

5-18-2019

# WINNING THE FIGHT BUT LOSING THE WAR: WHY CALIFORNIA SHOULD REMOVE JUDGES FROM THE LIST OF LOCAL OFFICIALS WHO ARE SUBJECT TO RECALL

Alexander S. Williams

Follow this and additional works at: <https://digitalcommons.law.scu.edu/lawreview>

Part of the [Law Commons](#)

## Recommended Citation

Alexander S. Williams, Case Note, *WINNING THE FIGHT BUT LOSING THE WAR: WHY CALIFORNIA SHOULD REMOVE JUDGES FROM THE LIST OF LOCAL OFFICIALS WHO ARE SUBJECT TO RECALL*, 59 SANTA CLARA L. REV. 425 (2019). Available at: <https://digitalcommons.law.scu.edu/lawreview/vol59/iss2/4>

This Case Note is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized editor of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com), [pamjadi@scu.edu](mailto:pamjadi@scu.edu).

**WINNING THE FIGHT BUT LOSING THE WAR: WHY  
CALIFORNIA SHOULD REMOVE JUDGES FROM THE  
LIST OF LOCAL OFFICIALS WHO ARE SUBJECT TO  
RECALL**

*Alexander S. Williams\**

TABLE OF CONTENTS

I. Introduction .....	426
II. Background .....	427
A. History of Direct Democracy .....	427
B. History and Process of California Recall .....	429
C. Mechanisms to Police Judges in California .....	430
1. Commission on Judicial Performance .....	430
2. California Impeachment .....	431
D. Judicial Independence .....	432
E. Arguments Regarding the Recall of Judge Aaron Persky .....	432
1. Arguments Opposing Judicial Recall .....	433
2. Arguments Supporting Judicial Recall .....	434
3. Judicial Recall in Other States .....	435
III. The Legal Problem .....	437
IV. Analysis .....	437
A. California's Commission on Judicial Performance Explanatory Statement .....	437
B. Analysis of Judicial Recall in Other States .....	445
C. Empirical Studies Reveal That Political Pressures Impact Judges' Sentencing Decisions to the Detriment of Criminal Defendants .....	446
V. Proposal .....	449
VI. Conclusion .....	451

---

\* Articles Editor, Santa Clara Law Review, Vol. 59; J.D. Candidate, Santa Clara University School of Law, 2019. I would like to thank Professor Cookie Ridolfi for encouraging me to write on this controversial topic. Additionally, I would like to thank Professors Ellen Kreitzberg and Marina Hsieh for contributing research materials. I would also like to thank my family and friends for their support throughout law school. Finally, special thank you to Vol. 59 Editorial Board for their skillful work on this Note.

## I. INTRODUCTION

Judicial recall threatens to abolish the independence of the judiciary.<sup>1</sup> These constitutional provisions set a dangerous precedent and will have an adverse effect on merciful sentencing in criminal cases.<sup>2</sup> In California, such a case exemplified these trepidations and ignited a fierce debate.<sup>3</sup> In 2017, a petition circulated in Santa Clara County for the recall of Judge Aaron Persky, a presiding judge for the past thirteen years, regarding his grossly lenient, albeit lawful, sentencing in the sexual assault case involving ex-Stanford swimmer Brock Turner.<sup>4</sup> The recall was placed on the June 2018 ballot, where Judge Persky was subsequently recalled.<sup>5</sup>

First, this Note will trace the historical development of judicial recall, along with other mechanisms for policing the judiciary. Second, this Note will identify the problem in California's Constitution: that permitting citizens to recall judges will allow political pressure to influence judges' sentencing decisions, thereby, abolishing the independence of California's judiciary. Third, this Note will explore why the current mechanisms for policing judges are adequate, as supported by empirical studies, thus demonstrating why judicial recall is unnecessary and its debilitating effects on an independent judiciary, the poor, and people of color. Finally, to preserve judicial independence in California, this Note proposes a solution and lays out a model amendment eliminating judges from being subject to recall, by borrowing underlying logic from states that do not provide judicial recall.

The goal of this Note is to emphasize why state constitutions permitting judicial recall will abolish the independence of the judiciary and set a dangerous precedent for criminal sentencing. Additionally, the Note utilizes the California case *People v. Turner*,<sup>6</sup> where Judge Aaron Persky administered the sentencing decision, as a focal point for highlighting these issues.

---

1. LaDoris Hazzard Cordell, *Why the Recall of Judge Persky is Terrible for Racial Justice*, JUDGECORDELL.COM, <http://judgecordell.com> (Sept. 23, 2017).

2. *Id.*

3. *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, NAT'L PUB. RADIO, <https://www.npr.org/sections/thetwo-way/2018/06/05/617071359/voters-are-deciding-whether-to-recall-aaron-persky-judge-who-sentenced-brock-tur> (Nov. 4, 2018).

4. *Id.*

5. *Id.*

6. Sentencing Memorandum, *People v. Turner* (No. B1577162).

## II. BACKGROUND

*A. History of Direct Democracy*

The Progressive Era saw the emergence of direct democracy as a mechanism for American citizens to directly participate in the political process.<sup>7</sup> The Progressive movement's general theme was to "restore a type of economic individualism and political democracy that was widely believed to have existed earlier in America and to have been destroyed by corporations and the corrupt party machines."<sup>8</sup> The Progressives were committed to transforming America's social, economic, and political climate.<sup>9</sup> In sum, they sought to use direct democracy as a means "to remedy the socioeconomic and cultural ills" afflicting the country during this era.<sup>10</sup>

To achieve social reform, the Progressives felt they needed a new political system, separate from the one they inherited.<sup>11</sup> All Progressives recognized the initiative, referendum, and recall as means toward "removing the corrupting influences which straightjacketed the political system into acquiescence to the social afflictions accompanying industrialization."<sup>12</sup>

Direct democracy only applies in states that have chosen to adopt it as part of the state constitution.<sup>13</sup> "The initiative is a process that enables citizens to bypass their state legislature by placing proposed statutes and, in some states, constitutional amendments on the ballot" for amendment.<sup>14</sup> The referendum "allows the public to vote on laws passed by the legislature before they become effective."<sup>15</sup> The recall is a procedure that allows citizens to remove and replace local and public officials before the end of their term of office.<sup>16</sup> The United States Constitution does not provide for recall of any federally elected

---

7. Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. & POL'Y REV. 11, 18 (1997).

8. *Id.*

9. Persily, *supra* note 7, at 22.

10. *Id.* at 23.

11. *Id.*

12. Persily, *supra* note 7, at 24.

13. See generally *Initiative, Referendum and Recall*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 20, 2012), <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx>.

14. *Id.*

15. Rebecca White Berch, Megan K. Scanlon & Jared L Sutton, *The Centennial of Arizona's Constitution: Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 ARIZ. ST. L.J. 468, 488 (2012).

16. *Initiative, Referendum and Recall*, *supra* note 13.

official.<sup>17</sup> Unlike the recall, which is a political device, impeachment is the legal process of removing an elected official from office.<sup>18</sup> Further, impeachment distinguishes itself from recall, because it generally requires that a government official commit a named crime.<sup>19</sup>

Seeing direct democracy as a threat to corporate interests, Pacific States Telephone and Telegraph Company challenged the constitutionality of the initiative process itself, and eventually argued it before the U.S. Supreme Court, alleging that it violated the “Guarantee Clause”<sup>20</sup> of the U.S. Constitution.<sup>21</sup> The Court “rejected the company’s argument and reemphasized the history of precedent, declaring the Guarantee Clause to be a non-justiciable political question to be answered only by the political branches.”<sup>22</sup> Thus, the decision erased any doubt as to whether direct democracy was constitutional.<sup>23</sup>

Although direct democracy is constitutional, these same democratic devices that originated as tools for the majority to uproot corporate interests have now evolved into mechanisms used by similar corporations and interest groups to attain their interests.<sup>24</sup> Corporations and interest groups quickly learned to use direct democracy to their advantage.<sup>25</sup>

In recent years, “liberals, conservatives, politicians, and citizens” have utilized the ballot to enact proposals they believe are being insufficiently addressed through the legislative process, and to resolve highly publicized political issues.<sup>26</sup> This use of direct democracy has created an initiative industry for collecting signatures, promoting measures, and attaining interests.<sup>27</sup> Additionally, direct democracy has manifested itself as a means for politicians and interest groups to manipulate the political process by permitting them to frame political

---

17. Tom Murse, *Can You Recall a Member of Congress?*, THOUGHT CO. (May 3, 2017), <https://www.thoughtco.com/can-members-of-congress-be-recalled-3368240>.

18. Recall of State Officials, NAT’L CONF. OF ST. LEGISLATURES (Mar. 8, 2016), <http://www.ncsl.org/research/elections-and-campaigns/recall-of-state-officials.aspx>.

19. Persily, *supra* note 7, at 14.

20. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.”).

21. Persily, *supra* note 7, at 32 (citing *Pac. Sts. Tel. & Tel. Co. v. Or.*, 223 U.S. 118 (1912)).

22. *Id.* at 32 (citing *Pac. Sts. Tel. & Tel. Co.*, 223 U.S. at 142-43).

23. *Id.* at 32.

24. *Id.*

25. *Id.* at 37.

26. *Id.* at 38.

27. Persily, *supra* note 7, at 38.

issues.<sup>28</sup> However, California recall is unique, in that it provides its citizens with broad power to recall officials.<sup>29</sup>

### *B. History and Process of California Recall*

Under the California Constitution, the Legislature possesses the power to provide recall of local officials.<sup>30</sup> Using this power, the Legislature drafted the recall provision, which grants citizens the power to remove state and local officials.<sup>31</sup>

The citizens of California adopted the recall provision as part of the California Constitution in 1911.<sup>32</sup> State trial court judges, unlike federal court judges, judges of the state court of appeal, and state Supreme Court justices, are listed as local officials and are subject to recall under local official standards enumerated within the California Constitution.<sup>33</sup> The standards required to initiate the recall of a local official are considerably lesser than those required to recall a state official.<sup>34</sup> The California constitution does not require specified grounds to recall a local official.<sup>35</sup> Although the recall of judges has been a rare event, California had previously recalled three superior court judges in 1932.<sup>36</sup> Most recently, California recalled Governor Gray Davis in 2003.<sup>37</sup>

The California Constitution prescribes the requirements for recall of local officials.<sup>38</sup> The recall process consists of a two-step petition and voting process: (1) the citizen recommending the action circulates a petition to obtain enough signatures to place the issue on the ballot, and

---

28. *Id.*

29. CAL. CONST. art. II, § 13 (“Recall is the power of the electors to remove an elective officer.”).

30. CAL. CONST. art. II, § 19 (“The Legislature shall provide for recall of local officers. This section does not affect counties and cities whose charters provide for recall.”).

31. CAL. CONST. art. II, § 13.

32. California Constitution Center, *What Does California’s Experience With Recall of Judges Teach Us?*, SCOCA BLOG (Nov. 10, 2016), [http://scocablog.com/what-does-californias-experience-with-recall-of-judges-teach-us/#\\_ftn27](http://scocablog.com/what-does-californias-experience-with-recall-of-judges-teach-us/#_ftn27).

33. CAL. CONST. art. II, § 14(b) (“A petition to recall a statewide officer must be signed by electors equal in number to 12 percent of the last vote for the office, with signatures from each of 5 counties equal in number to 1 percent of the last vote for the office in the county. Signatures to recall Senators, members of the Assembly, members of the Board of Equalization, and judges of courts of appeal and trial courts must equal in number 20 percent of the last vote for the office.”).

34. *Id.*

35. CAL. CONST. art. II, § 14(a) (“Recall of a state officer is initiated by delivering to the Secretary of State a petition alleging reason for recall. Sufficiency of reason is not reviewable. Proponents have 160 days to file signed petitions.”).

36. California Constitution Center, *supra* note 32, at n.27 (citing Wilbank J. Roche, *Judicial Discipline in California: A Critical Re-Evaluation*, 10 LOY. L.A. L. REV. 192 (1976)) (discussing 1932 recall of Los Angeles Superior Court judges John L. Fleming, Dailey S. Stafford, and Walter Guerin).

37. California Constitution Center, *supra* note 32.

38. CAL. CONST. art. II, § 14 subsections (a) through (c) lay out this framework.

(2) if sufficient signatures are collected and certified (in California the sufficient amount being twenty percent of the last vote for the office<sup>39</sup>), the issue is placed on the ballot for a vote.<sup>40</sup> If the citizens vote in favor to recall the official, the official will be removed from office before the end of his or her term and a replacement official (the candidate listed on the ballot who received the most votes) will fill the position.<sup>41</sup>

### *C. Mechanisms to Police Judges in California*

California currently possesses three mechanisms to police judges: the Commission on Judicial Performance,<sup>42</sup> impeachment,<sup>43</sup> and recall.<sup>44</sup> Additionally, because trial court judges are elected officials, it could be said that a fourth mechanism for policing exists in the form of retention elections.<sup>45</sup> These elections are held every six years and allow voters to decide whether to re-elect a judge for another term in office.<sup>46</sup>

#### *1. Commission on Judicial Performance*

The Commission on Judicial Performance (CJP) was established by legislative constitutional amendment approved by voters in 1960.<sup>47</sup> The CJP is an “independent state agency responsible for investigating complaints of judicial misconduct, judicial incapacity, and for disciplining judges, pursuant to the California Constitution.”<sup>48</sup>

The CJP consists of one judge of a court of appeal and two superior court judges.<sup>49</sup> It also consists of two members of the state bar of California who have practiced in the state for ten years, and six citizens who are not judges, retired judges, or members of the state bar.<sup>50</sup> Finally, CJP members are eligible to serve a maximum of two four-year terms or a total of ten years, if appointed to fill a vacancy.<sup>51</sup>

---

39. CAL. CONST. art. II, § 14(b).

40. Berch, Scanlon & Sutton, *supra* note 15, at 488.

41. CAL. CONST. art. II, § 15(e) (“If the majority vote on the question is to recall, the officer is removed and, if there is a candidate, the candidate who receives a plurality is the successor. The officer may not be a candidate, nor shall there be any candidacy for an office filled pursuant to subdivision (d) of Section 16 of Article VI.”).

42. CAL. CONST. art. VI, § 8.

43. CAL. CONST. art. IV, § 18.

44. CAL. CONST. art. II, § 14.

45. CAL. CONST. art. VI, § 16.

46. *Id.* Subsection (c) reads terms of judges of superior courts are six years beginning the Monday after January 1 following their election.

47. Commission on Judicial Performance, C.A. GOV’T, [https://cjp.ca.gov/legal\\_authority/](https://cjp.ca.gov/legal_authority/).

48. Commission on Judicial Performance, C.A. GOV’T, <https://cjp.ca.gov>. See also CAL. CONST. art. VI, § 18; CAL. CONST. art. VI, § 18.1; CAL. CONST. art. VI, § 18.5.

49. CAL. CONST. art. VI, § 8(a).

50. *Id.*

51. *Id.*

Pursuant to the California Constitution, the CJP has the authority to make rules for the investigation and formal proceedings against judges.<sup>52</sup> These rules are referred to as the Rules of the Commission on Judicial Performance.<sup>53</sup> In relevant part, one provision of the Rules of the CJP sets out the standard of review and standards for removal pertaining to legal error:

[d]iscipline . . . shall not be imposed for mere legal error without more. However, a judge who commits legal error in which, in addition, clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty is subject to investigation and discipline.<sup>54</sup>

Additionally, the California Constitution grants the California Supreme Court the power to make rules for the conduct of judges, both on and off the bench, referred to as the Code of Judicial Ethics.<sup>55</sup> This code serves as an ethical guideline, to which judges must abide.<sup>56</sup> It also serves as a tool for the CJP to use during its investigation, along with other laws.<sup>57</sup> Finally, after concluding an investigation, the CJP may submit a petition and recommendation to the Supreme Court for the removal of a judge.<sup>58</sup> Upon submission, the Supreme Court reviews investigation and recommendation, and determines whether the judge will be removed.<sup>59</sup>

## 2. California Impeachment

As mentioned above, impeachment is a legal process.<sup>60</sup> The California Constitution authorizes the power to impeach solely within the Assembly.<sup>61</sup> The Senate tries impeachment trials.<sup>62</sup> Judges of state courts are subject to impeachment for misconduct in office.<sup>63</sup> Judgment may extend only to removal from office and disqualification to hold any

---

52. CAL. CONST. art. VI, § 18. *See also* Commission on Judicial Performance, *supra* note 47.

53. Rules of the Commission on Judicial Discipline, [https://cjp.ca.gov/wp-content/uploads/sites/40/2017/08/CJP\\_Rules.pdf](https://cjp.ca.gov/wp-content/uploads/sites/40/2017/08/CJP_Rules.pdf).

54. *Id.*

55. CAL. CONST. art. VI, § 18(m).

56. *Id.*

57. CAL. CONST. art. VI, § 18.

58. CAL. CONST. art. VI, § 18(d).

59. *Id.* However, if the Supreme Court has not acted within 120 days after granting the petition, the decision of the commission shall be final.

60. Recall of State Officials, *supra* note 18.

61. CAL. CONST. art. IV, § 18(a).

62. *Id.*

63. CAL. CONST. art. IV, § 18(b).



office under the State, however, the person convicted remains subject to criminal punishment according to law.<sup>64</sup>

#### *D. Judicial Independence*

One of the core values of our democracy is judicial independence.<sup>65</sup> “It is based upon the principal that each case should be decided on its particular facts and applicable law rather than in response to political considerations or public opinion.”<sup>66</sup> The Founding Fathers and the Framers adopted the theory of an independent judiciary during the conception and ratification of the U.S. Constitution.<sup>67</sup> Article III of the U.S. Constitution is the crux of judicial independence and provides that federal judges may be appointed for life terms and that the legislative and executive branches may not combine to punish judges.<sup>68</sup>

Alexander Hamilton, a Framers of the U.S. Constitution, offered justification for an independent judiciary in the 78<sup>th</sup> paper of “The Federalist.”<sup>69</sup> Hamilton argued that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.”<sup>70</sup> Further, he explained that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”<sup>71</sup> By this, Hamilton meant that only an independent judicial branch of government would be able to impartially check an excessive exercise of power by the other branches of government.<sup>72</sup> Thus, the judiciary would guard the rule of law in a constitutional democracy.<sup>73</sup>

#### *E. Arguments Regarding the Recall of Judge Aaron Persky*

In California, the recall petition for Judge Aaron Persky has sparked a fierce debate regarding the recall’s effects on California’s independent judiciary. Additionally, Nevada and Utah’s approach to judicial recall will be discussed in contrast to California’s to support the position that

---

64. *Id.*

65. SUP. CT. OF CAL. CTY. OF SANTA CLARA RETIRED JUDICIAL OFFICERS, *Open Letter on the Need for Judicial Independence*, <http://pdfserver.amlaw.com/ca/SCC-Retired-Judges-Open-Letter.pdf>.

66. *Id.*

67. U.S. CONST. art. III, § 1 (“The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office.”).

68. U.S. CONST. art. III.

69. The Federalist No. 78 (Alexander Hamilton).

70. *Id.*

71. *Id.*

72. John Patrick, *Judicial Independence*, ANNENBERG CLASSROOM, <http://www.annenbergclassroom.org/term/judicial-independence>.

73. *Id.*

the recall mechanism is unnecessary and threatens to abrogate the independence of the judiciary.<sup>74</sup>

### *1. Arguments Opposing Judicial Recall*

Opponents of the recall assert that judicial independence is a cornerstone of due process and an essential prerequisite of a fair criminal justice system.<sup>75</sup> “Judges are entrusted with immense power over the life and liberty of criminal defendants from all walks of life, and they need latitude to exercise that power judiciously.”<sup>76</sup> Moreover, judicial recalls over a single lawful judicial ruling threaten our independent judiciary and set a dangerous precedent.<sup>77</sup> The rationale behind this is that “historically and empirically, recall actions push judges towards sharply ratcheting up sentences, especially against the poor and people of color, out of fear of media campaigns run by well-funded interest groups.”<sup>78</sup> Through use of the recall mechanism, we risk repeating an ugly chapter of California’s history: when three California Supreme Court Justices were recalled for voting in opposition to the death penalty, despite casting their votes “in accordance with the dictates of justice and the constitution as they understood them.”<sup>79</sup> In sum, “judges must be able to make decisions without fear of political repercussions.”<sup>80</sup>

Showing judicial mercy by granting a “second chance to criminal defendants is a delicate decision that requires courage on part of the judges.”<sup>81</sup> The CJP investigated the allegations against Judge Persky and rejected the claims of bias, finding that he followed the law and the Santa Clara County Probation Department’s recommendation.<sup>82</sup>

A “proper sentence that punishes and rehabilitates is not something that should be subject to popular vote.”<sup>83</sup> As stated by Judge LaDoris Cordell, “[s]hould the recall succeed, the independence of the California

---

74. See *infra* Section II.E.3.

75. *Open Letter on the Need for Judicial Independence*, *supra* note 65.

76. *Stanford Law School Graduates Submit Letter to Reconsider Recall Effort of Judge Persky*, A.C. JUST. PROJECT, <https://acjusticeproject.org/2016/06/22/stanford-law-school-graduates-submit-letter-to-reconsider-recall-effort-of-judge-persky/>.

77. *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, *supra* note 3.

78. *Law Professors’ Statement for the Independence of the Judiciary and Against the Recall of Santa Clara County Superior Court Judge Aaron Persky*, S.F. CHRON. (Aug. 15, 2017), <http://www.sfchronicle.com/file/232/4/2324-89%20names%20Law%20Professors%20Statement.pdf>.

79. *Stanford Law School Graduates Submit Letter to Reconsider Recall Effort of Judge Persky*, *supra* note 76.

80. *Open Letter on the Need for Judicial Independence*, *supra* note 65.

81. *Stanford Law School Graduates Submit Letter to Reconsider Recall Effort of Judge Persky*, *supra* note 76.

82. See generally *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, *supra* note 3.

83. Cordell, *supra* note 1.

judiciary and the integrity of lawful, albeit sometimes unpopular rulings by judges will be forever compromised.”<sup>84</sup> “Judges must have the ability to exercise their discretion, especially when it comes to sentencing.”<sup>85</sup> The predominant fear is that if voter-initiated recalls based upon unpopular rulings by judges become the precedent, judges will impose mandatory sentences without consideration for a defendant’s individual circumstances.<sup>86</sup> To support their assertions, the opposition cites several studies which indicate that the imposition of mandatory sentencing will have a disproportionately large effect on the poor and people of color.<sup>87</sup> All of these concerns highlight the need for an independent judiciary; one that is unbiased and considers a defendant’s circumstances when determining a sentence under the law, rather than predicating a sentence upon the fear of being recalled.

## 2. Arguments Supporting Judicial Recall

Proponents of the recall propose that citizens must have the power to directly police the judiciary, because judges “exercise political power, and therefore, may act for corrupt and improper reasons.”<sup>88</sup> Additionally, complaints sent to the CJP are subject to a biased, erroneous proceeding, conducted by an agency that has a history of protecting judges.<sup>89</sup> Recall is a constant threat, which makes judges continuously accountable for their actions.<sup>90</sup> Holding judges accountable through recall is a legitimate exercise of democratic accountability.<sup>91</sup> Recall does not affect judicial independence, because it is simply an early retention election.<sup>92</sup> “In a retention election, voters may consider information about a judge’s performance of his duties when casting their ballots.”<sup>93</sup> The recall is no different, as it is merely an alternative to a

---

84. *Id.*

85. *Id.*

86. *Id.*

87. Emi Young & Akiva Freidlin, *Race, Privilege, and Recall: Why the Misleading Campaign Against the Judge Who Sentenced Brock Turner Will Only Make Our System Less Fair*, MEDIUM (Aug. 17, 2016), <https://medium.com/@recalljustice/race-privilege-and-recall-d0658c8d04ea>.

88. Vikram David Amar, *Adventures in Direct Democracy: Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927, 939 n.58 (2004) (explaining the argument in support of including judges within recall statutes).

89. See generally *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, *supra* note 3.

90. *Id.*

91. Tracey Kaplan, *Opponents of Recalling Superior Court Judge Aaron Persky Stress Judicial Independence*, MERCURY NEWS (Oct. 12, 2017), <https://www.mercurynews.com/2017/10/12/opponents-of-recalling-judge-stress-judicial-independence/>.

92. See generally *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, *supra* note 3.

93. *Id.*

traditional election.<sup>94</sup> It is up to the voters to determine whether or not the judge continues in office and the voters may consider the judge's history on the bench, including his decisions, in making their determinations.<sup>95</sup>

Further, because the judiciary was created to serve the public, the people should have the right to remove members who fail to carry out their duties.<sup>96</sup> Thus, the retention election and the recall are similar devices which permit the public to decide whether to remove a judge from the bench.<sup>97</sup>

Finally, because it is the citizen's right to initiate a recall, it follows, then, that it is the electorate that should determine the merit of that reason as grounds for removal, not the court.<sup>98</sup> Through this process, the reason behind voters initiating the recall "presents a political issue for resolution by vote, and not a legal question for court decision."<sup>99</sup> The process grants citizens direct participation in policing the judiciary and provides a tool to attain equal justice.<sup>100</sup>

### 3. *Judicial Recall in Other States*

Recently, Nevada voters accused a municipal court judge of injudicious conduct and initiated a recall petition for her removal from office.<sup>101</sup> Seeking an injunction, the judge sued, arguing that judges are not subject to recall under the Nevada Constitution.<sup>102</sup> Nevada's Supreme Court held that citizens may elect judges, but they may not recall them from office.<sup>103</sup>

The Nevada voters approved the creation of the Commission on Judicial Discipline (CJD) "through a constitutional amendment to provide for a standardized system of judicial governance."<sup>104</sup> The "amendment provides for the removal of judges from office as a form of

---

94. Recall Aaron Persky (FAQ), <https://web.archive.org/web/20171231032027/http://www.recallaaronpersky.com/factsheet> (last visited Mar. 21, 2019).

95. See generally *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, *supra* note 3.

96. *Ramsey v. City of North Las Vegas*, 392 P.3d 614, 624 (2017) (Pickering J., Douglas J. dissenting).

97. *Id.*

98. *Id.* at 627.

99. *Id.*

100. See generally *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, *supra* note 3.

101. Steve Sebelius, *Nevada Supreme Court rules Silver State Judges Can't Be Recalled From Office*, L.V. REV. J., <https://www.reviewjournal.com/steve-sebelius/nevada-supreme-court-rules-silver-state-judges-cant-be-recalled-from-office/>.

102. *Id.*

103. *Ramsey*, 392 P.3d at 622.

104. *Id.* at 615-16.

discipline.”<sup>105</sup> The argument posed to the court was that even if judges originally could be recalled, the creation of the CJD repealed any such prior recall authority vested in citizens over judges.<sup>106</sup>

The court began by analyzing the Legislature’s intent for creating the CJD.<sup>107</sup> Intending to promote an independent judiciary, the Legislature believed that the CJD would be in a better position than voters to evaluate the performance of a judge and recommend corrective action.<sup>108</sup>

The court analyzed the language contained within the constitutional provision and held that the omission of an express intent to maintain the citizen’s recall power over judges was evidence of the Legislature’s intent to supplant other forms of judicial removal, except legislative impeachment.<sup>109</sup> Further, permitting voters to recall judges because of an unpopular decision, and not because of incompetence, subjects judges to political influence when rendering their decisions.<sup>110</sup>

Finally, the court held that judges were not subject to recall because of: (1) the legislative history, (2) the order in which the constitutional provisions were enacted, and (3) the importance of insulating the judicial branch from political influences; a prerogative that cannot be accomplished if voter recall of judges is interpreted to have not been repealed by the creation of the CJD.<sup>111</sup>

Similarly, Utah’s constitution does not provide citizens with the power to remove judges through recall.<sup>112</sup> Like Nevada, Utah limits its methods of removing judges to retention elections, legislative impeachment, or removal recommendations by the Judicial Conduct Commission (JCC) to the Utah Supreme Court.<sup>113</sup> Moreover, because citizens submit complaints for the JCC to investigate, they have a direct role in policing the judiciary.<sup>114</sup> Utah has yet to determine whether these methods of policing judges are inadequate,<sup>115</sup> thereby lending credence to the notion that despite opinions to the contrary, the ability to recall judges is not an essential political devise.

---

105. *Id.* at 616.

106. *Id.* at 617.

107. *Id.* at 618.

108. *Id.*

109. *Ramsey*, 392 P.3d at 619-22.

110. *Id.* at 624.

111. *Id.* at 622.

112. Timothy Pack, *High Crimes and Misdemeanors: Removing Public Officials from Office in Utah and the Case for Recall*, UTAH L. REV. 665, 665 (2008).

113. *Id.* at 667-68. The JCC may order the reprimand, censure, suspension, removal, or involuntary retirement of any justice or judge, however, before implementing any JCC order, the Utah Supreme Court will review the JCC’s proceedings as to both law and fact.

114. *Id.* at 669.

115. *Id.* at 665.

## III. THE LEGAL PROBLEM

The California Constitution's citizens recall provision is an insufficient mechanism to police the judiciary.<sup>116</sup> Currently, the constitution contains no provision stating grounds for which judges may be removed.<sup>117</sup> This language is overbroad because it gives citizens the power to recall a judge who makes one lawful, albeit unpopular decision.<sup>118</sup> Surely this is not what the Legislature had intended when granting citizens the power to recall judges.

Further, subjecting judges to recall entangles politics with California's independent judiciary.<sup>119</sup> Empirical studies have demonstrated that judges who are subject to being voted out of office allow political pressure to influence their sentencing decisions.<sup>120</sup> Judges' ability to remain impartial is nullified if they have to test the winds in fear of igniting public outrage before rendering a decision.<sup>121</sup> Finally, the evidence suggests that this overbroad power not only abolishes an independent judiciary, but also results in harsher sentencing for the poor and people of color.<sup>122</sup> The critical issue set forth is that the current California constitutional provision subjecting judges to citizen recall threatens to abolish the independence of the judiciary, and is therefore an insufficient mechanism to police judges.

## IV. ANALYSIS

*A. California's Commission on Judicial Performance Explanatory Statement*

Although proponents of judicial recall contend that the CJP is corrupt and biased in favor of judges,<sup>123</sup> the process in which it investigates allegations of misconduct is quite complex and impartial.<sup>124</sup> In the *Turner* case, Judge Aaron Persky sentenced Brock Turner to "six months in county jail plus three years of probation and lifetime sex

---

116. See generally Cordell, *supra* note 1.

117. CAL. CONST. art. II, § 14(a).

118. Cordell, *supra* note 1.

119. *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, *supra* note 3.

120. Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CTR. FOR JUST., [http://www.brennancenter.org/sites/default/files/publications/How\\_Judicial\\_Elections\\_Impact\\_Criminal\\_Cases.pdf](http://www.brennancenter.org/sites/default/files/publications/How_Judicial_Elections_Impact_Criminal_Cases.pdf).

121. Cordell, *supra* note 1.

122. Young & Freidlin, *supra* note 87.

123. See generally *Voters Recall Aaron Persky, Judge Who Sentenced Brock Turner*, *supra* note 3.

124. See generally Comm'n on Jud. Performance, *Commission On Judicial Performance Closes Investigation of Judge Aaron Persky*, C.A. GOV'T, [https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky\\_Explanatory\\_Statement\\_12-19-16.pdf](https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky_Explanatory_Statement_12-19-16.pdf).

offender registration.”<sup>125</sup> The sentencing decision was widely criticized as being too lenient, and triggered significant media coverage and public outrage.<sup>126</sup> In response to the outrage, the CJP issued an explanatory statement pursuant to the California Constitution.<sup>127</sup>

The complaints submitted to the CJP primarily “alleged that:

- (1) Judge Persky abused his authority and displayed bias in his sentencing of Turner;
- (2) the sentence was unlawful;
- (3) the judge displayed gender bias and failed to take sexual assault of women seriously;
- (4) the judge exhibited racial and/or socioeconomic bias because a non-white or less privileged defendant would have received a harsher sentence; and
- (5) the judge’s history as a student-athlete at Stanford University caused him to be biased in favor of Turner and that he should have disclosed his Stanford affiliation or disqualified himself from handling the case.”<sup>128</sup>

Regarding the unlawful sentencing complaint, the CJP determined that the sentence was within the parameters set by the Penal Code,<sup>129</sup> and was therefore lawful.<sup>130</sup> The transcript of the Turner sentencing hearing reflects the judge’s finding that “Turner’s youth and lack of a significant record reduced his culpability, thereby overcoming the statutory limitation on probation.”<sup>131</sup> The transcript also reflects the judge’s consideration of the factors that the rules require a court to consider to determine whether probation is appropriate instead of a state prison sentence.<sup>132</sup>

---

125. CAL. COMM’N ON JUD. PERFORMANCE, *Commission On Judicial Performance Closes Investigation of Judge Aaron Persky*, [https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky\\_Explanatory\\_Statement\\_12-19-16.pdf](https://cjp.ca.gov/wp-content/uploads/sites/40/2016/08/Persky_Explanatory_Statement_12-19-16.pdf).

126. *Id.*

127. *Id.* The CJP’s statement was made pursuant to CAL. CONST. art. VI, § 18(k).

128. CAL. COMM’N ON JUD. PERFORMANCE, *supra* note 125.

129. Cal. Penal Code § 1203.065(b) (“Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to a person who violates various other subsections relating to sexual offenses or is convicted of assault with intent to commit a specified sexual offense.”).

130. CAL. COMM’N ON JUD. PERFORMANCE, *supra* note 125.

131. *Id.*

132. *Id.* (“Factors include: the nature; seriousness; and circumstances of the crime as compared to other instances of the same crime; the vulnerability of the victim; whether the defendant inflicted physical or emotional injury; whether the defendant was an active participant in the crime; whether the defendant demonstrated criminal sophistication; the defendant’s prior criminal record; the defendant’s willingness and ability to comply with the terms of probation; the likely effect of imprisonment on the defendant; the adverse collateral consequences on the defendant from the felony conviction; whether the defendant is remorseful; and whether or not the defendant was likely be a danger to others.”).

Next, the CJP addressed an additional complaint that the judge's sentencing decision, based in part on Turner's youth, level of intoxication, and remorse, constituted judicial bias, and thus, an abuse of his discretion.<sup>133</sup> The CJP determined that "[e]ven if it were improper for the judge to assess those factors as he did, those issues are properly addressed on appeal."<sup>134</sup> Under the Code of Judicial Ethics, "[a] judicial decision or administrative act later determined to be incorrect legally is not itself a violation of this code."<sup>135</sup> Further, under the standard set by the California Supreme Court, even if the judge failed to follow a statute or abused his discretion, the CJP cannot impose discipline unless the error "clearly and convincingly reflect[ed] bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty."<sup>136</sup>

"The presence or absence of judicial bias has been established in some cases by examining whether a judge's remarks or conduct reflected bias."<sup>137</sup> "Bias has also been assessed in some instances by examining decisions in other similar cases."<sup>138</sup>

"A judge's comments during sentencing are one type of in court statement that commissions and courts are hesitant to subject to discipline; a reluctance based on concern that sanctions would discourage judges from articulating the bases for their sentencing decisions."<sup>139</sup> Regarding Judge Persky's remarks during the sentencing hearing, when granting probation for certain sex offenses under the Penal Code,<sup>140</sup> judges must explain on the record why granting probation would be in the interests of justice.<sup>141</sup> This can be demonstrated through an analysis of the circumstances surrounding the case.<sup>142</sup> Moreover, judges must also state the primary factor(s) that support their decision to grant probation.<sup>143</sup>

One complainant contended that "the judge's remark at the Turner sentencing hearing that Turner 'will not be a danger to others' reflected

---

133. *Id.*

134. *Id.*

135. CAL. JUD. ETHICS CODE, Cannon 1.

136. CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 125 (quoting *Oberholzer v. Comm'n on Judicial Performance*, 20 Cal. 4th 371, 395-99 (1999)).

137. *Id.* (quoting *In re Glickfeld*, 3 Cal. 3d 891 (1971)).

138. *Id.* (quoting *In re Complaint of Judicial Misconduct*, 751 F.3d 611 (9th Cir. 2014)).

139. *Id.* at n.5 (quoting Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245 (2004)).

140. Cal. Penal Code § 1203.065(b).

141. CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 125, at 7 (citing CAL. RULES OF COURT, R. 4.406).

142. *Id.*

143. *Id.* (citing CAL. RULES OF COURT, R. 4.406(b)).



bias.”<sup>144</sup> However, as the CJP’s statement noted “future dangerousness is one of the factors that a judge must consider when deciding whether to grant or deny probation.”<sup>145</sup> Further, the remark derived from the results of two clinical tests, contained within the probation report, which predicted whether Turner would be dangerous in the future.<sup>146</sup>

Another complainant contended that Judge Persky’s remark regarding the severe impact a prison sentence would have on Turner reflected his bias.<sup>147</sup> However, in determining whether probation is appropriate, “the likely impact of imprisonment on the defendant” is a relevant factor to which the judge must consider.<sup>148</sup>

Finally, the allegation that Judge Persky abused his discretion by engaging in judicial bias is unsupported by the transcript from the sentencing hearing, as there was no evidence that Turner’s race, socioeconomic status, university affiliation, or student athlete status were implicitly referenced when Judge Persky made his remarks.<sup>149</sup> Nor did the transcript support the notion that Judge Persky considered the victim’s damages in a subjective manner or that he lacked sympathy for her.<sup>150</sup>

In sum, the CJP concluded that neither judge Persky’s statements regarding Turner, nor any other remarks made by him during the sentencing hearing constituted clear and convincing evidence of judicial bias.<sup>151</sup>

The Commission also provided examples of cases where it found judges statements to reflect bias, in stark contrast to the instant case.<sup>152</sup>

---

144. *Id.*

145. *Id.* (citing CAL. RULES OF COURT, R. 4.414(b)(8)).

146. *Id.* (“The probation department evaluated Turner’s dangerousness using two assessment tools and advised in its report that he was not very likely to re-offend due to receiving a score of 3 on the Static-99R, an actuarial measure of sexual offense recidivism, which placed him in the low-moderate risk category for being charged or convicted of another sexual offense; further the Probation Department validated the previous finding by assessing Turner using the Corrections Assessment Intervention System, a standardized, validated assessment and case management system developed by the National Council on Crime and Delinquency which assesses a defendant’s criminogenic needs and risk to re-offend.”).

147. CAL. COMM’N ON JUD. PERFORMANCE, *supra* note 125, at 7.

148. *Id.* (citing CAL. RULES OF COURT, R. 4.414(b)(5)). Judge Persky “acknowledged that state prison is likely to have a severe impact on a defendant ‘in any case,’ and, he explained, ‘I think it’s probably more true with a youthful offender sentenced to state prison at a young age.’” *Id.*

149. *Id.*

150. *Id.* Judge Persky acknowledged that with respect to the vulnerability of the victim, the victim in this case was extremely vulnerable. Further, he acknowledged that it was an element of counts two and three of the crime Turner was charged with, but not count one. Finally, Judge Persky explained that the element obviously weighed in favor of denying probation. *Id.* at 4.

151. CAL. COMM’N ON JUD. PERFORMANCE, *supra* note 125, at 7.

152. *Id.*

In *People v. Beasley*,<sup>153</sup> the California Court of Appeal reversed the trial court's order of probation and dismissal of various rape, robbery, and kidnapping charges.<sup>154</sup> "In open court, the judge referred to the victim as the 'alleged victim' and ridiculed the police inspector who accompanied her to the defendants' probation hearing and his superior officer who had instructed the inspector to accompany the victim to court."<sup>155</sup> The court found that the judge's "incomprehensible tirade" constituted judicial bias against the victim and the accompanying officers.<sup>156</sup> The California Supreme Court censured the judge one year after the *Beasley* case was decided.<sup>157</sup> The Commission's recommendation for discipline was based on the remarks referred to in the appellate decision, the judge insulting the victim, and his intemperate remarks in open court.<sup>158</sup>

More recently, in 2012, the Commission publicly admonished a judge for making remarks at a sentencing hearing in a rape case that created the impression that he was biased against victims who did not suffer serious bodily injury demonstrating a struggle.<sup>159</sup>

Other criminal cases handled by Judge Persky have also been pointed out "as proof of his bias in favor of white and/or privileged male defendants, particularly college athletes, and/or of his failure to take violence against women seriously."<sup>160</sup> The explanatory statement of the investigation references each of these cases and explains why the sentencing determinations were lawful.<sup>161</sup>

In *People v. Ramirez*, Ramirez sexually assaulted his female roommate.<sup>162</sup> In a negotiated deal through counsel, Ramirez received a three-year sentence<sup>163</sup> in exchange for a guilty plea. There are some allegations, based upon a comparison between Ramirez's sentence and Turner's lighter sentence, which contend that Ramirez's Salvadorian heritage was the explanation for the disparity in sentencing decisions.<sup>164</sup>

---

153. *Id.* (citing *People v. Beasley*, 5 Cal. App. 3d 617 (1970)).

154. *Id.*

155. *Id.* at 7-8.

156. *Id.* at 8.

157. CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 125, at 8.

158. *Id.*

159. *Id.* (citing *Public Admonishment of Judge Johnson* (2012)). In this instance, "the judge relied on his own expert opinion, based on his experience as a prosecutor, saying, 'I'm not a gynecologist, but I can tell you something: If someone doesn't want to have sexual intercourse, the body shuts down. The body will not permit that to happen unless a lot of damage is inflicted . . .'. The judge also said that the case 'trivializes a rape,' was 'technical,' and was 'more of a crim law test than a real live criminal case.'"

160. *Id.* at 8.

161. *Id.*

162. *Id.*

163. CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 125, at 8.

164. *Id.*

However, although Judge Persky presided over the case's earlier proceedings, a subsequent judge presided over Ramirez's guilty plea. "Thus, the Ramirez case cannot be used to demonstrate disparate treatment in sentencing by Judge Persky."<sup>165</sup>

In addition, Ramirez's sentence resulted from negotiations between counsel.<sup>166</sup> Finally, the penalty for Ramirez's plea—to the crime of forcible sexual penetration of a conscious or unimpaired person—is comprised of a three year state prison statutory mandatory minimum sentence.<sup>167</sup> "California law explicitly prohibits a downward departure for a violation of that penal code section<sup>168</sup> under any circumstances, whereas the penal code sections Brock Turner was convicted of violating<sup>169</sup> permitted, at the time,<sup>170</sup> a downward departure to probation in certain circumstances."<sup>171</sup>

Proponents of judicial recall have also pointed to Judge Persky's sentencing in *People v. Chiang*, *People v. Gunderson*, and *People v. Smith*, each of which involved domestic battery charges, and *People v. Chain*, as proof of his bias towards white or privileged defendants or those who are college athletes, and as evidence that Judge Persky lacks sympathy in cases involving violence against women.<sup>172</sup>

Although judges must review a probation report, the law does not require them to follow its recommendations.<sup>173</sup> One of the county probation department's primary duties is to assist the court in arriving at an appropriate sentence.<sup>174</sup> "Judge Persky's sentencing decisions in the

---

165. *Id.*

166. *Id.* at 8.

167. Cal. Penal Code § 289(a) ("Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.").

168. *Id.*; Cal. Penal Code § 289(a).

169. *Id.*; Cal. Penal Code §§ 220(a)(1), 289(e), & 289(d).

170. *Id.*; See CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 125, at n.1 (explaining that on September 30, 2016, Governor Jerry Brown signed into law Assembly Bill 2888, which amended Penal Code § 1203.065 to prohibit courts from granting probation instead of a state prison sentence to anyone convicted of Penal Code § 289(d) or § 289(e)); see also Jazmine Ulloa, *Spurred by Brock Turner Case, Gov. Jerry Brown Signs Law to Toughen Against Rape*, L.A. TIMES (Sept. 30, 2016), <https://www.latimes.com/politics/la-pol-sac-california-sex-crimes-stanford-cosby-bills-20160930-snap-htmstory.html> (describing California's expansion of mandatory minimum sentences for sex crime cases in greater detail).

171. CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 125, at 8.

172. *Id.* at 9. (citing *People v. Chiang* (No. B1475227); *People v. Gunderson* (No. B1577341); *People v. Smith* (No. B1581137); *People v. Chain* (No. B1473538)).

173. *Id.* at 9; Cal. Penal Code § 1203(b)(3).

174. CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 125, at 9 (quoting *People v. Villarreal*, 65 Cal. App. 3d 938, 945 (1977)) (explaining it is fundamental that the probation decision should not turn solely upon the nature of the offense committed, but should be rooted in the facts and circumstances of each case).

*Chiang, Gunderson, and Smith* cases resulted from negotiated agreements between the defense and the prosecution.”<sup>175</sup> “In three of the four cases, the judge’s sentencing decisions aligned with the recommendations of the probation department.”<sup>176</sup> However, the fourth case did not involve a probation report.<sup>177</sup>

Thus, because Judge Persky followed all applicable rules, the CJP determined that these decisions did not provide clear and convincing evidence to support the contention that his decisions reflected personal bias in favor of white criminal defendants and/or more privileged criminal defendants, nor that he took crimes involving violence against women less seriously.<sup>178</sup>

Finally, critics have remarked that Judge Persky should have recused himself from the *Turner* case because he and Turner both competed in athletics at Stanford University.<sup>179</sup> They argue that at the very least, the judge should be required to disclose his connection with the university.<sup>180</sup>

The Code of Civil Procedure<sup>181</sup> (CCP) articulates the circumstances which require disqualification of a member of the judiciary.<sup>182</sup> The CCP “states that a judge shall be disqualified if [f]or any reason [a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.”<sup>183</sup> The Code of Judicial Ethics “requires judges to disclose on the record information that is reasonably relevant to the question of disqualification, even if the judge believes there is no basis for disqualification.”<sup>184</sup>

The commission cited *Cline v. Sawyer*,<sup>185</sup> as an example of a court denying a party’s disqualification challenge to a judge, which was premised upon the fact that the judge and the respondents attended the same university.<sup>186</sup> The court noted:

[t]he affidavit alleges that the judge and [respondents] attended the same university at the same time where ‘they *may* have’ belonged to

---

175. CAL. COMM’N ON JUD. PERFORMANCE, *supra* note 125, at 9.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 10.

180. *Id.*

181. CAL. COMM’N ON JUD. PERFORMANCE, *supra* note 125, at 10; Cal. Civ. Proc. Code § 170.1.

182. CAL. COMM’N ON JUD. PERFORMANCE, *supra* note 125, at 10.

183. *Id.*; Cal. Civ. Proc. Code § 170.1(a)(6)(A)(iii).

184. CAL. COMM’N ON JUD. PERFORMANCE, *supra* note 125, at 10; CAL. JUD. ETHICS CODE, Cannon 3E(2).

185. CAL. COMM’N ON JUD. PERFORMANCE, *supra* note 125, at 11 (quoting *Cline v. Sawyer*, 600 P. 2d 725 (Wyo. 1979)).

186. *Id.*

the same fraternities or associations. Certainly . . . [i]t does not reflect a leaning of his mind in favor of [respondents] to the extent that it will sway his judgment or to the extent that he would make his decisions in the matter other than on the evidence placed before him.<sup>187</sup>

The CJP concluded that Judge Persky's connections to Stanford University were not of the kind to which disclosure or recusal would have been required under the law.<sup>188</sup> Further, the ties were insufficient to establish his alleged failure to act impartially, in favor of Turner or other Stanford-affiliated litigants.<sup>189</sup>

In sum, "[a]n independent, impartial, and honorable judiciary is indispensable to justice in our society."<sup>190</sup> "An independent judge is one who is able to rule as he or she determines appropriate, without fear of jeopardy or punishment."<sup>191</sup> "So long as the judge makes rulings in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or overreaching lies in the adversary system and appellate review."<sup>192</sup> The CJP concluded by stating it did not find clear and convincing evidence of injudicious conduct by Judge Persky.<sup>193</sup>

Although there are allegations of the CJP being biased in favor of protecting judges,<sup>194</sup> its explanatory statement regarding the procedural process through which it analyzed the complaints against Judge Persky highlights its impartiality. All conclusions contained in the statement are supported by law and distinguish judicious conduct from injudicious conduct. Moreover, "since 2005, the CJP has removed six judges for misconduct."<sup>195</sup> Thus, the explanatory statement demonstrates that the CJP is an adequate mechanism to allow citizens to participate in the political process and police the judiciary, without the need for subjecting judges recall. Other states have created commissions similar to the CJP to eliminate political pressures from influencing judges' decisions, thereby, preserving their ability to remain impartial and maintaining the independence of the judiciary.<sup>196</sup>

---

187. *Id.*

188. CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 125, at 11.

189. *Id.*

190. *Id.* (quoting Canon 1 of the California Code of Judicial Ethics).

191. *Id.*

192. CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 125, at 12.

193. *Id.*

194. See generally Recall Aaron Persky (FAQ), (last visited Mar. 21, 2019) <https://web.archive.org/web/20171231032027/http://www.recallaaronpersky.com/factsheet>

195. LaDoris Cordell, *Cordell: Do Not Recall Persky Over Brock Turner-Stanford Case*, MERCURY NEWS (June 23, 2016), <https://www.mercurynews.com/2016/06/23/cordell-do-not-recall-persky-over-brock-turner-stanford-case/>.

196. See *infra* Section IV.B.

*B. Analysis of Judicial Recall in Other States*

In *Ramsey v. North Las Vegas*, the Supreme Court of Nevada rendered its decision based upon statutory interpretation.<sup>197</sup> Recognizing that judges were public officers and subject to recall under an existing constitutional provision,<sup>198</sup> the court looked to the language of the newer enactment to determine whether it gave the CJD exclusive authority to remove judges.<sup>199</sup> If so, the previous provision would be abrogated.<sup>200</sup>

Looking at the specific language contained within the statute creating the CJD, the court noted that the inclusion of impeachment and removal by the CJD were exclusive methods to remove a judge, thereby excluding recall.<sup>201</sup> In its holding, the court relied on the theory of statutory interpretation that states the expression of one thing is the exclusion of another,<sup>202</sup> and thus, the methods provided in the new enactment were exclusive and repealed any existing statutes reserving the power of recall to Nevada citizens.<sup>203</sup>

In addition, the court explained that “[w]hereas the Commission’s purpose is to be consistent, public opinion rarely is; instead, conduct that may yield a recall in one district may not do the same in another.”<sup>204</sup> The court continued, explaining “[t]he dissent correctly points out that recall is unique because it allows voters to initiate removal for cause they alone decide.<sup>205</sup> Such a result is precisely what the creation of the Commission was intended to avoid.”<sup>206</sup> Like Nevada, Utah does not allow citizens to recall judges.<sup>207</sup> Its Supreme Court has held repeatedly that the JCC is an adequate mechanism to participate police the judiciary.<sup>208</sup>

Thus, Nevada, Utah, and many other states<sup>209</sup> have refrained from subjecting judges to recall, recognizing the chilling effect it has on

---

197. *Ramsey*, 392 P.3d at 622.

198. NEV. CONST. art. 2, § 9 (providing in relevant part, every public officer in the State of Nevada is subject to recall from office by the registered voters of the state, or of the county, district, or municipality which he represents).

199. *Ramsey*, 392 P.3d at 619.

200. *Id.*

201. NEV. CONST. art. 6, §§ 19-21 (providing in relevant part, a justice of the Supreme Court, a district judge, a justice of the peace or a municipal judge may, *in addition to the provision of Article 7 for impeachment*, be censured, retired, removed or otherwise disciplined by the commission on judicial discipline).

202. Although California is not able to use such statutory interpretation, the Nevada court used the *maxim expressio unius est exclusio alterius*, meaning the expressing of one thing is the exclusion of another, to interpret the statute creating the CJD.

203. *Ramsey*, 392 P.3d at 622.

204. *Id.* at 621.

205. *Id.*

206. *Id.*

207. Pack, *supra* note 112, at 665.

208. *Id.*

209. See Recall of State Officials, *supra* note 18 (explaining that only eight states permit judicial recall: Arizona, California, North Dakota, Oregon, and Wisconsin permit judicial

judicial independence. Additionally, several in-depth studies analyze the effects of political pressures on judges' sentencing decisions in criminal cases, thereby supporting the notion that an independent judiciary is necessary for creating equality when sentencing criminal defendants.<sup>210</sup>

*C. Empirical Studies Reveal That Political Pressures Impact Judges' Sentencing Decisions to the Detriment of Criminal Defendants*

"Given the extraordinary power state court judges exercise over the liberty, and the lives, of defendants, it is vital that they remain impartial."<sup>211</sup> However, increasing amounts of evidence suggest that providing citizens with the ability to recall judges based upon lawful, albeit unpopular decisions jeopardizes judges' ability to remain impartial in criminal cases.<sup>212</sup>

Ten prominent empirical studies examining the relationship between judicial elections and criminal case outcomes all found that political pressures impact judges' rulings to the detriment of criminal defendants.<sup>213</sup> The studies found that the threat of recall causes judges to (1) sentence more punitively and (2) vote less frequently in favor of criminal defendants on appeal.<sup>214</sup>

The data reveals that advertisements and other media describing a judge's record on criminal history, has an effect on retention elections and on judges' sentencing decisions.<sup>215</sup> For example, a Pennsylvania study examining whether retention elections had an effect on judges analyzed over 22,000 sentences for aggravated assault, rape, and robbery in the 1990s.<sup>216</sup> Researchers found that "sentences for these crimes are significantly longer the closer the sentencing judge is to standing for reelection."<sup>217</sup> Additional research, based upon the crimes analyzed, indicated "more than 2,000 years of additional incarceration could be

---

recall based upon any grounds, while Georgia, Minnesota, and Montana require grounds such as malfeasance, misconduct, failure to perform duties of the office, or conviction of a serious crime while in office to support a petition for judicial recall).

210. See *infra* Section IV.C.

211. *How Judicial Elections Impact Criminal Cases*, *supra* note 120, at 1.

212. See *id.* at 1.

213. *Id.* at 1.

214. *Id.* at 2.

215. *Id.* at 1 ("To assess the role of criminal cases in judicial elections, this paper considers 15 years of television advertising data for state supreme court elections, provided by CMAG/Kantar Media and analyzed by the Brennan Center for Justice, as well as a series of reports synthesizing this data written by the Brennan Center, Justice at Stake, and the National Institute on Money in State Politics.").

216. *How Judicial Elections Impact Criminal Cases*, *supra* note 120, at 7. Researchers selected "this class of offense because judges sentencing in these cases always exercise some discretion in determining the severity of the punishment and typically assign prison time."

217. *Id.*

attributed to re-election pressures” and fear of being seen as soft on crime.<sup>218</sup>

Moreover, a separate study made similar findings about the impact of re-election pressures and its effect on sentencing in Washington State.<sup>219</sup> Every four years, Washington’s trial court judges stand for re-election.<sup>220</sup> The researchers relied on a dataset of 276,119 cases, which were heard by 265 judges in the state from 1995 to 2006.<sup>221</sup> The dataset revealed that sentences were ten percent longer when the judge’s political cycle neared an end; as opposed to sentences made during the beginning of the judge’s political cycle.<sup>222</sup> Their study focused on assault, murder, rape, and robbery cases.<sup>223</sup> In concluding that the increased sentences were a direct result of re-election pressure, the researchers determined that they could:

rule out patterns in cyclical sentencing due to factors other than politics . . . by examining sentencing by retiring judges, who do not face electoral pressure; the sentencing of less serious crimes, about which the public (and potential competitors for a judge’s seat) are likely less concerned; and sentencing in nearby Oregon, where judges are elected on a different cycle.<sup>224</sup>

Finally, a research study recording Kansas trial courts from 1997 to 2003 considered the effects of political pressures on judges’ sentencing decisions.<sup>225</sup> “They found that incumbent judges facing competitive re-election rendered more punitive sentences than judges seeking to keep their seats through non-contested retention races.”<sup>226</sup> The study analyzed a dataset containing 18,139 felonies—focusing on assault, criminal threat, robbery, sexual assault, theft, burglary, and arson—which revealed that judges imposed longer sentences when faced with an

---

218. *Id.* at 8-9.

219. *Id.*

220. *Id.*

221. *Id.*

222. *How Judicial Elections Impact Criminal Cases*, *supra* note 120, at 7.

223. *Id.* at 8.

224. *Id.*

225. *Id.* at 9.

226. *Id.*; see also Misty Fritz, *What is the Difference Between a Contested and an Uncontested Election?*, OTW ELECTIONS (Aug. 2, 2016), <http://elections.transformativeworks.org/faq/what-is-the-difference-between-a-contested-election-and-an-uncontested-election/> (explaining that a “contested election occurs when there are more candidates than there are available seats on the Board, and the voters choose which ones will be elected”, whereas, an “uncontested election occurs when the number of open seats on the Board is equal to or greater than the number of candidates,” thus, “each candidate is technically unopposed and will automatically be elected to the Board following the election process.”).



upcoming retention election, as compared to the sentencing imposed by judges with retention elections occurring at some time in the future.<sup>227</sup>

Based upon this analysis, the research indicates that there is strong evidence to support the notion that judges' behavior is affected by the threat of a feasible challenger in a retention election.<sup>228</sup> Moreover, the evidence shows that judicial politics affects racial groups in a disparate fashion.<sup>229</sup> Incarceration rates rise disproportionately for black felons, evidenced by a 2.2 to 2.6 percent increase during the election year; whereas white felons do not experience such an increase in incarceration rates.<sup>230</sup> The evidence is parallel to a model that predicts that judges will engage in discriminatory sentencing as a result of the electorate's preference for racially disparate sentencing.<sup>231</sup> Using proxies of district-level prejudice, research indicates that "the increase in black incarceration rates are 2 to 4.5 times larger in districts associated with higher levels of predicted racial prejudice."<sup>232</sup> "These results speak directly to the existing debate on the merits of judicial accountability versus independence."<sup>233</sup> "While judicial elections increase policy congruence, policy congruence seems less palatable when the electorate's ideal policy undermine fundamental democratic principles."<sup>234</sup>

In sum, these empirical studies conclude that judges' sentencing decisions are affected by political pressures. This supports the notion that recall has a chilling effect on an independent judiciary. Judges should not conform to the will of the majority in fear of losing their position on the bench; which ultimately effects their ability to act impartially.<sup>235</sup> Thus, because the exercise of judicial discretion is critical, "especially when it comes to sentencing, without discretion, we

---

227. *How Judicial Elections Impact Criminal Cases*, *supra* note 120, at 9.

228. *Id.*

229. Kyung H. Park, *Judicial Elections and Discrimination in Criminal Sentencing*, HARRIS SCH. OF PUB. POL'Y U. CHI., at 29 (Apr. 3, 2014), [http://home.uchicago.edu/~kpark1/docs/Dissertation\\_Chapter2.pdf](http://home.uchicago.edu/~kpark1/docs/Dissertation_Chapter2.pdf).

230. *Id.* at 29.

231. *Id.*

232. *Id.* at 4-5, 29 ("To ascertain these results, two proxies were used. The first proxy uses data from the Implicit Associations Test (IAT), which is an interactive online test designed to measure implicit racial prejudice. Because the IAT is an online test, and likely not creating a representative sample, a second proxy was used, which involved population counts from Census data. The second proxy computed the change in the Democratic vote share in the 2008 presidential election from the previous four presidential elections, premised on previous research that concluded, while voters select their politicians based on numerous criteria, racial prejudice was an important determinate of voting behavior during President Obama's 2008 election.").

233. *Id.* at 29.

234. *Id.*

235. Cordell, *supra* note 1.

are left with cookie cutter justice that imposes mandatory sentences without any regard to defendants' circumstances.<sup>236</sup> The effects are far more damaging than the occasional ill-advised sentence.<sup>237</sup> Mandatory sentencing has accomplished nothing, aside from mass incarceration of the poor and people of color.<sup>238</sup>

The underlying logic of creating a CJP and similar commissions was to police the judiciary and to address citizens' complaints pertaining to judge's injudicious conduct.<sup>239</sup> As exemplified by other states' exclusion of trial court judges from recall, the findings from the empirical studies, and the CJP's explanatory statement in the Persky investigation, recall is not an effective mechanism to police judges, and thus, should be eliminated from the California Constitution.

## V. PROPOSAL

Subjecting trial court judges to recall will have an adverse effect on the criminal justice system, and the justice system generally. The California Legislature should amend the California Constitution by removing trial court judges from the list of local officials subject to recall. Without an independent judiciary, judges will lose their discretion, thus bending towards the will of the majority when making sentencing decisions. This practice results in the abolition of merciful sentencing, the implementation of mandatory minimums, and longer sentencing so as to appear tough on crime in order to remain in office.<sup>240</sup> Throughout history, these practices have primarily had a debilitating effect on the poor and people of color.<sup>241</sup>

Removing a judge from office will not prevent crimes such as the sexual assault committed by Brock Turner. Proponents of judicial recall somehow believe that by removing a judge, the criminal justice system will be restored and power will remain with the people.<sup>242</sup> However, this is a fallacy. History and empirical evidence indicate that we have never

---

236. *Do Not Recall Persky Over Brock Turner-Stanford Case*, *supra* note 195.

237. *Id.*

238. *Id.*

239. *Ramsey*, 392 P.3d at 621.

240. Cordell, *supra* note 1.

241. *Id.* ("What's concerning . . . is that the idea of removing Judge Persky from the bench is being equated with the fight for racial justice and fairness—a strike against white privilege and a broken criminal justice system. But the reality is, despite the righteous place this instinct may come from, the end result will be only more of the weight of a racist criminal justice system placed down upon communities of color.").

242. Recall Judge Aaron Persky, *supra* note 3, (Frequently Asked Questions), <https://www.npr.org/sections/thetwo-way/2018/06/05/617071359/voters-are-deciding-whether-to-recall-aaron-persky-judge-who-sentenced-brock-tur>.

had an equal criminal justice system.<sup>243</sup> If judges lose their ability to remain impartial, courts will become extensions of the media, sentencing based upon public outrage rather than aggregating the totality of the circumstances and rendering a proper sentence under the law.<sup>244</sup> Abolishing California's independent judiciary will nullify all progress that we have made towards reforming the criminal justice system.

Further, commissions such as the CJP provide citizens with the ability and opportunity to police the judiciary. The Legislature intentionally included citizens who are not and were never part of the legal field as members of the CJP, so as to safeguard against bias and preserve impartiality during investigations.<sup>245</sup> Retention elections also serve as a tool for citizens to police the judiciary, because a judge who performs unsatisfactorily may be replaced at the end of his or her term in office. Finally, impeachment is an adequate mechanism to police the judiciary, because an investigation is initiated when a judge is alleged to have committed a crime enumerated within the impeachment statute.

Although an initiative is one option to resolve this problem, it is impracticable because of its high cost and the difficulty in messaging.<sup>246</sup> The implementation of my proposal is not substantially difficult. Because the California Legislature possesses the power to amend the constitution, I believe that it should amend the provision that expressly lists judges as local officials who are subject to recall. Although Nevada's constitutional provision creating the CJD sets out the only means by which judges may be removed, it is ambiguous and may be overturned in the future depending on the courts statutory analysis. California can avoid this pitfall and avoid any ambiguity by expressly stating that trial court judges are not subject to recall. An example of the provision may look as such: A petition to recall a statewide officer must be signed by electors equal in number to twelve percent of the last vote for the office, with signatures from each of five counties equal in number to one percent of the last vote for the office in the county. Signatures to recall senators, members of the Assembly, members of the Board of Equalization; excluding judges of the supreme court, courts of appeal, and trial courts, must equal in number twenty percent of the last vote for the office.<sup>247</sup>

---

243. *Stanford Law School Graduates Submit Letter to Reconsider Recall Effort of Judge Persky*, *supra* note 76.

244. *How Judicial Elections Impact Criminal Cases*, *supra* note 120, at 13.

245. CAL. CONST. art. VI, § 8(a).

246. STATEWIDE INITIATIVE GUIDE, CAL. SECRETARY OF STATE, <http://www.sos.ca.gov/elections/ballot-measures/how-qualify-initiative/initiative-guide/>. The filing fee of a citizen initiative is \$2,000, not including the costs of advertising and messaging regarding why citizens should vote in favor of the initiative.

247. Proposition model of Article II Section 14(b) of the California Constitution.

## VI. CONCLUSION

In sum, the current mechanisms for policing judges are sufficient and eliminate the need for citizen recall. State constitutions that do not possess provisions which allow the recall of judges have not shown the substantial deviation from justice that proponents of judicial recall claim will stem from abolishing this right. Thus, the evidence demonstrates that the only outcome of leaving judicial recall intact is the abolishment of judicial independence and the nullification of all progress made by criminal justice system reformists. Essentially, in regard to attaining an equal criminal justice system, proponents may win the fight at the detriment of losing the war.