutually exclusive; "taking sexual violence seriously [does not] necessarily translate[] to either support for increased incarceration or counterproductive sex offender penalties."<sup>66</sup> Doe wanted Turner to know that he had caused her pain, to take responsibility, and to get help,<sup>67</sup> but a protracted court battle and the consequent denigration of Emily Doe by Turner's legal team demonstrated his inability to recognize wrongdoing, making the ultimate sentence feel woefully incongruous.<sup>68</sup>

While the recall was an effective response to a perceived abuse of discretion, the imposition of mandatory minimums is bad policy that will exacerbate race and class disparities.<sup>69</sup> In 2003, Justice Kennedy said that he could accept neither the "necessity" nor "wisdom" of mandatory minimums.<sup>70</sup> Retired Judge Nancy Gertner has cautioned that removing judicial discretion redirects it to police and prosecutors, where it is less visible.<sup>71</sup> Feminist advocate Nita Chaudhary agreed that mandatory minimums are "not only bad policy generally, but also the wrong solution for this case."<sup>72</sup> They prevent the implementation of alternative sentences that are more responsive than incarceration.

Black and brown bodies fill our prison system,<sup>73</sup> and policies that make the criminal system more punitive tend to disproportionately impact the poor and people of color as a result of overpolicing.<sup>74</sup> With

<sup>64</sup> See CAL. RULES OF COURT 4.410.

<sup>65</sup> See, e.g., Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 187–99 (2016) (describing restorative justice responses to sexual assault).

<sup>66</sup> Phillips & Chagnon, *supra* note 37, at 15.

<sup>67</sup> Report of Probation Officer, *supra* note 17, at 5–6.

<sup>68</sup> See Baker, *supra* note 33 (detailing Doe's experience at trial).

<sup>69</sup> See Letter from Know Your IX to Governor Edmund G. Brown, Jr. (Sept. 9, 2016) (on file with the Harvard Law School Library) ("Mandatory minimums . . . exacerbate[] racial and class disparities in prosecution.").

<sup>70</sup> Editorial, *Justice Kennedy Speaks Out*, N.Y. TIMES (Aug. 12, 2003), <https://nyti.ms/2D9LroY> [<https://perma.cc/6N5L-NLDD>].

<sup>71</sup> *Brock Turner's Sentencing Revives Mandatory Minimums Debate*, NPR (Sept. 3, 2016, 8:50 AM) (interview with Judge Gertner), <https://www.npr.org/2016/09/03/492516923/brock-turners-sentencing-revives-mandatory-minimums-debate> [<https://perma.cc/HTB3-VHCU>].

<sup>72</sup> Jessica Calefati & Katy Murphy, *D.A. Jeff Rosen Introduces Bill to Send "Next Brock Turner" to Prison*, MERCURY NEWS (Dec. 19, 2016, 2:47 PM), <https://www.mercurynews.com/2016/06/22/d-a-jeff-rozen-introduces-bill-to-send-next-brock-turner-to-prison/> [<https://perma.cc/4GDV-68SZ>] (quoting statement by Nita Chaudhary).

<sup>73</sup> People of color make up 59% of the nation's prison and jail population. See LEAH SAKALA, PRISON POLICY INITIATIVE, BREAKING DOWN MASS INCARCERATION IN THE 2010 CENSUS: STATE-BY-STATE INCARCERATION RATES BY RACE/ETHNICITY (2014), <https://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/2VM3-DB7M>].

<sup>74</sup> See MICHELLE ALEXANDER, THE NEW JIM CROW 97–101 (rev. ed. 2012); Rose M. Brewer & Nancy A. Heitzeg, *The Racialization of Crime and Punishment: Criminal Justice, Color-*

California's sexual assault legislation, defendants who can afford to hire attorneys, like Turner, are likely to evade the harshest penalties while those who cannot will "bear the brunt of [the] law."<sup>75</sup> Turner had countless letters sent on his behalf from influential community members.<sup>76</sup> He had every advantage — race, class, family support — which influenced Judge Persky's and the probation officer's beliefs that he was not a threat. But each of those advantages also contributed to his ability to act with impunity. We should question reasoning that delivers leniency to those with privilege and denies it to those without. When defendants are impacted by implicit racial and class bias rather than privilege markers, a sentence like Turner's is not a reality — particularly as his sentence was necessarily exceptional.<sup>77</sup>

The fear that the recall might pressure judges to seek harsher sentences is valid.<sup>78</sup> However, Judge Persky's leniency toward a privileged Stanford athlete was never indicative of a widespread shift that would benefit people of color or others similarly situated and socioeconomically disadvantaged.<sup>79</sup> Judicial discretion exists to allow judges room to apply appropriate sentences, scaling up or down depending on the severity of the offense, not based on personal affinity. California voters disagreed with Judge Persky's determination in *Turner* and exercised their lawful right to recall. While California's new laws prevent us from knowing how the recall might have affected the exercise of judicial discretion within the state, let the election serve as a reminder that the people have the ability to revoke power bestowed on those who do not take sexual assault seriously.<sup>80</sup>

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*Blind Racism, and the Political Economy of the Prison Industrial Complex*, 51 AM. BEHAV. SCIENTIST 625, 627–30 (2008).

<sup>75</sup> Jazmine Ulloa, *Spurred by Brock Turner Case, Gov. Jerry Brown Signs Laws to Toughen Laws Against Rape*, L.A. TIMES (Sept. 30, 2016, 3:40 PM), <http://www.latimes.com/politics/la-pol-sac-california-sex-crimes-stanford-cosby-bills-20160930-snap-htmstory.html> [<https://perma.cc/5FRF-6EzQ>] (quoting Natasha Minsker of the ACLU).

<sup>76</sup> Report of Probation Officer, *supra* note 17, at 41–98.

<sup>77</sup> See CAL. PENAL CODE § 1170(b) (West 2015) (“[T]he choice of the appropriate term [of imprisonment] shall rest within the sound discretion of the court.”); *id.* § 1203.065(b)(1) (West 2009) (barring probation for individuals convicted of sexual assault “except in *unusual cases* where the interests of justice would best be served” (emphasis added)).

<sup>78</sup> See, e.g., Paul Butler, Opinion, *Judicial Recall Will Inevitably Lead to Harsher Sentences*, N.Y. TIMES (July 11, 2016, 3:50 PM), <https://nyti.ms/2zoM3dv> [<https://perma.cc/759H-UVKY>].

<sup>79</sup> Emily Doe questioned: “If a first time offender from an underprivileged background was accused of three felonies and displayed no accountability for his actions other than drinking, what would his sentence be? The fact that Brock was an athlete at a private university should not be seen as an entitlement to leniency, but as an opportunity to send a message that sexual assault is against the law regardless of social class.” Baker, *supra* note 33.

<sup>80</sup> See, e.g., Michelle Theriault Boots, *Voters Oust Anchorage Judge Targeted for Role in Controversial Plea Agreement*, ANCHORAGE DAILY NEWS (Nov. 10, 2018), <https://www.adn.com/alaska-news/2018/11/06/anchorage-judge-targeted-for-role-in-controversial-plea-agreement-trailing/> [<https://perma.cc/LD69-2LKL>].