

# SEXUAL DISCRIMINATION, ASSAULT AND HARASSMENT

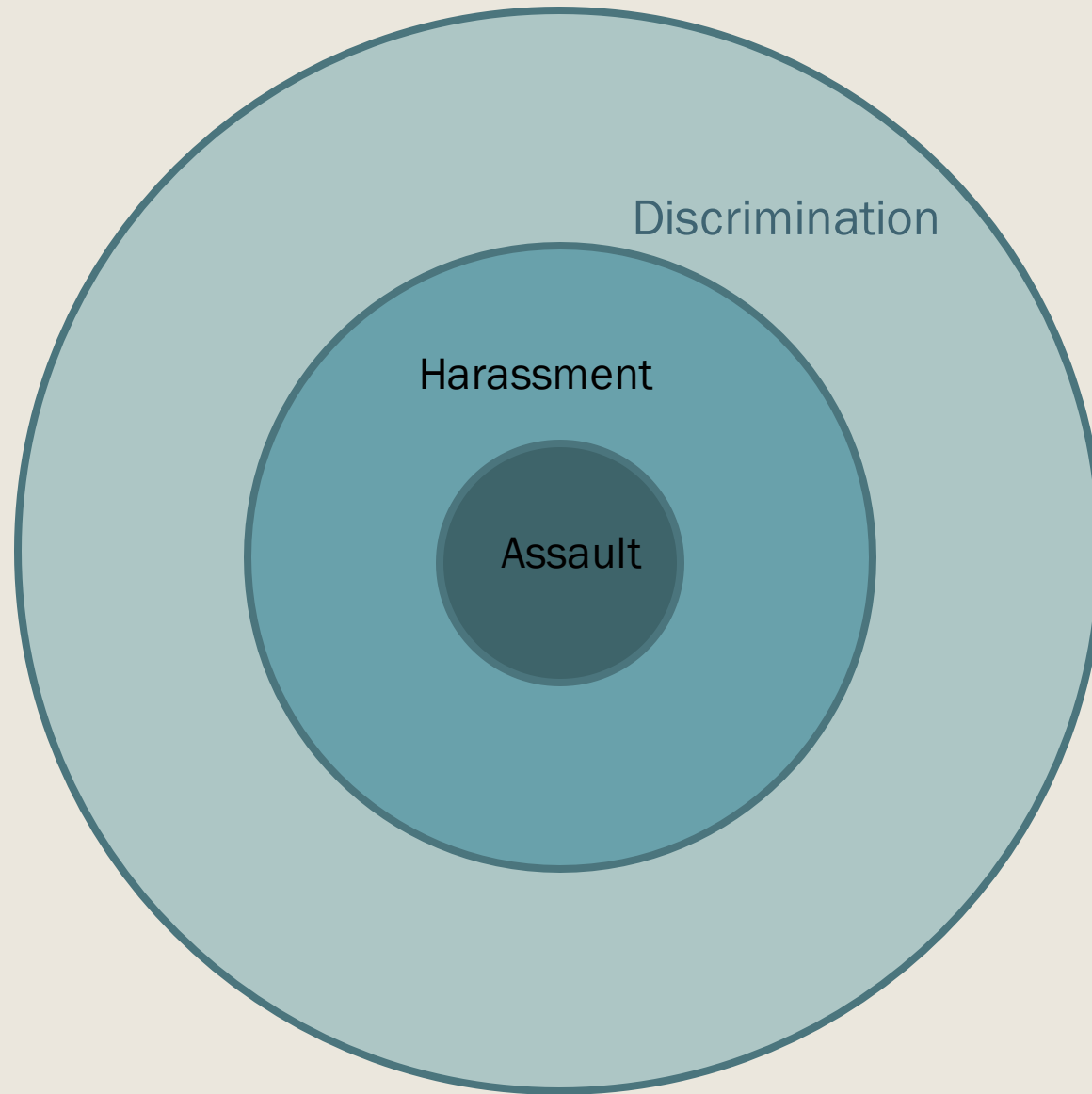
A Primer on Federal and State Law Claims

CALIFORNIA  
WOMEN'S  
LAW CENTER

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The California Women's Law Center's mission is to break down barriers and advance the potential of women and girls through transformative litigation, policy advocacy and education



Assault

Harassment

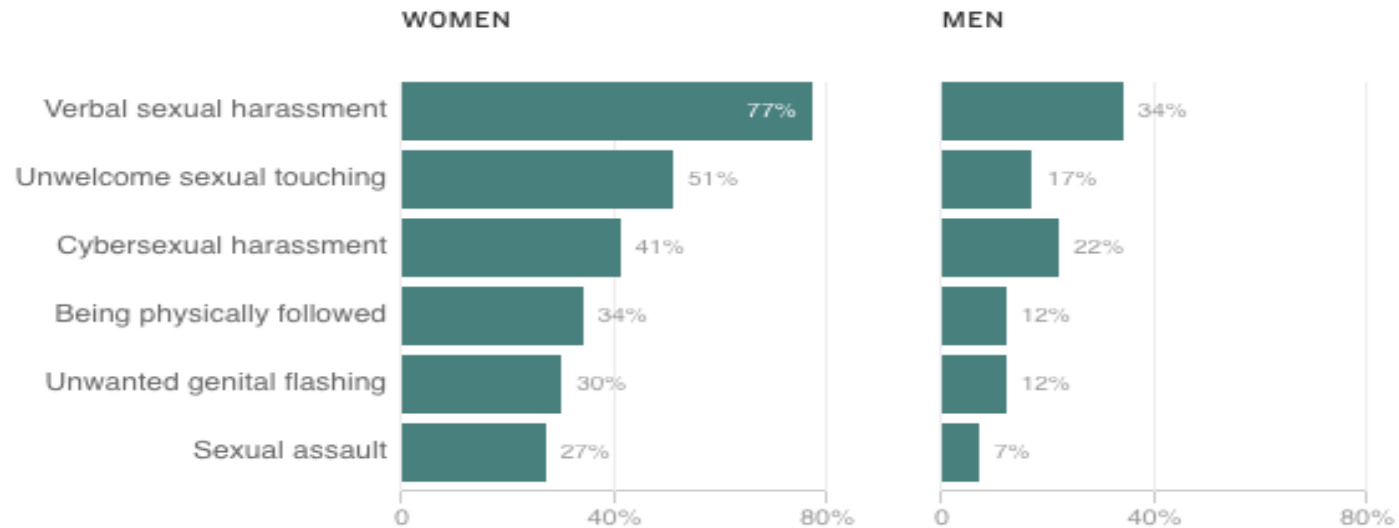
Discrimination

# The Problem – Sexual Harassment

- Recent poll found that **81%** of women have experienced some form of sexual harassment during their lifetime
  - *Stop Street Harassment*

## More Than 3 Out Of 4 Women Have Been Verbally Harassed

Share of respondents who have experienced different forms of harassment or assault



Source: *Stop Street Harassment*

Credit: *Hilary Fung/NPR*

# The Problem – *Sexual Harassment*

- 66% of women have been sexually harassed in public spaces
- 38% of women have been sexually harassed at their **workplace**
- 35% of women have experienced it at their residence
- Most had experienced harassment in multiple locations

# The Problem – Sexual Assault

- **1 in 5** women and 1 in 71 men will be raped at some point in their life
  - *1 in 3 women and 1 in 6 men have experienced some form of sexual violence in their life*
  - *91% of sexual assault victims are female*
  - *8% of rapes occur while the victim is at work*
- **Campus Sexual Assault**
  - *1 in 4 women are victims of sexual assault*
  - *84% of female survivors report being sexually assaulted during their first four semesters on campus (the "red zone")*
  - *Only **12%** of college student survivors report assault to the police*

# SEXUAL DISCRIMINATION

Federal Law



# Title VII

- *Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq).*
- *Disparate Treatment:*
  - *must show the employer had a discriminatory motive, then defendant may rebut by showing non-discriminatory purpose*
- *Elements*
  - *Member of a **protected class** (ex. Women)*
  - *Who is **qualified** for the position*
  - *Suffers an **adverse employment action***
  - *Under circumstances that suggest a **discriminatory motive***



# Title VII Continued

- *Disparate impact*: a facially neutral policy that led to discriminatory results in application
- **Elements:**
  - Policy that is **neutral** on its face
  - Has a **discriminatory impact** in practice because it disproportionately and adversely impacts a protected group
- *Exhaustion of Administrative Remedies*: must file a complaint with EEOC prior to commencing civil action in the court

# Title IX

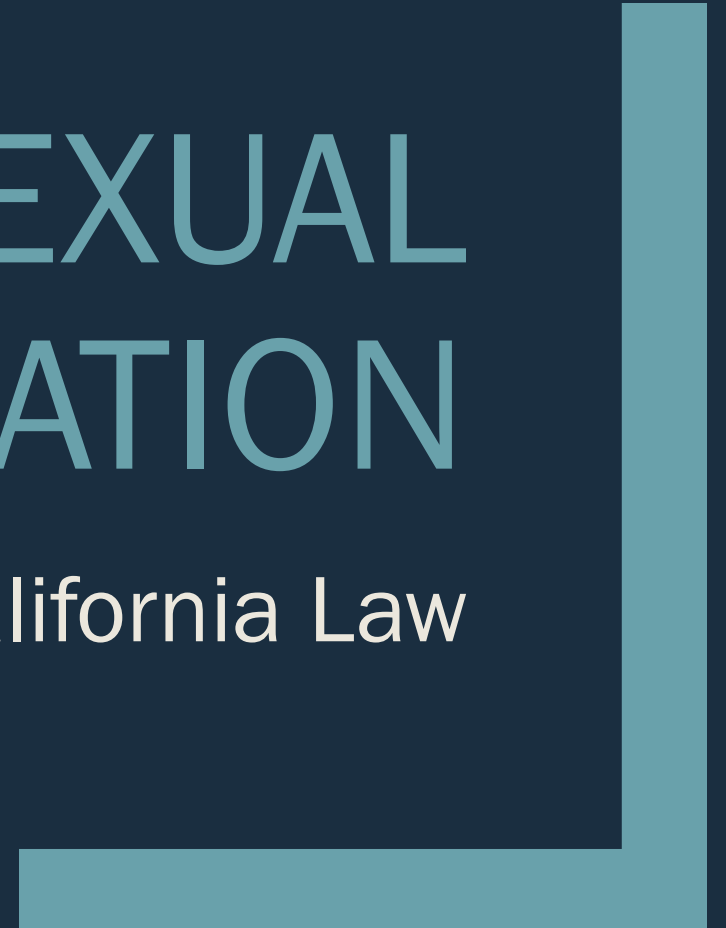
- Title IX of the Education Amendments Act of 1972 (20 U.S.C. § 1681)
- *Prohibits sex discrimination by any federally funded education program or activity*
- *Elements*
  - *An intentional act of discrimination*
  - *On the basis of sex*
- **Includes retaliation**
- Statute of Limitations: same as for personal injury within that state (2 years in CA)
- No exhaustion of administrative remedies required!

# Equal Pay Act

- Protects the rights of employees to be free from pay discrimination on the basis of sex
- Elements:
  - *The employer pays different wages to employees of the opposite sex*
  - *For **substantially** equal work*
  - *Such differential in payment is not based on*
    - Seniority system
    - Merit system
    - System which measures earnings by quantity or quality of production
    - System based on any factor other than sex
- Statute of Limitations: Two Years (Three Years for willful)

# SEXUAL DISCRIMINATION

California Law



# Fair Employment and Housing Act (FEHA)

- Cal. Gov't Code §§ 12900-12996
- **Disparate Treatment:** requires that a plaintiff show that the employer had a discriminatory motive
- Elements
  - *Member of a protected class (ex. Women)*
  - *Qualified for the position*
  - *Adverse employment action (ex. Firing or demotion)*
  - *Circumstances that suggest a discriminatory motive*

# Fair Employment and Housing Act (FEHA)

- Disparate Impact
- Elements
  - Policy that is *neutral* on its face
  - Impact of a neutral policy, is, in practice, discriminatory because it *disproportionately adversely impacts* a protected group (e.g. women)
- Exhaustion of Administrative Remedies: complaint must be filed with CA Dept of Fair Employment and Housing (DFEH) within one year of discriminatory act

# California Fair Pay Act

- Cal. Labor Code § 1197.5
- The California Fair Pay Act prohibits employers from paying employees lower wages for work that is substantially similar to the work of higher paid employees of the opposite sex
- Elements
  - *Employer paid **lower wages** to an employee, compared to employees of the opposite sex*
  - *For **substantially similar work**, when viewed as a composite of skill, effort and responsibility*
  - *Without demonstrating an appropriate **exception** applies*
- Exceptions
  - *A seniority system*
  - *A merit system*
  - *A system that measures earnings by quantity or quality of production*
  - *A bona fide factor other than sex, such as education, training or experience*
- Statute of Limitations: Two Years

# Unruh Civil Rights Act

- Cal. Civ. Code § 51
- The Unruh Civil Rights Act states that all persons are entitled to free and equal accommodations in all business establishments of any kind
- Elements
  - *Denial of full or equal accommodations, advantages, facilities, privileges or services*
  - *Because of **sex***
  - *By any **business establishment***
- Examples
  - *Sex-based price discounts on car washes*
  - *Charging higher prices for night club patrons based on sex*



# SEXUAL HARASSMENT

Federal Law



# Title VII: Harassment in the Workplace

- *Title VII of the Civil Rights Act of 1964 is a federal statute that prohibits discrimination based on statutorily enumerated categories, including sexual harassment.*
- Title VII applies to employers with 15 or more employees
- Hostile Work Environment
- *Elements*
  - *The employee belongs to a **protected group***
  - *The employee was subjected to **unwelcome sexual harassment***
  - *The harassment complained of **was based on sex***
  - *The harassment complained of affected a term or condition or privilege of employment in that it was **sufficiently severe or pervasive** to “alter the conditions of the victim’s employment and create an abusive working environment.”*
  - *From an **objective and subjective** perspective*

# Title VII: Harassment in the Workplace

- Quid Pro Quo
- It is “harassment that involves the conditioning of concrete employment benefits on sexual favors.” 72
- Elements
  - *The employee belonged to a **protected group***
  - *The employee was subject to **unwelcome sexual harassment***
  - *The harassment complained of was **based on sex***
  - *The employee’s reaction to the unwelcome behavior affected **tangible aspects** of the employee’s compensation, terms, conditions, or privileges of employment*
- Exhaustion of Administrative Remedies/Statute of Limitations: must file charge with **EEOC** first (generally within 180 days of discrimination), Right to Sue notice will be issued, must file suit within 90 days

# Title VII: Retaliation

- 42 U.S.C. § 2000e-3(a)
- Prohibits employers from retaliating against current or former employees who exercise their rights, or any employee who participates in an investigation, proceeding or hearing
- Elements:
  - *The Plaintiff engaged in **protected conduct***
    - Opposition clause & participation clause
  - *The plaintiff was thereafter subject to a **material adverse employment action***
  - *A **causal connection** exists between the protected conduct and the adverse action*
- Affirmative Defenses:
  - *Employer exercised reasonable care to prevent and correct promptly any harassing behavior*
  - *The plaintiff failed to take advantage of preventive or corrective opportunities provided by employer to avoid harm*

# Title IX: Harassment

- *Sexual harassment is a form of sex discrimination prohibited by Title IX.*
  - Whether gender-oriented conduct rises to the level of harassment is a context-driven determination
- **Elements** (for a COA for sexual harassment under Title IX)
  - The school exercised ***substantial control*** over both the harasser and the context in which the harassment occurred
  - The plaintiff suffered harassment that was so ***severe, pervasive and objectively offensive*** that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school
  - The harassment was committed ***on the basis of sex***
  - The school had ***actual knowledge*** of the harassment
  - The school responded with ***deliberate indifference***
  - The school's deliberate indifference subjected the plaintiff to ***further harassment*** or made the plaintiff liable or more vulnerable to it
- Unlike Title VII, no requirement of administrative exhaustion!

# SEXUAL HARASSMENT

California Law



# FEHA: Harassment in Workplace

- Cal. Gov't Code § 12940(j)
- Hostile Work Environment Elements
  - *Employee is a member of a **protected category***
  - *Employee was subjected to **unwelcome sexual advances, conduct or comments***
  - *The unwelcome conduct complained of was **because of the employee's sex***
  - *The conduct was sufficiently **severe or pervasive** to alter the conditions of plaintiff's employment and create a hostile or abusive work environment*
- Quid Pro Quo Elements
  - *The employee is a member of a **protected group***
  - *The employee is subjected to **unwelcome sexual advances, conduct or comments***
  - *The unwelcome conduct complained of was **because of employee's sex***
  - *The employee's reaction to the sexual conduct affected **tangible aspects** of the employee's **compensation, terms, conditions or privileges** of employment*
- Supervisory harassment, co-worker harassment, harassment by non-employee

# FEHA: Retaliation

- Cal. Gov't Code § 12940(h)
- Employer may not “harass, discharge, expel, or otherwise discriminate against any person because the person has opposed any [discriminatory or harassing] practices”, “or because the person has filed a complaint, testified, or assisted”
- Elements
  - *The employee engaged in **protected activity***
  - *The employee was subjected to a **material adverse employment action** by her employer after engaging in the protected activity*
  - *There was a **causal link** between the protected activity and the adverse employment action*
  - *The employer is aware that the employee’s complaint or opposition was based on a belief that the employer’s conduct was discriminatory*
- Exhaustion of Administrative Remedies/Statute of Limitations: complaint must be filed with DFEH within one year of last act of retaliation.
  - *DFEH → Right to Sue → lawsuit (90 days)*



# Harassment in Business Relationships (Civ. Code § 51.9)

## ■ Elements

- *There is a **business, service, or professional relationship** between the plaintiff and defendant*
- *Defendant makes sexual advances, or engages in other sexual conduct, that is **unwelcome and pervasive or severe***
- *Plaintiff **cannot easily terminate** the relationship*
- *Plaintiff has suffered or will suffer **harm***

## ■ Types of relationships (examples): Physician, therapist, dentist, attorney, social worker, banker, real estate agent, accountant, landlord, teacher

- *SB 224 (2018): investor, elected official, lobbyist, director, and producer*

## ■ Statute of Limitations: 2 years (personal injury)

# Ralph Act (Civ. Code § 51.7)

- Provides a civil remedy for violence or threats of violence based on protected characteristics
- Elements
  - Defendant threatened or committed an **act of violence** against plaintiff
    - “act of violence” = a physical, destructive act
  - Defendant was motivated by his perception that plaintiff had a **protected characteristic** (including gender, sex and sexual orientation)
  - Plaintiff was **harmed**
  - Defendant’s conduct was a **substantial factor** in causing the harm
- Statute of Limitations: 3 years from the alleged conduct

# SEXUAL ASSAULT & OTHER SEXUAL MISCONDUCT

Federal Law



# Title IX (Civil)

- Elements of the Cause of Action for Student-on-Student or Faculty-on-Student Sexual Assault
  - *The school exercised **substantial control** over both the perpetrator and the context in which the assault occurred.*
  - *The plaintiff suffered assault that was **severe, pervasive, and objectively offensive**.*
  - *The assault was committed on the basis of sex*
  - *The school had **actual knowledge** of the assault.*
  - *The school acted with **deliberate indifference** to the assault*
  - *The school's deliberate indifference must have subjected the plaintiff to further assault. or made the plaintiff liable or vulnerable to it.*

# Sexual Abuse/Stalking (Criminal)

- **Sexual Abuse**: D knowingly (1) caused another person to engage in a sexual act by threat or placing in fear OR (2) engaged in a sexual act with another person who is mentally or physically incapable
- **Sexual Abuse of a Minor**: D knowingly engaged in sexual act with a minor between 12-16, & >4 years age difference
- **Aggravated Sexual Abuse**: D caused another to engage in sexual act (1) by force OR (2) threat of death, serious bodily injury or kidnapping
- **Abusive Sexual Contact**: D knowingly engaged in sexual contact with another person without their permission
- **Interstate Stalking**: D traveled interstate with the intent to kill, injure, harass or surveil, AND engaged in a course of conduct
- **Interstate Domestic Violence**: D traveled interstate with the intent to kill, injure harass or intimidate partner, and in the course of travel commits a crime of violence against
- **Interstate Violation of a Protective Order**: D traveled interstate with intent to violate protection order and does so

# SEXUAL ASSAULT & OTHER MISCONDUCT

California Law - Civil



# Sexual Battery

- Cal. Civ. Code § 1708.5
- Elements
  - *Defendant acts with the **intent** to cause (1) a harmful or offensive contact with the intimate part of another, (2) contact with another by use of his or her intimate part, or (3) imminent apprehension of such conduct*
  - *A sexually offensive **contact** with that person directly or indirectly results*
  - *Batteree **did not consent** to the contact*
- Employer liability: employer is liable only where the misconduct occurred in the **scope of the perpetrator's employment**
- Statute of Limitations: 2 years, or if minor, with 8 years after age of majority

# Gender Violence

- Cal. Civ. Code § 52.4
- Elements
  - Gender-motivated hate conduct
  - Committed at least in part based on the gender of the victim
- Statute of Limitations: 3 years, 8 years if minor



# Stalking

- Cal Civ. Code 1708.7
- Elements
  - *Person engaged in a **pattern** of conduct intended to follow, alarm, surveil or harass;*
  - *As a result of the pattern of conduct:*
    - The plaintiff **reasonably feared for their safety** or the safety of an immediate family member OR
    - The plaintiff suffered **substantial emotional distress**
  - *The person made a credible threat with either the intent to place plaintiff in reasonable fear for their safety or with reckless disregard for the safety of the P OR D violated a restraining order*
- CYBERSTALKING – same elements as above, but occurs when a D uses email or other forms of electronic communication

# SEXUAL ASSAULT & OTHER MISCONDUCT

California Law -- Criminal

# Assault with Intent to Rape

- California Penal Code § 220
- Elements
  - *Defendant assaults another*
  - *With intent to commit mayhem, rape, sodomy, oral copulation, or any lewd or lascivious acts*
- Defendant's ***state of mind*** can be inferred from his conduct and the surrounding circumstances
  - *For attempted rape, the focus shifts from the penetration element to the requisite intent. Unlike the completed crime of rape, it is the state of mind of the defendant and not the victim that is at issue*
- Statute of Limitations: under 18=6 years, over 18=3 years

# Rape

- Cal. Penal Code §§ 261-262
- Elements:
  - Act of **sexual intercourse**
  - To which the victim **did not consent**
  - Under any of these circumstances
    - Incapacity to give consent
    - Accomplished by use of force, violence, duress, menace, fear, or threat (including threat to retaliate in the future or to use authority to incarcerate, arrest or deport)
    - Where a person is intoxicated
    - Where a person is unconscious, asleep, or unaware that the act occurred due to the perpetrator's fraudulent misrepresentations (Brock Turner case)
- Statute of Limitations: None for crimes committed on or after 1/1/2017, or for which the SOL had not run as of 1/1/2017

# Statutory Rape

- Cal. Penal Code § 261.5
- Elements
  - *Act of sexual intercourse*
  - *Accomplished with a person not the spouse of the perpetrator*
  - *Person is a **minor** (under 18)*
- Two minors who engage in sexual intercourse with each other can both be punished under the statute
- Statute of Limitations: If the minor is no more than 3 years older or younger than the perpetrator, SOL is one year (misdemeanor), otherwise, the SOL is 3 years

# Stalking

- Cal. Penal Code § 646.9
- Elements
  - *Willful, malicious, and repeated following or willful and malicious harassment of another person*
  - *Credible threat made with intent to place that person in reasonable fear for their safety or safety of another immediate family member*
- Harassment: knowing and willful behavior that “seriously alarms, annoys, torments, or terrorizes” another person and serves no legitimate purpose
- Credible threat: threat that is verbal, written, communicated electronically or implied by a pattern of conduct, made with the intent to place another person in **reasonable fear** for his or her safety, or the safety of his or her family
- CYBERSTALKING: use of the Internet, email or other telecommunication technologies, including computers, cell phones
  - *Example: “multiple messages on Facebook” found to constitute a credible threat*
- Statute of Limitations: 1-3 years

# Indecent Exposure

- Cal. Penal Code § 314
- Elements
  - *Willful and lewd **exposition** of one's person, or private parts thereof*
  - *In any **public place** or place where there are present other persons to be offended or annoyed thereby OR*
  - *Procuring, counseling, or assisting any person so to expose him or herself such as is offensive to decency, or is adapted to excite vicious or lewd thoughts or acts*
- Does not require that the "victim" be harmed or bothered by the conduct, just that the offender's motivation was "sexual" and he should have known it could be offensive

# Hate Crimes

- Cal. Penal Code § 422.6
- Hate Crimes are crimes committed to interfere with a person's civil liberties or to intimidate
- Elements
  - *To willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege **OR** To deface, damage or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege*
  - *In whole or in part because of their actual or perceived gender (or because of any of the following: disability, nationality, race/ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics)*
- Statute of Limitations: One Year



# Revenge Porn

- The intentional distribution of sexual images that were expected to be kept private, of another person with the intent to cause him or her emotional distress
- Elements
  - *Intentional distribution of an image of*
    - The intimate body part(s) of another identifiable person OR
    - The person depicted engaged in a sexual act
  - *Where the parties agreed or understood that the image was to remain private*
  - *The person distributing the image knew or should have known that distribution of the image would cause serious emotional distress*
  - *The person depicted actually suffers emotional distress*
- Statute of Limitations: One Year

# Questions or Comments??

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- [www.cwlc.org](http://www.cwlc.org)

- Download our Guide!

- <https://www.cwlc.org/download/a-guide-to-federal-and-california-state-sexual-discrimination-harassment-and-assault-laws-2018/>

