

COMMENTS TO:
WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT

DEFINING CONSENT TO EFFECTIVELY ADDRESS
SEXUAL VIOLENCE

Introduction

Addressing campus sexual assault at its core comes down to our understanding of consent. Consent must be present during the initiation and throughout the duration of sexual activity to distinguish it from a sexual assault. This is the focus of any judicial proceedings that seek to address sexual violence. It is also a key determinant when a survivor evaluates the decision of whether or not to report a sexual assault.

Survivors frequently fail to identify rape and sexual assault due to pervasive societal misunderstandings surrounding the concept of consent. Whether a survivor identifies a sexual encounter as an assault differs significantly when the experience is framed as a public health or law enforcement issue. For example, the 2010 National Intimate Partner and Sexual Violence Survey found pervasive rates of completed or attempted force penetration (1.27 million females victims), sexual coercion (2.41 million victims), and unwanted sexual contact (2.6 million victims).¹ However, the National Crime Victimization Survey only found 188,380 rapes or sexual assault.² As noted by the Center for Disease Control regarding these findings: “People may not identify their experiences with sexual violence as a crime, especially when it involves someone they know or love.”

This pattern of failing to properly identify a sexual assault is even more problematic on college campuses where survivors are more likely to know their assailants. Indeed, the top reason cited by college survivors who did not report, was that they “did not think it was serious enough to report,” according to the survey Sexual Victimization of College Women.³ This perception is exacerbated when societal norms presumes consent is present absent either physical or verbal resistance.

Institutionalizing an affirmative definition of consent is necessary for our society and its institutions to develop effective prevention and response strategies. The following proposal outlines the essential elements of an affirmative consent policy and provides an example model definition. We believe the Obama Administration, through its Task Force to Protect Students from Sexual Assault, can ensure affirmative consent policies are mandatory on campus and exemplified in federal criminal law under the FBI’s Unified Crime Reporting (UCR) definitions.

¹ Thomas Frieden, National Center for Injury Prevention and Control of the Centers for Disease Breiding, M.J., Chen J., & Black, M.C. (2014). *Intimate Partner Violence in the United States — 2010*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, available at: http://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf.

² Jennifer L. Truman, U.S. Dep't of Just., NCJ 235508, *National Crime Victimization Survey: Criminal Victimization*, 2010 (2011). available at <http://www.bjs.gov/content/pub/pdf/cv10.pdf>.

³ Bonnie Fisher et al., U.S. Dep't of Just., NCJ 182369, *The Sexual Victimization of College Women (2000)*, available at <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>

PART I: Affirmative Consent as a Requirement of Title IX

A) Defining Affirmative Consent

Through clarifying and elaborating on the need for affirmative consent within Title IX grievance processes, the U.S. Department of Education can serve to further the goals of preventing and responding to campus sexual violence. This is because ‘bare-bones’ definitions of consent may not be sufficient to encourage survivor reporting. Additionally, such vague policies increase the likelihood administrators will misinterpret a sexual encounter when adjudicating a sexual misconduct charge within a campus judicial proceeding. Therefore, the Department should interpret Title IX as requiring affirmative consent and provide guidance on such required campus policies, which should include the following standards in order to ensure consent is accurately identified.

1. Consent must be proactive action comprised of the following three components:
 - Consent must be **voluntary**, meaning it is exercised under conditions of free will and thus cannot be given when the following are present:
 - Coercion or pressure
 - Threat, intimidation, or fear
 - Consent must be **affirmative**, as indicated through a “yes,” whether expressed verbally or otherwise. Therefore consent cannot be inferred from the following:
 - Silence
 - Passivity or lack of resistance
 - Lack of active response
 - Consent must be **unambiguous**. It must be clearly demonstrated through words and/or actions as mutually understood by both individuals.
2. Consent cannot be given and/or is not valid when an individual is mentally or physically incapacitated. This includes, but is not limited to:
 - Sleep
 - Unconsciousness
 - Intoxication due to drugs, alcohol, or other reasons
3. Consent is contemporaneous to the initiation of every sexual act and can be revoked at any time during the course of a sexual encounter. Therefore consent cannot be presumed by a prior or current sexual or romantic relationship.

In incorporating these three essential standards for affirmative consent policies, the following model definition is provided⁴:

⁴ This definition combines elements suggested by the Department of Education during the second session of negotiated rulemaking on VAWA with the policies at Yale, Amherst, and University of Michigan.

Consent means the affirmative, unambiguous, and voluntary agreement to engage in each specific initiated sexual activity that may compose a sexual encounter. Consent is demonstrated through mutually understandable words and/or actions that clearly indicate a willingness to engage freely in sexual activity. A clear verbal “yes” or other outward demonstration of free choice is necessary. Therefore it cannot be inferred from silence, passivity, lack of resistance, or a lack of active response.

Consent must be ongoing throughout a sexual encounter and can be revoked at any time. It must be voluntarily given contemporaneous to the initiation of the sexual activity. Consent may not be valid if a person is being subjected to actions or behaviors that elicit emotional or psychological pressure, intimidation, or fear. It cannot be obtained by threat, coercion, or force.

B) Securing Affirmative Consent Policies Under Title IX

The Task Force should mandate that the U.S. Department of Education provide additional guidance to the 2011 Title IX Guidance (“Dear Colleague Letter”) requiring schools to include an affirmative consent definition as part of the Title IX grievance process. The standards outlined above should be required in all campus definitions in order to fully comply with Title IX to ensure sexual violence is identified and reported as a form of sex discrimination by affected students.

In addition to this mandate, the Obama Administration should consider issuing an Executive Order that: (1) prioritizes the compliance review of universities whose policies fail to require affirmative consent or address incapacitation through the U.S. Department of Education, and (2) increases funding for technical assistance to universities requesting guidance on reforming their consent policies through the U.S. Department of Justice’s Office on Violence Against Women. This ensures that colleges will actively adopt such affirmative consent policies.

PART II: Consent Definition Under the UCR Definition

The Task Force is currently looking beyond campuses to ensure students are protected from sexual assault. Therefore it is reviewing how criminal justice systems may be improved to ensure justice for victims of sexual violence. As seen in the Congressional record for the 1994 Violence Against Women Act (VAWA), law enforcement, prosecutors and the judiciary alike have a significant bias against victims of sexual violence, who are most often women. This bias is not only apparent in the treatment of reports, investigations, prosecutions, and judgments, it is also found in the very statutory language with which states define the crime. Such definitions exclude certain sexual acts, may fail to recognize certain classes of victims, or may fail to capture the scope of the crime by setting stringent resistance standards or failing to acknowledge incapacitation.

In 2012, the Federal Government began the necessary work of improving its own definition of sexual violence. The Obama Administration worked to update the definition of rape under the UCR as: “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.” This ensured

more harmful sexual acts were captured and all victims acknowledge, but it left the key element of consent undefined. Instead, the Federal Government left this definition of consent open to the States,⁵ which means protection of an individual's sexual autonomy depends on their geographical location. Instead of varied protection, our nation must move towards a standard understanding of consent that enshrines and protects the principles of personal autonomy by requiring affirmative consent. Given the limitations of the federal government to address state criminal law, it will be necessary for the Task Force to brainstorm creative means of achieving this goal. Whether offering federal funds in exchange for states legislation ensuring affirmative consent definitions within their criminal codes or seeking to change the definition solely for federal criminal law purposes to serve as an example, any step forward will work to change societal norms surrounding our understanding of consent.

The Task Force must move our nation forward in meaningfully addressing campus sexual assault as well as violence against women more generally. Taking this step requires our understanding of sexual violence itself to be coupled with a clear understanding and valuing of personal autonomy. We therefore ask the Task Force to take steps to protect students against sexual assault by creating a legal shift in our societal understanding of consent.

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⁵ "Attorney General Eric Holder Announces Revisions to the Uniform Crime Report's Definition of Rape," U.S. Department of Justice, 06 January 2012, Retrieved from <http://www.fbi.gov/news/pressrel/press-releases/attorney-general-eric-holder-announces-revisions-to-the-uniform-crime-reports-definition-of-rape>

ANNEX I: Suggested framing by the Department of Education during the second session of negotiated rulemaking on VAWA

Consent: For the purposes of determining whether a sex offense is reportable under this section, *consent* means the affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during a sexual encounter. Consent cannot be--

- (1) Given by an individual who--
 - (i) Is asleep, or mentally or physically incapacitated, either through the effect of drugs or alcohol or for any other reason; or
 - (ii) Is under duress, threat, coercion, or force; or
- (2) Inferred under circumstances in which consent is not clear, including but not limited to--
 - (i) The absence of “no” or “stop”; or
 - (ii) The existence of a prior or current relationship or sexual activity.

ANNEX II: Yale University’s Definition of Consent

Available at: <http://smr.yale.edu/definitions-sexual-misconduct-consent-and-harassment>

Definition of Sexual Consent

Sexual activity requires consent, which is defined as positive, unambiguous, and voluntary agreement to engage in specific sexual activity throughout a sexual encounter. Consent cannot be inferred from the absence of a "no"; a clear "yes," verbal or otherwise, is necessary. Consent to some sexual acts does not imply consent to others, nor does past consent to a given act imply present or future consent. Consent must be ongoing throughout a sexual encounter and can be revoked at any time.

Consent cannot be obtained by threat, coercion, or force. Agreement under such circumstances does not constitute consent.

Consent cannot be obtained from someone who is asleep or otherwise mentally or physically incapacitated, whether due to alcohol, drugs, or some other condition. A person is mentally or physically incapacitated when that person lacks the ability to make or act on considered decisions to engage in sexual activity. Engaging in sexual activity with a person whom you know -- or reasonably should know -- to be incapacitated constitutes sexual misconduct.

Guidance Regarding Sexual Consent

Consent can only be accurately gauged through direct communication about the decision to engage in sexual activity. Presumptions based upon contextual factors (such as clothing, alcohol consumption, or dancing) are unwarranted, and should not be considered as evidence for consent.

Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and gauging consent, and you are thus urged to seek consent in verbal form. Talking with sexual partners about desires and limits may seem awkward, but serves as the basis for positive sexual experiences shaped by mutual willingness and respect.

ANNEX III: University of Michigan's definition of consent and sexual misconduct

Available at: <http://studentsexualmisconductpolicy.umich.edu/definitions>

Consent

Clear and unambiguous agreement, expressed in mutually understandable words or actions, to engage in a particular activity. Consent can be withdrawn by either party at any point. Consent must be voluntarily given and may not be valid if a person is being subjected to actions or behaviors that elicit emotional or psychological pressure, intimidation, or fear. Consent to engage in one sexual activity, or past agreement to engage in a particular sexual activity, cannot be presumed to constitute consent to engage in a different sexual activity or to engage again in a sexual activity. Consent cannot be validly given by a person who is incapacitated. For purposes of this policy, the issue is whether the Respondent knew, or should have known, that the activity in question was not consensual.

Incapacitated

Lacking the physical and/or mental ability to make informed, rational judgments. This may have a variety of causes, including, but not limited to, being asleep or unconscious, having consumed alcohol or taken drugs, or experiencing blackouts or flashbacks.

Sexual Misconduct

Umbrella term used to encompass unwanted or unwelcome conduct of a sexual nature that is committed without valid consent, including sexual assault and sexual harassment. Sexual misconduct may occur between people of the same sex or between people of different sexes. Sexual misconduct can include both intentional conduct and conduct that results in negative effects, even if those negative effects were unintended. Sexual misconduct can also include retaliation in connection with a Complainant's or Reporter's allegations under this policy. Sexual misconduct may include the following:

- *Sexual Assault*: Unwanted or unwelcome touching of a sexual nature, including hugging, kissing, fondling, oral sex, anal or vaginal intercourse, or other physical sexual activity that occurs without valid consent.
- *Sexual Harassment*: Unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature if: (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's education, living environment, employment, or participation in a University-related activity or University Program; (2) submission to or rejection of such conduct by an individual is used as the basis for or a factor in decisions affecting that individual's education, living environment, employment, or participation in a University-related activity; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's educational performance

or creating an intimidating, hostile, offensive, or abusive environment for that individual's education, living environment, employment, or participation in a University-related activity.

- Examples may include, but are not limited to, the following: unwanted sexual statements; unwanted personal attention including stalking and cyber-stalking; unwanted physical or sexual advances that would constitute sexual assault, as defined in this policy; electronically recording, photographing, or transmitting intimate or sexual utterances, sounds, or images without the knowledge and consent of all parties involved; touching oneself sexually for others to view; and voyeurism (spying on others who are in intimate or sexual situations). More information about sexual harassment is available on the sexual misconduct policy website.
- Conduct reported as sexual harassment will be evaluated by considering the totality of the particular circumstances, including the nature, frequency, intensity, location, context, and duration of the questioned behavior. Although repeated incidents generally create a stronger claim of sexual harassment, a serious incident, even if isolated, can be sufficient. For example, a single instance of sexual assault can constitute sexual harassment.

ANNEX IV: Amherst College Statement on Consent, Coercion, Incapacitation, and Alcohol

Available at: https://www.amherst.edu/aboutamherst/sexual_respect/sexual-misconduct-and-harassment-policy/node/497976#StatementConsentCoercion

Consent to engage in sexual activity must be knowing and voluntary. Consent to engage in sexual activity must exist from the beginning to end of each instance of sexual activity, and for each form of sexual contact. Consent to one form of sexual contact does not constitute consent to all forms of sexual contact. For example, an individual may agree to kiss but choose not to engage in touching of the intimate parts or sexual intercourse. An individual should obtain consent before moving from one act to another.

Consent consists of an outward demonstration indicating that an individual has freely chosen to engage in sexual activity. Consent is demonstrated through mutually understandable words and/or actions that clearly indicate a willingness to engage freely in sexual activity. Relying on non-verbal communication can lead to misunderstandings. Consent may not be inferred from silence, passivity, lack of resistance or lack of active response alone. A person who does not physically resist or verbally refuse sexual activity is not necessarily giving consent. In the absence of an outward demonstration, consent does not exist. If at any time it is reasonably apparent that either party is hesitant, confused or uncertain, both parties should stop and obtain mutual verbal consent before continuing sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be mutually understandable communication that clearly indicates willingness to engage in sexual activity each time such activity occurs.

Consent may be withdrawn by either party at any time. Withdrawal of consent must also be outwardly demonstrated by words or actions that clearly indicate a desire to end sexual activity. Once withdrawal of consent has been expressed, sexual activity must cease.

In the state of Massachusetts, consent can never be given by minors under the age of 16.

Consent is not effective if it results from the use or threat of physical force, intimidation, or coercion, or any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual contact. Coercion includes the use of pressure and/or oppressive behavior, including express or implied threats of harm, severe and/or pervasive emotional intimidation, which places an individual in fear of immediate or future harm or physical injury or causes a person to engage in unwelcome sexual activity. A person's words or conduct amount to coercion if they wrongfully impair the other's freedom of will and ability to choose whether or not to engage in sexual activity.

An individual who is incapacitated is not able to make rational, reasonable judgments and therefore is incapable of giving consent. Incapacitation is the inability, temporarily or permanently, to give consent, because the individual is mentally and/or physically helpless due to drug or alcohol consumption, either voluntarily or involuntarily, or the individual is unconscious, asleep or otherwise unaware that the sexual activity is occurring. In addition, an individual is incapacitated if he/she/they demonstrate that they are unaware of where they are, how they got there, or why or how they became engaged in a sexual interaction. Where alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. Some indicators of incapacitation may include, but are not limited to, lack of control over physical movements, lack of awareness of circumstances or surroundings, or the inability to communicate for any reason. An individual may experience a blackout state in which he/she/they appear to be giving consent, but do not actually have conscious awareness or the ability to consent. It is especially important, therefore, that anyone engaging in sexual activity be aware of the other person's level of intoxication. The relevant standard that will be applied is whether the Respondent knew, or a sober reasonable person in the same position should have known, that the other party was incapacitated and therefore could not consent to the sexual activity.

The College considers sexual contact while under the influence of alcohol to be risky behavior. Alcohol impairs a person's decision-making capacity, awareness of the consequences, and ability to make informed judgments. Being intoxicated or impaired by drugs or alcohol is never an excuse for sexual misconduct and does not excuse one from the responsibility to obtain consent.