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Dear Western Political Science Association,

Below is a portion of my prospectus. The first 18 pages summarize the historical development of Title IX. However, I would mostly like feedback on the survey and experimental methods I plan to field in the next two months so if you are pressed for time feel free to start reading on page 18 under the heading “Theory of Consent” [which is linked here](#_Theory_of_Consent). Of course, I welcome feedback on any aspect of the paper if you would like to read all of it!

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Axes of Consent

Public Perception in the Legacy of Title IX

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Western Political Science Association

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# Introduction

Scholars have long pointed to equality as a crucial value in functioning democracies (Verba and Nie, 1972; Inglehart and Wezel, 2005; Ingham, 2021). In particular, research has shown the democratic importance of legal protections for the most vulnerable. Much has been written on the necessity of protection for the poor (Goodin, 1985), for migrant workers (Oberman, 2015), for the disenfranchised (McDonald and Popkin, 2001), for the disabled (Scotch, 2000), and for sexual minorities (Colby, 1984). Women, in particular, are a vulnerable group that requires extralegal protections, despite making up over 51% of the population. Indeed, the status of women in American democracy is a peculiar one.

On the one hand, women now enjoy more representation in political office than ever before. Women generally win elections at the same rate as men (Brechemacher, 2018), and women’s elective office-holding stands at an all-time high in the United States (Sanbonmatsu, 2020). On the other hand, women remain underrepresented in virtually all offices and aspects of American politics (Sanbonmatsu, 2020). Furthermore, many other areas of women’s vulnerability and the need for their protection remain open questions. Perhaps the most rampant and unaddressed women’s issue concerns rape and sexual violence. There has been some work on the politics of rape culture (see Kessel, 2021), but scant work explores why rape remains endemic despite widespread efforts to control it.

According to FBI data, in 2018, rape was the only violent crime that had not decreased over the past ten years. While violent crime, in general, has plummeted over the past decade (although 2020 and 2021 saw an unforeseen resurgence), rape continues to stay steady, despite being the most under-reported crime (Rennison, 2002). Although anyone of any gender can experience sexual violence, rape has historically been a women’s issue, with 91% of victims being female (Rennison, 2002). For this reason, the history and emergence of rape law and sexual violence prevention measures intrinsically connect to issues of protection for women in American democracy. However, the history of rape law also intersects with the history of women's subjugation. Freedman (2013) explains how rape laws originated to protect men's property (their wives) from other men. While the laws have become refined over time, their basis stays intact, providing additional insight into why they often do a poor job of protecting women from sexual violence: they were not designed to do so.

Today, the contestation between law and intent is even more apparent. Rape law has become intensely politicized and polarized, to the extent that candidates run their platforms on "protecting victims" or "eliminating false accusations." One need only look as far as the #metoo movement (and the intense backlash against it) to see the heightened political nature of sexual violence. Remarkably, these debates have intensified over the topic of education and university handlings of sexual violence. In 2014, Emma Sulkowicz drew national attention by carrying a mattress with her throughout the entirety of her spring quarter. She did so to draw attention to the failure of Columbia University to do anything about the man who raped her and two others. Her movement initiated a federal complaint against Columbia University for violating Title IX. The complaint remains unsettled (Muehlenhard et al., 2016). In 2015, the infamous case of Brock Turner, who brutally raped Chanel Miller behind a dumpster, led to the public court case of *The People of the State of California v. Brock Allen Turner*. Turner’s lenient sentencing and lack of reprimand sparked national outrage, and the failures of the university were set on trial once again (Kebodeaux, 2020).

The above cases highlight the complicated confluence of sex vulnerability, ambiguous and inadequate laws, and universities. Moreover, all three of these avenues intersect with politics, and this is most apparent when examining the present moment. Today, the plight of the university has become particularly contentious. In 2016, Betsy DeVos vowed to dismantle Title IX, the mechanism for adjudicating sexual violence on college campuses, as the public knew it. Indeed, there is no better example of the difficulties of sexual violence legislation in educational settings than Title IX, which has changed radically with whichever party controls the government. Administrations have updated requirements dramatically and cyclically: burdens of proof, the requirement of cross-examination, and even the very definition of key violence terms have all barred very different responsibilities over the last twelve years. This is all the more disturbing because Title IX constitutes the sole arbitrator of sexual violence on college campuses: yet the legislation remains in constant flux. Furthermore, just like legislation on rape itself, Title IX was not designed to protect victims.

Surprisingly, there has been little research on the politics of rape law, particularly as applied to educational settings. Despite the importance sexual violence prevention plays in protecting vulnerable populations, its implementation at the university level, protecting vulnerable youth at the age of such an important time of socialization, has long been missing from the literature.

While it is unclear exactly why Title IX has been the product of such intense politicization, one apparatus stands out as shouldering the weight of successful Title IX implementation: consent. Consent remains woefully underdeveloped and understood as a concept, yet the entirety of combating rape depends on a common understanding of consent. Indeed, consent serves as *the* mechanism that differentiates rape from sex. The legal and educational spheres, as well as media discussions implicitly presume a consensus on the definition of consent; yet, there is no reason to expect a uniform understanding among relevant stakeholders. The literature does not cite robust studies on how citizens think about consent, if these understandings of consent cohere with normative expectations, or if different populations – including those based on partisanship or different values – think about consent differently. If they do, it could explain an inadequacy in efforts to combat assault and rape and the political undertones of these failures. It may be why so many sexual assault cases come down to varying understandings of concepts.

My research focuses on how consent is understood, where the breakdowns in mutual understanding come from, the role of political beliefs in these gaps, and how these faults apply to the application of Title IX.

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## Universities and the Origins of Title IX

Any discussion of sexual behavior in education must consider Title IX. Its origins paint an illuminating story of the trials and tribulations that have radically altered the playing field of sexual violence on campus. Title IX was the mastermind project of Dr. Bernice Sandler, Senator Birch Bayh, and Representative Edith Green (Rose, 2015). Their idea for Title IX started as a follow-up to the Civil Rights Act of 1964. The CRA of 1964 prohibited unequal voter registration requirements, racial segregation in schools and public accommodations, and employment discrimination. However, it did not address or prohibit sex discrimination in any form (for more information on the CRA of 1964, see Aiken et al., 2013; Brown, 2014; Hersch and Shinall, 2015).

Many people were frustrated that "sex" was not a protected category initially covered under the CRA of 1964. In response to this frustration, as well as lobbying by women and activist groups, President Johnson expanded amended Executive Order 11246 (Equal Employment Opportunity) through Executive Order 11375, which specifically added sex discrimination in employment and hiring as a category protected by the previous Executive Order (Fisher, 2019). This amendment of the executive order provided Dr. Bernice Sandler, who had just been rejected from a plethora of academic jobs due to her gender, with legal footing to file a class-action lawsuit against over 250 universities. In partnership with the Women's Equity Action League and the Department of Labor, she complained that these universities failed to address sex discrimination, something they were required to do under EO 11375. The original class-action lawsuit morphed into the writing of Title IX by Congresswomen Patty Minsk and Representative Edith Green when Green received a letter from Sandler detailing her plan to sue all universities in the nation. Together, they wrote this simply prohibition which would become the basis of Title IX:

*No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance.[[1]](#footnote-1)*

Representative Green attempted to quietly maneuver Title IX through Congress by avoiding lobbying and downplaying its significance so that it could slip under the radar (Rose, 2015). While this worked to decelerate opposition somewhat, many did not like the idea of the federal government interfering with college admissions. As a result, Bayh had no choice but to tamper down Title IX severely, and he included it under the omnibus education reauthorization bill, "The Education Amendments of 1972."[[2]](#footnote-2) The new version passed in the House by 218-210 as a small provision in an omnibus educational legislation. However, the nail-biting closeness of the vote was due to other aspects of the bill, especially a controversial bussing provision.

The original purpose of Title IX was to allow women equal access to education. In fact, nowhere in the passage of Title IX was sexual harassment or sexual violence mentioned. To the contrary, most people did not know the term “sexual harassment” until 1991, when Anita Hill testified against Supreme Court nominee Clarence Thomas in a public, widely dissected court hearing. Although Thomas was ultimately confirmed, Hill's testimony had far-reaching implications for women's voices. Indeed, the number of sexual harassment cases reported in the United States and Canada increased 58 percent after Hill’s testimony and has since climbed steadily, as is depicted in Figure 1 (Dobbin and Kalev, 2020).[[3]](#footnote-3)

Figure 1 –– Total Number of Sexual Harassment Charges Filed with the EEOC, 1980­2002[[4]](#footnote-4)

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### Incorporating Sexual Harassment into Title IX

In 1979, renowned author, lawyer, and radical feminist Catharine MacKinnon published *Sexual Harassment of Working Women: A Case of Sex Discrimination (1979)*, which created the legal claim for sexual harassment as a form of sex discrimination under Title VII of the Civil Rights Act 1964 and any other sex-discrimination prohibition. MacKinnon worked as a professor at Yale and when one of MacKinnon’s students, Olivarius, informed her of the harassment that she and others were experiencing at the university, MacKinnon knew she had found a way to implement the theories put forth in her book (Reynolds, 2019). Olivarius and four other plantiffs had experienced a variety of transgressions without an avenue for justice, ranging from sexual harassment in the classroom to rape by a professor. With other notable feminists and lawyers offering advice, MacKinnon worked with the plaintiffs to create the language for *Alexander v. Yale* to use Title IX to fight for sexual harassment protection at Yale (Reynolds, 2019). *Alexander v. Yale* was the first use of Title IX in charges of sexual harassment against an educational institution and the first time Title IX had been interpreted as mandating protection against harassment.[[5]](#footnote-5) It established that sexual harassment of female students was sex discrimination and was thus illegal under Title IX.

The women did not win their case. One by one, the judge of the Second Circuit dismissed each plaintiff for various reasons, such as not having sufficient evidence. However, the case was pivotal in institutionalizing grievance processes at universities because the District Court upheld this legal view, ruling that "It is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education."[[6]](#footnote-6) Many universities followed suit and began setting up their own grievance processes. Within two years of the appellate decision, the University of Minnesota, Brown University, Tulane University, and U.C. Santa Cruz all had formal policies about sexual harassment. Within five years, several hundred had some sort of grievance process in place (Simon, 2008). These grievance processes started as places to hear complaints against the *schools themselves*—claims that they were discriminating based on sex. Then, they morphed into grievance processes as an internal bureaucracy adjudicating complaints arising from sexual conduct among students. Gersen and Gersen (2016) argue that this change occurred after passing OCR's 1997 guidance document (discussed in detail below) when schools learned they were now required to correct sexual harassment claims based on a hostile environment.

One year after *Alexander v. Yale,* the Office of Civil Rights specifically added sexual harassment to its Title IX prohibitions and issued procedures for investigating sexual harassment complaints. The agency cited *Alexander v. Yale* as the impetus for this massive change in provision. They wrote, “Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX” (Simon, 2008).[[7]](#footnote-7)

*Alexander v. Yale* set the basis for Title IX in regulating sexual behaviors in education. Universities, then, represent the critical institution where Title IX operates, and progressive matters of consent debut.

### The Importance of Universities

Title IX applies in educational settings and is one of the few uniform pieces of guidance regulating sexual violence, underscoring the necessity of studying assault in educational settings. According to the 2015 American Association of Universities (AAU) Climate Survey on Sexual Assault and Sexual Misconduct, one in four undergraduate women at leading universities have experienced sexual assault.[[8]](#footnote-8) This is a more significant proportion of women than the percentage of women sexually assaulted in the United States overall.[[9]](#footnote-9) The staggering percentage of sexual violence occurrence is only one of many reasons that I focus on universities as the focal point for understanding the operation of consent.

The university is a valuable linchpin to sexual violence research because it has been the site of disproportionate activism, attention, and media coverage regarding consent and regulating sex in general. This regulation reflects several dynamics. First, "strict" sexual consent laws originate at the university level. Antioch College, for example, was the first institution to attempt to codify affirmative consent (Hilgert 2016). Despite widespread mockery and ridicule for what many perceived as an incredulously high burden of proof and unrealistic standards, Antioch College set a precedent that would soon morph into affirmative consent as a mainstay in everyday discourse, which I will discuss more below. Second, Gersen and Suk (2016) depict universities as the pinnacle of what they coin "the sex bureaucracy." They define sex bureaucracy as morphing federal prohibitions against sex discrimination and sexual violence into the oversight of voluntary, nonviolent sex itself (881). In this sense, universities use their regulatory power not only to prevent violence but to regulate and moralize the act of sex in and of itself. They argue that colleges and universities are particularly guilty of sex bureaucracy due to students' residency away from home for the first time and first-time encounters with sexual experiences. Third, college-aged students enter a pivotal socialization time when developing attitudes on gender-related issues (Newcomb, 1943; Astin, 1977; Laar, 2005). If one understands universities as training grounds for future generations –– totalizing institutions to instill adolescents with virtues and morals –– then the university is a natural starting place for instilling sexual values (Napolitano, 2015). Finally, and most importantly, the university is the only institution outside of the military that can adjudicate its own sexual violence cases outside of a courtroom (Napolitano, 2015; Anderson 2016). The university's unique position as the arbitrator has been the object of intense scrutiny and controversy.[[10]](#footnote-10)

Needless to say, issues of consent and sexual violence permeate all of society. The potency of these issues at the university level is simply an illustration of larger structural issues that manifest in education due to the specific rules that universities must follow. Before discussing the current application of Title IX to consent, I will define the regulated behaviors based on their definition in Title IX and in the law more broadly in order to clarify what behaviors will be the object of study for this research.

# Evolution of Title IX as applied to sexual behaviors

The educational sphere became relevant regarding prohibiting harassment, and sexual violence more generally, due to *Alexander v. Yale*. To understand the educational space, one must understand Title IX. Although the information in these years is scarce, the 1981 update of Title IX stayed in place by all available accounts until 1997 with little regulatory upheaval. The late 1990s and early 2000s, however, were a constant cycle of regulatory upheaval for treating sexual harassment under Title IX. For example, in 1997, the Department of Education's Office for Civil Rights (OCR) issued a guidance document regarding Title IX that connected sexual harassment of students to sex discrimination and declared that schools must have grievance procedures so that students can file complaints about alleged sexual discrimination, including sexual harassment. Until then, it had been optional. Later, a series of Supreme Court cases in the mid-90s expanded the law's authority to include hostile environments, peer-to-peer harassment, and employee-student harassment into its understanding of sexual harassment.[[11]](#footnote-11) Now that sexual harassment was understood as a form of Title IX sex discrimination, grievances were no longer brought against the schools but complaints against other students that the schools had to adjudicate. There was some pushback; for example, in 1999, *Davis v. Monroe* ruled that universities must be both aware and "deliberately indifferent" to be held responsible for sexual harassment.

In 2009, the Supreme Court ruled in *Fitgerald v. Barnstable School Committee* that people who experience sexual harassment in schools could sue those schools under Title IX. This decision was spurred mainly by an ever-increasing trend in sexual harassment complaints at the university starting in 2006. As a result, by 2014, sexual harassment complaints under Title IX would reach parity with other complaints, such as academic and athletic complaints under Title IX. Figure 2 highlights the increasing proportion of Title IX complaints related to sexual harassment.

Figure 2[[12]](#footnote-12),[[13]](#footnote-13)

**Chart

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## Dear Colleague Letter

Obama's Dear Colleague Letter (DCL), released on the same day he announced his reelection bid in 2011, ushered in a new era of Title IX. Stimpson (2021) calls the DCL era a "new paradigm" that radically altered how the public understood Title IX. His letter was addressed to all universities everywhere and announced three significant changes to the structure of what it took for universities to be "in compliance" with Title IX. First, it introduced the term "sexual violence." The OCR stated that "the requirements of Title IX pertaining to sexual harassment also cover sexual violence." Second, it mandated the use of preponderance of evidence standard (more likely than not as opposed to beyond a reasonable doubt) and, third, it broadened the definition of actionable harassment to any unwelcome conduct of a sexual nature.

The letter also discouraged cross-examination of accusers, recommended a 60-day limit for all adjudications, and allowed accusers to appeal not-guilty findings.

Pushback to the DCL was swift and intense. Critics argued that the changes in the Dear Colleague Letter, particularly the new preponderance of evidence standard, robbed the accused of their legal rights. Others were concerned about widening the definition of "unwanted sexual conduct of ANY nature," which conflicted with peoples' first amendment rights. Some academics also pushed back on whether the demands in the letter were even constitutional. The Foundation for Individual Rights in Education (FIRE) was one of the most outspoken organizations fighting against the new regulations. With their prompting, they attempted two lawsuits: Doe v. Lhamon (2016) and Neal v. Colo. State Univ.–Pueblo (2016). These plaintiffs argued that the DCL was an invalid exercise of legislative rulemaking because it did not go through notice-and-comment rulemaking. The judge dismissed both cases.

## DeVos Rule

In 2017, under the Trump administration, the Department of Education noted that the original Title IX changes implemented in DCL were adopted without a rulemaking process to provide public notice and comment and rescinded the demands in the letter. This announcement was the first of many moves the new administration would make to repeal the DCL era. In September 2017, the Education Department formally rescinded Obama-era guidance on sexual violence under Title IX, including withdrawing his Dear Colleague Letter. Betsy DeVos, then United States Secretary of Education, announced she was beginning to revise Obama's rulings on sexual harassment enforcement in Title IX and released interim measures as the administration crafted new guidelines. In November 2017, the Department of Education released its proposed re-write of Title IX. Its central feature was a return to Title IX as understood in *Davis v. Monroe* (1999), which argued that universities must be both aware and "deliberately indifferent" to be held responsible for sexual harassment. They also rolled out the plan to 1) allow cross-examination of witnesses, complainants, and respondents, 2) the requirement of the presumption of innocence for all accused, and 3) the ability for universities to choose which standard of evidence they wanted to employ.

In May of 2020, the Department of Education released its Final Rule on the 2017 DeVos announcement. The Final Rule did three important things: First, it offered a narrower definition of sexual harassment. Instead of "unwanted sexual conduct of ANY nature," the new regulations defined sexual harassment as a "school employee conditioning education benefits on participation in unwelcome sexual conduct," "unwelcome conduct that a reasonable person would determine is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the school's education program or activity" or "sexual assault, dating violence, domestic violence, and stalking." Second, instead of universities being required to use a preponderance of evidence standard, schools could now choose whether their evidentiary standard was based on a “preponderance of evidence” or “clear and convincing evidence” (Melnick, 2019). And finally, and most shockingly, colleges would be required to hold live hearings with cross-examinations of *both* parties.

## Title IX Today

In 2020, Biden campaigned on overturning the finalized Title IX rules under the Trump administration. The new Biden administration worked to re-establish Obama-era Title IX regulations. In March of 2020, Biden signed an executive order directing Secretary of Education Cardona to suspend, revise or rescind the DeVos-era rule, or begin the process of collecting comments to draft a new rule. In June, the Education Department once again began re-writing Title IX sexual misconduct rules.

Ultimately, the status of Title IX remains in flux. OCR is undertaking a comprehensive review of the Department's existing regulations, including and with close attention to Betsy DeVos's amendments to the Department's Title IX regulations. Biden has suggested that he will replace most of the Trump Era amendments in the coming year, but nothing is for certain.

*Figure 3 details the landmark moments in the development of Title IX, particularly regarding its handling of sexual misconduct. As is depicted, each decade has produced at least one landmark moment.*

*Figure 3 - Historical Development of Title IX*A picture containing table

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Clearly, history has radically changed the scope of Title IX so that its jurisdiction has expanded wildly ­–– in the current moment, preventing sexual harassment, assault, and rape is a key component of Title IX’s role. These violence behaviors (sexual harassment, assault, and rape) are defined by the absence of consent. And yet, as I will demonstrate, the role of consent is curiously absent in Title IX memorandum. Indeed, the process of Title IX’s understanding and incorporation of consent is about as tumultuous as the expansion of Title IX itself.

# Consent in Title IX

Despite its importance in application, the actual content of Title IX contains no mention of consent, nor did the vocabulary of its original language in 1972. Consent is also not mentioned on Title IX's Wikipedia page or the Department of Justice's webpage on Title IX. The U.S. Department of Education's webpage contains the only mention of consent outside of the eCFR. They state:

*Sexual violence, as OCR uses the term, refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent[[14]](#footnote-14)*

Consent is also mentioned several times in the Electronic Code of Federal Regulations for Title IX. For example, scraping the eCFR's Title IX web page, Title 34: Education Code of Regulations, for "consent" brings up seven search results.[[15]](#footnote-15) 3/7 times the term "consent" refers to gaining permission from the plaintiff and respondent to go through the grievance process and other measures that, ironically, are related to consent to the legal proceedings when there is a grievance, not to the sexual encounter. Four times, consent is used by means of an agreement to sexual activity. Here are the ways the eCFR mentions consent related to sexual activity:

First and second usage:

Code 106 refers to the Department of Education’s nondiscrimination policy on the basis of sex in education programs or activities receiving federal financial assistance. Recipients, in this context, are universities that receive federal funding, so all universities are required to follow Title IX. The following statement dictates that the Department of Education will not require universities to adopt a uniform definition of consent to use in their application and compliance with Title IX.

106.30 a: Definitions

***Consent.*** *The Assistant Secretary will not require recipients to adopt a particular definition of* ***consent*** *with respect to sexual assault, as referenced in this section.[[16]](#footnote-16)*

Here Title IX details that it will not employ a standard definition of consent. While the statement clearly emphasizes the importance of consent, it is left up to individual institutions to define it at will. This starts a theme that plagues consent research: many institutions and regulations avoid defining consent explicitly and prefer to hedge responsibility to other entities to define it. Often, this practice leaves consent undefined.

Third usage:

The third usage of consent is about when the university is allowed to investigate the victim's prior sexual past in the investigation process. The guidelines clearly state that the previous sexual behavior of the victim is only allowed in an investigation when the behavior concerns the respondent and is necessary to prove that consent was indeed present during the sexual encounter.

106.45 (5)(I): Investigation of a formal complaint.

*Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove* ***consent****[[17]](#footnote-17)*

Previous sexual behavior can be brought up in cross-examination when necessary to prove consent. This creates an interesting precedent baked into the regulations that imply that a victim's past sexual experience with a defendant may imply consent.

Fourth usage:

The fourth usage of consent in the regulations is a replica of the third usage but about elementary and secondary schools. In other words, while the third reference states that the past sexual behavior of a defendant can only be weaponized in certain situations in post-secondary schools, the fourth reference details that this is also the case in elementary and secondary schools.

Despite its absence in written regulations (and the fact that the actual language does not mention it!), consent has become a crucial part of how assault under Title IX is understood. For example, Obama's 2011 Dear Colleague letter recommended that universities mandate campus training programs to prevent sexual assault and harassment of their student body and employees (Htun et al., 2018). Two years later, Congress passed the Campus SaVE Act (which refers to the recent Violence Against Women Act (VAWA) amendments to the Clery Act), which went further by requiring that colleges not only deliver these trainings but that these trainings include specific definitions on domestic and dating violence, sexual assault, stalking, and **consent.**

In fact, it was Obama's Dear Colleague Letter (DCL) that ushered in a new era of Title IX. Stimpson (2021) calls the DCL era a "new paradigm" that radically altered how the public understood title IX. The DCL era emphasized *active* consent as the ultimate goal as opposed to simply preventing rape or assault.

However, this new paradigm of active consent was prompted by a shift in ideology more than tangible laws. First, Obama was infamous for enforcing his regulations through threatening letters and memorandums to universities instead of legal mandates. Second, the DCL mentioned consent only twice: both times in defining sexual violence (more on this below). The move to a consent-based standard seemed like an implied necessity in preventing rape/sexual harassment/sexual violence but was not explicit when actually concerning the texts and letters of Title IX.

Ultimately, consent is a crucial concept. In many ways, it appears to be the lynchpin of Title IX and of defining assault more broadly. However, there is virtually no consensus on how consent should be defined. This suggests that it is open to interpretation, which is amplified by the lack of social consensus as well –– in fact, consent seems to be an inherently politicized and gendered term. Thus, it is crucial to understand different perceptions if one wants to understand views on assault and the role of politics in those views. In the next section, I will craft a novel framework for defining consent, grounded in both normative theory and policy expectations.

# Theory of Consent (4 axes)

Normative theory suggests standards that should be in place for consent to be meaningful. Scholars have long discussed the various contingencies of consent and the aspects that invalidate it. Affirmation (Dougherty, 2015; Halley, 2016), Power (MacKinnon, 1979; Srinivasan, 2021), Capability (Liberto, 2017; Bolinger, 2019), and Constitution (Irigaray, 1979) act as mainstays in political theory discourse on consent, with authors going back and forth on what role these axes take in the overall facilitation of consensual sexual experiences. I present a framework that puts extant legal considerations into conversation with these theoretical notions in the hopes of drawing out the ambiguities of consent.

The legal considerations are difficult to synthesize because, as I’ve demonstrated earlier, states create their own consent and rape laws, and the few federal laws in place primarily govern statutory rape and sex trafficking rather than consent. For this reason, there is no “one” legal definition of consent. Most states differentiate between consent, the action, and the capacity to consent. The latter may consider age, intoxication, disability, and coercion, among other factors. Although most states have different statutes for addressing rape, sexual harassment, consent, and sex trafficking, they vary drastically. Thus, there is no agreed-upon set of legal requisites. Nonetheless, a careful reading of legislation and theory allows me to identify four key axioms of consent. In conversation with the theoretical literature, I explicate four axes necessary for facilitating consent: affirmation, power, capability, and constitution.

## Yes Means Yes Laws and the Move to Affirmative Consent

In 2014, then-Governor Jerry Brown signed California’s controversial “Yes Means Yes” bill into law and debuted a new gold standard for consent legislation: affirmative consent. Whereas previous legislation required a verbal no or physical force to state the absence of consent, affirmative consent requires *active* participation to signify the presence of consent explicitly. Besides the new idea that consent needed the presence of a yes, not the absence of a no, affirmative consent sees each stage of sexual interaction as a kind of “chopped up” view of sexuality. It isolates each activity from the next, requiring a verbal YES to *each* escalation of activity. It portrays consent linguistically as a sequence of progressive contracts. Remarkable opposition met the bill. The question here is whether the Yes Means Yes law nationalized the conversation of affirmative consent as the norm or if this law was following a path that was already in place.

Halley (2016), for example, traces the origins of affirmative consent to the early Liberal feminist movement, which aims for increased criminalization to ground women’s emancipation. She argues that current campus sexual harassment policy models criminalize men, not just for rape but for engaging in sex or any unwanted behavior. Affirmative consent, she argues, “poses the possibility of a vast new criminalization” (263).

As previously mentioned, Antioch College implemented the first Affirmative Consent model on any college campus in 1991 (Humphrey 2016). Their Sexual Offense Prevention Policy defines consent as “verbally asking and verbally giving or denying consent for all levels of sexual behavior."[[18]](#footnote-18) At the time, the policy received overwhelming levels of critique, pushback, and downright mockery (Humphrey 2016; Halley 2016).

Despite these movements in the early feminist movement and at Antioch, the real “move to affirmative consent” did not appear until much later and was certainly not a mainstay at any national universities until the mid-2010s. The Affirmative Consent Project provides a thorough breakdown of Affirmative Consent policies by state and university. They report that seven states currently have statewide affirmative consent policies and another 22 have affirmative consent policies under consideration. The states with affirmative consent policies mirror the major universities in the nation. According to the National Center for Higher Education Risk Management, more than 1,500 colleges and universities now use some type of affirmative consent definition in their sexual assault policies.[[19]](#footnote-19) California’s Yes Means Yes bill prompted a slew of other universities to make a similar transition. Mere weeks after California’s statewide mandate, the State University of New York system adopted that same uniform definition at all of its 64 campuses. The California State University System had already adopted an affirmative consent model before Jerry Brown’s ruling. While affirmative consent was certainly in play at some universities and in feminist circles, the Yes Means Yes bill was the nation’s first state-level affirmative consent law. Its enactment, in many ways, preempted “the move to affirmative consent” that would begin to take over universities everywhere.

After the "Yes Means Yes" passage in California, many dissenters argued that this law fundamentally mischaracterized how college students engage in sex. Many argued that requiring verbal affirmation to each action ignored body language, long-term agreements, and many other ways that students court each other and show each other they are interested in escalating an encounter (Harris, 2017; Muehlenhard et al., 2016; Bogle, 2014). This is important because if students find policies unreasonable, they may disregard them (Htun et al., 2019). Infeasible legal requirements for consent may tempt students to ignore the entire concept.

## Capacity for Consent

Sexual capacity refers to the external manifestation of whether one can physically and verbally give consent, regardless of inner desire. Physical disability, emotional and intellectual handicaps, intoxication, age differences, and maturity can affect capability.

Age of consent laws are the most expansive form of capacity law. These laws dictate a widely held belief: that there is some level of capacity required to consent ­–– that just because someone agrees to something does not mean they have the legal capacity to make that agreement meaningful. Every state has its own age of consent, ranging from 16 to 18 years old and some states have close-in-age exemptions (commonly known as “Romeo and Juliet laws” that create exceptions when both participants are close in age and/or both below the age of consent). States differentiate on how consent varies given the age of the younger party, the older party, and/or both.[[20]](#footnote-20)

Laws on incapacitation and disability (both physical and mental) underscore capacity. For example, in many states, such as New York and Utah, it is illegal to have sex with someone deemed "physically helpless or mentally incapacitated" (Posner and Silbaugh, 1996). New York defines physical helplessness as unconscious or physically unable to communicate a willingness to act and mental incapacitation as incapable of controlling conduct due to intoxicating substance.[[21]](#footnote-21)

Both disability and intoxication are very difficult to monitor as there is no exact threshold for when one is deemed too drunk or too disabled to engage in sex. This makes for unclear standards of enforcement. The University of Tulsa, for example, states on their *Alcohol and Consent* webpage, “Remember, if you are unsure whether someone is sober enough to consent, it is best to “play it safe” and not engage in any sexual activity.”[[22]](#footnote-22) Dartmouth's website differentiates between intoxication and incapacitation, arguing that consent can be given from the former but not the latter. Still, there is no one legal standard, but capacity is crucial to conceptualizing consent.

Importantly, the capacity to consent was not something that many always prioritized. The influence of feminist activist groups and the incorporation of "date rape" as a concept in the 1980s started a pattern of understanding consent as more involved and nuanced than just the absence of a no. Now, one can define capacity for consent as hinging on physical and mental abilities, as well as level of intoxication, whether that be via drugs or alcohol. The ambiguity lies in the standards around disability and intoxication. Are some disabled people genuinely incapable of consent altogether? This has been the subject of several legal cases and media sensations, as with the case of Anna Stubblefield.[[23]](#footnote-23)

## Power

MacKinnon (1979) argues that the basis of sexual harassment occurs "in the context of a relationship of unequal power" (1). Although legal definitions scarcely use the term "power," power relations are implicit in many areas of sexual harassment law, particularly between employers and employees and professors and students.

The absence of *any* power in a sexual encounter requires consent without coercion or existing power dynamics. For example, many colleges prohibit teachers from having sex with their students. Even when students may be legal adults, these regulations suggest a power dynamic implicit in the student-teacher relationship that precludes consent (and coheres with the role of power dynamics concerning intention). A more covert example is that gendered power dynamics and histories of trauma may permeate an intimate relationship, meaning choices reflect trauma and previous experiences.

However, conceptions of power are barely present in the modern understanding of consent, and almost all relationships contain some element of power dynamic. Official Title IX documents do not mention power or power relations. Some universities, however, have taken it upon themselves to incorporate understandings of power. Florida State University, for example, uses the term "power-based personal violence" to refer to all forms of sexual violence outlined above.[[24]](#footnote-24) Georgetown University goes a step further and has a page on their Title IX website discussing power differentials and abuses of power. They explicitly state that relationships between students and people in authority, such as the university's president or athletic coaches, contradict Georgetown's values. Although these mentions of power are interesting, they are exceedingly rare in legislation (Buchhandler-Raphael, 2011).

## Constitution

What behavior needs to be consented to? How do we distinguish sexual consent from that of consent required for other kinds of nonsexual physical encounters? Is the breach of one kind of consent more severe than another? My past work has shown that the activities that constitute “sexual activity” remain ambiguous, although “consent to sexual activity” is often assumed to involve penetration, seeing that the college students I surveyed conflated sexual activity with intercourse. Current legislation uses words like "sex" and "sexual assault" without defining which behaviors and actions fit those criteria. Legal definitions that define their terms historically start from the premise of penetration as the uniting act. So too, MacKinnon argues that the centering of male penetration as the basis for sexual violence is a strategic tactic that renders other kinds of exploitation ineligible. MacKinnon states, “[t]he law to protect women’s sexuality from forcible violation/ expropriation defines the protected in male genital terms. Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women’s sexuality, pleasure or violation, than it is to male sexuality" (647). Here we are faced with an entirely new set of theoretical ambiguities that plague the operation and facilitation of consent. How does sexual consent operate without penetration?

*Summary*

In Table 2, I present each axis along with its definition (in its simplest terms). Furthermore, I detail what the presence and absence of each axis entail and examples of each. In this instance, the absences matter most since absence means consent is not fully granted, assuming consent requires each element. For instance, in the affirmative axis in Table 2, I use the example of a person asking to kiss their partner’s thigh, even if they have already received verbal permission to touch. This example showcases the verbal nature of the affirmative axis for each escalation of sexual behavior, regardless of its content. For the absence example, I take the inverse of this, a person relying on a moan or lack of a no as permission to move from a touch to a kiss, as the absence of affirmative consent. The question then is if individuals share this understanding of sexual consent.

Table 2 - Empirical Axes

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Definition** | **Presence** | **Absence** |
| **Affirmative** | Affirmative consent is when one receives a *verbal* yes for every behavior that is engaged in. As opposed to engaging in a behavior and proceeding if a “no” is not given, affirmative consent requires that one receives an active and agreed upon yes *before* any behavior is attempted | A person will verbally ask for consent for each behavior and wait for a verbal yes before proceeding. For example, one will ask verbal consent to kiss their partner’s thigh even if they have already received verbal consent to touch. Affirmative consent to *one* behavior is different than affirming *all* behaviors | Relying on body language, relationship status, or normative escalations of behavior is not affirmative consent. For example, touching someone’s thigh and taking a moan or lack of resistance for consent is not *affirmative* consent. Engaging in sex with one’s long-term partner without explicit verbal permission is, again, not *affirmative* consent |
| **Power** | Power is the ability of one person to exert control and influence within a relationship. Both obvious and covert power structures may affect one’s ability to give adequate consent. Interpersonal pressure due to power, peer pressure, and stressful life events orthogonal to peer pressure and interpersonal pressure can obfuscate one’s ability to make decisions about the sexual behavior they would like to engage in. | Two people in equal and symmetrical positions of power (e.g., age, workplace standing, no intimidation, histories of trauma) may be able to reflect on their desires and request to act them out accordingly. For example, two friends that have known each other for a long time are more capable of accessing and projecting their inner desires to have sex with each other (or not) than an employee is capable of reflecting in this manner with her boss | It is necessary that the person consenting not be in an asymmetrical power relationship that obfuscates one’s ability to make decisions about the sexual behavior they would like to engage in. |
| **Capability** | Capability is the extent to which one is able to physically and verbally give consent, regardless of inner desire. Physical disability, emotional and intellectual handicaps, intoxication, as well as maturity can all affect capability. | Two sober adults of equal ability and function represent the perfect character type of a couple capable of giving consent | Legally speaking, a minor is not capable of giving consent. Intoxication and being drugged takes away one’s capability. |
| **Constitution** | Constitution refers to whatever behaviors one considers to make up sex. This differs from person to person, and legal and social definitions of “sex” may vary drastically from individual definitions | Many people think of sex as:  intercourse (anal and vaginal penetration), uni-directional sex acts (performing oral or manual stimulation on a partner), and mutual masturbation. | Many people (including the law) do not consider talking, nipple play, kissing, or masturbating on the phone as sex. |

# Methods

Now that I have laid forth the historical and theoretical context for my dissertation, I will explore the methods I plan to use. In the following section I will first define the relevant stakeholders to this project –– that is, who will I be studying and who plays a significant role in the outcomes of this research. Second, I will describe the dependent and independent variables for my research agenda. I will introduce and describe my concept of the Consent Score that is the critical measure of this research and the various factors that I believe will significantly alter one’s Consent Score. Third, I will outline examples of specific survey questions I plan to employ in this research and how I intend to analyze the results. Finally, I will provide an overview of my data collection methods.

## Stake Holders

### College students

While Title IX applies to any person in an educational setting, college students have the most significant stake in its federal regulation. The instances of sexual violence on campus overwhelmingly affect students: the perpetrators of the vast majority of sexual violence committed on college campuses are undergraduate students, as are the victims. Furthermore, college-aged students are 78 percent more likely than non-students of the same age to be a victim of rape or sexual assault (Huff, 2022). Given that Title IX regulations thus work to protect students from assault, and consent defines assault, it is crucial to understand how students perceive consent. Indeed, university students' perceptions of consent likely differ from Title IX language and definitions around consent. More generally, preventing sexual violence on campus must, ultimately, begin with student behavior. To consider students’ views, I draw from two literatures: one about sexual violence and Title IX, and one about consent, all amongst undergraduates and their beliefs and understandings.

### Title IX Compliance Officers

Title IX offices house directors, administrators, case managers, and investigators. Because these offices make up the on-the-ground implementation of Title IX, they are crucial stakeholders. Title IX officers do not create the rules, but they enforce them. They also conduct investigations with both victims and the accused, compile evidence, and decide case outcomes. In this sense, compliance officers are critical to understanding the framework of consent as it operates on college campuses and its applicability to the lived experiences of undergraduates. While college students can speak to their beliefs around consent, compliance officers see these beliefs in action; they have a first-hand view of how Title IX legislation works (and does not work) in regulating undergraduates’ actual behavior.

### Faculty

Faculty compromise a significant component of the university and are similarly affected by the language and implementation of Title IX. In addition, faculty have a significant stake in the rules and regulations in two ways: 1) they are designated observers of the classroom, charged with monitoring classroom safety, and 2) they have their own institutionalized standards for how they must relate to their students, colleagues, and other university personnel.

## Variables

The following section explores both the dependent variables that I will employ in this research in order to discover how individuals understand consent and if this understanding if different among stakeholders. Differences in consent beliefs are critical to understanding the limitations of sexual violence legislation.

### Dependent Variables

I will have two dependent variables for this project: one abstract measure and one applied. The abstract measure willbe calculated as an aggregation of one’s beliefs in four axes: affirmation, power, intention, and constitution, and their relative importance in “agreement to sex” (the term “consent” is strategically not used in these questions). Respondents will answer survey questions about the importance of various activities and dispositions for agreement to sex to be legitimate.

The applied measure will be calculated from the conjoint experiment where participants will rank whether or not consent is present in various scenarios. The conjoint experiments will use examples of real people with real-life characteristics. Both abstract and applied measures are critical as, for example, respondents' views of the necessity of sobriety in consent might differ when asked abstractly compared to when participants are asked about a real person having sex while drunk.

The abstract measure of consent will depend on how well responses for all four axes of consent scale together. If they scale together well, then the measure will involve a single aggregated score of all four axes scores. If responses for each dimension do not make sense to merge, then respondents will receive four scores for each axis. Regardless, my hope is to create a scale of limited to expansive in respondent’s views of consent­–– the higher respondent score(s), the more limited their view of consent is. For the purposes of this writing, I will refer to that potential score or scores as one’s Consent Score. A person with a very limited view of consent will require all axes to be present to report consent. On the other hand, a person with a highly expansive view of consent will not require affirmation/power/capability per se because they believe consent can function in many different ways and environments. Regarding constitution, perhaps those with limited views of consent will see constitution as less relevant because sexual consent is important in every iteration, not just penetrative sex. In contrast, those with expansive views of consent will see sexual consent as only being necessary for penetrative sex. After a scale has been created, I will look for significance between position on the scale, characteristics such as age and gender, and independent variables, such as sexism, system justification and partisanship.

## Survey Design

         I plan to disseminate the below survey and experiment to representative samples of college students, Title IX compliance officers, and faculty. For the school populations, I will define the populations as coming from all accredited degree-granting two-year and four-year schools. Then, I will draw a random sample of the schools, identify the availability of contact information for each population via publicly available directories and, for schools without such information, I will drop and re-sample a replacement.

Each survey will include abstract measures and look at the relationships posited between the characteristics of the stakeholder and their views of consent. The survey will also include applied consent experiments, as I will explain next. As mentioned, I expect that people will have distinct opinions on consent in applied settings compared to when asked abstractly about it.

**All axes survey items will be on a 7-point scale. For example:**

*Some people think all involved parties must verbally agree to a sexual activity. Others believe that agreement to a sexual activity can be given in non-verbal ways. What about you?*

1. Definitely think agreement can be given non-verbally
2. Probably think agreement can be given non-verbally
3. Slightly think agreement can be given non-verbally
4. Unsure
5. Slightly think agreement must be verbal
6. Probably think agreement must be verbal
7. Definitely think certain agreement must be verbal

### Affirmative Consent

As described previously, affirmative consent is when one receives a verbal yes for every behavior that is engaged in. As opposed to engaging in a behavior and proceeding if a “no” is not given, affirmative consent requires that one receives an active and agreed upon yes before any behavior is attempted. Thus, I will operationalize affirmative consent in three ways to assure content validity from the following survey items: *1) Verbal affirmation, 2) Consent is required before each stage of sexual behavior and for every sexual activity, and 3) The absence of a no is not enough*.

|  |  |  |
| --- | --- | --- |
| Table #­­4 Example Survey Items of Affirmative Consent | | |
| Affirmative consent is when one receives a *verbal* yes for every behavior that is engaged in. As opposed to engaging in a behavior and proceeding if a “no” is not given, affirmative consent requires that one receives an active and agreed upon yes *before* any behavior is attempted. | | |
| Operationalization for content validity   1. Verbal affirmation 2. Consent is required before each stage of sexual behavior and for every sexual activity 3. The absence of a no is not enough | | |
| Operationalization 1 ­–– Verbal Affirmation | Close-ends | Some people think all parties must verbally agree to a sexual activity. Others believe that agreement to a sexual activity can be given in non-verbal ways. What about you? Place yourself on the below scale in terms of which point comes closer to what is necessary for consent. |
| Operationalization 2 ­­–– Consent is required before each stage of sexual behavior and for every sexual activity | Close-ends | Some people think that every sexual activity should be discussed before it is engaged in, while others believe communication at the beginning of a general sexual encounter is sufficient for all subsequent sexual activities in that encounter. What about you? Place yourself on the below scale in terms of which point comes closer to what is necessary for consent. |
| Operationalization 3 ­–– The absence of a no is not enough | Close-ends | Some people think that a verbal yes is required to agree to a sexual activity, while others believe that the absence of a no is enough. What about you? Place yourself on the below scale in terms of which point comes closer to what is necessary for consent. |

### Power

Power is the ability of one person to exert control and influence within a relationship. Both obvious and covert power structures may affect one’s ability to give adequate consent. Interpersonal pressure due to power, peer pressure, and stressful life events orthogonal to peer pressure and interpersonal pressure can obfuscate one’s ability to make decisions about the sexual behavior they would like to engage in. Based on this definition, power can be operationalized for content validity in three ways: *1) Interpersonal pressure due to power.* Interpersonal pressure is akin to power relationships and it occurs when one party (or someone close to that person)’s material or psychological well-being is affected by the other party. For example, suppose someone is dependent on another for food, shelter, or good grades. In that case, their dependence may influence what sexual activities that person agrees to participate in for fear of their food/shelter/grades being affected*. 2) Peer pressure.* Peer pressure is the act of being influenced by others to engage in sexual relations. *3) Stressful events orthogonal to peer pressure or interpersonal power (external forces).* Stressful events are defined as something that influences a person's decision-making to have sexual relations outside of themselves where one partner does not have control. For example, a stressful life event such as a death in the family may impact a person’s sexual decision-making.

|  |  |  |
| --- | --- | --- |
| Table #­­5 Example Survey Items of Power | | |
| Power is the ability of one person to exert control and influence within a relationship. Both obvious and covert power structures may affect one’s ability to give adequate consent. Interpersonal pressure due to power, peer pressure, and stressful life events orthogonal to peer pressure and interpersonal pressure can obfuscate one’s ability to make decisions about the sexual behavior they would like to engage in | | |
| Operationalization for content validity   1. Interpersonal pressure due to power 2. Peer Pressure 3. Stressful events orthogonal to peer pressure or interpersonal power | | |
| Operationalization 1 ­–– Interpersonal pressure due to power | Close-ends | Some people think that when one person’s material or psychological well-being depends on another person, that first person is unable to agree to sexual activities with the second person. Examples would be the first person depending on the second for food, shelter, or good grades. Others think that dependence on someone else does not matter for the ability to agree to sexual activities. Place yourself on the below scale in terms of which point comes closer to what is necessary for consent. |
| Hypothetical scenario | A person who was just fired from their job with a person who still has their career  A person dependent on another for food  A person dependent on another for shelter  A person dependent on another for money  Student and professor  Student and Teaching Assistant  Senior and Freshman  Senior and graduate student  Freshman and graduate student  Professor and graduate student  Freshman and Freshman  Student worker and adult boss  Student worker and student boss |
| Operationalization 2 ­­–– Peer Pressure |  |  |
| Close-ends | Peer pressure occurs when others encourage someone to engage in a sexual activity. Some people think that peer pressure to have sexual activity makes agreeing to engage in sexual activity impossible. Others believe peer pressure is irrelevant to a person’s decision to agree to sexual activity. What about you? Place yourself on the below scale in terms of which point comes closer to what is necessary for consent. (7-point scale). |
| Operationalization 3 ­–– Stressful events |  |  |
| Close-ends | Some people think that stressful events that influence sexual activities (ex. a death in the family or being fired from work) make agreement to sexual activity impossible. Others think that stressful events that influence sexual activities do not prevent agreement to sexual activity. What about you? Place yourself on the below scale in terms of which point comes closer to what is necessary for consent. |

### Capability

Capability is the extent to which one is able to give consent, regardless of inner desire. Intellectual disabilities, intoxication, maturity differences (often brought on by age differences), and any other kind of cognitive impairment all have the potential to affect capability. Thus, the operationalization for content validity is*, 1) verbal ability ­or the ability to express consent/agreement with one's voice, 2) the lack of intoxication and mind-altering substances that render one unable to express consent/agreement, and, 3) the lack of significant intellectual, and emotional disabilities, cognitive impairments, or differences in age and maturity that render one unable to express consent/agreement.*

|  |  |  |
| --- | --- | --- |
| Table #6 Example Survey Items of Capability | | |
| Capability is the extent to which one is able to give consent, regardless of inner desire. Intellectual disabilities, intoxication, maturity differences (often brought on by age differences), and any other kind of cognitive impairment all have the potential to affect capability. | | |
| Operationalization for content validity   1. Verbal ability ­–– the ability to express consent/agreement with one's voice 2. Lack of intoxication and mind-altering substances that render one unable to express consent/agreement 3. Lack of significant intellectual and emotional disabilities, cognitive impairments, or differences in age and maturity that render one unable to express consent/agreement | | |
| Operationalization 1 ­–– Verbal Ability | Close-ends | Some people think that disability can affect a person’s ability to agree to sexual activity. For example, some people think that a person who never learned to speak due to developmental disabilities would not be able to agree to sexual activity while others think that not being able to speak would not affect agreement to sexual activity. What about you? Place yourself on the below scale in terms of which point comes closer to your view |
| Operationalization 2 ­­–– Lack of intoxication and mind-altering substances | Close-ends | Some people think that a person must be sober to agree to sexual activity, while others do not think sobriety is necessary for agreement to sexual activity. What about you? Place yourself on the below scale in terms of which point comes closer to your view  Some people think that a person cannot be under the influence of drugs when agreeing to sexual activity, while others think you can still agree to sexual activity if you are under the influence of drugs. What about you? Place yourself on the below scale in terms of which point comes closer to your view |
| Operationalization 3 ­–– Lack of significant intellectual, and emotional disabilities | Close-ends | Some people think that an intellectual or developmental disability makes it impossible for a person to agree to a sexual activity (generally described as having an IQ of less than 70 and serious limitations in communication, self-help skills, and reasoning). Others think that you can have an intellectual or developmental disability and agree to sexual activity. What about you? Place yourself on the below scale in terms of which point comes closer to your view  Some people think that significant age gaps affect a person’s ability to agree to sexual activities while others do not think so. For example, some people think that a person would not be able to agree to sexual activities with a person who is 20 years older than them. What about you? Place yourself on the below scale in terms of which point comes closer to your view. |

### Constitution

Constitution refers to whatever behaviors one considers to make up sex. This differs from person to person, and legal and social definitions of “sex” may vary drastically from individual definitions.Thus, its operationalization for content validity is simply and is summarized by *the behaviors that make up “sex.”*Questions 1, 2, and 3 are open-ended questions that get at Operationalization 1, the behaviors that make up ‘sex.**’** These open-ended questions allow participants to answer according to their intuitions before deeper questions are brought up. First, I will ask participants, “In answering the prior questions, what types of sexual activities did you have in mind? More generally, what activities do you think require agreement between one person to another?” Next, I will ask them, “What sexual activities require agreement between those involved? Please be specific.” Finally, I will end with, “What activities come to mind when someone says they "agreed to sex?" Question 4 is an explicit close-ended measure of a variety of behaviors in order to categorize what exactly defines "sex." By showing respondents specific behaviors, I hope to jog their memories about the options available to them that they may not have thought of in the earlier open-ended questions. Figure 21 depicts question 4.

|  |  |  |
| --- | --- | --- |
| Table #7 Example Survey Items of Constitution | | |
| Constitution refers to whatever behaviors one considers to make up sex. This differs from person to person, and legal and social definitions of “sex” may vary drastically from individual definitions. | | |
| Operationalization for content validity   1. The behaviors that make up “sex.” | | |
| Operationalization 1 ­–– The behaviors that make up “sex.” | Open-Ends | In answering the previous questions, what types of sexual activities did you have in mind? More generally, what activities do you think require agreement between one person to another?  What sexual activities require agreement between those involved? Please be specific.  What activities come to mind when someone says they "agreed to sex?” |
| Close-ends | To what extent do each of the following sexual behaviors require consent? (Present Sexual Behavior Inventory). |

### Vignette Experiment

Conjoint analysis is a technique used to measure respondents' preferences given their evaluation of hypothetical profiles that display varied and randomized attributes (Druckman, 2022). Conjoint experiments are often used in political science to measure how different qualities impact a respondent's evaluation of a person or scenario. By measuring how respondents evaluate several attributes simultaneously, conjoint designs allow researchers to draw meaningful inferences about user preferences grounded in statistical estimations, not biased by the researcher’s translation (Bansak et al., 2020). For example, Banskak et al. (2020) use the example of a conjoint experiment where a respondent looks at profiles (age, gender, sexual orientation, race, occupation, etc.) of two hypothetical presidential candidates and then reports which candidate they would support. Each respondent receives 15 different randomized tables, and compares a total of 30 “candidates.” As a result, the researchers are able to decipher attributes that causally increase or decrease the appeal of a candidate, as well as how the political preferences of the respondent affect their choices.

For this research, I will use a conjoint vignette experiment to test the applied dimension of how people understand consent. My goal is to see if people’s opinions about the relevance of an axis of consent in the abstract questions change based on the specific other attributes detailed in the conjoint experiment.

I am interested in how the descriptive characteristics of both parties in a sexual scenario will affect respondents' perceptions. Therefore, I will vary the gender, race, and partisanship of the parties involved. I chose these characteristics because they are my independent variables (i.e., I expect them to affect attitudes toward consent and thus it is sensible that those attributes in terms of actors involved will influence opinions). Table 8 demonstrates all possible attributes that may be highlighted in the given scenario. For example, concerning gender, respondents might see one of four scenarios: a man and a woman where the man instigates the sexual interaction, a man and a woman where the woman instigates the sexual interaction, a woman and a woman, or a man and a man.

I will also vary the axes of consent present and absent in each scenario. Power is depicted by positionality or the position of power that both characters are in. Affirmation is depicted through the verbal engagement between the characters (i.e., is verbal agreement given or not). Capability is demonstrated through the level of intoxication between the parties (i.e., is one or both parties drunk, tipsy, high, or sober), and constitution is displayed based on what sex acts the participants engage in.

I will show respondents several vignettes. After each vignette, I will ask whether Partner 1 or Partner 2 gave sexual consent and the capacity each had for sexual consent given the circumstances. The list of possible attributes is listed in Table 8:

|  |  |  |
| --- | --- | --- |
| Table #8 –– List of Possible Attributes for Vignette Characters | | |
|  | **Partner 1 (Initiator)** | **Partner 2 (Responder)** |
| Gender | Female, Male | Female, Male |
| Race | White, Hispanic/Latino, Black, Asian, Not Specified | White, Hispanic/Latino, Black, Asian, Not Specified |
| Partisanship | Democrat, Independent, Republican, Not specified | Democrat, Independent, Republican, Not specified |
| Positionality  (Power) | Professor, Graduate Student, Teaching Assistant, Undergraduate Senior, Undergraduate Freshman | Professor, Graduate Student, Teaching Assistant, Undergraduate Senior, Undergraduate Freshman |
| Verbal engagement (Affirmation) | Verbal request to engage in sexual intercourse,  Non-verbal request to engage in sexual intercourse via gesturing,  No verbal or non-verbal request | Verbal “Yes” response, Verbal agreement via nodding, Silence |
| Level of intoxication (Capability) | Drunk, Tipsy, Sober, High | Drunk, Tipsy, Sober, High |
| Interaction  (Constitution) | Sexual intercourse, oral sex, digital stimulation, no sexual contact | |

1. Did the **initiator** consent to sex?
   1. Definitely did not consent
   2. Probably did not consent
   3. Unsure, leaving towards did not consent
   4. Unsure
   5. Unsure, leaning towards did consent
   6. Probably did consent
   7. Definitely did consent
2. Did the **responder** consent to sex?
   1. Definitely did not consent
   2. Probably did not consent
   3. Unsure, leaving towards did not consent
   4. Unsure
   5. Unsure, leaning towards did consent
   6. Probably did consent
   7. Definitely did consent
3. Was the scenario a case of sexual assault?
   1. Definitely a case of sexual assault
   2. Probably a case of sexual assault
   3. Unsure, leaning towards thinking it’s a case of sexual assault
   4. Unsure
   5. Unsure, leaning towards thinking it is not a case of sexual assault
   6. Probably not a case of sexual assault
   7. Definitely a case of sexual assault
4. Should this case be reported to the Title IX office?
   1. This case should definitely be reported
   2. This case should probably be reported
   3. Unsure, leaning towards should be reported
   4. Unsure
   5. Unsure, leaning towards should not be reported
   6. This case should probably not be reported
   7. This case should definitely not be reported

Once I receive responses, I can find each variable's average marginal component effect (AMCE) to estimate the isolated effect size for each randomized characteristic. I expect that people will shift their views on consent in these applied settings compared to the abstract questions in two ways: First, respondents with similar characteristics to those depicted in a given vignette may have their view of consent impacted. For example, a straight white Republican male will probably have very different views when a straight white Republican male is described in a vignette (as the initiator) compared to when the description of a Black lesbian Democrat is given vice versa. This may be due to the ability to empathize with a person that shares similar characteristics. Because of this, I hypothesize that Consent Scores will be statistically different in the applied measures compared to the abstract ones when a person is evaluating a profile that is similar to them. I am not sure whether the Consent Scores will be higher or lower in the applied measures, however.

Second, I am confident that certain attributes will be perceived as more or less vulnerable in the applied scenarios given stereotypes around gender and race. For example, I expect that the gender of the people depicted in the conjoint will strongly affect how a respondent views the potential for consent in a given interaction. I expect that women will consistently be seen as less able to consent than men, as research has shown that men are generally thought of as aggressors and women as victims (Chapleau, 2007; Bates, 2020; Wexler, 2020). This analysis will probably be complicated by the race attribute, however. Research finds that white women are more likely to be seen as victims than Black women and Latinx women (Boykins et al., 2010; Slakof and Brennan, 2019).

Furthermore, Black men are much less likely than women and white men to be seen as victims and the most likely to be read as aggressors in sexual violence situations (Phillips, 2006; Phipps, 2021). In this regard, those with high levels of racism and sexism will probably be affected most strongly by gender and race attributes, as I posited earlier in my predictions on sexism and its effects on respondents. I imagine this will be similar for those high in racism as well. It will be important to include one’s sexism and racism levels in the data analysis as well as look at the views of different gender and racial subgroups for this reason.

I am not sure if partisanship will matter (especially because of the subtle way I intend to mention partisanship, such as through volunteering), but if it does, perhaps those strongly affiliated with one party will be more likely to see those of another party as more able to give consent as they will empathize less with them and be less likely to imagine them in non-consensual situations.

Concerning the consent axis attributes, I imagine my earlier predictions for who will have expansive and limited views of consent will hold true here. I think that, overall, significant differences in positionality, such as a professor with an undergraduate, no verbal engagement or silence from both parties, and those who receive the drunk or high attribute will have the most potent effect. Those vignettes will most often be reported as not containing consent compared to the vignettes where the characters have the same power positionality, give verbal agreement, and are sober. It will be fascinating to sort out the different axis attributes and determine which ones matter the most. I assume that affirmation and capability will, but I must run the experiment to see.

Ultimately, this general survey and the vignette experiment will make up most of my quantitative data collection plans. Next, I will describe my qualitative data collection plans.

# Conclusion

Rape and sexual violence are public health crises that leave women, in particular, vulnerable and exploited. Yet, despite the uniform necessity for comprehensive legislation to protect the most vulnerable, rape law has become intensely polarizing in politics, the media, and the public more generally. Remarkably, these debates have grown heightened over the topic of education and university handlings of sexual violence. Title IX, in particular, is the perfect case study to underscore this politicization and the necessity of revisiting sexual violence and consent protections for the most vulnerable. Indeed, consent is the critical axis that differentiates sex from assault and so protection hinges on the solidity of it as a concept. However, the gap between theoretical understandings of consent among academics, and practical applications of it for college students and the general public remain a fundamental obstacle to healthy sexual practices on university campuses. My goal is to provide a path forward for future research about consent and to unpack how relevant stakeholders understand consent.

I have established four necessary axes that jointly create the conditions sufficient for consensual sex: affirmative consent, capability, power, and constitution. While philosophical notions of consent have been established and disseminated among scholars, the question remains whether college students, faculty, Title IX compliance officers, and the general public share these understandings of consent. Given the prevalence of sexual activity on campus, coupled with the heavy alcohol use of many college students, undergraduate conceptions of sex take on heightened significance. By leveraging a general survey with a vignette experiment that tackles each of the four axes, I will be able to demonstrate whether academic understandings of sex resonate among the relevant stakeholders. Furthermore, I hope to pilot my use of the Consent Score to aid future researchers in studying sexual violence and consent. Finally, by creating a way to map the public's views of consent on a scale from very limited to very expansive, I hope to standardize methods for understanding consent beliefs in the general public. In turn, I hope to fill the dearth of consent research in Political Science.

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1. See U.S. Department of Education: <https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html#:~:text=Title%20IX%20states%3A,activity%20receiving%20Federal%20financial%20assistance.> [↑](#footnote-ref-1)
2. Rose (2015) outlines how Sen. Bayh attempted to placate opposition in the senate by submitting a revised amendment that exempted private undergraduate programs, traditionally sex-segregated institutions like military academies, and single-sex programs like beauty pageants. [↑](#footnote-ref-2)
3. By Kevin Stainbeck at <https://www.researchgate.net/figure/Total-Number-of-Sexual-Harassment-Charges-Filed-with-the-EEOC-1980-2002_fig5_35696998>. [↑](#footnote-ref-3)
4. Figure by Kevin Stainback for “Politics, Environmental Uncertainty and Organizational Change: Race and Sex Workplace Opportunity in the Post­Civil Rights Era, 1966­2002,” 2007. [↑](#footnote-ref-4)
5. Michigan Law. “Alexander V. Yale: Civil Rights Litigation Clearinghouse.” Alexander v. Yale | Civil Rights Litigation Clearinghouse. Accessed November 12, 2021. https://www.clearinghouse.net/detail.php?id=12614. [↑](#footnote-ref-5)
6. “Alexander v. Yale University, 459 F. Supp. 1 (D. Conn. 1977).” n.d. Justia Law. Accessed February 25, 2022. <https://law.justia.com/cases/federal/district-courts/FSupp/459/1/1392608/>. [↑](#footnote-ref-6)
7. See the U.S. Department of Education’s archives: https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html. [↑](#footnote-ref-7)
8. “AAU Climate Survey on Sexual Assault and Sexual Misconduct (2015) | Association of American Universities (AAU).” Accessed February 24, 2022. <https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015>. [↑](#footnote-ref-8)
9. The exact number is notoriously difficult to calculate, mainly due to underreporting on the side of victims. For valiant attempts to calculate the exact percentage of women who experience sexual assault, see Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2019 (2020), and the National Sexual Violence Resource Center (NSVRC) 2018 Report. [↑](#footnote-ref-9)
10. See Lave 2016; Villasenor, 2016 (New York Times); Berkowitz, 2011 (Wall Street Journal) for just a small sample of this highly publicized pushback. [↑](#footnote-ref-10)
11. Reynolds (2019) compiled the following cases: Hostile sexual harassment cases*: Patricia H v. Berkeley Unified School District* [1993] 830 F. Supp 1288; *Doe By and Through Doe v. Petaluma City School District* 54 F. 3d 1447 [1995]; *Murray v. NYU College of Dentistry* 57 F.3d 243 [1995]; *Seamons v. Snow* 84 F.3d 1226 [1996]. Peer-to-peer harassment: *Davis V. Monroe County Board of Education*, 526 U.S. 629 [1999]. Employee-student verbal harassment of a sexual nature: *Jennings v. UNC-Chapel* *Hill*, 482 F.3d 686 [2007]. [↑](#footnote-ref-11)
12. Graph created by Celene Reynolds in “From Unequal Play to Unwanted Contact: Title IX in American Universities, 1972-2014” (2019). [↑](#footnote-ref-12)
13. Reynolds (2019) explains that "academics" in this graph refers to all complaints based on sex discrimination in grading, teaching, and admissions, while the "other" in this graph refers to any kind of complaint not covered by athletics, sexual harassment, and academics, for example, complaints involving discrimination against transgender students. [↑](#footnote-ref-13)
14. "Sex-Based Harassment." 2020. Investigative Reports; Monitoring Reports. U.S. Department of Education (E.D.). January 16, 2020. https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html. [↑](#footnote-ref-14)
15. I have taken all information from the eCFR (electronic Code of Federal Regulations). [↑](#footnote-ref-15)
16. All bolding of quotes represents my own emphasis throughout this document unless otherwise noted. [↑](#footnote-ref-16)
17. eCFR, “34 CFR Part 106 -- Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.” https://www.ecfr.gov/current/title-34/subtitle-B/chapter-I/part-106. [↑](#footnote-ref-17)
18. “Sexual Offense Prevention Policy (SOPP) & Title IX.” 2019. *Antioch College* (blog). January 8, 2019. <https://antiochcollege.edu/campus-life/sexual-offense-prevention-policy-title-ix/>. [↑](#footnote-ref-18)
19. “Campus Affirmative Consent Policy Maps (College Yes Means Yes/Title IX Policy) | Affirmative Consent / Stopping Campus Sexual Assault.” Accessed February 25, 2022. http://affirmativeconsent.com/consentpolicy/. [↑](#footnote-ref-19)
20. Assistant Secretary for Planning and Evaluation (ASPE), “Statutory Rape: A Guide to State Laws and Reporting Requirements.” Accessed February 25, 2022. https://aspe.hhs.gov/reports/statutory-rape-guide-state-laws-reporting-requirements-1. [↑](#footnote-ref-20)
21. “NY Penal L. Secs. 130.00, 130.05 130.20, 130.25, 130.30, 130.35 (2011).” n.d. Accessed February 25, 2022. https://h2o.law.harvard.edu/collages/19283. [↑](#footnote-ref-21)
22. The University of Tulsa. “Alcohol and Consent.” Accessed February 25, 2022. https://utulsa.edu/sexual-violence-prevention-education/alcohol-consent/. [↑](#footnote-ref-22)
23. Anna Stubblefield, who once chaired the Rutgers - Newark Philosophy Department, served two years in prison for engaging in sexual behavior with D.J., a 37-year-old non-verbal man with cerebral palsy. The New York Times featured her story on its front page in 2015: <https://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html>. Mintz (2017) writes about the case and its ambiguity in detail. [↑](#footnote-ref-23)
24. Florida State University (FSU), “What Is Power Based Personal Violence?” KNOw MORE (blog). Accessed February 25, 2022. https://knowmore.fsu.edu/know-more-initiative/what-is-power-based-personal-violence/. [↑](#footnote-ref-24)