

20 MINUTES TO...TRAINED STUDY GUIDE:

SEXUAL VIOLENCE

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Materials are adapted from
The ATIXA Playbook



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20 Minutes to Trained: Understanding Sexual Violence Learning Outcomes

- Participants will be able to explain the various methods of communicating consent.
- Participants will understand the concepts related to consent, including, but not limited to:
 - Consent to one form of sexual activity does not automatically imply consent to any other form of sexual activity.
 - Prior consent does not automatically imply consent to present or future sexual activity.
 - Consent may be withdrawn once given, as long as that withdrawal is clearly communicated.
- Participants will be familiar with terminology related to sexual violence, including, but not limited to:
 - Consent and associated terms
 - Incapacitation
 - Force and associated terms



20 Minutes to Trained: Understanding Sexual Violence Discussion Questions

- What are some examples of verbal and non-verbal consent?
- When assessing sexually violent behaviors, how do you determine if conduct is coercive?
- Can consent ever be implied, and under what circumstances?
- If someone is unsure of whether they have consent, and they try to touch their partner to see if they like it, and their partner tells them to stop, and they stop, has policy been violated?
- Is it better to apply policy literally, or to view the behaviors in light of the totality of the circumstances and context?



20 Minutes to Trained: Understanding Sexual Violence Case Studies

Grant and Owen

Grant, Reporting Party

Owen, Responding Party

Grant's 1st Interview

Today I'm here to give my side of two situations between me and Owen. I feel I was sexually assaulted. The first incident was June, before coming to college. We lived in the same city but went to different schools. We knew each other from Facebook – we were both in an accepted students group. Before this occasion in June, we had hooked up, but there was no sex. After that hookup, I told him I wasn't ready for a relationship, and he was upset.

The first incident happened the night of his graduation party at his friend's house. I went to the party with Owen, and in the car going to the party we kissed, 2 or 3 times. As the night went on, I tried to leave the party but didn't have enough money to get home and was kind of drunk so stayed the night even though I knew it was a bad idea. I was going to sleep on the couch in the living room. Owen came over to the couch, and we started talking and kissing. I know we went to the

bathroom for some privacy, but I don't really remember the conversation leading up to going to the bathroom.

So we're in the bathroom, we are kissing, pants come off. I found myself pinned to the sink and Owen says he wants me – he wants to fuck me. I told him no, not raw, but he tries anyway. I say no again, because it hurts. Owen says, "This is *my* graduation night; aren't you here to celebrate?" and tries again. I was able to turn around and tell him to stop, and his response was "Okay, then at least you can blow me." So, in an effort to placate him, that is what I did. It was rough and not enjoyable. He finished. I remember waking up with a hangover, and Owen is sleeping next to me on the couch with his pants off.

The second incident was this past Saturday. I was way too drunk to consent to anything – and was at a friend's house party. People were dancing; Owen came up to me, and we started talking. He confronted me about a rumor he had heard - involving me, but I don't really want to talk about it - and I told him he couldn't make me feel shitty when he had assaulted me the summer before coming to school. He seemed confused. He said he apologized if that was my experience, but he didn't remember that night. I got emotional and we walked outside. I told him that what he had heard (the rumor) was true, but at that point people were walking by so I said we should have the conversation somewhere private.

He grabbed my hand and led me to his residence hall. I didn't let go of his hand but wasn't too thrilled he was holding my hand either. When we got to his room, we talked for about twenty minutes, and then we were kissing. It quickly went to our clothes being off and things happening. I don't remember how that happened. At some point he said he wanted to have sex, but he didn't have a condom or lube – I didn't want to do that anyway; penetration is a big deal for me. Owen suggested going to my room, but I didn't want to do that. I told him "I don't want to get dressed" and kissed him to distract him from getting

dressed and going to my room. That didn't work though, and soon we were dressed and walking over to my room.

We get to my room. Very quickly the clothes are off, and we are fooling around again. I leave the condoms and lube in the drawer because I didn't want to do anything with them. So, we are naked and fooling around, and he is in a position where he could theoretically have sex with me, and he said something like "I want to fuck you," and I said no, and he inserted himself anyway – it hurt like crazy, and I pushed him back and moved to the edge of the bed. Eventually it stopped hurting. Like the first time, I tried to make him happy and finish the interaction. He went to reciprocate, and I said no. I don't remember him cuddling me, but, when I woke up the next morning, he was in my bed with his arms around me. I remember waking up and feeling trapped but I fell back asleep and woke up again around 10:15. Finally I got out bed and got my clothes on, which he finally took as a cue to leave.

The only other thing I think you should know is that, while sober, I have denied him 4-5 times in the past six months, and I have text messages supporting this.

Owen's Interview

After learning the general information about the two incidents in the initial report: I don't know why the incident prior to coming to campus is being addressed here? I don't think it should be addressed, and I'm not going to talk about it.

Grant and I were in the accepted students in the Facebook group. I think he first commented on a picture of mine when I changed my Facebook profile picture. We developed a friendship online, then talked on the phone and texted a lot, too. I met up with Grant in person our high school senior year; we went to the movies. After the movies, we

walked around downtown, talking, holding hands. We were excited to start school. After that, we hung out once, and I met his family – I think it was that day that we kissed for the first time. At the end of hanging out, he told me he still had feelings for his ex, which was upsetting. We didn't talk for a while after that because he made me feel like complete crap. After a few weeks, we talked about it and decided to put everything behind us and just be friends.

When we got to school, our relationship had lots of ups and downs, like any normal relationship – we always checked in with each other, though, to show we cared. Sometimes we lost contact – we were doing our own thing – and then found our way back to one another. We care deeply about each other. There were a few nights when we had some sexual interactions – we were just figuring things out.

This past Saturday, my friend Lacy and I went to Kylie's house around 11:30 p.m. I saw Grant dancing with some people and went up to dance with him and talk. I brought up a rumor I had heard about him with someone we both know – someone who is not a good person – that had hurt my feelings. He immediately denied it and insisted I tell him who told me.

Grant then said that I couldn't make him feel bad about that. When I asked him why not, he said that I had sexually assaulted him at my friend's house the night of my graduation party, prior to coming to school. I was totally stunned and asked him what he was talking about. I remember we made out, gave each other head, and I remember saying I wanted to have sex with him, but he said "No" and we stopped and went to sleep on the couch. Grant said that was not all that happened, that we should go outside to talk, so we did. We talked some more outside – Grant said "You tried to have sex with me after I said no." I told him that didn't happen. We went back and forth a couple of times until I said something like, "I'm sorry that is how you

remember that night, that is not how I remember that night; that is not what happened.” We talked a little more, and Grant said he forgave me. He then told me that the rumor I had confronted him with was true and we should talk somewhere more private.

There was a large group of people outside the house, smoking and talking. We walked away, not going anywhere in particular, talking about the rumor. I was upset and I asked him why he had lied. When we started walking, things were tense, but as we talked, we both loosened up a bit and laughed. I reached for his hand partly because it was cold that night, partly to get rid of the tension – he didn’t pull away or show any sign of discomfort. We held hands until we ended up outside my room, which was closer than his.

Once we got into my room, we sat pretty close to each other on my bed; he was leaning against me, and we continued to talk for a while. At one point, he lay completely down on the bed and pulled me toward him. We were facing each other and very close...we embraced. I told him I have and always will care about him. He leaned his head toward mine and kissed me. Then we began making out. He lowered his hands to my butt, over my jeans, then used both hands to lift my shirt. I took this as he wanted me to take my shirt off, so I did; then he lifted his arms, and I took his shirt off. I stopped kissing him, got off the bed, and reached for him to follow.

I undid his pants, took his pants and underwear off and performed oral sex on him. I was watching him, looking for cues. I kept going because I saw no discomfort and he never told me to stop. He was moaning in a good way. After a few minutes, he lifted me up, took off my pants, and went down on me. Neither of us came. He turned me around to get on my knees. I did this willingly, and he started to rim me from behind. After a while, I turned and lay on my back on the carpet, and he got on top of me and kissed me. After a few minutes, I wasn’t comfortable, so I

went to the bed and held out my hand so he would go with me. I decided to reciprocate rimming – he turned willingly so I could rim him, and then we continued kissing, rimming, and doing oral on each other. Grant asked if I had any condoms or lube. I said no, that I had run out, and we joked about that. I told him I wasn't expecting this to happen. I asked if he had any in his room – he said he did, and I asked him if we could go there. He agreed.

We continued to kiss; we were both moaning, in a good way, and then we slowly got dressed, teasing each other with kisses and fondling as we got dressed. I stopped and said we are wasting time, so we finished getting dressed, left my room, and walked to his. I talked about the cold weather, and he commented on it, too; then said he couldn't believe what was happening. I asked if this was bad and he said "No." I wanted to check in to see where he was with things. He said Adam was right – because Adam, a mutual friend, had said Grant and I would hook up again. Adam knows us really well – he knows how we feel about each other. We kept walking, and I said "Whatever happens, happens," and Grant repeated this, and then stopped and kissed me.

When we get to his room, we quickly start making out again and clothes come off. He got on his back on the bed; I was on top, holding his legs, rimming him, and he was moaning my name. I asked him if he liked it, and he said yes. I tried to ask him another question, but he told me to stop talking and lowered my head to his penis. I gave him oral sex for a few minutes. We took turns giving each other oral sex and rimming each other and kissing and then embracing and completely fell asleep in each other's arms. There was never a climax ever – neither one of us – that night. There was never any penetration or attempt at penetration.

I remember waking up to him slightly snoring, and I knew he was asleep. The next morning, he woke me up to check the time on his

watch, which was right by the bed – he was against the wall, and I was on the edge. He said it was 7:30 a.m., too early to be awake. I tried to go back to sleep, but I couldn't. I think he may have fallen asleep, though. We were spooning each other, and it felt really good. I don't know how much time went by, but later, Grant said he needed to start the day. I saw him grab his towel and put it around his waist, so I put on my clothes. I had a lot to do that day, so I told him I was leaving. He said "Okay," and I told him have a good day. He said, "You too," and I left and went back to my room. When I left the room, I was happy. When I went to get lunch, I ran into Adam, and we ate lunch together. I told him I had hooked up with someone. His second guess was Grant. I told him that I really enjoyed myself and was surprised at how strong my feelings were for Grant. Adam knows more about how that night made me feel, and he helped give me some perspective about my feelings. He told me to take a few days to reflect on things – he knows I'm impulsive—and to think about if I wanted to pursue an actual relationship with Grant.

Darcy and Jake

Darcy, Reporting Party

Jake, Responding Party

Darcy's Interview

2016 starting in the spring time Jake and I shared a second class together. Sometimes he would text me about homework - regular texts. And then I think he started texting me, asking if I wanted to meet up or come over. And I remember saying I wasn't interested. I think he only texted me a handful of times. I erased all traces of his texts because I didn't want to see them.

Sometime in April, I was setting up for an event – I received a text from him between 8:00 and 8:30pm. He texted that he was in a classroom

doing a makeup exam and asked if I could come by. I was confused as to why he would ask me to go over there while he was taking a makeup exam. I said I was busy. He texted over and over and over saying he's been alone for hours and was bored trying to do the assignment. I had a bottle of Gatorade with me and I'm not sure if he asked me to bring it to him – or if I got it for myself. I went to Samson Hall. He said, "You know why I asked you to come over here and you dressed like that – now you want to leave – but I want to hook up – why would you come over here?" At one point, he said "Oh you gave it to Joe, why wouldn't you want to hook up with me?" He said I should just stay and we wouldn't have sex we would just hook up – "We don't have to do everything." He came towards me and pushed me up against the blackboard and kissed me and started touching my butt. I didn't want it to go any farther. He pulled down his pants and said I couldn't go now because he had a boner. He asked to just put it in and out once and I said guys always say that and it wouldn't be just that. I didn't want to and he bent me over one of the tables and it was really uncomfortable and he wasn't wearing protection and I said I wanted to stop and he said we could just change positions and pinned me to the floor. He said I should suck him off and he came in my mouth without telling me and I ran out of the room to the bathroom and washed my mouth out. I went back in and Jake gave me a hug and said he'd see me in class.

It felt like a trap the way he set it up. He was using my past to try to guilt me into staying there and his voice would get whiny, "Oh come on, you walked all the way over here." "You gave it to Joe." He would belittle me and make me feel guilty. I felt off put and I wanted to get out of there – I was confused and emotionally thrown off because I never saw that behavior from him. He never tried to get to know me on any level. He was persuasive saying we wouldn't go too far. So, I thought if we were only going to make out it would be okay. I never gave him a verbal yes.

I was on the floor in the front of the classroom and he was standing with his back to the board. My shirt was still on. His shirt was on. I think his pants were a little bit down. He was doing the movement and I was just there. It felt gross and tasted gross. One of his hands was on my head pushing my head more on to him and I don't remember where the other one was. This was only a few minutes and then he said "at least let me put it in and out once." I said "It's never just once" and he was whining and guilting me into it. He took off his pants and shirt completely and he took off my shirt and I think I took off my skirt. He moved me over the table desk and went for it – he didn't ask about a condom. He put a hand on my shoulder and a hand on my back and pushed me down over the desk and he had his hands on the side of my hips and held me there. I said it hurt and I didn't want to do this. He said "ok fine, we'll change positions." He got up and pulled me to the floor and he had me in his grip. He had me get on top of him. Then he said, "ok fine just suck me off then." He was tiring my mouth out and he came in my mouth and it was so gross, so gross – and then I went to the bathroom. I was more than spitting because the Gatorade I had also come out some. I was confused as to why I felt so uncomfortable. I went back in the room to get my tights and shoes. I don't remember talking to Jake – just that he hugged me. I went back to my room but I can't remember definitively if anyone was there.

Maybe a week or two after it happened, Dan said "I heard you guys hooked up and that it was awkward." I don't think anyone was around. I don't remember if it was before class or in Harris. I know I responded, but I don't know what I said, I think I probably brushed it off.

Jake's Interview

I met Darcy in the fall but we spent time together in Spring 2016 – we had an art class together. I saw her in class or in the studio. I saw her around a lot – out sometimes. We were more than acquaintances, we

talked in class a lot. I felt like me, her, and Dan would be in the studio a lot.

In April...I remember texting her the night before. I definitely said some bolder stuff about hooking up. The next day I was in Samson and I texted her because I wanted to see what she was up to and what she was doing later. We had just spoken about having sex and I told her where I was and I asked her if she could come help me with the test. I was joking about needing her help...she came over and sat down next to me. We started talking in Samson and I proposed hooking up there. I remember us being against the chalkboard making out. I had my hand on her butt and she had her hand on me and was grabbing me. I asked her how she would feel about me slapping her butt – she said it would be awkward if we weren't having sex – so I just grabbed it. This was the first time I had done anything sexual in a classroom so I was trying not to make it awkward. I proposed having sex and I think she didn't want to have someone walk in on us. We talked about it and I said – for this amount of time – I was definitely trying to talk her into doing that. I didn't remember her saying no – she seemed active while we were hooking up. She ultimately said yes to having sex – I remember us being over a desk and asked to put it in. I asked to move to the floor and we did – she sat on me – we had sex for a few minutes and then stopped and I said I needed to get back to my test. We talked about future sexual activity before she left – and something about touching her butt. She left and that was it – I don't think we engaged in any sexual activity after that – I had a partner for the remainder of the year after that. We said hi and talked in class after that. I'm going to send you guys all the text messages and everything I have. I was under the impression that day that she was just concerned about the room we were in and being in an academic building.

She might have been taken aback when I brought up the idea of hooking up – she may have said something about not doing it here - in

that location. I think I was trying to convince her otherwise and minimize the awkwardness of having sex in a classroom. I was into her. I remember when we were trying to have sex the first time she was over the desk near that chalkboard. We agreed upon a duration of sex or something. I felt like I was like “just for a little.” “Maybe just a few”-like insertions - maybe pumps maybe. Something along the lines of just a little bit of sex. I think we went back and forth to get to that point and then she said ok. We talked about her being on the desk and me being behind her. I remember her asking if I was inside. I said it would be easier to be in the floor. It was a weird angle – like she was too tall or something. I think she said something about it not working, that she didn’t feel anything.

Then we moved to the floor and she was on top of me and I asked her if she liked it and if it was good for her. I honestly don’t remember too many other details. I know we had had the conversation about the duration of it. We spoke about a condom at the chalkboard. I said I didn’t have a condom. I said if we were both healthy and safe would it be ok without it. And she said yes to both those questions.

We must have had oral sex at one point – but I don’t remember. I think if it did happen – I don’t know. It could have happened more than once but I don’t remember that at all. My memory is not serving me well. I do know I did not ejaculate at any point with her.

We didn’t have any more interactions of a sexual nature. It was probably a little awkward after – I don’t remember there being a noticeable difference from the way we interacted before.

Looking back, I feel I may have bartered...I wish I had acknowledged the fact we were having a back and forth. Looking at the texts, I was definitely trying to get us together that night before Samson Hall. My intentions weren’t malicious in any way, but I can’t recall much else.

****Stop here. Read the Q&A in the following section before continuing.****

Text Messages Forwarded by Jake

4/15 – 2:05 am

Jake: what are you up to?

Darcy: just got back to my room. Pjs r on

Jake: even better! Laundry room?...

Darcy: Saturday? I have class at 9:40 am tomorrow

Jake: ahhh I may be with the team

Darcy: we can do this when I'm more sober I promise. If u wanna

Darcy: 100% another night. I'm sorry

Jake: its ok I was just down tonight for sure

Darcy: it's just v late and I gotta make it to class tomorrow, I bouta pass out im sorry

Jake: all good goodnight

Darcy: spank my booty in class and it's a done deal

Jake: I will certainly do so but I didn't even get a feel

Darcy: u can feel whenever u want u don't have to be drunk to do so

Jake: Idk if its as good as it looks

Darcy: ha its great

Jake: ...don't tempt me

Darcy: I am tempting u

Jake: I would probly have to bend you over a table after slapping it so I may have to resist

Darcy: I'm about to ko

Jake: ko?

Darcy: knock out

Jake: boo

Darcy: ill c u soon 😊...

Jake: Like in a few minutes. I'm coming over to fuck you in the hallway if I have to

Darcy: u can fuck me later. gotta build suspense...make ya want it

Jake: ughh. Fine

4/15 – 9:40 pm

Jake: Come to Samson and help me do a test

Darcy: help you do a test?! I suck at tests

Jake: orr just keep me company...

Darcy: okok that's next to Lane, right?

Jake: Yes!

Darcy: such a long walk mann what room?

Jake: 4th floor

Darcy: kk

Darcy: I'm on 4th flr

Jake: room w/ lights on...

Che

Che, a female student in 7th grade, was failing history, in part because she was not American-born. She was doing a group project with three other history students, Jack, Franco, and Serge.

In a Snapchat, the boys told Che they were going to their teacher to have her removed from the group because she was going to drag down the group grade. Che begged the boys not to drop her, because she needed them to help her pass the class.

Jack snapped, "Send us a panty pic and you can stay."

Che sent a picture of herself in her underwear, from the waist down.

Franco snapped back, "Full body pic."

Che sent a picture of her full body, with her shirt on and showing her underwear.

Serge snapped back, "Boobs too. We see boobs or you are out."

Che removed her shirt and bra and snapped a pic to the boys.

They completed the history project together as a group. On the day the

project finished, Serge snapped to the group, "Meet at theater, 11:30." All four students met at the theater at 11:30. Though it was locked, Jack propped open a door somehow. Che entered the dark theater to find the boys there.

Serge said, "Time for a BJ."

Che asked, "What?", not understanding the slang.

Jack said, "A blowjob," but Che refused.

Serge then pulled up the screenshots of Che undressed and told her that she needed to blow them or he would send the pictures to the whole school.

Che started to perform oral sex on Serge. As soon as this happened, Jack left. Franco stayed to guard the door and make sure no one came in.

After, Che's behavior changed, and her parents noticed. Finally, they made her tell them what happened. When they learned, they called police. The police notified the school resource officer, who notified the Title IX Coordinator.



20 Minutes to Trained: Understanding Sexual Violence Q&A

Grant and Owen

For Discussion

- How would you handle Owen's refusal to discuss the first reported incident?
 - Whether you have jurisdiction over the first incident depends on your institution's policy. If you are confident you have jurisdiction, explain why to Owen. If not, respect Owen's refusal and move on to discuss the second incident. Once you are confident in your jurisdictional authority, you can interview Owen again.
- What policies are implicated here?
 - Sexual Harassment
 - Non-Consensual Sexual Contact
 - Non-Consensual Sexual Intercourse
- What issues need to be considered?
 - Jurisdiction. Does the school have jurisdiction over the first incident? Why or why not? How did you determine this?
 - What actually happened.
 - Was there sexual intercourse between the parties?
 - What other pieces of information could help you determine this?

- According to Grant, he didn't consent to what conduct? All of the interaction? Just the sexual intercourse? How do you better understand what Grant is reporting in terms of assessing possible policy violation(s).
- Incapacitation
 - Based on the information provided, do you think you have a preponderance to support that Grant was incapacitated? Why or why not?
- Consent
 - If you determine that Grant was, by a preponderance of the evidence, **not** incapacitated, you proceed to the consent analysis. Do you look at consent for the interaction as a whole or do you parse the evening into distinct events?
 - For a situation like this, with multiple sexual activities, consider analyzing by activity and time period. For example, first address the interactions that occurred in Owen's room and break them down by interaction. Then turn to the sexual acts in Grant's room and analyze consent for each interaction there.
 - What factors do you consider as you analyze whether Grant provided consent?
 - Verbal communication, physical signs, dynamics between the party, sexual history between the party are just some of the factors to consider.

Darcy and Jake

For Discussion

- What policies are implicated here?

- Sexual Harassment
- Non-Consensual Sexual Contact
- Non-Consensual Sexual Intercourse
- Do you see any credibility issues?
 - Darcy reported that she took off her skirt and that she was physically on top of him for part of the sexual intercourse. Do these details affect her credibility?
- What issues are implicated by the parties' accounts of the events
 - Consent
 - Force – Is there force involved here? Potentially. What type of force may be at issue here? Coercion. If the events occurred as Darcy reported, do you think Jake put undue pressure on Darcy to engage in the sexual activity? Discuss what conduct, as reported by Darcy, constitutes *undue* pressure.
- How do the texts change your thoughts, if at all?
 - The texts raise questions about Darcy's credibility. Darcy noted that she had texted Jake she wasn't interested but in the communication that Jake provided, there is no message to that effect.
- What additional questions do you have for Darcy at this point?
 - Confirm that Darcy sent the above texts.
 - Ask Darcy to walk you through the communication – try to obtain her thoughts on her messages given the information she had provided to you in the interview.
- How does this text exchange affect your consent analysis, if at all?
 - While the texts don't constitute consent, you should absolutely consider them as you are taking into account the circumstances and context of the reported misconduct.
 - While a force analysis is still required as it pertains to Jake's conduct in the classroom, there also needs to be significant weight given to the credibility assessments of both parties.

Che

For Discussion:

- What policies are implicated here?
 - Sexual Harassment
 - Non-Consensual Sexual Contact
 - Non-Consensual Sexual Intercourse
 - Sexual Exploitation
- What issues might you face in investigating these incidents?
 - Remedies for Che, including academic assistance and counseling
 - Possible quid pro quo analysis
 - Force (threats, intimidation, coercion are all possibilities here)
 - Cultural sensitivities to consider when interviewing Che involving sexual activity
 - Distribution of the pictures
 - Parental involvement
 - FERPA issues
 - Cooperation with law enforcement, including possible delay of investigation

Non-Consensual Sexual Contact and Non-Consensual Sexual Intercourse

Asking the Right Question

Analyzing these types of allegations is frequently vexing for the investigators and fact-finders who are called upon to do so. Sexual offense allegations can be heart-wrenching, preying on our emotional reasoning, our sexual politics, our gender-role expectations and stereotypes, our basic sense of fair play, and our innate notions of right and wrong. Administrators report to us that these allegations can be brutal for them to resolve, because of the lack of clarity. We may “know” what happened, but we can’t “show” what happened, in the sense that evidence to support allegations may not be available. Yet, despite the complexity we attribute to sexual misconduct allegations, decision-making is a fairly straightforward five-step process:

1. Gather the evidence;
2. Evaluate the credibility of the evidence;
3. Assess the evidence against the elements of the policy;
4. Analyze and weigh the sufficiency of the evidence;
5. Render a determination and reduce it to writing.

If the greater weight of the evidence is uncertain, it probably results from one or two factors. First, your skills at feather-hunting and/or feather-weighting may need to be more finely honed,⁵² or second (and relatedly), emotional reasoning, sexual politics, gender-role expectations and stereotypes, rape myths, and pressures from OCR (real or imagined) all too often churn together to give us a muddled result.⁵³ This section offers Investigators and fact-finders a tool for consistent analysis and clear decision-making. These allegations are never easy. But, this rubric has become an industry standard over the last twelve years for its durability and the way it makes tough decisions easier for those called upon to make them.

Model Policy

Non-Consensual Sexual Contact is:

- any intentional sexual touching,
- however slight,
- with any object,
- by a person upon another person,
- that is without consent and/or by force.⁵⁴

Sexual Contact includes:

- intentional contact with the breasts, buttock, groin, or genitals, or touching an-

⁵² And, may we suggest you avail yourselves of the series of highly-evolved and time-tested trainings offered by ATIXA to help you hone your skills: <https://atixa.org/events/training-and-certification/>

⁵³ Okay, the case could just be a complete mess, too.

⁵⁴ The use of force is not “worse” than the subjective experience of violation of someone who has sex without consent. However, the use of physical force constitutes a stand-alone non-sexual offense as well, as it is our expectation that those who use physical force (restrict, battery, etc.) would face not just sexual misconduct allegations, but allegations under the code for the additional assaultive behavior.

- other with any of these body parts, or making another touch you or themselves with or on any of these body parts; or
- any other intentional bodily contact in a sexual manner.

Non-Consensual Sexual Intercourse is:

- any sexual intercourse,
- however slight,
- with any object,
- by a person upon another person,
- that is without consent and/or by force.⁵⁵

Intercourse includes:

- vaginal or anal penetration by a penis, object, tongue, or finger, and oral copulation (mouth to genital contact), no matter how slight the penetration or contact.

Model of Proof

The model of proof for these offenses is the policy itself, because we have written it in element format already. The analysis only varies between them as to whether the contact is sexual touching or sexual intercourse. There is an element of intent in the NCSC definition that is not in the NCSI definition, but the definitions are otherwise identical. You can image a non-intentional sexual contact, such as brushing someone's breast or buttocks in a crowded bar without meaning to, which is not an offense, but it is hard to image someone having sexual intercourse unintentionally. Thus, intent is not a requirement of the NCSI offense. Intersectionally, these offenses have overlap because intercourse is a type of sexual touch, and thus intercourse would be included in NCSC, but only intercourse is included in NCSI, though intercourse is also a type of contact. NCSC is thus the broader offense, and NCSI is narrower, as to the contact each encompasses. Typically, NCSI would pertain to more invasive, and thus more severe conduct, for which suspension, expulsion, or termination would commonly result. NCSC merits a wider range of sanctions, from warning to expulsion, because of the wide range of behaviors covered by that offense.

An example of a question set for the NCSC offense is:

1. Was there sexual contact by one person upon another, no matter how slight, as defined in the policy? If yes,
2. Was it intentional? If yes,
3. Was it by force? If yes, policy was violated. If no,
4. Was it without consent, as consent is defined in the policy? If yes, there is a policy violation, if no, there is no policy violation.

⁵⁵ *Id.*

The set for NCSI is simpler still:

1. Was there sexual intercourse by one person upon another, no matter how slight, as defined in the policy? If yes,
2. Was it by force? If yes, policy was violated. If no,
3. Was it without consent, as consent is defined in the policy? If yes, there is a policy violation, if no, there is no policy violation.

Rubric

While the basic question rubric above is helpful, there are deeper issues and questions related to force, capacity, and consent that still need to be addressed. The expanded rubric below does so. The rubric for NCSC and NCSI is about ensuring that for each and every allegation, we are asking the right questions. If we ask the right question, we'll have a better chance of getting the right answer. The three questions that should be asked are rooted in policy. All colleges should prohibit sexual activity when it occurs under the following circumstances:

1. When it is forced; or
2. When the reporting party is incapacitated, and that incapacity is known to or should have been known to the responding party; or
3. When it is non-consensual.

It is important to understand that incapacity is a form of non-consent, but our rubric classifies it as incapacity, separate from the consent inquiry, for reasons that will be apparent below. Usually, only one of these constructs will apply to your assessment, in the end, but you should answer each question each time you analyze an allegation, to make sure you don't miss anything. An example would be when a student alleges that they were incapacitated and that they did not consent. In our investigation reports, we would typically then analyze both questions, which may then place the finding on more than one of the grounds of force, consent, and incapacity. Another example would be when someone forces sex on another person, and that person also does not consent. You should analyze both force and consent constructs to determine if policy was violated, whereas in an allegation where force results in consent ("don't hurt me, I'll do what you want"), it is the force analysis that matters, not the consent analysis. This will become clearer as you read on, but the interaction of force and consent is important to understand. Using force to gain sexual access may or may not result in valid consent, but may result in acquiescence or passivity, to avoid or minimize the effects of the violence. Sometimes, force results in consent, as with threats, intimidation, and coercion. Because this consent is not voluntary, it is not valid consent, and the force analysis is the one that matters. Typically, we encourage assessing each of the three constructs in the order they are presented here: force, then incapacity, then consent. It is the most effective approach we have found, and the best way to keep each assessment clean and separate from the others, which is how this rubric is meant to be used.

Force

Let's start with an analysis of force. Force is a good place to start analyzing because if it is present, then incapacity and consent rarely need to be assessed. It makes sense that if someone is forced into sexual activity, their level of capacity is largely irrelevant. The force is what violates the policy, whether they are fully sober or completely unconscious. The literature of the field tells us that force is fairly uncommon in college investigations, used instrumentally rather than gratuitously, for the most part. Thus, it won't typically be an issue in your investigations, but when it is, it's the only construct that matters. Usually, you can rule it in quickly, and focus on it, or rule it out and move on to the incapacity analysis. That makes for efficient progress through the three questions.

Kink

The primary wrinkle in the force analysis is that kink is becoming more and more common in students' sexual lives, and thus in the reports of sexual misconduct we receive. Perhaps inspired by *Fifty Shades of Grey*, Bondage and Discipline, Dominance and Submission, or Sadism and Masochism (BDSM) relationships, safe words, and dominant/submissive behaviors are more common than when we wrote the original Whitepaper twelve years ago. To understand how this impacts our force analysis, we must realize that not all force or violence is non-consensual. In fact, kink relationships tend to value consent very highly, and there is a lot of communication about it, far more so than in many non-kink sexual interactions. We talked above about an analysis where force results in consent (perhaps as the result of a threat), which is a policy violation. But, in kink interactions, consent can result in force, and this is usually not a policy violation. Thus, the force analysis below explicitly pertains to non-consented-to use of force, and not to kink. In kink interactions and relationships, the key to proper analysis is assessing whether consent existed, or whether use of force exceeded that which was agreed upon (also a consent analysis), or whether force continued despite the exercise of an agreed upon safe word or other negotiated boundaries. These would be policy violations. Your personal approval or disapproval of kink is irrelevant. Even if someone is harmed in the sexual interaction, as long as they explicitly consented to being harmed, you have no basis to second-guess their sexual mores any more than they have a right to question yours.⁵⁶

Outside of kink interactions, the force paradigm is one where if sexual contact is forcible, violent, and/or against the will of the reporting party, it is a violation of policy. Some antiquated policies still speak to resistance by the reporting party, and this too is part of the force paradigm, as resistance may be shown in the face of force. It may also be used to prove non-consent. In the ATIXA model, force can take four forms: physical violence, threats, intimidation, and/or coercion.

Physical Violence

Physical violence is the most obvious force construct, equated with violence or the use of a weapon. No matter how slight, any intentional physical violence upon another, use of physical

⁵⁶ Obviously, religiously-affiliated institutions are free to take a more restrictive stance, but if so, we recommend you are clear about that in policy.

restraint, or the presence of a weapon to gain sexual access will constitute the use of force. To be clear, not all physical pressure eliminates consent. If someone is hit, held down, pushed, restrained, or otherwise acted upon violently, that evidences the use of force. However, an analysis of force must account for the nature of sexual intimacy, which often has some physical elements to it. For example, if a person uses physical pressure (not physical violence) to help facilitate a change in positions, places their hands on a person's head during oral sex or is simply pressing down upon a person while in the missionary position, this does not typically constitute physical force. The key question is whether the physical violence enabled the person's ability to gain sexual access. Some versions of Feminist theory advance the idea that the act of penetration itself is enough to constitute force, but that construct is not used in the ATIXA model policy because the consent construct more effectively protects bodily autonomy.

Threats

The law defines a threat narrowly: as a direct threat of death or grave bodily injury. "If you don't have sex with me, I will kill you." If a threat is used to obtain sex, force is present (the law calls it forcible compulsion). We give a much broader interpretation than the law does regarding what constitutes a threat. For us, any threat that causes someone to do something they would not have done absent the threat could be enough to prove force. This is especially true when coupled with evidence that the threatened individual reasonably believed the threatener had the will and capacity to carry out the threat. While this is not a strict legal interpretation, it certainly is useful for college policies, if not taken to an extreme. For context, please see the section on distinguishing coercion and negotiation below, because the same analysis can be applied to threats. While it is true that if I threaten you with a negative consequence, and that threat causes you to acquiesce in sexual activity, force is present, and sexual misconduct has occurred, it is also true that the construct is meant to apply to the kinds of threats listed below, and not to negotiations over sex. While we may not want people to exert power or leverage in sexual situations, not all such exertions are threats that are tantamount to the use of force. While this may seem a little nebulous, it is up to each college community to determine how much of a threat is an actionable threat, as a community standard.

- "If you do not have sex with me, I will harm someone close to you."
- "If you do not have sex with me, I will tell people you raped me."
- "If you do not have sex with me, I will hurt you."
- "If you do not sleep with me, I will fail you in my course."

Intimidation

Are threats and intimidation different from one another, and if so, how? This is a difficult question to answer, and for colleges whose policies prohibit both, they are often interpreted as synonyms. But, they are not entirely synonymous. We define intimidation as an implied threat, whereas threats are clear and overt. For example, we have recognized that "If you don't sleep with me, I will fail you" is a threat. Yet, many of us would agree that it would be just as inappropriate for a professor to say "If you have sex with me, you'll get an A in my class." But, would that be a threat? No. A threat has to have a negative condition attached. This example "threatens" a bene-

fit. We would argue that could be intimidation, rather than a threat.⁵⁷ If the student agrees to sex, is it because the faculty member is in a position of power and authority over her? What is offered here, the A grade, is overt. What is implied is what the professor might do to the student if she does not comply with his request.

We do not mean to suggest that just having power or authority over someone is inherently intimidating. When we talk about intimidation as a type of force, it describes a situation when someone uses their power or authority to influence someone else. For example, a female student once explained that she “was intimidated” by her date because he was bigger than she was. When asked if he menaced her, or used his size to make her feel that she was in jeopardy, she said no. She may have felt intimidated, but that does not mean that he intimidated her. Like sexual harassment, there are subjective and objective requirements to the proof of intimidation. Subjectively, the reporting party must have felt intimidated, but objectively, we must be able to say that the actions would have been intimidating to a reasonable person, as well. If he had pinned her into a corner, and had used his size to menace her or block her exit, we would find this to be intimidation equating to the use of force, even if he never touched her. Otherwise, any woman could argue that a sexual overture by any man larger than she was inherently intimidating. The average-sized man is bigger than the average-sized woman, so size alone cannot be enough to establish intimidation.

Coercion

Finally, the fourth element of force is coercion. Coercion includes elements of pressure, duress, cajoling, and compulsion. Coercion is the type of force most likely to be present in college sexual misconduct allegations. In a sexual context, coercion is an *unreasonable* amount of pressure to engage in sexual activity. What is unreasonable is a matter of community standards. Sometimes, it is helpful to identify coercion by contrasting it with seduction, and all Investigators and fact-finders need to be able to elucidate this distinction. Society defines seduction as reasonable, and coercion as unreasonable. Both involve convincing someone to do something you want them to do, so how do they truly differ? The distinction is in whether the person who is the object of the pressure wants or does not want to be convinced. In seduction, the sexual advances are ultimately welcome. You want to do some convincing, and the person who is the object of your sexual attention wants to be convinced. Seek to persuade them, and they are willing to go along. Two people are playing the same game.

“In a sexual context, coercion is an unreasonable amount of pressure to engage in sexual activity. What is unreasonable is a matter of community standards. Sometimes, it is helpful to identify coercion by contrasting it with seduction, and all Investigators and fact-finders need to be able to elucidate this distinction.”

⁵⁷ It is, of course, also a form of *quid pro quo* harassment, but if the student goes through with it, an allegation of NCSI should also be investigated.

Coercion is different because you want to convince someone, but they make it clear that they do not want to be convinced. They do not want to play along. They do not want to be persuaded. And the coercion begins not when you make the sexual advance, but when you realize they do not want to be convinced, and you push past that point. Seduction can become coercion. Yet, coercion is a matter of degree, rather than being an on/off-switch the minute you push past the point where the pressure is unwelcome. Bright-line thresholds in this arena are rare, as context matters. Some amount of pressure is reasonable and socially acceptable, but too much pressure crosses the line. That line begins when someone makes it clear that pressure is unwelcome, and for some communities, any additional pressure is unacceptable. This is a very intolerant threshold. Other communities ask what amount of pressure is unreasonable, beyond the indication that pressure is unwelcome. For these communities, determining what is unreasonable should be a function of four things: duration, frequency, isolation, and intensity.

Let's say I approached you at a crowded bar, and started to come on to you. If I pressure you for sex for five minutes, will I get very far? What if I have 30 minutes to pressure you, or three hours? I have a better chance of success if I have a longer duration in which to pressure you, so the duration of the pressure is something Investigators and fact-finders need to consider to assess whether the amount of pressure applied is reasonable or unreasonable. Let's look at frequency. If I have 30 minutes, and I ask you for sex two or three times, would that be less successful than if I asked you 30 times in that 30-minute timeframe? Of course. Frequency can enhance the coercive effect. The duration of the pressure is also something Investigators and fact-finders need to look to in assessing whether the amount of pressure applied is reasonable or unreasonable. The same is true of isolation. What if we weren't at a bar? Would my pressure be more or less effective if we were together in my room on campus, with no one else present? My coercion will likely be more effective if I isolate you. Isolation is something Investigators and fact-finders need to consider to assess whether the amount of pressure applied is reasonable or unreasonable.

Finally, intensity can impact my coercive effect, probably more so than the other three factors. We're at the bar, and I'm trying to convince you to have sex with me. I spend a half-hour telling you all the reasons why you should have sex with me. I'm really doing a great sell job, as I know my product better than anyone. I tell you that I'm the best lover you'll ever have. I challenge you to ask any woman in the bar, knowing they will vouch for my prowess. I tell you you owe it to yourself to fly Air Brett. I tell you this is one roller-coaster ride you just don't want to miss. I give you my best Lounge Lizard act. Not buying it? I know why. The problem isn't me. Any reasonable person would jump on the experience I am offering, literally. The problem, I see now, is YOU. So, I change tactics. "You come into a bar, dressed to kill, flirt with me, and then think you can tease me and say no? You're just a tease. You like to lead men on and then let them dangle. You're probably frigid. You should take a chance, you might just like it. What are you, some sort of religious freak? God won't know if we do it just once. I won't tell him. What are you, the last virgin in captivity? Everyone is doing it. Come on. Virginity is way overrated. Are you afraid your parents are going to find out? I won't tell them, I promise. Loosen up. Relax."

Do you see the intensity difference? I can talk myself up to you until I am blue in the face, and I have a First Amendment right to tell you how great I am in the sack. It's not coercive, it's obnox-

ious. But, if I turn on you, and start to attack you, rather than sell myself, there is a qualitative difference. If I assail your core values, your morals, your religion, I very well may be transgressing the community standard on intensity.

In summary, once you draw a line indicating that you don't want to play my game, and I pressure you beyond that point, seduction will become coercive. What amount of pressure is acceptable is a function of the frequency, intensity, isolation and duration of my pressure. Once your community standard is exceeded, it is appropriate for you to label my coercion as force. In investigations, we often find that coercion results in consent, but it is not sincere, positive, or enthusiastic consent. It's more like, "Fine, then just get it over with." That's a useful telltale as Investigators and fact-finders are looking to determine whether the amount of pressure was reasonable or unreasonable.

Since we (well, since Brett wrote it, considering he used himself as the hypothetical Lounge Lizard) wrote this section in 2005, much has changed. Today, at many colleges, coercion is becoming a tool of the sex police. Take the following statement from one college as an example:

Coercion is the use of emotional manipulation to persuade someone to do something they may not want to do — like being sexual or performing certain sexual acts. Examples of some coercive statements include: "If you love me, you would have sex with me," "If you don't have sex with me, I will find someone who will," and "I'm not sure I can be with someone who doesn't want to have sex with me."⁵⁸

And, look at these recent statements from another university:

Coercion can also take the form of, "If you don't have sex with me, I'm breaking up with you," even if it's not explicit like that, but if your relationship has created that type of coercion where you feel like you have to have sex with them to keep them in that relationship, that could definitely be a form of coercion where we would say you're not giving consent ...under university policy, consensual unwanted sex would not be considered consensual sex and a student could go through a formal sexual misconduct case.

"When the assessment of boundary-crossing behavior honors the subjective perceptions of the reporting party over the objective assessment of a reasonable person, we start down a slippery slope of utopian sex."

This type of irrationality, and that's exactly what this is, is gripping more than just these two colleges. These kinds of institutions are establishing a zero tolerance standard for negotiation in sexual relationships. That's not The NCHERM Way. There is such as thing as unwanted consensual sex, but as the descriptor indicates, it is consensual. This is important. It is not sexual

⁵⁸ Citation omitted so as not to call out any specific school. This could happen anywhere.

misconduct by any construction of our policies or beliefs about best practices. While we're glad we're not in college today, that is little help to students caught in this Kafka-esque sexual fun-house where up is down and down is up.

In every generation, there has been a term for behaviors that don't cross the line of sexual misconduct, but are still disrespectful. Additionally, an individual may reflect on a sexual encounter and wish they had acted differently or may be embarrassed by their own prior conduct. This does not, without additional factors, meet the elements of NCSI or NCSC. Students have called it "gray rape," "regretted sex," "rapey," and now "unwanted consensual sex." College administrators must be the rational arbiters of walking this admittedly fine line, and woe be to the administrators at places like these colleges when it comes time to prove in court that they are not biased on the basis of gender. *Remember, if everything is discriminatory, then discrimination means nothing.* When the assessment of boundary-crossing behavior honors the subjective perceptions of the reporting party over the objective assessment of a reasonable person, we start down a slippery slope of utopian sex. However, it is the objective standard that matters.

An operative understanding for this discussion is that coercion = sexual misconduct. That shouldn't be up for debate. The debate is about what constitutes coercion, right? Perhaps you take the position that everyone has a right to say no, should not have to repeatedly say no, negotiate (about their body), or make some concessions for the sake of peace or to keep a relationship. We agree, but the question is, if one of your students does so, does that make it sexual misconduct? Can we or should we distinguish between sexual misconduct and "less than ideal sex?" Does it diminish what sexual misconduct is to deem that "sex for the sake of peace" is sexual misconduct?

Let's say in my relationship that I want sex (could be oral/anal/vaginal) and I am not getting sex or the sex I want. If I say to my partner, "In order for me to be happy, I need to be in a relationship with a partner who wants sex (oral/anal/vaginal) with me. I'd like that to be with you, but if not, I respect your boundaries but need to find someone who will have sex (oral/anal/vaginal) with me. The choice is yours...." If my partner then decides to do the acts I want so that I can be happy in the relationship (and implicit is that they are "equally" free to act and that they decide there is something they want in being in a relationship with me that makes it worth it to them to compromise their boundary), have they been coerced?

Have I just sugarcoated a threat? Isn't this just a nice way of saying "If you won't have (oral) sex with me, I'll break up with you or I won't date you?" Is it not sexual misconduct if I sugarcoat it, but sexual misconduct if I just lay the threat out there bluntly? Do I have a right to ask this? Does my partner have a right to refuse? Have I crossed the line if I ask with this condition and I get consent? Some colleges and administrators are blurring the line between teaching sexual ethics and preventing illegal sex discrimination. Is that what we, as educators, should be doing? Are we creating a no-negotiation college bubble that is going to fail our students when they eventually get out into the real world and realize that people negotiate sex in relationships all the time, and they won't know how to do so?

On a fairness level, if your college doesn't believe that negotiation is an acceptable word (because you believe that what is really happening is coercion), or something acceptable to do in sexual dynamics, then we need to be fair to students by telling them clearly in policy and education as soon as they arrive that, "on this campus, you can't negotiate for sex. If you do, we'll sanction you." Some truth in advertising could go a long way here if that is your college philosophy, but we really hope it isn't. The current political environment isn't the right time to become militant about consent or coercion, if there ever is a right time. There will be a backlash, so be careful what you wish for. Yes, there are waves of students across colleges that want us to redefine sex offenses to align with their sexual mores, and they want "rapey," "gray," "regretted sex" to be considered policy violations. When they are college administrators someday, that will be their prerogative. Until then, we feel strongly that today's administrators must resist this push, and maintain objective standards for sex offenses. We also acknowledge the legitimacy of feelings of trespass, even trauma, such students might endure after such an experience. Just because behavior does not cross a line does not mean it is not harmful, a betrayal of trust, or emotionally painful. We trust that colleges will afford resources, counseling, and support to such students, regardless of whether their allegations factually cross the line or not.

Can colleges that subscribe to the no-negotiation philosophy honestly say that they are making it clear to students what their interpretation of the coercion policy will be? The college above publishes it in pretty clear examples on its website, right? Now, the above-referenced article means that university's community knows how its administrators interpret coercion. But, what about before that article was published? Those administrators gave those quotes because they clearly want students to know how they interpret policy. Is that enough? Maybe those standards are taught in other ways on these colleges (and others like them) as well? We hope so.

Maybe we should be telling prospective students about this in admissions materials even before they arrive, so that they can make an informed choice about the college they want to enroll in, and the rules under which they wish to live? What do you think of that as a recruitment tool? We think this is another manifestation of the very real tension between consent utopians and consent realists. So, which kind of college is yours? Overreaching on coercion is just another way of being the sex police. We've stated before that's not our philosophy. For those who argue that stricter approaches are their prerogative, they may be, but when higher education gets away from the golden mean, Congress or state legislatures tend to push through more regulation or rigid laws sooner or later. The next four years may not be especially hospitable to zealous sexual correctness.

Incapacitation

Let's start the section with an important point. Your institutional sexual misconduct policy needs to be based on incapacity. Not intoxication. Not impairment. Not inebriation. Not being under the influence. Not being too drunk to consent. If you choose any other basis than incapacity, it is going to run you into trouble under Title IX. And, frankly, unless you have religious or moral reasons, there is no reason that you should have a problem with drunk sex, legally. If two people want to go out, get drunk, and hook up, why are we trying to police that? As long as they are

okay with what they did, it's none of our business. Distinguishing between drunkenness and incapacity is a main goal of this section, along with providing tools for assessing incapacity. Here is what the ATIXA model policy says about incapacity:

- Sexual activity with someone you know to be or should know to be incapacitated constitutes a violation of this policy.
 - Incapacitation can occur mentally or physically, from developmental disability, by alcohol or other drug use, or blackout.⁵⁹
 - The question of what the responding party should have known is objectively based on what a reasonable person in the place of the responding party – sober and exercising good judgment – would have known about the condition of the reporting party.
 - Incapacitation is a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).
 - This policy also covers a person whose incapacity results from mental disability, sleep, unconsciousness, involuntary physical restraint, or from the taking of rape drugs.

Here are some critical understandings that we should all have about incapacity. First, there are two forms of incapacity, mental and physical. Mental incapacity results from cognitive impairment, such as developmental disability. Temporary mental incapacity can result from conditions such as epilepsy, panic attacks, and flashbacks. Physical incapacity results from a physical state or condition, such as sleep or alcohol or other drug consumption. As we build knowledge of trauma, and its impact on the body during a perceived threat event, we can add to the body of incapacity knowledge. During trauma, the body's autonomic responses include fight, flight, and freeze. For some reason, these three seem to fall into a pattern in our experience, where fight is most common when facing IPV, flight is most common in stalking incidents, and freeze is most common to sex offenses. Of course, any of the three reactions can occur with any perceived threat, but the key point to take away here is that freeze as a response can be a form of physical incapacity.

The most common form of incapacity is alcohol-induced incapacitation. Yet, it is often confused with what we call the “i-words” that often are applied to alcohol use. There are five i-words: (under the) influence, impairment, intoxication, inebriation, and incapacitation. They are not synonymous, and are more-or-less listed in order of severity of alcohol effect. One becomes under the influence of alcohol as soon as one has anything to drink. Impairment begins as soon as alcohol enters the bloodstream, and increases with consumption. Intoxication and inebriation are synonyms, as is drunkenness, and corresponds to a .08 blood alcohol concentration under most state laws. Incapacitation is a state beyond drunkenness or intoxication. What is confusing about

⁵⁹ Blackout, as it is used in scholarly literature, refers to a period where memory formation is blocked. A period of consistent memory loss is termed a blackout, whereas periods where memory is both lost and formed intermittently can be referred to in the literature as a brownout. Neither state of blackout nor brownout automatically indicates incapacitation, but factual context can establish that a blackout or a brownout is occurring in an individual who is incapacitated (where incapacity is defined as an inability to make rational, reasonable decisions or judgments). It is a mistake to automatically associate memory loss with incapacitation; they are often coupled, but not always (see e.g.: Mundt & Wetherill – 2012; NIH 2004).

incapacity is that it may have nothing to do with an amount of alcohol or a specific blood alcohol concentration. In fact, some drunk people will be incapacitated, and some will not. Incapacity can be defined with respect to how the alcohol consumed impacts on someone's decision-making capacity, awareness of consequences, and ability to make fully-informed judgments. The most obvious form of incapacity is sleep or unconsciousness. A sleeping or unconscious person can't make informed judgments about sex, and neither can a person whose incapacity from alcohol is equivalent to being asleep.

Incapacity Defined

So, incapacitation is a state beyond intoxication, where decision-making faculties are dysfunctional. In order to consent to sexual activity, you must be able to understand Who, What, When, Where, Why, and How with respect to that sexual activity. This is another way of stating the law's expectation that consent be informed, and any time it is not, consent cannot be effective. Where someone lacks the ability to make rational, reasonable judgments (for any reason, but commonly as a result of alcohol (or other drug) consumption), they are incapacitated. An incapacitated person could be stark naked, demanding sex, but if they are incapacitated at the time, and that is known or should be known to the responding party, any sexual activity that takes place is misconduct, and any factual consent that may have been expressed is IRRELEVANT. For example, a blacked-out person may say "yes" when asked if they want to have sex but, if incapacitated, they will not know they are saying it. Another way to think about incapacity is as a period of temporary disability.

Blackouts

It is important to understand what we now know about how "blackouts" may be related to, yet are distinct from, incapacitation. A previous version of this Whitepaper equated blackout with incapacity, but research conducted since that Whitepaper was published has caused us to retract that equivalence. Unfortunately, decoupling blackout from incapacity makes it harder to assess these kinds of allegations, but we cannot ignore the empirical research for the sake of convenient analysis. Students may use the term "blacked out" to describe their physical reaction to excessive alcohol or drug use, but what does that term actually mean? The term "blackout" refers to a situation when a person is awake and functioning, but is unable to create memories for events and actions. "Blackout" thus refers to amnesia for places a person went or things they did while intoxicated. Not all blackouts are the same. An individual may experience an *en bloc* blackout, where large chunks of time are missing from their memory, often spanning hours or more.

More common is the *fragmentary* blackout, often referred to as a brownout or greyout, where memory may be spotty. Blacking out is distinct from passing out, where a person is asleep or unconscious from excessive alcohol consumption. Comparatively, blackouts do not involve a loss of consciousness, although a blackout could precede passing out or losing consciousness. In understanding the phenomenon of blackouts, the following description from the National Institute on Alcohol Abuse and Alcoholism may be helpful: "Blackouts are periods of amnesia during which a person actively engages in behaviors like walking and talking, but does not create memories for these events as they transpire. This results in missing periods of time in the person's

autobiographical record.”⁶⁰ Someone experiencing a blackout may, while in the blackout state, be able to recall events that happened earlier in the evening or in the past, and may be able to do the same activities they could do under normal circumstances, but they are not creating memories for the events that occur during the blackout. To others, they may appear to be fully functional.

The ability to effectively consent to sexual activity is tied to *capacity*, or more precisely, to *incapacity*. Someone experiencing a blackout, a brownout, or a greyout, may or may not be incapacitated. Lacking memory after an incident does not automatically mean they lacked decision-making capacity for an act as it transpired. For this reason, policy language should be precise and not conflate terminology. The most straight-forward way to compose a policy on incapacity is with the following language:

“Having sex with someone whom you know to be, or should know to be, incapacitated (mentally or physically) is a violation of the sexual misconduct policy.”

You may choose to define incapacitation in your policy, as well. We prefer the following common sense definition: Incapacitation is defined as a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).

Assessing Incapacity

Physical incapacities are sometimes quite overt, and other times more subtle. Incapacitation is usually a subjective determination that you will make after the incident, in light of all the facts available. Rarely is there objective evidence of incapacity, though increased use of video and social media is changing that to some extent. Incapacitation is subjective because people reach incapacitation in different ways and as the result of different stimuli. Individuals exhibit incapacity in different ways. Incapacity is dependent on some or all of the following factors:

- Body weight, height, and size;
- Tolerance for alcohol and other drugs;
- Amount, pace, and type of alcohol or other drugs consumed;
- Amount of food intake prior to consumption;
- Voluntariness of consumption;
- Vomiting;
- Propensity for blacking out (mentally or physically);
- Genetics.

⁶⁰ National Institute on Alcohol Abuse and Alcoholism (June 2014). *Shining a Light on Alcohol Blackouts*, *NIAAA Spectrum*, Vol. 6, Iss. 2. Access at <https://www.spectrum.niaaa.nih.gov/archives/V6I2Jun2014/features/light.html>

Evidence of incapacity can come from a combination of context clues, such as:

- A witness or the responding party may know how much the other party has consumed;
- Slurred speech;
- Bloodshot eyes;
- The smell of alcohol on the breath;
- Shaky equilibrium;
- Vomiting;
- Outrageous or unusual behavior;
- Unconsciousness.

None of these facts, except for the last, may constitute – in and of themselves – incapacitation. But, the process of finding someone responsible for a violation of the sexual misconduct policy involves an accretion of evidence, amounting to a sufficient or insufficient meeting of the standard of proof. A preponderance may be met with some combination of the first seven, or all eight factors. For example, it might be met if someone is passing in and out of consciousness, and there is a high probability they could pass out again. Or, it might be met if someone is vomiting so violently and so often that they are simply in such bad shape that they cannot be said to have capacity.

Sexual Politics

One of the factors that leads to clouded judgment on the issue of incapacity is the very sexual context of the issue. Each of us has sexual politics, whether we admit it or not. Our sexual politics derive from our morals, religious values, open- or close-mindedness, sexual histories, role models, and culture, amongst other factors. They play into our decisions on sexual misconduct, especially with respect to incapacity. “She was asking for it.” “She brought him to her room.” “She got herself drunk.” “Well, he was drinking too. Maybe she raped him.” These rape myths have adherents because of sexual politics. The best way to address the myths of incapacity is with a story, believe it or not, about a Mercedes™. You have to remove incapacity from the sexual context to truly understand it, so please indulge this fantastical exploration from a different tangent.

Can a Mercedes™ be a Sexual Metaphor?

Let’s suppose that I like Mercedes-Benzenes™ and I have always wanted one. You know the one I mean, right? The red one. The convertible. The \$100,000 one. So, one night I go out drinking with my buddies. We down a few beers, and somehow, the car comes up in conversation. They tell me, “You know, Brett, you deserve that Mercedes™. You work hard, you should have it.” We have some more to drink. I begin to think I do deserve it. Finally, by the end of the night, I’m in my cups (pretty drunk). They’re egging me on now. “Just lease it. You don’t have to have \$100k now. Pay later.” I’m sufficiently drunk that I start to believe them. I work hard. I deserve that car. I stumble out of the bar, and march right down to my local all-night, drive-thru Mercedes™ dealership. I pull up to the window, and the salesman greets me. I tell him I want that

red convertible. Sure, he says, noting that I'm obviously drunk to the point of incapacity. Just sign right here. He even manages to tack on extra for the floor mats and undercoating. No one pays

“An agreement to have sex is a contract. Just like buying a car, buying a house, getting married, and any number of personal transactions. All parties to the contract must have a full understanding of all the terms of the agreement, and must accept them.”

for undercoating. But, I sign, and drive off in my dream car. The next morning, I wake up next to my wife. “Honey, I had the best dream last night. I dreamt I bought that Mercedes™ I've always wanted.” She looks out the window and points. “I don't think it was a dream.” Whoops. I look out. There it is, in the driveway. The signed lease is sitting on my nightstand, too. \$1,500 a month. Not a mortgage, a lease. My wife takes one look, and in the way only my wife can, tells me to take it back. “I can't,” I say, “I signed a lease.” She doesn't care. I have to take it back.

I drive back to the dealership, and there is the guy from last night. I tell him he needs to take the car back. He laughs. I tell him I was drunk. I didn't know what I was doing. Yes, you sure were, he agrees. But, once you buy a prize, it's yours to keep. I insist. He refuses. I sue him (after all, I am a lawyer).

So, what is the judge going to do? Will I win? Does the dealer have to take the car back and cancel the lease? It may surprise you to know that the answer is yes. We formed an agreement, but in order for a contract to be legally valid, there must be a meeting of the minds. All parties to the contract must have a full understanding of all the terms of the agreement, and must accept them. Simply, we must understand Who, What, When, Where, Why, and How. If any material term of the agreement is missing, there is no contract. The agreement is invalid. The court will require the dealer to take the car back and cancel the lease if I was incapacitated, did not know what I was doing, and my state was known to the dealer, or he should have known.

Why do you care about a Mercedes™? You care because an agreement to have sex is a contract. Just like buying a car, buying a house, getting married, and any number of personal transactions. This story helps to cut through the mythology and the politics. I wanted the car (sex). I came to your dealership (room). I signed the deal (consented). But, I did not understand any of the terms and conditions, so no sale (sexual misconduct). I think we would all agree that the dealer took advantage of a beyond-drunken customer, regardless of whether I made it easier for him to do so. The law protects us from being taken advantage of by unscrupulous dealers and opportunistic sexual aggressors. Incapacity is a broad legal concept. Applying it to sex is just one narrow window of its applicability. (For the record, I neither own nor lease a red, \$100,000 Mercedes™ convertible.)

But, I Was Drunk Too, So She Raped Me

What if the responding party's defense is “Well, I was drinking too. Maybe she raped me.” How does that hold up to the Mercedes™ analogy? Let's assume the salesman at the drive-in window is incapacitated, too. Now, both people on either side of the transaction are unable to appreciate

Who, What, When, Where, Why, and How. Doesn't that just make an already invalid transaction all the more invalid? Sure, it does. Arguing that "he was drunk too" doesn't function to excuse the misconduct, especially since it is almost always disingenuous. If he really felt victimized, why didn't he make an allegation? Let's be more specific. Most of the time, when someone argues they were drunk too, this is inadmissible evidence. We must remember that almost all colleges have a rule that being drunk does not excuse a policy violation, and even if you don't have that rule spelled out (you should), being drunk does not excuse the violation of a policy, or the trespass on another human being. What often occurs is a situation where the reporting party is incapacitated, and the responding party is merely drunk. In theory, a mutual incapacity could exist, but let's not jump to that conclusion too readily.

Jumping to Conclusions

In all of the combined years of your authors' practice, we have NEVER seen a true case of mutual incapacity. We don't doubt it could exist, but it's a unicorn. We have seen plenty of cases where two people were drunk, but that is not a policy violation at most colleges. But, mutual incapacity? How would two genuinely incapacitated people have the physical coordination necessary for sexual intercourse? And if they did, how would they remember it? The courts operate on the presumption that if a man is able to engage in and complete the act of sexual intercourse, he is not incapacitated.⁶¹ We have heard stories of students using Cialis™ to counteract what they call "beer dick," and if you have that factual situation, you'll have to piece through whether the evidence indicates intentional predation, or whether the mutual incapacity makes it impossible, from an evidentiary perspective, to determine who did what to whom. Of course, heterosexual sexual intercourse isn't the only way to have sex. Incapacity might make it difficult to achieve penetration by a penis, but lots of sex doesn't involve penetration. Or penises. So, this example is heteronormative. Perhaps in a non-penetrative interaction, mutual incapacitation could be likelier? It could be, but then we'd still have the issue of proof. How would incapacitated people prove incapacity? Maybe we'd find independent corroboration. But, who initiated what? Who is the reporting party and who is the responding party? There is a strong likelihood that we could not find a preponderance to establish a violation in such a case.

Self-Incapacitation

There is another issue with respect to incapacitation. Many Investigators and fact-finders get hung up on the distinction between allegations where the responding party incapacitates the reporting party, and allegations in which the reporting party self-incapacitates. For purposes of a resolution under Title IX, whether the reporting party self-incapacitates or not should not impact the finding. The question under the policy is whether the reporting party was incapacitated, not how they became incapacitated. While self-incapacitation may not impact the finding, it may have an impact on the sanction. It would be perfectly reasonable for a fact-finder to consider a harsher sanction to a student accused of deliberately and surreptitiously plying someone with spiked punch or a rape drug,⁶² than it would in a fact pattern where the reporting party had self-incapacitated.

⁶¹ *Mallory v. Ohio University*, 76 Fed. Appx. 634 (6th Cir. 2003).

⁶² By the way, since we wrote the original Whitepaper, rape drug cases have become something of a unicorn as well, at least in our practice. There are plenty of allegations of rape drugs, but their use is rarely, if ever, proven by evidence. We do have a ton of students who don't know how to drink, and who are surprised by how alcohol impacts them. But, this is inexperience,

Poor Judgment by the Responding Party

An interesting question we are often asked is the following: If the policy asks not only whether the reporting party was incapacitated, but also if the responding party knew that or should have known it, what should the responding party have known when they themselves have been drinking? The “should have known” part of the policy – what lawyers call constructive knowledge – can be misleading. It is not a subjective question of what the responding party should have known. It is an objective question that might be better phrased as “what would a reasonable person, in the position of the responding party, have known?” And, of course, a reasonable person under the law is assumed to be sober and using good judgment. That’s what reasonable people do.

Poor Judgment by the Reporting Party

At no point is it appropriate to excuse a violation of policy by the responding party because of poor judgment or a lack of responsibility by the reporting party. Two wrongs do not make a right. To blame the reporting party for irresponsible decisions confuses the difference between responsibility and culpability. The question in a college resolution is whether the responding party is culpable for a violation, not whether the reporting party was irresponsible (though they may have been). It is also inappropriate to hold the reporting party accountable for any minor policy violation they may have engaged in during the incident.⁶³ Further, allowing a responding party to file an unfounded counter-claim against the reporting party could make the institution a party to retaliation under Title IX. Where a counter-claim is valid, it ought to be addressed in a separate resolution process, in most circumstances.

Consent

Consent is the third of the three constructs discussed in this section, and “affirmative” consent is a political hot potato as of this writing. Fortunately, consent isn’t really controversial amongst students right now. They’ve embraced it. This generation of students owns consent, and that is a positive shift that was even underway twelve years ago when we published the original Whitepaper. So, why did we place quote marks around the term “affirmative” above? Because we don’t use the term. Using the modifier “affirmative” belies a misunderstanding of what consent is, as if there is some other kind of consent. So, for the record, consent is affirmative, by definition. Consent in sex is simply clear permission by word or action for specific sexual activity. The ATIXA model policy is consent-based, it frames consent positively (by its presence, not its absence), and it is a pure-consent construct. That means that the policy is violated by non-consent, without any other requirements of proof, such as force or resistance.

Consent as a concept is one whose time has come because of the resonant way in which the idea of consent ratifies the right we all have to bodily autonomy. We all have the right not to be

not a drugging. There is also the issue of how alcohol interacts with other drugs. This trend away from using rape drugs on campuses may be in part because it is relatively easy for a predator to find a self-incapacitated person than to take the risk of incapacitating someone with a drug. As we always teach our students, alcohol is the rape drug of choice on college campuses. Also, we use the accepted phrase “rape drug” while noting that we do not apply criminal language when discussing policy terminology.

⁶³ For additional reading, see ATIXA’s Position Statement in Favor of Amnesty Policies at <https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-in-Favor-of-Amnesty-Policies.pdf>

acted upon by someone else unless and until we give permission for it. Consent is a requirement for mutual respect, and the need to communicate that respect by word or action. Ideally, consent is neither given nor received, but exchanged. Bodily autonomy is key here, because other than defining sex offenses by consent, the only other two choices are to define it by force or by resistance. But, it is not true that someone's autonomy is only violated if they are forced, or if they resist the act. Autonomy is not respected any time something is taken from someone without their consent.

There are those, however, who believe that consent-based policies are unfair. They've conveniently linked affirmative consent to a due process failure, but that is just sleight-of-hand because they don't want to be seen as simply opposing the concept of consent, outright, which is what they are actually doing. Still, part of the goal of this publication is to ensure that you are using the consent construct correctly, so this must be briefly addressed for any of you who might misunderstand or misapply it.

The assessment of consent is a determination by the institution, not something proved by the reporting party or the responding party. The college determines whether its policy was violated, and has the burden to do so. The college does not place the burden on the reporting party to prove non-consent, and it does not place the burden on the responding party to prove consent. The concept of the presumption of innocence is based in criminal law, and really doesn't apply to college processes in a linear legal fashion.⁶⁴ However, it is important to state that while colleges don't really presume anything, because presumptions are a criminal construct, we certainly cannot presume that a responding party is in violation of our policies unless and until he⁶⁵ can prove he obtained consent. It is not the burden of the responding party to show consent, but the burden of the college to prove non-consent.

Put another way for simplicity, if the parties are equally persuasive as to their assertions of consent and non-consent, the college has not met its burden and the responding party cannot be found in violation of the sexual misconduct policy. The opponents of consent insist that "affirmative" consent is burden-shifting by design, and that the shift in burden is a violation of due process and unconstitutional. Precision is important here. By design, consent shifts the burden to a sexual initiator or actor to obtain consent, from a policy perspective, but it does not shift the burden to them to prove that consent if sexual misconduct is alleged. Put succinctly, it shifts the burden in the bedroom, but not in the college "courtroom."

Due process hawks won't agree, and will continue to insist that the consent construct offends the U.S. Constitution, but we consider ourselves due process hawks, and we have a question: If "affirmative" consent is unconstitutional, why then isn't the burden-shifting in robbery unconstitutional, too? You see, if someone takes something from you without your permission, it's a robbery. But, if they take it from you with your permission, it is borrowing, or a gift. Thus, property crimes like robbery, theft, and larceny are consent crimes. Take the property without consent and you have committed a crime. Take the property with consent and you have a brand new bicycle. If it isn't unconstitutional burden-shifting to undergird property crimes with consent, it isn't a due

⁶⁴ Mostly because the Fifth Amendment does not strictly apply to college processes in the way it does to criminal proceedings.

⁶⁵ He or she or they or other terms that recognize fluid or non-binary identities.

process issue to do it with sexual misconduct, either, as long as you don't misapply it by placing a burden of proof on the responding party that a consent-based policy does not require. Another analogy might be to fighting. Do it on the street, without the other person's okay, and you could be arrested for assault or battery. Do it in a ring, with the other person on board, we'll call it boxing, and you could be paid for it. Or at least get a good workout. Consent. It turns a crime into a sport, and it's a perfectly viable and constitutional legal concept.

Colleges differ in how they define consent. Here are the rules related to consent from the ATIXA model policy:

Consent is:

- clear, and
- knowing, and
- voluntary,
 - *words or actions,*
 - *that give permission for specific sexual activity.*

Additional clarification:

- Consent is active, not passive.
- Silence, in and of itself, cannot be interpreted as consent.
- Consent can be given by words or actions, as long as those words or actions create mutually understandable permission regarding willingness to engage in (and the conditions of) sexual activity.
 - *Consent to any one form of sexual activity cannot automatically imply consent to any other forms of sexual activity.*
 - *Previous relationships or prior consent cannot imply consent to future sexual acts.*
 - *Consent can be withdrawn once given, as long as that withdrawal is clearly communicated. Once consent is withdrawn, sexual activity must stop reasonably immediately.*
 - *In order to give consent, one must be of legal age.*

For more on consent, see the supplemental section ahead where we apply these concepts in two case studies on [page 58](#) and [page 63](#).

[Tying the Three Elements into an Analytic](#)

Now that we have a comprehensive understanding of force, incapacity, and consent, we can weave them into a coherent rubric. The rubric is a three-question progression that can be applied to any NCSC and/or NCSI allegations. The order in which we ask our questions is important because if the answer to the first question is yes, you don't need to progress to questions two and three. If the answer to the second question is yes, you don't need to progress to question three. The first question is:

Is there evidence that force was used to gain sexual access (as force is defined under college policy)?

If the answer is yes, you are done (unless there is a kink interaction, as discussed earlier). Find the responding party in violation of your policy, and sanction proportionally to the severity of the violation. Do not pay any attention to issues of consent or incapacity that may be present in the allegations once you find that force was used. They are irrelevant if force was present. Force, in and of itself, establishes a policy violation. Inquiring about consent is a distraction. For example, I threaten you: “If you don’t have sex with me, I’ll kill you.” You respond “Do whatever you want, just don’t kill me.” You just consented. If we engage in a consent-based inquiry, the answer is yes, there was consent. Again, if you ask the wrong question, you get the wrong answer. If the answer to the question of whether force was used is no, then we have to inquire into incapacity as the second question. Incapacity is a smart second question from an efficiency perspective, because it can be quickly ruled out in any allegation in which alcohol, sleep, or other incapacitating conditions are not alleged. And, asking about consent before incapacity may lead you to the wrong outcome; some incapacitated people do consent, in fact, but that consent is not valid. The incapacity question, as above, is:

Was the reporting party incapacitated, and did the responding party know that, or should they have known it?

You will only engage in inquiry on this second question if there is evidence that the reporting party was developmentally disabled, asleep, using alcohol or other drugs, or has any condition that might produce blackouts, loss of consciousness, or similar temporary incapacities. We already know that force is not an issue, because you have ruled it out with the first question in the rubric. The critical competency here is to make sure you do not indulge in a consent-based inquiry. Just like it is within a force-based inquiry, a consent-based inquiry is irrelevant here. Even if the reporting party verbally consented, or signed a contract, they cannot validly consent if they are incapacitated. THERE IS NOTHING AN INCAPACITATED PERSON CAN DO OR SAY TO MEANINGFULLY, VALIDLY CONSENT TO SEX. Too many incapacity inquiries become mired in “but she came on to him.” It does not matter. If the evidence shows, by a preponderance, that the reporting party was incapacitated, move on to the below sub-questions about the responding party’s knowledge. If the evidence does not show incapacity, move on to the third question in this analytic (consent).

“If the light is yellow, that’s still a violation... if the responding party argues ‘I asked her, and she did not respond (by word or action), so I thought it was okay,’ you are done... You thought you were going to get through the intersection in time, but you caused a collision.”

Does the evidence show that the responding party knew – as a fact⁶⁶ – that the reporting party was experiencing this incapacity? If so, find the responding party in violation of your policy, and sanction proportionally to the severity of the violation. If not, ask the next question.

Should a reasonable person, in the position of the responding party, have known of the reporting party's incapacity? If so, find the responding party in violation of your policy, and sanction proportionally to the severity of the violation. If not, you have determined that this allegation cannot be resolved using an incapacity construct. Move on to the third question in this rubric, the consent question:

What words (or actions) by the reporting party gave the responding party permission for the specific sexual activities that took place?

This is a pin-down question directed to the responding party. If the evidence shows words or actions that are reasonable indications of consent, you are done. There is no violation of policy. But, if the evidence does not show words or actions that are reasonable indications of consent, find the responding party in violation of your policy, and sanction proportionally to the severity of the violation. Consent is the primary inquiry you will need to assess allegations today, though in 2005, the incapacity construct was used more frequently than the consent analysis. The answer to the consent question is either a green light, a yellow light, or a red light. If green, go. There is no violation. If red, you likely have a predatory offender on your hands. If the light is yellow, that's still a violation. It's reckless and risky to run yellow lights. For example, if the responding party argues "I asked her, and she did not respond (by word or action), so I thought it was okay," you are done. No consent was communicated by word or action. Consent cannot be assumed through silence alone, and this is a violation of policy. You thought you were going to get through the intersection in time, but you caused a collision.

In rare cases, you may need a few other consent-based inquiries. For example, you may need to ask whether the reporting party was of legal age. Or, if the reporting party agrees that he did consent, you may need to ask whether he withdrew that consent. If he did, and that withdrawal was clearly communicated to the responding party and the responding party did not stop reasonably immediately, that is sexual misconduct. One of the benefits of this analytic is that it will help you to more effectively control inflammatory evidence, such as evidence about the sexual character of the parties. When you are asking only these three questions, it becomes more difficult to see how information about sexual history or character can help to answer any of these questions. Sexual character is usually a way for sexual politics to seep into the inquiry, and the rubric is designed to screen them out. Of course, sexual character isn't always irrelevant. When a party puts their own character into evidence, you have a right to inquire into it. And, when you are investigating a predatory pattern, character evidence can help you to establish a pattern.

⁶⁶ Factual evidence of knowledge of incapacity is relatively rare. It might appear in cases where the responding party admits to a witness that she knew, or where it is stated in a text message or on video, or by admission. But, practically speaking, almost all incapacity analysis hinges on the "should have known" element of constructive knowledge.

Section Conclusion

If you ask these three questions, in this order, it will impose discipline on your decision-making process. At many colleges, we have so embraced the concept of consent that we tend to over-apply it to all sexual misconduct allegations. This leads to flawed analyses. Hopefully, the message that has emerged from this section is about when and how to apply the consent construct, and when the force and/or incapacity constructs should be used, to the exclusion of consent-based inquiries. Where you find the other inquiries seeping into the question you are analyzing, you will have to challenge whether those inquiries aid in your decision, or confuse the issue you are trying to isolate. We think you will find this rubric to be of great aid in the vast majority of allegations you encounter.

Are You the Sex Police?: A supplement to the consent discussion above

One of the reasons we prioritized re-issuing and updating the 2005 Whitepaper this year is to provide further corrective direction as higher education continues to veer off-course in its resolutions of college sexual violence allegations. The NCHERM Group is widely credited with helping to popularize and institutionalize consent-based policies in higher education. As such, we have a responsibility to the field to make sure that this body of knowledge is used correctly, and to continue our thought-leadership on the ways that consent is applied in theory and practice. As usual, we'll be blunt. Some of you have become the sex police. Maybe you wound up in this role as the result of political pressures – real or imagined – that make you feel like you need to be policing student sexual mores. Or, for some of you, you took the 2011 DCL as a license to become the sex police that you always wanted to be. Or, maybe it has been a gradual and inadvertent shift for you. For whatever reason, if you have become the sex police, we want you to know that The NCHERM Group condemns what you are doing in the strongest possible terms and entreats you to change your thinking and your practices. Our tone in this section reflects the gravity and import of the situation.

Sex policing isn't working for you. The field is being hammered by an unprecedented wave of litigation, and higher education is losing! Do you remember the days when judges were deferential to the internal disciplinary decisions of college administrators? If those days are rapidly receding or are gone, you have to ask yourselves what role you have played in that. If you are the sex police, your overzealousness to impose sexual correctness is causing a backlash that is going to set back the entire consent movement. It is imperative that you self-correct and find a golden mean or middle path on this issue. You are sowing the seeds of your own destruction. We've been beating this drum since 2012, and we will get progressively louder and louder until you get it. If you persist, you will touch off a new wave of due process protections in the courts and in Congress, which will once again skew the playing field for victims and those who are accused – a playing field some of us have worked our entire careers to level. You don't want that because it will deeply inhibit your ability to spread the sexual correctness to which you are so very wedded. So, stop it. Now.

If you don't know what we mean by sex policing, it's happening on two levels: the substantive and the procedural. Procedurally, responding parties need to be accorded the full measure of their rights. The courts are starting to smack colleges down left and right when due process corners

“Human interactions are messy, confusing, and illogical. That includes sexual interactions. You should be struggling to apply the consent rules at your college. You should be wrestling with them, challenging your understandings, and trying to find the right balance.”

are cut, bias is in play, and politics motivate the imposition of corrupt outcomes. You need to get your procedural houses in order, because no one is served when the court overturns your decision, especially you, so why drive toward an outcome that won't be sustained by the scrutiny of the courts?⁶⁷ We want you to suspend and expel those who commit sexual violence at colleges. This has been a central theme of our work for almost 20 years. But, we need you to do it by the book. If the preponderance of the evidence standard of proof is a fairly minimal standard on the continuum of proof, we need you to apply it with steadfast rigor. Preponderance is an on/off switch. You're either

over 50% with the evidence you have found, or you're at 50% or under. Play it straight and keep your thumb off the scale. The NCHERM Group's Managing Partner, Daniel Swinton, says it best when he trains on Title IX: “If you picture the scales of justice, with evidence on either side, the Title IX Coordinator is the post in the middle, holding up the scales. The upright neutrality of the post allows the scale to tip, but does not cause it to do so. The evidence does, and nothing else should.”

For those of you who relish being the sex police, we don't respect what you are doing. Your thumb is on the scale, and if you intend to keep it there, we beseech you to at least be intellectually honest about it. Your students should know that you intend to examine their sexual decisions under a microscope. Your applicants should know that when choosing a college, you err on the side of caution and kick accused students out even if the evidence is uncertain. They should know you aren't just victim-centered, you are victim-favoring. Perhaps many students will like that. They will seek your college out because of your bias. But, for those that don't, the truth in advertising will help them to choose a college that values fairness and equity, if that is their preference. It's ours.

The rest of you have your thumbs on the scale inadvertently. Some of you stumbled into sex policing and simply need some perspective to realize you've gone too far. You are willing to self-correct, and we are eager to help you. We want you to be victim-centered. Every college should be. But, being victim-centered is different than being victim-favoring, and we recognize and honor that you are intent upon learning how to find the correct balance and upon affording equal dignity to every student, regardless of their role in your resolution process. You're our kind of administrator, so keep reading – this section is for you!

⁶⁷ And we'll note, as we have since day one, that the offending colleges being slapped the hardest by the courts are not those who have shifted to the civil rights model, but those who still cling to using the traditional student conduct process to resolve allegations of civil rights discrimination.

That brings us to the second form of sex policing, which is substantive. Put simply, you are misunderstanding or misapplying the rules. “Affirmative consent” policies are the norm now on colleges, and they are a boon to the cause of equity, but they need to be used correctly or the entire concept will get a bad name. Consent is clear permission for sex by word or action. It’s an elegant concept that is simple to capture in policy, but difficult to apply in practice. We can’t change that for you. Human interactions are messy, confusing, and illogical. That includes sexual interactions. You should be struggling to apply the consent rules at your college. You should be wrestling with them, challenging your understandings, and trying to find the right balance between being the sex police and allowing free reign for abusive sexual practices. Some of you are off track because you are applying a utopian lens to consent. You consciously or unconsciously want sex to be ideal, every time. Get over that. Sex is rarely ideal, especially for those 18-24 in age. Having less-than-ideal sex is unfortunate, but probably universal at some point for all people who are sexually active. We have to be able to separate less-than-ideal sexual experiences from those that are sexually transgressive of our rules. How?

To do so, we must understand that consent is imperfect in both theory and practice. It wasn’t meant as a perfect construct, but as a better construct than the force and resistance-based policies that defined sex offenses a generation ago. Because consent is an imperfect construct, applying it with rote literalism will not produce good results. Consent is meant to be applied in context, not in a vacuum that assumes all students are equal and all sexual events have parity to all other sexual events. Our consent rules need to be malleable to account for the vagaries of the human experience, and we need to be flexible enough to allow for the fact that human communication and interaction are imperfect. Late adolescence can teach people how to become sexual beings, but we can’t expect that students arrive at college fully equipped to think and act as mature, respectful sexual partners. They will fumble a bit. They will fail to make each sexual interaction ideal. They will not live up to our standards or theirs. So, should we discipline them for that developmental failure? We should impose our discipline for abusive transgressions, those actions according to OCR that have a discriminatory effect on the basis of sex or gender. Rudeness, insensitivity to one’s partner, having underdeveloped communication skills – these are behaviors that need to be corrected by appropriate intervention – but only the sex police believe they need to be disciplined.⁶⁸

In being sensitive to our own tendencies to want to be the sex police, we also need to consider that issue of intent. Should we give someone a break if they transgress against another student, but didn’t intend to do so? No, of course not. But, intent is much more complex than just the simple question of whether someone meant to transgress against another person’s sexual boundary. At this point in our understanding of consent theory, we’d say that intent is an aggravating factor, for sure. If you have the intent to violate someone, that heightens the abusiveness of the act. But, lacking the intent can mean a lot of different things, depending on context. It can mean carelessness, recklessness, naïveté, drunkenness, and many other things which may equate to a violation of policy, or might not. It’s not fair to say that the lack of intent means someone didn’t violate the rules, but we need to become better at reading the context to know more precisely what the lack of intent means to our ultimate determination of an allegation.

⁶⁸ It is important to note that some may self-define as survivors based on such experiences and are entitled to access support services, even if not policy processes.

To help us get there, we posit that you should look at consent more as transactional and contextual, meaning that we view the entire sexual interaction and the context of the larger relationship. We contrast that to an approach that is more particularized and occurrence-based, where finders-of-fact tend to hyper-focus on each touch within a sexual interaction and ignore the larger context of the relationship. There are always exceptions, but you will be best served by evaluating consent based on the perspective of a reasonable person who is viewing the totality of the circumstances. That means we look at the whole relationship or interaction (the transaction), not just one time that someone might have touched someone else problematically (the occurrence). And, we ask how a reasonable person would view the situation, and whether through that lens the behavior does or does not cross the line. Two case studies will demonstrate the reasonable person concept and the transaction concept. Approach them as if they are a Facebook™ quiz that lets you figure out your sex policing tendencies on a scale of 1 to 100.

Case Study #1– Liz and Neveah

Liz and Neveah are roommates on your campus. Liz is a virgin and identifies as straight. Neveah identifies as sexually fluid, and is very sexually experienced compared to Liz. One night after they have gone to bed, Liz heard Neveah masturbating along with the sound of a vibrator. The next day, Liz asked Neveah about it, and Neveah was very open with her, explaining that she has a “Bunny” which she described as a vibrator designed to allow her to penetrate herself while simultaneously stimulating her clitoris to climax. She was not apologetic or embarrassed that Liz overheard her masturbating, and asked Liz if she masturbates. Liz shyly said no and Neveah offered to teach her how if she is interested. She asked if Liz wants to see the Bunny. Liz seemed curious, so Neveah took it out and showed it to Liz. Liz immediately said she could never use it because she was diagnosed with vaginal hypoplasia, meaning a very narrow vaginal canal, and that the Bunny would never fit.

Neveah, sensing Liz’s growing interest, told her that she can use the Bunny on Liz if Liz would like, and go very gently with it to ensure that it doesn’t hurt. Alternately, she told Liz she can just use the Bunny’s “ears” on Liz, without penetrating her, if it’s too tight. Liz said she’ll think about it, and Neveah could see the flush on Liz’s face and how excited she was. Later that night, Neveah was more open about her masturbation and started to use the Bunny on herself while Liz was watching from across the room. She then asked Liz if Liz wants to try it. Liz agreed, but asked Neveah to show her how to do it, the first time. Neveah cleaned the Bunny, lubricated it, and slowly penetrated Liz with it. She asked Liz to tell her if it is painful at any point. Neveah began to use the Bunny on Liz, and Liz flinched in pain, telling Neveah to go slower. Neveah slowed down, and soon Liz was uncomfortable again. Neveah shifted the position of the Bunny and Liz became more comfortable. Neveah used the Bunny on Liz until she climaxed. Neveah tells Liz, “if you liked that, you should feel my tongue on you next time.” Liz smiled, and they go to bed.

The next night, Neveah again offers to use the Bunny on Liz. Liz agrees, but is immediately uncomfortable with the sensation of penetration by the vibrator. Neveah repositions it several times, but can’t find a comfortable position for Liz. Liz tells Neveah to stop because she is sore from the night before. Neveah stops penetrating Liz, and uses the “ears” of the Bunny to stim-

ulate Liz without penetrating her. While doing so, Neveah also uses her tongue to bring Liz to climax, and Liz presses her hands against Neveah's head as she does this. Afterward, Neveah asked Liz to use the Bunny on her, which Liz did. The women kissed and spent the night in the same bed.

The next night, Neveah climbed into bed with Liz, and began to perform oral sex on her. She told Liz she had lubed the Bunny and it was ready for her. Liz agreed and then allowed herself to be penetrated by the Bunny, and while it was still uncomfortable, it was less so than the night before. At one point, Liz cried out in pain, and Neveah repositioned the Bunny for greater comfort. Liz then seemed to get more into it, was arching her back and moaning with pleasure, and Neveah continued. Neveah also slapped Liz on the buttocks several times as they engaged in sexual contact. As Neveah continued with the Bunny, Liz called out in pain again, saying, "No. Stop." Neveah withdrew the Bunny slightly and eased up on the speed settings of the vibrator. She repositioned the Bunny again to ensure Liz's comfort, and penetrated her gently once again, but Liz pushed her hand away, making her stop, crying that she was just too tight for it. They went to bed.

The next day, Liz was talking with Burke, a woman on the hall who identifies as lesbian. Burke asked Liz if Neveah had turned her into a "lez" yet. Liz pretended not to understand, and Burke said, "She'll groom you and the next thing you know, she'll turn you into one of us." Liz suddenly realized that that was Neveah's plan to seduce her all along. She became very uncomfortable with Neveah as a roommate, someone she thought was trying to help her become more sexually comfortable as a friend, but who was really coming on to her as a girlfriend. Liz went back to her room and told Neveah how uncomfortable she was, and that all sexual contact needed to end. Neveah, who had perceived her encounters with Liz as a budding romance, was shocked, but agreed to keep things platonic.

The more Liz thought about it, the more upset she became. She felt betrayed by her roommate. Three days later, she went to the Title IX office and reported what happened. Neveah was notified of three alleged offenses: Non-Consensual Sexual Contact for performing cunnilingus on Liz without consent during the second encounter; Non-Consensual Sexual Intercourse for continuing to penetrate Liz with the Bunny during the third encounter after Liz said, "No. Stop"; and intimate partner violence, for slapping Liz on the buttocks during sex without consent.

Discussion

STOP HERE. It's time to analyze this fact-pattern and develop a gut check on what you think. Does your gut tell you that each of these behaviors does, technically, violate your consent policy? Many people would say so. But, take a step back and look at the totality of their interactions. Answer these questions:

- Does the totality of the evidence suggest an abusive series of encounters?
- Do you have evidence that Neveah was trying to groom Liz or sway her sexual orientation?

- Do you have evidence that Neveah intended to discriminate against Liz or cause her a hostile environment on the basis of sex?
- What assumptions did you make about Liz’s allegations?
- Do you have evidence that Neveah meant to transgress Liz’s sexual boundaries?
- What do you think Neveah’s responses to these allegations would be?

Neveah was shocked by the allegations. She realized that Burke might be interested in Liz, and was poisoning their budding relationship. She insisted that she had been incredibly respectful of Liz, not abusive. Neveah said that she constantly checked in with Liz during sex, repositioned the Bunny to ensure Liz’s comfort, and stopped when asked. She said she did not realize that Liz wanted her to stop that last time, thinking that like previous times, Liz meant she just needed to adjust the Bunny. Once she realized that Liz really meant stop, she stopped right away, and had only penetrated her once after she said to stop, to adjust the vibrator. So, is this a misunderstanding or a sex offense?

If you determined that this is sexual misconduct, you’re confusing Liz’s discomfort with her own sexual experimentation with a non-consensual sexual experience. Please understand that it is the unanimous consensus of all eight authors of this *Playbook* that Neveah should be found *not* in violation of the sexual misconduct policy. Maybe Neveah did seduce Liz. That’s not against policy. Maybe Neveah did want Liz to explore her sexuality or sexual orientation. That’s not uncommon

“To understand why this isn’t sexual misconduct, you need to understand the concept of ratification, which means retroactive consent demonstrated after the fact.”

in college, and as long as it isn’t coercive, that isn’t sexual misconduct. But, you might be thinking, don’t Neveah’s behaviors meet the definitions of sexual misconduct and intimate partner violence? Don’t you have to stop when someone tells you to stop in the middle of sexual intercourse? Don’t we teach our students that? Don’t we tell them you can’t touch someone sexually without getting permission first? We don’t want our students slapping each other during sex, do we?

Becoming the sex police can be a little insidious, creeping up on us without our even realizing we are propagating an orthodoxy of sexual correctness. It’s true that Liz told Neveah to stop during the third interaction, and that Neveah did not stop. If a male student kept thrusting when his female partner told him to stop, would we look at this differently? The ATIXA model policy says that if your partner withdraws consent, you must stop in a reasonably immediate time. That is what Neveah did. One additional thrust of the vibrator was not meant to be abusive, but to try to make Liz more comfortable, and she stopped within several seconds of understanding what Liz really wanted. Thus, the context is what matters here. At first, Neveah was not clear whether Liz was telling Neveah to stop, or communicating that she was uncomfortable with the position of the Bunny. Liz is saying now that she wanted Neveah to stop, and maybe that is true, but Neveah was thinking about the second sexual interaction, and how she had to position the Bunny carefully so that it did not hurt Liz, just as she had done earlier in the third sexual interaction as well. She thought she could reposition it similarly during the third interaction when Liz said stop,

to increase Liz's comfort and make sure it hurt less. Was this a reasonable interpretation by Neveah? Yes, Neveah's interpretation was reasonable when considered in the context of the totality of the circumstances surrounding their interactions.

Did she have reason to believe that Liz really wanted her to stop penetrating her entirely, or that she just wanted Neveah to be more gentle or to reposition the vibrator? If Neveah moved the Bunny and was then more gentle with it as the result of Liz's objection, wasn't she trying to make her partner more comfortable? How is that discriminatory? Doesn't no mean no, though? Well, during the second encounter, when Liz said stop, it meant a need to re-position. Isn't it reasonable to think the same context applied to the third encounter? After all, Neveah was clear that, after she tried to reposition the Bunny during the third encounter and Liz was still in pain, she needed to stop and she did. We can't chalk this up to a miscommunication about what Liz wanted, but Neveah's interpretation of the situation is reasonable given the totality of the circumstances.

Yes, but what about the oral sex during the second encounter? Taken together with what happened in the third encounter, doesn't the totality of the evidence show that Neveah was pushing Liz past her boundaries? I hope we can agree that when Neveah was using the Bunny's ears on Liz, and then began to use her tongue, Neveah did not have Liz's clear permission to do so. That was not consent, and most people can respect the distinction between agreeing to stimulation by an object and the use of someone's tongue. Permission for one does not imply permission for the other. To understand why this isn't sexual misconduct, you need to understand the concept of ratification, which means retroactive consent demonstrated after the fact. This happens in sex ALL THE TIME, though we don't account for it in our policies. Liz continued to have sexual interactions and want sexual interactions with Neveah after the oral sex. They had oral sex a second time. Liz pressed Neveah's head toward her as Neveah performed cunnilingus. That ratifies it after the fact, even if Neveah didn't strictly ask for consent when she first did it.

Not objecting to something is not the same thing as ratification, so be careful not to confuse those two things. While it's entirely possible that Liz was comfortable with a friend teaching her how to use a sex toy, but wholly uncomfortable with engaging in sexual activity directly with another female without the sex toy as a buffer, that's not the evidence we have here. Should Neveah have asked first? Sure. But, is it a sex offense that she didn't? Not in this context. Failing to object is passive. Ratification is an active participation subsequent to an encounter that began without clear consent.

Well, what about the butt slapping, then? *Fifty Shades of Grey* was a movie that made more than half a billion dollars at the box office in 2015. Light bondage and practices drawn from the BDSM world have gone mainstream. Again, context is everything. Was Neveah trying to abuse her partner? No. Should she have asked first? Sure, but to call a few slaps on the butt during sex a form of intimate partner violence is to water down what intimate partner violence is to the point of meaninglessness. ***If everything is discrimination, then discrimination means nothing.*** Many of our students are influenced by mainstream erotic and even hardcore pornography. You can't assume you can treat your partner the way it is depicted on screen, but we need to take into

account that for many of our students, if they have learned their sexual mores from pornography, this is an opportunity to re-socialize them, educationally, in respectful sexual patterns. What they think is normative is potentially going to be different than our sexual norms.

A twist on the ratification concept is tied to what happens to consent in relationships. We can debate whether what Liz and Neveah had was a relationship. We can survey the literature of the field that tells us that today students avoid relationships in favor of casual hook-ups. But, half of the investigations we do involve students in relationships or who were recently in relationships. To apply consent rationally to the relationship context, you have to accept that if students change your rules by creating their own, the best practice is to hold them to THEIR rules to assess consent, rather than to college policy. We know it sounds wrong to say that investigators should ignore college policy, but we have to allow couples in relationships the ability to define consent for themselves, otherwise unfairness results. If a couple loves to have incapacitated sex, and they have it dozens or hundreds of time with no issue at all, it is simply unfair to call that a violation of policy. This is related to the kink argument, above, as well. It's not okay to force someone in sex until it's okay to force someone in sex. Kink couples are rewriting our policies for their own sexual mores.

The key to understanding how relationships change the meaning of consent is that investigators have to be able to discern what the rules are that the couple have adopted, and need to be able to show that those rules operated clearly and were long-standing, understood, and/or explicitly agreed to. When they can so discern, investigators should apply the rules the couple has devised instead of college definitions of consent. An example will illustrate this idea. Suppose that a male student and female student have been dating for four months. In that time, it is found that there were at least 20-40 instances where the couple had sex that was initiated when the male student was aroused and began pushing his erection up against the female student. This led to sex over and over again, without any verbal exchange.

When the relationship ended, the female student made allegations of sexual misconduct, specifically that he was always pushing his erection up against her to initiate sex, and that he never had her consent to keep pushing his erection at her all the time. Without the context of this relationship, putting your erection up against someone without their consent is NCSC. But, in this relationship, evidence showed that every time he did this, the couple wound up having consensual sex. So, one way to analyze this is to say that she ratified the technically non-consensual touch by her later actions to participate willingly in sex as a result of the touch. Another way to analyze this is to say that this couple developed their own rules for consent. Those rules don't work for or apply to any other student, but they work for them, and we are going to hold them to those rules, not our policy, because we have evidence that they clearly adopted their own standard for consent. It would be manifestly unfair to hold the male student accountable for something the female student was okay with forty times, just because it technically violates our policy on consent. This is the introduction to the need to apply the reasonable person lens to our understanding of consent, as well.

A second case study will challenge us to apply the reasonable person lens.⁶⁹

Case Study #2 – Wes and Tameka

Tameka was flirting with Harris at the party. She told him if he agreed to date her, she would hook up with him that night. He told her he wasn't the dating type. Later, friends saw Tameka flirting with another student, Wes. The friends also testified that they saw Tameka and Wes walking hand-in-hand away from the party toward her residence hall. Surveillance video from the hall cameras shows that the two entered her residence hall at 11:14pm and proceeded to the common lounge, which was empty. While there is no audio, the video showed the two kissing, and then showed Tameka on top of Wes while he was lying on the couch. The video showed that she was grinding on him as he fondled her breasts, first over and then under her shirt. At one point, her breasts were clearly exposed on camera. They were on the couch for 23 minutes. The video then shows them getting up, and Tameka leading Wes down the hall by the hand. Their stories diverge at this point.

Tameka stated that she was going to see Wes out, but had to go to the bathroom. She stopped at her room on the way out. She let him into her room to wait and asked him to be quiet because her roommate was sleeping. She went into the bathroom and said that after she used the bathroom, he pushed his way inside the door and closed it behind him, before she had a chance to put her pants back on. She said that he then told her she couldn't leave him hanging, referring to their activity in the common lounge. He asked her for a handjob, and she agreed. He took off his shorts. She proceeded to rub his penis with her hand. He then asked her for a blowjob, but she said no, and continued with the handjob. As she gave him the handjob, he fondled her breasts and they kissed. He then began to rub between her legs and she allowed this and continued the handjob. He then penetrated her with his finger. She moved his hand away, stopped rubbing his penis, and told him he needed to leave. His account differed considerably.

Wes said that while on the couch in the common room, he suggested they go to her room and continue things more privately. She told him that her roommate was there and would be asleep at that hour. She then suggested they could go in her bathroom. They agreed, got up from the couch and she led him by the hand to her room, reminding him they needed to be quiet because her roommate would be asleep. They entered the room, and then went into the adjoining bathroom. There, she took off his shorts and hers and began to give him a handjob. He asked for a blowjob, but she said no and continued to rub his penis. During the handjob, they kissed and he fondled her breasts. He then began to rub her between her legs and she continued the handjob and was making moaning sounds. He teased her that she needed to be quiet or she'd wake her roommate. He then penetrated her vagina with his finger, and she immediately moved his hand away from her. She continued the handjob until he climaxed. Video shows that she escorted him from the residence hall at 12:24am, shows that she held the door open for him as he exited, and that they kissed as he left.

⁶⁹ Some people think it's important to debate the reasonable person standard. We do not. OCR says it's the reasonable member of a college community. For our purposes, we always interpret the standard to be a reasonable person in the same or similar circumstances, so it is contextual.

At 10:04am the next day, Tameka texted Wes, asking him how she should refer to their “couple status” when she told her roommate about the night before. At 10:18am, Wes texted her that he felt really guilty about what they did the night before because he had a girlfriend. He told Tameka that she was really nice, but that she needed to stay in the friend zone and that he hoped he hadn’t led her on. When she got the text, she immediately removed him from her contacts and blocked him on social media. She told her roommate that she needed to find someone who was ready for a serious relationship, and that the night before with Wes had been a mistake. Wes told his roommate that he felt bad that he had led her on.

By that evening, rumors were circulating that Wes had assaulted Tameka. He heard the rumors from a friend and decided he needed to address them. He texted Tameka at 8:40pm, “Please tell people I didn’t rape you. Some people are spreading a rumor.” She texted back at 8:42pm, “but u did rape me. Don’t contact me again.” The next morning, Wes went to the dean to address these rumors because he wanted to be clear that he had not raped Tameka. When he recounted to the dean what had happened, and concluded that they hadn’t even had sex, so he couldn’t have raped her, the dean informed him that it sounded from the story like he might have raped her. Wes was placed on interim suspension and an investigation was initiated. Wes tried to file a counter-claim that the handjob was not consensual, but the Title IX Coordinator decided it was retaliatory and did not take it forward.

Discussion

STOP HERE. Do you agree with this dean? Is she a steadfast protector of student welfare, or a card-carrying member of the sex police? If you consider the totality of the circumstances, there is a clear subtext to the allegations, right? Tameka was looking for a relationship. She rejected Harris when all he wanted was a hookup. She then attempted a relationship with Wes, but wound up being used by him and feeling rejected. That rejection could have been motivation to tell people that Wes assaulted her (she later filed a formal allegation and participated in the investigation), but that only addresses her motivation to report, and not the underlying question of whether what she was reporting was a violation policy. Are we troubled by the fact that she did not consider it sexual misconduct that morning, and came out of the interaction thinking that they were dating? Sure. It goes to her credibility. For some people, though, the reality of victimization takes a while to dawn on them, whether out of shock, denial, or a failure to self-identify. When that is the reason for delay, it is not a credibility concern.

You might think that Wes described a situation to the dean that is arguably sexual misconduct, regardless of Tameka’s motivation to report it, right? Let’s break it down. Wes and Tameka agreed that the sexual activity on the couch was consensual. But, what about the sexual activity in the bathroom? She performed the handjob voluntarily. It wasn’t coerced or forced. Thus, she consented to it. Whether he consented to being touched is a question we will address shortly. Their kissing was mutual, according to both of them, and she did not raise the fondling of her breasts as an issue. However, if you are a literalist about consent, he did fondle her breasts without consent. You can make a ratification argument here, though, because he didn’t ask to fondle her breasts in the common room, either, but she participated when he did. There is an

interesting question, too, about whether her consent to fondling her breasts earlier in the common room remained valid ten minutes later in the bathroom. We would say it did. And, we would argue that he had consent to touching her vulva and fondling her genital area by ratification. In the course of a sexual transaction, she permitted him to touch her, and continued to touch him as she did so, without objection. That's ratification. So, the only remaining question is whether his act to penetrate her with his finger was without consent. We believe a reasonable person would believe that act was consensual. How can this be? He penetrated her without asking, and her response clearly shows she did not welcome his penetration.

The construct of consent in sexual interactions is governed by policies, but as we noted above, it is not a perfect construct, in the sense that theory and practice do not fully align. Policies require clear actions or words indicating permission. So, if you think about it, there is no way to kiss someone without asking first, if you take the concept of consent literally. If I move in to kiss someone, I cannot know the conduct is agreed to unless I ask, because even if they move in to kiss me, they cannot know I am consenting unless they ask. So, rather than strictly adhering to such rigidity, we allow some non-verbal, unspoken rules to govern our sexual interactions. Many of us move in for a kiss, mutually, on the basis of context, without asking. And, in certain circumstances, consent can be assumed; for example, if you kiss me, I can kiss you back. I don't have to ask or clarify that. I am not expected to simply passively receive the kiss. The "clear words or action" part of the policy takes over from there. We can kiss, but what happens next has to be the result of agreement by word or conduct, if the interaction is to escalate sexually. Think of it as being akin to levelling up in a video game. Once you unlock a level, you are free to explore that level, but you can't move on to the next level until you unlock the achievement for that level (in this case, by having clear consent).

If a female student is voluntarily stroking a male student's penis, he is within the bounds of consent to reciprocate by touching her vulva and using his fingers to penetrate her vagina. This is really no different – in terms of reciprocity – than if a woman begins to stroke a man's chest, and he responds by fondling her breasts. It is artificial in the extreme to expect verbal requests in such a context, "I see that you are touching my pecs...does that mean I can caress your breast? If so, left, right, or both? And, is that your left or my left?" That's not how sexual communication works, as noted in describing the kiss, above. Consent is designed to allow such reciprocation without resorting to asking, **but** clarifying communication **is** required if one or both of the partners wish to elevate or progress the level of sexual interaction. If the partners are now caressing each others' chests, and one wants to touch the genitals of the other, that cannot be assumed to be okay, based on the sexual activity already taking place. To move to genital contact, there again must be communication that establishes consent. Consent theory supports this. Some acts are mutual, others require additional communication and clarification.

“As you can now see, a consent policy is viable in theory, but can become absurd in practice if taken to an extreme. You are the guardians of applying the reasonable person standard to these interactions.”

When a female student is voluntarily giving a male student a hand job, and he reciprocates by touching and fingering her vulva and vagina, if she denies having consented to being touched/penetrated solely because he didn't ask, we would say that a preponderance of evidence shows that they engaged in mutually consensual fondling of each other's genitals. To conclude otherwise would require that the male partner to say something like, "I see your hand is on my penis, may I now place my hand between your legs?"

That is not how sexual communication occurs, and it is not how consent policies were intended to function. To see the logic of this, take it to its extreme. Imagine that sexual intercourse is taking place. The female partner raises her hips on her male partner's penis. When she does, he hesitates, and says, "May I thrust my penis in response?" If the female partner says "yes," he may thrust back. How many times? Once? Many times? Does he need to clarify that, or is it assumed once they are having intercourse that thrusting is going to occur, positions may be changed, and there will likely be an ejaculation as a result? It is assumed, but according to policy, it's really not explicitly agreed to, is it?

Some of you will make a distinction with Wes and Tameka out of the fact that the sex acts weren't really mutual. They fondled each other's genitals, but she was penetrated and he was not. To that, we say that is a distinction that arises solely from anatomy, but it is no more invasive to a man to have a non-consensual handjob than it is to a woman to be fingered without consent. A man can be subject to sexual misconduct without being penetrated, so we need to stay focused on the video game metaphor. What Tameka did to Wes and what Wes did to Tameka each occurred on the same level of the game. No one upped the level without asking, and Wes respected her instruction to stop when he did something that went beyond her boundaries. This does not make him in violation of policy. That's what a reasonable person would say. I can fondle you if you are fondling me; I don't have to ask you. For anyone who wishes to insist that he is in violation of policy, we require you to be consistent. If your purist approach to consent demands that you find him in violation of policy for penetrating her, then you must also be willing to find her in violation for giving him a handjob without his consent. If that is your preferred approach, we think you are being absurd, but at least you will keep the legal profession gainfully employed for many years to come.

As you can now see, a consent policy is viable in theory, but can become absurd in practice if taken to an extreme. You are the guardians of applying the reasonable person standard to these interactions. We know this challenges an orthodoxy that may be widely accepted in the field, but the question is whether we are trying to govern every nuance of sex as if we are the sex police, or whether we are trying to establish reasonable rules to regulate inherently ambiguous human behavior in a way that minimizes the risk of harm to those involved? If you need a litmus test for whether you have become the sex police, ask yourself whether the college-age version of you would hate what you have become. If so, let's recalibrate. One way to do so is to refocus and rededicate ourselves to due process and protecting the rights of ALL students.