



## **A Comparison of Clery Act & Title IX Definitions of Sexual Assault & Related Violations**

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The Violence Against Women Act was enacted in 1994 to expand the protections of women against violent crimes across the United States (VAWA has since been amended and applies regardless of gender).<sup>2</sup> VAWA addressed crimes of dating violence, domestic violence, sexual assault, and stalking (which have historically and disproportionately affected women).<sup>3</sup> The act has been reauthorized on two separate occasions, 2005, and 2013, but contains no sunset provision. This means that re-funding VAWA programs is left to the discretion of Congress if there is no reauthorization.<sup>4</sup> Congress has re-funded all VAWA programs for the FY2020.<sup>5</sup>

Under the most recent reauthorization of VAWA in 2013, the Act expanded the definition of sexual assault to, “any nonconsensual sexual act proscribed by Federal, tribal, or State law, including when the victim lacks capacity to consent.”<sup>6</sup> This definition made VAWA more consistent with the FBI’s definition of sexual assault for reporting purposes and increased the scope of sexual assault to cover all humans, rather than exclusively women.

The 2013 reauthorization of VAWA also amended section 485(f) of the Higher Education Act (the Clery Act).<sup>7</sup> A notable aspect of these amendments are the requirements that institutions report dating violence, domestic violence, stalking, and sexual assault that occurs on campuses and requires that these incidents be reported in the Annual Security Report.<sup>8</sup> Furthermore, the Clery amendments state that sexual assault is, “[a]n offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart.”<sup>9</sup> Those corresponding definitions are:

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<sup>2</sup> Lisa N. Sacco, *The Violence Against Women Act (VAWA): Historical Overview, Funding, and Reauthorization*, CONGRESSIONAL RESEARCH SERVICE 7 (April 23, 2019), <https://fas.org/sgp/crs/misc/R45410.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> U.S. DEP’T OF JUSTICE, Laura L. Rogers, Acting Director, Office on Violence Against Women, *The Violence Against Women Act – An Ongoing Fixture in the Nation’s Response to Domestic Violence, Dating Violence, Sexual Assault, and Stalking* (Feb. 19, 2020), <https://www.justice.gov/ovw/blog/violence-against-women-act-ongoing-fixture-nation-s-response-domestic-violence-dating>.

<sup>5</sup> *Id.*

<sup>6</sup> 34 U.S.C. § 12291 (a)(29) (May 29, 2020).

<sup>7</sup> 79 Fed. Reg. 62,752.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 62,784.

*Rape.* The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.<sup>10</sup>

*Sex Offenses.* Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

A. Fondling—The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or temporary or permanent mental incapacity.

B. Incest—Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

C. Statutory Rape—Sexual intercourse with a person who is under the statutory age of consent.<sup>11</sup>

As a result, since the 2013 VAWA reauthorization, the Clery Act, VAWA and the FBI have all used the same or very similar definitions for the terms *sexual assault* and *sexual offences*.

The Clery Act regulations currently direct institutions to apply the SRS definition of “rape” and the NIBRS definitions of fondling, incest, and statutory rape.<sup>12</sup> While the SRS lists fondling, incest, and statutory rape in its definition of “sex offenses,” each is not individually defined.<sup>13</sup> Institutions must instead turn to the NIBRS which, by virtue of being a more modern data collection system, is far more expansive in the crimes it covers and individually defines these offenses.<sup>14</sup> Thanks to its more comprehensive data collecting capabilities, the FBI intends to move to exclusive use of the NIBRS system.<sup>15</sup> This means the SRS (and its definitions) will be retired from use on January 1, 2021.<sup>16</sup> Therefore, after January 1, the “uniform crime reporting system of the Federal Bureau of Investigation” referenced in the Clery statute will necessarily invoke not only the NIBRS definitions of fondling, incest, and statutory rape, as it always has, but the NIBRS definition of rape as well.<sup>17,18</sup> However, this elimination of the SRS

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<sup>10</sup> *Id.* at 62,789.

<sup>11</sup> *Id.* at 62,790.

<sup>12</sup> 34 CFR §668.46(c)(9)(i), (c)(9) (ii)

<sup>13</sup> Criminal Justice Information Services (CJIS) Division Uniform Crime Reporting (UCR) Program, *Summary Reporting System (SRS) User Manual*, 163 (2013) <https://ucr.fbi.gov/nibrs/summary-reporting-system-srs-user-manual>.

<sup>14</sup> See U.S. Dep’t. of Justice, Criminal Justice Information Services, *SRS to NIBRS: The Path to Better UCR Data* (Mar. 28, 2017), <https://www.fbi.gov/services/cjis/cjis-link/srs-to-nibrs-the-path-to-better-ucr-data>.

<sup>15</sup> *SRS to NIBRS*.

<sup>16</sup> *Id.*

<sup>17</sup> See Title IX 85 Fed. Reg. 30,026, 30,176 n.791 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

<sup>18</sup> Footnote 792 of the preamble directs readers to <https://ucr.fbi.gov/nibrs/2011/resources/nibrs-offense-definitions>. 85 Fed Reg. 30,176 n.792. This website provides the 2011 NIBRS definitions. The most recent version of these definitions is actually from 2018. Though it is not clear why the Department referenced the 2011 definitions over the current 2018, for the analysis here, the definitions do not have meaningful substantive differences.

system and subsequent use of the NIRBS definition of rape raises questions as each system uses a different definition.<sup>19</sup>

In 2013, the SRS definition of Rape was updated to read “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”<sup>20</sup> This SRS definition is what appears in Appendix A to subpart D of part 668 of the Clery regulations.<sup>21</sup>

Note that while the SRS rape definition was updated from its original “carnal knowledge of a female forcibly and against her will,” the NIBRS definition with a similar reference to carnal knowledge was not.<sup>22</sup> NIBRS defines rape as “[t]he carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.”<sup>23</sup> The NIBRS definition was not updated because “the NIBRS already captures the broader sex offense information reflected in the revised definition.”<sup>24</sup> This broader sex offense information comes from the definitions of sodomy, sexual assault with an object, and fondling, which, together with the definition of rape, make up Sex Offenses in the NIRBS system.<sup>25</sup> While the 2013 update intended to broaden the narrow scope of SRS’ rape definition to include victims of male and female genders, penetration of any orifice with any object or body part, and offenses where force was not used, the FBI explains that these considerations are all already allowed for in the NIBRS sex offenses definitions.<sup>26</sup> Therefore, the Bureau believes that when the SRS is retired, there will be no change in which crimes are reported as Sex Offenses as they see the SRS and NIBRS definitions as functionally the same, encompassing the same criminal activities.<sup>27</sup>

“The definitions that were developed for the NIBRS are not meant to be used for charging persons with crimes.”<sup>28</sup> Instead, the NIBRS is meant to be a national data collection service which categorizes or organizes American crime reporting.<sup>29</sup> Therefore, the definitions are necessarily broad in order to facilitate easy crime reporting from various states using various statutes.<sup>30</sup> In fact, the NIBRS takes its definitions from *Black’s Law Dictionary*, the *Uniform Crime Reporting Handbook* and the NCIC Uniform Offense Classifications in order to craft a common-law based definition that they hope will be cohesive with most states’ own definitions.

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<sup>19</sup> U.S. Dep’t. of Justice, Uniform Crime Reporting System, *NIBRS Rape vs. SRS Rape*, NATIONAL INCIDENT-BASED REPORTING SYSTEM (2013), <https://ucr.fbi.gov/nibrs/2013/resources/nibrs-rape-vs.-srs-rape>.

<sup>20</sup> *NIBRS Rape vs. SRS Rape*.

<sup>21</sup> Violence Against Women Act 79 Fed. Reg. 62,751, 62,789 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt.668).

<sup>22</sup> *NIBRS Rape vs. SRS Rape*.

<sup>23</sup> Criminal Justice Information Services Division Uniform Crime Reporting Program, *2019 National Incident-Based Reporting System User Manual* 41 (2018) <https://ucr.fbi.gov/nibrs/nibrs-user-manual>.

<sup>24</sup> *Id.*

<sup>25</sup> *NIBRS Manual* at 41-42.

<sup>26</sup> U.S. Dep’t. of Justice, Criminal Justice Information Services, *Frequently Asked Questions about the Change in the UCR Definition of Rape* (Dec. 11, 2014), <https://ucr.fbi.gov/recent-program-updates/new-rape-definition-frequently-asked-questions>.

<sup>27</sup> *See id.*

<sup>28</sup> U.S. Dep’t. of Justice, Uniform Crime Reporting System, NATIONAL INCIDENT-BASED REPORTING SYSTEM (2011), <https://ucr.fbi.gov/nibrs/2011/resources/nibrs-offense-definitions>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

The Department of Education acknowledges that this practice of using broad definitions is well-suited to the purposes of Title IX as they also hope to ensure institutions across various states “include a variety of sex offenses as discrimination under Title IX.”<sup>31</sup> Therefore, the Department believes that directing institutions to the Clery definitions, and thus to the NIRBS definitions, is appropriate.<sup>32</sup>

An issue arises, however, since these definitions are meant to be for counting purposes and not for charging purposes. Under the Title IX Final Rule, the use would be akin to a charging use. In one specific area, this leads to a narrow nuance that should be considered by institutions as they develop policies. The challenge is with a nuanced difference in the definition of non-consensual oral sexual contact on male genitalia versus female genitalia. The regulations themselves acknowledge that it is possible to classify the same assaultive act as a different NIRBS enumerated sex offense depending on the sex of the victim.<sup>33</sup> Oral sex performed on a nonconsenting female, as a penetrative act, meets the NIRBS definition of rape. However, oral sex performed on a nonconsenting male meets the NIRBS definition of sodomy.<sup>34</sup> Under the NIRBS system, the FBI does not take issue with this distinction because either offense still falls within the larger category of a sex offense<sup>35</sup> and, thus, does not really matter for counting purposes. However, many institutions will establish (and list as required by the Clery Act) potential sanctions for those found responsible for a violation of the Code defined by the Title IX Regulations and the Clery Act. Institutions may, understandably, list higher penalties for those found responsible of rape compared to fondling. But the key difference between the Clery Act approach and this Title IX approach is that applying these definitions in an institution’s sanctioning scheme could yield unequal results *on the basis of sex*. Institutions should therefore use caution when devising sanctions which are tied to these NIRBS definitions to establish a system where findings of responsibility for non-consensual oral sex on a person with biological male or female genitalia are sanctioned equitably, without differential treatment on the basis of the sex/gender of the Complainant or Respondent.

The attached chart compares the definitions of the covered crimes and provides some analysis.

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<sup>31</sup> 85 Fed. Reg. at 30,176.

<sup>32</sup> *See Id.*

<sup>33</sup> *See* 85 Fed Reg. 30,176.

<sup>34</sup> *See id.*

<sup>35</sup> *Frequently Asked Questions about the Change in the UCR Definition of Rape.*

## Definitions Comparison Chart

	Title IX	Clery Handbook	Notes
Sexual Assault	<p>“‘Sexual assault’ as defined in 20 U.S.C. 1092(f)(6)(A)(v).” 34 C.F.R. §106.30.</p> <p style="text-align: center;">↓</p> <p>“The term “sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation.” 20 U.S.C. 1092(f)(6)(A)(v).</p> <p style="text-align: center;">↓</p> <p>“Sex Offenses Any sexual act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.</p> <p>Rape (except Statutory Rape) The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity</p> <p>Sodomy Oral or anal sexual intercourse with another person, without the consent</p>	<p>“Sexual Assault (Sex Offenses). Any sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent.</p> <p>Rape is the penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. This offense includes the rape of both males and females.</p>	<p>The definitions of Sex Offenses in UCR NIBRS and the Clery Handbook are identical.</p> <p>The definitions in the NIBRS user manual and the Clery Handbook vary significantly.</p> <p>The NIBRS still uses the term “carnal knowledge” (which they provide <i>Black’s Law</i> definition as ‘the act of a man having sexual bodily connections with a woman; sexual intercourse.’) While NIBRS allows that both males and females can be raped, they restrict the definition of rape to instances between members of the opposite sex.</p> <p>NIBRS’ definition of rape also does not mention objects, only sexual organs. Instead, the NIBRS enumerates another sex offense (Sexual Assault With An Object) for that.</p>

	<p>of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity If the offender both raped and sodomized the victim in one incident, then LEAs should report both offenses.</p> <p><b>Sexual Assault With An Object</b> To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity An “object” or “instrument” is anything used by the offender other than the offender’s genitalia, e.g., a finger, bottle, handgun, stick. Version 1.0, 3/22/2018 42</p> <p><b>Fondling</b> The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of</p>	<p>Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of</p>	<p>Thus, it seems NIBRS’ definition of Rape is narrower than the Clery Handbook’s. However, the regulations appear not to be overly concerned with the potential bias in the application of these definitions. They acknowledge that it is possible for the same assaultive act to be classified differently based on the sex of the victim. <i>See</i> 85 Fed Reg. 30,176. Because any of these acts fall under the larger umbrella of “Sexual Assault,” these potential differences should not change the overall outcome that a report of such behavior would mandate a response. <b>Institutions should use caution here as many approaches tie available sanctions to the gravity of the proven offense. Here, using such a standard sanctioning scheme could lead to inequity in the resulting standards of nonconsensual</b></p>
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	<p>his/her age or because of his/her temporary or permanent mental or physical incapacity</p> <p>Sex Offenses, Non-Forcible Unlawful, non-forcible sexual intercourse</p> <p>Incest Non-Forcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law</p> <p>Statutory Rape Non-Forcible sexual intercourse with a person who is under the statutory age of consent There is no force or coercion used in Statutory Rape; the act is not an attack.”</p> <p>Criminal Justice Information Services Division Uniform Crime Reporting Program, <i>2019 National Incident-Based Reporting System User Manual 41-42 (2018)</i> <a href="https://ucr.fbi.gov/nibrs/nibrs-user-manual">https://ucr.fbi.gov/nibrs/nibrs-user-manual</a>.</p>	<p>his/her age or because of his/her temporary or permanent mental incapacity.</p> <p>Incest is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law. Count one offense per victim.</p> <p>Statutory Rape is sexual intercourse with a person who is under the statutory age of consent. Count one offense per victim.</p> <p>U.S. DEP’T OF EDUC. OFF. OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 3-6 to 3-7(2016), <a href="https://www2.ed.gov/admins/lead/safety/handbook.pdf">https://www2.ed.gov/admins/lead/safety/handbook.pdf</a>.</p>	<p><b>oral sex against individuals of different sexes/genders.</b></p> <p>The definitions of Fondling in UCR NIBRS and the Clery Handbook are identical.</p> <p>The definitions of Incest in UCR NIBRS and the Clery Handbook are identical apart from NIBRS’ “non-forcible” designation.</p> <p>The definitions of Statutory Rape in UCR NIBRS and the Clery Handbook differ only in that NIBRS specifies that Statutory Rape is non-forcible.</p>
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<p>Dating Violence</p>	<p>“‘dating violence’ as defined in 34 U.S.C. 12291(a)(10)” 34 C.F.R. §106.30.</p> <p style="text-align: center;">↓</p> <p>“Dating violence The term “dating violence” means violence committed by a person--(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and(B) where the existence of such a relationship shall be determined based on a consideration of the following factors:(i) The length of the relationship. (ii) The type of relationship (iii) The frequency of interaction between the persons involved in the relationship.”</p> <p>34 U.S.C. 12291(a)(10).</p>	<p>“Dating Violence is defined as violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.”</p> <p>For the purposes of this definition— Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.”</p> <p>U.S. DEP’T OF EDUC. OFF. OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING</p>	<p>The definitions are incredibly similar. The noticeable difference is that Clery specifies that it is the reporting party’s statement as to the three considerations which will be used. 34 U.S.C. 12291 does not indicate which account of the considerations will be used in the determination.</p>
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<p>Domestic Violence</p>	<p>“‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8)” 34 C.F.R. §106.30.</p> <p style="text-align: center;">↓</p> <p>“Domestic violence The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.” 34 U.S.C. 12291(a)(8).</p>	<p>“Domestic Violence is defined as a felony or misdemeanor crime of violence committed—</p> <ul style="list-style-type: none"> <li>• By a current or former spouse or intimate partner of the victim;</li> <li>• By a person with whom the victim shares a child in common;</li> <li>• By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;</li> <li>• By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred;</li> <li>• By any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.</li> </ul>	<p>The definitions are practically identical. In identifying the relevant jurisdiction, 34 U.S.C. 12291 mentions where funding is received, whereas the Clery Handbook specifies the jurisdiction as where the crime occurred. This is the only difference.</p>

		<p>To categorize an incident as Domestic Violence, the relationship between the perpetrator and the victim must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship. ”</p> <p>U.S. DEP’T OF EDUC. OFF. OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 3-37 to 3-38(2016), <a href="https://www2.ed.gov/admins/lead/safety/handbook.pdf">https://www2.ed.gov/admins/lead/safety/handbook.pdf</a>.</p>	
Stalking	<p>“‘stalking’ as defined in 34 U.S.C. 12291(a)(30)” 34 C.F.R. §106.30.</p> <p style="text-align: center;">↓</p> <p>“Stalking The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to-- (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.” 12291(a)(30)</p>	<p>“Stalking is defined as engaging in a course of conduct directed at a specific person that would cause a reasonable person to—</p> <ul style="list-style-type: none"> <li>• Fear for the person’s safety or the safety of others; or</li> <li>• Suffer substantial emotional distress.</li> </ul> <p>For the purposes of this definition—</p> <ul style="list-style-type: none"> <li>• Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly,</li> </ul>	<p>The definitions are functionally identical. The Clery Handbook is gender-neutral, however.</p>

		<p>indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.</p> <ul style="list-style-type: none"><li>• Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.<ul style="list-style-type: none"><li>• Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily require medical or other professional treatment or counseling.”</li></ul></li></ul> <p>U.S. DEP'T OF EDUC. OFF. OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 3-38 to 3-39(2016), <a href="https://www2.ed.gov/admins/lead/safety/handbook.pdf">https://www2.ed.gov/admins/lead/safety/handbook.pdf</a>.</p>	
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