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Inconsistent Solutions Don't Fix Persistent Problems: How Affirmative and Enthusiastic Consent Undermine Consent Laws Within Universities

ABSTRACT. This article critically examines sexual misconduct reporting on university campuses, emphasizing the inherent flaws in how consent is defined and implemented within policy frameworks. While acknowledging the value of clarity, it argues against adding modifiers like enthusiastic and affirmative, which can obscure and over-generalize consent definitions. Analyzing current policies and relevant cases underscores the urgent need for prompt changes in university and federal settings. More specifically, it focuses on the problems arising from schools having autonomy in setting their definitions of consent, leading to issues such as policy ineffectiveness. This article proposes a comprehensive definition of consent, incorporating key factors like culpability and verbal and nonverbal cues to promote safer campus environments. Thus, it advocates for the release of guidance documents by the OCR to push schools to adopt a standardized definition of consent, ensuring a more uniform approach to addressing sexual misconduct on university campuses.

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INTRODUCTION

Starry-eyed and dreamy college student hopefuls await acceptance letters, anticipating new starts in their lives. They grapple with the odds of getting into favored schools and programs and the chances of scoring an on-campus job. Pursuing a degree not only makes students aware of academic disparities but also highlights the unsettling possibility of becoming a statistic. Thus, as acceptance rates dip to uncharacteristic lows, one troubling statistic seems to be on the rise: 1 in 5 female college students are sexually assaulted while in college. Moreover, 90% of sexual assaults go unreported, so actual assaults are likely to be higher than that. These uncertain rates of reporting reduce the likelihood of victims of sexual assault receiving help and support, which is particularly detrimental since victims are two to four times more likely to be diagnosed with post-traumatic stress disorder (PTSD) and depression. The rates of sexual assault are too high and need to be reduced. But if the problem is clear, why have rates not decreased? What processes enable sexual assault to go largely underreported?

This article critically examines the reporting of sexual misconduct on university campuses, emphasizing flaws in how consent is defined and implemented within policy frameworks. Consent, relative to universal understandings of sexual violence, constitutes a voluntary agreement that is freely given and informed. Despite its omnipresent presence and prominence in sexual violence laws, there is no federally adopted definition of consent in university settings. Rather, it is up to each school to set its definitions, creating an extensive range of variance in what defines an individual's ability or inability to consent to sex. Uneven definitions of consent in campus sexual violence reporting processes contribute to the underreporting problem. Current discussions about consent advocate incorporating modifiers like “enthusiastic” and “affirmative” to explain its nuances and remedy variability. However, this article contends that consent already contains complexities without requiring supplementary qualifiers. Instead, policy should focus on holistic and standardized definitions of consent. This would allow for a more invariant nationwide standard, reducing debate on what constitutes consent.

Firstly, this piece will explore the historical evolution of sexual assault legislation and policies, such as Title IX and the Dear Colleague Letter. Historical context explains why the current framework has become lackluster and how multiple perspectives can add nuance to this conversation. Secondly, it provides definitions of consent, exploring successes and subsequent failures. Essentially, this portion highlights the shortcomings in applying consent and uncovering gaps and ambiguities within the

reporting process. Thirdly, it dives into case law and critically examines how rulings impact the resolution of future cases. Finally, it proposes aspects necessary for a new consent standard and advocates for a review of current policies through the U.S. Department of Education's Office for Civil Rights (OCR) and Title IX. The proposed changes will be geared towards promoting comprehensive and consistent definitions of consent while providing helpful standards for adjudicating sexual assault cases on campus. The definition and application of consent into sexual misconduct policies in universities contribute to an unsatisfactory reporting process, highlighting the need for a consistent definition of consent. Greater clarity will contribute positively to greater transparency and more effective methods for receiving justice.

I. HISTORY OF SEXUAL ASSAULT POLICIES

A. Policies

In the 1960s, the second wave of feminism blossomed due to countless feminist scholars dissecting historical precedents and rewriting societal narratives on gender roles, which laid the foundation for significant social transformations.[1] This new age of sexual equity ushered in federal policy changes like Title IX of the Education Amendments of 1972, signed by President Nixon.[2] The amendments fortified two pursuits: ensure that federal funds did not support discriminatory practices and secure individual protections from those practices.[3] In other words, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[4]

Historically, Title IX applied to college athletics, establishing terms like "substantial proportionality," which required that the amount of female athletes be proportional to females enrolled, and provided guidelines regarding other forms of sexual discrimination.[5] The importance of Title IX lies within the acts of

[1] *See* Patricia Hilden, *Review: Women's History: The Second Wave*, 25 Hist. J. 501, 501-512 (1982).
[2] *See* Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 Del. L. Rev. 83, (2013).
[3] *Id.* at 83.
[4] *Title IX of the Education Amendments of 1972*, 20 U.S.C. § 1681-1688 (2015).
[5] John Winn, *An Introduction to Title IX Higher Education Sexual Misconduct Cases*, 22 N.C. St. Bar J. 8, 8-12 (2017).

accountability it pushes schools to take. Title IX applies to all schools that "receive federal financial assistance from the department... [including] approximately 17,600 local school districts, over 5,000 postsecondary institutions, and charter schools, for-profit schools, libraries, and museums."[6] The U.S. Department of Education's Office for Civil Rights (OCR) constantly evaluates and investigates complaints of discrimination. When these complaints arise, recipients of federal financial assistance must comply with Title IX or face the risk of losing funding.[7] Universities, under the act, must establish reporting systems for complaints of sexual violence. This includes formal hearings- no mediation is allowed to replace this- and that reporters are made safe from retaliation.[8] Title IX serves as a backbone for all other legal principles surrounding sexual misconduct, allowing for generalized approaches and precedents relative to gender equity problems to be enforced federally.

On April 5, 1986, Jeanna Ann Clery, a student at Lehigh University, was raped and murdered in her dorm by a fellow student Joseph Henry.[9] In her memory, Congress passed the Crime Awareness and Campus Security Act (CACSA) in 1990- later renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) in 1998, requiring higher educational institutions to disclose campus crime statistics.[10] Later, the Act was amended by the Violence Against Women Reauthorization Act of 2013 (VAWA) to report statistics "regarding sexual assault, dating violence, stalking, and domestic violence," ushering in a new age of public awareness.[11] The statistics help emphasize the prevalence of crime on college campuses and strive to ensure students, parents, and the public are informed about possible threats to safety. Additionally, the VAWA act allowed universities to take on either the "preponderance of the evidence standard i.e., 'More likely than not,' or the clear and convincing evidence standard, i.e. ' substantially more true than not.'"[12] This flexibility is enacted to ensure a fair approach to investigation, limiting but respecting the rights of all parties involved. Thus, the Clery Act has pushed to not only affect the legal landscape but also create a shift towards prioritizing the well-being of students

[6] U.S. Dep't of Ed., Title IX and Sex Discrimination (2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.
[7] *Id.*
[8] RAINN, *Title IX*, https://www.rainn.org/articles/title-ix (last visited Feb. 1, 2024).
[9] Commonwealth v. Henry, 524 Pa. 135, (1999).
[10] U.S. Dep't of Ed., *Clery Act Appendix for FSA Handbook*, 1-13 (n.d.), https://www2.ed.gov/admins/lead/safety/cleryappendixfinal.pdf.
[11] Brooke Mason, *Title IX: How Universities Continue to Consent to Campus Sexual Assault*, 3 Fla. Dep't Legal Stud. L.J. 12, 12-18 (2020).
[12] *Id.* at

and safer educational spaces. However, as highlighted by prior statistics and reports the Clery Act has not served to eradicate problems of sexual violence on campuses. Rather, it highlights the gruesome nature behind campus crimes, without providing a concrete avenue to correct them.

In 2011, one of several Dear Colleague Letters (DCL), letters supplying guidance concerning the Title IV federal student aid program, was issued as a mandatory guideline for the implementation of Title IX in university reporting processes. The letters gave recipients examples of how the OCR determines compliance with "legal obligations to federal law."[13] One of the notable guidelines issued was the procedural requirements relative to sexual harrassment and sexual violence, which are:

(i) A University must issue a notice of nondiscrimination.

(ii) A University must have at least one designated Title IX employee.

(iii) A University must "adopt and publish grievance procedures."[14]

However, in 2017, the DCL was rescinded by the Department of Education due to inadequate attention to four areas: evidential standard, guidance, due process, and sanctions.[15] The "preponderance of evidence" standard was set too low according to critics of the DCL, potentially leading to unfair circumstances and jeopardizing due process rights of the accused. Although the document provided examples and recommendations, there was still a lack of clarity regarding due process rights of the accused in cases of sexual assault that posed a threat to equal educational opportunities. The document also removed the process of cross-examination and the right to a lawyer, fundamental aspects of fair due process. Finally, the DOE concluded that the notion that campuses could carry out sanctions created by the DCL was incorrect since it is not within a campuses jurisdiction to handle matters of justice.[16] Furthermore, the erasure of the documents showcased the lack of clear guidelines and recognition of nuances regarding sexual crimes on university campuses.

On September 28, 2014, California created a "Yes Means Yes" bill requiring universities and colleges within the state to include an affirmative consent standard for

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[13] Athenamarie Garcia-Gunn, *Analyzing the Dear Colleague Letter of 2011*, 3 Cal. Undergraduate J. of P.S. 166, 166-189 (2018).

[14] U.S. Dep't of Ed. Russlynn Ali, *Dear Colleague Letter: Sexual Violence*, (2011), https://archives.iupui.edu/server/api/core/bitstreams/3e9a873d-14ad-45cd-9ccc-81e73536c0a4/content.

[15] Garcia-Gunn, *supra*, at 168.

[16] *See* U.S. Dep't of Ed. Candice Jackson, *"Dear Colleague" Letter on Campus Sexual Misconduct,* (2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

sexual activity. In other words, students must receive an explicit yes that is ongoing and compounded by other activities, such as body language. Additionally, the use of "preponderance of evidence" as a standard of proof was codified, which means that an individual will be found guilty if it is more likely than not that they committed the sexual crime.[17] This unified policy pushed educational spaces to maintain a consistent explicit definition, going far beyond federal mandates that just provide guidelines and possibilities for accusations of sexual misconduct. Following this bill, New York signed the "Enough is Enough" bill on July 7, 2015. Similarly, this legislative step pushed an affirmative definition of consent where consent can be achieved through words or actions as long as they are clear indicators of willingness to engage in sexual acts.[18]

B. Emotional Implications of Historical Policies

All precedents set to remedy failures in sexual misconduct are momentous wins for survivors and victims alike. Take Title IX, for example: the federal law forced educational gender inequality to the front and center of the conversation, something no law had been able to do prior. However, only celebrating these laws for their immediate impact would be short-sighted; it's equally necessary to acknowledge the limitations and gaps they inevitably introduce.

Looking deeper at procedural policies like Title IX, an issue of the emotional implications of sexual misconduct arises: where does one draw the line between enforcement and empathy? As Title IX integrates into the university system, it pressures officials and support hubs to primarily focus on meeting regulatory requirements and fulfilling legal obligations. While rules and regulations serve an essential purpose, strict adherence to them can give rise to other problems, such as the broader social and cultural factors contributing to sexual violence.

The emotional implications of sexual misconduct are multifaceted. They not only affect survivors but also pose challenges for institutions tasked with handling these cases since they are rooted deeply in the way individuals are socialized. Understanding the underlying causes of initial and continuous offenses is crucial to remedy the cycle of gendered crimes. It involves recognizing the role of power dynamics, toxic masculinity, and a lack of comprehensive sex education. Addressing these factors requires an

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[17] FIRE, *California: Affirmative Consent Bill Threatens Student Due Process* (2014), https://www.thefire.org/cases/california-affirmative-consent-bill-threatens-student-due-process.

[18] *See* Sexual Respect, *New York State's "Enough is Enough" Bill*, Colum. in City N.Y., (n.d.), https://sexualrespect.columbia.edu/new-york-state-legislation-campus-sexual-assault.

approach, as previously mentioned, that goes beyond enforcement. It necessitates empathy, support, and education to prevent future incidents and aid survivors effectively.

Take for example two children at recess: a boy and a girl. When the boy pushes the girl, resulting in her injuring her ankle, the school reacts by punishing him while providing the girl with medical treatment. However, the next week the boy pulls the girl's hair, and the response remains unchanged. This repeats over and over again until suspension, all while adhering to reporting guidelines. Yet, the underlying problem remains unaddressed. The boy might have been told that "boys will just be boys" or that boys hurting girls is a sign of a crush, two common harmful narratives that perpetuate the girl is at fault for her experience.[19] Thus, by simply punishing the boy for each incident without addressing why he is behaving that way, the school fails to address the root cause of the problem, creating a cycle of harmful behavior.

Moreover, sexual crimes leave scars that run much deeper than the surface. Although it is not the law's "duty" to address emotionality, legislation can help as a preventative measure. In a study aimed to describe experiences of women suffering from the impacts of sexual violence, an interviewee stated, "I feel like my life had ended... sexual violence is much worse than dying for a woman."[20] By saying sexual violence is worse than death, it emphasizes how long-lasting and deep the repercussions of the crimes are. In a twisted way, death at least allows for pain to end, while sexual violence leaves permanent scars on an individual's psyche.

Title IX is notorious for facing enforcement challenges and inconsistencies, which, in turn, overshadows the broader goals of promoting gender equity and ensuring justice for survivors. This enforcement-centered perspective can inadvertently overlook the emotional repercussions of sexual violence, leading to rushed investigations, inadequate support systems, and a lack of transparency in the process. Ultimately, a holistic approach—one that acknowledges the emotional ramifications and addresses the root causes of sexual violence—is essential for fostering a culture of empathy, healing, and justice within educational institutions.

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[19] Mythill Rajiva, *A comparative analysis of White and Indigenous girls' perspectives on sexual violence, toxic masculinity and rape culture,* 36 International J. of Qualitative Studies in Education 6, 1 (2023)

[20] Maria José dos Reis, Maria Helena Baena de Moraes Lopes & Maria José Duarte Osis, *'It's much worse than dying': the experiences of female victims of sexual violence*, 26 J. of Clinical Nursing 15-16, 1 (2016)

C. Inconsistencies within Historical Policies

The efficacy of Title IX and the Clery Act depends on universities reporting sexual crime complaints. However, it is noted that sexual assault reporting increases by 44% when universities are being audited versus much lower rates of reporting when auditing concludes.[21] This pattern highlights the potential for discrepancies in the reporting process since a school only has high reporting rates when being watched and the influence of external scrutiny on universities. Alongside this, in the 2013-14 California State Audit found that in a survey of 208 students, 85 of them experienced incidents of sexual violence, and 74-87% of those incidents were not reported to Title IX.[22] These findings underscore systemic challenges in addressing sexual violence. Despite legislative frameworks like Title IX and the Clery Act mandating reporting and response protocols, barriers to reporting persist, including lack of trust in institutional responses. Additionally, the discrepancy between reported incidents and actual experiences highlights the need for improved support mechanisms and a more victim-centered approach within university policies and practices.

VAWA or the Clery Act allows for flexibility when it comes to the standard of evidence used to adjudicate individuals of sexual assault, which has been heavily criticized. One standard allowed is the preponderance of evidence standard, which is when an individual may be convicted when they more likely than not committed a crime. On the other hand, a clear and convincing standard may be applied, which depends on evidence being substantially more true than untrue. Both standards seem similar, however, they are completely different burdens of proof. Preponderance of evidence standard is a lower bar to meet than the clear and convincing standard, but both are lower standards than beyond a reasonable doubt.[23] Thus, both offered standards are commonly used in civil law rather than in criminal law, and are up to the schools to determine what they want in their own internal tribunals.

Burden of proof is a controversial area of sexual crimes due to the fact that burden of proof, as recognized by the Supreme Court, corresponds to the value placed

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[21] Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 Psychol. Pub. Pol'y & L.1, 1-9 (2015).

[22] Cal. St. Auditor, *Sexual Harassment and Sexual Violence: California Universities Must Better Protect Students by Doing More to Prevent, Respond to, and Resolve Incidents*, J. Legis. Audit Comm. 2013-124, 2013-2014 Sess., at 1-107 (2014).

[23] *See* Henrik Lando, *When is the Preponderance of the Evidence Standard Optimal?*, 27 Geneva Papers on Risk and Insurance. 602, 602-608 (2002).

upon civil liberties within a case.[24] In other words, the higher the punishment, the higher the burden of proof, so accidental judgements with lifelong consequences won't be made. This is why beyond a reasonable doubt is used in criminal cases, where jail is the consequence, versus the preponderance of evidence or clear and convincing standard that is used in civil cases, where monetary compensation is the consequence.[25] Furthermore, it is argued that the preponderance of evidence standard, and even the clear and convincing standard, is way too low of a bar to meet for such a serious category of crimes.

D. Significance of Historical Policies

Although all of the discussed items don't directly tie into the idea of consent, they do tie into the reporting process that umbrellas the area this article focuses on. Therefore, it is important to understand that there are plenty of other nuances that lead to poor reporting rates, failure of procedures, and ultimate lack of attention to sexual violence in universities before even discussing consent in depth. The definition of consent is one of the main factors confusing individual approaches to consent, but it is just one piece of a much larger puzzle. While these issues are important and deserve discussions, it is critical to not overlook the central role of consent. Consent is the cornerstone of defining sexual assault and is the root cause of the ambiguity in current policy. Without a clear understanding of consent, other aspects of sexual assault cannot be effectively addressed.

For example, if individuals were to acknowledge consent at higher rates, then there would be less violations of consent, sexual assault, and individuals would be less likely to suffer from emotional implications. It sounds mind numbingly simple; however, it has yet to occur, and victims continue to endure clinically significant social adjustment problems, anxiety disorders, sexual disorders, and much more.[26] Additionally, another emotional item to consider is the perpetuation of rape myths, beliefs that women are responsible for being raped, which are socialized into

[24] *See Addington v. Texas*, 441 U.S. 418, (1979).
[25] *See* J. Brad Reich, *When Is Due Process Due: Title IX, the State, and Public College and University Sexual Violence Procedures*, 11 Charleston L. Rev. 1, 1-50 (2017).
[26] *See* Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. of Interpersonal Violence 2, 223-250 (1993).

masculinity from a young age.[27] These myths and ideologies are evident in male attitudes toward women and violence. For instance, in a study of male undergraduates, ⅓ believed that it would "'do a woman some good to be raped,'" and in another study, the largest effects strongly linked hypermasculinity to increased sexual assault perpetration.[28] Thus it is clear that sexual assault is not just a crime, it is also a mentality of sexual dominance and violence ingrained into masculinity. Understanding consent, boundaries, and respect, is, therefore, the easiest way to uproot poor thoughts and socialization.

II. Consent relative to Sexual misconduct

A. Defined

Consent has historically served as the fundamental method to distinguish consensual sexual activities and sexual violence, establishing the boundaries between sex and rape. Akin to a sexual contract, it operates as an implicit or explicit agreement where two or more parties are able to communicate desire to engage in sexual activity while also establishing limitations to their engagement. Thus, it creates a stringent ruling on if a sexual act is immoral or illegal and if a person is a rapist or not, i.e. rough sex, may be societally looked down upon but it does not necessarily mean it is rape.[29]

In this article, I will be defining illegal sexual acts through an umbrella terms like sexual violence and misconduct, which includes crimes like sexual assault, sexual harassment, sexual battery, and rape. Sexual violence, as defined by the CDC, is a sexual act committed by a person without the proper consent of the victim or against an individual who cannot consent or refuse.[30] I will use this definition as a baseline definition, there is no one definition of consent legally, since it is clear and emphasizes situations where consent is absent, revoked, or impossible to give. Additionally, the CDC is an authoritative and highly recognized source, thus its definitions are widely accepted and credible. More specifically, consent, relative to this definition of sexual

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[27] *See* Ryon C. McDermott, Christopher Kilmartin, Daniel K. McKelvey & Matthew M. Kridel, *College Male Sexual Assault of Women and the Psychology of Men: Past, Present, and Future Directions for Research*, 16 Psychology of Men & Masculinity 4, 355-366 (2015).

[28] *See Id.*

[29] *See* James Roffee, *When Yes Actually Means Yes: Confusing Messages and Criminalising Consent in Rape Justice*, 72-91 (A. Powell, N. Henry, A. Flynn ed., 2015).

[30] Erin E. Bonar et al., *Prevention of sexual violence among college students: Current challenges and future directions*, J. of Am. Coll. Health, 575, 575-588 (2020).

violence, constitutes a rational voluntary agreement that is freely given and informed, which cannot occur when a person is a child, mentally ill, or intoxicated.[31]

Despite its ubiquitous presence and importance in sexual violence laws, there lacks a federally adopted definition of consent. Each state sets its own definitions, creating an extensive range of variability in what defines an individual's ability or inability to consent to sex.[32] For instance, California's adopted definition of consent, as outlined in Section 261.6 of the Cal. Penal Code, characterizes it as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."

It is necessary to recognize similarities and disparities between definitions of consent and how they can impact multiple facets of reporting of consent. Across the board, state definitions emphasize the voluntary nature of consent, necessitating a willingness to agree between both parties. However, some states do this in further detail than others. California law discusses the idea of "positive" cooperation and attitude, while Colorado's Section 18-3-401 of the Colo. Revised Statute simply states consent "means cooperation in act or attitude pursuant to an exercise of free will."[33] A single word like "positive" may not seem important at surface value, but it entails that the agreement be more than a passive agreement, leaning into more emotionally loaded and enthusiastic participation in the sexual interactions. Thus, this subtle shift in language modifies the standard of consent from a mere absence of objection to a proactive engagement, which is vastly different.

Additionally, several state laws, including Oklahoma and Illinois, explicitly address issues of communication and the absence of consent under certain circumstances. Section 21-112 of the Oklahoma Statute contends that consent cannot be " inferred under circumstances in which consent is not clear including... the absence of an individual saying 'no' or 'stop'."[34] Thus, this definition underscores the prioritization of verbal communication as a primary indicator of consensual

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[31] *See* Vera Bergelson, *The Meaning of Consent*, 12 Ohio St. J. of Criminal L. 171, 171-180 (2014).

[32] *See* RAINN, *How Does Your State Define Consent?*, (2016), https://www.rainn.org/news/how-does-your-state-define-consent.

[33] Michele Childs, *Other State Definitions of Consent* (2021), https://legislature.vermont.gov/Documents/2022/WorkGroups/Senate%20Judiciary/Bills/H.183/Drafts,%20Amendments%20and%20Legal%20Documents/H.183~Michele%20Childs~Other%20State%20Definitions%20of%20Consent~4-8-2021.pdf.

[34] *Id.* at 1

agreement. On the other hand, Section 5/11-1.70 of the Illinois Criminal Code 2012 describes that the "[l]ack of verbal or physical resistance... by the accuser shall not constitute consent."[35] By encompassing both verbal and non-verbal cues, Illinois law acknowledges that consent must be clear, regardless of whether the absence of consent is demonstrated verbally or through physical resistance. The semantic difference in these definitions reflects a broader distinction in how each state conceptualizes consent. Oklahoma's emphasis on verbal communication indicates a more traditional interpretation, while Illinois takes on a more holistic approach by recognizing that consent, or the lack thereof, can be communicated through multiple forms of expression. Furthermore, these differences have practical implications in legal proceedings. For example, in Oklahoma, the burden may often rest on establishing the absence of verbal consent, but in Illinois, attorneys must consider a wider range of evidence. This, ultimately, can influence how a case is argued and the type of evidence that is deemed most compelling to establish whether the standards for a consensual agreement were met.

B. Introduction of Modifiers to Consent

At the moment, it is estimated that over 1,400 higher-education institutions have moved to include an "affirmative definition of sexual consent," and those that have not, have been pushed into doing so.[36] Affirmative can be defined, in this case, following guidelines set forth by the "yes means yes" law in California, which necessitate that sexual assault, rape, and sexual harassment- all differing degrees of sexual misconduct- do not have to be inherently violent.[37] Proponents of affirmative consent argue that it mitigates ambiguity within sexual encounters, reducing the risk of misrepresenting passive cues as consent. For example, an individual may say yes to a sexual encounter, but they also could physically seem uncomfortable or shy away from touch, indicating a lack of willingness to continue the interaction. By requiring explicit affirmation and mutual agreement, this approach seeks to create a safer and more respectful environment for all individuals involved.

Emerging alongside affirmative consent, there has been a new notion of consent: the enthusiastic consent model. This paradigm emphasizes proactive affirmation, prioritizing the presence of a clear "yes" over the absence of a "no." It

[35] Childs, *supra* note 33, at 1.
[36] Deborah Tuerkheimer, *Affirmative Consent*, 13 Ohio St. J. of Criminal L. 441, 441-468 (2016).
[37] *See Id.*

differs from the affirmative consent model in the aspect that the sexual engagement must invoke a feeling of strong excitement and genuine enthusiasm, rather than just a lackluster agreement.[38] This model seeks to ensure that all parties are fully engaged and eager, rather than simply compliant, and focuses on the quality of the interaction. This means that the presence of consent is not only about hearing "yes," but also perceiving a partner as eager to engage in sexual activities. In addition to verbal consent, enthusiastic consent also considers multiple positive body language cues as indicators of willingness and desire. While both affirmative and enthusiastic consent models aim to promote clear communication in sexual encounters, they differ slightly in their emphasis and interpretation of cues. Affirmative consent focuses on ensuring explicit agreements, while enthusiastic consent demands active and excited participation.

C. Critiques of Modifiers

While modifiers like affirmative and enthusiastic are often in place for clarity and understanding, their addition in turn muddies the definition itself. Simply, it is like trying to clarify something by making it more confusing and more broad. Instead of adding more words that fail to define situations, we should consider why it is necessary to have a comprehensive definition of consent. On top of this, modifiers are used to add distinct meanings; however, through discussion it is clear that enthusiastic and affirmative consent definitions clearly intersect.[39]

Affirmative consent must be "voluntarily communicated" with "lack of protest, resistance, or refusal," and silence not qualifying as consent.[40] However, isn't this already the basic definition of consent? Consent, as stated priorly, is freely given and informed, so any physical refusal or lack of verbal statements would constitute as a nonconsensual interaction. Thus, is the addition of affirmative truly necessary? Should not attention be given to other poorly executed areas of sexual violence reporting?

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[38] *See* Dr. NerdLove, *Getting A Yes (Instead of Avoiding a No) – The Standard of Enthusiastic Consent, 1-8* (2013), https://xyonline.net/sites/xyonline.net/files/Dr%20NerdLove%2C%20Getting%20A%20Yes%20-%20The%20Standard%20of%20Enthusiastic%20Consent%202013.pdf.

[39] *See Modifiers*, Kent Law, http://www.kentlaw.edu/academics/lrw/grinker/LwtaModifiers.htm, (last visited Apr. 25, 2024).

[40] Malachi Willis & Kristen N. Jozkowski, *Barriers to the Success of Affirmative Consent Initiatives: An Application of the Social Ecological Model*, 13 Am. J. Sexuality Educ. 324, 324-336 (2018).

On top of this, initiatives that aim to introduce affirmative consent rely on a "miscommunication theory," where women do not clearly communicate their consent and men overestimate women's willingness to participate in sexual activities. This inherently puts faults and burdens on both parties, when in reality it should not. It is like saying that women struggling against men or not verbally giving a yes necessitates that they've failed at communication. Furthermore, the focus on affirmative consent may inadvertently reinforce gender stereotypes, where men are solely responsible for initiating and obtaining consent, while women are expected to merely withhold consent passively. This narrow minded perspective fails to account for autonomy of all individuals in sexual encounters, regardless of gender. Understandably, supporters of affirmative action counter that simple consent and "no means no" also places fault on women. This has validity since saying no can be difficult, so women, commonly pushed to appease and de-escalate, try to find roundabout ways to say no. However, I argue that consent does not inherently adopt a "no means no" mentality, which is at the core of their arguments. If we look back at the baseline definition of consent, "a rational voluntary agreement that is freely given and informed," nowhere does it imply that a roundabout way of saying no does not count as consent since it would not be voluntary or freely given. While initiatives promoting affirmative consent aim to address issues of communication and respect, they can inadvertently perpetuate simplistic views of gender roles and responsibility. It is imperative to move past the binary of "no means no" and "yes means yes" and recognize the autonomy and agency of all individuals involved.

In other areas of law like family law, informed explicit consent is needed for intervention between minors and parents.[41] However, consent to adjourn a meeting is assumed by lack of objection, rather than an explicit yes.[42] In property law, someone consents to legal obligations associated with their land when they buy it, whether they were aware of them or not does not affect the prior consent.[43] On the other hand, contract law puts heavy emphasis on signatures, but also takes into account intention, spoken words, and actions when considering consent.[44] Overall, differing areas of law

[41] *See* Frederic G. Reamer, *Informed Consent in Social Work*, 32 OUP. 425, 425-429 (1987).
[42] *See* Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. Pac. L. Rev. 665, (2016).
[43] *See* Robert G. Natelson, *Consent, Coercion, and Reasonableness in Private Law: The Special Case of the Property Owners Association*, 51 Ohio St. L. J. 41 (1990).
[44] *See* Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 Case W. Res. L. Rev. 57, (2012).

have very different definitions of what consent is, making the decision on a singular definition of consent within the context of sexual violence difficult.

Since sexual violence is such a specific crime the aforementioned examples are not applicable; however, I do consider implications of ex-ante and ex-post conduct. Ex-ante refers to policies that inform individuals beforehand what the law requires of them, while ex-post principles set the rules of violation upon which misconduct can be adjudicated.[45] For example, the explicit consent needed for intervention in social work is an ex-ante principle. In contract law, the emphasis on the agreement when determining if mutual agreement was violated or not, is an ex-post principle. Thus, when deciding on a definition of consent relative to sexual assault, we should be looking to establish an ex-post principle to determine if a right was violated. Yes, preventative measures are important, especially when looking at sexual assault, however, it is equally as important to put in place effective reactive measures to achieve justice for those impacted. In other words, affirmative or enthusiastic consent works to set boundaries and expectations of sexual encounters, and can be useful to increase positive interactions, but they fail when it comes to the legal system. Exclusively focusing on affirmative consent without taking into account other contextual factors, such as culpability or blameworthiness in the defendant, would be a failure of adjudication.

Take for example, Alex and Julia. Both Alex and Julia are intoxicated but coherent and return back to Alex's apartment, where they both express attraction for each other by guiding each other's hands and verbally agree to engage in intimacy. Later, Julia reflects and believes that she was too intoxicated to consent to the sexual activity. Therefore, even though affirmative consent was initially obtained, it fails to hold up as a valid ex-post judgment due to the presence of intoxication, which may render the sexual activity illegal. Furthermore, a more comprehensive definition would be a better ex-post judgment for the following reasons:

(i) Rather than focusing on just affirmative or enthusiastic consent, a clear explicit yes and body cues, a comprehensive definition takes into account a wide range of contextual factors that can influence the dynamics of consent such as coercion, manipulation, and intoxication.

(ii) A comprehensive definition of consent prioritizes the well-being of survivors by acknowledging diverse and differing expectations of sexual encounters. Rather than rigidly framing sexual encounters with strict verbal yes or no responses, a

[45] *See* Paul H. Robinson, *The Legal Limits of "Yes Means Yes"*, U. Penn Carey L. 1-4 (2016).

comprehensive definition offers a more holistic and nuanced perspective. It recognizes that sex is a fluid and natural aspect of human interaction, where non-verbal cues hold equal significance alongside verbal cues.

(iii) Affirmative consent standards may vary across jurisdictions and may not always reflect the most current understanding of consent and sexual violence. Take for example the University of California system. UC Merced states that consent " must be active and enthusiastic — this means that the person must be aware and involved with what is happening and that they must be excited and willing to participate. Active participants are awake, conscious and aware of all actions that are happening [and] are not pressured or coerced."[46] UC Riverside, on the other hand, has a page-long definition of consent stating that "Consent is an unambiguous, affirmative and conscious decision by each person to engage in mutually agreed-upon sexual activity," alongside multiple examples of what does or does not qualify as consent.[47] Both fall under the same "Yes Means Yes" affirmative consent bill, but UC Merced does not even mention affirmative consent. In fact, UC Riverside goes into so much more depth on consent, making the UC Merced definition seem scarily small and significantly less supportive or informative for victims of sexual misconduct. If schools mandated under the same bill in the same state differ so greatly, how different could schools across state lines differ? Furthermore, a comprehensive definition of sexual assault allows for ongoing adaptation and evolution based on new research, legal precedents, and societal norms. It ensures that the legal framework remains responsive and consistent to emerging issues and challenges related to sexual violence, ultimately enhancing the effectiveness of efforts to address and prevent it.

D. Applied to legislation

Acknowledging the law as a tool of public policy, legal experts require a consistent approach to defining and applying consent across various areas of regulation.[48] However, with the new inclusion of varying modifiers, definitions of

[46] CARE Office, UC Merced, https://care.ucmerced.edu/advocacy/about-sexual-violence (last visited Apr. 25, 2024).
[47] UC Riverside CARE Program, https://care.ucr.edu/education/what-is-consent#:~:text=Consent%20is%20an%20unambiguous%2C%20affirmative,mutually%20agreed%2Dupon%20sexual%20activity (last visited Apr. 25, 2024).
[48] *See* James Roffee, *When Yes Actually Means Yes: Confusing Messages and Criminalising Consent in Rape Justice* 72-91 (A. Powell, N. Henry, A. Flynn eds., 2015).

consent, more commonly than not, are inconsistent and create problems with application.

In 2022, The OCR provided a document that outlined different responses to a wide variety of questions relating to Title IX regulations.[49] When asked if schools needed to adopt a unified definition of consent, the OCR replied that "the preamble states that the Department will not require a school to adopt a particular definition of consent... [A] school has the flexibility to choose a definition of consent that 'best serves the unique needs, values, and environment of the [school's] own educational community.'"[50] However, in the 2022 regulatory document of Title IX, it was stated that "the Department has an interest in providing recipients with 'consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.'"[51] If it's important for both administrative and judicial areas of law to maintain consistent definitions of consent, why would it also not be important to have a consistent standard of consent for schools?

One argument for consistent administrative definitions, but not consistent university definitions is that universities have diverse needs, values, and environments of individual educational communities. By allowing schools to choose a definition of consent that best suits their specific context, the OCR aims to empower institutions to address sexual misconduct in a manner that aligns with their unique circumstances. However, a comprehensive definition of consent would envelop the nuances of diversity. This approach would acknowledge the unique circumstances of each educational community while also promoting a shared understanding of consent and sexual misconduct. Moreover, a consistent administrative definition could serve as a foundation for schools to develop their own tailored policies and procedures that align with their specific contexts. Rather than viewing consistency as rigid uniformity, it can be seen as a means to establish common ground and ensure fundamental principles are upheld, while still allowing for flexibility in implementation.

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[49] U.S. Dep't of Ed., *Questions and Answers on the Title IX Regulations on Sexual Harassment*, 1-59 (2022), https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf.

[50] U.S. Dep't of Ed., Questions and Answers on the Title IX Regulations on Sexual Harassment, 1-59 (2022), https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf.

[51] *Nondiscrimination on the Basis of Sex in Education or Activities Receiving Federal Financial Assistance*, 34 C.F.R. § 106 (2020).

III. CASE LAW

Consent, surprisingly, is not discussed a lot in case law itself. Rather issues of deliberate indifference and failures of reporting are more prevalent when considering outcomes of trials. However, there are instances where consent becomes an underlying issue.

A. Gopal Balakrishan v. The Regents of The University of California

In 2013, Jane Doe met Gopal Balakrishan, a University of California, Santa Cruz professor, at the East Bay Poetry Summit. One of the evenings, a professor held a party for attendees where Doe and Balakrishan were observed kissing. Later that night, Balakrishnan went into Witness 1, another professor, and Doe's room where he climbed into their bed naked, begging for sex, and prodded Doe with his penis, resulting in his removal from the room. On June 18, 2013, Annaliese H. attended a graduation party where she met Balakrishan and became intoxicated to the point of blacking out. Balakrishan offered to walk her home, which she accepted, and when at the house Annaliese invited Balakrishan inside. Annaliese insisted she just wanted to talk, but Balakrishan began to initiate sexual activities. She began to fall in and out of consciousness and awoke to Balakrishan performing oral sex to which she stated "'you need to leave,' and 'I do not want to have sex with you."[52] The University found that Balakrishan was guilty of sexually abusing two women and moved to terminate his employment and deny emeritus status. As a result, he petitioned for a writ of administrative mandate under 4 conditions: the University lacked jurisdiction, the University misinterpreted its own policies, he did not receive proper notice, and the sanctions were excessive. The Court of Appeal of the State of California, First Appellate District, Division Five, denied his writ petition. The court affirmed that University's policies extended to off-campus behavior related to the faculty member's professional status and upheld the University's findings of misconduct against the plaintiff.

In the factual and procedural background of this trial, the accusations were fleshed out in more depth. In the case of Anneliese, Balakrishan denied physically taking advantage of Anneliese to investigators and attempted to discredit her because

[52] *Balakrishnan v. Regents of the University of California*, No. A164480 at (Cal. 2024).

of her heavy levels of intoxication that lead to her blacking out. Additionally, when Anneliese called the plaintiff to confront him, he stated that he did not know she had been that intoxicated. However, the investigator found that more likely than not the plaintiff committed a violation of the Sexual Harassment Policy.

I agree with the conclusion drawn from the investigator, but want to point out a few procedural items that the University implemented.

(i) The University of California, Santa Cruz (UCSC) has a unique way its definition of consent is written. More specifically, it has a statement of culpability:

> The Respondent's belief [of consent] is not a valid defense where: (1) The Respondent's belief arose from the Respondent's own intoxication or recklessness; (2) The Respondent did not take reasonable steps... to ascertain whether the Complainant affirmatively consented (3) The Respondent knew or a reasonable person should have known that the Complainant was unable to consent because the Complainant was incapacitated.[53]

In the case of Annaliese and Balakrishan, even if Annaliese physically did not reflect a state of incapacitation, which she argues she did, Balakrishan would still be held guilty due to him violating the (2) statement by not taking steps to attain her level of intoxication.

(ii) UCSC falls under the "Yes Means Yes bill," and is mandated to include an affirmative definition of consent. However, semantically affirmative can be removed from the definition without impacting the practical application of the definition in determining consent in sexual encounters. Without explicitly stating "affirmative," the definition would still emphasize the importance of active and ongoing agreement, aligning with what I believe to be the true principles of consent. This is done through the addition of terms like conscious, voluntary, revocable, and even standards where consent is invalid like lack of protest, lack of resistance, etc.[54] Thus, affirmative, in this context, is redundant, unnecessary, and fails at its purpose to "narrow" the scope of the

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[53] UC Santa Cruz Title IX Office, *Glossary of Terms* (last visited Apr. 25, 2024), https://titleix.ucsc.edu/about/glossary_term.html#:~:text=Consent%20is%20affirmative%2C%20conscious%2C%20voluntary,to%20engage%20in%20sexual%20activity .

[54] UC Santa Cruz Title IX Office, *Glossary of Terms*, https://titleix.ucsc.edu/about/glossary_term.html#:~:text=Consent%20is%20affirmative%2C%20conscious%2C%20voluntary,to%20engage%20in%20sexual%20activity (last visited Apr. 25, 2024).

validity of consent by adding unnecessary complexity without enhancing understanding. This almost placeholder usage of affirmative brings into question the effectiveness of the "Yes Means Yes" bill.

Although UCSC has a level of complexity within its definition of consent, many schools do not, which has been highlighted in previous examples like UC Merced. Furthermore, it is important to acknowledge the benefits that come from a more extensive document, while noting areas that are lacking or unnecessary.

B. Karasek v. Regents of The Univ. of California

Plaintiffs Sofie Karasek, Nicoletta Commins, and Argyle Butler brought forth two claims against the University of California, Berkeley: post-assault and pre-assault. Post-assault is a claim that the university did have a proper response to a complaint of sexual violence under Title IX, while a pre-assault claim is that the school was deliberately indifferent to sexual harassment which in turn created an environment that increases the risk of harrassment.[55] In February 2012, Karasek was assaulted on a trip with the Democrats Club by then club president "TH," who had previously assaulted another female student on a similar trip, reported her assault to the university, and nothing occurred. In summer 2012, Butler was assaulted by a guest lecturer while serving as a graduate student instructor, and reported the incidents to the university. In January 2012, Commins was assaulted by another student "John Doe 2", who a few days prior assaulted two other students at a fraternity party. After Commins' report, John Doe 2 was allowed to resume his studies. Together, the plaintiffs alleged the university had contradictory policies for responses to sexual misconduct and avoided reporting requirements under the Clery Act through informal processes. The District Court for the Northern District of California dismissed two of the claims, Karasek and Commins, and motioned for summary judgment on Butler's Title IX claim. Ultimately, the Ninth Circuit dismissed Commins and Butler, but Karasek was not dismissed due to alleging an adequate claim. The court held that her pre-assault claim was "unusually strong" because the universities lack of action towards TH when he previously assaulted another female student, heightened the risk for another assault.

In the Fifth Amended Complaint (FAC), the California State Audit was highlighted. This 2014 audit conducted on California universities- UC Berkeley, University of California, Los Angeles; California State University, Chico; and San Diego State University- showed that all the universities reviewed did not ensure faculty

[55] *Karasek v. Regents of the University of California*, 500 F. Supp. 3d, 967 (Cal. 2020).

and key officials were trained in reporting incidents of sexual misconduct.[56] On top of this, the audit found that over five-years, University of California (UC) resolved 76 percent of sexual misconduct complaints using an early resolution process, in an inadequate manner, that had significant procedural differences between formal and informal processes.[57] This informal process emphasized the possibility of improper mishandling to the point that universities were "'unable to demonstrate that [they] consistently informed students of what to expect as the university investigated their complaints."[58] In other words, the University of California system- renowned for its educational opportunities- more often than not, treated sexual misconduct cases inadequately, failing to consistently handle complaints and update victims of investigation status.[59] Taking all of this into account it is important to note that Title IX does provide consistent guidelines for university grievance procedures. So if there are dozens of guidelines for said procedures and schools still seem to fail at adequately meeting them, how poorly would an area, consent, with extremely limited guidelines, be treated? This trial simply brought to light the gruesomeness of this audit, but through case studies of the University of California System it is clear definitions are inconsistent and commonly poorly written.

At the University of California, Berkeley (UCB), they follow an enthusiastic model of consent over an affirmative model of consent, "Yes means yes!" versus "Yes means yes." The difference seems minor, but UCB has a section that distinguishes their definition from other schools: "Asking for consent is mandatory, and it leads to more respectful, consensual, and communicative sex!"[60] As discussed priorly, stripping sex into a verbal strict transaction turns it into a disconnected act instead of a human act. Thus, instead of making sex safer, it stigmatizes it by framing it as inherently risky or potentially harmful. Take for example a hookup, two individuals show positive verbal signs of wanting to engage in intimacy. Both parties want the interaction, but don't verbalize it since they believe it is unnecessary for them. The sex was consensual but by UCB's definition it wasn't. Furthermore, reducing consent to a strictly verbal transaction overlooks the complexities of human communication and connection. In

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[56] *See* Cal. St. Auditor, *Sexual Harassment and Sexual Violence: California Universities Must Better Protect Students by Doing More to Prevent, Respond to, and Resolve Incidents* (2014).
[57] *Karasek*, 500 F. Supp. 3d at .
[58] Cal. St. Auditor, *Sexual Harassment and Sexual Violence: California Universities Must Better Protect Students by Doing More to Prevent, Respond to, and Resolve Incidents* (2014).
[59] *See Karasek*, 500 F. Supp. 3d, 967 (Cal. 2020).
[60] UC Berkeley U. Health Services, *Creating a Culture of Consent @* Berkeley, 1-2 (2014), https://uhs.berkeley.edu/sites/default/files/hp-consentdiscussionguide.pdf.

some cases, non-verbal cues and mutual understanding may suffice to convey consent effectively without the need for explicit verbal confirmation. On top of this, mandating specific forms of communication and behavior may limit individuals' freedom to express their desires and preferences in ways that feel authentic to them.

IIII. POSSIBLE SOLUTIONS

It is hard to pinpoint a singular correct solution to such an intricate problem; however, it is evident in practice and theory that some aspects are crucial for progress. Firstly, the most pressing issue is that schools have too much power when deciding their definitions of consent. As stated previously, administrative and judicial areas of law rely on consistent definitions of consent, but schools chose their definitions. This disconnect between applications leads to problems like inconsistency, legal misalignment, and policy ineffectiveness. When there are so many varying definitions of consent amongst schools, it creates a lack of uniformity, making it difficult to ensure fair and equitable treatment across institutions. Inconsistencies in consent definitions can also make it more confusing for students, especially when their primary education focuses on abstinence. This confusion can lead to misunderstandings, as students may not understand their rights or the expectations around sexual interactions. Thus, I propose that the OCR establish a federal definition of consent through regulatory guidance. As seen with the DCLs, the OCR can issue guidance documents to strongly influence how educational institutions define and handle issues related to consent under Title IX. By tying a specific definition of consent or more in-depth guidelines to compliance with Title IX, the OCR could ensure that schools adopt a specific standard as part of their policies to avoid losing federal funding.

Secondly, the definition I am proposing would consist of items like recognition of sex as a natural act, clear outlined instances of consensual verbal and physical cues, fleshed out descriptions of cues that would imply non-consent, and a statement of culpability. These are all necessary parts for the following reasons:

(i) Talks of consent should not make people fearful of having sex, rather consent should foster a safe and comfortable environment. These newer affirmative models attempt to adjust our behavior in sexual situations so they are less legally ambiguous, but they actively fail to recognize sex as fluid. In an idealistic world, verbal consent would be obtained before every interaction, but that is an inaccurate depiction of sex. Majority of sex is unplanned, especially in college party scenes and hookup culture, so asking for consent prior to every new aspect of the encounter could be a

mood killer and highly unrealistic.[61] Nonverbal cues are often integral to communication during intimate moments, and it's essential that these cues are recognized and respected as well. Simply, the law has no right to directly dictate communication on sex. Instead, it should recognize the autonomy and agency of all individuals involved by equally weighting verbal and nonverbal cues.

(ii) The definition should be explicit on what counts as consent or not. Since policy aims to make the legality of actions more specific, definitions should include examples of instances that qualify as legal consensual encounters versus instances that violate the law. These examples would include scenarios where clear verbal or nonverbal cues indicate consent, as well as situations where consent is absent or revoked. Verbal cues indicating consent could consist of, but are not limited to: "Yes," "I want to engage in the act," "I'm comfortable with this," "I'm excited to do this with you," and "Let's do it." All of these represent clear and explicit confirmations of agreement in sexual acts. Nonverbal cues indicative of consent can consist of: active participation and enthusiasm, initiating physical contact, making eye contact and smiling, moving closer or leaning in, and nodding.

Instances where consent would be lacking both verbally and nonverbally could include: silence or lack of response, pulling away or avoiding physical contact, expressions of discomfort, turning away or avoiding eye contact, being unconscious or asleep, being underage or unable to understand the nature of the situation, and stiffening of the body or appearing tense.

(iii) A statement of culpability protects a victim from the assaulter claiming that they believed they had consent when such belief is not reasonable. This is particularly crucial in cases where intoxication or incapacitation is involved. Thus, a statement should be added to the definition stating that a respondent's belief that they had consent is not a valid defense in certain situations. These situations would include cases where their belief arose from their own reckless behavior and intoxication, cases where the defendant did not take reasonable steps to attain consent, or cases where the victim was incapacitated or asleep.

CONCLUSION

Consent is not as simple as it seems, but there are clear steps policymakers and officials can make to help consent become more clear. Consent needs to have a

[61] Malachi Willis & Kristen N. Jozkowski, *Barriers to the Success of Affirmative Consent Initiatives: An Application of the Social Ecological Model*, 13 Am. J. Sexuality Educ. 324, 324-336 (2018).

comprehensive definition free of modifiers, which includes statements of culpability, standards the legal system can adjudicate on (both verbal and nonverbal), and constant measures that transcend state lines. As this occurs, campuses and women will feel safer, avoiding becoming the statistics they fear so greatly. Thus, the proposal for policy changes is not just a call to action, but a doctrinally sound and practical solution that could be implemented through a new federal federal guidance to Title IX, similar to the grievance process. By advocating for a comprehensive and universal definition of consent, the article aims to contribute to a nuanced approach to addressing sexual assault. Ultimately, this article matters because it challenges the status quo, pushing for a holistic and proactive approach to combat sexual misconduct on college campuses. It urges stakeholders to envision a future where policies are both reactive and preventative.