THE WAR ON RAPE? THE IMPLICATIONS OF SETTING MANDATORY MINIMUM SENTENCING FOR RAPE AND SEXUAL ASSAULT CONVICTIONS.

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INTRODUCTION

On the night of January 18, 2015, two Swedish graduate students were riding their bikes around the Stanford University campus.[1] They spotted movement near a dumpster outside the Kappa Alpha fraternity house and quickly deciphered it to be two people, one male and one female, possibly having sex. When they rode closer towards the dumpster, it appeared to them that the woman was unconscious; upon seeing the bicyclist, the man, Brock Turner, a 19-year-old White freshman attending Stanford on an athletic scholarship, stood up and quickly ran from the scene. The bicyclists gave chase, eventually tripping and pinning him to the ground before police arrived. It later emerged that the victim, who used the pseudonym "Emily Doe" in court papers, had attended a party at the frat house with her sister earlier that night.[2] After consuming considerable alcohol, she had blacked out, eventually coming to on a gurney in a hospital where she learned that she had been sexually assaulted.[3]

The Santa Clara County DA initially filed the following charges against Turner: one count of assault with an intent to commit a felony, and two counts of sexual penetration.[4] Turner was initially charged with two counts of rape, which were the only charges at the time to be ineligible for a sentence of probation or a suspended sentence.[5] However, those two charges were dropped by prosecutors after DNA results of the rape kit were made available, though the results of the tests have not been disclosed; testimony given by Santa Clare County Criminalist Craig Lee may lead one to speculate that the prosecutors did not have enough evidence to bring those charges.[6] On March 30, 2016, a jury found Turner guilty on the remaining three charges, for which he faced a maximum possible sentence of fourteen years in prison.[7] Before

1 Compl., The People v. Brock Turner (Cal. Sup. Ct. 2015), Jan. 15, 2015, DA NO 15012055

2 2Katie J.M. Baker, "Here Is The Powerful Letter The Stanford Victim Read Aloud To Her Attacker," BUZZFEED (Jun. 3, 2016), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.rp78rE9mp#.gmeqZdvog.

3 *Id*.

4 Compl., *supra note* 1; Cal PENAL §§220 (a) (1), 289 (d) and (e).

5 Cal PENAL §§261 (a) (3), (4), 1203.065 (amend. 2016).

6 Lee testified that the victim's DNA was found under Turner's fingernails, but none on his genital; nor was there any semen found on the victim's body, *see* Tracey Kaplan & Jacqueline Lee, *Witness: Stanford rape defendant had victim's DNA on fingers*, THE MERCURY NEWS (Mar. 21, 2016), http://www.mercurynews.com/2016/03/21/witness-stanford-rape-defendant-had-victims-dna-on-fingers/ . *See also* Veronica Rocha & Richard Winton, *Light sentence for Stanford Swimmer sexual assault 'extraordinary,' legal experts say*, LOS ANGELES TIMES (Jun. 8, 2016), http://www.latimes.com/local/lanow/la-me-ln-stanford-sexual-assault-sentence-20160607-snap-story.html.

7 Hannah Knowles, *Brock Turner Found Guilty on Three Felony Counts*, THE STANFORD DAILY (Mar. 30 2016), http://www.stanforddaily.com/2016/03/30/brock-turner-found-guilty-on-

the Judge issued sentencing, the Probation Office prepared a probation report, recommending a "moderate county jail sentence" because probation was not a legally authorized sentence.[8] But several factors listed in the report may have presented Turner in a more favorable stance when it came to his sentencing. Because the victim's unconsciousness and intoxication were elements of the offenses, the report declared there were no aggravating circumstances which would be applicable to determining a recommended sentence; essentially, the lack of "force" was a mitigating factor in recommending the "moderate" sentence.[9] The report also deemed the assault "less serious" when compared to other offenses ineligible for probation and lessened Turner's culpability due to his age and his intoxicated state at the time of the offense.[10] The report also suggested that the victim's wishes should be taken into consideration and quoted the following statement by the victim in a May 3, 2016 interview with the probation officer preparing the report:

> "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."[11]

In her impact statement to the court prior to sentencing, published on BuzzFeed, Emily Doe expressed anger at the report's recommendation, stating that it twisted her words to suggest Turner receive leniency.[12] The fact that Turner's loss of his scholarship and his swimming career were taken into consideration upset Doe, noting that someone underprivileged were in Turner's shoes would not receive such recommendation.[13] Despite the report's conclusion and the prosecution's recommendation of six years in prison, Judge Aaron M. Persky sentenced Turner to six months in jail and three years' probation.[14]

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three-felony-counts/.

8 Nick Anderson & Susan Svrluga, *In Stanford Sexual Assault Case, Probation Officer Recommended 'Moderate' Jail Term*, THE WASHINGTON POST (June 16, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/06/10/probation-officers-report-for-brock-turners-sentencing/?utm_term=.004c3e058f1e .

9 Rep. of Probation Officer, *The People v. Brock Turner*, No. B1577162 (Cal. Sup. Ct. 2016).

10 *See Id*.

11 *See Id*.

12 Katie J.M. Baker, *Here Is The Powerful Letter The Stanford Victim Read Aloud To Her Attacker*, BUZZFEED (Jun. 3, 2016), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.rp78rE9mp#.gmeqZdvog.

13 *Id*.

14 Nick Anderson & Susan Svrluga, *Prosecutors Urged 'Substantial Prison Term' in Stanford Sexual Assault Case, Records Show*, THE WASHINGTON POST (June 11, 2016),

The outcome was met with widespread outrage across the country, especially critical of the judge's apparent bias towards Turner's privileged background and inconsideration for the victim.[15] The public outcry against the sentence and the impactful statement by Emily Doe inspired California legislators to introduce and pass Assemb. B. 2888. The law, which Governor Jerry Brown signed on September 30, 2016, and went into effect on January 1, 2017, adds offenses to Cal PENAL §1203.065, which is California's mandatory sentencing statute for sex crimes. Specifically, Cal PENAL §289 (d) and (e), two of the offenses of which Turner was convicted, were added to the statute, thus ensuring future offenders who assault victims who are intoxicated and/or unconscious will be subject to the minimum sentences already featured in the statutes[16]

Brock Turner's case is illustrative of a broader problem in the American criminal justice system regarding the treatment of sex offenses. Although most people in our society abhor rape, our laws historically have made it very difficult to prove rape. Traditional rape statutes are classified in a way that alludes to predatory behavior preceding rape (i.e. physical force or drugging), which can make rape prosecutions difficult without a showing of force. And while states like New York have amended their laws to prosecute similar assaults like Turner's, which do not involve the use of force in the traditional sense, the sentences available for such offenses are typically lesser than traditional rape offenses, and indeterminate rather than mandatory. Incidentally, New York and California hold a similar rate of rape committed annually, in both the traditional and non-traditional sense; the latter former, like that of the Turner case, is the most prevalent assaults in this country.[17] This note argues that states such as New York

https://www.washingtonpost.com/news/grade-point/wp/2016/06/11/prosecutors-urged-substantial-prison-term-in-stanford-sexual-assault-case-records-show/?utm_term=.dc3c7a84ae43.

15 Emanuella Grinberg, *California Lawmakers Pass Bill Inspired by Brock Turner Case*, CNN (Aug. 30, 2016), http://www.cnn.com/2016/08/29/politics/california-mandatory-prison-unconscious-intoxicated-brock-turner/ .

16 Jazmine Ulloa, "Spurred by Brock Turner Case, Gov. Jerry Brown Signs Laws to Toughen Laws Against Rape," LOS ANGELES TIMES (Sep. 30, 2016), http://www.latimes.com/politics/la-pol-sac-california-sex-crimes-stanford-cosby-bills-20160930-snap-htmlstory.html . *See also* Cal. Pen/ Code §1203.065; under (a), Cal. Pen. Code §289 (d) and (e) were introduced.

17 "CRIME IN THE UNITED STATES – BY STATE 2015," FBI-UCR, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-5 . The data labels "legacy" definition as including the force element and was limited to only female victims. The "revised" definition removes the gender element and only needs proof of non-consent. In 2015, approximately 24.0 out of 100,000 inhabitants reported "traditional" rape while 32.7 out of 100,000 reported "revised" rape. In New York, 30 out of 100,000 in habitants reported "traditional" rape and 22.2 out of 100.000 reported "revised" rape. *See* notes 19-36 and accompanying text; this note will also consider various studies regarding assaults and the demographics of the victims and assailants; inconsistencies as to how these studies were conducted and their results will also be

should follow California's example in requiring mandatory minimum sentences for rape offenses. Although some may fear that this change would replicate the consequences of the War on Drugs,[18] this note argues that such concerns are misplaced.

Part I will examine prevailing myths about rape that can hinder prosecutions and discourage victims from reporting their assaults. Part II will consider reforms enacted in the late-twentieth century intended to respond to these myths and encourage reporting and prosecutions. Part III will examine recent reform throughout the country as well as in New York, along with their intended results and likelihood of passage. And Part IV will consider the potential arguments against mandatory minimum sentencing statutes for lower-level sex offenses, including that such laws will be applied in a racially disparate way like those in effect since the 1980s for drug offenses.

I. RAPE MYTHS AND NEW YORK'S RAPE STATUTES

A. THE "TYPICAL RAPE"

Rape trials in American were historically encumbered by societal beliefs about what constituted a "typical rape." Early English common law required a victim to immediately confide the assault to anyone nearby and present physical evidence of force.[19] The most prevalent myth about rape is that there is an element of force that used by an assailant to commit the offense. For example, New York's statute defining Rape and Criminal Sexual Assault in the First Degree, both enacted in 1965, requires proof of "forceful compulsion" was against the victim;[20] "Forceful compulsion" presently means either use of force or threat of immediate use of force to the victim or someone else.[21]

considered when addressing the possible consequences of mandatory minimum sentencing.

18 Ulloa, *supra note* 16; Bridgette Dunlap, *How California's New Rape Law Could Be a Step Backward*, ROLLING STONE (Sep. 1, 2016), http://www.rollingstone.com/culture/news/how-californias-new-rape-law-could-be-a-step-backward-w437373 .

19 All crimes required immediate reporting under the "hue and cry" rule, otherwise a court may refuse to hear the case, *see* Dawn M. Dubois, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1087, 1089 (1988). Regarding force, to hold credibility in their accusations, unmarried victims were expected to be virgin; one piece of evidence that was focused on by courts was the showing of blood-stained sheets; *see notes* 37-61 and accompanying text. *see also* Michelle J. Anderson, Article, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 61-65 (*hereinafter Chastity*) (2002). One evidence that was focused on by courts was the need to show blood-stained sheets; to hold credibility in their accusations, unmarried victims were expected to be virgins, *see note* 33-56 and accompanying text.

20 N.Y. Penal §130.35 (1) and N.Y. Penal §130.50 (1).

21 N.Y. Penal §130.00 (8) (a) and (b). Courts have interpreted section (b) to allow for inquiry

Force is a predicate to a "typical rape" because the rape itself is not seen as a violent act; if there is no physical injury, then it will be harder for the complainant to prove that no consent had been given. [22]

If physical evidence of force were absent, the victim's testimony was often met with skepticism. Behind the English and American common laws regarding the element of force is the persuasive writing of Sir Matthew Hale, who wrote: "rape is an accusation easy to be made, hard to be proved and harder to be defended by the party accused though ever so innocent."[23] This served as a warning to courts to scrutinize rape complaints due to viable possibility that the complainant is lying; if a complaint without force proceeded to trial, a court would usually give a special instruction to the jury.[24] Outside the legal context, myths about women's proclivity to make false accusations were influenced by medical science; now debunked psychoanalysis conducted by the likes of Sigmund Freud found women to be prone to imagining sexual encounters and making false accusations due to psychological defects.[25] Both the legal and medical findings about the veracity of women led society to be cautionary when a rape accusation is made.[26] Thus, some courts and legislatures insisted that a prompt complaint must be made and corroborating evidence must exist to sustain a conviction.[27] But "acquaintance rape," the most prevalent form of rape perpetrated in this country,[28] is vehemently unreported for several reasons, one being the heightened skepticism that plagues the

into the victim's state of mind; in *People v. Coleman*, 42 N.Y.2d 500 (N.Y. 1977), the New York Court of Appeals found that an implied threat takes into consideration what the victim observes the defendant doing which could give reason to fear what could happen if the victim does not comply with her attacker.

22 Emily C. Shanahan, Note: *Stranger and Nonstranger Rape: One Crime, One Penalty*, 36 Am. Crim. L Rev. 1371, 1372-1375 (1999).

23 Matthew Hale, THE HISTORY OF THE PLEAS OF THE CROWN 634 (Robert H. Small ed., 1st Am. ed. 1847) (1736).

24 *See notes* 102-136 and accompanying text regarding reforms to eliminate these and other rules in the interest of protecting a complaining witness's credibility.

25 Michelle J. Anderson, Article, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. Rev. 945, 983-984 [*hereinafter Legacy*] (2004).

26 Today, the portrayal of sexual assault and victims in media is highly influential in furthering the false accusation myth, *see* Lee Ann Kahlor and Dan Morrison, *Television Viewing and Rape Myth Acceptance among College Women*, 56 SEX ROLES 729 (2007).

27 *See notes* 85-116 and accompanying text regarding reforms to eliminate these and other rules in the interest of protecting a complaining witness's credibility.

28 Rape in America: A Report to the Nation, NATIONAL VICTIMS CENTER AND CRIME VICTIMS RESEARCH AND TREATMENT CENTER [hereinafter Rape in America] (Apr. 23, 1993). "Acquaintance Rape" typically involves the victim and assailant knowing each other in some way, which can fall anywhere from former intimate partners to the two having only met on a handful of occasions, *see* David P. Bryden & Sonja Lengnick, Criminal Law: Rape in the Criminal Justice System, 87 J. CRIM. L. & CRIMINOLGY 1194, 1204-1206 (1997).

complainants.[29] If a woman were to get drunk at a party, for example, the acquaintance is perceived as less threatening to women who would abstain from drinking, thereby abiding by societal expectation of modestly.[30] Jurors tend to be influenced on the relationship because they perceive a man who the victim voluntary acquaintance themselves with to be less dangerous than a stranger.[31] While "The Typical rapist" is dangerous in all situations, the acquaintance is believed to be less dangerous in any situation in which a woman may be deemed at fault for a subsequent attack.[32]

Today, most sexual assaults lack an element of force; this includes physical force and the use or threat of use of a weapon.[33] The belief that a real victim would resist an attack undermines the varying reactions a victim could have during the assault.[34] Because of the prevailing rape myths, assaults which are carried out without the use or threat of physical force are deemed less detrimental to the victim,[35] leading to the assailants being charged at lower degrees and sentenced to little or no time in prison.[36]

B. The "Typical Victim"

The United States inherited most of its moral principles from England, including its views on sex and marriage.[37] The Puritans heavily prosecuted both fornication and adultery because of their perceived threat to their community's interest in following Biblical

29 Bryden & Lengnick, *supra note* 28 at 1218-1230.

30 *Id*. *See also* notes 155-176 and accompanying text which further discusses how prosecuting rape is impacted by voluntary or involuntary intoxication of victims.

31 *Id*. at 1260-1261.

32 *Id*.

33 Rape in America, *supra* note 28; over two-thirds of rape victim who took part in the survey stated they did not have serious physical injuries because of the attack and 24% stated they only had minor injuries. Roughly half of responders described being fearful of serious physical injury or death during the rape.

See also Female Victims of Sexual Violence, 1994-2010, U.S. Dep't of Justice, Office of Justice Programs, B.J.S., March 2013 (researched show an increase in injuries sustained during an assault and later treatment from 26% in 1994-1998 to 35% in 2005-2010. Only 11% of reported rapes involved an armed offender.)

34 Dubois, *supra note* 19 at 1105-1107.

35 *See generally* Lynn Hecht Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439 (1992).

36 See Part III.B & C, 132-176 and accompanying text.

37 Michelle J. Anderson, Article, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L. J. 1465, 1477-1482 (*hereinafter Marital Immunity*) (2003), where the Author describes three theories which justified the marital exemption, one of which was the ongoing consent theory; *see also* HALE, *supra* note 23 at 626-636.

doctrine.[38] Evidently, a woman's rape accusation was her "defense" to her partaking in unlawful intercourse.[39] During the Colonial Era, a woman could only hope to bring a claim if she, as best described Prof. Michelle J. Anderson, was as "an ideal of sexual virtue and feminine modesty;"[40] this description defines the chastity requirement, which Puritans viewed as comporting with the Biblical tenets that influenced their communities.[41] Though fornication and adultery eventually lost its illicit statuses,[42] chastity was still heavily favored among Americans up until the 1980s.[43]

In the early history of the United States' judicial system, a witness's credibility focused on more than just the ability to speak truthfully, but also on the witness's moral character.[44] The credibility that came from a witness swearing an oath of honesty was, in a sense, a declaration of honesty not only to the court but also to the higher power the witness worshipped; in a witness's eye, criminal sanctions were not the sole threat to lying, but the "vengeance of the Diety [sic]" that would occur in the afterlife if she were to commit a sin.[45] But religion

38 Richard Green, MD, JD, *Fornication: Common Law Legacy and American Sexual Privacy*, 17 Anglo-Am. L. Rev. 226-228 (1998); *see also* Dr. JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 132-134 (2014). The crime of adultery was rarely enforced against married men; this fact traces back to English law which barred illegitimate children from inheriting from their father's estate, *d*. at 138-139.

39 Anne M. Coughlin, Article: *Sex and Guilt*, 84 VA. L. REV. 1, 8 (1998); fornication was often charged as a lesser charged offense in a rape case, thus a defendant could face some punishment for his act, regardless of whether the consent of the victim had been proven, *see also* Robert E. Rodes, Jr., *Article: On Law and Chastity*, 76 NOTRE DAME L. REV. 643 (2001).

40 *See Chastity*, *supra* note 19 at 64-68.

41 Many of the crimes were mirrored from biblical scripture which viewed the acts as sin. *See* Dr. JoAnne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Criminal Laws*, 46 LOY. U. CHI. L.J. 127, 132-133 (2014).

42 Presently, fornication is a misdemeanor in thirteen states, *see* Ga. Code Ann. 16-6-18; Idaho Code 18-6603; 720 ILL. COMP. STAT. ANN. 5/11-40; MASS. GEN. LAWS ANN. CH. 272, 18; MICH. COMP. LAWS ANN. 750.335; MINN. STAT. ANN. 609.34; MISS. CODE ANN. 97-29-1; N.C. GEN. STAT. 14-184; OKLA. STAT. ANN. TIT. 21, 1120; S.C. CODE ANN. 16-15-60; UTAH CODE ANN. 76-7-104; VA. CODE ANN. 18.2-344; OKLA. STAT. ANN. TIT. 21, 1120, 1121.
In addition, adultery is a misdemeanor in seventeen states. *See* ALA. CODE 13A-13-2; ARIZ. REV. STAT. ANN. 13-1408; FLA. STAT. ANN. 798.01; GA. CODE ANN. 16-6-19; IDAHO CODE 18-6601; MASS. GEN. LAWS ANN. CH. 272, 14; MINN. STAT. ANN. 609.36; MISS. CODE ANN. 97-29-1; N.Y. PENAL LAW 255.17; N.C. GEN. STAT. 14-184; N.D. CENT. CODE 12.1-20-09; OKLA. STAT. ANN. TIT. 21, 871, 872; R.I. GEN. LAWS. 11-6-2; S.C. CODE ANN. 16-15-60, 16-15-70; UTAH CODE ANN. 76-7-103; VA. CODE ANN. 18.2-365; WIS. STAT. ANN. 944.16.

43 *For the 1st Time, Most in U.S. Say Sex Before Marriage Is Not Wrong*, FAMILY PLANNING PERSPECTIVES (1985); *see also* Lawrence B. Finer, *Trends in Premarital Sex in the United States, 1954-2003*, 122 PUBLIC HEALTH REPORTS 73 (2007), which describes the downward trend in young adults abstaining from sex throughout the reported years.

44 *See* Julia Simon-Kerr, Article: *Moral Turpitude*, 2012 UTAH L. REV. 1001 [hereinafter *Moral Turpitude*] (2012).

45 Paul W. Kaufman, Note: *Disbelievers: Atheism, Competence, and Credibility in the Turn of the Century American Courtroom*, 15 YALE J.L. & HUMAN. 395, 402 (2003). Early-English and

alone did not lead society to intertwine chastity with credibility, rather the belief that one's morality coincided with one's reputation within her community; a witness with an honorable reputation would most likely commit to the oath of honesty.[46] The credibility of a witness could be impeached based on the moral turpitude standard, which engulfed the negative characteristics that a community deemed contrary to its interest;[47] if a person is believed to be immoral, then their testimony holds less credibility because they believed to have the peculiarity of lying.[48] A reputation for honor differed between genders; a man's honor innately included trustworthiness, but a woman's honor was established not by her veracity, but her reputation for virtuousness.[49]

Character evidence is used at trial to prove that a defendant, victim, or witness holds a pertinent trait relevant in each trial.[50] Early-English common law generally barred the introduction of a defendant's prior bad acts to prove a defendant committed the crime at issue, regardless of its relevance, due to its prejudicial effect on the defendant.[51] Evidence of the witness's character was admissible, however, if it would be utilized to demonstrate or attack a witness's credibility.[52]

American common law deemed atheist as "incompetent"; because this witness did not believe in divine retribution, the witness has no incentive to be honest while testifying. Subsequently, atheists were deemed competent to testify, but many states permitted impeach of credibility, *Id*.

46 *See* Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1860-1868 [hereinafter *Unchaste*] (2008).

47 *See Moral Turpitude*, *supra* note 44, at 1006.

48 *Unchaste*, *supra* note 46, at 1863:

"According to the Justice [Greene in the majority opinion of *Carter v. Cavenaugh*, 1 Greene 171, Iowa 1848], honesty was a necessary, though not a sufficient element of honor. Thus, though 'to be honorable, a man must be strictly honest; still, he may be honest without being honorable.' Nonetheless, a dishonorable man would generally be perceived as untrustworthy. For this reason, siblings would go to great lengths to 'save the honor' of a defaulting brother by paying or taking on his debts. The resulting loss of credit in the community was so severe that it was to be avoided at all costs."

49 *Id*.

50 *See e.g.*, Charles P. Nemeth, *Character Evidence in Rape Trials in Nineteenth Century New York: Chastity and the Admissibility of Specific Act*, 6 WOMEN'S RTS. L. REP. 214, 216 (1980); *see also* FED. R. EVID. 404: Notes of Advisory Committee on Proposed Rules, "Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense… (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character,"

51 David P. Leonard, Article: *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1167-1170 (1998). *See also* Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989-1000 [hereinafter *Stone*] (1938), where the author describes how American courts began to rely less on English common law after 1840, which would include the courts adherence to the evidence rule of excluding all similar facts to the present case; *see also* Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933), where the author shows how the English common law also evolved its rules on excluding similar acts.

52 Fed. R. Evid 404 (a) (2) (B) and 405: Notes of Advisory Committee on Proposed Rules;

Before mid-nineteenth century, English common law permitted the use of community reputation, but the reputation of the person needed to be of consensus within the community as personal opinions of the person were believed to be less reliable in proving a character trait;[53] in a rape trial, the community reputation of the complaining victim may be admitted as evidence, but any mention of the sexual history of the victim was limited to prior acts with the defendant.[54] Because early-nineteenth century American courts was heavily influenced by English common law, a rape victim's reputation of promiscuity was permissible, but any specific instances were barred unless it involved the defendant.[55]

The sexual history of a rape victim first became relevant toward credibility of female victims in New York courts during the nineteenth-century.[56] In People v. Abbot, the New York Court of Appeals voiced disdain that the punishment for the rape of a woman who is "severely chaste" would be the same as a victim "who already submitted herself to the lewd embraces of another."[57] Justice Cowen wrote that a woman who has had sex, even once, is prone to promiscuity and, "by human nature," is more likely to consent to any sexual intercourse.[58] Though this language was dictum, subsequent trials began to allow testimony and questioning about a complainant's sexual history.[59]

The sexual history is not the only facet of the complainant subject to scrutiny. Society has frequently placed the burden on women to protect themselves from sexual assault. Not only is a victim's physical appearance determinative of how credible her accusation is, but her actions may also suggest that she provoked the attack or failed to protect herself from it.[60] The plausible worry of persecution of one's personal choices is one of many reasons why victims do not report their assaults.[61]

see also Nemeth, *supra* note 50 at 216.

53 Nemeth, *supra* note 50 at 216.

54 *Id*.

55 Stone, *supra note* 51, at 991.

56 *Id*.

57 *People v*. *Abbot*, 19 Wend. 192, 196-198 (N.Y. 1838).

58 *Id*.

59 In *Woods v. People*, 55 N.Y. 515 (N.Y. 1874), the Court of Appeals stated that evidence of a complaining witness's bad reputation for chastity was admissible because of the probability that an unchaste woman assented to such intercourse than one of strict virtue."

60 *Contra* Kate Harding, ASKING FOR IT: THE ALARMING RISE OF RAPE CULTURE – AND WHAT WE CAN DO ABOUT IT 27-37 (2015).

61 Rape in America, *supra note* 28; about half of respondent worried about their name being made public by the media, while seventy-one percent worried about their family finding about their assault and sixty-nine feared they would be blamed for the assault. *Id*.

C. The "Typical Rapist"

Because of the heinousness that is assumed to occur in "typical rapes," society has come to expect certain features in a "typical rapist." The "typical rapist" has historically been viewed as being a social pariah. Before the twentieth-century, a man's reputation could be a determinant when he is a suspect in an investigation or a defendant in a rape trial; if the defendant was of a higher social class than the victim, for example, he was less likely to be found guilty.[62] In the early-twentieth century, psychiatrists began classify sex offenders as mentally ill, incapable of self-restraint and likely to commit repeat offenses.[63] The assailant is viewed as having negative qualities that counter society's expectations, thus leading him to be "undesirable" for developing romantic relationships; including the assailant's physical appearance, relationship status and employment status.[64] One prevalent idea that has persisted throughout American history was the notion of the "Bestial Black Man."[65] For centuries, Black People have been viewed as primitive animals based on inconsiderate judgments based on their body, skin, and culture dissimilar to European countries in the seventeenth century.[66] One keen idea that was suggested about Black men is that they were lecherous, holding unrestrainable sexual desire that Americans, both pre- and post-slavery believed to be a danger to White women.[67] It only took so much as a rumor to sentence a Black man to capital punishment, regardless of any involvement of the justice system.[68] Sadly, the race of the defendant and victim in a rape trial is

62 *See Chastity*, *supra* note 1 at 66-69. quoting Historian Nancy Cott, Anderson suggested that "[m]en had to be despicable cads, unfit for citizenship…"

63 Christina E. Wells and Erin Elliott Motley, *Reinforcing the Myth of the Crazed Serial Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. Rev. 127, 153-161 (2001); jurors are also likely to convict if the defendant has a criminal record, *see* David P. Bryden and Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1275-1278 (1997).

64 Bryden & Lengnick, *supra note* 63.

65 N. Jeremi Duru, *The Central Park Five, The Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1321-1322 (2003).

66 *See Id*.

67 *Id*; Evidently, this same stereotype as marred Black women to being inherently "non-Typical Rape Victims," *see* 57-72 and accompanying notes for further discussion.

68 *See Id*. at 1325-1333, citing Angela Y. Davis, WOMEN, RACE & CLASS 1986 (1983); lynching, which entailed the murder of a person perceived to have committed a crime by a group of people acting outside the courts, was a preferred method used by White Southern in post-Reconstruction Era who felt threatened by recently-freed Blacks. In a study cited by Duru, most lynches did not result from rape or attempted rape accusations, Coinciding with these lynches were the unfair legal system that Black men found themselves in if they were not already killed in contrast to the burden Prosecutors faced when prosecuting White defendants, the prosecution of Black defendants was both swift and unfair as only testimony was needed to convict; racial prejudice fueled the assumption in the Jim Crow South that a White woman would never consent

still influential towards the verdict and the sentencing.[69]

One extension of the "undesirable" factor of a "typical rapist," the belief that the assailant is a stranger to the victim, is that there was no rape between married spouses. Early-rape statutes included a marital exemption, barring wives from bringing rape complaints against their husbands.[70] Under early-English common law, the wife was "the property" of her husband and the husband was responsible for the wife's public and private affairs[71]. Because the marriage was a legal entity that the husband represented and controlled, the rape of a wife by her husband was equated with the husband committing a wrong upon himself.[72] Even though women were no longer viewed as property or legally dependable on their spouse, the ongoing-consent theory,[73] remained in English and, later, American common law. Like in most U.S. states,[74] the marital exemption was codified into New York's sex offense statutes in 1909; the statute for Rape in the First Degree read "a person who perpetrates an act of sexual intercourse with a female not his wife, against her will or without her consent."[75] Similar language existed in New York towards the end of the twentieth-century,[76] furthering the notion that marital status was not just exception, but also a requisite factor in determining if the sexual intercourse could be defined as rape. The marital exemption is pertinent in evaluating the "Typical Rapist" for two reasons: one, society's belief of a "Typical rape" invokes the image of violence preceding intercourse,[77] and two, society believes that only "undesirable" men would perpetrate such

to having sex with a Black man, *Id*. at 1330-1338.

69 *See* Katharine K. Baker, Article, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 592-596 (1997). Black men receive greater sentences for rape convictions where the victim is white than if the races were reversed. The sentencing of all men is also lesser in cases where the victim was a Black woman than if she were white; this is in part due to the "non-Typical Rape Victim" status placed on Black women, see notes 57-72 and accompanying notes for further discussion.

70 *Marital*, *supra* note 37 at 1465.

71 *Id*. at 1478-1481.

72 *Id*.

73 *Id*. Anderson references Hall's Treatise, which stated that a wife contracted herself into "mutual matrimonial consent" which she cannot retract. *See also* Hall, *supra* note 23 at 628.

74 *Id*. at 1467- 1474.

75 *See* N.Y. PENAL §130.00 (3) (amended 2001), though it must be noted that the phrase "person not married to the actor" was not removed by subsequent amendments until 2010.

76 *See* N.Y. PENAL §130.00 (4) (amended 2003) defining "female" as "any female person who is not married to the actor." This language replaced "with a female not his wife" in N.Y. PENAL §130.35 (amended 2001). While no U.S. state has the marital exemption in its statutes, some states put limits to how their rape statutes apply if the perpetrator and victim are married, *see* N.Y. PENAL §130.10 (4), which provides a marital defense in certain cases; In addition, the Model Penal Code still holds such language in its Sexual Assault and Related Offenses section, s*ee also* Model Penal Code §§ 213.0(3); 213.1(1); 213.2(1); 213.3(1); 213.4; 213.5 (2001); *see also Anderson*, *supra* note 37 at 1468-1473, 1485-1487.

77 *See supra* Section I.B. and accompanying text.

violence, thereby excluding husbands and, incidentally, men who are known to the victim.

The qualities of a defendant may also affect how he is sentenced after a guilty plea is entered or a guilty verdict is delivered. Race is a factor that continues to the plague the justice system; Black defendants continue to receive harsher sentences than White defendants, despite taken into consideration qualities such as education and employment status which generally work in a rape defendant's favor.[78] Conversely, there is an implicit bias in favor of white defendants when it comes to all aspects of the criminal justice system, but particularly with sentencing.[79] White defendants generally receive more lenient charges brought against them, especially in cases which may have the death penalty as an option.[80] White defendants also garner greater empathy by judges when considering their sincerity in be remorseful for their actions.[81] Such empathy may also have been exemplified in the Brock Turner case. Judge Aaron Persky signed off on a plea deal for a three-year-prison sentence of an El Salvador immigrant for felony sexual penetration by force.[82] The nature of the defendant's assault was like that of Turner's with the one difference being that victim in this case was conscious.[83] While this difference may have been a substantial difference in possible sentencing,[84] it does bring into question why the plea deal produced a greater sentence than Turner's jury conviction.

II. RAPE REFORMS

Rape reform became a prominent goal during the feminist movement in the 1970s. Reformist sought to repeal the statutes and sentiments that affected the prosecution of rape cases.[85] These reforms

78 Racial Disparities in Sentencing, Hearing on Reports of Racism in the Justice System of the United States, Submitted to the Inter-American Commission on Human Rights, 153rd Session, AMERICAN CIVIL LIBERTIES UNION (2014).

79 Robert J. Smith et al., Article: *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 918-921 (2015).

80 *Id*.

81 *Id*.

82 Sam Levin, "Stanford Trial Judge Overseeing Much Harsher Sentence for Similar Assault Case," THE GUARDIAN (Jun. 27, 2016), https://www.theguardian.com/us-news/2016/jun/27/stanford-sexual-assault-trial-judge-persky.

83 *Id*.

84 The pre-amended rape statute graded sexual assaults on an unconscious victim lower than a conscious victim. The Brock Turner case brought this fact into light and is one reason for the California amendment.

85 Ronet Bachman, Ph.D. and Raymond Paternoster, Ph.D., *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. OF CRIM. L. & CRIMINOLOGY 554 (1993), ("Such perceptions included: (a) the belief that rape was not a serious

served to both remove barriers which made obtaining convictions for "non-Typical rapes" more difficult and to encourage rape complainants to come forward. Such barriers existed in part because of the influential Hall treatise which warned of the supposed ease to levy rape accusations without needing proof.[86] But this fear of false accusations may be exaggerated; though studies are conflicting as to the rate of false rape accusations as compared to other violent offenses,[87] many reports are tainted by the inconsistent labeling of "unfounded" reports.[88] Statistics of "unfounded" rape reports across the country are tainted in part from mischaracterized rape cases as lesser offenses, and partly from rape myths leading an officer's judgment on to investigate a case.[89]

Though further reform may be needed to eliminate these issues, there are several doctrines which generally no longer apply in the judicial system. One such doctrine, the prompt complaint rule, obligated victims to file a complaint immediately after their attack; the doctrine thrived through the assumption that any delay in reporting the rape should fall under suspicion that the complainant is fabricating the accusation. [90] Though the doctrine initially barred rape cases from going to trial, it later shifted to be used to attack a rape complainant's credibility as a witness;[91] victims who do not tell someone or report the attack are presumed to be making it up.[92] Fortunately, the prosecution can provide countering evidence to an attack on credibility, which includes bringing an expert witness to testify about typical responses to rape victims.[93]

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and violent offense; (b) the notion that "acquaintance rapes" or rapes perpetrated by intimates were less serious than and different from 'real rapes'… and (c) the various "rape myths" which suggested, among other things, that rape victims were somehow partially to blame for their own victimization.""

86 Hall, *supra* note 23 at 634.

87 The percentage of false rape reports is generally viewed to be between two to eight percent, *see Legacy*, *supra* note 25.

88 *See generally,* Corey Rayburn Yung, Articles, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 Iowa L. Rev. 1197 (2014).

89 *Id*. at 1214-1220.

90 Dubois, *supra* note 19 at 1090-1098.

91 *Id*. The probative value that was suggested from a victim's delayed reporting was parallel to the Admission of Silence that is generally used to impeach defendant-witnesses. This rule was justified because it is believed that people would become vocal when silence would otherwise inculpate them; when applied to rape complainants, it is assumed that a real victim would want to report immediately to "eliminate any semblance of cooperation with her attacker."

92 Kathryn M. Stanchi, Article, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. Rev. 441, 460-462 (1996).

93 Dubois, *supra* note 19 at 1105-1107. *See also* Andrew E. Taslitz, RAPE AND THE CULTURE OF THE COURTROOM 131-133 (1999). The author notes that expert testimony is generally used to rebut arguments that the complainant did not comport with typical behavior of rape victims, including not reporting the attack promptly. The author goes on to suggest using testimony offensively to attack the myths that affects society's beliefs regarding rape and rape victims.

The prompt complaint doctrine also coincided with special jury instructions given to jurors in rape trials, instructed them to take special caution to a complainant's testimony.[94] Because jury instructions are necessary for jurors to adequately weigh each parties' case to the relevant law, the cautionary instructions inadvertently shifts the focus on the complainant.[95] Though the lack of a prompt complaint may be utilized to attack a complaint's credibility, the cautionary instruction is more prejudicial as it leaves jurors with doubt as to the credibility of a complainant right before they commence deliberation.[96] The underlying assumption regarding the former use of these instructions was that jurors were biased in favor of the victim because of the severity of the offense.[97] This presumption mirrors the Hall treatise's notion that rape accusations are easy to make and hard to disprove, which would further from the truth considering that prevailing myths cloud the judgments of every participant of the trial from judge to juror.[98] Cautionary instructions are virtually none existing in any state statute, with some states outright prohibiting judges from giving such instructions.[99]

Another judicial procedure eliminated from most statutes was the corroborating evidence rule. Unlike other doctrines, this rule did not directly come from English common law; this rule manifested in the mid-nineteenth century, though not as a prerequisite to satisfying a rape conviction; rather, courts suggested a cautionary instruction to the jury, thus complainants could still get justice if they adhered to the moral standards that would find them credible.[100] As in the case of a complainant's sexual history, New York turned what was essentially dictum into law when it became the first state to codify the rule in 1886; the statute read "No conviction can be had for abduction, compulsory marriage, rape, or defilement upon the testimony of the female abducted, compelled or defiled, unsupported by other evidence."[101] The underlying concern behind this rule was no different than other restrictions: the supposed ease in making rape accusations worried legislators and judges enough to discredit the credibility of even the most virtuous of complainants to protect defendants. Though the rule

94 *Legacy*, *supra* note 25 at 959-960. Anderson turns to the Section 213 (5) of the Model Penal Code which calls for jurors "to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."

95 A. Thomas Morris, Note, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154, 169-171 (1988).

96 *Id*.

97 *Legacy*, *supra* note 25 at 980.

98 *Id*.

99 *Id*. at 973-974.

100 *Id*. at 955-956.

101 *Id*.; N.Y. Penal §130.15 (McKinney 1967).

has since been repealed,[102] there is an implicit expectation of corroborating evidence throughout the judicial system.[103]

The most progressive and controversial reforms to come about in the 1970s are the Rape Shield statutes enacted throughout the country. The "Privacy Protection for Rape Victims Act" served to diminish the use of a complainant's sexual history at trial, finding it to be irrelevant to proving consent in the alleged assault and an unfair persecution of the complainant instead of the defendant.[104] One criticism of these statutes is that they violate the defendant's Sixth Amendment right to confront his or her accuser; many find that this evidence is pertinent for providing an adequate defense.[105] Despite the judicial discretion exception that may allow evidence excluded in another provision if it is relevant and admissible in the interest of justice,[106] critics believe that rape shield statutes cannot adequately govern the unique facts in each rape trial with limited exceptions.[107] Reformists counter this argument by noting that the purpose of these statutes is to advance the truth seeking process by barring irrelevant evidence, such as the unchastity of the victim, when considering if a defendant committed the offense.[108] Because unchastity is irrelevant, there is no probative value in comparing its prejudicial effect on the defendant by excluding it since the defendant is not permitted from introducing such evidence.[109] There are some exceptions under the New York Rape statute which permit a complainant's prior sexual conduct to be introduced, but only under fleeting instances which do hold probative value and minimize the

102 N.Y. PENAL §130.16, which requires corroborating evidence if the victim was incapable of consenting due to mental defect or mental incapacity. *See generally* Yung, *supra note* 88, where the Author references rape myths' impact on how police departments have handled rape cases; based on the evidence, an officer may deem a case "unfound," or false, regardless of how much effort has been put in investigating cases. *See also Id*. 1219-1220, where the Author gives discusses the Los Angeles Police Departments unofficial corroborating evidence requirement for rape complaints.

103 Taslitz, *supra* note 93 at 7, where author notes that prosecutors often decide which cases to bring based on if corroborating evidence exist. *See also* John F. Decker & Peter G. Baroni, "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. OF CRIM. LAW & CRIMINOLOGY 1081, 1149 (2012), where Author discusses New York courts remaining apprehensive about convicting defendants with only the complainant's testimony as to the assailant's identity.

104 *Chastity*, *supra* note 19 at 86-94.

105 Harriett R. Galvin, Article: *Shielding Rape Victims in the State and Federal Court: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 807-808 (1986).

106 N.Y. CRIM. PRO. §60.42 (5).

107 *Chastity*, *supra* note 19 at 156.

108 Galvin, *supra* note 105 at 805-807. *Chastity*, *supra* note19 at 159-16,

109 *Chastity*, *supra* note 19 at 153-155. The author refers to several Supreme Court cases which struck down certain state laws which barred certain parts of a witness' past from being brought up at trial; the pertinent statutes from those cases differ from Rape Shield laws because the latter seeks to bar evidence that generally fails to be pertinent to showing potential bias from a complaining witness.

prejudicial effect on the complainants. Like the Federal Rape Statutes, N.Y. Crim. Pro. §60.42, New York's Rape Shield permits the introduction of prior sexual conduct to rebut the prosecutor's evidence of the defendant being "the cause of victim's pregnancy or disease of the victim, or the source of the semen found in the victim."[110] This exception does not disrupt the statute's purpose because, unlike the introduction of complainant's entire prior history, this evidence does not draw upon rape myths to be relevant; rather, the evidence is used to prove the defendant did not have intercourse with the complainant without the consideration of the complainant's consent.[111] The sexual history between the complainant and the defendant is also permissible since it is arguable that this is not as prejudicial to the complaint because the sexual history is restricted to one person.[112] Another use for this provision is that it does not consider the complainant's chastity as it would her mindset during the event in question.[113]

But one prominent provision that does counter the statutes purpose is the admittance of a complainant's conviction of prostitution within three years prior to the assault.[114] Some courts have reasoned that because Rape Shield laws serve to protect individual's private sex lives from being exposed to the public, thus it is worthless to apply it to complainants who have been convicted for the public, criminal sex acts with strangers.[115] But this exception is no different from allowing the sexual history of a complainant without such a conviction; both assign probative value in a complainant's prior sexual history, assuming that it resolves the question of consent in a rape trial. This provision also counters the general purpose of excluding the criminal history of witnesses that do not otherwise bring skepticism to their credibility.[116]

III. CONTEMPORARY PENDING AND SUGGESTED REFORMS TO RAPE STATUTES

A. Redefining Intercourse

On April 12, 2016, the New York Assembly passed New York Bill

110 N.Y. CRIM. PRO. §60.42 (4); *see also* USCS FED RULES EVID. R 412.

111 Galvin, *supra* note 105 at 818-825.

112 N.Y. CRIM. PRO. §60.42 (1); Galvin, *supra* note 105 at 608.

113 Galvin, *supra* note 105 at 807.

114 N.Y. CRIM. PRO. §60.42 (2).

115 *Chastity*, *supra* note 19 at 113-118.

116 Under N.Y. CRIM. PRO. §60.40, a witness may be impeached if they respond negatively to an inquiry about previous conviction. Only a defendant's criminal history may be brought to negate testimony of good character.

A.B. 4959.[117] The bill would have eliminated the eliminate the "penetration" requirement in the rape statutes.[118] The bill's purpose was to eliminate inconsistency between the proof of rape and criminal sexual assault.[119] This loophole comes directly from the trial of Michael Pena; the former NYPD officer was charged with several sex offenses including rape and criminal sexual assault for a 2009 attack on a school teacher.[120] Though Pena was convicted of criminal sexual assault, the judge declared a mistrial as to the remaining charge of rape.[121] The three felony rape statutes in New York includes the phrase "sexual intercourse" in their text;[122] N.Y. PENAL §130.00 defines "sexual intercourse" as having "its ordinary meaning and occurs upon any penetration, however slight."[123] The jurors in the Pena case deadlocked as to whether the victim was vaginally penetrated, despite evidence of semen in the victim's underwear and bruising on the victim's genitals which should have suggested otherwise.[124] Pena was convicted under the Criminal Sexual Assault charge because the statute only requires "contact" between penis and mouth or anus, not "penetration."[125]

The bill would not have simply reformatted the laws to include anal and oral contact under the definition of rape but eliminate the confusion that results from distinguishing "rape" and "criminal sexual assault." The bill's sponsor, Assemblywoman Aravella Simotas, argued that people commonly refer to oral and anal contact as "rape," not "criminal sexual assault;" by matching the language of the statute to colloquial language, jurors will better understand that these acts constitute rape and can convict accordingly.[126] Simotas also argued that the distinguishing between "rape" and "criminal sexual assault" eliminates gender neutrality that has plagued rape statutes.[127] The bill did not advanced pass the assembly since being approved in the Assembly, but it reflects the growing tide of reforms of rape statutes

117 Assemb. B. 4959 (N.Y. 2015).

118 *Id*.

119 Assemb. B. 4959 Memo (N.Y. 2015). Statutes N.Y. PENAL §130.25, N.Y. PENAL §130.30, and N.Y. PENAL §130.35 would have included oral and anal sexual contact, thus eliminating N.Y. PENAL §130.40, N.Y. PENAL §130.45, and N.Y. PENAL §130.50.

120 Adam Martin, *New York Juries Don't Like Convicting Cops of Rape*, THE WIRE (Mar. 28, 2012), http://www.thewire.com/national/2012/03/new-york-juries-dont-convicting-cops-rape/50465 .

121 Russ Buettner, *Mistrial on Final Charges Day After Officer's Conviction in Sex Attack*, THE NEW YORK TIMES (Mar. 28, 2012), http://www.nytimes.com/2012/03/29/nyregion/mistrial-declared-on-remaining-charges-day-after-officers-conviction-in-sex-attack.html .

122 N.Y. PENAL §130.25, N.Y. PENAL §130.30, and N.Y. PENAL §130.35.

123 N.Y. PENAL §130.00.

124 Assemb. B. 4959 Memo (N.Y. 2015).

125 N.Y. PENAL §130.50.

126 Aravella Simotas, Press Release, Simotas Statement on Rape is Rape Bill (Feb. 14, 2013).

127 *Id*.

being sought throughout the country that seek to eliminate the preconceived notion that only men are perpetrators of rape and only women can be rape victims.[128]

While this bill is noble in its attempt to address inconsistencies in labeling and conviction of sex offenses, it may not have been helpful in the earlier stages of a rape case. Three pertinent stages that this point will reference are the police reporting, prosecutorial discretion and plea bargaining. The first stage is one in controversial due to the national scrutiny on how many reports are deemed "unfounded" based on rape myths permeating police precincts.[129] The next two stages, the prosecutor's decision whether to bring charges against an assailant and the possible plea deals that can be offered, are influenced more by legislative changes, but prosecutorial discretion may also be plagued by rape myths that affect which cases go forward and predict how a jury may vote.[130] The final stage, plea bargaining, affects the prosecutor's decision to bring forth certain charges because of the almost-certain outcome of defendants taking a plea over the risk of greater punishment.[131] This sections will look at reforms implemented in several states, reforms legal scholars have discussed in recent years, and their pros and cons in sustaining rape cases throughout these three early stages.

B. Redefining the Force Requirement

The force element has been removed or diminished in many rape statutes; twenty-eight states presently have some statutes which only require a showing of non-consent (a verbal or physical assertion of refusing sexual intercourse), of which seventeen include such an element in offenses involving sexual penetration, not just sexual contact.[132] N.Y. Penal §§130.25 and 130.40 permit the finding of guilt of a defendant who "engages in sexual intercourse with another person without such person's consent where such lack of consent is by reason

128 Philip N.S. Rumney, Response Piece: *In Defence of Gender Neutrality Within Rape*, 6 SEATTLE J. SOCT. JUST. 481, 486-487 (2007).

129 Yung, *supra note* 88 at 1221-1223 (2014); *see also* Testimony of Carol E. Tracy, Executive Director, Women's Law Project, Before the Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, Hearing on Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases (Sep. 14, 2010), available at https://www.judiciary.senate.gov/imo/media/doc/09-14-10%20Tracy%20Testimony.pdf.

130 Aya Gruber, Article, *Rape, Feminism, and The War On Crime*, 84 WASH. L. REV. 581, 615-619 (2009) .

131 Stephanos Bibas, Article, *Plea Bargaining Outside The Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 (2004).

132 Decker & Baroni, *supra note* 103 at 1084-1088.

of some factor other than incapacity to consent."[133] These statutes, read together with the "lack of consent" definition under N.Y. Penal §130.05 (2) (d), permit cases where a victim expresses her non-consent to intercourse. In People v Evans, 79 A.D.3d 454 (N.Y. App. Div. 3d Dep't 2010), the complainant testified to repeatedly expressing disinterest leaving the defendant as well as crying throughout the duration of the intercourse. The mens rea of the defendant is irrelevant in such context; rather, the question is whether a reasonable person in the defendant's shoes could take the victim's words or actions to mean she does not consent.[134] These statutes are more progressive than some states when dealing with cases that lack evidence of force or injury.[135] But New York has multiple definitions of "lack of consent",[136] in N.Y. Penal §130.05, "lack of consent" results from either "forcible compulsion," "incapacity to consent," if the victim of sexual abuse or forcible touching "does not expressly or impliedly acquiesce in the actor's conduct," or if the victim cleared expressed non-consent, but the latter only applies to Rape or Criminal Sexual Assault in the Third Degree.[137] The distinction between how non-consent can be proven based on the offense and its degree continues to place greater importance on Typical rapes" over non-injurious assaults or assaults on a voluntarily-intoxicated victim.

The affirmative consent standard has been gaining momentum in recent years as an alternative element to establishing consent; under this standard, the defendant would need to prove the complainant affirmatively consent to intercourse, not just that she did not say no.[138] Proponents of this standard believe it will promote communication between partners, diminishing possible misconstruing of words or actions that can leave one partner to misbelieve the other's consent.[139] Though only two states currently have affirmative consent in their rape

133 N.Y. Penal §§130.25 (3) and 130.40 (3).

134 *People v Evans*, 79 A.D.3d 454 (N.Y. App. Div. 3d Dep't 2010), citing *People v. Newton*, 8 N.Y.3d 460, 463 (N.Y. 2007).

135 Decker & Baroni, *supra note* 103 at 1103-1105; the article refers to Delaware and Nebraska statutes which require the victim to exert enough resistance to show adequately show her resistance (Del. Code Ann. tit. 11, §761(j)(1) and Neb. Rev. Stat. §28-318(8)(b)). Both statutes also make the defendant's mens rea a focal point in determining his guilt; this contrast New York's standard which considers whether the victim's actions objectively show non-consent, not if they were enough to be apparent to the defendant.

136 *Id*. at 1093-1095.

137 N.Y. PENAL §130.05 (1) (A) – (D); the definition under (1) (c) expresses similar language to an affirmative consent statute, but only applicable to offenses with relatively minimal punishment, *see* notes _ and accompanying text.

138 Nicholas J. Little, Note: From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law, 58 VAND. L. REV. 1321, 1345 (2005).

139 *Id*. at 1350-1353; Aya Gruber, Article, Rape, Feminism, and The War On Crime, 84 WASH. L. REV. 581, 601-603 (2009).

statutes,[140] the standard has been implemented in disciplinary hearings conducted in New York and California's state-run universities.[141] The American Law Institute (ALI) recently debated instituting affirmative consent into the Sexual Assault and Other Offenses section the Model Penal Code.[142] "Consent" is now defined under Model Penal Code §213.0 (3) (a) as a person's willingness to engage in a specific act of sexual penetration or sexual contact. Though language in the draft provision which required "positive agreement" to sexual acts was eliminated, several ALI members argued that this provision is functionally equivalent to affirmative consent, which they believe goes against cultural norms of how people initiate sexual conduct.[143] These ALI members argued there would be an increase of false allegations because the prosecution need only argue that no communication regarding consent took place, thus improperly shifting the burden to the defendant to prove otherwise.[144] Proponents for affirmative consent counter that the burden still remains with the prosecution to prove there was no consent and that the defendant willfully or recklessly disregarded this fact.[145] Contrary to the argument about oral affirmation, an affirmative consent can be implied, as the new MPC provision and other applications of the standard have suggested.[146] Critics also predict the standard may cause greater confusion over the victim's consent; a victim saying "yes" can be strong enough to negate any evidence of coercion such as implied threats or intimidation.[147] Again, the totality-of-the-circumstance standard would be helpful to determining the

140 WIS. STAT. ANN. §940.225(4) and VT. STAT. ANN. tit. 13, §3251(3), cited in Deborah Tuerkhelmer, Article: *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 451 [*hereinafter Tuerkhelmer*] (2016).

141 Noah Hilgert, Article: *The Burden of Consent: Due Process and the Emerging Adoption of the Affirmative Consent Standard in Sexual Assault Laws*, 58 ARIZ. L. REV. 867, 879-880 (2016); notably, hundreds of universities have applied affirmative consent into their disciplinary codes, *see* Deborah Tuerkhelmer, Article: *Rape On and Off Campus*, 65 EMORY L.J. 1, 10-14 (2015).

142 Jennifer Moringo, *The Evolution of the Model Penal Code 'Consent' Definition*, THE ALI ADVISOR (Sep. 6, 2016), http://www.thealiadviser.org/sexual-assault/evolution-of-model-penal-code-consent-definition/ . Jennifer Moringo, *Updated "Consent" Definition*, THE ALI ADVISOR (Dec. 19, 2016), http://www.thealiadviser.org/sexual-assault/updated-consent-definition/ .

143 Andrew L. Frey et al., "Motion Concerning §213.0(3) and §213.2, Tentative Draft #2, Model Penal Code: Sexual Assault," (May. 6, 2016). The members' suggestion to consider implied, as well as expressed, assertions when considering if, under the totality of the circumstances, consent had been given was implemented under Model Penal Code §213.0 (3) (c).

144 *Id;* Little, *supra note* 138 at 1357-1359 (2005).

145 Little, *supra* note 138, at 1357-1359.

146 *Id; see also* Model Penal Code §213.0 (3) (c); Tuerkhelmer, *supra note* 141 at 450, where author discusses the defense of implied consent, but for offenses for sexual contact, no the higher graded sexual assault; Hilgert, *supra note* 141 at 878-880 (2016), where Author discusses the implied consent defense as applied to the judicially created standard in New Jersey and New York and California-enacted statutes applicable to their state universities.

147 Catherine A. MacKinnon, Article*: Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 454-456 (2016); *see also* Hilgert, *supra note* 158 at 899.

validity of the complainant's "affirmative consent." But the probability of such policy expanding to other states is low; many consider this concept to be an intrusion into people's private lives, dictating how one must behave in a sexual encounter or else deem it to have been nonconsensual.[148]

The effect of reforming force provision has not been articulated well from state-statute comparison studies. Reforms have not resulted in greater charging of crime or convictions, even in states with strongest reforms of statutes and procedural rules.[149] While Colorado, a non-consent state,[150] experienced an increase of rape reports a few years after the reforms were implemented, this rate was not as high as reformist had hoped, especially in comparison to Massachusetts, a force state[151], and the rest of the United States.[152] The rates of Colorado, Massachusetts, and the U.S. average fluctuated at a similar rate, increasing post-reforms before dropping in the 1990s.[153] Without accurate statistics regarding police reporting and sexual assault rates in the country, there is no certain conclusion that can be made about the reform's effect beyond symbolic gesturing.[154]

C. Addressing Involuntary Intoxication

Rape reformist in the 1970s-80s also addressed the "date rape" epidemic; during this period, there was growing concern regarding the use of drugs to incapacitate unsuspecting victims.[155] Reports vary as to the percentage of rapes which involve drug or alcohol-use, but most reports consider the percentage to be high.[156] Almost all jurisdictions include a provision defining sexual intercourse through involuntary

148 Cathy Young, *Campus Rape: The Problem with "Yes Means Yes,"* TIME (Aug. 29, 2014), http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes/ .

149 Cassia Spohn and Julie Horney, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 173-175 (1992); this study includes rape shield enactments in addition to changes to the language of the statutes.

150 COLO. REV. STAT. ANN. §18-3-402.

151 MASS. ANN. LAWS ch. 265, §22.

152 Rape reports were generally higher in Colorado than the U.S. trend, even before its removal of the force element, *see* Peter Landsman, Note: *Does Removing the Force Element Matter?: An Empirical Comparison of Rape Statistics in Massachusetts and Colorado*, 21 WM. & MARY J. OF WOMEN & L. 767, 784-791 (2015).

153 *Id*.

154 *Id*.; *see also* Decker & Baroni, *supra* note 103 at 793. Both articles conclude that efforts by reformist to promote law reforms may have factored into the rise in reporting.

155 Allison C. Nicolis, Note, *Out of The Haze: A Clearer Path For Prosecution of Alcohol-Facilitated Sexual Assault*, 71 N.Y.U. ANN. SURV. AM. L. 213, 221-222 (2015).

156 Teresa P. Scalzo, *Prosecuting Alcohol-Facilitated Sexual Assault*, NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AMERICAN PROSECUTORS RESEARCH INSTITUTE (2007).

intoxication as rape, with some even placing the provision in the same statutes at the same degree as forcible rape.[157] Either way, the difficulty in properly addressing the disparity between voluntary and involuntary intoxication-related rape cases in statutes presents greater difficulty for "non-typical victims" from getting justice. The rate in which alcohol plays a role in an assault is ambiguous due to inconsistencies between reported assaults and assaults as described in surveys, but researchers generally believe roughly at least half of all sexual assaults involve either the victim, perpetrator, or both having drinking.[158] This is especially troubling given the recent discussions regarding campus sexual assault, where alcohol is typically a factor in an assault.[159]

Alcohol impairs one's cognitive judgment and decreases their motor skills, leaving the drinker's perception of their surroundings to be blurred and lessening their ability to physically react to any situation, thus an intoxicated person is less likely to resist a perpetrator's assault.[160] Because the victim is too inebriated to resist the attack, the force element cannot be met to charge the assailant with many current rape statutes.[161] At the initial reporting stage, police officers are more likely to be skeptical about a complainant's report if she had been drinking or drunk at the time of the assault.[162] This has led to such cases being categorized as lesser offenses or labeled "unfounded," being deemed to lack enough credible details to prove a crime occurred.[163] Prosecutors may also be apprehensive about bringing charges when the complainant was intoxicated because of the difficulty of bringing a strong case as well as jurors shifting the blame from the defendant onto the victim.[164]

Most statutes do not address voluntary intoxication; only seven states include provisions which separately refer sexual assault of voluntarily intoxicated victims.[165] Other states prosecute cases with

157 *Id*.

158 *Id*.

159 Several studies have found that at least 50% of campus sexual assaults involved the use of alcohol, with 55% of victim-participants in the surveys admitting to drinking at the time, *see* Antonia Abby, Ph.D., Alcohol-Related Sexual Assault: A Common Problem among College Students, 14 J. STUD. ALCOHOL 118 (2002).

160 *Alcohol Awareness, W.V.U. SCH. OF PUB. HEALTH, Short-Term Effects of Alcohol*, http://publichealth.hsc.wvu.edu/alcohol/effects-on-the-body/short-term-effects-of-alcohol (last visited Mar. 10, 2018).

161 Scalzo, *supra note* 156 at 1-3; such a loophole is why Brock Turner was only charged with offenses which did not have a probation option.

162 Nicolis, *supra note* 155 at 265-268.

163 *Id*.; Yung, *supra note* 88 at 1221-1225 (2014).

164 Wayne A. Kerstetter, Article: *Criminology: Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, 81 J. CRIM & CRIMINOLOGY 267, 275-276, 305-306 (1990).

165 *Id*.; *see also* CAL. PENAL CODE §261(A)(3); IDAHO CODE ANN. §18-6101(5); IOWA CODE

voluntary intoxicated victim using either another provision in existing statutes or judicial interpretation of statutes that incorporates such cases. A few states define "mentally incapacitated or mentally impaired" to include voluntary intoxicated victims.[166] The problem with using such a provision is it typically deals with cases where the victim suffers a mental or developmental disorder.[167] This statute looks to the victim's mental state, considering whether the victim was "incapable of appraising or controlling their conduct" and, in certain statutes, if the defendant was aware of this; jurors may be confused with the equating of a permanent cognitive impairment to the temporary impairment of an intoxicated victim. [168]

Another issue with this method is determining how intoxicated a victim must be in order to qualify under this provision.[169] Washington State's interpretation of "mentally incapacitated" takes into consideration any factors which will determine whether a victim held a "meaningful understanding of the nature or consequences of the act of sexual intercourse."[170] This standard may be difficult to meet if a victim is unable to fully recall her assault. This sentencing for this offense can also be an issue when it comes to prosecuting the case; the "mentally incapacitated" element tend to be included in the highest degree of sexual assault statutes, putting it in the same footing as the "force" element.[171] There have not been many cases with the "mentally incapacitated" element that have been heard at the higher courts in Washington, leading Nicolis to speculate that Prosecutors have been hesitant in applying the statute to cases involving involuntary intoxicated victims.[172] This is likely because of the prevailing rape myths which render such assaults as being less serious than "typical rape" and places blame on the victim.[173]

ANN. §709.4(1)(C); KAN. STAT. ANN. §21-5503(A)(2); LA. REV. STAT. ANN. §14:43(A)(1); S.D. CODIFIED LAWS §22-22-1(4); WIS. STAT. §940.225(2)(CM), *cited* Nicolis, *supra note* 155 at 236-237.

166 Nicolas, *supra* note 155 at 221-222; N.Y. Penal §130.00 hold separate provision for "mentally disabled" and "mentally incapacitated," the latter used to address "date rape" cases. The New York Court of Appeals stated that the "mentally incapacitated" provision does not include assaults where the victim was intoxicated voluntarily, see *People v. Johnson*, 23 N.Y.3d 973, 1975 (N.Y. 2014).

167 Nicolas, *supra note* 155 at 230-236.

168 *Id*.

169 *Id;* this issue is also prevalent in statutes which do distinguish assaults on voluntarily intoxicated victim, *Id. at 238-240.*

170 *Id*. at 233-234, citing State v. Ortega-Martinez, 881 P.2d 231, 237 (Wash. 1994); *see also* WASH. REV. CODE. ANN. §9A.44.010(4).

171 Nicolas, *supra* note 155 at 236.

172 *Id*. at 235.

173 Scalzo, *supra note* 156. Scalzo also references research that found many view women who drink or get drink to be more likely to engage in sex acts than women who abstain, *see also*

Judicially-Interpreted application of voluntary consumption cases are less prevalent, though states with this method tend to have inconsistent results.[174] This method is utilized in New York under a limited circumstance. Under N.Y. Penal §130.35 (2), a defendant is guilty of first degree rape if victim was incapable of consenting by being "physically helpless," or as N.Y. Penal §130.00 (7) describes, the victim was "unconscious or for any other reason [was] physically unable to communicate unwillingness to an act." Courts have applied intoxicant-induced unconsciousness to fall under this definition, regardless if the consumption was voluntary.[175] But this creates two polarizing situations regarding intoxication that are covered under either statute or case law: a victim who was drugged and a victim who voluntarily became intoxicated, but subsequently lost consciousness. While these two scenarios permit the charging of first degree rape or criminal sexual assault, perpetrators of rape of voluntarily-intoxicated victims who remained conscious may only be charged with E-felony offenses, which provide lower possible prison sentences or probation.[176]

IV. IMPOSING MANDATORY MINIMUM SENTENCING FOR SEX OFFENSES

States may be able to avoid controversial sentencing for rape by simply removing the possibility of probation and guaranteeing mandatory minimum sentencing. The purpose of the California's bill A.B. 2888 was to remove the probation options for several felony sex offenses, some of which Brock Turner was found guilty of, such as CA Penal §289 (d) penetration with a foreign object where the victim was unconscious.[177] California legislators found the discrepancy in possible sentencing based on the voluntariness of the victim's intoxication to be particularly troubling.[178] But critics of A.B. 2888 found such a bill to be

William Recording et al., *The Role of Alcohol Expectancies and Alcohol Consumption Among Sexually Victimized and Nonvictimized College Women*, 16 J. OF INTERPERSONAL VIOLENCE 297 (2001).

174 Nicolis, *supra note* 155 at 241-244. Nicolis focuses on Georgia and Massachusetts, which both hold varying terminology to describe a victim's condition that would signal her inability to consent.

175 *See People v Bjork*, 105 A.D.3d 1258, 1260 (N.Y. App. Div. 3d Dep't 2013), where the Third Department Appellate Court explicitly stated unconsciousness induced by the victim's voluntary consumption of alcohol fell under the definition of "physically unconscious."

176 Such cases may be applicable to N.Y. Penal §§130.25 and 130.40, which are punishable by up to four years and have a possible probation sentencing that is not possible under the B-felony offenses which the two situations fall under.

177 CA 288 Pub. S. (Aug. 16, 2016).

178 *Id*.

reactionary to the present controversy, and even compared it to prior legislative efforts to combat rising crime by toughen sentencing in the 1970s and 1980s. [179] Indeed, California's effort to combat sexual assault is like reforms by electors to combat "predatory sex offenders" over the past two decades; several state and federal statutes were implemented to increase the minimum sentencing for sex offenses and increase post-release restrictions.[180] Though both reform efforts were reactionary, California's effort did not increase the potential sentences like most punitive reform statutes have implemented; the removal of the probation option simply places a mandatory minimum sentence that was already computed in the statutes.[181] Provisions (a) (3) and (4) Cal Pen Code §261, which deal with involuntary intoxication and unconscious victims, were previously not included under Cal Pen Code §1203.065; as seen in the Brock Turner case, a defendant could be sentenced to either three, six or eight years for each offenses, but also could get less than a year or probation based on the court's discretion.[182]

One underlying reason for this amendment is to bring about adequate sentencing for the offense at hand. Mandatory minimum sentencing would ensure rape assailants are justly sentenced as well as serve as deterrence of this crime which society abhors.[183] The retributivist approach behind mandatory minimum sentencing branches off the retributive theory that is heavily favored in American society.[184] The preference of punishment that fits the crime is not only exerted through our statutes, but can be observed through direct and indirect measures in American society. The status of "felon" is a label which can interfere in most aspects of a person's life, ranging from his ability to find employment,[185] to his ability to exercise his constitutional rights.[186]

> "'Under this interpretation of the law, a perpetrator at a college party who chooses to forcibly rape a conscious victim will go to prison. However, a different perpetrator at the same party who chooses to watch and wait for a victim to pass out from intoxication before sexually assaulting her may get probation. Whether penetration is accomplished through physical aggression [force] or predatory behavior is a distinction without a difference. Both perpetrators seek prey that are vulnerable; disadvantaged by his/her capacity to resist. Both perpetrators represent a danger to the community.'"

179 Bridgette Dunlap, How California's New Rape Law Could Be a Step Backward, ROLLING STONE (Sep. 1, 2016), http://www.rollingstone.com/culture/news/how-californias-new-rape-law-could-be-a-step-backward-w437373 .

180 *Legacy*, *supra* note 25 at 1954-1959.

181 CAL PEN CODE §1203.065 (amend. 2016).

182 CAL PEN CODE §264; compare CAL PEN CODE §261 (A) (2), which contains the force element, and was already prohibited a sentence of probation pre-A.B. 2888.

183 Erik Luna & Paul G. Cassell, Article: *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 10-13 (2010).

184 *See generally* David Gray & Johnathan Huber, Article: Retributivism for Progressives: A Response to Professor Flanders, 70 MD. L. REV. 141 (2010).

185 Michelle Alexander, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE

But such hindrances in post-imprisonment is not of concern in several parts of the country, not that it is advocated, rather that it is plagued by indifference.[187]

But regardless of the continuous struggle felons have during and after imprisonment, many Americans do support harsh punishment for violent offenses to deter others from replicating it; a 2014 study by the Opportunity Agenda found that 54% favored harsh punishment to benefit society while 46% favored rehabilitation.[188] But mandatory minimum sentencing is highly criticized because of their applicability to offenses which many believe are "harmless" or at least inoffensive enough to not permit unduly harsh sentences. The disproportionate impact this policy has had on minority defendants does give appreciation to concern of how the new law will affect Californians, but the concern should not be placed squarely on the policy. Rather, there are multiple factors coinciding the War on Drugs which drove mandatory minimum sentencing to primarily impact poor and minority defendants. First, the drug laws were written in such a way which guaranteed racial disparity in arrest of offenders. Second, the bias exhibited in enforcement of these laws and the rigid practice throughout the criminal justice system are what contributed in the increase in Black and Latino prison population.

A. Brief History of The War on Drugs

Prior to the 1980s, mandatory minimum sentencing was utilized for various federal offenses including drug-related offenses; a two-year minimum sentence was warranted from a violation of the Narcotic

OF COLORBLINDNESS 145-150 (2012).

186 Felony Disenfranchisement has become a highly-debated topic throughout the 2016 elections, in part because of the belief that such laws disproportionally effect Black citizens; *see Id*. at 187-189, *see also* "Felony Disenfranchisement: A Primer," THE SENTENCING PROJECT (retrieved Jan. 2, 2017), http://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf .

187 Alexander, *supra note* 185 at 214-217, 242-248, where Author argues that Civil Rights activists have ignored the issue of Black Mass Incarceration because of the stigma attached to the prisoners. Historically, Alexander argues, activist have been selective in whom to represent when challenging racially discriminatory police; Rosa Parks, for example, was not the first Black woman the NAACP to challenge the Racist Bus policy, but because of certain personal factors which the organization feared would distract from the issue at hand.

188 *See An Overview of Public Opinion and Discourse on Criminal Justice Issues*, *The Opportunity Agenda* 19-22, 34 (Aug. 2014), https://opportunityagenda.org/files/field_file/2014.08.23-CriminalJusticeReport-FINAL_0.pdf . The Report cites several studies regarding people's distinctive viewpoints of punishment for both violent and nonviolent offenses; while a sizable number of Americans prefer rehabilitation to be a goal, if not the goal, for punishing offenders, most find that efforts to rehabilitate violent offenders to be a waste of time.

Drugs Import and Export Act, a 1922 Congressional Act which covered the trafficking and sale of cocaine and opium.[189] With the growing concern of drug sale and addiction in the country, Congress passed the Comprehensive Drug Abuse Prevention and Control Act in 1970, which created schedules of Controlled Substances based on the severity of its effects and the possibility of its benefits.[190] The Act also removed mandatory minimum sentencing for all drug offenses; the reasoning behind this change was to focus on deterrence of drug use, especially with the growing rate of addition throughout the country.[191] President Richard Nixon declared a "War on drugs" in 1971, citing the rise of addiction amongst Vietnam War veterans and the linkage between drug use and the rising crime rate.[192] The primary focus during the earlier part of this "war" was to only criminalize active participation in the drug trade and help, not punish, drug users, especially those who fought in the war.

But the rise in drug use and drug violence throughout the 1970s and 1980s led to President Ronald Reagan efforts to enhance the government's role in fighting crime, which including greater penalization of drug offense violation.[193] The Reagan Administration's effort to publicize the danger of drug use effectively legitimized the War on Drugs as a national issue amongst the public eye; Congress' legislative efforts were swiftly performed with little dissent.[194] The first act to establish the prominent mandatory minimum penalties was The Anti-Drug Abuse of 1986, which focused on powdered and crack cocaine possession; there was a 100-1 ratio discrepancy between the minimum amount of crack and cocaine possession needed to qualify for the five year prison sentence.[195] Further penalties were implemented under President George H. W. Bush and Bill Clinton, leading to an increase in law enforcement resources to combat drug crimes and

189 Pub. L. No. 82–255, §1, 65 Stat. 767 (1951), cited from 2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, Chapter 2, "History of Mandatory Minimum Penalties and Statutory Relief Mechanisms", UNITED STATES SENTENCING COMMISSION (hereinafter *Chapter 2*), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf . ("Before 1951, mandatory minimum penalties typically punished offenses concerning treason, murder, piracy, rape, slave trafficking, internal revenue
collection, and counterfeiting.").

190 *See* 21 U.S.C. ch. 13; *see also Chapter 2*, *supra note* 189.

191 Chapter 2, *supra* note 189.

192 Richard Nixon, President of the United States, Special Message to the Congress on Drug Abuse Prevention and Control (Jun, 17, 1971).

193 Alexander, *supra note* 185 at 47-53

194 *Id*.; Chapter 2, *supra* note 189.

195 *Id*.; for further discussion of the ratio discrepancy, *see* notes 227-234 and accompanying text.

enhanced penalty for drug and repeat offenders.[196]

The War on Drugs is now viewed as a failure of weakening drug trafficking and use, and primarily blamed for the unprecedented increase in the prison population.[197] The most prominent criticism regarding mandatory minimums is its detrimental impact on minority defendants. The number of inmates in American prisons had skyrocketed in the past three decades, with the substantial portion of the offenses being nonviolent drug felonies.[198] This rate coincided with the increase of Black inmates in both state and federal prison, growing from 39% of prisoners in 1979 to 53% in 2000.[199] There were an estimated 1.5 million inmates in state and federal prison in 2015, almost half of which for drug-related offenses.[200] Black inmates accounted for 37% of the roughly 185,000 felons sentenced to federal prison in 2015.[201] Almost one-half of the newly-sentenced prisoners' most serious offenses were drug-related and of this percentage, Black prisoners made up 50% of prisoners sentenced for drug-related offenses.[202] In 2010, roughly two-thirds of federal drug convictions included an offense subject to a mandatory-minimum sentence; Black offenders made up 30% of this statistic, but made 40% of Black offenders were sentenced

196 Alexander, *supra* note 185 at 53-57.

197 *One in 31: The Long Reach of American Correction*, THE PEW CENTER ON THE STATES (Mar. 2009), http://www.pewtrusts.org/~/media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf .

> "[I]n Washington, from 1980 to 2001, the benefit-to-cost ratio for drug offenders plummeted from $9.22 to $0.37. That is, for every dollar invested in new prison beds for drug offenders, state taxpayers get only 37 cents in averted crime. An updated analysis from 2006 found that incarceration of offenders convicted of violent offenses remained a positive net benefit, while property and drug offenders offered negative returns."

198 *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, Chapter 8, MANDATORY MINIMUM PENALTIES FOR DRUG OFFENSES*, UNITED STATES SENTENCING COMMISSION, http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf [*hereinafter Chapter 8*]; *see also* Jamie Fellner, Punishment and Prejudice: Racial Disparities in the War on Drugs, HUMAN RIGHTS WATCH IN NEW YORK CITY [*hereinafter Fellner*] (May 2000).

199 Fellner, *supra* note 198.

200 Quick Facts: Federal Offenders in Prison – March 2016, United States Sentencing Commission (retrieved Jan. 1, 2017); *see also* "Trends in U.S. Corrections: U.S. State and Federal Prison Population, 1925-2014," THE SENTENCING PROJECT (Dec. 15, 2015), which discusses the rapid increase in ratio of drug offenders to the overall federal prison population; E. Ann Carson, Ph.D. & Elizabeth Alexander, "Prisoners in 2015," BUREAU OF JUSTICE STATISTICS (Dec. 2016); Peter Wagner & Bernadette Robury, "Mass Incarceration: The Whole Pie 2015," Prison Policy Initiative (Dec. 8, 2015), https://www.prisonpolicy.org/reports/pie2015.html#fnref:4 .

201 Carson & Alexander, *supra* note 200.

202 *Id*.

to a mandatory minimum sentence.[203] The fact that there is a similar rate of illegal drug use between most racial groups in America supports the notion that Black inmates disproportionally make-up the nation's prison population.[204] The critics of mandatory minimum sentencing are mistaken in assuming the practice in and of itself is the racial disparity in imprisonment; rather, mandatory minimum sentencing disproportionally effects minorities because of racial bias in police procedures and the application of law.

B. Racially-Disparaging Consequence of Drug Laws

The racial disparity in sentencing resulted, in part, due to the distinguishing of drug-type and quantity of possession in the drug statute. There are two variations of cocaine that are addressed in the Anti-Drug Abuse Act of 1986: powdered cocaine and cocaine base (i.e., crack cocaine). [205] Black defendants were more likely to be arrested for crack cocaine possession than White defendants; while the reverse was true regarding powder cocaine.[206] Until 2010, under the Anti-Drug Abuse Act of 1986, to trigger a five-year-minimum term, one must be in possession of at least 5 grams of crack cocaine or 500 grams of powdered cocaine.[207] The severe sentencing for a comparably smaller quantity of crack cocaine was backed by proponents who believed the prevalent myths regarding crack consumption. Reports of a "Crack Epidemic" plaguing urban cities were routinely broadcasted by media outlets; Black faces were paraded on the news with stories about "crack babies" and violent impulses due to the drug gave rise to the belief that crack cocaine was even more dangerous than the cocaine that has been around for decades.[208] But the "Crack Epidemic" was later proven to

203 *Chapter 8*, *supra* note 198 at 154.

204"Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings," U.S. DEPT. OF HEALTH AND SERVICES (Sep. 2014): "In 2013, among persons aged 12 or older, the rate of current illicit drug use was 3.1 percent among Asians, 8.8 percent among Hispanics, 9.5 percent among whites, 10.5 percent among blacks, 12.3 percent among American Indians or Alaska Natives, 14.0 percent among Native Hawaiians or Other Pacific Islanders, and 17.4 percent among persons reporting two or more races."

205 The main difference between the two forms of cocaine are the methods of utilizing them. Powdered cocaine is typically snorted through the nose and crack cocaine, a variation or cocaine base, is smoked like a cigarette, *see* Alyssa L. Beaver, Note: *Getting a Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 79 FORDHAM L. REV. 2531, 2540-2541 (2010).

206 *Id*.

207 21 U.S.C. §841 (B) (ii) & (iii) (amend. 2010). The minimal amount of crack cocaine possession to trigger the five-year mandatory sentence was increased in 2010 to 28 grams.

208 Beaver, *supra note* 226 at 2545-2547 (2010); Deborah J. Vagins, & Jesselyn McCurdy,

contain several exaggerations; the psychological effect of cocaine usage is same regardless of its form, including its potential harms and addictiveness.[209] The violent tendency crack cocaine usage supposedly produced was also unfounded; crimes with relations to crack cocaine typically came from violent interactions with gangs and dealers, which were also prevalent with the distribution of powdered cocaine and other drugs.[210] The one truth to come out of the hysteria of the "Crack Epidemic" was that crack cocaine was primarily dealt in urban areas; crack cocaine use was higher in the Black and Hispanic communities than in White communities, which would explain why there were more Black and Hispanic crack cocaine offenders. [211]

C. Law Enforcement and Judicial Bias

Recent studies have shown a similar rate of drug use between Black and White Americans, yet there are predominately more Black inmates in the Federal prison population.[212] The current provision regarding crack cocaine alone does not explain how this contradictory finding came about, rather the execution of the rule by law enforcement agencies and judicial actors has presented a racial bias by persecuting Black Americans more frequently and harshly than White Americans. Black Americans are frequently perceived by society, specifically by law enforcement, as being prone to commit violent crime.[213] The viewing of Black citizens as potential suspects has led to disproportionate arrest rates of Black citizens despite there being similar rates of varying drugs use between Black and White residents.[214] The

"Cracks in the System: Twenty Years of the Unjust Federal Crack Cocaine Law," THE AMERICAN CIVIL LIBERTIES UNION (Oct. 2006), https://www.aclu.org/sites/default/files/pdfs/drugpolicy/cracksinsystem_20061025.pdf.

209 Vagins and McCurdy, *supra* note 208.

210 *Id*.

211 Id.; Roland G. Fryer, Jr. et al., *Measuring Crack Cocaine and Its Impact*, HARVARD UNIVERSITY SOCIETY OF FELLOWS AND NBER (Apr. 2006).

212 "Results from the 2013 National Survey on Drug Use and Health: Summary of National Findings," U.S. DEPT. OF HEALTH AND SERVICES (Sep. 2014); according to this study, there is only an one-percent different between Black and White illicit drug (10.5 and 9.5 in 2013, respectively; Drug Offenders in Federal Prisons: Estimates of Characteristics Based on Linked Data," BUREAU OF JUSTICE STATISTICS (Dec. 2016), https://www.bjs.gov/content/pub/pdf/dofp12.pdf; Black offenders made up 38.8% of federal inmates, compared to 21.8% of White inmates .

213 *See generally* Alexander, *supra note* 205 (2012), which discusses the reoccurring stereotype of Black Americans throughout American history, practically Chapter Three's discussion of implicit bias against Black Americans expressed throughout the War on Drugs; *see also* Robert J. Smith, Justin D. Levinson, and Zoë Robinson, Article: Implicit White Favoritism in the Criminal Justice System, 66 ALA. L. REV. 871, 881-883 (2014).

214 See generally "The War on Marijuana in Black and White," AMERICAN CIVIL LIBERTIES

implicit bias held by law enforcement toward minorities has fueled controversial tactics to stop crime, including the "Stop-and-Frisk" program in New York.[215]

Prosecutorial discretion of charging suspects is a factor in how Black defendants end up disproportionally serving mandatory-minimum sentences. The prosecutorial discretion to charge defendants with offenses with mandatory minimum sentencing is a persistent concern among critics of the policy. The interest of achieving justice in a case may be hampered by the incentive to dispose of cases quickly and successfully to achieve recognition and maintain job security.[216] Prosecutors may try to balance the interest of pleasing judges by issuing as many pleas as possible with the public's interest in justice; doing well with the former may bring more favorable rulings by the judge in the future, while the latter presents the judicial system as functioning under the public eye.[217] Because of these incentives, prosecutors may charge offenses with a mandatory minimum penalty to persuade defendants to plea out and/or cooperate with prosecutors on subsequent cases.[218] The favoring of plea bargaining is apparent in percentages of disposition of felony cases in New York in 2015; over 64% of felony cases were plead out while 5% of felony cases ended with a conviction at trial.[219] Critics believe this routine practice does more harm than good; because of the pressure exerted by both prosecutors and defense counsel, defendants may be plead guilty regardless of the strength of

UNION (June, 2013), https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf , which discusses studies indicating similar usage of marijuana between Black and White Americans and the disproportionate arrest rates. See also Jamie Fellner, Race, Drugs, and Law Enforcement in the United States, 20 STAN. L. & POL'Y REV 257 [hereafter *J. Fellner*] (2009) which discusses several studies regarding drug use between Black and White Americans by drug type and the disproportional arrest and conviction rates between them.

215 The practice was ruled unconstitutional in *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). The practice yielded 4.4 million Terry stops between January 2004 and June 2012, of which 52% of the people stopped were Black (although 23% of the city population in 2010 was Black) and only 2.8% of Black people stopped resulted in weapons and/or contraband being seized. The City's argument that the racially disproportionate stops were based on reasonable suspicion of criminal activity was denied because the minuscule hit-rate of stopped persons should have given the city an indication that the targeting of the specific population was flawed in attempting to curb crime, and instead led to continuous fourth amendment violations.

216 Stephanos Bibas, Article, *Plea Bargaining Outside The Shadow of Trial*, 117 HARV. L. REV. 2463, 2470-2476 (2004); the financial incentive for prosecutors is not as predominate as it is to defense attorneys, though both tend to have overlapping incentives, see notes 244-248 and accompanying text; Coramae Richey Mann, UNEQUAL JUSTICE: A QUESTION OF COLOR 180-181 (1993).

217 Bibas, *supra note* 214 at 2470-2476.

218 Erik Luna & Paul G. Cassell, Article: *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 10-13 (2010).

219 New York State Felony Processing Report: Calendar Year 2015, NEW YORK STATE CORRECTIONS AND COMMUNITY SUPERVISION, http://www.doccs.ny.gov/Research/Reports/2016/NYS_Felony_Processing_2015.pdf.

evidence or if they are guilty.[220] The large quantity of guilty pleas can also be attributed to the overwhelming reliance on court-appointed representation; in a Bureau of Justice Statistics study published in 2000, roughly two-thirds of state defendants were represented by a publicly-financed attorney; Black and Hispanic defendants were more likely to be represented by public defenders than White defendants.[221] Poor defendants may receive inadequate representation because the defenders also have an incentive to plea out cases regardless of actual guilt. Publicly-funded attorneys are typically assigned an encumbering amount of cases annually, far exceeding the recommended 150 felony or 400 misdemeanor cases the American Bar Association recommends; this comes in part from an ineffective amount of state and federal funding, comparably lower than the prosecutorial budget.[222] With the added pressure from prosecutors and judges to plea out quickly, or risk losing out on a good deal, defenders are unable to properly assess an individual case, which could be better served determining the available evidence and the likelihood of acquittal at trial.[223] If a Defendant does not take a plea, or is not offered one, and goes to trial, he is more likely to be convicted if he is represented by a publicly-funded attorney in part because of the lawyer's inexperience in litigations.[224]

220 U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL
SENTENCING POLICY 102-103 (2002), cited in Vagins & McCurdy, *supra note* 208 ("…data from the
Sentencing Commission shows that 73% of crack defendants have only
low-level involvement in drug activity, such as street-level dealers, couriers,
or lookouts."); *see also J. Fellner*, *supra note* 214, which refers to other studies which show low-level offenses occupying most drug offenders in state and federal prisons.

221 Caroline Wolfe Harlow, Ph.D., "Defense Counsel in Criminal Cases," BUREAU OF JUSTICE STATISTICS (Nov. 2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf .

222 Johnathan Ross, "Ten Principles of a Public Defense Delivery System," AMERICAN BAR ASSOCIATION (2002),
http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf , cite in Thomas Giovanni and Roopal Patel, *Gideon at 50: Three Reforms to Revive the Right to Counsel*, BRENNEN CENTER FOR JUSTICE (2013), http://www.brennancenter.org/sites/default/files/publications/Gideon_Report_040913.pdf.

223 *Id*.

224 Erin York Cornwell, *The Trials of Indigent Defense: Type of Counsel and Case Outcomes in Felony Jury Trials*, 78 ALBANY L. REV 1239, 1251-1259 (2015) Defendants with private counsel serve slightly longer sentences than defendants with court-appointed attorneys, though other factors may explain this fact; court-appointed attorneys are usually more cordial with prosecutors due to their frequency of bargaining together. Also, defendants with private counsel are more likely to go to trial, so they would risk higher sentences if convicted at trial, *see* Harlow, *supra* note 244.

D. Compare Mandatory Minimums Sentencing for Drugs and Sex Offenses

Though it is arguable whether drug offenses are as harmful to society as the punishments attached to them reflects, the same cannot be said regarding the heinousness of rape and sexual assault. The harm a rape victim suffers does not necessarily appear externally through physical injury; rather psychological trauma such as Post Traumatic Stress Disorder and Major Depression may plague the victim due the intrusion of one's personal space and deprival of autonomy and control.[225] Subsequent reporting and judicial proceedings may also retraumatize victims because they may repeat their story in a public space and have details of their intimate lives exposed, barring the application of a rape shield law.[226] The devastation left from the offense merits a more definite punishment than that which will result if it is left in the hands of a judge or prosecutor to decide, who could advocate for a lighter sentence.

Mandatory minimum sentencing serves the public's interest in deterrence and retribution for an offense; by having a guaranteed or increased prison sentence in place with an offense, society's abhorrence of the offense is expressed with the goal to deter others from doing it and sufficiently punishing those who do.[227] The unforgiving nature of these viewpoints are of concern to some that it are both too severe and inconsiderate of the individual offender.[228] But if mandatory minimum

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225 Schafran, *supra* note 35 at 444-452 (1992); Shanahan, *supra* note 22 at 1377-1379 (1999), where Author notes that victims of non-stranger rape may suffer more trauma in part because they blame themselves for the attack:

> "Moreover, as compared to victims of non-stranger rape, victims of stranger rape are more likely to seek support from others to deal with their experience. This difference is significant because talking about the ordeal has important therapeutic value. 44 Victims of non-stranger rape tend not to discuss their attacks because they experience heightened feelings of guilt and self-blame. By remaining silent, victims of non-stranger rape may suffer a greater psychological cost than victims of stranger rape 'whose open discussion of their experiences alleviates some of the psychological symptoms.'"

See also Dean G. Kilpatrik, Ph.D., *The Mental Health Impact of Rape*, NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER MEDICAL UNIVERSITY OF SOUTH CAROLINA (retrieved Jan. 12, 2017), https://mainweb-v.musc.edu/vawprevention/research/mentalimpact.shtml .

226 Galvin, *supra* note 105 at 794-796.

227 *2011 Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, Chapter 5, "POLICY VIEWS ABOUT MANDATORY MINIMUM PENALTIES"*, UNITED STATES SENTENCING COMMISSION, http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_05.pdf .

228 *Id*.

sentencing is implemented in a similar vein as California, then there would be no excessive sentence that a defendant would not already be eligible to receive. In New York, if N.Y. Penal §70.80 (4) (b)[229] were to be removed, then a defendant would have to serve the minimum statutory sentence for either a class D- or E-felony sex offense violation.[230] Hypothetically, if the probation option were eliminated in 2015, up to sixty offenders would have been sentenced instead of receiving probation.[231] The possible expense of implementing the law may not be extraordinary but could be excessive due to the relatively high average cost of $60,076 per inmate of New York prisons.[232] Still, the greater assurance that an offender would be punished may give a greater benefit to rape survivors and society as a whole who want that punishment to reflect their disdain for the offense than the cost. The concern that this policy will be unfair to first-time offenders is also calmed by existing statutes which differentiate sentencing of repeat offenders. For instance, if a defendant is convicted of Rape in the Third Degree,[233] a class E felony, then he must serve at least a year and a half sentence under N.Y. PENAL §70.80 (4) (a) (iv); however, if he were a predicate felony sex offender, then he would be subject to, at least, either a two or two-and-a-half-year sentence, depending on whether the predicate was non-violent or violent, respectively.[234]

Additionally, this sentencing scheme is not severe considering the heinousness of the offense; the potential sentence is light given the likelihood that a class D- or E-felony sex offense violation would not have the elements of a "typical rape." For example, compare this minimal sentence to Georgia's mandatory minimum provision for rape; Georgia is a force state which carries a mandatory minimum life sentence of twenty-five years.[235] Scholars have deemed that such a

229 N.Y. Penal §70.80 (4) (b):

> "Probation. The court may sentence a defendant convicted of a class D or class E felony sex offense to probation in accordance with the provisions of section 65.00 of this title."

230 N.Y. Penal §70.80 (4) (a) (iii) & (iv); the minimum sentence for a D- or E-felony violation is two and one and one-half years, respectively.

231 *See New York State Felony Processing Report: Calendar Year 2015*, NEW YORK STATE CORRECTIONS AND COMMUNITY SUPERVISION, http://www.doccs.ny.gov/Research/Reports/2016/NYS_Felony_Processing_2015.pdf; this claim assumes the sixty offenders sentenced in 2015 were convicted of a D- or E-felony.

232 "The Price of Prisons: What Incarceration Costs Taxpayers," Vera Institute of Justice (Feb. 2012), https://www.vera.org/publications/the-price-of-prisons-what-incarceration-costs-taxpayers.

233 N.Y. PENAL §130.25.

234 N.Y. PENAL §70.80 (5) (b) (iv) & (5) (c) (iv).

235 Ga. Code Ann. §16-6-1; notably, the Court of Appeals of Georgia, in upholding a rape conviction, stated that where the victim's will is temporarily lost due to drug or alcohol use, sexual intercourse constitutes rape; *see* Paul v. State, 144 Ga. App. 106 (Ga. Ct. App. 1977).

lengthy sentence would influence juror's decision in convicting defendants of rape, which does not follow the prevailing myths.[236] But the minimum prison sentence for an offender could be comforting to some jurors who would otherwise be skeptical to convict someone for a non-injurious rape. Such a minimal sentence may not be satisfying to reformist who seek to educate the public on the prevalence of alcohol-induced rape and unaffirmed consent. Some may even portray the distinct offenses and their penalties may reinforce the idea that certain assaults are less serious than others.[237] But as with many cultural norms which stigmatized women's sexual behavior and which deemed marital rape to be acceptable, certain ideas engrained in society about what constitutes rape needed to be re-evaluated.[238] In addition to educating judicial actors and law enforcement about appropriate responses to atypical reports, society must diminish the responsibly imparted on women to prevent their own attacks and cease qualifying certain behavior by men which inculpates their actions.[239]

The issue of discrepancy of perpetrators who commit rape and those who are arrested and convicted does not mirror the discrepancy that exist with drug offences for two reasons: one, the investigations of both crimes are relatively different, and two, the racial demographic of the perpetrators arrested and convicted may have a different impact when tailored to rape offenses.

Drug investigations can begin through several different means; while citizen complaints are valued assets to commencing investigations, law enforcement agencies generally investigate suspected drug business in neighborhoods.[240] Some investigations can start from an initial arrest for possession and plea-induced cooperation may dictate how they will proceed.[241] The investigation of a rape

236 Andrea A. Curio, *The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws*, 20 GA. ST. U.L. REV. 565, 585-587, 591-593 (2004); at the time of the article's publishing, the mandatory minimum for rape in Georgia was ten years, *see* Ga. Code Ann. §16-6-1 (amend. 2006).

237 Shanahan, *supra note* 22 at 1376-1377, where Shanahan reinforced the common critique of force statutes:

"Limiting the cognizable harm of rape to physical injury means that nonstranger [sic] rape, because it often involves no physical injury, will not be recognized as a serious crime."

238 *See* Nicolis *supra* note 155 at 221; coinciding with the enactment of various reforms in the 1970s, judicial actors and law enforcement was educated on the new changes and invalid assumptions regarding rape.

239 *Id*. at 265-269; In regard to alcohol-facilitated rape, Nicolis suggest prosecutors worry less about trying "strong" case which could diminish the reporting of these kinds of assaults; Harding, *supra* note 55 at 27-46.

240 Mark H. Moore and Mark A.R. Kleiman, *Perspectives on Policing, "The Police and Drugs*", U.S. DEPT. OF JUSTICE (Sep. 1989), https://www.ncjrs.gov/pdffiles1/nij/117447.pdf .

241 Matt Hutton, *Drug Task Force Investigations Can Take Weeks or Months, But Often Yield Results*, DAILY REVIEW ATLAS (Sep. 29, 2010), http://www.reviewatlas.com/x211927986/Drug-

generally commences only when the rape is reported.[242] Officials tailor their investigation based on the available evidence and, if possible, the description of the perpetrator.[243] The "proactive" approach to drug investigations could lead to specific targeting of subjects who police believe are potential violators, thus the racial discrepancy in searches and arrest for low-level offenses. Conversely, rape and sexual assault offenses are "reactive," therefore any instances of wrongfully accused men of color being charged and convicted can come from either misidentification by a witness or missteps by the police.[244] But the racial and economic demographic of defendants strengthen the impression that there would be discrepancies in mandatory minimum sentencing for sex offenses like with drug offenses. Roughly two-thirds of state defendants and eight of ten federal defendants convicted of violent crimes, including sex offenses, were represented by publicly-funded attorneys; because these defendants are predominantly Black or Hispanic, this could suggest that the conviction rate will reflect this discrepancy, especially with the traditional plea bargaining practice which leave many poor and minority offenders with little choice but to face punishment.[245] The demographic of rape perpetrators is also pertinent to determining the likelihood of possible convictions, though its accurate depiction of attacks is not accurate. In a 2014 report from the Bureau of Justice Statistics (BJS), researchers found that in cases of rape or sexual assault where the female victim was of college-age (18-24 years old), roughly 60% perceived their offender to be a White male.[246] A 1997

Task-Force-investigations-can-take-weeks-or-months-but-often-yield-results .

242 This may be because most sexual assaults take place indoors, thus patrolling officers may not around to encounter and stop a rape attempt, *see generally* Dr. Larry Jetmore, *Investigating Rape Crimes, Part 1: Guidelines for First Responders*, POLICEONE (Jun. 15, 2006), https://www.policeone.com/police-products/investigation/evidence-management/articles/509858-Investigating-Rape-Crimes-Part-1-Guidelines-for-first-responders/ . *See also* Female Victims of Sexual Violence, 1994-2010, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, B.J.S. (March 2013). (between 2005-2010, 55% of assaults took place at or near the victim's home, compared to 15% that took place at an open, public area).

243 Jetmore, *supra note* 242.

244 No recent case may be as great as an example of this as "Central Park Five" case. Five Black teens were convicted of raping a White woman on April 19, 1989. Lacking any physical evidence, the case against these teens primarily relied on their statements made to officials after being detained, but those statements were subsequently recanted and the teens argued they were coerced. It was not until the real perpetrator confessed to the crime in 2002 did the men gain vindication from the accusations. Though there might not have been official misconduct, the sheer brutality of the assault, the public outrage, and the implicit perception of Black men as savages might have led to the conviction despite the weak evidence, *see generally* Duru, *supra note* 65.

245 Wolfe, *supra note* 221.

246 S*ee* Sofi Sinozich & Lynn Langston, Ph.D, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, BUREAU OF JUSTICE STATISTICS (Dec. 2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf .

BJS report stated 52% of rape perpetrators in state prison were White men, compared to 43% of Black men.[247] But another BJS report stated that Black men made up 42% of the arrest rate in 2009 for rape in seventy-urban counties.[248] In New York City, 51% of rape suspects and 44% of arrestees were Black in 2015.[249] These reports do not give a precise calculation of the racial identity of most rape suspects and convicts in the U.S; the former two studies are based on voluntary survey answers and do not include reported rapes while the latter two are both limited in the locations and may not represent an accurate representation due to unreported cases.[250] One could predict that because most crime is committed intraracially,[251] the demographic of rape perpetrators would mirror the overall demographic of a location, but this may not be easy to conclude because of the lack of reports or consistent statistics.

Though the potential for non-White defendants disproportionally representing offenders sentenced is not certain, society's abhorrence for the offense may come before such risk. Consider possession of child pornography, another offense with mandatory minimum penalties; White offenders overwhelmingly make up arrestees for this crime and other federal sex exploitation laws. [252] Though there is criticism

247 Lawrence A. Greenfeld, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, BUREAU OF JUSTICE STATISTICS (Feb. 1997), https://www.bjs.gov/content/pub/pdf/SOO.PDF . The report stresses that this number does not include distinctions between White- and Black-Hispanics and non-White and non-Black Hispanics.

248 Brian A. Reeve, Ph. D., *Felony Defendants in Large Urban Counties, 2009 - Statistical Tables*, BUREAU OF JUSTICE STATISTICS (Dec. 2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf . The study uses date collected from 39 large counties, which were part of a sample that spanned the 75 largest urban counties in America.

249 *Crime and Enforcement Activity in New York City*, N.Y. POLICE DEP'T, http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/year_end_2015_enforcement_report.pdf ("suspect" in the report refers to the description given to the police, "arrestee" refers to the description of a suspect arraigned for the offense). Reports in notes _ and _ include answers regarding attacks which were not reported while the reports in note and here include actual statistics of reported complaints and convictions.

250 Reeve, supra note 270; the study followed only 75 counties out of the 3,601 urban counties and urban clusters in the U.S., so the results may produce a correlating figure of actual demography in most Urban areas.

251 *Crime the United States, 2015: Murder Race, Ethnicity, and Sex of Victim by Race, Ethnicity, and Sex of Offender, 2015*, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING (retrieved Jan. 12, 2017), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_6_murder_race_and_sex_of_vicitm_by_race_and_sex_of_offender_2015.xls . (The FBI does not collect date regarding the demographic of rape victims and rape preparators, but regarding murder, about 81% of White victims were killed by White victims and roughly 89% of Black victims were killed by Black offenders.)

252 18 USC §2252 (a) (4); Mark Motivans, Ph.D. & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders, 2006*, BUREAU OF JUSTICE STATISTICS (Dec. 2007), https://www.bjs.gov/content/pub/pdf/fpcseo06.pdf ; eighty-nine percent of arrestees were White men and were seventy-five percent of all defendants for federal sex exploitation. *See also* Jane

regarding the penalties for theses offenses, if focuses on the erosion of civil liberties of offenders, not on the racial discrepancy that exist within this group.[253] If society believes that sex offenses warrant harsher punishment than drug offenses, then this may leave us disinterested in the racial makeup of subsequent offenders.

CONCLUSION

The treatment of rape victims by the criminal justice system is one reason for the deterrence of rape victims reporting their assaults. There is a stigma to being a rape victim that remains prevalent, deterring some victims from reporting if the assault does not exemplify a "typical rape." But if a victim does decide to come forward and the assailant is eventually convicted, the fear that justice will not be served for victims can still be illustrated through a light sentence, as in the case of Brock Turner. By allowing such a low sentence to be an option, we continue to hold the idea that some rapes are not serious, that some victims are not as damaged as others, and that some offenders have qualities which can levy more sympathy towards them instead to the victims. If New York were to implement mandatory minimum sentencing for rape offenses, then the message regarding the seriousness of the offense would be solidified through the assurance of punishment.

This note's suggestions regarding the enactment of mandatory minimum sentencing does not guarantee that more rape complaints will be filed or more perpetrators will be punished. The myths surrounding rape dampen the likelihood that those who have suffered this crime will report if any one aspect of the attack those not meet society's expectations. More needs to be done to raise awareness of rape and sexual assaults which do not meet the myths; more awareness about gaining and validating one's consent is one way to ensure any subsequent attack is affirmed by police, prosecutors, and jurors that a rape did occur. Also, educating the general population about the myths regarding a perpetrator and victim may broaden potential jurors' minds about what a successful rape prosecution should and should not entail.

The one objection to this policy is the possible disparity in sentencing between racial groups and economic classes; this could be calmed when considering the various factors which made the War on

Wolak et al, *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE: J. OF RESEARCH & TREATMENT 22 (2011), which describes the typical demographic of an offender, White male with some college education, remained stagnant from 2000 to 2006.

253 *See generally* Yung, *supra* note 88.

Drugs a disaster to the Black community and notice their absence when it comes to targeting rape and sexual assault. If we do see a disparity in California, we should research the racial demographic of the cities where the differences exist, the groups most effected by the sentence, and determine how law enforcement, prosecutors, and publicly-funded attorneys have a role in producing these disparities. The last thing that we want to result from this and subsequent change is innocent actors being swept up in the effort to dispel this problem. But as with drug possession and use, rape harrows through all communities; we must consider if the seriousness of the offense is worth shadowing a possible disparity.