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## Keeping it in Your Pants: Moving Towards a More Codified Approach to Sexual Harassment Law

*Maxwell Collins<sup>1</sup> and Holly Castleton<sup>2</sup>*

In January 2015, an inconspicuous party took place at a fraternity house on Stanford University's campus.<sup>3</sup> Full of young adults, alcohol, and a relief that comes with the weekend, the party possessed a distinct air of indifference; certainly no one expected anything out of the ordinary to immortalize this night. However, by the end of the night this run-of-the-mill event would become the center of national attention and the precursor to the most scrutinized instance of sexual assault in the twenty-first century. That night, two graduate students biking past the Kappa Alpha fraternity would find Brock Turner, a nineteen-year-old Stanford freshman swimmer with aspirations to compete in the Olympics, raping a twenty-two-year-old recently graduated student behind a dumpster. Turner, after realizing their presence, attempted to flee the scene until the graduate students apprehended him on their bicycles. It seemed that this case was very much in favor of the victim, with an abundance of evidence and two eyewitnesses to corroborate the account. However, the ultimate results of the case would frustrate thousands of people, especially survivors, across the country. Turner was charged and convicted on three counts of felony sexual assault and withdrew from Stanford, but only received six months in jail out of a possible fourteen years. The egregiously light nature of his punishment caused protest movements throughout California and prompted harsh criticism from around the country. The case of Brock Turner and its subsequent outcome is typical of many sexual assault cases and highlights important issues regarding how the legal system handles sexual offenses.

Unfortunately, the fact that Turner's case even went to trial is unique. Even more surprising is that his trial resulted in a conviction. For every 1000 instances of rape, 994 perpetrators will not face any repercussions.<sup>4</sup> The number of yearly incidents involving sexual harassment and lesser forms of sexual assault that go unaddressed is even higher. How can we reform state and federal codes to enable law enforcement to prosecute sexual offenders? What can we do to enable survivors to get quick and affordable access to legal help? How can we streamline the reporting of incidents? How do we appropriately sentence those convicted? How can we make going to trial less rare? These questions are among many that need to be addressed.

Much attention is devoted to analyzing the attitudes of individuals to whom survivors report, such as police officers or campus officials. Sometimes the effect known as 'victim

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<sup>3</sup> Julia Ioffe, *When the Punishment Feels Like a Crime*, HUFF. POST (June 1, 2018) <https://highline.huffingtonpost.com/articles/en/brock-turner-michele-dauber/> (last visited June 19, 2018).

<sup>4</sup> RAINN.ORG STATISTICS <https://www.rainn.org/statistics/criminal-justice-system>. (last visited October 2018)

blaming' occurs, where the survivor receives criticism for his or her actions immediately preceding the incident. However, the issue stands not with civil or collegiate officials, but with the way that laws and policies are written and applied to each individual situation. If Brock Turner's case had been tried in Utah, he would have faced a mandatory minimum sentence of five years<sup>5</sup> due to his clean record and the lack of excessive harm done to the victim. However, not every state has laws like Utah in place. California, where Turner was tried, currently has no mandatory minimum sentencing, and Brock Turner was given a lighter sentence than the prosecutors suggested (a mere six months with three years' probation). This is a prime example of too much leeway being given to judges and prosecutors in deciding what happens to offenders (in the rare cases where the accused even ends up in a courtroom).

This article uses existing state and federal codes, statutes, and case precedent as a means of examining the status of the law and its execution regarding sexual harassment (both verbal and physical). For the purposes of this article, the terms "harassment" and "assault" are interchangeable, since different state codes use both options in their statutes. These societal developments over the past 100 years continue to prompt gender issues to move to the forefront of legal discussions. Our article has two aims: First, we identify the primary issues surrounding the difficulties of investigating and prosecuting credible sexual harassment allegations. This will include an attempt to determine why a statistically significant<sup>6</sup> number of allegations end without any formal investigation. Second, we examine the issues surrounding the sentencing of those convicted of sexual harassment. This article argues that the decision to enact mandatory minimum sentences as a deterrent for future sex crimes is misguided and counterproductive, and we offer a potentially more codified and nuanced approach to sentencing that covers the diverse range of offenses that fall under "sexual harassment." This approach will seek to isolate these offenses and provide more specific punishments that will be more relevant and beneficial to the defendant and plaintiff and bring a greater feeling of justice to all those involved.

## I. Background

The modern understanding of sexual harassment as a form of discrimination based on sex dates back only about twenty years. As a practice, sexual coercion and other unwanted sexual relations in American culture can be easily traced back to the founding of our country. For example, numerous slave women suffered at the hands of their owners without protection of the law.<sup>7</sup> Even free women operating in domestic capacities regularly faced sexual advances by their male employers, though their situations differed from their slave counterparts.<sup>8</sup>

This kind of predatory behavior evolved with society as the traditional capacities of women and slaves were reformed and abolished. With the Industrial Revolution in the late nineteenth and early twentieth centuries came the advent of women in the workplace, where for

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<sup>5</sup> Utah Code § 76-5-402(3)(a)

<sup>6</sup> *Supra* fn. 3

<sup>7</sup> Reva B. Siegel, "Introduction: A Short History of Sexual Harassment" *DIRECTIONS IN SEXUAL HARASSMENT LAW*, 2003, fn. 1. Yale University Press. DOI: 10.12987/yale/9780300098006.001.0001.

<sup>8</sup> *Id.* fn. 4

the first time in history there was a large demand and even expectation for a female workforce. However, these developments brought with them their own brand of sexual harassment.<sup>9</sup>

Consistent through the ages is the oft-quoted defense voiced by the accused that the victims ‘initiated’ the sexual contact, or that their ‘promiscuous’ nature invited the actions of their alleged harassers.<sup>10</sup> Equally consistent was the belief held by the male-dominated courts that women wanted the sexual contact. However, though the law was recorded and presumably enforced, the definition of rape was so narrow and restrictive that it hardly gave reason to sanction offenders. One example of this narrow and restrictive nature is found in a decision from the high court in New York made toward the end of the nineteenth century; the decision, which threw out a rape prosecution against a man accused of assaulting his fourteen-year-old servant girl, included the following phrase: “If a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant? *If consent, though not express, enters into her conduct, there is no rape* (emphasis added).”<sup>11</sup> Earlier, the decision mentions New York State law of the time (1874), the wording of which reinforces the decision made by the justice.

Though public sentiment has always been anti-sexual-harassment, many women in the eighteenth, nineteenth, and twentieth centuries did not report instances of sexual harassment or assault when it occurred because they felt (often correctly) that no one would listen, much less believe them. Another large factor in the silence of victims was the culture of the nineteenth and twentieth centuries, where a woman who claimed she was raped suffered damage to her own reputation and consequently lost marriage prospects. The argument made by the earliest women’s suffrage leaders in response to a woman sentenced to death for infanticide echo this thought pattern: In 1868, Hester Vaughn was raped by her employer and fired when she became pregnant, leading to a life of homelessness and causing the early death of her infant child.<sup>12</sup> When women’s rights advocates heard and publicized her story, they emphasized the socioeconomic restrictions responsible for Vaughn’s working situation and, consequently, her sexual vulnerability. Vaughn’s 150-year-old example is still relevant and illustrates today’s need for societal changes to coincide with legal changes for any reformations to be legitimate or lasting.

The suffering of early American women and subsequent movements for progress were productive. Following the Civil Rights Act with the inclusion of Title VII, unwanted suggestive sexual advances (as opposed to explicit actions) became legally actionable for the first time, due to their updated classification as a form of discrimination. Universally recognized within the United States because of its federal status, Title VII also led to the protection of students on

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<sup>9</sup> Id. fn. 5

<sup>10</sup> Id. fn. 6

<sup>11</sup> Id. fn. 16 [*Dohring*, 59 N.Y. 374 (N.Y. 1874)]

<sup>12</sup> Angela G. Ray, *Representing the Working Class in Early U.S. Feminist Media: The Case of Hester Vaughn*, 26 WOMEN’S STUDIES IN COMMUNICATION 1-26 (2003).

campuses with the advent of Title IX of the Education Amendments of 1972.<sup>13</sup> Today, every state and campus has statutes and policies that protect individuals from discrimination based on sex while condemning all forms of sexual harassment or assault. Although this legislation moved in the right direction, much is still needed in regards to sexual harassment law: one in three women and one in six men experience some form of sexual violence during their lifetime.<sup>14</sup> On college campuses, up to a quarter of female students will be victims of forced sex during their time at school.<sup>15</sup>

Hence, the issue is not a need to codify sex crimes, but to operationalize the definitions of specific offenses, such as rape. For example, rape definitions vary state by state and are subject to influence from too many extralegal factors, such as legislative advocacy or societal values of the time.<sup>16</sup>

### I. Prosecuting Woes

The current issue with sexual harassment law is not unlike a children's little league game that lacks adult supervision. The players most likely know the rules; they have abided by them in previous games, and they understand why following them is crucial to their success as a team. However, let us assume those with the authority to enforce the rules are not there. Perhaps the umpire met with a flat tire while en route to the game. Now, the players understand the rules and how to apply them, but the incentive to do so has significantly diminished. Most players will largely stick to the rules, but undoubtedly some will see this as an opportunity to be taken advantage of. Now when certain players cheat and other players complain, who is there to enforce the rules? If there is an easier way for one team to win, with seemingly no repercussions, what will discourage them from doing so? Such is the current state of sexual harassment law.

Sexual harassment clauses exist in the legal statutes among all fifty states and territories and are likewise codified in federal law.<sup>17</sup> However, as has been stated, ninety-nine percent of perpetrators of sexual assault will not face any repercussions for their actions. Much like the little leaguers without an umpire, offenders often feel that they can cheat and get away with it. And because the risk-reward-consequences reality favors offenders under the current structure of the law, they are not necessarily wrong. This reality, however, is not due to lack of legislating – anti-rape laws have been on the books since the inception of our legal system. And in the modern era these laws are often, like in Utah, very thorough. Utah defines rape as having sexual intercourse with another person without the victim's consent; the statute then goes on to list eleven different

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<sup>13</sup> U.S. DEPARTMENT OF EDUCATION, *Title IX and Sex Discrimination*, Revised April 2015, [https://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html).

<sup>14</sup> The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 state report. <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf> (last visited October 2018).

<sup>15</sup> Bonnie Fisher, Francis T. Cullen, and Michael G. Turner, *The Sexual Victimization of College Women*, WASHINGTON D.C.: U.S. DEPARTMENT OF JUSTICE (2000).

<sup>16</sup> NATIONAL INSTITUTE OF JUSTICE, *Rape and Sexual Violence*, Last Modified March 21, 2017, <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/welcome.aspx>.

<sup>17</sup> The Law LIBRARY OF CONGRESS, *U.S. States & Territories*, Last Modified November 4, 2016 <https://www.loc.gov/law/help/guide/states.php>.

clarifications on exactly what “without consent” means. Consent can be given with words or actions – it can be also be overridden with physical force or verbal threats. Consent also considers a victim’s state of consciousness or other mental state, a victim’s age, or an offender’s position of authority relative to a victim.<sup>18</sup> Obviously, the issue does not necessarily arise due to lack of clarity or specificity in the wording of the law.

Rather, a primary issue is insufficient evidence. Evidentiary problems are also a major reason why victims do not think their story will be taken seriously on their word alone. Thus enters one of the most difficult issues affecting the prosecution of sexual harassment claims: crimes that create often insurmountable due process and evidentiary hurdles because they are typically committed in private, discreet settings with no witnesses. And as difficult as this makes accusations of sexual assault to prosecute, it is not incorrect. The rule of law and due process protections which define our legal system do not (and should not) allow law enforcement to apprehend and charge individuals based on a verbal accusation alone. One answer is DNA evidence. It is indispensable in the process of validating victims’ claims, particularly when considering the likeliness of a jury to convict an alleged perpetrator;<sup>19</sup> however, the issue with DNA evidence is its short-term and delicate nature. DNA material like saliva, skin tissue, hair follicles, blood, or semen may be lost or destroyed within hours of the occurrence, if an adequate quantity was even available to begin with. The advent of Sexual Assault Kits (SAKs) has helped significantly with the quality and consistency of DNA evidence used in cases of sexual assault,<sup>20</sup> but the system facilitating their use requires reformation, since on average only thirty-eight percent of SAKs are qualified for entry to the Combined DNA Index System (CODIS), and of those, less than half result in hits for eligible cases.<sup>21</sup> For example, studies conducted in several major U.S. cities tested 7,214 SAKs, of which only 1,390 resulted in a CODIS hit.<sup>22</sup> The necessity of these kits in prosecuting claims of sexual assault makes their availability and functionality imperative.

However, DNA evidence is not enough in and of itself; some states do not require alleged offenders to surrender to DNA testing at all. As new technologies develop, so do the tactics of offenders,<sup>23</sup> and so non-DNA evidence has become even more crucial than in previous decades. In cases where the perpetrator is unknown, details must be gathered that can link an individual to the time of the offense, such as fingerprints or definitive traits about potential weapons that

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<sup>18</sup> Utah Code Ann. § 76-5-402

<sup>19</sup> Donald E. Shelton, *The ‘CSI Effect’: Does It Really Exist?*, NIJ J. 259, 1-7 (2008).

<sup>20</sup> Michael Briody, *The Effects of DNA Evidence on Sexual Offence Cases in Court*, CURRENT ISSUES OF CRIMINAL JUSTICE 14, 159 (2002).

<sup>21</sup> Heather Waltke, Gerald LaPorte, Danielle Weiss, Dawn Schwarting, Minh Nguyen, and Frances Scott, *Sexual Assault Cases: Exploring the Importance of Non-DNA Forensic Evidence*, Exh. 1. November 10, 2017, <https://nij.gov/journals/279/Pages/non-dna-evidence-in-sexual-assault-cases.aspx#table1>

<sup>22</sup> *Supra* fn. 17.

<sup>23</sup> T. Christian Miller and Ken Armstrong, *An Unbelievable Story of Rape*. NEW YORK: PROPUBLICA AND THE MARSHALL PROJECT. 2015. <https://www.propublica.org/article/false-rape-accusations-an-unbelievable-story>.

perpetrators may have used. In cases where the perpetrator is familiar with the victim, and does not deny that sexual contact occurred, evidence other than verbal testimony must come forth proving lack of consent for a conviction to stand or for prosecutors to even be willing to charge. This can include torn clothing, bodily injuries, messages sent prior to the offense, toxicology reports, or audio/video recordings. Timeliness in reporting is crucial to the validity and successful prosecution of sexual assault claims. Injuries heal, messages get lost, and toxins filter through the body. Hence, a dire need presents itself for readily available resources for victims immediately following an offense.

The instinctive place to turn following any kind of sexual harassment would be the local authorities, or simply calling 911 if the offense warrants that kind of response. However, there are a number of reasons victims may not feel comfortable reporting in the moment. Perhaps the offender is scared off before any actual harassment can take place, or victims may be familiar with their perpetrators.<sup>24</sup> Sometimes the offender is someone from a previous relationship, or maybe there are not any physical injuries, so victims feel they do not have a case. Occasionally victims refrain from reporting because they believe law enforcement will not believe them, and too often victims are justified in that belief.<sup>25</sup> Overall, the preexisting beliefs of victims and first responders alike are often the result of implicit bias against victims of sexual harassment – a key paradigm which must be altered for the success of existing sexual harassment law.

In the rare instance that a case makes it to trial with enough evidence to guarantee a conviction, there is no guarantee of justice. Such was the case of Brock Turner,<sup>26</sup> a man caught in the act of object rape<sup>27</sup> against a fellow student who met with a sentence of six months that would turn into parole after spending only three months incarcerated. This spurred California to legally redefine rape as well as enact mandatory minimum sentencing for rape offenses.<sup>28</sup> These actions were initially met with praise, as many believed that felons being let off with abnormally light sentences discourages other victims from coming forward, feeding the idea that nothing will come of it.<sup>29</sup> However, the bill was not entirely without opposition, as two dozen groups

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<sup>24</sup> Reporting to Law Enforcement, PROGRAMS AND EXPERTISE | RAINN, <https://rainn.org/articles/reporting-law-enforcement> (last visited Oct 16, 2018).

<sup>25</sup> Alex Campbell and Katie J.M. Baker, *Unfounded*, BUZZ. NEWS, September 8, 2016, <https://www.buzzfeednews.com/article/alexcampbell/unfounded>

<sup>26</sup> *Supra* fn. 3.

<sup>27</sup> Utah Code § 76-5-402.2: “A person who, without the victim's consent, causes the penetration, however slight, of the genital or anal opening of another person who is 14 years of age or older, by any foreign object, substance, instrument, or device, including a part of the human body other than the mouth or genitals, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person.”

<sup>28</sup> Cal. AB 2888 §§ 1-3.

<sup>29</sup> Ass. Press, CALIFORNIA PASSES MANDATORY SENTENCES FOR SEXUAL ASSAULT AFTER STANFORD SCANDAL, THE GUARDIAN (2016), <https://www.theguardian.com/us-news/2016/sep/30/stanford-sexual-assault-case-california-rape-law>.

dedicated to ending sexual assaults feared the bill would inadvertently target minority groups and lower-income defendants.<sup>30</sup>

Another issue facing the sentencing of sexual harassment offenders is the lack of specificity and uniformity for different offenses. For instance, in California there are different sentencing guidelines for rape, rape of a spouse, and sodomy.<sup>31</sup> In Utah there is a little more uniformity, with sexual harassment offenses falling under preexisting punishment classifications,<sup>32</sup> but much is left to be desired.

## II. Solutions

To combat the problematic issues of DNA evidence it is essential that victims and law enforcement additionally focus on non-DNA evidence to ensure the successful prosecution of sexual offenders. The greater the amount and diversity of evidence, the higher the probability an offender will be charged and convicted. And if district attorneys, state prosecutors, and local law enforcement believe there is a greater likelihood of conviction, they may be more inclined to assist victims when a claim is made.

Additionally, as the societal and legal climate improve the handling of investigations and prosecution of claims, it is likely that more claims will be made. So, more resources must be available to further assist victims. Specialty nurses known as Sexual Assault Nurse Examiners (SANEs) are specifically trained for the psychological and physical care of victims of sexual harassment. The legal benefit of training more SANEs is their increased forensic effectiveness with initial evidence collection as well as maintaining the chain of custody at a higher rate than non-SANEs.<sup>33</sup> Additionally, having more SANEs would increase the reporting rate of sexual assaults because victims would know they will be handled by someone trained specifically to care for them, as opposed to being processed by probably-untrained law enforcement officials who lack the proper conduct for interacting with someone who recently experienced a traumatic event such as sexual assault. SANEs also increase the number of patients that complete evidence collection,<sup>34</sup> the number of charges filed,<sup>35</sup> and the conviction rate.<sup>36</sup> Thus, with more SANE nurses the quality and quantity of evidence will improve, and the law will have a greater chance of being applied to a wider range of sexual harassment cases.

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<sup>30</sup> Supra fn. 24.

<sup>31</sup> Cal. PENAL CODE §§ 261, 261.6, 263, 263.1, 269, 288.7;

<sup>32</sup> Utah Code Ann. §§ 76-5-401, 76-5-402

<sup>33</sup> Linda E. Ledray and Kathy Simmelink, *Efficacy of SANE Evidence Collection: A Minnesota Study*, 23 J. OF EMERGENCY NURSING 75–77 (1997); Valerie Sievers, Sherri Murphy, and Joseph J. Miller, *Sexual Assault Evidence Collection More Accurate When Completed by Sexual Assault Nurse Examiners: Colorado's Experience*, 29 J. OF EMERGENCY NURSING 511-514 (2003).

<sup>34</sup> Rebecca Campbell et al., *The Impact of Sexual Assault Nurse Examiner Programs on Criminal Justice Case Outcomes*, 20 VIOLENCE AGAINST WOMEN 607-625 (2014).

<sup>35</sup> Rebecca Campbell, Debra Patterson & Deborah Bybee, *Prosecution of Adult Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 223-244 (2012).

<sup>36</sup> Cameron S. Crandall M.D., Deborah Helitzer Sc.D., *Impact Evaluation of a Sexual Assault Nurse Examiner (SANE) Program*, NATIONAL INSTITUTE OF JUSTICE (2003).

Once the cases go to court and convictions are obtained, changes must be made regarding sentencing. In this regard, research has shown that greater punishment is a far less effective deterrent of criminal activity than is the certainty of being caught.<sup>37</sup> For this reason, improving the astoundingly low prosecution rate for sexual harassment should serve as the number one priority for those seeking to reduce sexual harassment. And if the goal is avoiding harassment in the first place, the knee-jerk response legislatures often have to enact mandatory sentencing, as with the case of Brock Turner and California, is misguided and counterproductive. Ineffective sentencing is a problem that affects everyone – from the victims to the accused, and all the way down to the taxpayers who provide for their incarceration.

### III. Conclusion

If we do not change the prosecuting and sentencing methods for sexual assault and harassment in the U.S., tens of thousands of individuals will suffer. Statistically, one in five women and one in seventy-one men will be raped at some point in their lives.<sup>38</sup> Sexual harassment also affects children; one in four girls and one in six boys experience sexual abuse before they are eighteen, with the ages of victims reaching younger than ten years old. The cost and impact of sexual assault, particularly regarding rape, is enormous, with lifetime amounts reaching \$122,461 per rape victim.<sup>39</sup> Annually, rape is the number one crime posing a financial burden to the U.S., with overall costs exceeding \$127 billion.<sup>40</sup>

The current status of the law on the state and federal level is mostly clear on its prohibition of sexual assault, with the largest disparities appearing in some of the more ambiguous forms of sexual harassment, such as harassment in the workplace or other types of verbal or emotional assault. Other disparities exist in the consistency between states on their statutes of limitations and mandatory sentencing habits.

This article has used existing state and federal codes, statutes, and case precedent as a means of examining the status of the law and its execution regarding sexual harassment. Throughout we have identified some of the primary issues surrounding the investigating and prosecuting of credible sexual harassment allegations. Additionally, we have examined issues pertaining to the sentencing of those convicted of sexual harassment. We have also provided what we believe to be several tentative solutions to the problems identified.

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<sup>37</sup> Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME AND JUSTICE 199-263 (2013).

<sup>38</sup> The Center for Disease Control, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 Summary Report. [https://www.cdc.gov/violenceprevention/pdf/NISVS\\_Executive\\_Summary-a.pdf](https://www.cdc.gov/violenceprevention/pdf/NISVS_Executive_Summary-a.pdf) (last visited October 2018).

<sup>39</sup> Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AMERICAN J. OF PREVENTATIVE MEDICINE 691-701 (2017).

<sup>40</sup> Ted R. Miller, Mark A. Cohen, and Brian Wiersema, *Victim Costs and Consequences: A New Look* (1996). WASHINGTON D.C.: U.S. DEPARTMENT OF JUSTICE.