

RAPE SENTENCING: WE'RE ALL MAD ABOUT BROCK TURNER, BUT NOW WHAT?

By Claire Kebodeaux

I. INTRODUCTION

In January 2015, a twenty-three-year-old woman woke up in a hospital in California to the news someone had raped her.¹ Earlier that night, two graduate students biking across campus witnessed Brock Turner rape her behind a dumpster while she was lying unconscious.² The woman learned the explicit details of her assault as she sat at work, reading the news.³ Turner was found guilty of three counts of sexual assault.⁴ At Turner's sentencing, the victim read aloud a powerful victim impact statement stressing that, "the probation officer's recommendation of a year or less in county jail is a soft time-out, a mockery of the seriousness of his assaults, and of the consequences of the pain I have been forced to endure."⁵ Judge Persky sentenced Turner to six months in county jail.⁶ He spent only three months in jail, amounting to exactly half of his sentence.⁷

Turner's lenient sentence spawned public outrage, generating countless

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1. Katie J.M. Baker, *Here is the Powerful Letter the Stanford Victim Read Aloud to Her Attacker*, BUZZFEED (June 3, 2016, 3:17 PM), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.sqeywrQA6B#.tkmaV6OAJb. The victim originally provided her statement in full to BuzzFeed News. *Id.*

2. Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, ATLANTIC (June 17, 2016), <http://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/>.

3. Baker, *supra* note 1.

4. *Id.*

5. Emanuella Grinberg & Catherine E. Shoichet, *Brock Turner Released from Jail After Serving 3 Months for Sexual Assault*, CNN (Sept. 2, 2016, 8:52 PM), <http://www.cnn.com/2016/09/02/us/brock-turner-release-jail/>.

6. Baker, *supra* note 1; Sam Levin, *Stanford Sexual Assault: Read the Full Text of the Judge's Controversial Decision*, GUARDIAN (June 14, 2016, 6:00 PM), <https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky>.

7. Tracy Bloom, *Stanford Rape Case: Brock Turner Expected to Be Released 3 Months Early, Jail Records Show*, KTLA 5 (June 9, 2016, 11:49 AM), <http://ktla.com/2016/06/09/ex-stanford-swimmer-brock-turner-expected-to-be-released-3-months-early-jail-records/>.

blog posts, comments, articles, and petitions.⁸ A petition that circulated to recall Judge Persky obtained more than one million signatures.⁹ In response to the public outcry, California passed a bill imposing mandatory minimum sentences for offenders who sexually assault an unconscious person.¹⁰ While mandatory minimums are one approach to fixing sentencing—and one way to address public outcry about rape sentencing issues—they are an imperfect solution to a complicated problem.

Adjudicating rape involves confronting many issues at every step of an already lengthy process—from reporting to prosecuting to sentencing. While there are many different approaches to various issues that come with adjudicating rape, this article will focus solely on sentencing.¹¹ The current state of rape sentencing is unacceptable to both sex crime victims and the public as a whole. This article argues that the best solution to help victims of certain sex crimes is restorative justice, a community-based solution that gives agency back to victims. Part II of this article gives a brief overview of American rape law. Part III describes past sentencing regimes for rape and the current sentencing status quo. Part IV explains why mandatory minimums are not the solution. Part V offers restorative justice as an alternative to sentencing in specific cases of acquaintance rape and misdemeanor sex crimes. Part VI concludes and emphasizes that rape is a multifaceted issue that cannot be solved by hastily formed sentencing solutions.

II. HISTORY OF RAPE LAW

The traditional common law definition of rape was the “carnal knowledge of a female, forcibly and against her will.”¹² If a woman did not use “all of her powers of resistance and defense,” a jury could infer that the act was not against

8. See, e.g., Tanya Chen, *This Brock Turner Hashtag Is Allowing People to Vent Their Frustration*, BUZZFEED (Sept. 9, 2016, 11:10 AM), https://www.buzzfeed.com/tanyachen/people-are-sharing-thingslongerthanbrockturnersrapesentence?utm_term=.mj2M4XBvb1#.ocEGIPr2kO; Stassa Edwards, *Brock Turner Will Spend More Time in Jail Than 97 Percent of Rapists*, JEZEBEL (June 7, 2016, 2:25 PM), <http://jezebel.com/brock-turner-will-spend-more-time-in-jail-than-97-perce-1781032260>; Meghan Murphy, *Rape Culture is Brock Turner’s Father Describing Sexual Assault as ‘30 Minutes of Action,’* FEMINIST CURRENT (June 6, 2016), <http://www.feministcurrent.com/2016/06/06/rape-culture-is-brock-turner-father-20-minutes-action/>; Kimberley Richards, *Brock Turner Is Being Released From Prison Early & Yes, You Should Be Mad*, ROMPER (Aug. 29, 2016), <https://www.romper.com/p/brock-turner-is-being-released-from-prison-early-yes-you-should-be-mad-17398>.

9. Maria Ruiz, *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 Oct. 10, 2017). At the time of writing, the petition has 1,325,326 signatures. *Id.*

10. Stassa Edwards, *California Passes Mandatory Minimum Bill in Response to Brock Turner Controversy*, JEZEBEL (Sept. 30, 2016, 5:20 PM), <http://jezebel.com/california-passes-mandatory-minimum-bill-in-response-to-1787289987>.

11. Anyone regardless of age, gender, race, or nationality can be raped or sexually assaulted, but the scope of this article will leave out any discussion of child rape. The discussion in this article will focus on rape generally, without going into gender; however, most data used in this article is measured with samples of males raping females.

12. *Morrow v. Georgia*, 79 S.E. 63, 65 (Ga. Ct. App. 1913).

her will.¹³ Traditional rape law was very heteronormative, concerned only with a man's penetration of a woman. Because society accepted that women were prone to lie about rape to cover up "premarital intercourse, infidelity, pregnancy, or disease, or to retaliate against an ex-lover," many jurisdictions required corroboration.¹⁴ Courts required prosecutors to present evidence other than the victim's testimony in order to corroborate the story.¹⁵

In the 1960s and '70s, reformers sought to change the common law definition of rape. In 1962, the Model Penal Code (MPC) attempted to move away from the common law definition.¹⁶ However, the MPC did not stray very far from common law.¹⁷ The new definition failed to include marital rape, was confined to a male raping a female, and included a force requirement.¹⁸ In the 1970s, reformers attempted to change four areas of concern: the definition of rape, evidentiary rules, statutory age of consent, and the penalty structure.¹⁹ In updating the definition of rape, many states changed rape and other sex crimes to "a series of gender-neutral graded offenses with commensurate penalties."²⁰

Other evidentiary rule reforms included removing the corroboration element and instituting rape shield laws. Before these reforms, corroboration requirements dictated that the prosecutor verify all essential elements of a case, including penetration and non-consent.²¹ The corroboration requirement stunted rape prosecutions because rapes are typically not committed in the presence of witnesses; removing the corroboration requirement allowed for increased prosecution of rapes.²² Rape shield laws restrict the admissibility of the victim's past sexual history at trial.²³ These laws protect victims from being victimized a second time on the witness stand.²⁴ Rape shield laws are intended to keep the

13. *Id.* at 66.

14. CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 24 (1992).

15. *Id.*

16. Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 75 (2001).

17. MODEL PENAL CODE § 213.1(1) (AM. LAW INST., Official Draft and Explanatory Notes 1985) ("Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone . . . Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree."); §213.1(2) ("Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if: (a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or . . . (c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband.").

18. *See* §213.1(1)-(2).

19. Futter & Mebane, *supra* note 16, at 75.

20. SPOHN & HORNEY, *supra* note 14, at 22.

21. *Id.* at 24.

22. *Id.* at 25.

23. Futter & Mebane, *supra* note 16, at 79.

24. SPOHN & HORNEY, *supra* note 14, at 27.

victim from cross-examination on potentially embarrassing or prejudicial details of her sex life.²⁵ Rape shield laws were established to combat the widely held, but inaccurate, beliefs that women who have more sex are more likely to consent to sex on any given occasion and that promiscuous women are more likely to testify untruthfully about consent.²⁶ The rape shield statutes were not without their detractors, however; they are heavily criticized because they infringe on a defendant's right to confront and cross-examine adverse witnesses.²⁷

Current definitions of rape vary from state to state, but generally include (1) a sex act and non-consent or (2) a sex act, non-consent, and force.²⁸ Many jurisdictions still have a force requirement for rape.²⁹ The amount of force and type of force required also varies from state to state, as do specific sex acts that constitute rape or sexual assault.³⁰ Many consider Michigan to have the model statute because of its exhaustive definition of sexual penetration, stated as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening of another person's body, but the emission of semen is not required."³¹

III. CURRENT SENTENCING

According to the Rape Abuse & Incest National Network (RAINN), "out of every 1000 rapes, 994 perpetrators will walk free."³² Six out of a thousand rapists will be incarcerated, compared to twenty out of a thousand robbers and thirty-three out of a thousand batterers.³³ Scott Berkowitz, RAINN's president and founder, believes "this staggering statistic sends a clear message to offenders that they can commit this horrible crime and get away with it."³⁴ Berkowitz also believes that "the single most important thing we can do to prevent rape is to put more rapists in prison."³⁵

The two factors that are most predictive of sentence length for any crime

25. See, e.g., KAN. STAT. ANN. § 21-5502(b) (2016).

26. Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1470 (2012).

27. SPOHN & HORNEY, *supra* note 14, at 28.

28. See John F. Decker & Peter G. Baroni, "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1083-86 (2011).

29. CAROL E. TRACY ET AL., RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM 1 (2012), http://sites.nationalacademies.org/cs/groups/dbassesite/documents/webpage/dbasse_080060.pdf.

30. See Elizabeth Hanus, Comment, *Rape by Nonphysical Coercion: State v. Brooks*, 64 KAN. L. REV. 1141, 1148 (2016).

31. SPOHN & HORNEY, *supra* note 14, at 22 (citing MICH. COMP. LAWS ANN. § 750.520a(r) (West 2014)).

32. *The Criminal Justice System: Statistics*, RAPE ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Feb. 15, 2016).

33. *Id.*

34. RAINNews: *March 2012*, RAPE ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/newsletters/03-2012/march-newsletter-version-1.html> (last visited Feb. 15, 2016).

35. *Id.*

are the seriousness of the offense and the defendant's criminal record.³⁶ For rape, these factors do not make as much sense as they do in other crimes, because most rapes occur in a context where the defendant does not have a prior criminal record and the victim and defendant know each other.³⁷ Only 13.8% of women report being raped by a stranger.³⁸ The majority of women are raped by a partner (51.1%), acquaintance (40.8%), or family member (12.5%).³⁹ For male victims, the statistic goes up slightly, with 15.1% reporting being raped by a stranger.⁴⁰

Rapists have high levels of recidivism and "research shows that not only do an alarmingly high number of perpetrators of rape reoffend, but also that repeat offenders commit the vast majority of rapes."⁴¹ In a study of 126 incarcerated rapists, the rapists committed a total of 907 rapes involving 882 victims.⁴² The average number of victims per rapist was seven.⁴³

In a statistical analysis comparing the prosecution of sexual assault to other crimes, sexual assault offenders were more likely to be imprisoned when the offender was unemployed or when there were multiple witnesses, two factors that had no effect on the length of sentence for persons convicted of non-sex offenses.⁴⁴ In a statistical analysis of the seventy-five most populous counties in America, the median length of incarceration rapists received at sentencing was four years.⁴⁵

Less than 50% of people arrested for rape are convicted, compared to a 69% conviction rate for murder and a 61% conviction rate for robbery.⁴⁶ Twenty-one percent of convicted rapists are never sentenced to jail, while 24% of convicted rapists spend only eleven months in jail.⁴⁷ Prosecutors tend to recommend, and judges tend to sentence, all first-time violent offenders to lighter sentences, based on the assumption that first-time offenders are less dangerous than repeat offenders and first-time offenders will not reoffend.⁴⁸

36. Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439, 452 (1993).

37. *Id.*

38. TRACY ET AL., *supra* note 29, at 7.

39. *Id.*

40. *Id.*

41. *Id.* at 13.

42. NAT'L VICTIM CTR. & CRIME VICTIM'S RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 6 (1992), <http://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=538>.

43. *Id.*

44. Martha A. Myers & Gary D. LaFree, *Criminology: Sexual Assault and Its Prosecution: A Comparison with Other Crimes*, 73 J. CRIM. L. & CRIMINOLOGY 1282, 1294 (1982). The study used a sample of 945 defendants from Indianapolis, Indiana. *Id.* at 1286.

45. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT FELONS IN LARGE URBAN COUNTIES 9 (2006), <http://www.bjs.gov/content/pub/pdf/vfluc.pdf>.

46. STAFF OF S. COMM. ON THE JUDICIARY, 103RD CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE 11 (Comm. Print 1993), <https://babel.hathitrust.org/cgi/pt?id=uc1.c046218314;view=1up;seq=22> [hereinafter RESPONSE TO RAPE REPORT].

47. *Id.* at 12.

48. *Id.* at 12-13.

This assumption, however, does not apply to rape cases, because rapists have a high rate of reoffending.⁴⁹ Rapists are also given lighter sentences compared to other crimes due to societal and community assumptions.⁵⁰ When the community believes that a rape by an acquaintance is less severe than a stranger rape, or a victim is to blame for drinking at a bar, judges in that community are less likely to hand down severe sentences.⁵¹ When the community assumes “that a rapist who is young and otherwise an exemplary student and athlete is not sufficiently dangerous to send to prison, then [the community is] likely to see less severe sentences.”⁵² Prosecutors and judges perceiving first-time rapists as not dangerous coupled with societal leniency towards rapists results in lighter sentences for rapists compared to other offenders.

While in theory the victim’s race should not be a factor in sentencing, in reality the victim’s race impacts sentence length. Even when criminal history, offense type, and details of the crime are controlled for, the race and sex of victims matter in the sentencing of homicide cases.⁵³ The race and sex of victims matter in vehicular homicides sentencing, even though vehicular homicide is a crime “in which victims are almost always random and blameless.”⁵⁴ Even with “all other variables being equal, a drunk driver who kills a woman will receive a sentence 50% longer than one who kills a man, and a driver who kills a black victim will receive a sentence 50% shorter than one who kills a white victim.”⁵⁵ Although sex crimes and vehicular homicides are different crimes, these statistics demonstrate that the race and sex of the victim do impact sentence length. There is no reason to think that race and sex of a victim do not have an impact on sentence length for sex crimes.

Some trial courts have broad discretion when sentencing.⁵⁶ Judicial discretion is important for many reasons. Laws will not perfectly apply to every set of facts and not every decision can be reviewed on appeal. Judges must be able to adjust the sentence to fit the needs of specific cases.⁵⁷ The Supreme Court has acknowledged that judges have “broad discretion in sentencing—since the nineteenth century shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range.”⁵⁸

The different types of sentencing schemes are: determinate, indeterminate,

49. See TRACY ET AL., *supra* note 29, at 13.

50. RESPONSE TO RAPE REPORT, *supra* note 46, at 13.

51. *Id.*

52. *Id.*

53. David D. Cole, *Formalism, Realism, and the War on Drugs*, 35 SUFFOLK U. L. REV. 241, 245–46 (2001).

54. *Id.* at 246.

55. *Id.*

56. See generally Steven Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377 (2005).

57. Ian Weinstein, *The Discontinuous Tradition of Sentencing Discretion: Koon's Failure to Recognize the Reshaping of Judicial Discretion Under the Guidelines*, 79 B.U. L. REV. 493, 505 (1999).

58. *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000).

mandatory minimum, and presumptive guidelines.⁵⁹ States may choose one scheme for all crimes or may use different sentencing schemes for different crimes. Determinate sentences are sentences with a fixed term.⁶⁰ These sentences have a release date and are not reviewed by a parole board.⁶¹ Indeterminate sentences give a judge discretion to set a minimum and maximum sentence, and a parole board can decide when, within that range, a person is released.⁶² Sentencing guidelines, developed by a sentencing commission, are “explicit and highly structured, relying on a quantitative scoring instrument.”⁶³ Mandatory minimums are exactly what they sound like: minimum sentences specified by statute that are applied to all convictions of a certain crime.⁶⁴ Twenty states have determinate sentencing and twenty-nine states have indeterminate sentencing.⁶⁵ All fifty states and the District of Columbia have some form of mandatory minimums, but the term ‘mandatory minimum’ is broadly defined and varies in every state.⁶⁶ Seventeen states reported having mandatory minimums for sex offenses as of February 1994.⁶⁷

California passed new laws in response to the outrage over Brock Turner.⁶⁸ Governor Jerry Brown signed into law a bill that imposes mandatory minimums for sexual assaults.⁶⁹ Governor Brown is usually against adding more mandatory minimums, but he believes mandatory minimums bring “a measure of parity to sentencing for criminal acts that are substantially similar.”⁷⁰ The law also dispenses with the force requirement as it pertains to sentencing.⁷¹ Previously, California classified sexual assaults on unconscious or intoxicated victims as lacking force.⁷² That distinction was important because under California’s old statute, force “would trigger a mandatory denial of probation.”⁷³ Under the new law, probation will be denied in all sexual assault cases where penetration occurs.⁷⁴

59. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, NATIONAL ASSESSMENT OF STRUCTURED SENTENCING 2 (2004), <https://www.ncjrs.gov/pdffiles/strsent.pdf> [hereinafter ASSESSMENT OF STRUCTURED SENTENCING].

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 17.

64. *Id.* at 2.

65. *Id.* at 20–21. States were allowed to check multiple sentencing schemes on the survey. *Id.* at 19.

66. *Id.* at 19.

67. *Id.* at 24–25.

68. Edwards, *supra* note 10.

69. Niraj Chokshi, *After Stanford Case, California Governor Signs Bill Toughening Penalties for Sexual Assault*, N.Y. TIMES (Sept. 30, 2016), <http://www.nytimes.com/2016/10/01/us/sentencing-law-california-stanford-case.html>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

IV. WHY MANDATORY MINIMUMS ARE NOT THE ANSWER

Mandatory minimums are a hastily formed solution to a nuanced problem. They are racially biased and bad for public policy because they switch discretion from judges to prosecutors.

Mandatory minimum sentences for sexual offenses are not the solution to the sentencing problem, primarily because mandatory minimums disproportionately affect men of color.⁷⁵ While drug laws and rape laws are different, the information about mandatory minimums for drug laws can be applied to rape laws. While this is not a perfect comparison, mandatory minimums imposed by rape laws and those imposed by drug laws will likely have substantially similar effects. Mandatory minimums also increase the amount of people incarcerated. In 2008, the statistics showed that “more than one in every 100 adults is now confined in an American jail or prison.”⁷⁶

The argument that mandatory minimums take away the race and class disparities in sentencing, because the sentences are supposed to be “colorblind,” ignores the fact that it is mostly men of color who receive the mandatory sentences.⁷⁷ Mandatory terms and sentencing enhancements disproportionately increase black men’s admission rates to prison.⁷⁸ In fact, it is the very belief that mandatory minimums are race neutral that results in the disparity. While counterintuitive, “when racial disparity is produced through race neutral policies, the institutionalization of racial difference is disguised” as acceptable and just.⁷⁹ In the end, mandatory minimums simply allow white people to believe the criminal justice system is impartial, while the sentencing scheme continues to disproportionately affect black people.⁸⁰

Critics may counter by arguing that more black men are in prison because black men commit more crimes. This is clearly refuted by statistics: “from 1970 to 1996, the proportion of blacks in prison increased by 25%, while the proportion of blacks arrested for violent crimes dropped by 20%. From 1986 to 1991, the number of white drug offenders in state prisons increased by 110%, but the number of black offenders incarcerated grew by 465%.”⁸¹ Even though African-American men commit drug crimes in “rough proportion to their representation in the population at large, they were sentenced at a rate 5 to 6

75. See generally Danielle Snyder, *One Size Does Not Fit All: A Look at the Disproportionate Effects of Federal Mandatory Minimum Drug Sentences on Racial Minorities and How They Have Contributed to the Degradation of the Underprivileged African-American Family*, 36 *HAMLIN J. PUB. L. & POL’Y* 77 (2014).

76. PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008* 3 (2008), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2008/one20in20100pdf.pdf.

77. See Traci Schlesinger, *The Failure of Race Neutral Policies: How Mandatory Terms and Sentencing Enhancements Contribute to Mass Racialized Incarceration*, 57 *CRIME & DELINQ.* 56, 57–58 (2011).

78. See *id.* at 59.

79. *Id.* at 74.

80. *Id.*

81. Cole, *supra* note 53, at 251.

times their representation in the population.”⁸² While one in 100 Americans is incarcerated, the statistics are even more jarring for black men. For black men eighteen years old or older, one in fifteen is incarcerated.⁸³ For black men between the ages of twenty and thirty-four, one in nine is incarcerated.⁸⁴

Mandatory minimums may have been a reaction to public perception that judges exercised too much leniency in sentencing; however, the addition of mandatory minimums does not take away discretion—it just shifts it from judges to prosecutors.⁸⁵ In a study of Pennsylvania case outcomes, the “findings support the long-suspected notion that mandatory minimums are not mandatory at all but simply substitute prosecutorial discretion for judicial discretion.”⁸⁶ Judges have to impose the sentence that the law requires, but prosecutors have the discretion to choose what crime or crimes to charge.⁸⁷ For example, a prosecutor could choose to file misdemeanor assault charges over more severe sex offenses without any oversight. Because prosecutorial discretion in charging and plea negotiation is “neither open to public review nor generally reviewable by the courts, the honesty and truth in sentencing . . . is compromised.”⁸⁸ Mandatory minimums restrict judges’ discretion and lead to unfair sentences.⁸⁹ Mandatory minimums should not be used because they replace judicial discretion with prosecutorial discretion.

Critics may argue that prosecutors are subject to the same public scrutiny that judges are held to because prosecutors are elected. This is true in the case of most lead prosecutors, who are elected and therefore have to follow public demands in order to keep their jobs.⁹⁰ However, almost ninety percent of prosecutors are not elected.⁹¹ Although unelected prosecutors report to an elected boss, they do not face the same pressures as elected officials.⁹² While

82. *Id.* at 248.

83. PEW CTR. ON THE STATES, *supra* note 78, at 6.

84. *Id.*

85. Jeffrey T. Ulmer et. al., *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. RES. CRIME & DELINQ. 427, 451 (2007).

86. *Id.*

87. EVAN BERNICK & PAUL LARKIN, HERITAGE FOUND., RECONSIDERING MANDATORY MINIMUM SENTENCES: THE ARGUMENTS FOR AND AGAINST POTENTIAL REFORMS, HERITAGE 3 (2014), http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms#_ftnref25.

88. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM ii (1991), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf.

89. Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 4 (2008).

90. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533 (2001).

91. *Id.* at 535.

92. *See id.* (“District attorneys are likely to seek to manage their offices in ways that win them public support. To some degree, line prosecutors will seek to do that too, because that is their bosses’ goal, and they must satisfy their bosses in order to keep their jobs. But line prosecutors, like other employees, are likely also to seek to order their jobs in ways that make those jobs more pleasant.”).

unelected prosecutors may face pressure from their elected boss, prosecutors do not have to hold themselves to the same standards of fairness that judges do.⁹³ Prosecutors are inherently advocates for one side, whereas judges are a neutral party. While not all judges are elected, judges can be subject to public scrutiny because their job is to be impartial, demonstrating again that prosecutorial discretion is not equivalent to judicial discretion, and the discretion in sentencing should be left to judges, not prosecutors.

Mandatory minimums for sexual assault will not work.⁹⁴ To support her argument in favor of mandatory minimums for rape, Isabelle Barraquiel Reyes points out the arguments against mandatory guidelines—“unwanted increases in prosecutorial discretion; the stripping of moral judgment from the criminal justice system; and reduction of disparity as a problematic goal of the Mandatory Guidelines system”—but fails to acknowledge the disparate impact these mandatory minimums will have on poor men of color.⁹⁵

Applying mandatory minimums to rape convictions is not good public policy. With the overwhelming public outrage to Turner’s case, it is understandable that lawmakers, advocates, and feminists want to do something. However, this “something” should not be applying mandatory minimums. It might be that the “something” needed to fix the criminal justice system is not implemented through the criminal justice system at all; to fix the criminal justice system, societal attitudes must first be fixed. Sexual assault is a huge problem in America, but it might be a larger symptom of gender inequality—“scapegoating one judge or ratcheting up sentences for acts that are already criminal will do little to solve [systematic gender inequality].”⁹⁶ While it is extremely important to change societal attitudes, this type of change is slow. After the Brock Turner case, there was public outcry against lenient sentencing and the public wanted immediate action. California lawmakers decided imposing mandatory minimums was the best solution because it caused an immediate change. But despite the immediacy of change they bring, mandatory minimums are not the best solution.

Many rape activists are against mandatory minimums for sexual assault. Twenty-five feminist organizations published a letter acknowledging that mandatory minimums are a “harmful mistaken solution” to the sexual assault sentencing problem.⁹⁷ They argue that because mandatory minimums did not

93. See Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from “Big Judge Davis,”* 99 KY. L.J. 259, 261 (2011) (“Public trust and confidence in the judiciary is best maintained by the exhibition of judicial fairness and impartiality in the courtroom.”).

94. Isabelle Barraquiel Reyes, Comment, *The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy*, 12 UCLA WOMEN’S L.J. 355, 374 (2003).

95. 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>.

96. *Id.*

97. Tess Owen, *A Coalition of Feminist Groups Want to Block Sentencing Bill Inspired by Stanford Rape Case*, VICE (Sept. 12, 2016), <https://news.vice.com/article/a-coalition-of-feminist->

work for drugs, mandatory minimums will not work for sexual assault either.⁹⁸ Some supporters argue that mandatory minimums will address the racial bias that worked in Turner's favor—Turner arguably got a light sentence because he is a young, affluent white male. In the past, however, “mandatory minimums [have] exacerbated racial and class disparities” in prosecution.⁹⁹ It is admirable that lawmakers and the public want to do something to correct the injustice of Brock Turner's case, but mandatory minimums are not the answer, especially because there are other, better options to alleviate current sentencing problems.

V. ALTERNATIVE SOLUTIONS TO CURRENT SENTENCING

Current sentencing schemes are retributive, centered around “getting back at those convicted of crimes.”¹⁰⁰ Current rape laws, including mandatory minimums, are retributive sentences. In the criminal justice system, crimes are framed as being committed against the state, not against a certain person, even though that person is labeled a victim.¹⁰¹ It is questionable whether “current sentencing structures, which so often culminate in a sentence to jail or prison, are responsive to, and lead to the redressing of, the actual harm, including psychic harm, crimes inflict on individuals and the community as a whole.”¹⁰² One such redress is restorative justice. Restorative justice should be implemented in some cases.

Restorative justice may be a solution for only a minority of offenders. This solution would not apply to violent, serial rapists or people with a history of domestic violence. While diverting sex crimes cases away from the criminal justice system may seem counterintuitive, restorative justice ultimately benefits victims. Although it may seem to only fix part of the problem, if people can be stopped before they reoffend and genuinely rehabilitated, they can transform the community and save future potential victims.

Restorative justice is the opposite of the current retributive sentencing scheme because restorative justice requires the offender to “give back to others.”¹⁰³ Although it is hard to find one overarching definition of restorative justice, the most succinct definition is offered by Howard Zehr: “restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”¹⁰⁴ In *Changing Lenses*, Zehr contends that his work on restorative justice provides “the

groups-want-to-block-sentencing-bill-inspired-by-stanford-rape-case.

98. *Id.*

99. *Id.*

100. Lynn S. Branham, *Plowing into Hope: A Three-Part Framework for Incorporating Restorative Justice into Sentencing and Correctional Systems*, 38 WM. MITCHELL L. REV. 1261, 1266 (2012).

101. *Id.*

102. *Id.* at 1263.

103. *Id.* at 1266.

104. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 19–20 (2002).

conceptual framework for the movement and has influenced policymakers and practitioners throughout the world.”¹⁰⁵ The purpose of restorative justice is to “bring victims and offenders together in an inclusive encounter aiming at a consensual resolution of the prejudices caused by a crime.”¹⁰⁶ Restorative justice has three core premises:

The first is that a crime violates people and the relationships between them. The second is that this violation spawns obligations. The third premise is that the primary obligation created by a crime is the right to wrong stemming from the violation. Restorative justice, when implemented, enables those who commit crimes to make amends, in a concrete and reparative way, for the harm their crimes have caused individuals and the community as a whole. Instead of concentrating on the exaction of revenge, restorative justice strives for other ends: accountability, healing, peace, and wholeness.¹⁰⁷

Restorative justice allows society to change the lens through which it looks at the criminal justice system.¹⁰⁸ Society can view crime as a personal violation against the victim, not as a crime against the state. Alternatively, instead of “viewing that [criminal justice] system as a mechanism for inflicting pain and tribulation on convicted offenders because of the pain and tribulation they have caused others,”¹⁰⁹ restorative justice can change the view to “a mechanism through which at least many convicted offenders alleviate, through compensatory deeds, the harm their misdeeds have caused others, including the community as a whole.”¹¹⁰

Restorative justice benefits victims. During the restorative justice process, “victims can experience a degree of catharsis as they explain to the person who victimized them the injurious effects of their crimes.”¹¹¹ Victims can also receive “answers to questions that may have been troubling them, such as what propelled the offender to commit the crime in the first place.”¹¹² These encounters give victims opportunities that the criminal justice system does not allow. Restorative justice also benefits offenders. Beyond avoiding incarceration, offenders can be rehabilitated instead of just being punished. Going through a court procedure can be shameful and stigmatizing for offenders.¹¹³ However, if the “shaming is focused on the [behavior] and not on the person and is followed by gestures of reacceptance, it is a powerful emotion that can lead to desistance.”¹¹⁴

105. Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 256 (2005).

106. Lode Walgrave, *Restorative Justice: Investigating the Potentials of Restorative Justice Practice*, 36 WASH. U. J.L. & POL’Y 91, 95 (2011).

107. Branham, *supra* note 100, at 1266.

108. See HOWARD ZEHR, CHANGING LENSES 181 (1990).

109. Branham, *supra* note 100, at 1310.

110. *Id.*

111. *Id.* at 1267.

112. *Id.*

113. Walgrave, *supra* note 106, at 118.

114. *Id.*

The restorative justice approach is entirely consensual.¹¹⁵ Offenders have the opportunity to choose to be part of a restorative justice program.¹¹⁶ An offender must be willing to acknowledge harm for the process to be beneficial to the victim and society.¹¹⁷ If an offender is “reticent to remedy that harm, imposition of a restorative sentence would be futile, erode the commitment of other convicted offenders trying to remedy their past misconduct, and could, in a sense, re-victimize the community.”¹¹⁸ An offender must recognize the harm and take responsibility. The consensual aspect of restorative justice is one way to minimize the amount of cases going through the program.

The best way to understand restorative justice is to see an example of a successful program. Project RESTORE (Responsibility and Equity for Sexual Transgressions Offering Restorative Experience) was a pilot restorative justice program started in Pima County, Arizona. The mission was: “to facilitate a victim-centered, community-driven resolution of selected individual sex crimes that creates and carries out a plan for accountability, healing, and public safety.”¹¹⁹ Project RESTORE was shaped around needs identified by victims of sexual assault that were not met by traditional criminal justice system measures.¹²⁰ These needs included: input in regard to their case, ability to tell their story without being interrupted, validation, safety and shaping a resolution to meet their emotional needs.¹²¹ Project RESTORE was for acquaintance rape and misdemeanor sex crimes.¹²² It did not allow the participation of “repeat sexual offenders, persons with police reports for domestic violence, or individuals with arrests for any crimes involving non-sexual forms of physical assault.”¹²³ An offender could not participate restorative justice if they were perceived to be a threat to public safety.¹²⁴

Project RESTORE involved a four-stage process to address the stated needs of victims.¹²⁵ These stages included (1) referral and intake, (2) preparation, (3) conference, and (4) monitoring and reintegration.¹²⁶ During stage one, prosecutors referred eligible cases to program personnel who then contacted the victims.¹²⁷ Eligible cases included acquaintance rape and misdemeanor sex crimes.¹²⁸ If the victim did not wish to participate, the offender was never

115. *Id.*

116. Branham, *supra* note 100, at 1279.

117. *Id.*

118. *Id.*

119. Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN* 218–19 (James Ptacek ed., 2010).

120. *Id.* at 221–22.

121. *Id.*

122. *Id.*

123. Mary P. Koss, *The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes*, 29 *J. INTERPERSONAL VIOLENCE* 1623, 1632 (2014).

124. Koss, *supra* note 119.

125. *See id.*

126. *Id.*

127. *Id.* at 227.

128. *Id.*

offered a chance to participate; however, if the victim did wish to participate, the offender was then contacted.¹²⁹ During intake, the victim and offender (with his or her lawyer) had separate meetings with project personnel to review the Project RESTORE manual, discuss program requirements, and sign informed consent forms.¹³⁰ If either the victim or offender did not consent to Project RESTORE, the case was sent back to the prosecutor's office for regular prosecution.¹³¹ If both the victim and offender consented, the offender then met with a forensic evaluator, who had to approve the offender's participation in Project RESTORE before moving on to stage two.¹³²

Stage two was the preparation stage. The project personnel met separately and individually with the victim and the offender; both were allowed to have their family and friends present during this meeting.¹³³ During these separate meetings, project personnel reviewed safety concerns, ground rules, conference statements, and the format of the conference between the victim and the offender.¹³⁴ The victim wrote an impact statement and the offender wrote a responsibility statement.¹³⁵ Personnel helped shape the statements and, in the case of impact statements, discouraged "ad hominem statements such as pervert, scumbag, or words that could be considered profanity."¹³⁶ They also discouraged excessive shaming of the offender because it could be counterproductive to the healing process.¹³⁷ Many of the offender's responsibility statements started out as too vague and impersonal, and personnel worked with the offender to include more information and emotion.¹³⁸ Personnel asked for the victim's input in forming a redress plan for the offender and helped prepare the offender for what might be part of the redress plan.¹³⁹ Each redress plan was individualized to the offender to minimize the risk of reoffending.¹⁴⁰ Redress plans included volunteer opportunities, reparations to the victim, symbolic reparations such as donations, drug or alcohol treatment, psychotherapy, and no contact.¹⁴¹ Redress plans always included "weekly supervision by program staff" and "quarterly supervision by the community board."¹⁴² The most important part of the preparation stage was to:

Ensure that the [victim] is ready to go to a meeting with enough emotional control and confidence that she/he will not feel reabused by completely breaking down, that the [offender] is ready to stay on

129. *Id.* at 230.

130. *Id.* at 227.

131. *Id.*

132. *Id.*

133. *Id.* at 230.

134. *Id.* at 228, 230–31.

135. *Id.* at 231.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 232.

140. *Id.*

141. *Id.* at 232–33.

142. *Id.* at 233.

message and accept redress plans without resistance, and that everyone knows the group rules in advance and the consequences of breaking them.¹⁴³

Once the participants were adequately prepared, they were ready for stage three, the actual conference. The conference included program personnel, the facilitator, the victim, the offender, the victim's friends and family, and the offender's friends and family.¹⁴⁴ The victim decided if he or she wanted to read his or her impact statement first or the offender to read his or her responsibility statement first.¹⁴⁵ When the victim read his or her statement, he or she described the incident and how it affected him or her.¹⁴⁶ After the victim spoke, the offender summarized in his or her own words what the victim said.¹⁴⁷ When the offender spoke, he or she described the incident and his or her responsibility for the incident.¹⁴⁸ After the victim and offender had both spoken, the friends and family of each had the opportunity to describe how the incident affected them.¹⁴⁹ After each person spoke, the offender had to summarize how the incident affected that person.¹⁵⁰ When the offender spoke, the victim was "asked to provide feedback on whether the restatement capture[d] her intended meaning, or to reemphasize certain points until the [offender could] verbalize them."¹⁵¹ The victim and offender then discussed the redress agreement, with input from the other people at the meeting.¹⁵² The victim, offender, program personnel, and facilitator then signed the agreement.¹⁵³ The conference ended with the offender leaving immediately, but the victim and the victim's family and friends could stay in the room if they wished to discuss their feelings in the aftermath of the conference.¹⁵⁴

The fourth and final stage of Project RESTORE was accountability and reintegration. Program personnel supervised the offender for the next year while he or she completed the redress agreement.¹⁵⁵ The offender had meetings with the Community Accountability and Reintegration Board (CARB).¹⁵⁶ The CARB was made up of volunteer community members and the decision to continue offering support or to terminate the plan rested with the CARB.¹⁵⁷ The CARB represented both the community and the idea that offenses are not just

143. *Id.*

144. *Id.* at 229.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 232.

152. *Id.*

153. *Id.* at 229.

154. *Id.* at 233.

155. *Id.* at 229.

156. *Id.*

157. *Id.* at 233.

perpetrated on a specific victim, but against the community at large.¹⁵⁸ Although the victim's active participation in the process was over after the redress agreement was signed, the victim would be immediately notified if the offender failed to complete the program or reoffended.¹⁵⁹ The victim was also allowed to attend any CARB meetings.¹⁶⁰ One year after the initial conference, the offenders went to his or her final CARB meeting.¹⁶¹ At this meeting the offender read a letter detailing his or her progress and reflection. This meeting symbolized the formal recognition of his or her "reintegration back into society as a law-abiding citizen."¹⁶²

Project RESTORE was established as a supplement to the criminal justice system.¹⁶³ If the offender did not complete the program, that offender could be prosecuted.¹⁶⁴ When the offender successfully completed the program, the "judge dismis[s]e[d] the case without the possibility of refileing it."¹⁶⁵

Project RESTORE ended in 2007 when the funding ran out.¹⁶⁶ When the program ended, it had an 80% completion rate and "those offenders accepted responsibility in a noticeably different manner from their initial statements."¹⁶⁷ Implementing programs like Project RESTORE around the United States is one way to fix the rape sentencing crisis.

Restorative justice is meant to change the message that society sends to offenders. Offenders learn to avoid criminal conduct because crimes hurt other people, not merely because crimes are illegal.¹⁶⁸ It is also more constructive for society to denounce crime "by doing things for the victim (and requiring the offenders to do so), rather than against the offender."¹⁶⁹ Implementing programs based on Project RESTORE across the United States is a way to fix the rape sentencing crisis in specific cases. Restorative justice is beneficial because it gives agency back to the victim and allows the victim to make decisions that the traditional criminal justice system takes away from them. It allows victims to get closure in a different way than the criminal justice system can offer.

Because community involvement is a key feature of restorative justice that distinguishes it from the traditional criminal justice system, it is imperative that the community is involved from the beginning of implementing the program. When planning to implement a restorative justice program in a community,

158. *Id.*

159. *Id.* at 229.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 234.

164. *Id.*

165. *Id.*

166. Amy Kasparian, Note, *Justice Beyond Bars: Exploring the Restorative Justice Alternative for Victims of Rape and Sexual Assault*, 37 SUFFOLK TRANSNAT'L L. REV. 377, 396 (2014).

167. *Id.*

168. ZEHR, *supra* note 108, at 198.

169. *Id.* at 199.

policymakers should remember “major changes in a criminal-justice system are more likely to garner the support of key constituencies within that system if they are spearheaded and contoured by a diverse coalition of individuals drawn from these constituencies.”¹⁷⁰ The CARB portion of Project RESTORE allowed the community to be involved. If future restorative justice programs are based on the Project RESTORE model, a coalition of community members initiating the project could turn into a beneficial community board. The committee planning the program and the community members implementing the program need to be representative of the community in order to help the community more readily accept and respect restorative justice. Each community is different and each community should ensure their restorative justice program is reflective of that specific community’s values.

Another important element of involving the community is educating the community. Because the restorative justice will likely be a foreign concept, community members will probably not understand its details or benefits. The planning committee should explain the “comparative benefits of, and risks associated with, restorative sentences . . . in a candid and truthful way that forestalls irrational fears about them and garners the community’s long-term support for them.”¹⁷¹ The planning committee must clearly communicate that the restorative justice approach would not be available to violent offenders or serial rapists. Community participation, support, and understanding are key to a successful restorative justice program.

VI. CONCLUSION

The public outcry over Brock Turner brought rape sentencing into the spotlight; however, rape adjudication has many problems that begin before the sentencing phase. Lack of reporting, policing, prosecuting, and convictions all lead to a lack of rapists being sentenced. Light sentences may send a message to rapists that they can get away with the crime. While critics of restorative justice may posit that it allows rapists to commit rape without any criminal penalties, the community-based focus of restorative justice teaches offenders that crimes affect more than just the victim. Restorative justice also redirects the focus away from the state and onto the most important person involved—the victim. It gives the victim a voice that the traditional criminal justice system takes away.

Changing rape sentencing will take more than just changing the sentencing phase of rape adjudication. For more people to be sentenced, more people have to report. More charges have to be pressed based on these police reports. More defendants need to be found guilty. For that to happen, society needs to change how it views and discusses rape.

It is understandable that the public was outraged with the Brock Turner case, but a rush to mandatory minimums is a mistaken solution that will not

170. Branham, *supra* note 100, at 1275.

171. *Id.* at 1285.

systematically solve the issue. Mandatory minimums are not the answer to the sentencing failures of sex crimes. Reactively establishing mandatory minimums is a rash decision that has been proven not to work in drug cases—and while drugs and sexual assault are different, mandatory minimums similarly will not work for sexual assault. Sentencing solutions must be thoroughly contemplated and planned instead of rashly imposed in reaction to public outcry. Restorative justice, if well planned and well executed, can be a beneficial solution to rape victims, offenders, and the community as a whole.

For those who do choose to participate in restorative justice, it can change the lives of those involved because it shifts the focus of the lens from the offender to the victim. A traditional rape prosecution is “almost entirely offender-driven because the focus remains on achieving justice through conviction, punishment, and imprisonment.”¹⁷² However, restorative justice is important because it is a victim-oriented reform that returns agency to the victim. Victim-oriented reforms are important because in the legal system:

The defendant has considerably more ‘power’ than the victim. Not only are the rights of the defendant constitutionally protected, but in defending those rights the defendant has, at least in theory, an advocate in the defense attorney. The prosecutor does not play the same role for the victim, but is instead an advocate for the state, and the interests of the state may often conflict with those of the victim.¹⁷³

Restorative justice benefits the victim, offender, and the community as a whole.

Restorative justice supplements, rather than replaces, the current sentencing scheme. Instead of changing traditional prosecution, restorative justice is an option for specific victims. The consensual nature of restorative justice also makes it a valuable option; no one is forced to participate in the restorative justice model if they feel they will be re-victimized or will not get anything out of it.

Brock Turner’s case was shocking to the public, but likely not the only one of its kind. This case brought into the spotlight the unjust nature of sentencing laws in rape cases. One measure to re-introduce a different type of justice into rape sentencing is restorative justice. For Brock Turner’s case, restorative justice could not have been applied because Turner almost certainly would not have consented to restorative justice.¹⁷⁴ But, would the situation have turned out differently if there was restorative justice? Would he have taken responsibility for his actions if he had known there was an option? There is no way to know. But maybe, as society works to prevent first-time offenders, it can simultaneously work to prevent future Brock Turners from reoffending.

172. Kasparian, *supra* note 166, at 392.

173. SPOHN & HORNEY, *supra* note 14, at 174.

174. See Liam Stack, *In Stanford Rape Case, Brock Turner Blamed Drinking and Promiscuity*, N.Y. TIMES (June 8, 2016), <http://www.nytimes.com/2016/06/09/us/brock-turner-blamed-drinking-and-promiscuity-in-sexual-assault-at-stanford.html>.