Going Beyond Clery: Evaluating Campus Definitions of ‘Sexual Assault’ and ‘Consent’

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Abstract
This study examined institutional definitions of “sexual assault” and “consent” in a sample of four-year residential institutions in one state. Findings were promising in some regards and discouraging in others. Almost all campuses were compliant with the Clery Act. Many defined “sexual assault” more broadly than statutes, and also defined “consent” in progressive ways. But, information remained scattered across documents and regressive Uniform Crime Report (UCR) language was not uncommon.
Introduction
National research on sexual assault victimization has found that one in five female students at institutions of higher education (IHEs) experience sexual assault or attempted sexual assault while enrolled (Krebs et al., 2007), but only 4.9 percent of assaulted women report the assault to police or campus authorities (Fisher et al., 2003). As a result, few assailants are held accountable for violating campus codes of conduct or prosecuted under criminal laws.

Sabina and Ho (2014) point out that most researchers concerned with sexually assaulted college students’ low rates of disclosure and service utilization have focused on the personal reasons for which victimized students are disinterested. However, a handful of studies have focused on the ways in which policy and service provision at IHEs may also contribute to this problem. Several have audited publications that institutions generate for student use (including print and Web-based texts) to determine if they contain the definitions and policies required by federal legislation (Karjane, Fisher, and Cullen, 2002; Krivoshey et al., 2013; Lu, 1996). The assumption is that students who attend institutions that are compliant will have more resources to make decisions and more support to negotiate adjudication processes. But, knowing that a sexual assault/misconduct policy includes definitions of “sexual assault” and “consent” does not ensure its utility to students. Policy definitions may be vague or conflicted, more or less progressive than state laws, or simply difficult to locate.

A study was undertaken to better understand the context in which sexually assaulted students make reporting decisions. It goes a step further and parses the terms that institutions use to define “sexual assault/misconduct” and “consent.” Seeking to determine if campuses have expanded the scope of actionable assaultive behaviors, the terms adopted by institutions are also compared to existing statutory language. This article additionally reviews studies that have focused explicitly on campus conduct codes. It describes how “sexual assault” is defined in the Maryland penal code, and in the absence of a definition of “consent,” how institutions might develop their own definitions by inverting the statutory language or drawing on existing concepts of effective or affirmative consent. Finally, it discusses the methodology and results of this study, and concludes with policy recommendations.

Institutional Definitions of Sexual Assault
Few studies have focused on the definitions of “sexual assault/misconduct” as institutionalized in student codes of conduct (Hayes-Smith and Hayes-Smith, 2009; Karjane, Fisher, and Cullen, 2002; Krivoshey et al., 2013; Potter, Krider, and McMahon, 2000). All have employed some sort of content analysis of official publications, print- or Web-based. Two studies are based on nationally representative samples, a third on a regional sample, and one attempted a census of a single state. In each case, the focus on definitions was part of a broader assessment of sexual assault policies, and the reported findings about definitions are not extensive.

In 1998, Potter, Krider, and McMahon (2000) randomly selected a national sample of 78 two- and four-year institutions and sought to secure their sexual assault policies. They found that 81 percent of the institutions had a policy, though this was more common among four-year than two-year institutions (2000, p. 1,353). Where the policies were located varied. The majority (43 percent) were in student handbooks, while others were in brochures (35 percent), or on flyers and websites (12 percent) (2000, p. 1,356). Potter et al. also assessed whether definitions included references to date or acquaintance rape. Only 28 percent of the sample did (2000: 1,356).

Karjane, Fisher, and Cullen’s (2002) analysis of IHE documents collected in 1999 also from a nationally representative sample, provides a baseline of information about definitions presented to students. They found that 33.2 percent of institutions used a generic term, such as “sexual assault” or “sexual offense” in their policies, and only 14 percent defined the term (2002, p. 44). The remaining two-thirds “used at least one specific term” (e.g., “rape”), and four-year schools provided more detail than two-year schools (2002, p. 45). Nine out of 10 schools had policies covering “penile-vaginal rape,” 62 percent included “sexual contact,” 45 percent included other forms of penetration, and 12 percent mentioned “incest” (2002, p. 46). It is not clear how institutions defined offenses, or if they addressed consent. In contrast to Potter et al. (2000), most institutions mentioned acquaintance rape (2002, p. 45). Like Potter et al., they found sexual assault policies in multiple locations: 38.6 percent in the annual security report, 19.3 percent in the student handbook, 14.6 percent in both, and 11.5 percent on a Web page (2002, p. 48).
Hayes-Smith and Hayes-Smith (2009) randomly selected 54 institutions in the Great Lakes Region in 2004 and analyzed their public websites for women’s resources centers and sexual assault literature. They examined the "clarity and extensiveness of definitions of ‘sexual assault’" (2009: 114), among other things.

They concluded that, in general, IHE websites did not provide students with enough information to recognize assaultive sexual interactions as crimes or to take action for the purposes of self-care or adjudication. The authors found that most campuses used the Uniform Crime Report definition of "forcible rape" on their websites: "The carnal knowledge of a female forcibly and against her will" (2009, p. 119). They accurately noted that this is not a comprehensive definition of sexual assault.²

The Hayes-Smiths categorized institutions on the basis of the quality of the information provided on their sites. They rated 35 percent of the websites as “poor” for not meeting Clery Act requirements. These institutions provided very little or no sexual assault information, and narrow definitions of "sexual assault" that were focused on "male genitalia insertion" (2009: 118). The authors placed 32 percent of the IHE websites in a "basic" category because they met most Clery requirements but did not provide extensive information (2009, p. 118). The authors supplied no information about the quality of the definitions in this category. Institutions placed in an “adequate” category (17 percent) included Purdue University, which the authors noted “offered definitions of sexual assault scenarios which included acquaintance rape” (2009, p. 119). The authors did not describe the quality of definitions employed by institutions that were placed in the “excellent” category (15 percent).

Krivoshey et al. (2013) examined the public websites of four-year colleges in Ohio between March and November of 2011, using eight measures related to the availability of sexual assault policies. They analyzed website text for the presence of offense titles in the Ohio Revised Code (ORC): rape, sexual battery, gross sexual imposition, sexual imposition, public indecency, voyeurism, and sexual misconduct. Krivoshey et al. reported that while two-thirds (66 percent) of the institutions had a sexual assault policy, institutional definitions “varied widely” (2013, p. 144), and fewer than one percent of the institutions with a policy listed all six ORC offense titles (2013: 143). The authors provided no information about whether the IHEs adopted some, but not all, offenses, and if so, which ones; nor did they indicate if campuses defined the offense titles or incorporated other terms.

In sum, the existing literature points to cross-campus variability in the location of sexual assault policies and their contents.³ Although it provides little detail about the terms that IHEs use to define “sexual assault,” it suggests that policies may be shaped by both state criminal statutes and UCR/National Incident Based Reporting System (NIBRS) definitions used to construct Clery reports. These results beg a question: Do students receive ambiguous and even conflicting constructions of prohibited behavior in the same document, working against the goal of increasing reporting?

Conceptualizing Sexual Assault and Consent

The Clery Act requires institutions to define “sexual assault” and “consent,” but doesn’t explain how to define them. An overview of the URC/NIBRS definition was provided earlier. In this section, the Maryland Sexual Violence statute is described, because the study was conducted on four-year residential IHEs in the state. The Maryland statute does not define “consent,” so each Maryland IHE must construct its own definition; I will describe alternative constructions of “consent” in use nationally that Maryland institutions might adopt.

Maryland has a tiered sexual violence statute (Maryland Criminal Law Code §3-301), in which “vaginal intercourse” is characterized as “rape in the first degree” and other forms of penetration into a genital opening or anus for the purposes of arousal or for abuse of either party (by an object or other part of the body) are characterized as a “sexual offense in the first degree.” “Sexual contact” (a sexual offense of the third degree) involves “intentional touching of the victim’s or actor’s genital, anal, or other intimate area for sexual arousal or gratification, or for the abuse of either party.” The law requires that these acts occur with “force,” the “threat of force,” or “without the consent of the other.” Adults of three types are designated as unable to consent: 1) a “mentally defective individual” is one who suffers from mental retardation or a mental disorder; 2) a “mentally incapacitated individual” is someone under the “influence of a drug, narcotic, or intoxicating substance;” and 3) a “physically helpless individual,” is a
person who is unable to resist, or communicate unwillingness. Maryland law also prohibits incest and sexual interaction with individuals below a minimum age.

The Maryland penal code does not define “consent,” given the statutory focus on overcoming implied resistance through force or taking advantage of lack of resistance (incapacity). If IHEs in Maryland wish to remain close to the statutory definition, they may invert the statutory language and frame consent as the absence of conditions that raise questions about the voluntariness of participating in sexual activity. For example, when force or threat of force exists, there is no consent.

The concept of “effective consent” is another alternative. It refers to whether individuals’ authorization for others to act on their property or body is valid. In the absence of conditions that would make it unreasonable to assume agreement or voluntariness, consent may be assumed. “Effective consent” thus precludes agreement (consent) secured through force, threat, coercion, deception, or fraud. When a person knows another to be unable to make reasonable decisions (e.g., due to youth, mental disease/illness, or intoxication), the consent is also not effective. Definitions of “effective consent” typically allow for expressed consent (verbal) or apparent assent (behavioral acquiescence). Strictly speaking, a silent person could be assumed to effectively consent in the absence of conditions that preclude voluntariness. Effective consent, to the extent that it includes intimidation and coercion, sets a standard of voluntariness that is more stringent than Maryland law. This definition of “consent” is written into the statutory language of the penal codes of several states, including Texas and Kentucky, but it is not binding in cases of sexual assault.

“Affirmative consent” is agreement that is explicitly communicated. It is achieved when a person desiring to act on or with another seeks and secures an affirmation, typically verbal, that such conduct is desired (Anderson, 2004; National Organization of Women, 2015; Remick, 1993; Seidman and Vickers, 2005). In the absence of a deliberate response and agreement, consent does not exist. With respect to sexual behavior, affirmative consent holds the initiator of sexual activity responsible for determining whether her/his advances are wanted before acting sexually. Consent must be ongoing through a sexual encounter, and silence (or the absence of “no”) does not confer consent. Restrictive versions of affirmative consent require that communication is oral; a verbal “yes” (or its equivalent) must be articulated. More broadly defined (weaker) versions of affirmative consent encompass words or behaviors (enthusiastic actions) that clearly communicate a “yes.”

“In 1992, the New Jersey Supreme Court upheld the constitutionality of statutory language stating, ‘any act of sexual penetration engaged in by the defendant without the affirmative and freely given permission of the victim of the specific act of penetration constitutes the offense of sexual assault’” (Sanday, 1996, p. 281). Other progressive definitions of “consent” passed since then include “cooperation in act or attitude” (Colorado), “positive cooperation” (California), and “word or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact” (Wisconsin) (Harvard Law Review, 2004, pp. 2,350–2,351).

This conceptualization of consent has recently been gaining traction on college campuses outside these states. Antioch College in Ohio started the trend, adopting a restrictive version of affirmative consent in 1991. Other IHEs with strong definitions include Vassar College in New York, the University of New Hampshire, and the University of Northern Alabama (Vendituoli, 2014). More broadly defined forms of affirmative consent have been adopted by Amherst College in Massachusetts, the University of Connecticut, Occidental College in California, and Wesleyan University in Connecticut (Vendituoli, 2014; Wilson, 2015). Heller (2015) reported that The NCHERM Group counts more than 800 IHEs that are now using “some sort of affirmative consent standard.”

**Data Collection**

To assess the consistency of IHE definitions with statutory law, it was necessary to focus on institutions within one state. Because sexual assault is of particular concern on residential campuses, the sample was restricted to residential, four-year institutions.

Maryland was a choice of convenience for analytic and political reasons. On a spectrum of statutory progressivism, the Maryland statute falls in the middle. The state continues to separate forced vaginal penile intercourse (rape) from other forms of penetration, unlike Arizona.
and Florida, which combine all forms of penetration in a single assault statute (National Crime Victim Law Institute, n.d.). On the other hand, the Maryland Supreme Court ruled in 2008 that consent may be withdrawn after intercourse has commenced (Wyatt, 2008). As of 2004, this progressive position was held in only eight states (Harvard Law Review, 2004, p. 2,352). The absence of a definition of “consent” in the Maryland statute also imposes a particular problem on IHEs seeking to comply with the recent expansion of the Clery Act. In short, Maryland statutory and common law provides interesting features for comparison to IHE definitions. My institution is also in Maryland, thus focusing on the state enabled me to provide my administration with information about the relative progressivism of our existing sexual assault policy.

This study focused on the development of policy pertaining to the management of campus sexual assault during the 2013–2014 academic year. This time frame followed the March 7, 2013 passage of the Violence Against Women Reauthorization Act of 2013 (VAWA), which substantially expanded Clery Act mandates. However, IHEs were not obliged to provide students with updated policies before the 2014–2015 academic year, or to meet new reporting criteria until Oct. 1, 2014, when annual security reports were due. Institutions were, however, expected to make good-faith efforts to comply with revisions of the statute until final regulations were published (Mahaffie, 2014). Thus, the time frame within which materials were collected was one of flux for institutions. They had been directed to act, but were not yet accountable to the new mandates.

The data was in publicly available documents. Like Kriivoshey et al. (2013), a student assistant and I secured them via internet searches of institution’s websites. Initially, we sought the annual security report and student handbook (for the conduct code). If the sexual assault and sexual harassment policies were not within these two documents, we used the sites’ internal search functions to locate them. We also employed searches for “sexual assault” to locate any additional material pertaining to campus judicial policies. My assistant and I were unable to locate the October 2013 annual security reports for two campuses. Most campuses posted PDFs of policy documents; however, a few provided only relevant information on their Web pages. In these instances, we copied all text into a Microsoft Word document for coding.

Analysis
I developed a codebook with student research assistants to capture features of campus definitions and policies. We assessed documents for the presence of text that was responsive to 20 key terms within the Maryland Penal Code 3-301 through 3-312 pertaining to sexual violence, and 12 key terms in the National Incident Based Reporting System definitions. We also coded for six elements reflective of effective consent, eight elements reflective of affirmative consent, and the presence of inverted statutory language. Two readers independently coded each document for the presence of all items. Any inconsistencies were resolved through discussion and by consulting the texts. Frequencies for the full data set were computed, and a summary score for each IHE was created. The percentage of Maryland State Law terms and NIBRS terms used by each IHE were also calculated.

An issue separate from the content of policies available to students is how efficiently students are able to access information to guide post-assault decision-making. To assess this, the location of information responsive to Clery and VAWA within IHEs’ documents and the consistency of information across documents were compared.

Features of the Sample
The study included 25 residential, four-year institutions of higher education in the state of Maryland. Eleven (44 percent) are public, and 14 are private. Three of the colleges and universities in the study are historically black, and one is a women’s college. The smallest enrolled 301 undergraduates, and the largest enrolled more than 35,000. The majority served between 1,000 and 3,999 students. However, more students were enrolled on the largest state campus than on the campuses of all IHEs with enrollments under 4,000 combined. In total, the three largest state campuses served more students than all others combined. Knowing the sizes of campus populations enabled estimation of the proportion of students who were impacted by particular kinds of definitions.

Findings
Defining ‘Sexual Misconduct/Assault’
Campus and Criminal Justice Equivalence
Only a fifth of Maryland IHEs specifically mentioned Maryland’s criminal code when presenting the campus
definition of “sexual misconduct” (see Table 1, below). The majority crafted definitions of prohibited behavior that did not rely heavily on language in the code. The highest percentage of statutory terms used was 65, but only 40 percent of the IHEs used more than half of them. Specific terms found in more than two-thirds of definitions were: rape, intercourse, touch, force, any penetration, threat, and contact.

<table>
<thead>
<tr>
<th>Table 1: Representation of Maryland Statutory Language in Sexual Misconduct Definitions (N=25)</th>
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<tbody>
<tr>
<td>Features</td>
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<tr>
<td>Maryland state statute is referenced in some way.</td>
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<tr>
<td>Definition includes “intercourse.”</td>
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<tr>
<td>Definition specifically uses the term “rape.”</td>
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<tr>
<td>Definition includes “sex act.”</td>
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<tr>
<td>Definition includes “sexual contact.”</td>
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<tr>
<td>Definition refers to “any penetration” by any body part or object.</td>
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<tr>
<td>Definition includes “sexual offense.”</td>
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<tr>
<td>Definition refers to “touching” of genital or anal, or other intimate areas.</td>
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<tr>
<td>Definition specifies that sexual misconduct occurs when acts take place “without consent.”</td>
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<tr>
<td>Definition specifies that sexual misconduct occurs when there is an effort to injure or damage (suffocate, strangle, disfigure, or inflict serious bodily injury).</td>
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<tr>
<td>Definition specifies that rape or sexual assault occurs when there is a “threat” of force (or reference to employing or displaying a dangerous weapon).</td>
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<tr>
<td>Definition refers to what the victim reasonably believes with respect to threat.</td>
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<td>Definition specifies that threats include placing in fear imminently subject to death.</td>
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<tr>
<td>Definition refers to sex acts aided and abetted by another.</td>
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<tr>
<td>Definition refers to sex acts perpetrated during a burglary.</td>
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<tr>
<td>Definition specifies that rape or sexual assault occurs when the victim is “mentally defective.”</td>
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<tr>
<td>Definition specifies that sexual misconduct occurs when the victim is “incapacitated” (or has an “incapacity”) due to drugs, narcotics, or intoxicating substances.</td>
</tr>
<tr>
<td>Definition specifies that sexual misconduct occurs when the victim is “physically helpless,” unconscious, and physically unable to resist/communicate unwillingness to submit to sex.</td>
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<tr>
<td>Definition refers to what the person performing act “knows or should have known.”</td>
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Although strict reliance on statutory language was low, most defined “sexual assault” to encompass penetrative and non-penetrative acts. While 28 percent of the IHEs used the term “sex act” to delineate penetration of the vagina or anus by the tongue, penis, or an object, another third adopted “non-consensual intercourse” to cover the same behaviors. Almost two-thirds of IHEs employed the term “sexual contact” to delineate prohibited touching, and 16 percent prohibited “non-consensual physical conduct of a sexual nature,” which was comparable. One IHE used both the statutory and alternative terms. Roughly half the institutions incorporated physical helplessness and described it as being “unconscious or physically unable to resist or communicate unwillingness to submit.” Only about a quarter included the term “mentally defective,” which encompassed a lower IQ and mental illness.

**Narrowing the Scope of Actionable Behavior and Confusing the Issue**

The mandate to report crimes in compliance with the Clery Act also appears to shape sexual misconduct definitions at Maryland residential IHEs (see Table 2, below). One private college used 100 percent of the NIBRS terms, and about a third of the other IHEs used more than half. Specific NIBRS terms found in the definitions of two-thirds or more of the IHEs were: sodomy, any penetration with an object, and forcible.

<table>
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<tr>
<th>Table 2: Representation of NIBRS/FBI Terminology in Sexual Misconduct Definitions (N=25)</th>
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<tbody>
<tr>
<td>Features</td>
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<tr>
<td>Definition includes “carnal knowledge” (1998, 1999, 2013).</td>
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<tr>
<td>Definition specifies that rape includes the rape of both males and females if offender is of the opposite sex.</td>
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<tr>
<td>Definition includes “sodomy” to mean oral or anal intercourse (2013).</td>
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<tr>
<td>Definition includes “object” — use of an object or instrument to unlawfully penetrate, however slight (in 2000+).</td>
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<tr>
<td>Definition specifically describes the victim as “incapable” of giving consent (1999).</td>
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<tr>
<td>Definition specifies that rape or sexual assault occurs when the victim has a temporary or permanent mental or physical “incapacity” (2000, 2013).</td>
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<tr>
<td>Definition specifically uses the word “fondling” — touching of private body parts (2013).</td>
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<tr>
<td>Definition includes “forcible” as a modifier (1999, 2000).</td>
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<tr>
<td>Definition includes “nonforcible” as a modifier (1999, 2000).</td>
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<tr>
<td>Definition refers to sexual acts against a person’s “will” (1999, 2000).</td>
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For the most part, incorporation of NIBRS terms occurred in ways that are fairly consistent with Maryland law. However, some that institutions incorporated into definitions raised the bar above the state standard. Against a person’s “will” implies an expectation of physical or verbal resistance that the Maryland statute does not require. “Carnal knowledge” refers only to vaginal intercourse, which is a far narrower standard than the Maryland statute. Both terms have been dropped from NIBRS for being problematic, but appeared in a third and almost a tenth of the IHE definitions, respectively. “Incapacity” as defined by NIBRS is different than “helplessness” as defined in the Maryland statute. Denoting sexual assaults as “forcible” also sets a bar not found in the Maryland statute and confuses the issue of helplessness.

Forty percent of the IHEs incorporated more terms from the Maryland statute than NIBRS into their definitions. Slightly less than a third used more terms from NIBRS; and about a third of IHEs used both sets of terms in equal measure. A fifth of IHEs used more than 50 percent of both sets of terms.

Widening the Scope of Actionable Behavior
None of the IHEs adopted language from the Maryland statute that expanded on the elements of force or threat of force, and the importance of a victim’s reasonable belief of danger. Omitting these details from the statute effectively imposed a lower threshold for force or threat of force, and produced a more expansive definition of “sexual assault.” Almost three-quarters of the IHEs also prohibited actors from achieving sexual gratification through “intimidation,” all but one of the public institutions included this term. Almost half of the IHEs also prohibited “coercion.” The introduction of these terms expanded the scope of actionable behavior beyond the Maryland penal code and, based on campus size, affected the majority of university students.

Defining ‘Consent’
Ninety-two percent of the institutions provided a definition of “consent,” although there was a wide range of detail among the definitions. A few were one sentence long; most were a paragraph; and a few incorporated examples. Three-quarters of the IHEs incorporated some negation of statutory language, framing consent as an absence of conditions such as threat or force that would raise questions about the voluntariness of participation in sexual activity. Two exclusively offered this definition of “consent.”

About half of the IHEs also specified that sexual activity must occur with “effective consent” or must not occur “without effective consent.” About three-fifths of them specified that consent must be demonstrated through words or actions, and admonished that “silence was not consent,” carving out a narrower scope of assumed consent than typical of an effective consent standard. A corollary of effective consent is an actor’s accountability for being aware of the state of the individual with whom s/he is interacting. Three IHEs (12 percent) addressed the issue directly by specifying that an individual’s drug or alcohol use could not function as a defense against accountability to know another’s capacity to voluntarily consent.

Three institutions (12 percent) adopted a clear-cut affirmative consent standard, which requires an initiator to gain spoken agreement to particular sexual activities in an ongoing fashion and to halt the activity if consent is withdrawn. Another three adopted a more broadly defined version and allowed for verbal or behavioral indications of consent. Based on campus populations, less than three percent of Maryland residential IHE students were obliged by restrictive constructions of affirmative consent, but almost a quarter (23 percent) were bound by the less restrictive form.

Additionally, regardless of whether they used the terms “effective” or “affirmative,” almost half the institutions specified that previous consent does not indicate current consent; two-fifths set a standard of mutual understanding for sexual activity to take place. Almost a third noted that consent could be verbally withdrawn, consistent with the 2008 Maryland Supreme Court decision. Thus, many IHEs in the state presented students with definitions of “consent” that leaned toward an affirmative standard. They did not disallow an assumption of consent, but they required students interested in sexual activity to recognize that each sex act required effective consent independently, and required them to focus more attention on whether a presumption of voluntariness existed. Because this expectation of greater responsibility and attentiveness existed at schools with greater enrollments, it extended to the majority of students at Maryland residential campuses.

Efficiency of Information Delivery
Almost half of the institutions concentrated a majority (88 percent or more) of their information responsive to the 2013 Clery Act mandates in one document, including definitions of “sexual misconduct” and “consent.”
and information about reporting, adjudication procedures, counseling services, and accommodations. The particular document in which information was concentrated varied from campus to campus. For example, students at Goucher College, St. Johns College, and the University of Maryland College Park could find most required information in the annual security report and student handbook, and a separately published sexual assault/misconduct policy, respectively. Loyola University Maryland and McDaniel College provided complete information in both their student handbooks and in their annual security reports.

The other half of IHEs spread information required under the Clery Act among documents. Where they published particular information varied, as well as how much overlap existed across documents. For example, Washington College published 66 percent of its information responsive to the Clery Act in the student handbook, 44 percent in the annual security report, and 30 percent in a freestanding policy. Morgan State University published 74 percent of its information in the sexual assault/misconduct policy, 32 percent in the student handbook, and 50 percent in the annual security report. When IHEs spread information among documents, information about adjudication was typically allocated to a single place, while reporting-related information appeared elsewhere. Definitions of “sexual misconduct” and “consent” were most frequently found in the student handbook, but were also located in the annual security report or a separately published sexual assault/misconduct policy. Thus, on some campuses, definitions and reporting instructions were to be found in different documents. This practice creates inconvenience for students and could be a significant challenge for a student in crisis to sort through.

Discussion
Four-year IHEs in Maryland serving residential students, who are at greatest risk of assault by peers, exhibited a commitment to providing behavioral guidelines to students. All but one Maryland IHE provided a definition of “sexual assault,” in comparison to the third of Ohio IHEs that Krivoshey et al. (2013) reported were missing it. The difference may result from the absence of two-year colleges in this sample or, more likely, may reflect efforts to comply with the 2013 Campus SaVE Act (passed as part of VAWA). Although it had not taken effect, only two IHEs in Maryland fell short of also providing the definition of “consent” the act requires. These results are encouraging from the standpoint of preventing sexual assaults and increasing reporting to campus authorities or police.

Closer inspection of the specifics of IHE guidelines is promising in some regards and discouraging in others. Like Hayes-Smith and Hayes-Smith (2009), I believe the presence of the NIBRS terms in IHE publications are a cause for concern. At best, they confuse the issue of what sexual assault entails and, at worst, they present students with a narrower scope of actionable behaviors on campus than the criminal justice system. Guidance for defining “sexual assault” and “consent” have been late in arriving from the federal government. Although the National Institutes of Justice called for “explicit and behavioral definitions of ‘consent’ and ‘sexual offenses’” (2005, p.11) a decade ago, the 2013 Campus SaVE Act is the first legislation to supply model text. In the absence of directives, campus administrators interested in achieving compliance with the Clery Act may have incorporated language from the FBI issued in the 1992 UCR Handbook, NIBRS Edition to prepare their first annual security reports. The frequent presence of “intimidation” in definitions of sexual assault in Maryland IHE publications probably reflects the new data collection guidelines issued by the FBI in 2000 that offered “stalking” as an example of “intimidation” within the category of “assaults.” Prior to the 2013–2014 academic year, there was no call to question usage of FBI language in campus definitions of “sexual assault.” However, the stage may be set for this to occur. The FBI’s Dec. 11, 2014 “Frequently Asked Questions” concerning NIBRS explained that the phrase “forcibly or against the victim’s will” would be changed to “without the consent of the victim” (Reese, 2104, slide 17). Perhaps, institutions that have drawn from FBI sources will make changes that reflect the FAQ document or will adopt model language from the Campus SaVE Act to protect against Title IX program review. The Department of Education hired an expanded enforcement staff in 2010, increasing the odds of review (Gardner 2015).10

Like Krivoshey et al. (2013), I found that few IHEs extensively incorporated language from the existing penal code into definitions of “sexual assault.” Why this was the case was not obvious. Possibly, IHEs have not turned to state statutes because the federal government has not directed them to do so. But, given the necessity to reconcile reporting using the FBI criteria with local criminal laws to prepare annual security reports, it is improbable that all campus administrators are unaware of statutory language. The
absence may follow from the current division of labor at IHEs regarding sexual assault, in which law enforcement units take responsibility for preparing the annual security report and student life units manage the development of definitions of prohibited behaviors. The absence may also be intentional. The presence of alternative terms generally consistent with statutory language may indicate that administrators are seeking to streamline the tiered structure of the Maryland statute. Or, it may indicate a deliberate attempt not to replicate statutory language when the goal is to broaden the scope of actionable behaviors on campus. That is, administrators may be seeking to avoid implying that the institutional standard is the state standard. However, the use of some statutory terms and not others suggests that institutions may be crafting definitions of "sexual assault" and "consent" based on resources provided by professional administrative organizations and consulting services (Baker, 2014; New, 2014). One campus in this study credited a particular set of higher education associations for its procedures, but the repetition of certain phrases in the data set suggests that other IHEs also developed their definitions from common source materials. Private institutions in Maryland are members of the Maryland Independent College and University Association, and may also hold membership in the National Association of Independent Colleges and Universities, NASPA – Student Affairs Professionals in Higher Education or the American College Personnel Association, all of which provide recommendations about "best practices" pertaining to managing sexual misconduct. Likewise, while the Board of Regents governs state IHEs, the administrators of public universities also participate in these latter two organizations.

Whatever the source of motivation or models adopted by Maryland IHEs, by the 2013–2014 academic year, the majority of campuses had published definitions of "sexual assault" that expanded the scope of actionable behavior beyond state law and defined "consent" more stringently than implied by statute. Because the particular IHEs deploying broader definitions included the most populous campuses, they extended to the majority of students enrolled at four-year, residential campuses in the state. In short, a "yes means yes" standard for sexual activity that places responsibility on the initiators of sexual activity was not an exception at Maryland; rather, it was becoming the norm. The fact that these progressive definitions existed a year before the Clery Act was expanded by the Campus SaVE Act/VAWA suggests that federal legislation was not the singular or even primary impetus for their existence. The Maryland Board of Regents’ 2014 policy directing state-funded IHEs to adopt an “affirmative consent” standard (Department of Legislative Services, 2015) will extend the ability to adjudicate a broader range of sexual misconduct to all enrolled students at Maryland state colleges and universities. It may become difficult for less progressive private institutions to retain their existing definitions. This progress suggests that, if passed, state legislation advanced to mandate an affirmative definition of “consent,” such as MD SB138, which was proposed in 2015, may ultimately be more symbolic than instrumental (Fisher et al., 2002; Sloan and Shoemaker, 2007). Since the data analyzed in this study was published, the White House Task Force to Protect Students from Sexual Assault recommended language for consent at Notalone.gov. The public visibility of this website and President Barack Obama’s comments on the subject could galvanize students, faculty, staff, and administrators to push for particular ways of defining “sexual misconduct” and “consent” at their home IHEs, especially those also exposed to “Know Your IX” (http://knowyourix.org/).

Department of Education data for Maryland IHEs shows that reports of sexual misconduct rose between 2000 and 2013, while reports of total aggravated assaults dropped (Department of Legislative Services, 2015). While these statistics could represent an increase in the sexual assault/misconduct rate, it is also possible that they represent greater accuracy in annual security reports as more assaults are properly classified or reported by students. Increased reporting may represent a change in students’ attitudes. That is, it may indicate that victimized women and men are blaming themselves less, and/or their peers are providing greater support for reporting. Alternatively, the increase in reporting may also reflect institutional changes, including the broadening of definitions of “sexual assault” and “consent,” as found in this study. Following this logic, students are applying new criteria and, as a result, are reporting behaviors that they would not have reported before.

**Recommendations**

The Clery Act has, for more than two decades, driven the development of the sexual misconduct policies on many campuses. Its 2013 expansion as the result of VAWA’s passage focused on ensuring that victims of peer assaults have a viable option for seeking justice on campus, in addition to participating in the criminal justice process. Yet, IHEs can comply with Clery Act mandates while providing victims with information that is inadequately detailed
to make them feel secure about reporting and activating the campus process (Karjane et al., 2002); that is fraught with internal conflicts; or that is not readily accessible. If the goal is to encourage victims to come forward, then IHEs must clearly, consistently, and accessibly: 1) define prohibited conduct and “consent;” 2) specify procedures for reporting and what participating in adjudication entails; 3) enumerate protections for the accused and accuser; and 4) convey all possible outcomes. The findings detailed in this article concerning definitions suggest that several policy changes are necessary.

Spreading information across documents is not a best practice from the standpoint of encouraging victim initiative. Searching for information in a crisis, students may not recognize that they have discovered partial information and later, feel undermined, when they discover that campus practices are not as they anticipated. Locating all information relevant to sexual misconduct in a single website linked to multiple campus Web pages addresses this problem. Bohmer and Parrot (1993) urged that sexual assault information be provided online. Studies conducted with millennial students have affirmed that they use the internet for information about sexual assault and health (Hayes-Smith and Hayes-Smith, 2010; Krivoshey et al., 2013). Second to that, it would be advisable to publish full information in hard copy in several forums, specifically in the student handbook and the annual security report.

For the most part, the word-salad approach, in which institutions provide a mixture of statutory language, NIBRS terms, and synonyms to define “sexual misconduct,” appears to be the result of adding verbiage over time without a systematic review of purpose. It is time for IHEs to undertake such a review with utility for student users in mind. Statutory definitions of “sexual assault” and “consent” and relevant appellate decisions should provide a minimum standard of actionable behavior. IHEs should expunge NIBRS terminology from definitions of “sexual misconduct” that govern student behavior and clearly note in the annual security report that the definitions presented are only for statistical purposes. Institutions should further be explicit about how campus definitions differ from state law, acknowledging, when relevant, that they are broader. They should define terms such as “coercion” and “intimidation,” and (in Maryland) describe types of physical and mental incapacity that raise questions about knowing what a person desires. IHEs should also articulate consent as a presence, not an absence, and explain the concepts of effective consent or affirmative consent, if used.

Bogle (2014) has argued that the “yes means yes” standard is not a solution to rapes on campus, because a person may be too drunk for a “yes” to be meaningful and because studies show that men who assault serially are not doing so out of confusion about what their victims want. She is partially correct, but misses the point that an affirmative consent standard offers a vital shift in perspective. It will not stop all sexual assailants, but it has a potential, in conjunction with explicit statements about incapacitation and appropriate programming (Borges et al., 2008), to lead individuals who are in pursuit of sex to be more circumspect about their behavior and to also lead individuals who have been victimized to take action through campus judicial systems.

**Future Research**

More systematic attention needs to be focused on the evolution of campus policies. This type of detailed analysis of definitions should be applied in other states with more and less progressive statutes than Maryland. Non-residential IHEs should be included as well (Krivoshey et al., 2013), so that we may gain a complete understanding of the current status of campus policies affecting students. Additionally, research on definitions should expand to include “intimate partner violence” and “stalking,” which VAWA now requires campuses to define. However, there are limits to how much can be understood from an objective assessment of documents. Interviews with Title IX and student life staff are necessary to understand how administrators develop policies within individual institutions. Questions to be pursued include: 1) Do IHEs with the most progressive definitions have similar policy development strategies and/or memberships in particular national organizations; and 2) Have philosophical, political, or religious perspectives associated with an institution or held by a particular, influential administrator motivated institutional action?

Because most student-victims will first reveal assaults to peers (Sabina and Ho 2014), who have ability to influence whether formal reports are made, it is critical that “common knowledge” about campus sexual assault policy is correct knowledge. Additional research should also explore how formal sexual misconduct policies among IHEs are understood by their target audiences. Surveys
of students can uncover whether they grasp definitions related to sexual misconduct and consent and procedures for reporting, and understand what is required to ensure that campus judicial procedures are followed.

Endnotes


2. The UCR definition is the basis of statistical reporting for the federally required annual security report.

3. The literature reviewed here concerned policies developed before the 2011 “Dear Colleague Letter” from the Office for Civil Rights, which brought greater attention to sexual assault on campuses. In 2014, Congress reauthorized VAWA, providing examples of language, but not mandating it. See Konradi (forthcoming) for discussion of legal mandates concerning campus adjudication.


5. This figure likely includes both effective and affirmative consent.

6. Psychology Undergraduate Alyssa Quenzel was involved in securing documents, the development of the fields, and coding of half the IHE documents. Sociology Undergraduate Emily Delaney, coded the remainder of the IHE documents and assisted with data manipulation for analysis.

7. This data is part of a larger study in which 43 features were coded, and we ascertained the presence of 236 separate items. The full codebook is available from the author.

8. When the percentages were within five points, we consider them the same.

9. This consisted of five terms in the codebook.

10. Four Maryland IHEs were under investigation as of January 2015.

11. For a further discussion of the cottage industry in consulting that has emerged in relation to Title IX, see New (2014).

12. Campuses may also have contracts with consulting organizations such as The NCHERM Group, which provides model language.

13. The Board of Regents urged USM institutions to minimally adopt the definitions, but allows them to develop their own definitions as long as they do not conflict.

14. Maryland House Delegate Frank Conaway introduced House Bill 138 to require public and private colleges in Maryland to adopt the same definition of “consent.” HB138 passed out of committee.

15. Maryland has 16 community colleges that enrolled 291,996 students in 2014 (Maryland Association of Community Colleges, 2015).

References


