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## The "Leniency Epidemic": A Study of Leniency Granted to Convicted Rapists in America and Australia

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**THE “LENIENCY EPIDEMIC”: A STUDY  
OF LENIENCY GRANTED TO  
CONVICTED RAPISTS IN AMERICA AND  
AUSTRALIA**

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## I. INTRODUCTION

Recent world-wide media has prevalently focused on Brock Turner, the young man convicted of rape and, due to his apparently promising future, sentenced to a mere six months of incarceration.<sup>1</sup> The rape case against Turner, alongside those against David Becker and Austin Wilkerson, demonstrate a curious trend of granting leniency to young, privileged, white<sup>2</sup> rapists. These cases gained prominence over the last three years as instances of personal bias regarding the promising future and rehabilitative potential of a defendant. While these qualities may be included as mitigating factors during sentencing, they do not have any determinative power within the statutes themselves, leaving their use to the discretion of judges.<sup>3</sup>

America's changing attitudes toward leniency in rape sentencing pales in comparison to that of other countries.<sup>4</sup> Australia in particular took recent drastic steps to fix what will be loosely termed in this comment as their "leniency epidemic." Despite the fact that Australia, like the United States, utilizes an adversarial justice system composed of common and statutory law as well as a series of state-specific rules, the legislatures came together to propose a near-universal mandatory minimum of fourteen years' imprisonment with a standard non-parole period of seven years (meaning that convict will only be eligible for parole after seven years of incarceration).<sup>5</sup> In

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<sup>1</sup> Steven J. Harper, *Stanford, Trump and the Culture That Marginalizes Rape*, THE AMERICAN LAWYER, (Sept. 16, 2016), <http://www.americanlawyer.com/id=1202767624252/Stanford-Trump-and-a-Culture-That-Marginalizes-Rape>.

<sup>2</sup> I would like to clarify here that I did not intentionally seek out cases with white defendants. There are, however, irrefutable differences in how various races are treated in the judicial system, both in America and in Australia. Such differences, as they pertain to this comment, are discussed later.

<sup>3</sup> Kate Stith, *Principles, Pragmatism, and Politics: The Evolution of Washington State's Sentencing Guidelines*, 76 LAW & CONTEMP. PROBS. 105, 111 (2013).

<sup>4</sup> By this, I mean countries with similar cultural and legal systems to the United States'. For example, I excluded countries such as those in the Middle East that use religious law as the basis of their judicial system. I also excluded countries like China that have moved toward a lesser emphasis on the adversarial system of law, which the United States still heavily utilizes.

<sup>5</sup> Geoff Wilkinson, *Rape sentences in Victoria too lenient, says DPP*, HERALD SUN (March 23, 2011, 9:00 AM), <http://www.heraldsun.com.au/news/victoria>

addition, in the few cases where defendants successfully appealed for leniency, the courts solely granted such leniency on procedural bases.<sup>6</sup> Put another way, the Australian appellate courts focus on the role of court-based error in sentencing and adjust accordingly, rather than permitting less than the mandatory minimum due to the personal characteristics of the defendants alone.<sup>7</sup>

This comment's focus will initially be on individual but brief case studies of the three American cases<sup>8</sup> described above as well as

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/rape-sentences-in-victoria-too-lenient-says-dpp/newsstory/310444d4677dfc7435d  
bd00ff1ede3f?sv= f233e6476637f0b8d94757abf446832c.

<sup>6</sup> Director of Public Prosecutions v PKJ [2007] TASSC 51 (26 June 2007); Tiberiji Flora v R [2013] VSCA 192 (31 July 2013); Justin Anderson v R [2013] VSCA 138, ¶ 1 (6 June 2013); R. v Gerard Cortese [2013] NSWCCA 148, ¶ 56 (26 June 2013). Although other cases could also be mentioned here, in order to be exhaustive such a list would be an article unto itself. As a result, I list in this endnote only those cases which are relevant to and discussed in this article.

Additionally, please note that in Australian cases, the state is represented by the letter "R," meaning *regina*, as a reference to the Crown, since Australia is technically a parliamentary constitutional monarchy. This is distinct from American cases, which in public prosecutions list the state in question or the federal government of the United States as the prosecuting party.

<sup>7</sup> There has been one American case in which the convicted rapist fitting the same demographic as the other American defendants discussed here was granted leniency on appeal. In that case, Jesse Vierstra entered an Alford plea (a guilty plea asserting innocence) after serving three years for raping a woman outside a University of Idaho fraternity house and was resentenced to 10 years of probation. He brought the appeal on the basis that his attorneys did not have sufficient time to prepare for his trial in March of 2013, but news articles indicate that the plea was granted as part of a settlement with the prosecution. Without an available judicial record to explain why leniency was ultimately granted, and due to the differing explanations provided in the article discussing Vierstra's case, I cannot include this case as part of my study except to mention it as a possible similarity to Australian leniency. See Associated Press, *Man convicted of UI rape resentenced after successful appeal*, 7KTVB.COM (Oct. 4, 2016, 2:10 PM), <http://www.ktvb.com/news/crime/man-convicted-of-ui-rape-resentenced-after-successful-appeal/328947598>.

<sup>8</sup> This article will focus exclusively on these cases as examples of leniency granted to defendants who went through the trial phase, were found guilty, and then were granted leniency; it will not discuss defendants who pled guilty and therefore received mitigated sentences. This is because of the automatically reduced sentences offered to defendants who plead guilty, an independent factor that does not reflect mitigation of the crime itself.

three Australian cases<sup>9</sup> from the past five years that confronted the same leniency issue. It will then discuss why leniency should not be based on personal characteristics of the defendants alone, the societal and legal reasons supporting as well as opposing the “leniency epidemic,” and what changes should be made for us, as a society, and for the future.

## II. BACKGROUND

### A. American Case Studies: Cult of Personality Leniency

In the last five years, three rape cases from America have captured national attention: those of David Becker, Austin Wilkerson, and, most prominently, Brock Turner. Although Brock Turner’s case garnered arguably the most media interest, it will be discussed here last because of the extensive detail and clarity surrounding the events of Turner’s crime, which is not the case for Wilkerson or Becker.

#### 1. David Becker

David Becker was, at the time the rapes took place, an 18-year-old high school athlete who sexually assaulted two young women, attending the same house party as him in Massachusetts, while they slept.<sup>10</sup> While initially charged with two counts of rape and one count of indecent assault and battery, the judge ultimately ordered a continuance without finding when the District Attorney opted to drop the rape charges and only pursue the indecent assault and battery.<sup>11</sup> As a result of the continuation without finding, Becker received only two years of probation with the following terms:

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<sup>9</sup> While the American cases feature young, affluent, white defendants, the Australian cases do not. This is primarily because of the point I make in this article; namely, that the personal characteristics of the defendants do not necessarily factor into leniency granted in Australian cases. As a result, it was too difficult to distinguish those same types of defendants in Australian cases.

<sup>10</sup> Ellie Kaufman, *Judge Declines Review in David Becker Sex Assault Case*, CNN (Aug. 30, 2016, 9:26 PM), <http://www.cnn.com/2016/08/30/us/david-becker-sexual-assault-probation-review/index.html>.

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

abstention from drug and alcohol use; staying away from the two victims; and submission to an evaluation for sex offender treatment.<sup>12</sup> These terms allow him to continue attending college in Ohio during his probation, shirking the traditional probationary ban on leaving the state.<sup>13</sup> Upon successful completion of the two-year probation period, these charges will not appear on Becker's criminal record and he will not have to register as a sex offender.<sup>14</sup> Under Massachusetts law, Becker could have received up to life in prison for the rape charges.<sup>15</sup>

Several mitigating factors may have contributed to Becker's lenient sentence.<sup>16</sup> First, the District Attorney's decision to drop the rape charges would allow for a lesser sentence; however, the Massachusetts statute for indecent assault and battery shows a maximum penalty of five years in state prison or two and one-half years in a jail or house of corrections.<sup>17</sup> Furthermore, the statute also explicitly states, "A prosecution commenced under this paragraph shall not be placed on file nor continued without a finding."<sup>18</sup> Without any official court record, there is no clear reason why the judge seemingly chose to directly contradict the provisions of the relevant statute. Another mitigating factor may have been the victim impact statement of one of the victims, in which she stated "that she didn't believe Becker should go to jail for what he did."<sup>19</sup>

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<sup>12</sup> *Id.*

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

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

<sup>15</sup> *Id.*

<sup>16</sup> One source, an article by Massachusetts Lawyers Weekly, reports that the sentencing hearing transcript showed the judge felt Becker was "unlikely to reoffend" and also references the victim impact statement of one of the victims. The same article also reports that rather than the case being continued without a finding, Becker instead admitted to the assault on the first victim and took an Alford plea (defined above) on the other. I, however, have not been able to verify this information through any other source; as a result, I will focus on what other sources say about the case until the date of publication.

<sup>17</sup> MASS. GEN. LAWS CH. 265, §13H, <https://malegislature.gov/Laws/GeneralLaws/PartIV/TitleI/Chapter265/Section13H>.

<sup>18</sup> *Id.*

<sup>19</sup> Kaufman, *supra* note 10. The other victim did not provide a formal victim impact statement and although news sources indicate that she was also consulted prior to sentencing, they do not share what, if anything, the second

Despite this showing of forgiveness, nothing in the limited available facts indicates that the victims' opinions were a determining factor in sentencing<sup>20</sup>; instead, the recommended sentence itself provides the clearest reasoning for the final sentence. Requiring Becker to register as a sex offender and precluding him from leaving Massachusetts, the proper jurisdiction for his case, would both impair Becker's ability to continue with his college education.<sup>21</sup> The judgment of "continuance without a finding" also means that Becker will not face any immediate charges,<sup>22</sup> again freeing him to return to his college experience. None of the news articles discussing the Becker case suggest any procedural or evidentiary reasons why Becker received such a lenient sentence in defiance of the Massachusetts statute. The only indicated justifications for leniency lie in Becker's status as a young athlete with a promising collegiate future.

## 2. Austin Wilkerson

Wilkerson, a 22-year-old college student from Colorado, raped his heavily intoxicated victim following a house party on Saint Patrick's Day.<sup>23</sup> Over the course of his trial, Becker maintained that the victim not only had the mental state to consent, but also actually consented.<sup>24</sup> Despite witnesses from the same party testifying Wilkerson told them he would take the victim home because of her drunken state, Wilkerson insisted throughout his trial that the victim was not inebriated and that the sex was consensual.<sup>25</sup> Judge Patrick

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victim said. There is also no indication as to whether that consultation was on the record or part of an *in camera* conference.

<sup>20</sup> *Id.* ("The victim impact statement was not made available in the court documents.")

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Tyler Kingkade, *No Prison for Colorado Student Who Raped Helpless Freshman*, THE HUFFINGTON POST, (Aug. 10, 2016, 11:31 PM), [http://www.huffingtonpost.com/entry/austin-wilkerson-boulder-rape-prison\\_us\\_57abb86ce4b06e52746f3b22](http://www.huffingtonpost.com/entry/austin-wilkerson-boulder-rape-prison_us_57abb86ce4b06e52746f3b22).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* In fact, Wilkerson's counsel premised his defense on the argument that the victim had only filed the rape charges as a false excuse for why her grades had dropped.



Butler sentenced Wilkerson to two years in prison, specifically a work-release program, and 20 years of probation.<sup>26</sup> Wilkerson will be able to leave the facility for work or school and sex offender treatment, but such ventures will be subject to “substantial supervision.”<sup>27</sup> Unlike Becker, Wilkerson must register as a sex offender, but both men must refrain from drug and alcohol use.<sup>28</sup> As in Becker’s case, and perhaps again because of the recent nature of the case, there is little to no official information available regarding the judge’s decision-making process in arriving at this sentence.

One possible explanation for the leniency that Wilkerson received, however, is the potentially extreme alternative. According to Colorado law, a judge cannot send a convicted rapist to prison for a finite term.<sup>29</sup> Instead, any prison term to which Judge Butler could have sentenced Wilkerson would have to be “for an indeterminate term up to the rest of his life.”<sup>30</sup> This means that, under Colorado law, Judge Butler had only two reasonable options: “the sentence imposed, or imprisoning the defendant indefinitely for between four years and life.”<sup>31</sup> Judge Butler chose to keep Wilkerson from hard prison time, and without an official court record<sup>32</sup> Wilkerson appears

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<sup>26</sup> Mary Claire Mulligan, et. al., *Limited Options Produce Rape Sentencing Controversy*, DAILY CAMERA (Sept. 1, 2016, 7:30 PM), [http://www.dailycamera.com/guest-opinions/ci\\_30317956/mary-claire-mulligan-et-al-limited-options-produce](http://www.dailycamera.com/guest-opinions/ci_30317956/mary-claire-mulligan-et-al-limited-options-produce).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Darren Cantor, *Sex Assault Sentencing Model Is Broken*, DAILY CAMERA (Sept. 17, 2016, 7:20 PM), [http://www.dailycamera.com/guest-opinions/ci\\_30371960/darren-cantor-sex-assault-sentencing-model-is-broken](http://www.dailycamera.com/guest-opinions/ci_30371960/darren-cantor-sex-assault-sentencing-model-is-broken); *see also*, Associated Press in Sacramento, *Sex offenders ‘marked men’ in California prison as many are killed at higher rate*, THE GUARDIAN (Feb. 16, 2015, 12:10 PM), <https://www.theguardian.com/us-news/2015/feb/16/sex-offenders-killed-higher-rate-california-prison>.

<sup>30</sup> *Id.*

<sup>31</sup> Mulligan, *supra* note 26. However, please note that without understanding what felony class Becker’s sexual assault conviction falls under — information which the news articles pertaining to his case do not reveal and for which there is no available court document — it is difficult to verify that these were the only two options available to the judge at that time.

<sup>32</sup> *Id.* Judge Butler is also “precluded from responding on his own behalf under the Judicial Code of Conduct which provides that judges may not comment

to be another in a line of young men who receive leniency based solely on supposedly bright collegiate futures.

### 3. Brock Turner

Turner's case garnered undoubtedly the most media attention of any of the cases discussed or mentioned in this article. A Stanford college student, swimmer, and now convicted rapist, Turner was raping the unconscious victim behind a dumpster when he was seen by two passersby.<sup>33</sup> The two men pursued and held Turner when he tried to flee.<sup>34</sup> Despite these witnesses, and the fact that the victim did not regain consciousness until nearly three hours after EMT technicians arrived and began medical treatment,<sup>35</sup> Turner maintained throughout the trial both his innocence and the consensual nature of the sexual activity. Following three felony convictions,<sup>36</sup> an impassioned victim impact statement,<sup>37</sup> and pleas from Turner's family and friends,<sup>38</sup> Judge Aaron Persky sentenced Turner to six

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on cases." *Id.* Without the court record or the possibility of an official statement from Judge Butler, one can only speculate as to the ultimate reasoning behind the sentence he handed down.

<sup>33</sup> *People v. Turner*, 2016 WL 3442308, (CA Sup. Ct. May 27, 2016) (sentencing mem.).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* Turner was found guilty of three felonies, each of which would typically independently require Turner to register as a sex offender: Penal Code section 220(a), assault with intent to commit rape of an intoxicated/unconscious person; Penal Code section 289(e), penetration of an intoxicated person; and Penal Code section 289(d), penetration of an unconscious person.

<sup>37</sup> The victim's statement was originally released by the victim herself to BuzzFeed, an independent Internet news company, on June 3, 2016. The letter can still be found on the BuzzFeed news site at [https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm\\_term=.wtgeYQzgaW#.glyBYWoEM3](https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.wtgeYQzgaW#.glyBYWoEM3), and copies may be found on multiple additional Internet news sites.

<sup>38</sup> One such plea is the well-publicized request Turner's father made to Judge Persky during the sentencing process, asking him not to punish "twenty minutes of action" with twenty years in prison.

months in the county jail.<sup>39</sup> Turner was subsequently released on parole after only three months.<sup>40</sup>

Leniency in this case came on the heels of a prosecutorial sentencing recommendation for six years in prison,<sup>41</sup> a still-lenient sentence considering Turner could have received the 14-year maximum.<sup>42</sup> The District Attorney considered a variety of factors, including Turner's prior arrest for underage drinking, references to drinking and drug use found on Turner's cell phone, and Turner's demonstrated pattern of predatory behavior toward women at parties in the past.<sup>43</sup> In this instance, the victim's alcohol consumption and subsequent unconsciousness made her vulnerable, and Turner took advantage of that vulnerability when he found her passed out behind the dumpster.<sup>44</sup>

Such evidence contrasted Turner's claims that the sexual encounter was the result of a mistake – albeit a consensual one – that he made as a young man new to drinking and partying, as well as his claim that the incident resulted from an unusual circumstance and was “unlikely to recur.”<sup>45</sup> Judge Persky even specifically referenced Turner's swimming career as part of the college experience that a prison term would impermissibly infringe upon.<sup>46</sup> On the other hand, the prosecution pointed out that the defendant's youth should not be taken into account, as such a consideration would indicate that no

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<sup>39</sup> Harper, *supra* note 1.

<sup>40</sup> 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>.

<sup>41</sup> Turner, 2016 WL 3442308 (CA Sup. Ct. May 27, 2016).

<sup>42</sup> Harper, *supra* note 1.

<sup>43</sup> Turner, 2016 WL 3442308

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Ray Sanchez, *USA Swimming bans Brock Turner for life*, CNN (June 10, 2016, 11:40 AM), <http://www.cnn.com/2016/06/10/us/sexual-assault-brock-turner-swimming/index.html>. Ironically, USA Swimming then stated that not only is Turner “not a current member” of its organization, but he is also “ineligible for membership” in the future. USA Swimming came to this decision as part of a conscious condemnation of Turner's “crimes and actions.” *Id.*

college-aged rapists should be held accountable for their actions<sup>47</sup> despite the prevalence of rape on college campuses.<sup>48</sup>

The final and perhaps most egregious argument against leniency is Turner's seeming lack of remorse.<sup>49</sup> Despite his conviction, indicating that whatever he told the court was not enough to create enough reasonable doubt for an acquittal, Turner continued to repeat his claim that the sexual encounter was consensual during sentencing proceedings.<sup>50</sup> The pre-sentencing report included statements from Turner in which he managed to blame everything but himself for the rape, with culprits ranging from alcohol<sup>51</sup> to peer pressure<sup>52</sup> and college culture.<sup>53</sup> Turner's lenient sentence indicates a willingness on the court's part to overlook procedural and statutory requirements in favor of personal characteristics, despite a conviction which undermines the value of the offender's character.

#### B. Rape Sentencing Statutes: America versus Australia

In both America and Australia, rape is a state crime rather than a federal one.<sup>54</sup> As a result, the statutory definitions of rape and

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<sup>47</sup> *Id.*

<sup>48</sup> Harper, *supra* note 1. It is estimated that four out of five sexual assaults on college campuses go unreported. It should be acknowledged here, however, the difficulty of estimating crimes that are not reported, making any statistics given an educated guess. *Id.*

<sup>49</sup> *Id.*; People v. Turner, 2016 WL 3442308 (CA Sup. Ct. May 27, 2016).

<sup>50</sup> Turner, 2016 WL 3442308

<sup>51</sup> *Id.* ("Being drunk, I just couldn't make the best decisions and neither could she.").

<sup>52</sup> *Id.* ("One needs to recognize the influence that peer pressure and the attitude of having to fit in can have on someone.").

<sup>53</sup> *Id.* ("I know I can impact and change people's attitudes towards the culture surrounded by binge drinking and sexual promiscuity that protrudes through what people think is at the core of being a college student . . . I want to demolish the assumption that drinking and partying are what make up a college lifestyle.").

<sup>54</sup> *Sentencing Guidelines: Australia*, THE LAW LIBRARY OF CONGRESS, <https://www.loc.gov/law/help/sentencing-guidelines/australia.php>; *Analysis of Penalties for Federal Rape Cases*, U.S. Sentencing Commission, [http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/199503\\_Federal\\_Rape\\_Cases.pdf](http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/199503_Federal_Rape_Cases.pdf). Please note that although most

the sentencing guidelines upon conviction vary by jurisdiction. Rather than go through each state's statute for both countries, this comment will feature only the statutes relevant for the case studies discussed. Both Australia and America, however, have federal statutes for rape committed within certain federal jurisdictions, such as maritime jurisdictions or prisons.<sup>55</sup>

### 1. American Statutory Schemes for Rape and Sexual Assault

Until recently, in California, the jurisdiction controlling Brock Turner's case, probation was generally "disfavored, rather than barred, for specific categories of persons."<sup>56</sup> Rapists who used "force or violence" and people who "willfully inflicted great bodily injury . . . in committing the crime" in question were among those for whom "probation is possible but disfavored."<sup>57</sup> However, there were certain categories of rape and sexual violence for which probation was possible, including cases like Brock Turner's and David Becker's in which the victim was unconscious or incapable of giving consent due to intoxication.<sup>58</sup> The sentencing statutes of California, however, have changed with the passing of Assembly Bill 2888, which "prohibit[s] a judge from handing a convicted offender probation in certain sex crimes such as rape, sodomy and forced oral copulation when the victim is unconscious or prevented from resisting by any intoxicating, anesthetic or controlled substance."<sup>59</sup>

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rapes and sexual assaults fall under state jurisdiction, if the assault takes place on federal land it falls under federal jurisdiction. Such assaults, however, are not the subject of this comment.

<sup>55</sup> Jill M. Marks, *Construction and Application of 18 U.S.C.A. § 2242(2), Proscribing Sexual Abuse of Person Incapable of Appraising Nature of Conduct, Declining Participation, or Communicating Unwillingness to Participate in Sexual Act*, 83 A.L.R. Fed. 2d 1, (2017).

<sup>56</sup> 9 WITKIN CAL. CRIM. LAW PUNISH. § 621.

<sup>57</sup> *Id.*

<sup>58</sup> Liam Dillon, *In wake of Stanford sexual assault case, lawmakers once again pitch mandatory prison time*, LOS ANGELES TIMES (Aug. 6, 2016, 12:05 AM), <http://www.latimes.com/politics/la-pol-sac-stanford-rape-prison-sentences-2016-0806-snap-story.html>.

<sup>59</sup> Sarah Larimer, *In aftermath of Brock Turner case, California's governor signs sex crimes bill* (Oct. 30, 2016), THE WASHINGTON POST, <https://www.washingtonpost.com>

There has been less change in Massachusetts and Colorado, the jurisdictions controlling the cases of David Becker and Austin Wilkerson, respectively. In Massachusetts, rapists can receive a sentence of up to life imprisonment.<sup>60</sup> In Colorado, the court has discretion to choose between sentencing a Class 4 sex felon to prison or jail and probation.<sup>61</sup> Should the court sentence the offender to prison, the prison sentence must be four years to life; this four-year minimum sentence is “indeterminate,” so it does not come with any guarantee of release, as referenced in the discussion of Austin Wilkerson’s case.<sup>62</sup> In addition, Colorado’s Lifetime Supervision Act provides that “a sex offender sentenced to prison must complete treatment and apply for parole before he can be released.”<sup>63</sup> As will be discussed below, however, sex offender treatment can be difficult to complete due to constraints within the prison system.<sup>64</sup>

### C. Australian Case Studies: Procedural Justifications for Leniency

The next three cases demonstrate Australian rationales for leniency, necessitating more procedural reasons for leniency than the American rationales above which incorporate personal reasons oriented around the convicted defendant’s qualities or promising futures. The court in *Director of Public Prosecutions v P, K, J CCA* (2007)<sup>65</sup> lists five overlapping groups of justifications for appellate refusal to disturb lenient sentences that apply to all the cases discussed below.<sup>66</sup> These groups are: (1) where there has been delay;

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.com/news/grade-point/wp/2016/09/30/in-aftermath-of-brock-turner-case-californias-governor-signs-sex-crime-bill.

<sup>60</sup> Kaufman, *supra* note 10.

<sup>61</sup> Mulligan, *supra* note 26.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Cantor, *supra* note 29. (“However, only about 11 percent of the state’s [California’s] inmate sex offender population is in the treatment program . . .”).

<sup>65</sup> It should be noted at this point that unlike American cases, Australian cases are formatted without periods (i.e., the formatting is structured as “DPP v P, K J” rather than “DPP v. P., K. J.”) As far as my research has shown, there is no express reason why this is the case.

<sup>66</sup> *Director of Public Prosecutions v PKJ* [2007] TASSC 51, ¶ 20 (26 June 2007).

(2) where a co-offender's unappealed sentence creates a "penalty ceiling"<sup>67</sup>; (3) where imposing an appropriate sentence would offend the "totality" principle; (4) where the lenient sentence may have a significant prospect of "rehabilitating" the defendant; and (5) where the court granted leniency because of the Crown's lack of challenges to sentencing facts submitted to the judge.<sup>68</sup> Only one of these, the fourth, takes into account the defendant's personal characteristics. Also in contrast with the American cases described above, each of the convicted rapists below were granted leniency only on appeal, rather than during the lower court's sentencing stage as in the American cases.

#### 1. *Tiberiji Flora v R*

In *Tiberiji Flora v R*, the appellate court resentenced the appellant to a lesser prison term based on the trial judge's failure to give adequate consideration to the delay between the dates of the offenses for which the appellant was convicted and the date of sentencing for those convictions.<sup>69</sup> Flora was found guilty in 2008 of intentionally causing injury to and raping his on-again, off-again girlfriend, identified only as CR, nearly three-and-a-half years prior.<sup>70</sup> While the court admitted that it considered other mitigating factors, including Flora's prior good behavior and his good prospects of rehabilitation, it also made it clear that "[f]ar and away the most important mitigating factor, however, was the delay that had occurred."<sup>71</sup> The court also held that it would consider delay as a mitigating factor in sentencing regardless of whether or not the prosecution could provide a "satisfactory explanation for the delay" and should instead focus on "the effect which the lapse of time—

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<sup>67</sup> This phrase references the Sentencing Council's "legally defined 'ceiling' on the lawful action permitted by the State against an offender." Such a "penalty ceiling" should be "sufficiently low to provide meaningful guidance to sentencers [*sic*] as to the seriousness of the offence and yet sufficiently high to provide for the worst examples of the crime that the sentencer may face." *Maximum Penalty for Negligently Causing Serious Injury Report*, Sentencing Advisory Council (2007).

<sup>68</sup> *Id.*

<sup>69</sup> *Tiberiji Flora v R* [2013] VSCA 192, ¶ 95 (31 July 2013).

<sup>70</sup> *Id.* at ¶ 1.

<sup>71</sup> *Id.* at ¶ 96.

however caused—has on the accused.”<sup>72</sup> The court then reduced Flora’s sentence from six years and two months’ imprisonment, with a non-parole period of four years, to five years and two months’ imprisonment with a non-parole period of three years.<sup>73</sup>

## 2. Justin Anderson v R –

In this case, the appellate court resentenced the appellant to a lesser sentence based on the trial judge’s failure to take both current sentencing practices and the delay between conviction and sentencing into account and to reduce the sentence in accordance with the defendant’s decision to plead guilty to the lesser charges.<sup>74</sup> Anderson pled guilty to indecent assault against a female friend, and a jury subsequently found him guilty of raping that friend in June of 2011.<sup>75</sup> Anderson originally received a total of eight years and three months’ imprisonment with a six-year non-parole period.<sup>76</sup> On appeal, the appellate court first found that the trial court judge erred in refusing to consider the guilty plea on the indecent assault charge simply because it did not reduce the length of the trial and because the Crown had a strong case against him on that charge anyway.<sup>77</sup> Instead, the appellate court found that these external factors do not affect the utilitarian benefit of the guilty plea, meaning that it must be permitted to discount the overall sentence.<sup>78</sup> Second, the appellate court found that the trial court gave insufficient regard to current sentencing practices for rape, instead erroneously choosing to conduct its own review of such practices.<sup>79</sup> Instead, the appellate court stated that it “remain[s] constrained to a certain extent” by current sentencing practices, which dictate that on conviction for

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<sup>72</sup> *Id.* at ¶ 97.

<sup>73</sup> *Id.* at ¶ 100.

<sup>74</sup> Justin Anderson v R [2013] VSCA 138, ¶ 1 (6 June 2013).

<sup>75</sup> *Id.* at ¶ 2. In addition, Anderson also plead guilty in December 2011 to child pornography charges which were attached to the June 2011 charges, despite the different offense dates. *Id.* The child pornography plea is not directly related to the facts necessary for this article and is relevant only in the sentencing determinations as part of the final sentence calculation.

<sup>76</sup> *Id.* at ¶ 3.

<sup>77</sup> *Id.* at ¶ 13.

<sup>78</sup> *Id.* at ¶ 14.

<sup>79</sup> *Id.* at ¶ 18.



rape following trial – a distinct difference from a conviction following a guilty plea – a judge can sentence an offender within a range as low as three years and as high as six years.<sup>80</sup> Third and finally, the appellate court touches on the four-year delay between the offense date and sentencing, including a five-and-a-half month delay between the conviction date and the sentencing date.<sup>81</sup> While the court willingly considers delay in the re-sentencing evaluation, however, it does not consider it a “discrete ground” requiring full analysis.<sup>82</sup> In considering all three grounds for appeal, the appellate court re-sentenced Anderson to six years and three months’ imprisonment with four years and nine months of non-parole.<sup>83</sup>

### 3. R v Gerard Cortese

The respondent in this case was given a reduced sentence on appeal based on the sentencing judge’s error in assessing culpability because he failed to take into account the relevance of a pre-existing relationship.<sup>84</sup> Cortese and the victim had been involved in a relationship for a few weeks prior to the assault, which occurred shortly after the victim ended the relationship.<sup>85</sup> The appellate court addressed multiple matters in which the trial court erred and which would lend themselves to mitigation but found only four that actually affected the leniency decision, each of which are briefly addressed here.<sup>86</sup> First, the record provides sufficient evidence regarding Cortese’s situation and supervision — namely, Cortese’s depression diagnosis and the “considerable hardships” subsequently suffered in custody — to allow the consideration of such evidence in the leniency decision.<sup>87</sup> Second, the court found no evidence of ongoing trauma to the victim, based on evidence that the victim initiated additional sexual encounters with the respondent after the assault in

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<sup>80</sup> *Id.* The appellate court does leave open the possibility of a change in sentencing practices, but states that it must be done by a formal review. The court does not, however, explain in this opinion how such a review would take place.

<sup>81</sup> *Id.* at ¶ 27.

<sup>82</sup> *Id.* at ¶ 28.

<sup>83</sup> Justin Anderson v R [2013] VSCA 138, ¶ 32 (6 June 2013).

<sup>84</sup> R v Gerard Cortese [2013] NSWCCA 148, ¶56 (26 June 2013).

<sup>85</sup> *Id.* at ¶ 7.

<sup>86</sup> *Id.* at ¶ 72.

<sup>87</sup> *Id.* at ¶ 20-21, ¶ 72.

question took place.<sup>88</sup> Third, the court found that the relative seriousness of the assault, despite the threats of violence as well as aggressive and humiliating language, fell “below the mid range of offences [*sic*] of this character.”<sup>89</sup> Fourth and finally, the appellate court felt that the respondent’s lack of prior incarceration and good prospects of rehabilitation should have been considered as special considerations.<sup>90</sup> Taking all these factors into account, the appellate court resentenced the respondent to three years imprisonment with a non-parole period of eighteen months.<sup>91</sup>

#### D. Australian Statutory Schemes for Rape and Sexual Assault

Australia has one of the highest rates of reported sexual assault in the world,<sup>92</sup> and it outlines its federal statutory schemes for sexual offenses in the Model Criminal Code.<sup>93</sup> This Code provides for increased penalties when certain aggravating factors are present, including: “causing injury; using a weapon; detaining the victim; the victim’s age; if the victim had a disability or cognitive impairment; or where the accused was in a position of authority in relation to the victim.”<sup>94</sup> The Australian Law Reform Commission, a federal body, acknowledges the “inconsistent application of aggravating

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<sup>88</sup> *Id.* at ¶ 32, ¶ 72. The court voices its “considerable misgivings about whether the material was capable of supporting such an extreme finding about the lack of ongoing trauma,” but at 33 notes that “none of the Crown’s grounds of appeal expressly challenged this finding of fact.” Without such an appeal expressly filed by the Crown, the court must approach the appeal “on the basis that [the claim regarding lack of harm to the victim] survives despite its tenuous support in the evidence.” *Id.*

<sup>89</sup> *Id.* at ¶ 57, ¶ 72.

<sup>90</sup> *Id.* at ¶ 72.

<sup>91</sup> *Id.* at ¶ 73.

<sup>92</sup> Sylvia Varnham O’Regan, *What is the legal process for rape cases in Australia?*, SBS (Austl.) (May 13, 2015, 9:51 AM). It is also important to note that while Australia may have a higher rate of reported sexual assault, that does not mean that more sexual assaults take place in Australia than anywhere else. Instead, it may simply mean that more victims report sexual assaults in Australia than they report sexual assaults that happen elsewhere or, conversely, that far fewer victims report sexual assaults in other countries than they do in Australia.

<sup>93</sup> Section 25 Sexual Offences, Family Violence – A National Legal Response (ALRC Report 114, 2010) (Austl.).

<sup>94</sup> *Id.*

circumstances between jurisdictions,” but it did not make any recommendations outside of suggesting that state and territory governments pay close attention to such inconsistencies when reviewing sexual assault offenses.<sup>95</sup>

The Commission took the same position in regard to inconsistencies in maximum penalties, which range from twelve years to life imprisonment depending on the jurisdiction and the presence of any aggravating factors.<sup>96</sup> The minimum, of course, “can range from a good-behaviour [*sic*] bond or a suspended sentence to a full-time jail sentence.”<sup>97</sup> The Crimes Act of 1914 sets out the federal sentencing law frameworks.<sup>98</sup> Interestingly, Victoria actually listed rape as a capital offense until 1949.<sup>99</sup> Because of this extreme penalty, prior to 1949 “the greatest number of undeserved acquittals occurred in rape cases.”<sup>100</sup> The Victorian legislature subsequently provided express statutory recognition of so-called “mitigating circumstances” in sentencing following a rape conviction not because it truly believed such circumstances “could be especially prominent in the law of rape,” but to avoid “complete acquittal of the accused” by a jury unwilling to sentence the offender to death.<sup>101</sup> Unfortunately, mitigating circumstances may still be (and often are) used in sentencing despite the removal of the death penalty; as recently as 2011, the Director of Public Prosecutions found that “13 of the 56 rape sentences imposed in Victoria in 2009 were inadequate”<sup>102</sup> due to apparent mitigation.

In Australia, each jurisdiction requires proof that the sexual penetration — described as “rape” in Victoria and “sexual assault” in New South Wales — took place without the victim’s (or, in some cases, the complainant’s) consent.<sup>103</sup> Both Victoria and New South

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> O’Regan, *supra* note 92.

<sup>98</sup> *Sentencing Guidelines: Australia*, *supra* note 54.

<sup>99</sup> GREG TAYLOR, RAPE WITH MITIGATING CIRCUMSTANCES, 2005 ABR LEXIS 26, \*7 (Aug. 2005).

<sup>100</sup> *Id.* at \*15.

<sup>101</sup> *Id.* at \*7.

<sup>102</sup> Harper, *supra* note 1.

<sup>103</sup> *Sentencing Guidelines: Australia*, *supra* note 54.

Wales are common law jurisdictions, which means that the prosecution must also prove the offender knew the victim did not consent or was reckless about obtaining such consent.<sup>104</sup> In New South Wales, the penetrative sexual offense (sexual assault) is a separate crime from “aggravated sexual assault.”<sup>105</sup> As a result, the sentencing guidelines differ for the separate offenses as well, with the maximum jail sentence in New South Wales set at fourteen years for sexual assault and life for aggravated sexual assault.<sup>106</sup> Additionally, New South Wales specifically provides for only six guideline judgments, including so-called “discounts” for pleading guilty.<sup>107</sup> The Crimes (Sentencing Procedure) Act of 1999 sets out the sentencing law framework for New South Wales, while the Sentencing Act of 1991 sets out the framework for Victoria.<sup>108</sup> Victoria, less specific in its provisions, merely “authorizes the Court of Appeal to give or review guideline judgments when considering an appeal against a sentence.”<sup>109</sup> To sum up, while many jurisdictions share the same basic definitions of sexual assault and its adjoining terms, they also provide for significant judicial discretion in sentencing considerations at both the trial and appeal levels.

### III. ANALYSIS

#### A. America versus Australia: Why Convicted Defendants Get Leniency

Considering that 97 out of every 100 rapists in America receive no punishment, it is no surprise that an excessive number of those who are punished appear to receive leniency.<sup>110</sup> According to RAINN (Rape, Abuse & Incest National Network), in the United States only one of every four reported rapes leads to an arrest and

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> O’Regan, *supra* note 92.

<sup>107</sup> *Sentencing Guidelines: Australia*, *supra* note 54.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Leaha Dobson, *The Black and White: A rape case*, THE EASTERN ECHO (Oct. 23, 2016, 8:27 PM), <http://www.easternecho.com/article/2016/10/the-black-and-white-a-rape-case>.

only one of four such arrests leads to a felony conviction and incarceration.<sup>111</sup>

One of the foremost reasons for any country's reluctance to sentence anyone to prison is because of the profound negative impact and stigma the offenders subsequently face. Concerns over defendants' futures were cited reasons in many of the case studies above, both American and Australian.<sup>112</sup> As Gresham Sykes pointed out in his book *The Society of Captives: A Study of a Maximum Security Prison*,<sup>113</sup> the "pains of imprisonment include: (1) the deprivation of goods and services; (2) the deprivation of heterosexual relationships; (3) the deprivation of autonomy; and (4) the deprivation of security."<sup>114</sup> Both the justice system and society as a whole have a history of expressing concerns that these deprivations may have negative consequences that extend far beyond the physical term of imprisonment.<sup>115</sup> This especially rings true for sex offenders, who are typically targeted in prison,<sup>116</sup> face retaliatory violence even upon

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<sup>111</sup> *Id.*

<sup>112</sup> Director of Public Prosecutions v PKJ [2007] TASSC 51, note 6 (26 June 2007); Tiberiji Flora v R [2013] VSCA 192, note 6 (31 July 2013); Justin Anderson v R [2013] VSCA 138, note 6 (6 June 2013); R v Gerard Cortese [2013] NSWCCA 148, note 6 (26 June 2013).

<sup>113</sup> Gresham Sykes, *The Society of Captives: A Study of a Maximum Security Prison*, (1<sup>st</sup> ed. 1958).

<sup>114</sup> Mirko Bagaric, *Articles: An argument for uniform Australian sentencing law*, 2013 ABR LEXIS 3 (2011).

<sup>115</sup> *Id.*

<sup>116</sup> See Associated Press in Sacramento, *Sex offenders 'marked men' in California prison as many are killed at higher rate*, THE GUARDIAN (Feb. 16, 2015), <https://www.theguardian.com/us-news/2015/feb/16/sex-offenders-killed-higher-rate-california-prison>.

release,<sup>117</sup> and may have to stay on sex offender registries for the rest of their lives.<sup>118</sup>

## B. The “Leniency Epidemic”: The Dangers of Reduced Rape Sentencing

Despite the negative consequences imprisonment may have on offenders, one must still consider the shortcomings of offering leniency. When judges offer leniency to these young, affluent offenders, they may help minimize rape culture, make offender recidivism more likely, and do greater long-term harm to the victims of these sex crimes and the community at large.

### 1. Minimizing Rape Culture

The most recent example of rape culture’s primacy in America is the election of President Donald Trump. Trump was elected despite “headlines about . . . unsavory comments – and alleged actions – toward women.”<sup>119</sup> Throughout this past election cycle, Trump put out tweets and statements reiterating the myths and stereotypes that perpetuate rape culture.<sup>120</sup> In an interview with Matt

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<sup>117</sup> In fact, shortly after Turner’s release, “about a dozen” armed protesters gathered outside of Turner’s parents’ home in Ohio where Turner was staying, some with rifles and some with signs calling for Turner’s castration. Feliks Garcia, *Stanford rape case: Armed protesters await Brock Turner’s arrival at Ohio home*, THE INDEPENDENT (Sept. 4, 2016), <http://www.independent.co.uk/news/world/americas/stanford-rape-case-armed-protesters-brock-turner-home-ohio-a7225381.html>.

<sup>118</sup> *The National Guidelines for Sex Offender Registration and Notification*, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (the SMART Office) at 57, [https://www.smart.gov/pdfs/final\\_sornaguidelines.pdf](https://www.smart.gov/pdfs/final_sornaguidelines.pdf), (no date). (Section 115(a) of SORNA (the Sex Offender Registration and Notification Act) “generally requires that sex offenders keep the registration current for 15 years in case of a tier I sex offender, for 25 years in case of a tier II sex offender, and for the life of the sex offender in case of a tier III sex offender . . .”).

<sup>119</sup> Katie Mettler, *Stanford sex assault survivor named Glamour Woman of the Year*, THE WASHINGTON POST (2 Nov. 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/11/02/stanford-sexual-assault-survivor-named-glamour-woman-of-the-year/?utm\\_term=.c152b1e88098](https://www.washingtonpost.com/news/morning-mix/wp/2016/11/02/stanford-sexual-assault-survivor-named-glamour-woman-of-the-year/?utm_term=.c152b1e88098).

<sup>120</sup> Harper, *supra* note 1.

Lauer just days after Turner's release, Trump stood by a 2013 tweet in which he stated, "26,000 unreported sexual assaults [sic] in the military-only 238 convictions. What did these geniuses expect when they put men & women together?"<sup>121</sup> This view that prolonged contact between men and women will inevitably lead to rape received additional attention with Trump's infamous "grab her by the p\*\*y" comment as caught on tape in 2005.<sup>122</sup> In it, Trump bragged about being able to grab and kiss women without their consent, a conversation that he described both in his formal apology and at the second Presidential debate as "locker room talk."<sup>123</sup> When asked by Anderson Cooper during that second debate if he understood that the actions he described legally constituted sexual assault, Trump deflected by discussing plans to defeat ISIS.<sup>124</sup> The normalization of sexual assault through bragging and inappropriate humor create and perpetuate rape culture, a culture now emphasized and encouraged by the man who occupies America's highest elected office.

Australia is not immune to the dangers of rape culture, and both Australia and America share some of the same negative consequences. In *R v Gerard Cortese*, discussed above, the court specifically lists "no ongoing trauma to the victim" and the "relative seriousness of the offence [sic]" as factors permitting leniency.<sup>125</sup> Permitting such factors in considering leniency, despite the *Cortese* court's citation of other factors unrelated to the crime itself, dangerously refers back to the common law interpretation of rape that Australia and America shared before statutory reforms took place, which "instead of criminalizing rape, . . . criminalized the extrinsic, violent assault."<sup>126</sup> This in turn leads to the supposition that "without an extrinsic, violent assault, the law . . . often assumed there

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<sup>121</sup> *Id.*

<sup>122</sup> Danielle Paquette, *Anderson Cooper told Trump 'That is sexual assault.' The Justice Department agrees*, THE WASHINGTON POST (Oct. 9, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/10/09/anderson-cooper-told-trump-that-is-sexual-assault-the-justice-department-agrees/?utm\\_term=.5e23c6f238a6](https://www.washingtonpost.com/news/wonk/wp/2016/10/09/anderson-cooper-told-trump-that-is-sexual-assault-the-justice-department-agrees/?utm_term=.5e23c6f238a6).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *R v Gerard Cortese* [2013] NSWCCA 148, ¶72 (26 June 2013).

<sup>126</sup> Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 628 (2012).

is no harm in rape.”<sup>127</sup> Men who – like Turner, Wilkerson, and Becker – do not use force during the sexual assaults they commit need to understand, whether through international discussions of rape culture or through the punishments allotted by the justice system, that any deprivation of choice in sexual autonomy extends beyond the simple definition of such deprivation and transforms into “a profound dehumanization that the lack of sexual choice does not reflect.”<sup>128</sup>

When the justice system grants leniency to the so-called “non-violent” offenders mentioned above, it perpetuates an aspect of rape culture known as “benevolent sexism.”<sup>129</sup> While “hostile sexism” features the “typical antipathy that is commonly associated with sexist prejudices,” benevolent sexism is “a set of attitudes that are sexist in their prescription of stereotypical roles for women but are subjectively positive and affectionate towards women.”<sup>130</sup> In a study on how these two types of sexism affect the sentences doled out to sexual offenders, Viki, Abrams, and Masser found that “participants attributed less blame to, and recommended shorter sentences for, the acquaintance rape perpetrator in comparison to the stranger rape perpetrator.”<sup>131</sup> These participants may have reached these judgments because of “perceived intent to rape or judgments of consent,” such as “the perception that the victim has consented to sexual familiarity,” or because of “the attribution of blame and evaluations of appropriateness of the behaviors of the victim and the perpetrator.”<sup>132</sup>

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<sup>127</sup> *Id.* at 636.

<sup>128</sup> *Id.* at 640.

<sup>129</sup> G. Tendayi Viki, et. al., *Evaluating Stranger and Acquaintance Rape: The Role of Benevolent Sexism and Perpetrator Blame and Recommended Sentence Length*, 28 L. & HUM. BEHAV. 295, 297 (2004).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 301.

<sup>132</sup> *Id.* at 302.



## 2. Offender Recidivism

According to RAINN, 21% of released rapists will likely be rearrested within the first six months and 60% within five years.<sup>133</sup> While no evidence exists to prove that “offenders who have been subjected to harsh punishment are less likely to reoffend,” there is also no comprehensive system of rehabilitation that works for all offenders.<sup>134</sup> Without such a system of “wide-ranging techniques,” rehabilitating sexual offenders, even outside of prison, requires more time and effort than many systems can provide<sup>135</sup>, which puts society back in the position of needing to incapacitate sex offenders in order to ensure they will not re-offend.

The societal goal of conveying disapproval of the offender’s actions also poses an interesting question as to how such a goal pertains to recidivism.<sup>136</sup> If, as in Turner’s case, the court mitigates specifically due to an offender’s youth, it would create a distinct advantage for offenders on college campuses, where “most of the people who commit these types of sexual assaults are typically in college and by definition ‘youthful.’”<sup>137</sup> In fact, the ability to get into and successfully navigate college should indicate a particular ability to reach a higher standard of professionalism and discipline than other offenders around the same age who are not part of the campus environment and culture.<sup>138</sup>

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<sup>133</sup> Dobson, *supra* note 110. This statistic does not, however, make it clear if the repeated crime will be an additional sexual offense, or merely another crime of another, distinct category.

<sup>134</sup> Bagaric, *supra* note 114, at 69.

<sup>135</sup> *Id.* at 70.

<sup>136</sup> *Id.* at 16.

<sup>137</sup> *People v. Turner*, 2016 WL 3442308, at note 33 (CA Sup. Ct. May 27, 2016).

<sup>138</sup> *Id.* In its sentencing memo for Turner, the prosecution points out that Turner, “unlike a typical high school student, competed competitively as a swimmer and therefore was more disciplined and had the ability to engage in goal oriented activities. . . . The same advantages that he was privileged to have should not be used to give him the benefit of a light sentence.” *Id.*

### 3. Balance Between the Harm and Good of Leniency

The advantages of leniency based on judicial discretion depend on the offender in question. In some of the Australian cases discussed above, leniency on appeal clearly provides the courts with an opportunity to correct, or at least mitigate, past procedural errors from the lower courts. In the case of Austin Wilkerson, the statutory mandates for sentencing ultimately factored into Judge Butler's sentencing decision.<sup>139</sup> Had Judge Butler decided to sentence Wilkerson to a prison sentence rather than the jail/work release sentence Wilkerson ultimately received, it would have meant incarcerating him "indefinitely for between four years and life."<sup>140</sup> While in the prison system, Wilkerson would be placed in a long line of other sex offenders requiring state-mandated treatment from "an underfunded Department of Corrections."<sup>141</sup> If Wilkerson can truly benefit from treatment, the community as a whole may benefit more from Wilkerson receiving it as soon as possible, even if such urgency means he avoids a prison sentence.

Despite the potential advantages to offenders, leniency may harm the victims of these violent offenses and, ultimately, the community at large. A criminal sanction that fits the crime and harm done "acknowledges that the victim's hurt occurred" and "expresses society's recognition of the importance of the victim."<sup>142</sup> Emily Doe, the woman who survived Brock Turner's assault, said in her *Glamour* essay that while she felt "relieved and excited to read her statement" after Turner's conviction, she "immediately felt silenced and 'embarrassed' . . . when Turner's sentence was read."<sup>143</sup> Appropriate punishment also benefits society by not only warning others of the consequences of rape – fitting the criminal law goal of general deterrence – and helping reform the rapist – fitting the criminal law goal of specific deterrence – but also by "quell[ing] the desire for socially harmful vendettas."<sup>144</sup> When judges fail to achieve

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<sup>139</sup> Mulligan, *supra* note 26.

<sup>140</sup> *Id.*

<sup>141</sup> Cantor, *supra* note 29.

<sup>142</sup> Bagaric, *supra* note 114, at 15.

<sup>143</sup> Mettler, *supra* note 119.

<sup>144</sup> Bagaric, *supra* note 114, at 17, 18.

consistency in sentencing, or when consistency is achieved but leads to inappropriate sanctions, they fall short of “the notion of equal justice” and such failure may erode public confidence in the justice system.<sup>145</sup>

One harm statistically evident in sentencing leniency is that the justice system does not consistently extend such mercy to both Caucasian offenders and offenders of color. In *The Black and White: A rape case*, author Leaha Dotson addresses the discrepancies in sentencing between white and black men convicted of rape.<sup>146</sup> She compares the cases of Brock Turner and Corey Batey, a football player at Vanderbilt “found guilty of three felony charges including ‘aggravated rape and two counts of aggravated sexual battery’” after raping an unconscious woman.<sup>147</sup> While the case facts closely mirror those of Turner’s case – indeed, the facts are almost identical at certain points – the resulting sentences vastly differed: Turner received a sentence of only six months in jail, while Batey was sentenced to serve the mandatory minimum of 15 to 25 years in prison.<sup>148</sup> In Australia, rape prosecutions “are already more likely to proceed when the offender is non-Caucasian, with Indigenous men . . . forming a disproportionate number of prosecuted offenders.”<sup>149</sup>

### C. International Pushback Against Leniency

Even though the leniency shown in America encourages rape culture, those fighting against it have displayed a simultaneous surge. One such example is Glamour Magazine’s designation of Emily Doe, Brock Turner’s victim, as a “Woman of the Year.”<sup>150</sup> In her Glamour essay, Doe addressed the inadequacies of the system: “I had forensic evidence, sober unbiased witnesses, a slurred voice mail, police at the

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<sup>145</sup> *Id.* at 24.

<sup>146</sup> Dobson, *supra* note 110.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Wendy Larcombe, *Falling Rape Conviction Rates: (Some) Feminist Aims and Measures for Rape Law*, 19 FEM. LEG. STUD. 27, 36 (2011). Unfortunately, as of the date of publication for this article there are no comprehensive statistics regarding the sentencing of Indigenous men versus Caucasian men in Australia.

<sup>150</sup> Mettler, *supra* note 119.

scene . . . and I was still told it was not a slam dunk.”<sup>151</sup> Doe received an outpouring of support from both victims and supporters around the globe, including Vice President Joe Biden.<sup>152</sup> The prosecution in Turner’s case stated that this case garnered such worldwide attention not just because “a star athlete, yet again, was accused of committing sexual assault,” but also because of “the audacious and callous manner that the Defendant assaulted a completely unconscious female in public.”<sup>153</sup> A crime that so shocks the conscience reverberates around the globe, and the global community responded to Emily Doe in kind.

Still, clear disconnects continue to exist between attempted reforms and actual, tangible change in conviction rates. Following a series of judicial reforms in the United Kingdom in the 1970s, conviction rates in England, Wales, and Ireland actually declined.<sup>154</sup> In these European countries, “jury attitudes are known to be a significant factor in conviction rates,” especially as jurors reference “a range of extra-legal factors, including rape myths, gender stereotypes, inferences drawn about the complainant or defendant and attitudes towards violence against women generally.”<sup>155</sup> While the international community has expressed its distaste for lenient sentences, there must be further changes made to the global culture and its way of thinking to eradicate the reasoning that leads anyone, especially judges, to think such leniency is acceptable.

#### D. A Philosophical Discussion of the Ramifications of and Potential for Change

Placing guideline reform in the hands of the legislature raises undeniable concerns. Judges enjoy the ability to make discretionary exceptions for a reason, as the presumably unbiased party in charge

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *People v. Turner*, 2016 WL 3442308 (CA Sup. Ct. May 27, 2016).

<sup>154</sup> Larcombe, *supra* note 149, at 30 (explaining that in England and Wales, “conviction rates declined from 32% of reported rapes in 1977 . . . to an all-time low of 5.3% in 2005.” Ireland fared even worse with a “conviction rate of 1-2% from 1993 to 2000.”).

<sup>155</sup> *Id.* at 32.

of overseeing that justice is done while also considering aggravating and mitigating factors.<sup>156</sup> On the other hand, however, judges are not as attuned to changing culture and opinions from their jurisdictions, whereas “placing sentencing policy squarely in the legislature holds that policy accountable to the preferences of the people.”<sup>157</sup> The benefits of encouraging legislative certainties over judicial discretion are evidenced by the California legislature’s response to Brock Turner’s case and the passing of Assembly Bill 2888.<sup>158</sup> The American people, at the very least those of California, exhibited a desire to enact change and took steps to encourage and enforce that change.

Amidst the statutory changes taking place in the United States and Australia, Americans as a society still need to participate in a complete overhaul of not only how we view rape and sexual assault, but how we deal with offenders. In cases such as Wilkerson’s, making sure that sex offender treatment is more readily available to all those who need it while in the prison system can ensure the immediate safety of the community while providing opportunities for the offender to receive treatment, which protects the community in the long run. There should not be an either-or rationale behind sentencing sex offenders; if the ramification of change in favor of protecting against undue leniency is less treatment and help for sex offenders, such change cannot in good conscience be considered or enacted.

#### IV. CONCLUSION

While both America and Australia allow for leniency within their justice systems, the American system is undeniably based more on personal characteristics than the Australian system, which focuses on procedural bases for leniency. This inadequate sentencing in the American system is the product of concern for incarcerated defendants and systemic rape culture, whereas Australia largely blends a series of procedural and judicial factors. Even in cases where

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<sup>156</sup> Anthony Townsend Kronman, *The Problem of Judicial Discretion*, 36 J. LEGAL EDUC. 481, 482 (1986).

<sup>157</sup> Stith, *supra* note 3, at 129.

<sup>158</sup> Larimer, *supra* note 59.

personal characteristics are taken into account, as in the Australian cases above, judges take care to articulate that those factors are subordinate to the procedural ones.

The American system could be improved by adopting more of the Australian system's characteristics. What is interesting is that even though both Australia and America exhibit some of the same cultural and social views of rape and sexual assault, Australia still has a more objective judicial process than America does. While changing cultural norms regarding rape and improving outcomes for inmates may help change the way judges sentence sexual offenders, we must also consider engaging in a comprehensive review of our laws and judicial discretion. Australia has a similar adversarial system and set of cultural norms; we should take a close look at their statutory schemes and ultimate judicial decisions to determine how our sentencing schemes should be more reflective of theirs.

To be clear, this comment does not argue that leniency is a bad thing. The point of this comment is not to condemn leniency for offenders convicted of rape, or to suggest that they should all receive the maximum penalty. The point is to suggest that when a rapist repeatedly declares his innocence, goes through the trial process, and is found guilty, leniency should be granted on grounds unrelated to his youth or collegiate promise alone. Without other extrinsic factors, such grounds would impermissibly allow too many other convicted rapists to receive similar leniency. Instead, I suggest reforming the existing American laws, at least until our society and judicial discretion comply, as Australia's do, with the basic principles of fairness and justice.