

# Sentencing Through the Media: How the Media Can Help Strengthen Legal Sanctions Against Sexual Assault by College Athletes

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### Repository Citation

Samantha C. Huddleston, *Sentencing Through the Media: How the Media Can Help Strengthen Legal Sanctions Against Sexual Assault by College Athletes*, 28 Marq. Sports L. Rev. 485 (2018)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol28/iss2/8>

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# SENTENCING THROUGH THE MEDIA: HOW THE MEDIA CAN HELP STRENGTHEN LEGAL SANCTIONS AGAINST SEXUAL ASSAULT BY COLLEGE ATHLETES

SAMANTHA C. HUDDLESTON\*

## I. INTRODUCTION

One in five women are sexually assaulted in college.<sup>1</sup> Ninety percent of women who are sexually assaulted do not report.<sup>2</sup> Headlines graze the bottom of television screens across the nation announcing the most recent sexual assault allegations; yet rarely, if ever, are the legal consequences paraded across the screen. Instead the private lives of the attacker and the victim are displayed on open-air for everyone to see. This is especially apparent when the attacker is a college athlete. The media exposes the attacker's childhood experiences, previous instances of misbehavior, sports records, and personal relationships to viewers across the country, positioning the public as the "jury" to determine whether the attacker is guilty. In the last few years; however, the media has aided society's understanding of juries, the courtroom, and sentencing procedure. While the public has always had an infatuation with "the law," an analysis of how the public perceives sexual assaults in the college athletics microcosm will demonstrate many of the misconceptions in sentencing sexual assault attackers.

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1. *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., [https://www.nsvrc.org/sites/default/files/2015-01/publications\\_nsvrc\\_factsheet\\_media-packet\\_statistics-about-sexual-violence\\_0.pdf](https://www.nsvrc.org/sites/default/files/2015-01/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf) (last visited July 30, 2018).

2. *Id.*

Forty-eight states classify sexual assault as a sex crime,<sup>3</sup> punishable as a felony or misdemeanor.<sup>4</sup> Depending on state specific statutes, an attacker can face six years to sixty years in prison; however, convicted attackers rarely serve the “recommended” sentence.<sup>5</sup> Despite recommended sentences of upwards of sixty years, attackers will often serve less than one year in a county jail; less time than someone who is convicted of robbery or aggravated battery<sup>6</sup> leaving the victim to serve the ultimate life-sentence.

Public perception would think otherwise based on the scrolling headlines announcing the most recent scandal in college athletics. From the media’s perspective, it seems as if the attackers have been punished and the system has done its job. But the reality is that the media focuses on college athlete sexual assaults much more than “everyday assaults.”<sup>7</sup> An assault by the neighbor who raped the little girl next door, or an assault by the best friend who raped a girl who trusted him rarely make national headlines because athletes are more socially significant.<sup>8</sup> Despite this disparity in publicity, all publicity is good publicity; sexual assault victims assaulted by non-athletes also benefit from this exposure. When it comes to calling attention to the lack of sentencing in sexual assault cases, college athlete sexual assault catches the public’s attention.<sup>9</sup> This analysis will demonstrate how media exposure of sexual assault, specifically by male college athletes, has served as a platform for recognizing the inconsistencies and leniency of our criminal justice system in cases of sexual violence and will call to action legal reform for mandatory minimum sentencing of all sexual offenders.

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3. Definitions for sex crimes such as assault, battery, and rape differ due to state laws. For the purpose of this paper, I will use the term “sexual assault” to describe all levels of sexual violence unless specifically noted otherwise.

4. Bernice Yeung, *In 2 States, Sexual Assault Laws Lag Far Behind the Mainstream*, REVEAL (Aug. 25, 2015), <https://www.revealnews.org/article/in-2-states-sexual-assault-laws-lag-far-behind-the-mainstream/>.

5. *Id.*

6. In Wisconsin for example, armed robbery is a Class E felony punishable by up to fifteen years in prison; likewise, aggravated battery is a Class H felony punishable by up to six years in prison. WIS. STAT. §§ 939.50(3)(e), (h) (2018).

7. Angela Osborne et al., *Celebrity, Scandal and the Male Athlete: A Sport Media Analysis*, 16 EUR. SPORT MGMT. Q. 255, 265 (2016).

8. *Id.*

9. Frank R. Baumgartner & Sarah McAdon, *There’s Been a Big Change in How the News Media Covers Sexual Assault*, WASH. POST, May 11, 2017, [https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/11/theres-been-a-big-change-in-how-the-news-media-cover-sexual-assault/?utm\\_term=.d154fd1897b2](https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/11/theres-been-a-big-change-in-how-the-news-media-cover-sexual-assault/?utm_term=.d154fd1897b2).

## II. CURRENT PUNISHMENTS ARE TOO LENIENT

Case-after-case, news media exposes male athletes who have faced allegations of sexual assault.<sup>10</sup> Case-after-case, news media demonstrates how male athletes accused of sexual assault do not receive just or proper convictions or sentences through the legal system. Most state prosecutors refuse to charge the athletes; emphasizing the multitude of instances where these athletes receive lenient sentences or early parole.<sup>11</sup> Such exposure has sparked much awaited discussions about sexual assault of females in a broader context.<sup>12</sup> Essentially, the influx of media coverage involving college athlete sexual assault has effectively raised awareness to the lenient sentencing all sexual offenders receive across the nation; a leniency that mirrors that of the entire criminal justice system.

Historically, individual athletes and teams alike, have used their celebrity status as a platform to raise awareness of important social issues such as cancer, domestic violence, race discrimination, and police violence.<sup>13</sup> Sports are a social institution that greatly influences our youth, especially that of young boys and male college athletes. This celebrity status comes early and often in an athlete's college career. Unfortunately for them, this status includes scrutiny by the public eye both on and off the field. Athletic endorsements and sponsorships actively increase the rate of social awareness, but it is a much different story when the negative behavior of college athletes raises social awareness.<sup>14</sup>

College athletes accused of sexual assault are often penalized more harshly by the university than the legal system.<sup>15</sup> Time and time again, athletes are suspended from play or put on academic probation if sexual assault/rape accusations are made; however, criminal charges are rarely filed by state prosecutors against these individuals.<sup>16</sup> Even when charges are filed against the

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10. See Danielle De Smeth et al., *The Brock Turner Sentencing and the Face of Bias*, 58 ORANGE COUNTY L. MAG. 54 (Oct. 2016); *Gophers Basketball Player Accused of Sexual Assault Suspended from Team*, FOX 9 NEWS, May 10, 2016, <http://www.fox9.com/news/139644869-video>; Web Staff, *UNC Football Player Accused of Rape Cleared by the University*, FOX 8 NEWS, Apr. 7, 2017, <http://myfox8.com/2017/04/07/unc-football-player-accused-of-rape-cleared-by-the-university/>.

11. See Emily Shapiro, *Brock Turner Walks Out of Jail After Stanford Sex Assault Sentence*, ABC NEWS, Sept. 2, 2016, <http://abcnews.go.com/US/brock-turner-walks-jail-stanford-sex-assault-sentence/story?id=41821212>.

12. For purposes of this Comment, while it is apparent and recognized that men are also victims of sexual assault, sexual assault of males will not be included in this analysis.

13. Kareem Copeland, *Athletes Using Sports Platforms to Push for Social Change*, WASH. TIMES, July 25, 2016, <http://www.washingtontimes.com/news/2016/jul/25/athletes-using-sports-platforms-to-push-for-social/>.

14. *Id.*

15. *Gophers Basketball Player Accused of Sexual Assault Suspended from Team*, *supra* note 10.

16. *Id.*

players, these charges are usually reduced or dropped entirely, resulting in another sex offender walking away with minimum sentences and no remorse.<sup>17</sup> Prosecutors often cite a lack of evidence to meet the burden of proof to support its reluctance to charge,<sup>18</sup> meaning that a woman's allegations and self-reporting are not enough "proof" for the state to find that by a preponderance of the evidence, the sexual conduct occurred.

Sexual assault is a crime whether it occurs on a college campus, a bar, at home, or elsewhere. A review of recent sexual assault allegations against college athletes will support the claim that athletes are "getting off" of criminal punishment too easily by our court systems. Sex offenders, including college athletes, are punished with a slap on the wrist when they are committing crimes that, in most states, are classified as felonies.<sup>19</sup> Because sexual assault and rape laws vary state by state,<sup>20</sup> this review will analyze each case within the applicable state laws. These cases of college athlete sexual assault will show that our legal system does not place enough emphasis on the seriousness of sexual assaults as it does for other crimes. College athletes are just the beginning, and if they continue to get away with sexual violence towards women, then our court system will continue to send the wrong message to men nationwide.

### III. SEXUAL ASSAULT ON CAMPUS

According to a recent survey by the White House Task Force to Protect Students from Sexual Assault, a survey of approximately 15,000 women and 8,000 men showed "that 20% of campus sexual assault perpetrators are athletes."<sup>21</sup> The study also showed that "[s]chools that don't have a big athletic culture or a big Greek life have fewer incidents of sexual assault."<sup>22</sup>

In general, approximately 63% of all sexual assault cases are not reported to police.<sup>23</sup> Many cases of sexual assault, therefore, go unnoticed because the victims are afraid of the backlash they will receive for coming forward and

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17. See, e.g., De Smeth et al., *supra* note 10.

18. Dave Orrick, *No Charges for UMN Gopher Football Players in Sex Case, After 2nd Review*, TWIN CITIES PIONEER PRESS, Dec. 30, 2016, <http://www.twincities.com/2016/12/30/deplorable-behavior-but-no-charges-in-gopher-football-sex-assault-allegations-prosecutors-say/>.

19. Yeung, *supra* note 4.

20. *Sexual Assault Penalties and Sentencing*, FINDLAW, <http://criminal.findlaw.com/criminal-charges/sexual-assault-penalties-and-sentencing.html> (last visited July 30, 2018).

21. Amber Jamieson, *10% of Female US College Students Experienced Sexual Assault in 2015*, GUARDIAN, Jan. 21, 2016, <https://www.theguardian.com/us-news/2016/jan/21/college-campus-sexual-assault-report-2015-university-students-rape>.

22. *Id.*

23. *Statistics About Sexual Violence*, *supra* note 1.

exposing their attacker to the public. One of the largest contributors to the lack of reporting is fear of embarrassment and backlash and “fear that no one will believe you.”<sup>24</sup> When judges overturn verdicts and show sympathy to the offender by imposing lenient sentences and when state prosecutors fail to file charges against offenders, the system is reinforcing these anti-reporting sentiments.<sup>25</sup>

Victims of sexual assault often receive criticism or harsh treatment by police and university officials when the victim files a sexual assault complaint.<sup>26</sup> Victims are often criticized by the public for ruining college athletes’ lives by making false or misleading accusations of rape or sexual assault. Victims are blamed for being drunk, consenting at first only to later rescind that consent when things escalate, and for acting in ways that suggest consent.<sup>27</sup> In reality, however, only two-percent of all rape and sexual assault accusations are false, fake, or unprecedented.<sup>28</sup> Regardless of the thought process in the attacker’s head when he commits the sexual act, the statutes very clearly state that sexual conduct must be consented to and that any unwanted sexual conduct imposed on a non-consenting individual is sexual assault.<sup>29</sup> Community service – and a six-month sentence – was the sanction a college athlete received after he was convicted of sexual assault but all felony charges were dropped.<sup>30</sup>

The criminal justice system, our judges, and our prosecutors must put forth a good faith effort to demonstrate to the general public that sexual assault is a crime, and that the victim should not be further victimized by the system that classifies itself as the protector. Punishing college athletes properly for their sexual assault crimes is one way to show our society the seriousness of sexual assault, and is a way to ensure that sanctioning sexual offenders under the correct application of the law is applied to every case of sexual violence.

According to a study by the National Coalition Against Violent Student Athletes, male student-athletes comprise 3.3% of the population, yet male

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24. Emanuella Grinberg, *These Tweets Show Why Women Don't Report Sexual Assault*, CNN (Oct. 13, 2016), <http://www.cnn.com/2016/10/13/health/why-women-dont-report/>. See Julia Jacobo, *Alleged Rape Victim at UNC Said She Was 'Treated Like a Suspect'*, ABC NEWS, Sept. 13, 2016, <http://abcnews.go.com/US/alleged-rape-victim-unc-treated-suspect/story?id=42065614>.

25. De Smeth et al., *supra* note 10.

26. See Jacobo, *supra* note 24.

27. Grinberg, *supra* note 24.

28. *Statistics About Sexual Violence*, *supra* note 1.

29. *Sexual Assault Overview*, FINDLAW, <https://criminal.findlaw.com/criminal-charges/sexual-assault-overview.html> (last visited July 30, 2018).

30. Sam Levin, *Stanford Sexual Assault: Read the Full Text of the Judge's Controversial Decision*, GUARDIAN, June 14, 2016, <https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky> (contains the Brock Turner Sentencing transcript).

student-athletes commit approximately 19–20% of sexual assaults on college campuses.<sup>31</sup> It is no secret that college campuses, especially those with nationally recognized sports teams, house a “rape-culture” among male student-athletes.<sup>32</sup> With the enactment of Title IX<sup>33</sup> and the Office for Civil Rights<sup>34</sup> division working with universities to enforce anti-assault policies, regulations, and sanctions, there has definitely been institutional changes put in place to combat the serious issue of college campus sexual assaults.<sup>35</sup> Even with *Dear Colleague Letters* informing universities of safer on-campus practices and suggested solutions to sexual-assault,<sup>36</sup> it seems that our society and our government feels that this is an issue that needs addressing only at the internal, university level rather than the criminal level.

This Comment is not intended to criticize or disagree with internal procedures and sanctions imposed by universities and their athletic programs, but rather to argue that there is more our legal system can do to address this serious issue on campuses nationwide. According to the Bureau of Justice Statistics, the average sentence length for rape is eleven years.<sup>37</sup> While this number is an average, and although many student-athletes are not ultimately charged with rape (if they are even criminally charged at all), this is another example of how the criminal justice system is doing our society a disfavor by dropping or lowering rape charges in favor of a lesser offense or a misdemeanor.<sup>38</sup>

Every state has different laws concerning sexual assault and rape; likewise, every state has different sentencing schemes and punishments for those who are

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31. Jamieson, *supra* note 21; *NCAVA: Building Positive Athlete Role Models and Reducing Violence*, BEYOND THE CHEERS, <http://www.beyondthecheers.com/ncava-building-positive-athlete-role-models-and-reducing-violence/#.WwsqRtMvw0o> (last visited July 30, 2018).

32. See 8 JEFFERY R. BENEDICT, *ATHLETES AND ACQUAINTANCE RAPE* (1998).

33. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–88 (2018).

34. *Office for Civil Rights*, U.S. DEPT. OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/index.html> (last visited July 30, 2018).

35. *How to File a Discrimination Complaint with the Office for Civil Rights*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T. OF EDUC. (Sept. 2010), <http://www2.ed.gov/about/offices/list/ocr/docs/howto.pdf>; *Title IX Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> (last visited July 30, 2018).

36. See generally Russlynn Ali, Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T. OF EDUC. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

37. Danielle Paquette, *What Makes the Stanford Sex Offender’s Six Month Jail Sentence So Unusual*, WASH. POST, June 6, 2016, [https://www.washingtonpost.com/news/wonk/wp/2016/06/06/what-makes-the-stanford-sex-offenders-six-month-jail-sentence-so-unusual/?utm\\_term=.c8170824ca4a](https://www.washingtonpost.com/news/wonk/wp/2016/06/06/what-makes-the-stanford-sex-offenders-six-month-jail-sentence-so-unusual/?utm_term=.c8170824ca4a); see Paula M. Ditton et al., *Truth in Sentencing in State Prisons*, U.S. DEP’T. OF EDUC. (Jan. 1999), <https://bjs.gov/content/pub/pdf/tssp.pdf>.

38. Paquette, *supra* note 37.

ultimately convicted of a sexually charged crime.<sup>39</sup> In California, someone convicted of sexual assault could face anywhere from twenty-four to forty-eight months in prison and a fine of up to \$10,000.<sup>40</sup> Yet, we saw a former college swimmer, with aspirations of making it to the Olympics, receive only a six-month sentence in a case with witnesses.<sup>41</sup> New York classifies a sexual assault conviction as a Class D felony, carrying a minimum sentencing term of one to two years with a maximum term of seven years.<sup>42</sup> Similarly, in Texas, almost all sexual assault convictions under the Texas Penal Code result in a second-degree felony.<sup>43</sup> A closer look at other cases of college athlete sexual assault in the appropriate state law context will show that as a whole, on the state level, the legal system is not doing enough to remedy the inappropriate and lenient sentencing of sexual offenders.

#### IV. CASE STUDIES

Although efforts have been taken by universities to prevent sexual assault before it occurs and to remedy the situation with caution and sympathy, sexual assault awareness is more prevalent than ever; yet, victims still feel uncomfortable coming forward. Most recently in the news, convictions and sentencing for college athletes do not accurately represent the statutory language contained in their states' penal codes. This section will focus on recent cases of sexual assault claims analyzed in the context of state specific statutes and sex-offender programs. As stated earlier, because state laws differ across the nation, each section below will provide insight into the state specific legal remedies college athletes could have faced based on their alleged behavior and convictions.

##### *A. California*

###### 1. USC Linebacker Osa Masina

University of Southern California (USC) suspended linebacker, Osa Masina after Snapchat videos and pictures were sent to the victim's ex-boyfriend showing Masina and another USC football player, Don Hill, raping her in July

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39. *Sexual Assault Penalties and Sentencing*, *supra* note 20.

40. *Id.*

41. Levin, *supra* note 30.

42. *Sexual Assault Penalties and Sentencing*, *supra* note 20.

43. TEX. PENAL CODE § 22.011(f) (2018).

2016.<sup>44</sup> Masina and Hill were both suspended from USC's football program.<sup>45</sup> Masina was later expelled from USC and was prohibited from stepping foot on campus at any time.<sup>46</sup>

A Utah judge ordered Masina to stand trial for forcible rape.<sup>47</sup> Masina is a Utah native and the attack occurred in Utah.<sup>48</sup> The state charged him with one count of rape and two counts of forced sodomy after investigations revealed Masina raped her at a high school friend's party.<sup>49</sup> Masina pleaded not guilty and stood trial in June 2017.<sup>50</sup> Ultimately, Masina pleaded guilty to three counts of sexual battery, a class A misdemeanor.<sup>51</sup> A twenty-year old man who "brutally raped and injured [a] woman"<sup>52</sup> was let go with a class A misdemeanor, a crime punishable by a maximum of three years in jail in Utah.<sup>53</sup> Fortunately in this case, some action was taken.

A similar attack occurred two weeks earlier at teammate Don Hill's off-campus home in California.<sup>54</sup> The woman told investigators the two USC players assaulted her, and then sent videos of the assault to her ex-boyfriend via Snapchat.<sup>55</sup> Charges for the California assault were never filed by the State of California.<sup>56</sup> Los Angeles prosecutors decided not to file charges against Masina for the alleged California attack, citing "it would be too difficult to prove in court that the victim was too intoxicated to

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44. Lyz Lenz, *USC Football Players Allegedly Snapchatted Rape and Sent It to Victim's Ex-Boyfriend*, DAILY DOT (Sept. 2, 2016), <https://www.dailydot.com/irl/usc-snapchat-rape/>.

45. Associated Press, *Judge Orders Suspended USC LB Osa Masina to Trial on Rape Charges*, ESPN (Dec. 12, 2016), [http://www.espn.com/college-football/story/\\_/id/18265799/judge-orders-suspended-usc-lb-osa-masina-trial-rape-charges](http://www.espn.com/college-football/story/_/id/18265799/judge-orders-suspended-usc-lb-osa-masina-trial-rape-charges).

46. Kyle Bonagura, *Osa Masina of USC Trojans Removed from School As Police Investigations Continue*, ESPN (Sept. 13, 2016), [http://www.espn.com/college-football/story/\\_/id/17539145/osa-masina-usc-trojans-removed-school-police-investigations-continue](http://www.espn.com/college-football/story/_/id/17539145/osa-masina-usc-trojans-removed-school-police-investigations-continue).

47. Associated Press, *supra* note 45.

48. *Id.*

49. *Id.*

50. Scott Polacek, *Former USC LB Osa Masina Avoids Sexual Assault Charges in LA, Awaits Utah Trial*, BLEACHER REPORT (Mar. 7, 2017), <http://bleacherreport.com/articles/2696721-uscs-osa-masina-avoids-sexual-assault-charges-in-la-will-go-to-trial-in-utah>.

51. McKenzie Romero, *Deal for Ex-USC Player Drops Sex Assault Charges to Misdemeanors*, DESERET NEWS, Oct. 12, 2017, <https://www.deseretnews.com/article/865690889/Ex-linebacker-Osa-Masina-pleads-guilty-to-reduced-charges-in-sex-assault-case.html>.

52. *Id.*

53. UTAH CODE § 76-3-204 (2018) (the statute states that a Class A misdemeanor is for a one-year maximum term; but because Masina was charged with three counts, he will likely receive a maximum punishment of the 3 years or 1 year per count).

54. Polacek, *supra* note 50.

55. *Id.*

56. *Id.*

provide consent as she has alleged.”<sup>57</sup> California prosecutors also elected to forego charging Masina’s teammate Don Hill for his involvement in the California assault that occurred at his home.<sup>58</sup>

“Too difficult to prove . . . that the victim was too intoxicated to provide consent,”<sup>59</sup> is the standard which the L.A. prosecutor determined that charges would not be filed against two men who have video evidence of sexual conduct with a woman whom told police that she did not consent. By this standard, the State of California, and the city of Los Angeles has determined that a woman’s word and belief regarding consent can be discounted by the fact that she was drunk. Another example of how state criminal systems differ, the same crime was committed in both California and Utah, yet only one state prosecuted.

## 2. Stanford Swimmer Brock Turner

Brock Turner, a former Stanford University Swimmer received a six-month sentence and community service “after being convicted of sexually assaulting an unconscious, intoxicated woman in January 2015.”<sup>60</sup> Turner was charged with five felonies, four of which included: [1] rape of an intoxicated person, [2] rape of an unconscious person, [3] sexual penetration by a foreign object of an intoxicated woman and [4] assault with intent to commit rape.<sup>61</sup> During trial, Turner faced a fourteen-year sentence for the five charges and would have to register as a sex offender if convicted.<sup>62</sup>

When it was Turner’s turn to present his case-in-chief, he did what almost every other defendant in a sexual assault case does, point the finger and claim the victim consented.<sup>63</sup> He claimed the two were both drunk and that earlier at the party, she had made him believe she wanted to have sex with him.<sup>64</sup> The defense heavily relied on Turner’s credentials as a swimmer, citing he had once Olympic aspirations.<sup>65</sup> Yet, what the defense failed to show was that no matter what the defendant believes to be consent, sexually forcing oneself on an unconscious woman is sexual assault, regardless of that person’s athletic prowess.

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57. *Id.*

58. *Id.*

59. *Id.*

60. Kayla Lombardo, *Brock Turner: Stanford Sexual Assault Case, Explained*, SPORTS ILLUSTRATED, June 9, 2016, <http://www.si.com/more-sports/brock-turner-stanford-swimming-sexual-assault-rape-case>.

61. *Id.*

62. *Id.*

63. De Smeth et al., *supra* note 10.

64. *Id.*

65. Lombardo, *supra* note 60.

Despite the severity of Turner's actions, he was not convicted of rape because under the California statute, rape requires penetration of an unconscious person.<sup>66</sup> Instead, the jury convicted Turner of "three felony counts of sexual assault: assault with intent to commit rape of an intoxicated or unconscious person, penetrating an intoxicated person with a foreign object and penetrating an unconscious person with a foreign object."<sup>67</sup>

Judge Persky, a Stanford graduate himself, sentenced Turner to only six months in jail with three years of probation,<sup>68</sup> stating that a longer sentence would "have a severe impact on [Turner]."<sup>69</sup> Turner was also required to register as a sex offender in his home state upon release.<sup>70</sup> Ultimately, however, Turner only served three months of his lenient six-month sentence for raping an unconscious girl outside of a college party.<sup>71</sup> Section 484 of the California Penal Code mandates the same sentence for petty theft: a misdemeanor punishable by up to six months in county jail.<sup>72</sup> Yet, a judge allowed a man who sexually assaulted an unconscious girl behind a dumpster to serve a punishment equivalent with that of stealing a pack of gum from the gas station.<sup>73</sup>

Recent legislation from California, such as the "yes means yes" law,<sup>74</sup> suggests the state is working towards addressing the seriousness of sexual assaults on college campuses. This law specifically defines consent necessary for sexual activity as an "affirmative, conscious and voluntary agreement to engage in sexual activity."<sup>75</sup> The law also goes on to include that a person under the influence of drugs and alcohol, or a person who is asleep cannot give consent necessary to engage in sexual conduct.<sup>76</sup>

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66. Kirsten Salyer, *Brock Turner Is Technically Not a 'Rapist'*, TIME, June 9, 2016, <http://time.com/4362949/stanford-sexual-assault-not-rape/>.

67. *Id.*

68. Lombardo, *supra* note 60.

69. Ashley Fantz, *Brock Turner's 6-month Sentence in Stanford Rape Case Sparks Outrage*, CNN (June 7, 2016), <http://www.cnn.com/2016/06/06/us/sexual-assault-brock-turner-stanford/>.

70. De Smeth et al., *supra* note 10.

71. Levin, *supra* note 30; Emanuella Grinberg & Catherine E. Shoichet, *Brock Turner Released From Jail After 3 Months*, CNN (Sept. 2, 2016), <https://www.cnn.com/2016/09/02/us/brock-turner-release-jail/index.html>.

72. CAL. PENAL CODE § 484 (2018). See *California Penal Code Section 484(a) PC and 488 PC: Petty Theft*, KRAUT LAW GROUP, <https://www.losangelescriminallawyer.pro/california-penal-code-section-484-a-pc-and-488-pc-petty-theft.html> (last visited July 30, 2018).

73. Grinberg & Shoichet, *supra* note 71.

74. See CAL. EDUC. CODE § 67386 (2018); see also S.B. 967, 2013-14 Gen. Assemb., Reg. Sess. (Ca. 2014).

75. *Id.*

76. *Id.*

This law was passed by the California legislature in 2014, yet Turner and Masina's cases occurred in 2016 and 2017, respectively.<sup>77</sup> Despite this law, the courts did not hold these sexual offenders to the scrutiny of this newly imposed law. The athletes were convicted and sentenced to terms way below what was expected, and Masina was not charged at all.

In California, there is also a difference between sexual battery and sexual assault. Sexual battery is punishable by Section 243.4(a) of the California Penal Code and defines sexual battery as:

Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars (\$2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars (\$10,000).<sup>78</sup>

To prove a case of sexual battery, the prosecutor must establish the following three elements:

- (1) the victim was touched in her intimate parts by the assaulter while being restrained;
- (2) the assaulter touched the victim against her will; and
- (3) the assaulter had intent to purposefully touch the victim for 'sexual gratification, sexual arousal, or sexual abuse.'<sup>79</sup>

California has ten statutory laws defining crimes that can stand as the basis for sexual assault and related criminal charges.<sup>80</sup> Section 261 of the California Code defines rape as an "act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another"<sup>81</sup> and "where a person is prevented from resisting by any intoxicating or anesthetic substance, or any

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77. See Salyer, *supra* note 66; see also Romero, *supra* note 51.

78. CAL. PENAL CODE § 243.4(a) (2018).

79. *California Sexual Assault Laws*, FINDLAW, <http://statelaws.findlaw.com/california-law/california-sexual-assault-laws.html> (last visited July 30, 2018).

80. *California Sexual Assault Laws & Punishments*, AGEOFCONSENT, <https://www.ageofconsent.net/laws/california> (last visited July 30, 2018).

81. CAL. PENAL CODE § 261(a)(2) (2018).

controlled substance, and this condition was known, or reasonably should have been known by the accused.”<sup>82</sup>

Thus, California has multiple statutes and laws under which sexual offenders can be convicted and punished. Yet, despite Brock Turner’s ultimate conviction of three felonies, he merely served three months in a county jail;<sup>83</sup> the same sentence one might receive for committing petty theft in California.

### *B. North Carolina*

#### 1. UNC Football Player Allen Artis

University of North Carolina at Chapel Hill (UNC) football player Allen Artis sexually assaulted a fellow student in her apartment complex at UNC.<sup>84</sup> When the victim reported the incident to the police, she was insulted that they did not take her seriously.<sup>85</sup> Only after the victim held a press conference six months later to speak out about her sexual assault was Artis finally served with a misdemeanor warrant and suspended from the university’s football team.<sup>86</sup> Six months went by without any law enforcement action taken. The system forced the victim to take actions into her own hands, and to start her own investigation.<sup>87</sup>

The victim complied with all protocol necessary to come forward with a rape claim; she consented to a rape kit and fully complied with UNC’s sexual assault procedures, yet after six months the University did nothing to remedy the situation.<sup>88</sup> After the victim held a press conference of her own, the District Attorney’s office finally opened an investigation and issued an arrest warrant

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82. *Id.*

83. Levin, *supra* note 30.

84. D.C. McAllister, *Media Goes Quiet Over UNC Rape Case That Flips ‘Social Justice’ Narrative*, PJ MEDIA (Sept. 14, 2016), <https://pjmedia.com/blog/unc-rape-case-reveals-race-double-standard/>.

85. *Id.*

86. *Id.*

87. Sammy Batten, *Warrant Issued for UNC Linebacker Allen Artis After Rape Allegation*, FAYETTEVILLE OBSERVER, Sept. 13, 2016, <http://www.fayobserver.com/4b025a86-79fc-11e6-a63b-9b9192e6590d.html>.

88. *Id.*

for Artis.<sup>89</sup> Yet again, rather than being charged with a felony for nonconsensual sex,<sup>90</sup> Artis faced two misdemeanor charges of sexual battery and assault.<sup>91</sup>

### *C. Minnesota*

In September 2016, several University of Minnesota football players were investigated for sexual assault allegations.<sup>92</sup> Following a police investigation, no charges were filed against the players.<sup>93</sup> Following the release of the University's investigation, County Attorney, Mike Freeman, reviewed the case a second time and once again elected not to file charges against the players, finding there was not enough evidence to sustain criminal charges.<sup>94</sup> "There [was] insufficient admissible evidence for prosecutors to prove beyond a reasonable doubt that either force was used, or that the victim was physically helpless as defined by law in sexual encounter."<sup>95</sup>

The University suspended ten players in relation to this incident.<sup>96</sup> After further investigations, five of those players were later recommended for expulsion.<sup>97</sup> The Minnesota Board of Regents reviewed the punishments after those expulsions were appealed in February 2017.<sup>98</sup> Four of the five players' expulsions were upheld and one was reduced to a one-year suspension.<sup>99</sup>

This discrepancy in University punishment and criminal charges is said to fall on the standard of proof necessary for each institution.<sup>100</sup> A University's standard of proof is said to be much lower than that of the beyond a reasonable doubt standard necessary to file criminal charges.<sup>101</sup>

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89. *Id.*

90. N.C. GEN. STAT. § 14-27.21 (2018) (first-degree forcible rape offenders guilty of a Class B1 felony); § 14-27.22 (2018) (second-degree forcible rape offenders guilty of a Class C felony); § 14-27.26 (2018) (first-degree forcible sexual offense offenders guilty of a Class B1 felony); § 14-27.27 (2018) (second-degree forcible sexual offense offenders guilty of a Class C felony).

91. Web Staff, *supra* note 10.

92. Orrick, *supra* note 18.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. Josh Verges, *UMN Regents to Review Punishment of Gopher Football Players*, TWIN CITIES PIONEER PRESS, Mar. 24, 2017, <https://www.twincities.com/2017/03/24/umn-regents-to-review-punishment-of-gopher-football-players/>.

99. *Id.*

100. See Sarah Horner, *University of Minnesota Report Details Gophers Football Sex Assault Allegation, Players' Defense*, TWIN CITIES PIONEER PRESS, Jan. 4, 2017, <http://www.twincities.com/2016/12/17/university-report-details-womans-sexual-assault-allegation-football-players-defense/>.

101. *Id.*

The Minnesota Sex Offender Program requires that all adult offenders register as a sexual offender with the program.<sup>102</sup> There are three elements to this process:

- (1) Sex offender specific treatment to assist offenders to learn to develop internal controls,
- (2) Probation supervision and monitoring to exert external control over offenders, and
- (3) Polygraph examinations to obtain complete sexual history information and monitor a participant's fantasies or behaviorally-specific access to victims.<sup>103</sup>

These are the legal requirements for convicted sex offenders, however, when charges are not filed by state prosecutors, these accused sexual offenders do not have to register as sex offenders in the state.<sup>104</sup> This allows accused sex offenders to continue their everyday lives, possibly committing more sexual assaults in the future, forcing the victim to live with the vulgar and scarring memories.

#### *D. Texas*

Former Baylor football player, Sam Ukwuachu, was convicted of sexual assault in August 2015 and was sentenced to 180 days in jail and eight years of felony probation after a Texas district court found him guilty of sexually assaulting a woman in October 2013.<sup>105</sup> Throughout the trial, several text messages between the victim and Ukwuachu were precluded from the Ukwuachu's attorney's review under the Rape Shield Law.<sup>106</sup>

Following an appeal, the court overturned the district court's decision finding that the text messages should have been available for Ukwuachu's attorney's review.<sup>107</sup> Therefore, Ukwuachu will receive a new trial and may get a lesser sentence than that already imposed because upon reviewing the evidence found in the text messages, the jury could very well find that since the victim had consented to sexual relations in the past, that this instance was also

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102. *Sex Offender Program*, STEARNS COUNTY MINN., <https://co.stearns.mn.us/LawPublicSafety/Adult-Probation/SexOffenderProgram> (last visited July 30, 2018).

103. *Id.*

104. *Frequently Asked Questions*, MINN. PREDATORY OFFENDER REGISTRATION, <https://por.state.mn.us/predatorfaq.aspx> (last visited July 30, 2018).

105. *Ukwuachu v. State*, 494 S.W.3d 733 (Tex. Crim. App. 2016); Diana Moskovitz, *Appeals Court Overturns Sexual Assault Conviction of Ex-Baylor DE Sam Ukwuachu*, DEADSPIN (Mar. 23, 2017), <http://deadspin.com/appeals-court-overturns-sexual-assault-conviction-of-ex-1793573878>.

106. TEX. R. EVID. 412.

107. Moskovitz, *supra* note 105.

consented to.<sup>108</sup> Again, this is inconsistent with how we as a society should view allegations of sexual assault. One-time consent should not be construed to legally determine consent every time subsequent to that first instance.

In Texas, sexual assault is one of the most serious offenses a person can be accused. Under section 22.011 of the Texas Penal Code, sexual assault can occur without penetration and in most cases, sexual assault is a second-degree felony punishable by two to twenty years in prison.<sup>109</sup> An individual convicted of aggravated sexual assault, an assault particularly violent and committed with use of a weapon or under the threat of death, can face a first-degree felony with a sentence of five to ninety-nine years in prison.<sup>110</sup> Yet again, we see that the state often remains hesitant to charge individuals accused of rape or sexual assault because proof of consent is too difficult to determine.

## V. LEAD BY EXAMPLE

Media coverage of sexual assault by college athletes, and legal reform of sexual assault laws and policies is not a new issue. Sexual assault has been occurring on campuses well before the media began exposing cases of such to society. Yet, reform after reform has come and gone, and we still see instances of sexual assault on and off campus, and a lack of interest in following through with supporting any change in laws.

Starting in the 1970s, many states began to impose what was known as a “rape law reform.”<sup>111</sup> These reforms included adding rape shield laws and making jury instructions less convoluted to make the laws less misogynistic and encourage reporting.<sup>112</sup> Academics and other social critics’ focus on sexual violence in the context of men’s sports, in large part, sparked the discussions leading to this reform in the late 1970s.<sup>113</sup>

Forty years ago, the segregation among woman’s and men’s sports was faulted for producing or creating the “rape culture” so prevalent in college sports and on college campuses.<sup>114</sup> The “rape culture” was, and still is, said to stem

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108. Tom Fornelli, *Former Baylor Player Sam Ukwuachu Gets Sexual Assault Conviction Overturned*, CBS SPORTS (Mar. 23, 2017), <http://www.cbssports.com/college-football/news/former-baylor-player-sam-ukwuachu-gets-sexual-assault-conviction-overturned/>.

109. TEX. PENAL CODE § 22.011 (2018).

110. *Id.*

111. Stacy Futter Jr. & Walter R. Mebane, *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN’S L.J. 72 (2001).

112. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1198 (1997).

113. Todd W. Crosset et al., *Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, 19 J. OF SPORT & SOC. ISSUES 126, 127 (May 1995).

114. *Id.*

from the athletic system's desire to teach male athletes that aggression makes a good player.<sup>115</sup> Unfortunately, this aggression often follows the athlete off the field or court. Therefore, the big push to reform sexual assault laws and change the perception of women who are victimized by both the sex offender and the legal system, along with the enactment of Title IX by the Department of Education in 1972,<sup>116</sup> was largely based on the idea that men are taught to be aggressive through sports. Reformists and academics believed that if women were 'equalized' in the sports context, there would be less of a tendency to sexually abuse women based on masculinity, power, and athletic status.<sup>117</sup>

After Title IX was passed by the U.S. Department of Education in 1972, universities began to take more efforts to ensure equal opportunities for women in education. Title IX prohibits discrimination on the basis of sex in education programs, including sports programs that receive federal funds.<sup>118</sup> The Office for Civil Rights also provides guidance to universities across the nation for dealing with sexual assault allegations and claims to ensure that universities are following Title IX's procedural requirements.<sup>119</sup> The legal system may benefit from understanding how universities deal with such instances of sexual assault on campus and ensuring the attackers receive proper punishments.

Some states have already proposed amendments to current sexual assault laws to clear up any ambiguities that may lead to insufficient convictions and sentences. California, for example, after seeing the result of the Brock Turner sentencing took action.<sup>120</sup> Two weeks after Brock Turner was sentenced to only six months in jail after being convicted of sexual assault of an unconscious woman, California legislators proposed a bill for mandatory prison sentences for sexual assault convictions.<sup>121</sup> "This bill would prohibit a court from granting probation or suspending the execution or imposition of a sentence if a person is convicted of rape, sodomy, penetration with a foreign object, or oral copulation

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115. *Id.*

116. 20 U.S.C. §§ 1681–88 (2018).

117. *Title IX: Working to Ensure Gender Equity in Education*, NAT'L COALITION FOR WOMEN & GIRLS IN EDUC. (2012), <http://www.ncwge.org/TitleIX40/TitleIX-print.pdf>.

118. §§ 1681–88 (2018).

119. *See, e.g., Q&A on Campus Sexual Misconduct*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. (Sept. 2017), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

120. Liam Dillon, *In Wake of Stanford Sexual Assault Case, Lawmakers Once Again Pitch Mandatory Prison Time*, L.A. TIMES, Aug. 6, 2016, <http://www.latimes.com/politics/la-pol-sac-stanford-rape-prison-sentences-20160806-snap-story.html>.

121. *Id.*

if the victim was either unconscious or incapable of giving consent due to intoxication.”<sup>122</sup>

Prior to the proposed amendment, there was a loophole in the language of the California Penal Code that “deemed the sexual assault of an unconscious person less severe than an attack on a conscious person.”<sup>123</sup> California Governor, Jerry Brown signed the bill on September 30, 2016.<sup>124</sup> The goal of the amendment is to hold offenders accountable for their actions and to punish all offenders, regardless of their athletic celebrity status.<sup>125</sup> If the same crime had been committed by someone other than Brock Turner, the offender would have gotten either a three-, six-, or eight-year prison sentence.<sup>126</sup>

Other states must do the same and rewrite the laws to make the language less sexist.<sup>127</sup> Deeming sexual assault of an unconscious person less of a crime in terms of punishment than the sexual assault of a conscious person ultimately sends the message that it is the victim’s fault she was assaulted or raped because she was unconscious. This sends the wrong message.

## VI. CONCLUSION

The most personal and intimate invasion of privacy is sexual assault. It is time for a legal reform of our sexual assault laws and sentencing guidelines that the court will take seriously, and the publicity invoked by male college athlete offenders can serve as a platform to achieve it. Courts must impose fair and justiciable penalties on college athletes who commit acts of sexual assault or violence, and must alter the way in which they sentence all sex offenders. Moreover, athletes must be held to the same scrutiny as any other individual who sexually assaults another. Sexual assault, sexual battery, and rape are crimes that cannot be solely punished on an internal university level. Our legal system needs to take a serious look at how sexual assault victims are often blamed while allowing the offenders to slip through the legal cracks.

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122. Assemb. B. 2888, 2015-16 Gen. Assemb., Reg. Sess. (Ca. 2016); Liam Dillon, *In Response to Stanford Case, State Democrats Propose Mandatory Prison Sentences for Rape Convictions*, L.A. TIMES, June 22, 2016, <http://www.latimes.com/politics/la-pol-sac-essential-politics-1466617948-htm1story.html>.

123. Katy Murphy & Jessica Calefati, *Increasing Penalties for Sexual Assault Not That Easy*, SANTA CRUZ SENTINEL, June 26, 2016, <http://www.santacruzsentinel.com/article/NE/20160626/NEWS/160629784>.

124. CAL. PENAL CODE § 1203.065 (2018).

125. Sarah Larimer, *In Aftermath of Brock Turner Case, California’s Governor Signs Sex Crime Bill*, WASH. POST, Sept. 30, 2016, [https://www.washingtonpost.com/news/grade-point/wp/2016/09/30/in-aftermath-of-brock-turner-case-californias-governor-signs-sex-crime-bill/?utm\\_term=.524ca9cafeb2](https://www.washingtonpost.com/news/grade-point/wp/2016/09/30/in-aftermath-of-brock-turner-case-californias-governor-signs-sex-crime-bill/?utm_term=.524ca9cafeb2).

126. § 289(d); see Larimer, *supra* note 125.

127. Bryden & Lengnick, *supra* note 112.

In 2013, the Federal Bureau of Investigation amended their definition of rape to: “penetration, no matter how slight, of the vagina or anus with any body-part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”<sup>128</sup> State legislatures should use this definition as a mold to amend sexual assault laws and sentencing guidelines. Jury verdicts will also greatly benefit from seeing more harsh penalties given to sexual offenders because they will see that the court takes the charges seriously. This impression will impact how the jury weighs the factual and circumstantial evidence when reaching a verdict. However, with the current leniency in sentencing sexual offenders, “woman, [especially female college students,] cannot depend” on the criminal justice system<sup>129</sup> for protection.

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128. Salyer, *supra* note 66.

129. Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 227 (2009).