

THE AGONY & THE ECSTASY OF #METOO: THE HIDDEN COSTS OF RELIANCE ON CARCERAL POLITICS

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Many have considered the conversation sparked by #MeToo as a necessary and overdue interrogation of not only the spectre of common sexual harms in American society, but also the inadequacy of traditional mechanisms of accountability. Against this backdrop, smaller-scale flashpoints have erupted over perceived inadequacy of punishment, such as the successful campaign to recall California judge Aaron Persky from the bench over what many saw as leniency in the widely-publicized case of *People v. Turner*. This paper analyzes the complex relationship between #MeToo and the carceral state. In arguably the most punitive nation on the planet—particularly when considering the breadth and scope of public post-conviction registries—I argue that seeking to address broad and systemic failures of accountability by advocating for more severe punishment paradoxically undermines the larger goals of #MetToo to the extent that those goals are concerned with effectively challenging systems that perpetuate sexual harms. An approach that harmonizes efforts to prevent sexual harms and bring those who cause harm to account without endorsement of carceral politics is explored.

INTRODUCTION

In 2006, Tarana Burke was working as a youth camp director when a young girl in her care told her of the sexual abuse that she had endured from her mother's boyfriend.¹ The experiences stirred Burke, resonating with her

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1. Abby Ohleiser, *Meet the Woman Who Coined 'Me Too' 10 Years Ago—to Help Women of Color*, CHI. TRIB. (Oct. 19, 2017, 11:55 AM), <https://www.chicagotribune.com/lifestyles/ct-me->

own experiences of sexual abuse. She turned that moment into activism and sought to center the experiences of survivors of sexual violence, particularly young girls of color, who are often disregarded by society writ large.² Burke coined “Me Too.”

What began in Burke’s apartment took on new dimension in 2017, after Alyssa Milano turned it into a viral hashtag, #MeToo.³ Me Too, or #MeToo, has become something of a cultural shibboleth, a rorschach test of sexual harm and state power. Contained within it are undeniable truths about our society: to wit, the commonality of sexual harms, and our collective failure to effectively address those harms.

Eleven years after Burke breathed Me Too into life, a Santa Clara judge ordered former California judge Aaron Persky to pay \$135,000 in legal fees to the attorneys behind the effort to recall him from the bench in the wake of *People v. Turner*,⁴ a criminal case that transformed into a cultural flashpoint. In *Turner*, Persky had imposed a sentence for a sexual assault that many perceived as too lenient:⁵ three years of probation with six months to serve in the county jail, and a lifetime of sex offense registration.⁶

When confronted with the disparate treatment and stark disparity in America’s criminal legal systems, our well-worn response is one of uniquely American equality: that all should be treated equally harshly⁷—and so it was

too-campaign-origins-20171019-story.html; Tarana Burke, *The Inception*, JUST BE INC., <https://justbeinc.wixsite.com/justbeinc/the-me-too-movement-cmml> (last visited Aug. 16, 2019).

2. Jim DeRogatis, the Chicago Tribune reporter, who spent years reporting on allegations of sexual offenses against R. Kelly, once remarked in an interview about his experiences reporting the case that “[t]he saddest fact I’ve learned is nobody matters less to our society than young black women. Nobody.” JIM DEROGATIS, *SOULLESS: THE CASE AGAINST R. KELLY* 237 (2019).

3. *#MeToo: A Timeline of Events*, CHI. TRIB. (July 19, 2019, 7:12 PM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmistory.html>.

4. The fees were imposed as a result of a lawsuit that Persky had filed to stop the recall, alleging that the California Secretary of State should have presided over the recall petition as opposed to the local election office. The suit was decided against Persky, and thus he was liable for attorney’s fees. Jennifer Wadsworth, *Recalled Judge Aaron Persky Asks for Help to Pay Off \$135K in Campaign-Related Legal Costs*, SAN JOSE INSIDE, (Dec. 13, 2018, 7:22 AM), <https://www.sanjoseinside.com/2018/12/11/recalled-judge-aaron-persky-asks-for-help-to-pay-off-135k-in-campaign-related-legal-costs/>.

5. Tracey Kaplan, *Ousted Brock Turner Case Judge Implores Supporters to Help Pay \$135,000 Debt*, MERCURY NEWS (Dec. 13, 2018, 7:22 AM), <https://www.mercurynews.com/2018/12/11/brock-turner-judge-persky-debt-payoff/>.

6. Tara Golshan, *Why the Stanford Sexual Assault Case Has Become a National Flashpoint, Explained*, VOX (Dec. 19, 2016, 3:39 PM), <https://www.vox.com/2016/6/7/11866390/brock-turner-stanford-sexual-assault-explained>.

7. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003) (arguing that due to an absence of an aristocratic element in American society that we “level down” and degrade all equally, as opposed to the European practice of “leveling up” and extending dignity and leniency to all).

that Turner's jail term triggered a massive backlash that ultimately resulted in Persky's removal from the bench. Despite a judicial inquest into Persky's handling of the case finding no misconduct, bias, or abuse of discretion, he was recalled from the bench by a twenty-point popular vote margin.⁸ In addition to the recall, which was spearheaded by Stanford law professor Michele Dauber,⁹ the California legislature passed legislation mandating prison terms for numerous sexual offenses.¹⁰

While many saw the recall and its aftermath as correcting an injustice, a closer reading of events that precipitated them and forces that propelled them suggest a result that sounds less in correcting injustice, and more in compounding it. While the length of a prison sentence remains the focal point in how seriously we seek to take the problem of sexual harm and violence in our society (or, indeed, any problem), this elides both ways in which carceral responses perpetuate sexual violence, and ways in which carceral power is beginning to evolve.

In the most punitive democracy on the planet,¹¹ our culture stands at something of a crossroads: what if punishment doesn't work? Increasingly broad segments of our society are ready to agree that our impulse to incarcerate and punish is at odds with broader conceptions of justice, and yet often the sole beneficiaries of this purported grant of mercy are the "non-nons": people convicted of non-serious, non-violent, and non-sexual offenses.¹² Beyond the cages themselves, rendered invisible in the calculus about punishment, are our nation's increasingly broad and swollen sex offense (and myriad other) public conviction registries.¹³ While these conditions were regarded as something of a footnote in Turner's case—they are arguably harsher than a prison term.

8. Registrar of Voters, Santa Clara Cty., *Recall, Superior Court Judge*, RESULTS .ENR.CLARITYELECTIONS.COM (July 9, 2018, 1:12 PM), http://results.enr.clarityelections.com/CA/Santa_Clara/75369/Web02.207986/#/cid/24.

9. Kaplan, *supra* note 5.

10. A.B. 2888, 2015-16 Leg., Reg. Sess. (Cal. 2016).

11. *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited Oct. 11, 2019).

12. Florida recently passed a ballot measure to return to the voting franchise people who had been convicted of felonies, but the measure expressly excluded people who had been convicted of sexual offenses or murder. Alice Sperti, *Florida's Amendment 4 Would Restore Voting Rights to 1.4 Million People*, INTERCEPT (Nov. 3, 2018, 6:00 AM), <https://theintercept.com/2018/11/03/florida-felon-voting-rights-amendment-4/>.

13. See Celia Llopis-Jepsen, *Can Registries Cover Too Many Crimes? Kansas Legislation Suggests a Rollback*, KCUR 89.3 (Feb. 20, 2018), <https://www.kcur.org/post/can-registries-cover-too-many-crimes-kansas-legislation-suggests-rollback>.

This paper explores the fraught, complicated relationship between social movements that seek to address sexual harms and the carceral state. In an area where mass incarceration and state carceral power appear to be beginning to metastasize from an era of mass-caging to an era of mass-surveillance, I invite a broader understanding of what punishment is, and the utility that it has. I argue that our culture is in the midst of two distinct crises with respect to sexual harms that ultimately reinforce and perpetuate one another.

The first crisis is one marked by a noted absence: for most sexual harms in America, there is no formal recognition that harm occurred, no accountability, and no recompense. To be believed, those who are harmed are told that they must report what happened to police. The police, in turn, act as gatekeepers to a criminal legal system that many survivors of sexual violence experience as being even more traumatic than the harm they are seeking to report.¹⁴ Simply stated, this is a crisis about accountability for people who cause harm, and faith in both the ability and legitimacy of the state to provide it.

If the first crisis is one marked by absence, the second is one of abundance. We are the most punitive nation on the face of the planet, particularly when it comes to those who have been accountable for sexual harms. Outrage over criminal sentences that are perceived as light—while understandable—also misses the myriad ways in which punitive state power is evolving, and the effects that has on society. As is apparent, there are broad segments of our society who do not see this as a crisis at all, but indeed, as a desirous outcome.

These two crises create something of a perpetual motion machine of suffering for all actors involved in our criminal legal system in the context of sexual harm. The searing pain and anger from the first crisis feeds directly into the second, which in turn, creates massive disincentives for the very things that victim-survivors¹⁵ are often seeking: accountability, ownership, and redress. These disincentives then result in more pain, more anger, and more calls for punishment (or alternately, disbelief of those who make allegations) in a cultural and legal arms-race that ensures that all are made to suffer in equal measure.

As we seek to shore up failures of formal accountability with punitive architecture, the two people who ought to matter the most in our criminal legal system—the person who caused harm, and the person who was harmed—tend to figure as little more than props needed to propel a vehicle

14. See Corey R. Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 205, 219, 231-33 (2017).

15. Thanks to Abby Honold for suggesting this nomenclature.

that we have come to call justice. Whether this vehicle takes us to a place we want to go is another matter entirely, and a question I invite critical reflection on.

In Part I, I briefly describe the relationship between sexual harm and the American carceral state, including the massive expansion of sex offense and other public conviction registries, placing particular emphasis on the ways in which institutional actors routinely fail to effectively address sexual harms. Part II considers the criminal case of *People v. Turner*—and its volatile aftermath—as a lens through which to view the larger principles of accountability and punishment in this context. Part III turns to an application of those principles to sexual harms in America, and their impacts, suggesting that even as we seek to take the problem of sexual harms seriously, our efforts may do more harm than good. Part IV charts a different course, one that attempts to thread a delicate needle, or at least describe how one might be threaded, should we seek to resolve an arms race of pain. I then conclude with an invitation for critical reflection on the outcomes we desire, on the outcomes we say that we desire, and on whether those are in fact the same things.

I. “FAIRLY NORMAL AND ROUTINE:” A BRIEF OVERVIEW OF SEXUAL HARM & CARCERAL RESPONSE

But if the story of sexual violence at Stanford over the last half-century is to teach us anything, it’s that commotion will only do so much to reform culture. Although it has dominated campus headlines every few years—seemingly only after high-profile incidents or series of incidents—and although new initiatives have been tested each time, the problem of sexual violence remains an intractable one. Even the attention given toward sexual violence by the university tends to be reactionary, and it has done little to affect the cultural norms that perpetuate this problem on campus.¹⁶

You start to wonder, is rape really illegal?¹⁷

The landscape of sexual harms and violence in the United States is something of a paradox: it is, at the same time, everywhere, and nowhere. It is everywhere in the sense that many, many people experience some type of sexual harm in their lifetimes. One out of six boys and one out of four girls will be sexually abused before reaching adulthood.¹⁸ One out of three

16. Ruairi Arrieta-Kenna & Roxy Bonafont, “*Fairly Normal and Routine*”: 50 Years of Sexual Violence at Stanford, STAN. POL. MAG., (Jan. 31, 2018), <https://stanfordpolitics.org/2018/01/31/sexual-violence-cover-story/>.

17. Yung, *supra* note 14, at 237 (statement of Meaghan Ybos).

18. *Get Statistics: Sexual Assault in the United States*, NAT’L SEXUAL VIOLENCE RESOURCE CTR., <https://www.nsvrc.org/node/4737> (last visited Oct. 11, 2019).

women, and one out of six men, report experiencing some form of sexual violence in their lifetimes.¹⁹

Despite this pervasiveness, it is nowhere in the sense that for most of these harms there is no kind of formal accountability.²⁰ Most sexual offenses are never reported to authorities.²¹ Of those that are reported, most don't result in an arrest,²² and thus, no formal recognition that harm has occurred. If one were to simply rely on statistics of convictions, one would conclude that sexual harms are actually relatively rare.²³

While there are certainly high-profile examples where mechanisms designed to bring people to account seem to have failed in horrifying ways²⁴—these failures give the impression that the system, if it works as it is designed to work, would not result in these outcomes. Offenses would be reported, police would investigate, wrongdoers would be prosecuted, and those prosecutions would result in jail terms. In other words, many are left with the impression these cases are simply aberrations.

This impression is largely a false one. To the contrary, outcomes where our mechanisms of accountability fail might be more properly described as normal and routine: “[u]ltimately, police are the largest obstacle to the

19. *Id.*

20. An important consideration to flag is that the only kind of accountability that is on offer in our system is that which is provided by way of criminal or pseudo-criminal processes which often undermine and are conflated with personal accountability—that is to say, the person who caused harm taking ownership of that harm. *See* DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 13 (2019).

21. CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, *RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MED. ATTENTION, 1992-2000*, at 1-2 (2002), <https://www.bjs.gov/content/pub/pdf/rsarp00.pdf>. Underreporting patterns might be changing (perhaps in response to wider awareness of sexual harm in society), as data from the 2017 National Crime Victimization Survey indicated that sexual violence was reported to police at approximately 80% of the rate of violent crime more generally, though these numbers declined in 2018. RACHEL E. MORGAN & GRACE KENA, BUREAU OF JUSTICE STATISTICS, *CRIMINAL VICTIMIZATION*, 2018, at 8 tbl. 4 (2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf>.

22. *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Aug. 23, 2019).

23. *See id.*

24. For example, Jeffrey Epstein avoided far more serious criminal consequences for sexual abuse of underage girls and sex trafficking by way of a much-maligned non-prosecution agreement that he entered into with the then Assistant United States Attorney for the Southern District of Florida, Alex Acosta. Julie Brown, *How a Future Trump Cabinet Member Gave a Serial Sex Abuser the Deal of a Lifetime*, MIAMI HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article220097825.html>. Epstein subsequently died by suicide while in custody in the Manhattan Detention Center, after the United States Attorney for the Southern District of New York filed criminal charges against him. Tom Winter et al., *Jeffrey Epstein Died by Suicide in Manhattan Jail Cell, Autopsy Report Says*, NBC NEWS (Aug. 16, 2019, 1:38 PM), <https://www.nbcnews.com/news/us-news/jeffrey-epstein-died-suicide-manhattan-jail-cell-medical-examiner-says-n1041571>; *see also* Yung, *supra* note 14.

prosecution and conviction of rapists in the United States. Police disbelieve rape victims far more often than the public and other agents involved in rape investigations.²⁵

Police routinely fail to adequately investigate allegations of sexual harm, leading—amongst other things—to the creation of a rapekit “backlog.”²⁶ Suffice it to say, national clearance rates for rape cases hover around the 30% mark.²⁷ The popular narrative for why this is the case is because many rape cases boil down to “he-said-she-said allegations,” however, there are more systemic forces at work. Police routinely administratively “clear” rape cases for a variety of reasons—including to bolster numbers for crime reporting data.²⁸ As law professor Corey Yung and others have argued, police have traditionally functioned as hostile gatekeepers, even going so far as to threaten (and indeed, actually charge) victim-survivors with false reporting.²⁹

Investigatory failures in police departments stem from a variety of sources, which includes poor training, inadequate staffing amongst sex crimes units (and thus also poor morale amongst investigators), and manipulating stats to give the appearance of solving more rape offenses than are actually solved.³⁰ These well-documented phenomena in American law enforcement are at least arguably responsible for the reason why a bulk of rape complaints are either (a) never made or (b) never make it to later stages in the criminal legal process.³¹

In short, there exists an undeniable failure of accountability on the part of our mechanisms of institutional accountability³²—police routinely fail to appropriately respond to and address complaints, leading to a widespread

25. Yung, *supra* note 14, at 209.

26. This term, however, is quite misleading. See Meaghan Ybos & Heather Marlowe, *Five Ways the Media-Driven Rape Kit ‘Backlog’ Narrative Gets it Wrong*, THE APPEAL (Mar. 5, 2018), <https://theappeal.org/five-ways-the-media-driven-rape-kit-backlog-narrative-gets-it-wrong-99a02956df06/>.

27. Jim Mustian & Michael R. Sisak, *Despite #MeToo, ‘Clearance Rate’ for Rape Cases at the Lowest Point Since the 1960s*, USA TODAY (Dec. 27, 2018, 12:41 PM), <https://www.usatoday.com/story/news/nation/2018/12/27/rape-cases-clearance-rate-hits-low-despite-metoo/2421259002/>.

28. Corey Rayburn Yung, *How to Lie with Rape Statistics: America’s Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1200-04 (2014) (detailing at least forty-six police departments intentionally manipulating rape data by undercounting rapes within their respective jurisdictions, classifying rape cases as lesser offenses and thereby exempting them from mandatory reporting of the statistics, or failing to make written record of reported rape complaints).

29. Yung, *supra* note 14, at 211.

30. Yung, *supra* note 28, at 1200-04.

31. Yung refers to this phenomenon as the crime funnel. Yung, *supra* note 14, at 218.

32. Arguably, these failures have also fueled some of the more punitive aspects of #MeToo, “cancel culture,” informal shaming, etc. Stated differently, if people cannot have accountability by way of official channels, they will seek it elsewhere.

belief that reporting would likely be futile, and further leave people who commit acts of sexual violence free to continue with relative impunity. Examples of this abound, but Meaghan Ybos is particularly emblematic. Ybos was raped at knifepoint by Anthony Alliano in 2003, and despite promptly reporting the rape, the rape kit would not be tested by Memphis PD for another nine years.³³ During those nine years, Alliano would go on to commit at least an additional five attacks against Memphis-area women.³⁴ While Ybos' experiences are certainly horrific, they are far from unique, and instead, are emblematic of a pattern of general police hostility toward rape victims.

Despite these phenomena being well-documented and consistent throughout jurisdictions, relatively little attention is paid to their true natures. These basic structural and investigatory failures are often parlayed into calls for extraordinary expansion of state power, additional funding, or fewer rights for criminal defendants, as opposed to holding law enforcement and elected officials to account for delivery of services to victim-survivors.

These failures, it should be pointed out, appear to be much more pronounced when it comes to communities of color, or individuals who are not “perfect victims”³⁵ (despite communities of color experiencing higher rates of sexual violence than white communities).³⁶ This racial framing is also reflected in our legislation—the Adam Walsh Act, passed in 2006, for example, names seventeen victims (eighteen, if you include Adam Walsh himself) in its preamble as justification for the necessity of the legislation—all of whom are white (and all, save one, were attacked by strangers).³⁷ In other words, our legislation reflects this model of a “perfect victim”: a white, innocent woman or child and the prototypical offender is a violent stranger. This framing obfuscates the majority of sexual harms in America, and thereby perpetuates it by diverting awareness, resources, and interventions.³⁸

If the foregoing discussion of reporting and official hostility are considered to be evaluating the “upstream” of our criminal legal processes,

33. Yung, *supra* note 14, at 237.

34. *Id.* at 237-38.

35. The term refers to women who are victimized and comport with wider cultural rape myths and thus more likely to be believed (e.g., white, attacked by a stranger, dressed conservatively, not intoxicated). See Jan Jordan, *Perfect Victims, Perfect Policing? Improving Rape Complainant's Experiences of Police Investigations*, 86 PUB. ADMIN. 699, 703 (2008).

36. E.g., *Where We Stand: Racism and Rape*, NAT'L ALLIANCE TO END SEXUAL VIOLENCE, https://www.endsexualviolence.org/where_we_stand/racism-and-rape/ (last visited Oct. 11, 2019).

37. 34 U.S.C. § 20901(1)-(17) (Supp. V 2017).

38. This is, of course, not to say that “perfect victims” are not also people who have been harmed tremendously. But rather that their elevation by policymakers as paradigmatic examples of American sexual violence blinks the realities of that violence.

most of our focus and solutions are focused “downstream”—that is to say, on criminal (and pseudo-criminal)³⁹ trials, constitutional rights afforded to defendants, sentence length, and public conviction registries.⁴⁰ This is so, even despite upstream processes that are arguably much more important toward the goals of deterring criminal conduct and holding people accountable for conduct that has occurred, as opposed to the punishment that figures so largely downstream.

Perhaps by way of seeking absolution for these failures, America is the most punitive nation on the face of the planet, particularly at the intersection of punishment for sexual harms. While we cage more people per capita than any other nation on the planet, ours is not *just* a numbers game. American punishment is particularly degrading and brutal, though this has come to be expected as a central feature of punishment itself (as opposed to simply the loss of autonomy).⁴¹

With respect to the criminal legal system writ large, there is widespread agreement that we live in an era marked by a “crisis of punishment.”⁴² While much noise has been made about mass incarceration being the result of the war on drugs, most people who are incarcerated are incarcerated for violent offenses.⁴³

Observations about the severity of American punishment are underscored when talking about people convicted of sex offenses: they are subjected to some of the starkest legal exceptionalism in the context of an already exceptional criminal legal system. At the federal level, the class of offenses that are the most harshly punished are sexual offenses.⁴⁴ Importantly, we also punish people convicted of sexual offenses by sending them to places that are generally awash in sexual violence themselves, with little acknowledgement of this fact.⁴⁵ Generally, state courts are also punitive

39. Such as Title IX proceedings on college campuses.

40. Yung, *supra* note 14, at 235.

41. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1036 (2016).

42. *Id.*

43. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 5-6 (2017).

44. Guy Hamilton-Smith, *New DOJ Report Demonstrates Stunning Disingenuity on Cases Involving Sexual Exploitation of Children*, THE APPEAL (Jan. 17, 2018), <https://theappeal.org/new-doj-report-demonstrates-stunning-disingenuity-on-cases-involving-sexual-exploitation-of-b44a0c444e5d/>.

45. In addition, this form of rape is often seen as just desserts punishment. Bennet Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1301 (2011). A recent example of this was seen during Larry Nassar’s sentencing for numerous sex offenses, where Michigan Judge Rosemarie Aquilina mused about Nassar being raped in prison. Graeme Wood, *Where Nassar’s Judge Went Wrong*, ATLANTIC (Jan. 24, 2018) <https://www.theatlantic.com/politics/archive/2018/01/nassar-judge/551456/>.

in this context in that state judges are traditionally elected positions, and as research has demonstrated, tend to be very sensitive to populist sentiment when it comes to criminal cases.⁴⁶

Length of imprisonment has traditionally been our virtually solitary measure of justice,⁴⁷ but this elides some of the harshest punishments in the American legal arsenal. Despite being treated as footnotes in cases of sexual harm, public sex offense registration is arguably harsher than a jail term.

Modern-era sex offense registration began to take its shape in the early 1990s. Federal and state legislation was quickly passed in response to high-profile cases of child abduction and murder, establishing (at first private, then public) notification of people convicted of sex offenses.⁴⁸ Soon, every state in the nation had its own registry, each with its own set of regulations and requirements—with which failure to comply generally meant new felony prosecutions.⁴⁹

These new legal regimes sparked court challenges, which led to a pair of 2003 United States Supreme Court cases that denied essential constitutional protections to the people on them.⁵⁰ The cases—*Smith v. Doe* and *Connecticut Department of Public Safety v. Doe*—had the combined effect of issuing a blank constitutional check to states: registration was declared non-punitive and necessary on the basis of *purported* dangerousness,⁵¹ but rendered any inquiry into *actual* risk irrelevant.⁵² The combined impact of these cases rendered the monstrous nature of the people on these lists both presumed and irrefutable.

Thus began a nationwide race-to-the-bottom in an experiment with punitive exceptionalism that has been largely unmatched in the entirety of

46. See KATE BERRY, BRENNAN CTR. FOR JUSTICE AT NYU SCH. OF LAW, HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 7 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_How_Judicial_Elections_Impact_Criminal_Cases.pdf.

47. See Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 535 (2019).

48. The federal Jacob Wetterling Act originally contemplated private law-enforcement registries. The subsequent Megan's Law mandated public notification, which soon became the national standard.

49. See *Sex Offender Enactments Database*, NCSL.ORG, <http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-enactments-database.aspx> (last visited Sept. 4, 2019).

50. *Smith v. Doe*, 538 U.S. 84, 105 (2003); *Conn. Dep't Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003).

51. Ira Mark Ellman & Tara Ellman, "*Frightening and High*": *The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015).

52. *Smith* dealt with the Ex Post Facto clause of the United States Constitution and justified registration, in part, on the basis of the "frightening and high" risk of re-offending. *Smith*, 538 U.S. at 105. *Connecticut Department of Public Safety*, in turn, rejected the argument procedural due process mandated a hearing on a person's dangerousness before a state could include them on a sex offense registry. 583 U.S. 1 (2003).

our legal system.⁵³ What began as a relatively simple list soon morphed into something akin to a prison-sans-bars.⁵⁴ If America had a civil death penalty, putting people on its sex offense registries would be it.⁵⁵ A legislative “ratchet”⁵⁶ combined with public animus has resulted in a patchwork of legal requirements that have become increasingly untethered from considerations of public safety,⁵⁷ evolving into what some scholars have begun to call “super-registration” schemes.⁵⁸ Take, for example, what was required of a mentally-challenged juvenile defendant in Ohio in 2012:

You are required to register in person with the sheriff of the county in which you establish residency within three days of coming into that county, or if temporarily domiciled for more than three days. If you change residence address you shall provide written notice of that residence change to the sheriff with whom you are most recently registered and to the sheriff in the county in which you intend to reside at least 20–days prior to any change of residence address. You are required to provide to the sheriff temporary lodging information including address and length of stay if your absence will be for seven days or more. Since you are a public registry qualified juvenile offender registrant you are also required to register in person with the sheriff of the county in which you establish a place of education immediately upon coming to that county. You are also required to register in person with the sheriff of the county in which you establish a place of employment if you have been employed for more than three days or for an aggregate of 14 days in a calendar year. Employment includes voluntary services. As a public registry qualified juvenile offender registrant, you also shall provide written notice of a change of address or your place of employment or your place of education at least 20 days prior to any change and no later than three days after the change of employment. [Y]ou shall provide written notice within three days of any change in vehicle information, e-mail addresses, internet identifiers or telephone numbers registered to or used by you to the sheriff with whom you are most recently

53. Guy Hamilton-Smith, *Sex Registries as Modern-Day Witch Pyres: Why Criminal Justice Reform Advocates Need to Address the Treatment of People on the Sex Offender Registry*, THE APPEAL (Dec. 12, 2017) <https://theappeal.org/sex-registries-as-modern-day-witch-pyres-why-criminal-justice-reform-advocates-need-to-address-the-aca3aaa47f03/>.

54. Despite their passive name, registries are much more than just registries. They are public lists plus a myriad of laws, banishing people subject to them from living or even being present in certain areas and imposing numerous affirmative obligations on pain of felony conviction.

55. Hamilton-Smith, *supra* note 53.

56. Meaning that legislatures only ever add new restrictions or make existing ones more onerous—never (or, rarely) the other way around.

57. Or, to the extent they ever were. Research, for example, indicates that there is little association between “failing to register” and sexual reoffending. Levenson et al., *Failure to Register as a Sex Offender: Is it Associated with Recidivism?*, 27 JUST. Q. 305, 326 (2010).

58. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L. J. 1071, 1079 (2012).

registered. [Y]ou are required to abide by all of the above described requirements for your lifetime as a Tier III offender with in person verification every 90–days. That means for the rest of your life every three months you’re going to be checking in with [the] sheriff where you live or work or both. Failure to register, failure to verify on the specific notice and times as outlined here will result in criminal prosecution.⁵⁹

Given the complexity of these schemes, it is perhaps not surprising that the most common reason in many jurisdictions that people on registries return to prison—not for a new sexual offense, but rather for failure to abide by the many technical requirements imposed on them by the registries.⁶⁰ Penalties for these failures are severe: distinct from parole violations (sometimes referred to as technical violations), these are considered new felony offenses.⁶¹ As such, they can carry with them mandatory minimum terms of imprisonment or expose people to “three-strikes” type sentencing enhancements. Failing to abide by these requirements can mean tolling or even resetting of registration periods,⁶² meaning more opportunities for failure, and more opportunities for imprisonment. In addition to state-sanctioned punishment, presence on a sex offense registry also exposes people to vigilantism, perpetual homelessness due to housing banishment laws and landlords unwilling to rent, joblessness, and harassment of spouses and children.⁶³ Arguably, these legal regimes seek to accomplish what our constitution would otherwise expressly prohibit: increased and continuous punishment for people who have already been held accountable for an offense.

In recent years, the judiciary has begun to push back. Judges have not only found that these registries have become punitive,⁶⁴ but that they go so far as to violate the federal constitution’s prohibition on cruel and unusual

59. *In re C.P.*, 131 Ohio St. 3d 513, 515-16, 2012-Ohio-1446, 967 N.E.2d 513, 515-16.

60. Grant Duwe & William Donnay, *The Effects of Failure to Register on Sex Offender Recidivism*, 37 CRIM. JUST. & BEHAV. 520, 521 (2010).

61. In every jurisdiction that this author is aware of, failing to comply is a felony offense. The Adam Walsh Act of 2006, which sets the federal standards for the states, mandates that failing to register is a felony offense if states wish to receive Byrne block grant funds. 34 U.S.C. § 20913(e) (Supp. V 2017).

62. U.S. Dep’t of Justice, *Significant Changes to SORNA Guidelines*, SMART.GOV, https://www.smart.gov/pdfs/sorna_significant_changes.pdf (last visited Aug. 21, 2019).

63. Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412-19 (2010). It is worth observing here that people with resources will in many ways be able to insulate themselves from the worst impacts of registries—such as not being able to find housing or meet their economic needs (e.g., Jeffrey Epstein).

64. *Does #1-5 v. Snyder*, 834 F.3d 696, 704-05 (6th Cir. 2016).

punishments—a legal conclusion virtually unheard of outside of the context of death penalty litigation.⁶⁵

In addition to these deepening punitive qualities, registries have also come to impact more and more people and their families. Now, there are nearly one million people on them,⁶⁶ nearly double the 2005 figure.⁶⁷ Periods of registration are lengthy, sometimes for life, and thus it seems likely that these figures will only continue to increase.

As with the generally racially disparate impact of the criminal-legal system writ large, public conviction and sex offense registries disproportionately impact people of color.⁶⁸ Additionally, people of color are more likely to be classified into higher “risk tiers”⁶⁹ than white counterparts,⁷⁰ which tends to mean lengthier periods of registration and an increase in the variety of requirements (and, thus, an increase in the number of opportunities to run afoul of those requirements and return to prison, assuming that they are ever allowed to leave at all).⁷¹

Sex offense registries and their impact bear discussion here for several reasons, but amongst them is that a discussion of sexual harms, institutional responses, and punitiveness is all undergirded with the assumption that our overall goal here is to prevent sexual harm from happening, and effectively respond to harms that have transpired. To the extent these are our goals, there are compelling reasons to believe that the application of registries, in particular, perpetuate the very harms that they are supposed to vanquish. Scholars have effectively criticized sex offense registries as a type of patriarchal retaliation for early feminist efforts to reform rape law.⁷² Our collective inability, then, to apprehend their true natures (both in terms of their punitive impact, but as well as their ineffectiveness at preventing sexual

65. Millard v. Rankin, 265 F. Supp. 3d 1211, 1231 (D. Colo. 2017).

66. Steven Yoder, *Why Sex Offender Registries Keep Growing Even as Sexual Violence Rates Fall*, THE APPEAL (July 3, 2018), <https://theappeal.org/why-sex-offender-registries-keep-growing-even-as-sexual-violence-rates-fall/>.

67. Trevor Hoppe, *Punishing Sex: Sex Offenders and the Missing Punitive Turn in Sexuality Studies*, 41 L. & SOC. INQUIRY 573, 575 (2016).

68. *Id.*

69. Generally, tiering has very little to do with an individual’s risk or needs, but rather it is only related to the title of the offense that they had been convicted of.

70. Bobbie Ticknor & Jessica J. Warner, *Evaluating the Accuracy of SORNA: Testing for Classification Errors and Racial Bias*, CRIM. JUST. POL’Y REV. 1, 5 (2018).

71. In states with housing banishment laws, people convicted of sex offenses are often not allowed to leave prison until they are able to secure “legal” housing—a feat which is often impossible for those who lack resources or connections on the outside. See Murphy v. Raoul, 380 F. Supp. 3d 731, 764 (N.D. Ill. 2019).

72. See Rose Corrigan, *Making Meaning of Megan’s Law*, 31 L. & SOC. INQUIRY 267, 308 (2012).

harm) complicates our collective efforts to address the problem of sexual violence in our society.

In other words, how we understand a problem necessarily suggests its solution. If our collective understanding of the problem of sexual violence is that the culprits are recidivistic predators, then the solutions are banishment—either actual, as is the case with imprisonment, or constructive, as is the case with registries. However, this framing badly misapprehends the realities of sexual harm, and thus undermines our efforts to address it.

Equally as important, public conviction registries such as sex offense registries represent an important vector through which the discharge of state power and carceral economics is beginning to evolve. As discussed above, there are now approximately a million people on sex offense registries alone (to say nothing of the other public conviction registries). Given their trajectory, long registration periods, and few opportunities for exit,⁷³ it is not unreasonable to predict that one day there might be more people on public conviction registries than in prison in America. Private corporations are rapidly capitalizing on registries, introducing a profit motive into our system of punishment in the same way private prisons (and the privatization of services provided to public prisons)⁷⁴ have, though in ways that much fewer people are even aware of.⁷⁵

II. MIDNIGHT IN THE GARDEN OF PERSKY AND TURNER

Some are shocked at how short [Turner's] sentence is. Others who are more familiar with the way sexual violence has been handled in the criminal justice system are shocked that he was found guilty and served any time at all. What do you think?⁷⁶

73. Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2 WIS. L. REV. 219, 224-25 (2015).

74. See Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email*, WIRED (Aug. 3, 2018, 7:00 AM), <https://www.wired.com/story/jpay-securus-prison-email-charging-millions/>.

75. For example, one company, OffenderWatch now has contracts in roughly half of the states to operate public conviction registries and are selling their services to the general public. Faith King, *State Sheriff's Encouraging Parents to Download New Sex Offender Watch App*, KALB (Oct. 23, 2019, 6:52 PM), <https://www.kalb.com/content/news/Louisiana-Sheriffs-encouraging-parents-to-download-new-sex-offender-watch-app-563734711.html>.

76. Lisa Ryan, *Brock Turner Is Used as the Example for a Rapist in This New Textbook*, THE CUT (Sept. 13, 2017), <https://www.thecut.com/2017/09/brock-turner-criminal-justice-rape-textbook.html>.

Shortly after midnight, an unknown male approached the Santa Clara County Sheriff's deputies from behind, signaling for their attention, exclaiming that they have him pinned to the ground.⁷⁷

The deputy, turning his attention from the unconscious woman laying on the ground, sought clarification—who? “They said it was the guy who did that,” he replied, pointing to the woman.⁷⁸ The woman—Chanel Miller—was partially nude and covered in pine needles, and would soon become known around the world as Emily Doe.⁷⁹

Before deputies were dispatched, two Swedish students studying at Stanford happened to be riding on a nearby bike path and observed what they first believed to be a couple—Turner and Miller—having sex.⁸⁰ One of the students realized that Miller did not appear to be conscious, and they intervened—chasing Turner a short distance and tackling him to the ground until authorities arrived.⁸¹

Thus set in motion the events that would become *People v. Turner*. While *Turner* was ostensibly a criminal-legal vehicle through which to adjudicate an offense that was committed by Turner against Miller, that vehicle would soon experience a violent collision with mass media, politics, and an unmistakably carceral vision of justice that would become seared onto the public's consciousness.

The initial felony complaint filed against Turner contained five counts for various offenses, including two counts of rape,⁸² though the rape charges were later dismissed due to a lack of evidence that penetration had occurred.⁸³ Turner was indicted in Santa Clara County Circuit Court, and Santa Clara jurist Aaron Persky drew the case.⁸⁴ Turner elected to proceed to trial.

The evidence adduced at the trial was that both Turner and Miller had attended a party at the Kappa Alpha fraternity house that had begun the

77. Probation Report at 3, *People v. Brock Turner*, No. H043709, 2018 WL 3751731 (Cal. Ct. App. Aug. 8, 2018), <https://assets.documentcloud.org/documents/2858997/Probation-officer-s-report-in-Brock-Turner-case.pdf>.

78. *Id.*

79. *Id.* at 2. Miller was known as Emily Doe, as her identity was shielded in the media as the victim of a sexual assault. Subsequent to the assault, the trial, and the recall, Chanel Miller wrote a book about her experiences. In keeping with her decision to tell her story publicly, I refer to her by her name here. See generally CHANEL MILLER, *KNOW MY NAME: A MEMOIR* (2019).

80. *Id.* at 4.

81. *Id.*

82. Felony Complaint at 2-3, *People v. Turner*, No. B1577162 (Cal. Super. Ct. filed Jan. 28, 2015), <https://assets.documentcloud.org/documents/1532973/complaint-brock-turner.pdf>.

83. Michael Vitiello, *Brock Turner: Sorting Through the Noise*, 49 UNIV. PAC. L. REV. 631, 637 (2018).

84. *Id.*

previous evening, and both had consumed large amounts of alcohol.⁸⁵ Turner admitted sexual activity with Miller, but believed it was consensual, and denied that Miller was not conscious.⁸⁶ Miller's testimony rejected Turner's version of events, as she testified that she had no recollection of what happened, and that whatever Turner did was without her consent.⁸⁷

A jury found Turner guilty on all counts.⁸⁸ As is customary practice (in both Santa Clara County and elsewhere), the county probation department prepared a report that would summarize various aspects of the case and ultimately recommend a sentence for Turner.⁸⁹

Amongst the items contained in the report were statements both by Turner, as well as Miller. Turner, for his part, stated to the probation officer preparing the report that he felt remorse for both the offense, as well as the pain that Miller experienced as a result of having to go through the trial process.⁹⁰ Miller also expressed her myriad emotions regarding both the harm that Turner had caused her, as well as the resulting trial:

I still feel a lot of anger because of what he put me through at trial. I want him to be sorry and express remorse. He attacked my personal life in whatever way possible and in the end, it didn't work. I don't experience joy from this. I don't feel like I won anything. It was just the anger of hearing what he said in Court. It was devastating. I want him to know it hurt me, but I don't want his life to be over. I want him to be punished, but as a human, I just want him to get better. I don't want him to feel like his life is over and I don't want him to rot away in jail; he doesn't need to be behind bars.⁹¹

The sixteen-page report ultimately concluded, based on the assessment of a variety of factors, that "a moderate county jail sentence, formal probation, and sexual offender treatment is respectfully recommended."⁹² At the sentencing hearing, Persky heard arguments both by the prosecutor's office as well as by Turner's attorneys.⁹³

85. *Id.* at 632.

86. *Id.*

87. *Id.* at 648.

88. Verdict of the Jury, *People v. Turner*, No. B1577162 (Cal. Super. Ct. filed Mar. 30, 2016), 2016 WL 3442307.

89. Vitiello, *supra* note 83.

90. Probation Report at 7, *People v. Turner*, No. B1577162 (Cal. Super. Ct. filed June 2, 2015), <https://assets.documentcloud.org/documents/2858997/Probation-officer-s-report-in-Brock-Turner-case.pdf>.

91. *Id.* at 5.

92. *Id.* at 12.

93. Reporter's Transcript of Proceedings, *People v. Turner*, No. B1577162 (Cal. Super. Ct. June 2, 2016), <http://www.documentcloud.org/documents/2860659-People-v-Brock-Turner-Sentencing-Hearing-6-2-2016.html>.

Perhaps the most well-known aspect of Turner's sentencing, however, was Chanel Miller's powerful victim impact statement.⁹⁴ Miller's 12,000-word statement went viral,⁹⁵ being shared more than 11 million times in four days. Stanford law professor Michele Dauber, who would later lead the charge to remove Persky from the bench, referred to Miller's victim impact statement as "the manifesto of the Me Too movement."⁹⁶

Persky sentenced Turner to three years of probation with six months in jail, as well as a lifetime of sex offense registration, which was both consistent with the recommendation of the probation officer's report, California state law, as well as Persky's established practice.⁹⁷ Turner's sentence immediately sparked a firestorm and an organized effort to recall Persky from the bench under an idiosyncratic feature of California law.

The *Recall Aaron Persky Campaign* formed, with Stanford law professor Michele Dauber as its figurehead, cast itself as a *cause célèbre*, a referendum on sexual assault in America, and our undeniably bad track record with addressing it.⁹⁸

As the recall campaign began to get underway, many observers were troubled by the way in which the campaign appeared to have slanted many of the facts of both *People v. Turner*, and Persky's record as a judge in an apparent ends-justify-the-means political effort.⁹⁹ For example, Persky was praised by prosecutors and defense attorneys alike for being a fair jurist.¹⁰⁰ The Santa Clara District Attorney's Office—the entity that prosecuted Turner—despite its expressed disagreement with the sentence Turner received, staunchly opposed the effort to recall Persky from the bench.¹⁰¹ A

94. Katie J.M. Baker, *Here's the Powerful Letter the Stanford Victim Read to Her Attacker*, BUZZFEED NEWS (June 3, 2016, 4:17 PM), <https://www.buzzfeednews.com/article/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra#.xf2YDd8Xv>.

95. Julia Ioffe, *When the Punishment Feels Like a Crime*, HUFFPOST: HIGHLINE (June 1, 2018), <https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber/>.

96. *Id.*

97. Vitiello, *supra* note 83.

98. *See supra* note 10 and accompanying text.

99. *See* Vitiello, *supra* note 83, at 638-39; *see also* Press Release, Comm'n on Judicial Performance, Commission on Judicial Performance Closes Investigation of Judge Aaron Persky (Dec. 19, 2016), https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky_Explanatory_Statement_12-19-16.pdf.

100. Paul DeBenedetto, *Santa Clara County Public Defender Explains What Judge Persky's Recall Means for His Clients*, THE APPEAL (June 11, 2018), <https://theappeal.org/santa-clara-public-defender-persky-recall/>.

101. News Release, Cty. of Santa Clara Office of the Dist. Attorney, DA Makes Statement on Brock Turner Sentencing (June 6, 2016), <https://www.sccgov.org/sites/da/newsroom/newsreleases/Pages/NRA2016/DA-on-Turner-Sentence.aspx>.

group of law professors also signed onto a letter, opposing the recall effort.¹⁰² Indeed, in the wake of Persky's recall, members of the Santa Clara criminal bar spoke out against the recall—both defense attorneys and prosecutors.¹⁰³ The California Commission on Judicial Performance evaluated the complaints that the recall campaign lodged against Persky's supposed bias and abuse of discretion, though found that he behaved entirely within the bounds of the law.¹⁰⁴

This is to say nothing of the impact of a judicial recall, discussed more below. As law professor Michael Vitiello points out in *Sorting Through the Noise*, even if one thinks that the custodial aspect of Turner's sentence was too lenient, a judicial recall poses distinct problems:¹⁰⁵ in short, that harsher sentencing practices would generally impact defendants that look nothing like Turner, nor have access to his resources and privilege.

The facts of *Turner*, Persky's record, and concerns voiced about inviting populist political anger into the criminal process, however, mattered relatively little to the wider media narrative and, importantly, to voters. Persky was ousted by a twenty-point margin.¹⁰⁶ *People v. Turner*, in addition to the judicial recall, led to the passage of new mandatory sentencing laws for sexual assault.¹⁰⁷

The recall and the legislation were both signals that, to take the problem of rape and sexual assault seriously, *we must take it seriously*, which in America has traditionally meant being faced with a problem, and America "reach[ing] into their culture and pull[ing] out the concept of evil and the concept of a cage."¹⁰⁸ As Miller reflected in her book, she—at least initially—viewed the sentence that Turner had received as a referendum on her worth as a person.¹⁰⁹

Thus it is clear that campaigns like *Recall Persky*, and the carceral logic that they appeal to, sought to make a difference in cases of rape and sexual assault by way of longer criminal sentences. After all, American culture is one that has comparatively few tools to contend with social ills or interpersonal harm aside from the criminal legal system, and there are few ways for observers to know how "well" the system is working outside of

102. Elena Kadvanly, *Law Professors Voice Opposition to Persky Recall*, PALO ALTO ONLINE (Aug. 21, 2017, 8:26 AM), <https://www.paloaltoonline.com/news/2017/08/18/law-professors-voice-opposition-to-persky-recall>.

103. DeBenedetto, *supra* note 100.

104. Press Release, Comm'n on Judicial Performance, *supra* note 99.

105. Vitiello, *supra* note 83, at 632.

106. *See supra* note 8.

107. *See supra* note 10.

108. Kleinfeld, *supra* note 41, at 1026.

109. MILLER, *supra* note 79, at 242-43.

sentence length. Indeed, in the federal system, it is codified that sentence length is meant to—*inter alia*—“reflect the seriousness of the offense.”¹¹⁰

While it is more or less assumed that longer sentences mean more justice, the reality is likely more complicated, at least to the extent that our conception of justice is concerned with effectively preventing sexual harm and holding people accountable for that harm.

III. THE AGONY

Today, I am every woman.

We are the official campaign to recall Judge Aaron Persky—an all-volunteer operation. It’s clear we need judges who understand sexual assault and violence against women and take it seriously. It’s up to us, the voters, to make a difference.¹¹¹

Given these realities of carceral culture in America, it is unsurprising that the template of a call of ousting judges perceived as overly lenient from the bench has seen reprise outside of California. USA Today, for example, reported on a pair of recent criminal cases under the headline “why don’t rapists go to prison?”¹¹² Explicitly invoking *Turner*, the article bemoaned a presumed lack of justice that at first glance appeared outrageous, though on closer inspection both sentences were the result of negotiated pleas—one in which the victim passed on a deal that would have mandated prison time. Despite this, the framing of the article makes clear that judges are the ones responsible.¹¹³ Unsurprisingly, an online petition to remove the New York judge from the bench currently sits at more than 50,000 signatures.¹¹⁴

What seems missing, however, is any serious reflection as to whether such campaigns will have the intended impact with respect to sexual harms.

110. 18 U.S.C. § 3553(a)(2)(A) (1987).

111. RECALL JUDGE AARON PERSKY, <https://recallaaronpersky.nationbuilder.com/> [<https://web.archive.org/web/20180816215442/https://recallaaronpersky.nationbuilder.com/>] (last visited Oct. 17, 2019).

112. Alia E. Dastagir, *A Bus Driver Rapes, a Man Keeps Girl Captive and Neither Are Going to Prison*, USA TODAY (May 6, 2019, 6:32 AM), <https://www.usatoday.com/story/news/nation/2019/05/03/bus-driver-shane-pinche-wont-go-prison-rape-hes-not-alone/3653181002/>.

113. *Id.*; see Casey Grove, *In Alaska, ‘Righteous Rage’ Over Sexual Assault*, NPR (Oct. 2, 2018, 2:31 PM), <https://www.npr.org/2018/10/02/652825497/in-alaska-righteous-rage-over-sexual-assault>; see also Doug Clark, Viewpoint, *Supremely Unfair Attack on Justice*, CHARLOTTE OBSERVER (Apr. 30, 2014), <https://www.charlotteobserver.com/opinion/op-ed/article9117476.html>.

114. Ewan Palmer, *50,000 Sign Petition Demanding Judge Who Spared Bus Driving Child Rapist from Jail Be Removed from Bench*, NEWSWEEK (May 1, 2019, 1:10 PM), <https://www.newsweek.com/petition-judge-james-mcclusky-shane-piche-rape-bus-driver-1411261>.

At the start, perhaps one of the most well-replicated findings in criminological research is that punishment's severity tracks very little with individual deterrence.¹¹⁵ What matters far more than how *severe* a consequence is, is how *likely* an individual is to experience it.¹¹⁶ As observed in Part I, that likelihood here is vanishingly small. Even if that likelihood were boosted, the deterrent value of the criminal law remains questionable at best.¹¹⁷ Two centuries' worth of data indicates that mandatory punishment schemes, for example, have no deterrent impact, but carry with them enormous social, fiscal, and human cost.¹¹⁸

Ramping up on consequences in the wake of cases like Turner's¹¹⁹ also can only ever be likely to impact those individuals who lack the money, connections, resources, and power to avoid entering into the criminal legal system in the first place. While criminal defendants like Turner make tempting targets for punitive anger, scholars have consistently shown that people who are poor, who are sexual minorities, people of color, or other marginalized groups will be the most impacted.¹²⁰

Not only are populations of color most likely to be those populations which are most severely impacted by these criminal legal policies, they are also those populations of victim-survivors and others whom the law is intended to benefit that are most likely to be ignored, discarded, or criminally charged themselves.¹²¹

Mandatory punishment schemes also wind up having the perverse impact of reducing accountability and transparency—which often is exceedingly important for people who have experienced sexual harm—by incentivizing defendants to enter pleas to offenses that they did not commit in order to avoid certain mandatory punishment schemes (such as imprisonment or sex offense registration).

Raising the punitive stakes also has other perverse consequences for communities and for those embroiled in the criminal legal system. To the extent that what victim-survivors truly seek is someone to be accountable and

115. *Five Things About Deterrence*, NAT'L INST. OF JUST. (June 5, 2016) <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>.

116. *Id.*

117. LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE* 25 (2018).

118. Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 *CRIME AND JUST.* 65, 67 (2009).

119. BERRY, *supra* note 46, at 1-2.

120. See GOODMARK, *supra* note 117, at 25; see also Levin, *supra* note 47, at 502.

121. See Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 *WASH. L. REV.* 581, 587 (2009) (tracing the historical development and use of rape law, providing white men with "a virtual license to rape."); see also *supra* note 15 and accompanying text.

take responsibility for the harms they have experienced,¹²² increasing the costs ever-higher for people who have committed those harms dramatically disincentivizes people from taking those steps at all, or by way of plea agreement to an offense that did not actually occur.

It is also worth observing that expressions of remorse, like those expressed by Turner in the probation report,¹²³ might be perhaps viewed skeptically in light of the fact that he proceeded to trial and subsequently sought appellate review.¹²⁴ In Turner's example, is difficult, if not impossible, for anyone other than Turner to know what he genuinely feels. Assuming he *does* feel remorse, it is possible that this apparent contradiction of terms is something of an artifact of the context in which he is supposed to express that remorse.

Stated differently, if the only thing that awaits someone who *has* caused harm is decades in a cage plus a lifetime of civil death, then the only real incentive that they have would seem to be to fight tooth and nail to avoid those consequences, even if they *are* remorseful. While such a choice might be understandable, the natural outcome would seem to result in a system that victim-survivors often report as more traumatic than the offense that they seek to have adjudicated.¹²⁵ Arguably, this deters reporting as well, if the only option for victim-survivors is a process that will only damage them further without any guarantee that they will "win."¹²⁶

More broadly, casting the problem of sexual violence in terms of a fight over "not-enough-years"¹²⁷ or "too-many-rights"¹²⁸ or containing would-be

122. See SERED, *supra* note 20, at 23; MILLER, *supra* note 79, at 91 ("I wanted accountability and punishment, but I also hoped he was getting better. I didn't fight to end him, I fought to convert him to my side. I wanted him to understand, to acknowledge the harm his actions had caused and reform himself.").

123. Probation Report, *supra* note 90.

124. "[Turner's appellate counsel] announced he'd already prepared the Notice of Appeal, [and] asked where he could file it. Brock may have been *genuinely remorseful*, but he had hired an even higher-powered attorney to repaint me as a liar, drunk, willing." MILLER, *supra* note 79, at 237.

125. Miller reflected,

When you say *go to the police* what do you envision? I was grateful for my team. But the police will move on to other cases while the victim is left in the agonizing, protracted judicial process, where she will be made to question, and then forget, who she is. You were just physically attacked? Here's some information on how you can enter a multiyear process of verbal abuse. Often it seems easier to suffer rape alone, than face the dismembering that comes with seeking support.

Id. at 287.

126. And winning in this context is often of dubious value.

127. Such as the conflagration that erupted over Brock Turner.

128. The campaign for "Marsy's Law"—an ostensible victim's rights political organization, has asked on its website whether it is fair that criminal defendants have more rights than victims, for example. For more information, see *About Marsy's Law*, MARSY'S LAW, https://www.marsyslaw.us/about_marsys_law (last visited, Oct. 26, 2019).

incorrigible criminals¹²⁹ puts all of our attention and focus “downstream,” which has a limited reach, questionable efficacy (and obfuscates more important upstream failures with respect to police gatekeeping, and systems of money and power that perpetuate sexual violence), but also triggers pushback from civil rights organizations, resulting in protracted culture wars.

The upshot of all of this is that arguably sexual harms become perpetuated in our society, even by way of ostensibly good-faith attempts to address it. As noted previously, scholarship exists as to how our framing of sexual violence in terms of predators, strangers, and monsters serves to bolster and prop up the occurrence of sexual violence in society.¹³⁰ To the extent we render the identity and existence of the Brock Turners of the world as “rapists” and “monsters” and “predators,” we elide over the realities of sexual harms by “paint[ing] a picture of a criminal that look[s] nothing like the average college date rapist.”¹³¹

This mis-framing works hand-in-hand to submerge the bulk of sexual harms in our society. As the severity of our punishments increase, then, and to the extent that survivors also care (sometimes by way of necessity)¹³² about the welfare of the person who harmed them, there are reasons to believe increasing our penal harshness might inhibit the willingness of people to report into that system. For example, data indicates that over the last several years, while reporting of stranger sex offenses has stayed constant, reporting for those offenses where the perpetrator was known to the survivor have declined significantly.¹³³

Enhanced punitivity, even (and perhaps especially) in high-profile cases, also facilitates ignoring larger structural incentives, which facilitate sexual violence:

A long custodial sentence, like the one handed down to [Larry] Nassar, contributes to the misguided idea that sexual harm is the result of one ‘sick’ individual, removed and isolated from the very culture that allows these kinds of interpersonal harms to happen, unabated, even in the face of accusations and rumours of misconduct.¹³⁴

129. For further discussion of sex offense registries, see *supra* notes 12-14 and accompanying text.

130. See ERIC S. JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 113-16 (2006); see also Corrigan, *supra* note 72, at 303.

131. Gruber, *supra* note 121, at 641.

132. Much sexual violence is intrafamilial. Oftentimes those who are harmed also depend on the person who is harming them for financial security or housing.

133. See RACHEL E. MORGAN & GRACE KENA, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMATION, 2016: REVISED, at 7 tbl.4 (2018), <https://www.bjs.gov/content/pub/pdf/cv16re.pdf>.

134. Adina Ilea, *What About ‘the Sex Offenders’? Addressing Harm from an Abolitionist Perspective*, 26 CRITICAL CRIMINOLOGY 357, 360 (2018).

There are also broader philosophical concerns to be grappled with respect to this punitive turn. In 2009, Anya Gruber remarked that,

The historical moment in which American feminist reformers find themselves is one where criminal law and incarceration has for three decades been the most acceptable form of government action. This philosophy has devastating effects on the most subordinated segments of society. The feminist movement's continued calls for more and harsher punishment of gendered crimes in this era of vengeance and victims' rights makes it complicit in a neoliberal system that undermines women's equality and economic health and retards equality generally. As a result, it seems that 'feminist ideas and credibility are being appropriated to strengthen an apparatus that . . . should be dismantled.'¹³⁵

Stated differently, arguably, the punitive turn to address sexual violence is something of a wolf-in-sheep's-clothing: that ideas that are anathema to ideas central to feminist liberation are being dragooned into service ostensibly in support of those goals.

For instance, to punish sexual violence, we send people to places that are awash in sexual violence—thus perhaps signaling it is not so much sexual violence that we find detestable, just against whom and under what conditions it is deployed.¹³⁶

IV. THE ECSTASY

Nobody wins. We have all been devastated, we have all been trying to find some meaning in all of this suffering.¹³⁷

Miller's statement above reflects an experience with a criminal legal process that depends on everyone being made to suffer in equal measure (as opposed to helping everyone to heal in equal measure). In other words, it is a system that rarely produces "good" outcomes for anyone involved when allegations of sexual harms are considered. Miller is hardly alone in that estimation; as in one conversation with a former rape crisis legal advocate with years of experience, it was revealed that out of her many clients, not one claimed that they felt it was worth it on balance.¹³⁸

135. Gruber, *supra* note 121, at 625-26; *see also* ANGELA DAVIS, ARE PRISONS OBSOLETE? 49 (Greg Ruggiero ed., 2003).

136. *See* Jessi Lee Jackson, *Sexual Necropolitics and Prison Rape Elimination*, 39 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 197, 210 (2013).

137. Baker, *supra* note 94 (referring to statement of Chanel Miller.).

138. For a fuller discussion of the ways in which the carceral system fails survivors, *see* Stefanie Mundhenk Harrelson, *I Was Sexually Assaulted. And I Believe Incarcerating Rapists Doesn't Help Victims Like Me.*, THE APPEAL (July 18, 2019), <https://theappeal.org/i-was-sexually-assaulted-and-i-believe-incarcerating-rapists-doesnt-help-victims-like-me/>.

As described above, there are compelling reasons to believe that reliance on the criminal law for ending gendered violence is something of a false hope:

There is another, more progressive, feminist agency argument that criticizes reforms that install the criminal law as “a coercive entity” in women’s lives. Like the conservative agency argument, it criticizes discourse that characterizes female rape victims, not simply as individuals to whom something bad has happened, but as perpetually “ruined” women who must forever bear witness to their victimhood.¹³⁹

Reliance on the criminal law, as critics point out, means that women’s general self-perception as constant potential victims of rape effectively limits the range of their autonomous actions:

A socially constructed but deeply internalized fear of sexual crime victimhood has served to constrain women’s movement through the world—what we do, what we say, where we go, how we live—arguably to the benefit of men’s interests. This is what some scholars term the “disciplinary” function of male abuse of women.¹⁴⁰

In other words, a carceral approach is one which arguably perpetuates and shores up oppression more broadly.¹⁴¹

While this isn’t to say that the criminal legal system has *no* role, arguably the legal procedures that we have erected and the allocation of our resources and attention creates a system that is ultimately one that perpetuates injustice and suffering on all sides, in the name of ameliorating it. Assuming that our goals are to reduce harm and hold people accountable for that harm, might there be better approaches?

There is a better path. The basic idea is this: ours is a system badly out of balance—all of our focus, solutions, ideas, public safety resources, and discourse is focused almost entirely on the “downstream”—that is, sentence length, constitutional rights, and registries. If we shifted our focus “upstream,” had more of a focus on accountability and less on punishment, and also adopted evidence-based public health models of sexual violence, it would be, for all parties involved, a better and more humane use of our resources than our current approach.

139. Gruber, *supra* note 121, at 609.

140. *Id.* at 609.

141. As some scholars have recognized:

[T]he move by feminist activists and scholars to embrace harsh punitive responses to gender violence has exacerbated troubling distributional inequities. Rather than empowering women victimized by gendered subordination, many of these policies (mandatory no-drop policies, preferences for pretrial detention, etc.) have empowered prosecutors and further contributed to the hyper-policing and hyper-incarceration of poor people of color and defendants from marginalized communities.

Levin, *supra* note 47, at 531.

As observed in the introduction, there are separate crises that reinforce one another: a flood of punishment in a desert that needs accountability. Punishment eats resources that might be better able to address the crisis it is deployed for in other ways, for example, by boosting the likelihood of accountability, or preventing harm in the first place.

A posture that de-prioritizes severe punishments also incentivizes people who have caused harm to take responsibility for that harm and participate in the healing process of the victim-survivor. As it stands, because the stakes and the stigma are so outsized, the only real incentive is to vigorously fight, thus also contributing to additional trauma that victim-survivors experience in the criminal legal system.

For example, sex offense registries occupy an increasingly large economic footprint and consume an enormous amount of public safety resources despite not enhancing community safety.¹⁴² If these were abolished or curtailed in some significant way, then the resources that go into ensuring their operation, officer time spent investigating compliance, and judicial resources spent prosecuting failure to comply violations could be allocated elsewhere. As the Association for the Treatment of Sexual Abusers observed: “Victim advocate organizations have questioned the large expenditure of funds on sex offender management tools that may not really protect communities, while resources and services for victims are being cut.”¹⁴³

In addition to services for victim-survivors, as observed in Part I, there are myriad structural reasons why the likelihood of accountability is exceedingly small to begin with, however, resources and attention can at least begin to correct this. Sex crimes units can be properly staffed and trained, and incentives that police departments have to misrepresent rape statistics can end.

There are also evidence-based public health models of sexual violence that, when effectively deployed, significantly reduce the rates of rape to begin with. In short, good social policy is the best crime policy. Even on the re-entry side, with individuals who truly are high needs, there are effective evidence-based models of re-entry that do not rely on the punitive and shaming models adopted by public conviction registries.¹⁴⁴

142. See SARAH NAPIER ET AL., AUSTRALIAN INSTITUTE OF CRIMINOLOGY, WHAT IMPACT DO PUBLIC SEX OFFENDER REGISTRIES HAVE ON COMMUNITY SAFETY? 4, 6 (2018), <https://aic.gov.au/publications/tandi/tandi550> (download PDF).

143. JOAN TABACHNICK & ALISA KLEIN, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, A REASONED APPROACH: RESHAPING SEX OFFENDER POLICY TO PREVENT CHILD SEXUAL ABUSE 9 (2011), <http://www.atsa.com/pdfs/ppReasonedApproach.pdf>.

144. See *Article 8*, CRIMINOLOGICAL HIGHLIGHTS, Mar. 2019, at 11, <https://criminology.utoronto.ca/wp-content/uploads/2019/08/CrimHighlightsV17N6.pdf>.

Most importantly, our current approach is mostly indifferent to the needs of victim-survivors.¹⁴⁵ Restorative justice models, which have gained popularity with violence writ large,¹⁴⁶ are also operative within the context of sexual violence.¹⁴⁷ Organizations such as generationFive use a transformative justice approach to tackle the problem of child abuse, all of which focus on and center around the needs of the person who was harmed to ensure their safety within the context of a process that does not rely on carceral politics.¹⁴⁸ In the context of violence, survivors report satisfaction with these models that far exceed traditional adversarial legal proceedings.¹⁴⁹

CONCLUSION: A TALE OF TWO ME TOOS

Every society, like every person, has its monsters in the closet, the nightmares it has trouble not thinking about, and those fears teach us something about the culture.¹⁵⁰

Twelve years after launching Me Too, in December of 2018, Tarana Burke took to the TEDWomen 2018 stage in Palm Springs, California to remark on her journey.¹⁵¹ She observed that even as “survivors of sexual violence are all at once being heard, and then vilified,” that the movement that she started is being talked about and cloaked in the language of vengeance, when it was “started to support all survivors of sexual violence.”¹⁵² In other words, at times, she found “the Me Too movement that [she hears] some people talk about is unrecognizable” to her.¹⁵³

The fact of Burke’s activism lays plain an undeniable fact about our culture: our culture is one that is awash in sexual harms, particularly for women and girls. Our institutions routinely fail to meaningfully address these harms (particularly when those who are harmed come from communities that are traditionally treated as hostile by police), and arguably perpetuate them in a variety of ways. On the comparatively rare occasions

145. See Harrelson, *supra* note 138.

146. See SERED, *supra* note 20, at 43.

147. Alissa R. Ackerman, *The Importance of Connection*, YOUTUBE: TEDxCSULB (Jan. 23, 2019), <https://www.youtube.com/watch?v=DTfBVR1eLFo>.

148. GENERATIONFIVE, CHILD SEX ABUSE: A TRANSFORMATIVE JUSTICE HANDBOOK, at 37-38 (2017), <http://www.generationfive.org/wp-content/uploads/2018/08/g5-Transformative-Justice-Handbook.pdf>.

149. See Michelle Alexander, Opinion, *Reckoning with Violence*, N.Y. TIMES, Mar. 3, 2019, at A21.

150. Kleinfeld, *supra* note 41, at 997.

151. Tarana Burke, *Me Too Is a Movement, Not a Moment*, TED (Nov. 2018), https://www.ted.com/talks/tarana_burke_me_too_is_a_movement_not_a_moment?language=en.

152. *Id.*

153. *Id.*

when people are held accountable, we tend to compensate for our broader failures by rendering them immutable monsters and treating them as such. They become far removed from our communities, our friends, our families, or indeed ourselves. While most would perhaps be fine with this arrangement if it made us safer, there are compelling reasons to believe that our framing and approach perpetuates sexual violence in society—to say nothing of the human, constitutional, and fiscal costs.

People v. Turner, and its explosive aftermath revealed much about our culture: both the undeniable pain of so many women and men who had experienced sexual harm, but also our favored response. The undeniably atrocious reality of Turner's actions notwithstanding, against this backdrop a largely fictitious narrative took root, which ultimately resulted in Aaron Persky's recall from the bench—though the full impact of the recall remains to be seen as it continues to reverberate throughout our culture, media, and courts.

Approaches that rely on carceral politics are deaf to the needs of victim-survivors, especially when those needs diverge from maximizing state power. Curiously, in our criminal legal system, the two individuals who should matter the most to the entire process—the person who caused harm, and the person who was harmed—seem to function as props necessary for a machine to operate, which in turn “focuses nearly exclusively on punishing criminals and virtually ignores forgiveness, victim healing, elimination of socio-economic predicates of crime, and victim social services.”¹⁵⁴

We exist in a time when increasingly broad segments of our society are willing to reconsider the wisdom of putting people into cages,¹⁵⁵ though this enthusiasm dims significantly when we consider people convicted of violent or sexual offenses. While the language of cages and years has been our traditional one, there are reasons to believe that reliance on carceral politics will do little to address violence, sexual or otherwise, in our society.¹⁵⁶

Many saw the Persky recall as vindication for #MeToo. Populist anger makes for easy translation to legislative proposals ramping up on punishments for the moral monsters of the era, though with questionable efficacy, and obvious costs. While early rape law reform sought to destigmatize rape offenses, the current trend appears to be the opposite: to make it as stigmatizing as possible, in an ostensibly good-faith bid to take the problem seriously and lend support to victim-survivors. Arguably, this stigmatization is another patriarchal trope that ultimately serves no one.

154. Gruber, *supra* note 121, at 615.

155. See Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG., April 21, 2019, at 37.

156. See Gruber, *supra* note 121, at 615-16.

Perhaps the most that is known about the epilogue of any of the people who were involved in the recall effort is Chanel Miller, who as noted above, wrote a book about her experiences and gave numerous media interviews.¹⁵⁷ Aaron Persky was recently fired from his job as a high school tennis coach one day after he was hired, after it became known that he was the judge in *People v. Turner*.¹⁵⁸ Turner, now twenty-four, is listed as a “level III” sex offender in Ohio, and is reported that he is working at a factory and living with his parents.¹⁵⁹ While many internet commentators sought to ensure that he would “become known as the Stanford rapist,” it would appear that they have succeeded. The site behind the Kappa Alpha fraternity house where Turner attacked Miller has since been turned into a memorial, proposed by Professor Dauber,¹⁶⁰ though efforts to inscribe the memorial with portions of Miller’s statement were resisted by Stanford, who only recently acquiesced.¹⁶¹ Our language for victim-survivors and predators freezes the humanity of both Miller and Turner in place, locating both of them in a moment in time: to wit, a college party in Santa Clara County in the early morning hours of January 18, 2015.¹⁶²

If we care about preventing harm, then it seems plain that there are better approaches to that end than the systems that we have in place. Throughout this paper, I have mentioned the assumption that all of this—our laws and our policies—is intended to create public safety. Considering the reality of the laws, policies, and resources that we have deployed to achieve this goal, this is arguably a big assumption to make. Police as hostile gatekeepers depress reporting (and sometimes result in women being criminally charged for reporting their own rapes). Sex registries make re-offense *more* likely. Lengthy prison terms, despite satisfying our carceral urges, are actually criminogenic.

Perhaps there are other, less conscious motivations at work. Punishment, in a way, provides for a fractured society to achieve solidarity—a “hostile

157. MILLER, *supra* note 79.

158. Sarah Moon & Amanda Watts, *The Judge Who Was Recalled After the Brock Turner Case Is Fired from His New Job as a High School Tennis Coach*, CNN (Sept. 12, 2019, 9:44 AM), <https://www.cnn.com/2019/09/12/us/brock-turner-case-judge-fired-coaching-job/index.html>.

159. Alyssa Choiniere, *Brock Turner Now: Where Is Turner in 2019?*, HEAVY (Sept. 23, 2019, 3:47 PM), <https://heavy.com/news/2019/09/brock-turner-now-2019-update/>.

160. See Courtney Vinopal, *Stanford Transformed the Brock Turner Assault Site into a Powerful Reminder for Students*, BUSTLE (Nov. 7, 2017), <https://www.bustle.com/p/stanford-transformed-the-brock-turner-assault-site-into-a-powerful-reminder-for-students-3237966>.

161. Kris Reyes, *Stanford Approves Chanel Miller Plaque Following Years of Protests*, ABC7 NEWS (Nov. 13, 2019, 9:14 AM), <https://abc7news.com/society/stanford-approves-chanel-miller-plaque-following-years-of-protests/5693816/>.

162. Felony Complaint, *supra* note 82, at 4.

solidarity.”¹⁶³ The more we punish for this purpose, then, the more it becomes necessary to achieve the same results.¹⁶⁴ Like a drug, we become addicted to punishment. Stated differently, perhaps we care less about preventing harm than we say we do, because if we prevented harm, there would be no one left to punish.

This piece ends with a question, as opposed to a proscription. A moment of cultural and legal reckoning as to the reality of sexual and gendered harms has brewed for generations, and now appears at hand. Alongside this moment exists another; one that regards our massive penal infrastructure as woefully inefficient at addressing, and thus changing, societal problems.

As we regard the crossroads before us, it remains to be seen, exactly, down which road we will travel, taking our police, prisons, people they house, and our pain with us. The outcome will depend largely on what we, as a society and a culture, decide is important to us.

163. Henrique Carvalho & Anastasia Chamberlen, *Why Punishment Pleases: Punitive Feelings in a World of Hostile Solidarity*, 20 PUNISHMENT & SOCIETY 217, 222 (2017).

164. *Id.*