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# Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should “Yes” Mean “No”?

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# Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should “Yes” Mean “No”?

LORI E. SHAW\*

INTRODUCTION.....	1363
I. BLURRED LINES: COLLEGE LIFE IN 2015 .....	1371
A. MAE AND SAM SCENARIO .....	1372
B. THE HOOKUP CULTURE.....	1378
C. THE BINGE DRINKING ERA.....	1383
D. BINGE DRINKING, HOOKUPS & UNWANTED SEX: IT’S COMPLICATED ..	1388
II. TITLE IX AND THE STUDENT-CONDUCT SYSTEM.....	1395
A. STUDENT-CONDUCT SYSTEMS—A BRIEF PRIMER.....	1395
B. THE REQUIREMENTS IMPOSED BY TITLE IX .....	1400
III. “EFFECTIVE CONSENT” AND THE LAW .....	1406
A. RAPE AND CONSENT UNDER THE CRIMINAL LAW.....	1408
B. CONSENT AND INTOXICATION UNDER THE LAW .....	1414
C. PROPOSED STANDARD.....	1421
CONCLUSION.....	1423

## INTRODUCTION

Open any newspaper or visit any news website and you will be assailed with media reports proclaiming sexual assault on college campuses an “epidemic.”<sup>1</sup> On an almost daily basis, the media cautions that studies show that “one in four to one in five women will be sexually assaulted while in college.”<sup>2</sup>

The United States Department of Education’s (DOE’s) Office for Civil Rights (OCR) has led the federal government’s efforts to reduce the number of sexual assaults on college campuses. It is responsible for enforcing Title IX of the Education Amendments of 1972<sup>3</sup> (Title IX), legislation prohibiting discrimination based on sex

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\* Lori E. Shaw is a Professor of Lawyering Skills at the University of Dayton School of Law and formerly served as the University’s Title IX Coordinator. I would like to thank Deanna Arivett for her exceptional research assistance. I would also like to thank the following colleagues and friends for their invaluable advice and their constant encouragement: Tan Boston, Susan Elliott, Harry Gerla, Walter Rice, Richard Robol, Staci Rucker, David Sipusic, Victoria VanZandt, and Susan Wawrose.

1. E.g., Shannon Liao, *New York and California Fight Sexual Assault Epidemic with Affirmative Consent*, EPOCH TIMES (Oct. 7, 2014, 9:44 AM), <http://www.theepochtimes.com/n3/1001269-new-york-and-california-fight-sexual-assault-epidemic-with-affirmative-consent/?sidebar=related-below> [<https://perma.cc/M4TQ-2FEL>]; Nedra Pickler, *Obama Targets College Sexual Assault Epidemic*, AP THE BIG STORY (Jan. 22, 2014, 8:57 PM), <http://bigstory.ap.org/article/obama-targets-college-sexual-assault-epidemic> [<https://perma.cc/96AZ-R7RZ>].

2. Kathleen Megan, *Reports of Sex Assault on College Campuses Climb as More Victims Come Forward*, HARTFORD COURANT (Oct. 25, 2014, 5:54 PM), <http://www.courant.com/education/hc-clery-campus-sexual-assault-1016-20141025-story.html#page=1> [<https://perma.cc/8VME-NX8W>].

3. Pursuant to 20 U.S.C. § 1681(a) (2000), “No person in the United States shall, on the

in federally-funded education programs. Sexual assault (i.e., sexual violence) is one form of prohibited sex-based discrimination.<sup>4</sup> The DOE has mandated that all federally-funded, postsecondary institutions “take immediate action to eliminate . . . [sexual] harassment, [including sexual assault,] prevent its recurrence, and address its effects.”<sup>5</sup>

The DOE is not the only governmental entity actively addressing the issue of campus sexual assault. In 2014, the President established the White House Task Force to Protect Students from Sexual Assault.<sup>6</sup> State governments are also becoming involved. California, for example, has enacted legislation requiring postsecondary institutions within the state to adopt sexual assault policies containing an affirmative-consent standard.<sup>7</sup>

But is this “epidemic” what lawmakers and the media purport it to be? Do we really understand the nature of the challenge before us? And are we taking the necessary steps to create an effective response? From January 2012 to June 2014, I enjoyed the unique opportunity to observe the fight against campus sexual assault from the ground level as my university’s Title IX Coordinator.<sup>8</sup> I worked with and learned from members of my own campus community as well as with peers from around the country. Based on my experiences, the answer to each of the questions posed above is an unequivocal “no.” Serious misunderstandings abound as to the nature of the epidemic, and, in our attempts to combat it, we as a society are making significant missteps that are harming the students we seek to protect.

basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”

4. See U.S. DEP’T OF EDUC., LETTER FROM RUSSLYNN ALI, ASSISTANT SEC’Y FOR CIVIL RIGHTS, at 1 (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/3XVM-84FG>] [hereinafter “DCL”].

5. *Id.* at 4.

6. Memorandum of January 22, 2014—Establishing a White House Task Force To Protect Students from Sexual Assault, 79 Fed. Reg. 4383 (Jan. 27, 2014).

7. See, e.g., CAL. EDUC. CODE § 67386 (West 2016).

8. Title IX requires that every postsecondary institution receiving federal funds “shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.” 34 C.F.R. § 106.8 (2014). This employee is commonly referred to as the institution’s “Title IX coordinator.” The DCL, *supra* note 4, at 7, outlines the responsibilities of the Title IX coordinator in some detail:

The coordinator’s responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed. . . .

Recipients must ensure that employees designated to serve as Title IX coordinators have adequate training on what constitutes sexual harassment, including sexual violence, and that they understand how the recipient’s grievance procedures operate.

I was inspired to write this Article by the profound emotional distress that I witnessed among women and men, complainants, respondents, witnesses, and others, including those students who never make it to the Title IX Office. There has never been a generation facing more confusion about sexual choices and boundaries. Our failure to fully educate ourselves about the prevalent sexual culture on college campuses, develop clear boundaries and standards, and educate students about those boundaries and standards has only served to create more pain and confusion.

As I engaged in my work as a Title IX coordinator, I came to the realization that critical mistakes are being made because experts in government, law, science, and education are conducting their work in silos. The only way to successfully address campus sexual assault is for these groups to collaborate in rule making. This Article focuses upon one area in which such collaboration is sorely needed—the creation of standards for sexual assault generally and the standard for consent specifically<sup>9</sup>—but it is my sincere hope that it will spur change in a multitude of areas. The significance of our failure to collaborate was brought home to me by three alarming discoveries: (1) DOE employees were relying upon the false assumption that student transcripts include notations of disciplinary actions taken against the student—the reality is that many schools do not note discipline on transcripts, and many students found responsible for sexual assault are able to transfer to another institution with none the wiser as to their history; (2) Social scientists researching sexual assault on college campuses were relying upon definitions of rape and other legal terms that were inconsistent with their legal definitions—in tabulating the frequency of sexual assaults on campus, these scientists are counting incidents that would not be considered sexual assaults under the criminal law; (3) School officials charged with creating student codes of conduct were relying upon faulty scientific theories relating to the issue of incapacitation—these officials defined “incapacitation” in such a way that a respondent/accused could be held responsible for assaulting a complainant who said “yes” to the sexual act and was in fact capable of making conscious choices.

I now will discuss these three points in greater detail. First, I discovered a disturbing gap in the DOE’s understanding of what happens when a student expelled for sexual assault applies to another school. The following exchange transpired during a question and answer session at a DOE seminar for Title IX coordinators:<sup>10</sup>

COORDINATOR: We are about to expel a student who has been found responsible under our conduct code for stalking numerous women on campus. I know he is planning to apply to the University of X. How do I let them know he is dangerous without violating The Family Educational and Privacy Rights Act (FERPA)?<sup>11</sup>

DOE PANELISTS: That’s no problem. The University of X will see it on his transcript.

AUDIENCE IN UNISON: Oh, no, it won’t!

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9. See *infra* Part III.

10. The language that follows paraphrases and summarizes the points that were raised.

11. The Family Educational and Privacy Rights Act restricts the release of education records. 20 U.S.C. § 1232g(b)(1) (2012).

What the audience of educators knew that no DOE panelist appeared to know<sup>12</sup> is that many, if not most, colleges and universities limit the information provided on transcripts to academic information—disciplinary actions by the school, including actions relating to serious matters like sexual assault, do not appear.<sup>13</sup>

If a school finds a student responsible for a sexual assault and expels him, the student can easily matriculate at the school up the street with none the wiser as to the fact that he was found to be a threat to the community.<sup>14</sup> If the goal of the DOE is to prevent campus assaults, it must do something to address this issue—shifting sexual predators to another campus is obviously not improving safety.<sup>15</sup> Preventing predators from moving freely from one campus to another should have been at the top of the DOE's to do list, but it was not. The DOE was blind to a problem that was and is very real to educators.

Second, I discovered that the media, the government, and others relying on data found in scientific studies are not being provided with an accurate picture of what is happening on college campuses.<sup>16</sup> This is because social scientists seeking to measure the prevalence of sexual assault on campuses are using a multitude of different definitions of “sexual assault,”<sup>17</sup> many, if not most, of which are inconsistent with its legal definitions.

12. My hope is that there are those within the DOE who are aware of this issue and working to address it.

13. See ASS'N FOR STUDENT CONDUCT ADMINISTRATION, REPORT OF THE TRANSCRIPT NOTATION TASK FORCE 1 (2013), available at <http://www.theasca.org/files/Governing%20Documents/Notation%20Task%20Force%20Report%20Final.pdf> [https://perma.cc/82Y5-V288] (“Across institutions of higher education in the United States, significant inconsistencies exist in recommendations, policies, and practices related to the notation of disciplinary dismissals on student transcripts. . . . If disciplinary dismissals are not noted on a transcript, students who have been found responsible for violating an institution's code of conduct, can transfer to another institution without the receiving institution having any knowledge of this history, even when the student has been suspended or expelled.”).

14. See generally Tyler Kingkade, *How Colleges Let Sexual Predators Slip Away to Other Schools*, HUFFINGTON POST (Oct. 23, 2014, 7:49 AM), [http://www.huffingtonpost.com/2014/10/23/college-rape-transfer\\_n\\_6030770.html](http://www.huffingtonpost.com/2014/10/23/college-rape-transfer_n_6030770.html) [https://perma.cc/P2CJ-96J8].

15. Of course, if someone is to be labeled as a sex offender, it is critical that every school employs the same definition of “sexual assault” and other key terms. Currently, that is not the case. See *infra* notes 269–71 and accompanying text.

16. See generally Cathy Young, *The MIT Rape Study and Other Sloppy Surveys*, MINDING THE CAMPUS: REFORMING OUR UNIVERSITIES (Nov. 2, 2014), <http://www.mindingthecampus.org/2014/11/the-mit-rape-study-and-other-sloppy-surveys/> [https://perma.cc/23HE-M2R9].

17. See, e.g., Nat'l Inst. of Justice, *Sexual Assault on Campus: Measuring Frequency* (Oct. 1, 2008), <http://www.nij.gov/topics/crime/rape-sexual-violence/campus/pages/measuring.aspx> [https://perma.cc/YJ55-AUZC].

*Unfortunately, researchers have been unable to determine the precise incidence of sexual assault on American campuses because the incidence found depends on how the questions are worded and the context of the survey. For example, researchers did two parallel surveys of American college women during the same time and came up with very different results. . . .*

*One survey found a completed rape rate of 1.7 percent, while the other study found a 0.16 percent rate. . . . Thus, the percentage of the sample that reported experiencing a completed rape in one study was 11 times the percentage in the*

For example, *The Campus Sexual Assault Study*,<sup>18</sup> a seminal study cited by both the OCR<sup>19</sup> and the White House Task Force,<sup>20</sup> specifically recognizes that “[m]any students drink without becoming incapacitated, and it would be inappropriate to assume that any incidents in which the victim was drinking could be classified as incapacitated sexual assaults.”<sup>21</sup> No state employs a legal standard for “sexual assault” under which every level of drunkenness establishes incapacitation—intoxication must be extreme to even warrant any consideration of possible incapacitation.<sup>22</sup>

Unfortunately, the question actually posed to study participants was not consistent with the legal standard for sexual assault. Study participants were asked, “Has someone had sexual contact with you when you were unable to provide consent . . . because you were passed out, drugged, drunk, incapacitated, or asleep?”<sup>23</sup> Because the question itself conflates mere drunkenness with incapacitation, the logical result is an inflation of the number of incidents being counted as sexual assaults. Equally troubling is the study’s failure to ask participants whether their sexual partner knew or should have known they were incapacitated. For a sexual assault to exist under the law, a defendant must be, at the very least, negligent as to the alleged victim’s incapacitation.<sup>24</sup> The study’s conclusion that nineteen percent of the women participating in the study “reported experiencing attempted or completed sexual assault since entering college”<sup>25</sup> counted incidents as sexual assaults that, under criminal law standards, clearly do not qualify as sexual assaults.

How can we make good decisions without good data? Scientists, educators, and government officials must develop a common language to discuss sexual assault before they can effectively speak to it. We cannot play fast and loose with the

other study. Researchers believe the disparity arises from the way the survey questions are worded.

*Id.* (emphasis in original); see also NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 92–93 (Candace Kruttschnitt, William D. Kalsbeek & Carol C. House eds. 2014).

18. CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST, TARA D. WARNER, BONNIE S. FISHER & SANDRA L. MARTIN, *THE CAMPUS SEXUAL ASSAULT STUDY (2007)*, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/523D-7PAX>].

19. DCL, *supra* note 4, at 2 n.3.

20. THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 6 n.1 (2014).

21. KREBS ET AL., *supra* note 18, at 1-4.

22. See *infra* Part III.B.

23. KREBS ET AL., *supra* note 18, at A-2. A study participant could easily say to herself, “Well, I was drunk, and if I hadn’t been, I probably wouldn’t have said ‘yes.’ So yes, I did have sex when I was drunk and couldn’t really provide consent.”

24. See *infra* note 379 and accompanying text. In defense of the scientific community, there is no standard definition of “sexual assault” or “rape”—the states address these crimes in different ways. See *infra* Part III.A–B. That fact makes developing a standard definition a challenging task, but a task that would be far from impossible in the hands of an attorney. The problem is that researchers do not know what they do not know, because they assume that the law is far less complex than it is.

25. KREBS ET AL., *supra* note 18, at 5-3.

meaning of terms like “sexual assault” and “effective consent.” This Article proposes a standard that could be used to begin that process.<sup>26</sup>

Third, I discovered a colossal misstep made by many schools as they tried to develop standards relating to sexual assault without the DOE’s assistance. Such schools erroneously presumed that if a complainant has “blacked out”<sup>27</sup> (i.e., cannot recall the events surrounding the alleged assault the next day), she was incapacitated (i.e., could not effectively consent) at the time of the assault.<sup>28</sup> This was the most alarming discovery of all because it most directly impacts the lives of students. This error has the potential to result in countless respondents being held responsible for sexual assault when their partners, in fact, had the capacity to provide consent. Labeling someone as responsible for a sexual assault is a serious business. There is no room for error, even when someone faces expulsion rather than jail.

Schools are struggling to define what “effective consent” means. When is someone incapable of effectively consenting to sex? As I engaged in my own struggle to define this key term, I became increasingly frustrated by the lack of a carefully crafted, uniform definition based on scientific evidence, which could be employed by all institutions subject to the requirements of Title IX. I saw schools doing their very best to define effective consent, but often totally missing the mark.

The assumption that blackout equals incapacitation concerned me on multiple levels.<sup>29</sup> Many of my cases involved an assertion by the complainant that she could not remember anything about the night (i.e., she had en bloc amnesia, a “blackout”) or, more commonly, that she could only remember “flashes” of what happened (i.e., she had fragmentary amnesia, a “brownout”).<sup>30</sup> Every student development professional I questioned said the same thing: “Everyone knows that a student who

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26. See *infra* Part III.C.

27. “Blackouts are periods of amnesia during which a person actively engages in behaviors (e.g., walking, talking) but the brain is unable to create memories for the events. Blackouts are different from passing out, which means either falling asleep or becoming unconscious from excessive drinking.” Aaron White & Ralph Hingson, *The Burden of Alcohol Use: Excessive Alcohol Consumption and Related Consequences Among College Students*, 35 ALCOHOL RES. 201, 209 (2014).

28. E.g., SAMFORD UNIV., STUDENT HANDBOOK 93 (2015–16), available at <http://www.samford.edu/files/Student-Handbook.pdf> [https://perma.cc/6ZEV-VDVP] (“Incapacitation means the physical and/or mental inability to make informed, rational judgments. States of incapacitation include, without limitation, sleep, *blackouts* and flashbacks.” (emphasis added)).

29. My first concern was motivated by cases in which the complainant had had more to drink *after* the sexual contact at issue: How was I to tell when the blackout was triggered? My second concern was much more basic: videos, testimony, and other evidence often showed the complainant engaging in relatively complex tasks during the time covered by the blackout.

30. Blackouts are alarmingly common among college students. Aaron M. White, Matthew L. Signer, Courtney L. Kraus & H. Scott Swartzwelder, *Experiential Aspects of Alcohol-Induced Blackouts Among College Students*, 30 AM. J. DRUG & ALCOHOL ABUSE 205, 209 (2004) (“White, Jamieson-Drake, and Swartzwelder recently surveyed 772 undergraduates regarding their experiences with blackouts. Approximately one-half (51 percent) of those who had ever consumed alcohol reported experiencing at least one blackout in their lives, and 40 percent experienced one in the year before the survey.” (citation omitted)).

suffers from a blackout did not know what she was doing.” However, none of the professionals cited any authority for the statement. So, I looked to see what scientific evidence, if any, supported it.

Ultimately, I learned that a book, *The Alcohol Blackout: Walking, Talking, Unconscious & Lethal*,<sup>31</sup> had been touted in a book review published by the National Center for Higher Education Risk Management as “an important book that should be on the reading list of student conduct professionals.”<sup>32</sup> The book’s author posits the theory that “if a person in a blackout has stopped forming memory . . . then that person is in an unconscious state. He has no idea what he is doing. He is out of control.”<sup>33</sup> This theory spread from one school to another until it became akin to gospel.<sup>34</sup> Schools were trying to do the right thing by looking to science, but they accepted the scientific validity of this blackout theory without substantial inquiry in a way that no court of law would have done.<sup>35</sup>

Such an inquiry would have shown that the existing scientific literature does not support the theory that someone who is suffering from a blackout is a mere automaton, incapable of conscious thought.<sup>36</sup> It shows the opposite—someone in the midst of a blackout is often making conscious choices. She can engage in any manner of activities from actively participating in a detailed conversation<sup>37</sup> to driving a car.<sup>38</sup>

31. DONAL F. SWEENEY WITH ROBERT A. LISTON, *THE ALCOHOL BLACKOUT: WALKING, TALKING, UNCONSCIOUS & LETHAL* (2003).

32. Brett A. Sokolow, *The Alcohol Blackout: A Book Review*, NAT’L CENTER FOR HIGHER EDUC. RISK MGMT., <https://www.ncherp.org/pdfs/article06-alcohol-blackout.pdf> [<https://perma.cc/26CN-9WUM>].

33. SWEENEY WITH LISTON, *supra* note 31, at 3.

34. Even the author himself was not suggesting a wholesale adoption of his theory—he was merely advocating for further research on the topic. *Id.* at 161–63.

35. *See, e.g.*, *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993) (setting forth the test for determining the admissibility of expert scientific testimony).

36. *See* Mark R. Pressman & David S. Caudill, *Alcohol-Induced Blackout as a Criminal Defense or Mitigating Factor: An Evidence-Based Review and Admissibility as Scientific Evidence*, 58 J. FORENSIC SCI. 932, 939 (2013) (“Blackout patients are not ‘fall down drunk.’ They do not appear to have obvious impairment in coordination, balance, social interaction, or speech. Rather, to all outward appearances, they are cognitively and physically intact. . . . [A]lcohol ‘blackout’ does not meet the requirements for an automatism or even for diminished capacity.”). Another problem with using the existence of a blackout to establish incapacitation is that “there is no generally accepted scientific method to detect an alcoholic blackout while it is occurring or afterward.” *Id.* at 937–38. The courts have not recognized alcoholic blackouts as a criminal defense. *E.g.*, *Crossley v. State*, 582 S.E.2d 204, 206 (Ga. Ct. App. 2003).

37. White & Hingson, *supra* note 27, at 209.

38. AARON M. WHITE, NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, *WHAT HAPPENED? ALCOHOL, MEMORY BLACKOUTS, AND THE BRAIN* (2004), *available at* [http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm?icid%5Bmaster%5D=vid~aa462ca7-6c0c-4267-bbc5-6a81dfcadebb&icid%5Bil726%5D=rlt~1419410585~land~2\\_4757\\_direct\\_](http://pubs.niaaa.nih.gov/publications/arh27-2/186-196.htm?icid%5Bmaster%5D=vid~aa462ca7-6c0c-4267-bbc5-6a81dfcadebb&icid%5Bil726%5D=rlt~1419410585~land~2_4757_direct_) [<https://perma.cc/S4RR-ZFFH>] (noting that people “can often carry on conversations, drive automobiles, and engage in other complicated behaviors. Information pertaining to these events is simply not transferred into long-term storage.”). Documented instances exist of someone in a blackout state driving a car for hours in rush-hour traffic. Alan J. Cunnien, *Alcoholic Blackouts: Phenomenology and Legal Relevance*, 4 BEHAV. SCI. & LAW 73, 76 (1986).



Her remote memory is intact (e.g., she can remember a poem she learned in fifth grade), and her recent memory is intact (e.g., she can follow a conversation).<sup>39</sup> To onlookers, her behaviors may appear perfectly normal.<sup>40</sup>

The existence of a blackout does not definitively establish how much someone has had to drink.<sup>41</sup> A student can be severely intoxicated without suffering from a blackout, and a student can suffer from a blackout without being severely intoxicated.<sup>42</sup>

The errors made by schools in assessing the significance of blackouts illustrate the dangers involved in foisting the task of developing what are essentially legal standards upon schools. It is far too exacting and important a task to be undertaken on an ad hoc basis by individual institutions that may well be lacking in time, resources, and expertise.<sup>43</sup>

The DOE must use the rule-making authority granted it by Congress to knock down the silos standing in the way of a true collaboration between educators, lawyers, scientists, and government officials.<sup>44</sup> After proper notice, comment, and opportunities for public participation, it should promulgate regulations establishing the standards to be applied in determining whether a sexual assault has occurred, including the standard for effective consent.

This Article is intended to set the process in motion by providing the DOE and the educational institutions governed by Title IX with a proposed standard for “effective consent.” Part I provides an overview of the realities of campus life in the 2010s, delving into the root causes of sexual assault and other forms of unwanted

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39. Donald W. Goodwin, *Editorial: Alcohol Amnesia*, 90 *ADDICTION* 315, 316 (1995). If her blackout is en bloc, her short-term memory is what is lacking. *See id.* If her blackout is fragmentary, the problem is likely not failure to store memories but difficulty in retrieving them. Bryan Hartzler & Kim Fromme, *Fragmentary and En Bloc Blackouts: Similarity and Distinction Among Episodes of Alcohol-Induced Memory Loss*, 64 *J. STUD. ON ALCOHOL* 547, 547 (2003).

40. Kim van Oorsouw, Harald Merckelbach, Dick Ravelli, Henk Nijman & Ingrid Mekking-Pompen, *Alcoholic Blackout for Criminally Relevant Behavior*, 32 *J. AM. ACAD. PSYCHIATRY & L.* 364, 364 (2004).

41. The rate of alcohol consumption, rather than the amount, determines whether someone suffers from a blackout. White et al., *supra* note 30, at 208. Drinking on an empty stomach can also increase the likelihood of a blackout. Mark E. Rose & Jon E. Grant, *Alcohol-Induced Blackout: Phenomenology, Biological Basis, and Gender Differences*, 4 *J. ADDICTION MED.* 61, 63 (2010).

42. White et al., *supra* note 30, at 208. Fragmentary blackouts are the most common form of blackout, and they can occur at lower blood alcohol concentrations (BACs) than en bloc blackouts. Hartzler & Fromme, *supra* note 39, at 547. Blackouts have been documented at BACs as low as .07–.12 percent. *Id.* at 549, fig.1.

43. *See generally infra* Part II.

44. Pursuant to 20 U.S.C. § 1682 (2000), “Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . . .”

sexual contact. Sexual hookups<sup>45</sup> and binge drinking,<sup>46</sup> two aspects of campus life inextricably linked to one another and to unwanted sexual contact, are explored in depth.

Part II presents an overview of the traditional role, structures, and processes of the student-conduct system.<sup>47</sup> It then explains why schools are struggling to cope with the demands of creating and enforcing sexual assault policies and how the DOE is contributing to that struggle through its failure to adopt clarifying regulations defining effective consent and other key terms.<sup>48</sup>

Part III proposes a definition of “effective consent” that reflects the realities of college life today, the needs of the student-conduct system and its fact finders, and the relevant legal and scientific principles.<sup>49</sup> It takes on the controversial issue of whether students are better served by a “yes means yes” standard or a “no means no” standard,<sup>50</sup> and the equally challenging issue of when severe intoxication should preclude effective consent.<sup>51</sup>

### I. BLURRED LINES: COLLEGE LIFE IN 2015

Any standard established by the DOE for “effective consent” should be informed by the complex social and sexual relationships of our era. We need to create standards that reflect the realities of our time. One such reality is that many, if not most, campus sexual assaults take place in the context of a “hookup.” It is not stranger rape, and it is not date rape.<sup>52</sup> Another is that most campus sexual assaults involve the voluntary<sup>53</sup> use of alcohol or drugs by one or both parties.<sup>54</sup> Binge drinking and sexual assault are inextricably linked.<sup>55</sup>

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45. See *infra* Part I.B.

46. See *infra* Part I.C.

47. See *infra* Part II.A.

48. See *infra* Part II.B.

49. See *infra* Part III.C.

50. See *infra* Part III.A.

51. See *infra* Part III.B.

52. Heather Littleton, Holly Tabernik, Erika J. Canales & Tamika Backstrom, *Risky Situation or Harmless Fun? A Qualitative Examination of College Women’s Bad Hook-Up and Rape Scripts*, 60 *SEX ROLES* 793, 793–94 (2009); see also Tara E. Sutton & Leslie Gordon Simons, *Sexual Assault Among College Students: Family of Origin Hostility, Attachment, and the Hook-Up Culture as Risk Factors*, 24 *J. CHILD. & FAM. STUD.* 2827 (2015).

53. Relatively few sexual assault complaints involve involuntary intoxication. KREBS ET AL., *supra* note 18, at 5-19. For example, in *The Campus Sexual Assault Study*, “[a] low proportion of incapacitated sexual assault only victims (4%) reported . . . coercive drug intoxication [i.e., being given an intoxicant without their consent].” *Id.*

54. Emily R. Mouilso, Sarah Fischer & Karen S. Calhoun, *A Prospective Study of Sexual Assault and Alcohol Use Among First-Year College Women*, 27 *VIOLENCE & VICTIMS* 78, 79 (2012).

55. See *infra* Part I.D.

Part I begins with a hypothetical case scenario intended to provide the reader with context.<sup>56</sup> It then provides an overview of the hookup culture,<sup>57</sup> the problem of binge drinking on college campuses,<sup>58</sup> and the intersection between the two.<sup>59</sup>

#### A. Mae and Sam Scenario

Understanding the problem of sexual assault on college campuses requires that certain preconceptions be set aside. We have all viewed stomach-turning videos of drunk, helpless young women who have passed out and are literally, physically being carried off by their alleged attackers.<sup>60</sup> These cases are real, they are horrific, and they must be addressed by both the educational system and the justice system. But in my experience, they are not the norm. The issues presented by most sexual assault cases are far more complex.

We live in the era of hookups<sup>61</sup> and binge drinking.<sup>62</sup> “Blurred Lines”<sup>63</sup> is more than just a song; it is a relationship reality. Rarely is anyone carrying anyone off. It is far more common to confront a case like that found in the Mae and Sam scenario that follows. Two young people, who are at most acquaintances, decide to spend time together. Each has consumed significant quantities of alcohol.<sup>64</sup> They may agree to at least some sexual contact (e.g., kissing). But then something goes terribly wrong. The question then becomes who is responsible for what happened.

Though the scenario that follows is not based on an actual case,<sup>65</sup> it accurately reflects my experience as a Title IX coordinator and highlights the challenges

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56. *See infra* Part I.A.

57. *See infra* Part I.B.

58. *See infra* Part I.C.

59. *See infra* Part I.D.

60. *E.g.*, Don Carpenter, *Text Messages that Led to Convictions in the Steubenville Rape Trial*, MOBILE BROADCAST NEWS (Mar. 17, 2013, 11:05 PM), <http://www.mobilebroadcastnews.com/NewsRoom/Don-Carpenter/Text-Messages-led-convictions-Steubenville-Rape-Trial> [<https://perma.cc/4PHP-SQ9H>].

61. *See infra* Part I.B.

62. *See infra* Part I.C.

63. ROBIN THICKE FEATURING T.I. & PHARRELL, *BLURRED LINES* (INTERSCOPE 2012) (“You’re a good girl. Can’t let it get past me. You’re far from plastic. Talk about getting blasted. I hate these blurred lines. I know you want it. I know you want it. I know you want it.”).

64. I rarely dealt with a case involving the use of physical force, and the national statistics appear consistent with my experience. *See* KREBS ET AL., *supra* note 18, at 5-2. Among the women college students participating in the CSA (Campus Sexual Assault) study, 11.1 percent reported experiencing a sexual assault while incapacitated, while 4.7 percent reported experiencing a physically-forced sexual assault. *Id.* at 5-3 fig.5-2. Granted, as discussed above, the numbers relating to assault while incapacitated are likely inflated. *See supra* notes 18–25 and accompanying text.

65. The Family Educational and Privacy Rights Act (FERPA) restricts the release of education records, including those relating to Title IX investigations. *See generally* 20 U.S.C. § 1232g(b)(1) (2012). However, it is possible to find some fascinating accounts of Title IX cases that have made their way into the courts. *See, e.g.*, Amanda Hess, *How Drunk Is Too Drunk To Have Sex?*, SLATE (Feb. 11, 2015), [http://www.slate.com/articles/double\\_x](http://www.slate.com/articles/double_x)

commonly faced by those charged with investigating a Title IX complaint. The parties and witnesses represent an amalgamation of real-life individuals and embody the characteristics, patterns, and themes I witnessed in my work and discovered in my research.<sup>66</sup> I include it here to allow you to put yourself in the position faced by those responsible for Title IX compliance on a daily basis.

### 1. Your Role

You are a Title IX coordinator at State U. You recently received a complaint by a first-year student, Mae, that another first-year student, Sam, sexually assaulted her. The parties and witnesses provided the following accounts during the course of your investigation.

### 2. Mae's Account

Mae is eighteen years old and just started her second semester at State U. She had a long-time boyfriend in high school, but they recently broke up. Prior to the incident in question, she had never engaged in vaginal intercourse. Her sexual experience had been limited to kissing, heavy petting, and oral sex with her boyfriend.

On the first Saturday night of winter term, Mae was invited to a party at the apartment of her friend, Lisa. Mae looked forward to starting her social life anew at the party. During the first semester, she had felt constrained about dancing, etc., with her male acquaintances because she had a boyfriend. Now that they had broken up, Mae hoped she could begin to enjoy the college experience.

Mae felt nervous. Along with her new freedom, she felt a new pressure to mix with her classmates. She had always been shy, and she felt particularly self-conscious about interacting with male classmates. She had only had one boyfriend.

Mae's friends advised her not to worry about dating. They said she should take advantage of her freedom to "hookup" with lots of different guys. She needed to relax, have some fun, and save looking for a potential mate until she was older. The advice made sense to Mae. Few of her friends had boyfriends. They seemed content to play the field.

One aspect of the social scene that Mae had explored during her first semester was drinking. She had experimented with alcohol in high school and found alcohol amazingly easy to obtain on and near her college campus. Most weeks, she consumed anywhere from ten to fifteen alcoholic beverages. Drinking helped her overcome her natural shyness. Friends told her that after a couple of drinks, she became bubbly and outgoing.

At about 9:00 p.m., before the party, Mae drank a beer to calm her nerves. She was on a diet and had skipped breakfast, had a small salad for lunch, and had only a container of yogurt for dinner.

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[/doublex/2015/02/drunken\\_sex\\_on\\_campus\\_universities\\_are\\_struggling\\_to\\_determine\\_when\\_intoxicated.html](https://doublex/2015/02/drunken_sex_on_campus_universities_are_struggling_to_determine_when_intoxicated.html) [https://perma.cc/M2J2-ZT3X].

66. The Mae and Sam scenario represents a close call, the outcome of which will depend on the standard employed by their school. Not every case involves a close call—there are cases in which the respondent is clearly responsible and cases in which he is clearly not responsible—but there are also many cases involving close calls.

She walked the three blocks to the party with a suitemate, Sally. When she arrived at the party at about 9:20 p.m., she discovered that someone had made “jungle juice.” She was unsure at the time of what was in this particular mix, but she was later told that it contained fruit juices mixed with vodka and rum. Feeling nervous and a bit overheated, Mae drank four glasses of jungle juice over the next two hours.

While at the party, Mae started dancing with girlfriends. She recalls having fun and talking a mile a minute. At 11:00 p.m., Sam, an acquaintance, approached her. Mae had met Sam in her first-semester Composition course, but she had only spoken to him a few times. Sam asked if she would like to dance, and Mae said, “yes.”

Mae and Sam spent the next thirty minutes dancing and talking. He seemed like a nice guy, and they had friends in common. The party was hot and noisy. Mae mentioned that she was ready to head home, and Sam asked if she would like for him to escort her. Mae said that would be nice. She told Sally that she was going home and headed home with Sam.

Mae had started feeling slightly woozy and out of it at around 11:15 p.m., but had not told anyone. She thought the walk home would clear her head. Mae and Sam walked three blocks to her dorm,<sup>67</sup> and she asked him if he would like to come in. Sam said, “yes.” She used her swipe card to enter the dorm and her suite. She remembers dropping her swipe card at her suite door and feeling clumsy both times she had to swipe it.

None of Mae’s suitemates were home. She recalls taking Sam to her room where they could listen to music. The two sat on her bed and talked for a bit. They started to make out, kissing and fondling one another. Sam asked if he could remove her sweater. Mae said, “okay,” and Sam removed her sweater. She still had on her bra and her jeans.

Mae began performing oral sex on Sam.<sup>68</sup> Mae later said that she did not really know why she did so. She had never been with anyone except her boyfriend and wanted to see what it was like to make out with someone else, but she said she would not have engaged in oral sex with a virtual stranger in a million years had she been sober.

Mae’s next recollection is awaking alone in her bed the next morning at 7:30 a.m. Her bra was unhooked and her jeans and panties were on the floor. Her vaginal area

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67. This scenario is set on campus, but institutions to which Title IX applies are often required to investigate incidents that took place off campus. *See generally* OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 29–30, available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/8D9H-VS2E>]. For example, since Mae and Sam are both State U students, had they met at a party in their hometown 300 miles from campus and the alleged assault taken place there, State U would have exactly the same duty to investigate. Cases arising off campus are not uncommon, particularly at commuter schools.

68. Today’s college students’ attitudes towards oral sex differ from those of earlier generations in the sense that it is now often viewed as less intimate than sexual intercourse. Sarah A. Vannier & E. Sandra Byers, *A Qualitative Study of University Students’ Perceptions of Oral Sex, Intercourse, and Intimacy*, 42 ARCHIVES SEXUAL BEHAV. 1573, 1574 (2013). Many, if not most, college students do not view oral sex as being “sex” at all. Kylie P. Dotson-Blake, David Knox & Marty E. Zusman, *Exploring Social Sexual Scripts Related to Oral Sex: A Profile of College Student Perceptions*, 2 PROF. COUNS. 1, 9 (2012).

was sore, and there was a small amount of blood on her inner thighs. She was horrified to discover a used condom in her trash basket. Mae became physically ill and vomited.

She called campus police and reported a rape. She was immediately taken to the hospital. There were no bruises or other signs of physical struggle on her body. Her blood alcohol level was .01.

Mae is distraught. She is adamant that she would never have consented to intercourse, saying “My boyfriend wanted to have sex so many times, and I always said, ‘no.’ Why would I say ‘yes’ to someone I barely know? That just didn’t happen.” She does not know if she passed out or was simply too out of it to realize what was happening. Mae feels violated and has had to seek counseling for depression. She is having trouble sleeping, has lost her appetite, and is struggling in her classes.

She asserts that Sam had to know that she was drunk. She was sipping on one of the jungle juices as they danced. Further, her friends have told her that they could tell she was drunk. She believes that he took advantage of her intoxication to have intercourse with her. Mae believes Sam is a threat to the campus community and should be removed immediately.

### 3. Sam’s Account

Sam is nineteen years old and just started his second semester at State U. He has no criminal record and no disciplinary history at State U.

In high school, Sam and his friends went out in groups. He and several female friends considered themselves to be “friends with benefits.” They engaged in various sexual acts, including oral sex and intercourse, without any strings being attached. When he came to college, the same pattern emerged.

On the first Saturday night of the winter term, Sam went to a party at the apartment of a classmate named Lisa. He did not know Lisa personally, but his roommate, Adam, was Lisa’s acquaintance, and Adam had invited him to tag along to the party.

Sam spent the day of the party with Adam and other friends watching basketball on TV. As they watched, they drank beer and nibbled on pizza. Sam estimated that he drank a beer or two an hour between 4:00 p.m. and 10:30 p.m., when he headed to the party with Adam. When he arrived at the party around 10:45 p.m., he grabbed another beer.

At approximately 11:00 p.m., Sam spotted Mae. He had met her in his Composition course in the fall and wanted to get to know her better, so he approached her and asked her to dance. She immediately agreed, and they spent the next several minutes dancing, talking, and laughing. At approximately 11:30 p.m., Mae said she was ready to go home. Sam was concerned about her walking back to her home alone, so he asked if she would like him to come with her. Mae was grateful for the offer and said, “yes.”

They walked the three blocks to her room arm in arm. Sam recalls stumbling a few times along the way, but Mae kept him from falling. He did not know where she lived and simply followed her. When they reached Mae’s dorm, she asked him in. She swiped them into the building and her suite.

They went to Mae’s room, and she turned on some music. They sat on the bed chatting for ten minutes. Sam recalls Mae describing a journal she had to keep for a

psychology class. Sam had his arm around Mae's shoulders, and she had her arm around his waist. She asked if he would like a kiss, and he said, "yes."

They stretched out on the bed and started kissing. Sam describes Mae as lying on top of him. Soon, they were fondling one another's genital areas through their clothing. Sam asked Mae if he could remove her top, and she said, "okay." This kissing and fondling became more intense. Sam removed his jeans, and Mae followed suit. They continued making out. Mae began performing oral sex on Sam.

Sam asked Mae if they could have intercourse. Mae asked Sam if he had a condom. She said she was not on birth control. Sam said he had one in his wallet. Mae said, "Then, yes." While Sam put on the condom, Mae removed her panties. They then had intercourse.

They cuddled for a few minutes, and Sam asked if he could spend the night. Mae replied, "I don't think that's a good idea." Sam dressed, gave Mae a quick kiss goodbye, and went home to his dorm. It was approximately 1:00 a.m.

At 11:12 a.m., Campus Police came to his dorm and informed him that Mae had filed a complaint of rape against him. Sam is shocked and outraged. He says that nothing happened to which Mae did not consent: "I followed the rules. I asked her before I did anything, and she agreed to everything that we did."

When asked whether Mae was drunk, Sam replies, "I didn't see anything that made me think Mae didn't know what she was doing. I saw her with one drink, but everybody in the place had a drink, including me. She wasn't unsteady on her feet. She didn't throw up or pass out. She made sense when we talked. She led me back to her house. I didn't even know where she lived. If she was so drunk, how did she do that?"

Sam is beside himself over the accusation. He says he would never force a woman to do something she did not want to do. Telling his parents about Mae's accusation was the hardest thing he ever had to do. He feels as if people are talking about him and pointing at him all the time. He is suffering from anxiety and has had to go on prescription medications to combat it.

#### 4. The Witnesses' Account<sup>69</sup>

You interviewed four witnesses who were present at Lisa's party and recalled interacting with Mae or Sam. The parties had identified the four witnesses

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69. The investigators informed the parties and witnesses that State U has an amnesty policy for students participating in a Title IX investigation, and that they would not be sanctioned for any drinking violations revealed in the course of their interview. Amnesty policies are not uncommon—for obvious reasons, schools are far more concerned about sexual assaults than alcohol offenses. Some amnesty policies protect parties only, but many protect witnesses as well. *See, e.g.*, UNIV. OF ALABAMA, SEXUAL MISCONDUCT POLICY I (2015), available at [http://titleix.ua.edu/uploads/3/7/4/1/37415083/2015\\_sexual\\_misconduct\\_policy.pdf](http://titleix.ua.edu/uploads/3/7/4/1/37415083/2015_sexual_misconduct_policy.pdf) [<https://perma.cc/SCL7-RGR2>] ("The University of Alabama community views the safety of our students as a top priority. A student who is under the influence of alcohol or drugs at the time of an incident should not be reluctant to seek assistance for that reason. The University will not pursue disciplinary violations against a student (or against a witness) for their improper use of alcohol or drugs (e.g., underage drinking) if the student is making a good faith report of Prohibited Conduct.").

interviewed as having the most contact with them. You then contacted five additional attendees of the party: two failed to respond to the request for information; two responded, but indicated that they had not really observed Sam or Mae; and one responded, but indicated that she had had so much to drink that she had no recollection of the party.

Lisa, the party's host and Mae's friend, noted that she never saw Mae without a glass in her hand that night. She said, "I knew Mae was drunk because she was acting so silly and giggly. That's how she gets when she's drunk." She did not see Mae stumble or hear her slur any words. Lisa did not talk to Sam at all and really did not pay much attention to him: "I saw him with a beer in his hand at one point. I only noticed him because he banged up against one of my walls while he and Mae were dancing and knocked a picture down. I couldn't tell you if he was drunk or not." Lisa herself had consumed several glasses of jungle juice.

Adam, Sam's friend, said he saw Mae with a drink in her hand, but was not sure what it was. Adam had spoken with Mae for a few minutes and thought she seemed okay. She was talking about a concert she was going to the following week. She tripped over a few words, but Adam thought that was because she was talking so fast. He did not think she was drunk. Adam said Sam had been drinking beer all day: "Sam's an athlete, and he's usually really graceful, but he was a total klutz that night, and when we walked over to the party, I had to grab him to stop him from walking into the traffic when we crossed the street. He was drunk as hell." Adam had been matching Sam beer for beer all evening.

C.J., a friend of Mae and Sam, saw both at the party. He said, "Mae was really guzzling down the jungle juice, but I only saw Sam with one beer. Of course, Sam was only there for a short while. Mae was acting really silly—laughing and making noise. She gets like that when she drinks. She's so quiet when she's sober that it really jumps out when she's been drinking. But she wasn't falling down or anything, and when I asked her what classes she is taking this semester she was able to list them. I didn't have a chance to talk to Sam, but I saw him dancing. It was actually kind of funny. He kept bumping into people and things. I'd say they were both drunk, but not that drunk. Nobody looked like they were going to barf or anything." C.J. had only had a couple of beers.

Penny, a stranger to Mae and Sam, met both of them at the party. Adam introduced her to Sam. Penny said that they talked mostly about some of the basketball games that had been televised that day. She said Sam was pretty quiet, but he took part in the conversation. Lisa introduced her to Mae. They chatted for a bit and discovered they were from neighboring towns. Mae asked Penny to lunch the next week. Penny said Sam and Mae had drinks in their hands when they spoke, but she honestly did not think either was drunk. Penny had nothing to drink that evening.

## 5. Additional Evidence

You were able to obtain surveillance videos of Sam and Mae returning to her dorm. Video from Camera 1, located outside the main door, shows they arrived at the dorm at 11:39 p.m. The two are seen slowly walking arm in arm approaching the door. Mae appears to have difficulty removing her swipe card from the back pocket of her jeans. Her hand-eye coordination seems somewhat off. When she does remove the card and attempt to swipe it, she drops it on the ground. She retrieves the card



and successfully swipes it on her second attempt. She holds the door open so that Sam can follow her. Sam appears slightly unsteady on his feet.

Camera 2, on the other side of the door, then picks up the action. Once Sam is through the door, Mae again takes his arm. They are seen chatting and laughing as they approach the elevator. Mae pushes the button for the elevator, and the two enter. Camera 3 picks up the two exiting the elevator. Sam stumbles as they step off the elevator, but does not fall. The two then exit camera range.

At 1:04 a.m. the cameras capture Sam leaving the building alone. He still appears somewhat unsteady on his feet, but does not stumble, and successfully makes his way out.<sup>70</sup>

### B. The Hookup Culture

The Mae and Sam scenario involves one of the most common types of sexual encounters found on today's college campus, the "hookup." A "hookup" is "generally defined as a spontaneous sexual encounter, with or without sexual intercourse, between two individuals with no prior romantic relationship."<sup>71</sup> Hookups are focused on the moment. Participants typically have no expressed intention of forming a future committed relationship.<sup>72</sup> They involve "sex without love, commitment or expectations for the future."<sup>73</sup>

From the 1920s through the 1960s, the "sexual script"<sup>74</sup> prescribed that dating was the path to sexual intimacy.<sup>75</sup> Since then, the sexual script has changed dramatically.

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70. Surveillance video is often available when an assault has taken place on campus, but it typically picks up only a few seconds of events. Investigators may also be able to pick up evidence on social media sites. Students sometimes volunteer to produce copies of text messages, emails, cell phone photographs, etc., but lacking subpoena power, investigators cannot compel them to produce evidence.

71. Littleton et al., *supra* note 52, at 793.

72. Caroline Heldman & Lisa Wade, *Hook-Up Culture: Setting a New Research Agenda*, 7 *SEXUALITY RES. & SOC. POL'Y* 323, 324 (2010).

73. Jennifer Katz, Vanessa Tirone & Erika van der Kloet, *Moving in and Hooking Up: Women's and Men's Casual Sexual Experiences During the First Two Months of College*, *ELECTRONIC J. HUM. SEXUALITY* (Mar. 31, 2012), <http://www.ejhs.org/volume15/Hookingup.html> [<https://perma.cc/N5A2-NKP7>]. It might be more accurate to say that there are no expressed expectations for the future. In one study in which participants were asked to identify "possibly multiple" motivations for hooking up, "51% of participants – and equally for both men and women – reported hooking up as a way to potentially initiate a traditional romantic relationship." Justin R. Garcia & Chris Reiber, *Hook-Up Behavior: A Biopsychosocial Perspective*, 2 *J. SOC., EVOLUTIONARY & CULTURAL PSYCHOL.* 192, 198 (2008). So there may be some desire to form a longer-lasting relationship, but neither party is typically talking about it.

74. "Sociologists believe that how a person behaves in a social setting can resemble an actor following a script. . . . [T]he cultural norms that we live by can dictate how people act in a given situation." KATHLEEN A. BOGLE, *HOOING UP: SEX, DATING, AND RELATIONSHIPS ON CAMPUS* 7 (2008) (citations omitted).

75. *Id.* at 8. Dating can be loosely defined as a couple pairing up and going somewhere "outside the home in order to enjoy each other's company." *Id.* at 13.

Dating is no longer the only path to sexual intimacy.<sup>76</sup> The hookup now provides an alternative script followed by many.<sup>77</sup> Not every student hooks up, and among those who do, not every student engages in the same behaviors; but the hookup culture pervades the college campus.<sup>78</sup>

This new era of stranger and acquaintance sex demands that “consent” be defined with greater precision than ever before. The ability of romantic partners to intuit their significant other’s desires is simply not there. Somehow, we as a society need to develop a common understanding of consent and begin to impart it to our youth long before they reach college age.

Ascertaining the number of hookups taking place on today’s college campus with any degree of precision is complicated by the fact that some researchers have broadly defined hooking up as encompassing the “friends with benefits” relationship.<sup>79</sup> As the name implies, a friends with benefits relationship<sup>80</sup> involves casual sex on a periodic basis with someone the student knows.<sup>81</sup> There is no romantic relationship, but there is an on-going friendship.<sup>82</sup> Other researchers have limited the definition of a hookup to situations involving a one-night stand,<sup>83</sup> typically with a stranger or acquaintance, as was the case with Mae and Sam.<sup>84</sup> Regardless of which definition is used, large numbers of students are engaging in sexual activity with partners they either do not know well or do not know at all.

The number of students engaging in hookups today can be mind-boggling for those from earlier generations. Multiple studies show that by the end of their college years, over two-thirds of college students have engaged in at least one hookup.<sup>85</sup>

76. *Id.* at 8.

77. See Jessica Siebenbruner, *Are College Students Replacing Dating and Romantic Relationships with Hooking Up?*, 54 J. C. STUDENT DEV. 433, 434 (2013) (noting that dating and hook-ups are both “prevalent on college campuses”).

78. See BOGLE, *supra* note 74, at 9.

79. See Robyn L. Fielder & Michael P. Carey, *Prevalence and Characteristics of Sexual Hookups Among First-Semester Female College Students*, 36 J. SEX & MARITAL THERAPY 346, 346–47 (2010).

80. These relationships are also commonly known as a “booty call relationships” or “f\*\*\* buddy relationships.”

81. Jesse Owen & Frank D. Fincham, *Young Adults’ Emotional Reactions After Hooking Up Encounters*, 40 ARCHIVES SEXUAL BEHAV. 321, 321 (2011).

82. Garcia & Reiber, *supra* note 73, at 194.

83. Fielder & Carey, *supra* note 79, at 346–47.

84. College students have a false sense of security about their safety on campus. See, e.g., Stephanie Booth, *Why Your Campus Can Be a Danger Zone*, COSMOPOLITAN, Jan. 2008, at 120–23. That same sense of security seems to carry over to the people who live on and visit campus. I cannot tell you how many times a student said something to me like, “He was my best friend’s boyfriend’s friend, so I thought everything would be okay.” Even the risk of a sexually-transmitted infection (STI) does not seem real to many students. E.g., Teresa M. Downing-Matibag & Brandi Geisinger, *Hooking Up and Sexual Risk Taking Among College Students: A Health Belief Model Perspective*, 19 QUALITATIVE HEALTH RES. 1196, 1199 (2009).

85. Heldman & Wade, *supra* note 72, at 324 (“Depending on methodology (surveys, interviews, and focus groups) and operationalization (of, for example, ‘friends with benefits’), studies have found that between two thirds and three quarters of students hook up at some

Around a quarter will participate in ten or more hookups during this time.<sup>86</sup> In a 2008 study, 34 percent of instances of first intercourse were reported to have taken place in the context of a hookup.<sup>87</sup> In a 2012 study, 37 percent of participants reported hooking up during the first eight weeks of college.<sup>88</sup>

Students seek and find hookup opportunities at parties, bars, and other social gatherings.<sup>89</sup> Men are somewhat more likely to initiate a hookup, but women regularly initiate them.<sup>90</sup> Sometimes the hookup partner is someone a student met in a class or someone introduced by a friend.<sup>91</sup> Other times the hookup partner is a stranger who happened to attend the same event.<sup>92</sup>

The process of agreeing to hookup is more than a bit nebulous, with nonverbal cues—such as making eye contact, engaging in one-on-one conversation, and flirting—playing a key role in indicating sexual interest.<sup>93</sup> Verbalizing agreement to sexual activity is not part of the equation.<sup>94</sup> If the students highly value their privacy

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point during college.” (citations omitted)). “When casual sex is more narrowly defined as vaginal, oral, or anal sex with a non-dating partner, over one-half of male students (52%) and over one-third of female students (36%) reported having engaged in such behaviors.” Carolyn Bradshaw, Arnold S. Kahn & Bryan K. Saville, *To Hook Up or Date: Which Gender Benefits?*, 62 *SEX ROLES* 661, 662 (2010).

As Garcia & Reiber note, several circumstances in addition to the methodology employed and the specific inquiries asked may explain the statistical differences among studies:

The frequency of hook-ups varies from campus to campus, likely as a result of ecological differences between college environments, historical time of data collection, age of participants, and the demographics of the surveyed population. Paul, McManus and Hayes (2000) found approximately 78% of participants had hooked-up; two years later, Paul and Hayes (2002) reported that approximately 70% of undergraduate participants had engaged in a hook-up at least once in their college career. Lambert, Kahn and Apple (2003) found that approximately 78% of female and 84% of male participants had hooked up. More recently, England, Shafer and Fogarty (2007) reported that 76% of undergraduate seniors (fourth/final year students) had hooked-up at some point.

Garcia & Reiber, *supra* note 73, at 193.

A number of factors appear to bear on whether a particular student opts to hookup. Hooking up appears to be less common among “racial minorities, students who are *very* religious, and those who are already in exclusive, committed relationships.” BOGLE, *supra* note 74, at 25 (emphasis in original).

86. Heldman & Wade, *supra* note 72, at 324.

87. Garcia & Reiber, *supra* note 73, at 198.

88. Katz et. al., *supra* note 73.

89. BOGLE, *supra* note 74, at 29. They often begin the evening as part of a single-sex group (e.g., a woman might head out to a bar with her roommates). *Id.*

90. Garcia & Reiber, *supra* note 73, at 198 (“Of men, 80% reported having tried to initiate a hook-up; of women, 65% reported having tried to do so.”).

91. BOGLE, *supra* note 74, at 30.

92. *Id.* (noting that a hookup with a stranger is known as a “random” hookup).

93. *Id.* at 33–34.

94. *Id.*

or wish to become more intimate, they may find an empty room or go home.<sup>95</sup> Again, there is typically no discussion about the purpose of heading to a secluded spot.<sup>96</sup>

Students seem to find any conversation about the specifics of a hookup, including exactly what activities it will involve, awkward and embarrassing.<sup>97</sup> This lack of a meaningful dialogue is completely consistent with what research tells us about how people interact about sex—“[n]umerous studies have demonstrated that the preferred approach to signal consent for both men and women tends to be nonverbal instead of verbal.”<sup>98</sup> But reading the nonverbal cues of a stranger is infinitely more difficult than reading those of a romantic partner.

What takes place during the hookup is influenced by both the personal moral beliefs of the participants and what they believe to be the social norms for their peer group.<sup>99</sup> If a student thinks “everyone” is having intercourse during hookups, he or she is likely to do so, too. Evidence exists that students may actually be willing to go further in terms of sexual intimacy with a hookup partner with whom they have absolutely no interest in pursuing a relationship.<sup>100</sup> When a romantic relationship is desired, both students may wish to signal that they view the other as something more than a hookup by initially focusing the relationship on something other than sexual pleasure.<sup>101</sup>

What happens during a hookup varies tremendously, but recent studies provide some insights.<sup>102</sup> Almost every hookup involves kissing.<sup>103</sup> Participants in a 2010 study reported the following additional hookup activities: 58 percent engaged in sexual touching above the waist; 53 percent engaged in sexual touching below the waist; 36 percent performed oral sex; 35 percent received oral sex; and 34 percent engaged in sexual intercourse.<sup>104</sup>

Once the hookup ends, students frequently separate without spending the night together.<sup>105</sup> The entire hookup process from meeting to parting can easily be achieved within two hours or less. The students may or may not meet again, with one study indicating that about half of college students who engaged in sexual intercourse during a hookup reported that they “never saw their hookup partner again.”<sup>106</sup>

95. *Id.* at 35. The choice to go back to someone’s room does not indicate consent to a higher level of intimacy—some people simply value privacy more than others. *Id.*

96. *Id.* at 36.

97. *Id.*

98. Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale—Revised: Development, Reliability, and Preliminary Validity*, 47 J. SEX RES. 420, 421 (2010).

99. BOGLE, *supra* note 74, at 36–38.

100. *Id.* at 37.

101. *Id.* at 37–39.

102. *See, e.g.*, Fielder & Carey, *supra* note 79; Chris Reiber & Justin R. Garcia, *Hooking Up: Gender Differences, Evolution, and Pluralistic Ignorance*, 8 EVOLUTIONARY PSYCHOL. 390 (2010).

103. Fielder & Carey, *supra* note 79, at 351.

104. Reiber & Garcia, *supra* note 102, at 395.

105. BOGLE, *supra* note 74, at 35.

106. Elizabeth L. Paul, Brian McManus & Allison Hayes, “Hookups”: *Characteristics and Correlates of College Students’ Spontaneous and Anonymous Sexual Experiences*, 37 J. SEX RES. 76, 81 (2000).

Hookups tend to result in mixed emotions for both men and women.<sup>107</sup> In most instances, both parties leave with more positive than negative feelings about the hookup.<sup>108</sup> The most commonly cited reasons for engaging in sexual activity by both male and female college students are “I was attracted to the person”; “I wanted to experience the physical pleasure”; and “It feels good.”<sup>109</sup> A romantic relationship is clearly not required to satisfy these human desires. Still, the negative feelings are significant,<sup>110</sup> and alcohol consumption related to the hookup only decreases positive feelings and increases negative feelings.<sup>111</sup>

Women experience more negative feelings about hookups than do men.<sup>112</sup> The most common explanation for this phenomenon is that, historically, society has taught women to view sex as an “emotional investment” and to “hope for relational commitment.”<sup>113</sup> Since hookups rarely result in long-term relationships, women may be hurt and disappointed for reasons they may not even fully grasp.<sup>114</sup> But there is more to it than disappointment. The number one reported reason for regret among both college women and men is sexual guilt, “guilt about moral conduct in sexual situations.”<sup>115</sup> Among the most regretted encounters are those in which a student engages in intercourse with a stranger.<sup>116</sup>

There is one additional critical component of the vast majority of hookups—alcohol consumption.<sup>117</sup> Binge drinking and hookups feed off of one another—the desire to

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107. Owen & Fincham, *supra* note 81, at 322. For example, in one study of college women, “64% reported that they felt ‘awkward’ a day or two after the hook up, followed by ‘desirable’ (62%) and ‘confused’ (57%).” Johanna Strokoff, Jesse Owen & Frank D. Fincham, *Diverse Reactions to Hooking Up Among U.S. University Students*, 44 ARCHIVES SEXUAL BEHAV. 935, 935 (2015).

108. Owen & Fincham, *supra* note 81, at 327.

109. Cindy M. Meston & David M. Buss, *Why Humans Have Sex*, 36 ARCHIVES SEXUAL BEHAV. 477, 481 tbl.1 (2007).

110. Owen & Fincham, *supra* note 81, at 325.

111. *Id.* at 325–26.

112. *Id.* at 322 (noting in one recent study that “26.4% of women reported positive emotions after the hooking up experience, 48.7% reported negative emotions, and 24.9% reported a mix of positive and negative emotions. In contrast, 50.4% of men reported that hooking up encounters were associated with positive emotions, 26.0% reported negative emotions, and 23.6% reported a mix of positive and negative emotions.”).

113. *Id.*

114. *See id.*

115. Sara B. Oswalt, Kenzie A. Cameron & Jeffrey J. Koob, *Sexual Regret in College Students*, 34 ARCHIVES SEXUAL BEHAV. 663, 667 (2005).

116. Justin R. Garcia, Chris Reiber, Sean G. Massey & Ann M. Merriwether, *Sexual Hookup Culture: A Review*, 16 REV. GEN. PSYCHOL. 161, 170 (2012). Any number of possible explanations exist for why students are hooking up in situations that run contra to their personal moral code, but one that seems to play a key role is a concept known as “pluralistic ignorance.” Pluralistic ignorance “is characterized by individuals behaving in accordance with (generally false) beliefs attributed to the group, regardless of their own beliefs.” Reiber & Garcia, *supra* note 102, at 391. Students who have moral qualms about engaging in a sexual activity often engage in that activity because they mistakenly believe that peers approve of and are engaging in that activity. *Id.*

117. Heldman & Wade, *supra* note 72, at 328.

hookup leads students to fortify themselves with “liquid courage” and alcohol consumption leads to riskier sexual behavior.<sup>118</sup>

### C. The Binge Drinking Era

The Mae and Sam scenario also highlights the problem of excessive or “binge” drinking, something schools have battled for decades.<sup>119</sup> Under the standard used by the National Institute on Alcohol Abuse and Alcoholism (NIAAA), binge drinking involves a woman consuming four or more drinks or a man consuming five or more drinks in a two-hour period.<sup>120</sup> Despite ever-increasing efforts by schools across the country to prevent excessive drinking,<sup>121</sup> the percentage of students engaging in binge drinking has held steady over the past two decades with forty to forty-five percent of students reporting at least one episode of binge drinking over the past month.<sup>122</sup>

College men continue to have higher rates of daily drinking and binge drinking than women, but, since 2004, the gap has been narrowing because men are drinking less and women are drinking more.<sup>123</sup> This increase in alcohol use by women is consistent with what is happening elsewhere in society.<sup>124</sup> College women now exceed the NIAAA’s weekly drinking guidelines at a higher rate than their male counterparts.<sup>125</sup>

118. See *infra* Part I.C.

119. Beth McMurtrie, *Why Colleges Haven’t Stopped Students from Binge Drinking*, CHRON. HIGHER EDUC., Dec. 5, 2014, at A23, available at MasterFILE Premier via EBSCOhost 99815430.

120. White & Hingson, *supra* note 27, at 202. Drinking this amount in a two-hour period “generate[s] blood alcohol levels of roughly 0.08 percent, the legal limit for driving, for drinkers of average weight.” *Id.* The gender-specific measures reflect the fact that women do not need to consume as much alcohol as men to suffer drinking-related problems, such as suffering an injury. Henry Wechsler, George W. Dowdall, Andrea Davenport & Eric B. Rimm, *A Gender-Specific Measure of Binge Drinking Among College Students*, 85 AM. J. PUB. HEALTH 982, 984 (1995).

121. Henry Wechsler, Jae Eun Lee, Meichun Kuo, Mark Seibring, Toben F. Nelson & Hang Lee, *Trends in College Binge Drinking During a Period of Increased Prevention Efforts: Findings from 4 Harvard School of Public Health College Alcohol Study Surveys: 1993–2001*, 50 J. AM. C. HEALTH 203, 215 (2002).

122. White & Hingson, *supra* note 27, at 202. Binge drinking is becoming more common among all Americans. Maggie Fox, *Americans Are Drinking More—A Lot More*, NBC NEWS (Apr. 23, 2015, 6:31 PM), <http://www.nbcnews.com/health/health-news/americans-are-drinking-more-lot-more-n347126> [https://perma.cc/VTS4-X7M3].

123. LLOYD D. JOHNSTON, PATRICK M. O’MALLEY, JERALD G. BACHMAN, JOHN E. SCHULENBERG & RICHARD A. MIECH, 2 MONITORING THE FUTURE: NATIONAL SURVEY RESULTS ON DRUG USE 1975–2013: COLLEGE STUDENTS & ADULTS AGES 19–55, 388 (2014); accord Desiree Hensel, Katherine Leigh Todd & Ruth C. Engs, *College Student’s Health, Drinking and Smoking Patterns: What Has Changed in 20 Years?*, 48 C. STUDENT J. 378, 381 (2014).

124. Fox, *supra* note 122.

125. Bettina B. Hoepfner, Anna L. Paskausky, Kristina M. Jackson & Nancy P. Barnett, *Sex Differences in College Student Adherence to NIAAA Drinking Guidelines*, 37 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 1779, 1781 (2013).

A byproduct of increased alcohol use by women is an increase in the number of sexual encounters in which the issue of incapacitation arguably comes into play. The question of whether one or both of the parties was incapable of consent arises in most sexual assault cases. Unfortunately, no one has developed a clear, workable standard on this issue.

Drinking has always been a part of campus life, but the “partying is getting even harder.”<sup>126</sup> It is easy for someone who graduated a few decades ago to assume that the drinking culture is exactly what it always was on her campus, but it is not; the intensity of the drinking is almost exponentially greater. Drinking patterns have become more polarized with a higher percentage of students abstaining, but a higher percentage of students falling into the category of “frequent” binge drinkers (i.e., drinkers who report three or more binge drinking episodes over a two-week period).<sup>127</sup> One in five college students is a frequent binge drinker.<sup>128</sup> The number of “extreme” binge drinkers is also a concern with 13% of students reporting having consumed at least ten drinks in a row at least once over the past two weeks and 5% reporting having consumed at least fifteen drinks in a row.<sup>129</sup>

Hard liquor has replaced beer as the alcohol of choice and is particularly popular among binge drinkers.<sup>130</sup> Almost half of all college students who drink do so for the express purpose of getting drunk—drunkenness is no longer a byproduct of drinking, but a goal.<sup>131</sup> Many students actively seek to drink to the point of blacking out.<sup>132</sup>

Pregaming (also known as front-loading) has become a central feature of the campus scene.<sup>133</sup> It can be defined as “consuming alcohol prior to attending one’s intended destination (e.g., a party, bar, sporting event) at which more alcohol may or may not be consumed.”<sup>134</sup> Approximately two-thirds of college students who drink

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126. McMurtrie, *supra* note 119. “In 2012, 8.2 percent of all Americans were considered heavy drinkers and 18.3 percent were binge drinkers.” Fox, *supra* note 122 (quoting *Heavy Drinking and Binge Drinking Rise Sharply in US Counties*, INST. FOR HEALTH METRICS AND EVALUATION <http://www.healthdata.org/news-release/heavy-drinking-and-binge-drinking-rise-sharply-us-counties> [<https://perma.cc/L8NT-B8U7>]).

127. Henry Wechsler & Toben F. Nelson, *What We Have Learned from the Harvard School of Public Health College Alcohol Study: Focusing Attention on College Student Alcohol Consumption and the Environmental Conditions That Promote It*, 69 J. STUD. ON ALCOHOL & DRUGS 481, 483 (2008).

128. White & Hingson, *supra* note 27, at 203.

129. JOHNSTON ET AL., *supra* note 123, at 367.

130. Hensel et al., *supra* note 123, at 383–84.

131. Wechsler & Nelson, *supra* note 127, at 483.

132. *20/20: Intoxication Nation* (ABC television broadcast Sept. 21, 2012).

133. E.g., Rachel L. Bachrach, Jennifer E. Merrill, Katrina M. Bytschkow & Jennifer P. Read, *Development and Initial Validation of a Measure of Motives for Pregaming in College Students*, 37 ADDICTIVE BEHAV. 1038, 1038 (2012).

134. Joseph W. LaBrie, Justin F. Hummer, Eric R. Pedersen, Andrew Lac & Taona Chithambo, *Measuring College Students’ Motives Behind Prepartying Drinking: Development and Validation of the Prepartying Motivations Inventory*, 37 ADDICTIVE BEHAV. 962, 962 (2012).

engage in pregaming,<sup>135</sup> and women and men engage in pregaming in equal numbers.<sup>136</sup>

Pregaming increases the risk of negative consequences of drinking.<sup>137</sup> It involves consuming alcohol very rapidly, making blackouts highly likely.<sup>138</sup> It also tends to increase the overall amount of alcohol consumed over the course of the evening, making consequences like alcohol poisoning more likely.<sup>139</sup> Students who engage in pregaming typically reach somewhere close to the blood alcohol concentration (BAC) required for legal intoxication (.08%) before they even head out and often reach double that level before the night is through.<sup>140</sup>

It also makes it far more difficult for potential sexual partners to gauge levels of intoxication. In our scenario, Sam told the truth when he said he did not know how many drinks Mae had had. Hookup partners are typically not there for the pregaming.

Pregaming is motivated by a number of factors.<sup>141</sup> It is more cost effective to become intoxicated before going to a bar, and students need not worry about barriers to drinking like being underage.<sup>142</sup> But these practical considerations are not the only motivation for pregaming.

Students report pregaming for interpersonal enhancement (i.e., they believe that they will enjoy the party more and be more social and outgoing if they walk in the door with a buzz).<sup>143</sup> Along the same lines, students report pregaming for purposes of intimate pursuit.<sup>144</sup> Students, men and women, are pregaming because they believe doing so will help them achieve a hookup,<sup>145</sup> and they appear to be right. Studies show that anywhere from 64 percent to 80 percent of hookups involve the use of alcohol.<sup>146</sup> In most cases, both participants in the hookup have been drinking.<sup>147</sup> Women engaging in hookups have consumed a median of four drinks, and men engaging in hookups have consumed a median of six drinks.<sup>148</sup>

A number of theories exist about how pregaming and other alcohol uses promote hookups.<sup>149</sup> There is a psychological and a physiological component to the relationship between drinking and sexual activity. Pregaming may take place because

135. Bachrach et al., *supra* note 133, at 1039.

136. LaBrie et al., *supra* note 134, at 962.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Kim M. Caudwell & Martin S. Hagger, *Pre-Drinking and Alcohol-Related Harm in Undergraduates: The Influence of Explicit Motives and Implicit Alcohol Identity*, 37 J. BEHAV. MED. 1252, 1253 (2014).

142. *Id.*

143. LaBrie et al., *supra* note 134, at 967.

144. *Id.*

145. *Id.*

146. Garcia et al., *supra* note 116, at 169.

147. NORVAL GLENN & ELIZABETH MARQUARDT, INST. FOR AM. VALUES, HOOKING UP, HANGING OUT, AND HOPING FOR MR. RIGHT: COLLEGE WOMEN ON DATING AND MATING TODAY 15 (2001), available at <http://www.americanvalues.org/search/item.php?id=18> [https://perma.cc/9LZ4-JPVB].

148. Heldman & Wade, *supra* note 72, at 328.

149. Paul et al., *supra* note 106, at 77.



someone has the desire to hookup and is using alcohol to facilitate that hookup.<sup>150</sup> Some students drink to reduce their sexual inhibitions—they seek “liquid courage” to reduce their anxieties and their sexual fears.<sup>151</sup> Approximately half the college women in one study indicated that they had used drugs or alcohol to facilitate sexual activity.<sup>152</sup>

The “Alcohol Expectancy Theory” (AET) relates to the psychological effect of drinking to promote sexual activity, suggesting that “how individuals expect they will behave and feel while intoxicated influences their actual behavior and feelings while intoxicated.”<sup>153</sup> In other words, when someone drinks heavily to make sexual activity more likely to occur, a self-fulfilling prophecy can be created.<sup>154</sup> If you think drinking will lower your inhibitions and allow you to take more sexual risks, it will.<sup>155</sup>

Alcohol use also functions as an “anticipatory excuse.”<sup>156</sup> Drinking allows students to engage in behaviors they feel may be questionable with the built-in excuse that they would never have done such a thing had they been sober.<sup>157</sup> Today’s college women, in particular, are in a catch-22 situation—on the one hand, they are being socially pressured to join in the hookup culture, and, on the other, unlike men, they risk being socially condemned as promiscuous if they do so.<sup>158</sup> Women may seek to use the excuse “I was drunk” to avoid both peer condemnation and self-condemnation.<sup>159</sup>

Alcohol consumption also has physiological and pharmacological effects that may make sexual activity more likely. Even if pregaming was not done with the intent to promote sexual activity, it may still do so because of its effect on the student’s decision-making process.<sup>160</sup> The “Alcohol Myopia Theory (AMT),” also known as “beer goggles,” posits, “alcohol limits cognitive processing resulting in the

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150. Jesse Owen, Frank D. Fincham & Jon Moore, *Short-Term Prospective Study of Hooking Up Among College Students*, 40 ARCHIVES SEXUAL BEHAV. 331, 338–39 (2011).

151. Susan A. Stoner, William H. George, Laura M. Peters & Jeanette Norris, *Liquid Courage: Alcohol Fosters Risky Sexual Decision-Making in Individuals with Sexual Fears*, 11 AIDS & BEHAV. 227, 228 (2007).

152. Megan E. Patrick & Jennifer L. Maggs, *Does Drinking Lead to Sex? Daily Alcohol-Sex Behaviors & Expectancies Among College Students*, 23 PSYCHOL. ADDICTIVE BEHAV. 472, 473 (2009).

153. Amanda K. Gilmore, William H. George, Hong V. Nguyen, Julia R. Heiman, Kelly Cue Davis & Jeanette Norris, *Influences of Situational Factors and Alcohol Expectancies on Sexual Desire and Arousal Among Heavy-Episodic Drinking Women: Acute Alcohol Intoxication and Condom Availability*, 42 ARCHIVES SEXUAL BEHAV. 949, 951 (2013).

154. *Id.*

155. *Id.*

156. Paul et al., *supra* note 106, at 77.

157. *Id.*

158. Katz et al., *supra* note 73.

159. GLENN & MARQUARDT, *supra* note 147, at 16 (“[A] University of Michigan student said, ‘Girls are actually allowed to be a lot more sexual when they are drunk. . . .’ A University of Chicago junior observed, ‘One of my best friends . . . sometimes that’s her goal when we go out. Like she wants to get drunk so I guess she doesn’t have to feel guilty about [hooking up].’” (alteration in original) (emphasis removed)).

160. Owen et al., *supra* note 150, at 338.

intoxicated individual only being able to attend to the most immediate salient environmental cues.”<sup>161</sup> In plain English, drinking can affect a student’s cognitive ability to assess risk.<sup>162</sup> He or she becomes “nearsighted” and is only dealing in the “now” of sexual arousal.<sup>163</sup>

People rely on two different types of cues in sexual decision making. Disinhibitory cues are “go” cues.<sup>164</sup> They relate to sexual desires: “Here are all of the reasons I should engage in this sexual activity (e.g., sexual gratification, romance, affiliation).”<sup>165</sup> Inhibitory cues are “stop” cues.<sup>166</sup> They relate to sexual fears: “Here are all of the reasons I should not engage in this sexual activity.”<sup>167</sup> Many of these cues relate to longer-term concerns (e.g., pregnancy, the transmission of an STI, violation of social or moral conventions).<sup>168</sup>

According to the AMT, alcohol consumption makes common sense “go out the window.”<sup>169</sup> An intoxicated individual may see only the “go” cues and never make it to the “stop” cues.<sup>170</sup> This disconnect makes it more likely that he or she will consent to the sexual activity.<sup>171</sup> It is not that the individual is incapable of making a decision. Rather, she is making a conscious decision that may be viewed as a bad decision in the cold light of day.

Adding to the risk, a disconnect may also exist for the intoxicated individual’s partner if, as is likely, he has engaged in drinking, too. For example, if a woman has consented to some sexual activity (e.g., oral sex), her intoxicated partner may see her consent to that activity as a “go” cue for sexual intercourse.<sup>172</sup> Complicating matters further, studies indicate that men may view a woman who drinks as sending a “go” cue that she is interested in sexual activity.<sup>173</sup> All the myopic partner may see are these “go” cues, which may lead to sexual aggression.<sup>174</sup>

161. Brenda J. Benson, Carol L. Gohm & Alan M. Gross, *College Women and Sexual Assault: The Role of Sex-Related Alcohol Expectancies*, 22 J. FAM. VIOLENCE 341, 342 (2007).

162. Jessica A. Griffin, M. Renée Umstadd & Stuart L. Usdan, *Alcohol Use and High-Risk Sexual Behavior Among Collegiate Women: A Review of Research on Alcohol Myopia Theory*, 58 J. AM. C. HEALTH 523, 524 (2010).

163. *Id.*

164. William H. George, Kelly Cue Davis, Julia R. Heiman, Jeanette Norris, Susan A. Stoner, Rebecca L. Schacht, Christian S. Hendershot & Kelly F. Kajumulo, *Women’s Sexual Arousal: Effects of High Alcohol Dosages and Self-Control Instructions*, 59 HORMONES & BEHAV. 730, 731 (2011).

165. See Kelly Cue Davis, William H. George & Jeanette Norris, *Women’s Responses to Unwanted Sexual Advances: The Role of Alcohol and Inhibition Conflict*, 28 PSYCHOL. WOMEN Q. 333, 334 (2004).

166. George et al., *supra* note 164, at 731.

167. See Peter R. Giancola, Robert A. Josephs, Dominic J. Parrott & Aaron A. Duke, *Alcohol Myopia Revisited: Clarifying Aggression and Other Acts of Disinhibition Through a Distorted Lens*, 5 PERSP. ON PSYCHOL. SCI. 265, 267 (2010).

168. *Id.*

169. *Id.*

170. *Id.*

171. Davis et al., *supra* note 165, at 334.

172. *Id.* at 333.

173. Benson et al., *supra* note 161, at 341–42.

174. Davis et al., *supra* note 165, at 333; see also Benson et al., *supra* note 161, at 342.

Along with making sexual activity more likely, pregameing tends to result in riskier sexual behavior. Students who engaged in sexual intercourse during a hookup report greater alcohol consumption than those who engaged in kissing, petting, etc.<sup>175</sup> Further, both male and female students who pregame are more likely to hookup with someone they just met that evening.<sup>176</sup>

*D. Binge Drinking, Hookups & Unwanted Sex: It's Complicated*

The combination of binge drinking, hookups, and college students only just beginning to explore their own sexuality creates a perfect storm of bad sexual experiences, some of which involve sexual assault, but many of which do not. Understanding the various types of unwanted sexual experiences is essential to crafting the programs and policies needed to address each.

“Unwanted sexual behavior” can be defined as including “any behavior involving sexual contact experienced as harmful or regretful during or following the incident.”<sup>177</sup> That includes behaviors that would meet the legal definition of sexual assault, but it also includes a host of other behaviors.<sup>178</sup> Mae and Sam’s hookup clearly involved unwanted sexual behavior, but it may or may not have involved a sexual assault. Either way, Mae is suffering severe emotional distress.

Hookups and unwanted sexual behaviors, including sexual assaults, go hand-in-hand.<sup>179</sup> In one recent study, “30 of the 122 students who had hooked up reported unwanted intercourse compared to none of the 55 students who had never hooked up.”<sup>180</sup> Among the 36 incidents of unwanted sexual intercourse, 77.8 percent took place in the context of a hookup, 8.3 percent took place in the context of a date, and 13.9 percent took place in the context of an ongoing relationship.<sup>181</sup>

Participants in the study were asked to try to articulate the reasons for the unwanted intercourse, and the answers provided by women participants are set forth in Table 1.<sup>182</sup> A review of the reasons provided evidences how few of the incidents might reasonably be said to fall within in the realm of criminal sexual assault. For

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175. Owen et al., *supra* note 150, at 338.

176. Joseph W. LaBrie, Justin F. Hummer, Tehniat M. Ghaidarov, Andrew Lac & Shannon R. Kenney, *Hooking Up in the College Context: The Event-Level Effects of Alcohol Use and Partner Familiarity on Hookup Behaviors and Contentment*, 51 J. SEX RES. 62, 69 (2014).

177. William F. Flack, Jr., Kimberly A. Daubman, Marcia L. Caron, Jenica A. Asadorian, Nicole R. D’Aureli, Shannon N. Gigliotti, Anna T. Hall, Sarah Kiser & Erin R. Stine, *Risk Factors and Consequences of Unwanted Sex Among University Students: Hooking Up, Alcohol, and Stress Response*, 22 J. INTERPERSONAL VIOLENCE 139, 140 (2007).

178. *Id.*

179. *Id.* at 140–41.

180. *Id.* at 146.

181. *Id.*

182. While Table 1 focuses on the responses provided by women, it is important to note that while their numbers are smaller, men as well as women report experiencing unwanted sex. *Id.* at 145–46.

instance, none of the participants indicated that they had been pressured physically or experienced fear that the other person would harm them.<sup>183</sup>

With 11 (68.8 percent) of the women in the study indicating that alcohol impaired their judgment, alcohol certainly played a role in the unwanted sex.<sup>184</sup> Still, only 3 (18.8 percent) women reported that they were “taken advantage of” because they were “wasted.”<sup>185</sup> Thus, even in jurisdictions recognizing having sex with someone who is voluntarily intoxicated as a form of sexual assault,<sup>186</sup> few of the incidents involving alcohol would seem to rise to the level of a criminal assault. Consistent with that idea, only two of the women participating in the study identified their experience as a “rape.”<sup>187</sup>

**Table 1.** Frequencies and percentages of women students endorsing top three reasons for worst or only experience of unwanted vaginal intercourse<sup>188</sup>

Reason	Number of responses	Percentage (%)
Judgment impaired by alcohol or drugs	11	68.8
Happened before I could stop it	8	50.0
Thought I wanted it at the time	6	37.5
Couldn't control myself because so turned on	5	31.3
Taken advantage of because wasted	3	18.8
Easier to go along than cause trouble	3	18.8
Other person pressured me verbally	3	18.8
Wanted to establish or continue a relationship	3	18.8
Afraid other person would hurt me	—	—
Other person pressured me physically	—	—

College women engage in unwanted sex for a variety of reasons.<sup>189</sup> Sometimes the sexual behavior is unwanted at the time it takes place. “Sexual compliance” involves willingly and consensually engaging in a sexual activity that you do not really desire in order to please your partner.<sup>190</sup> A student may wish to give her partner pleasure or, as reflected in Table 1, may think it is simply “easier to go along than

183. *Id.* at 148–49.

184. *Id.* at 148.

185. *Id.*

186. *See infra* Part III.B.

187. Flack et al., *supra* note 177, at 149.

188. *Id.* at 148–49.

189. Katz et al., *supra* note 73.

190. Jennifer Katz & Vanessa Tirone, *Going Along with It: Sexually Coercive Partner Behavior Predicts Dating Women's Compliance with Unwanted Sex*, 16 VIOLENCE AGAINST WOMEN 730, 730 (2010).

cause trouble.”<sup>191</sup> “Sexual coercion” involves engaging in unwanted sex as a result of “overwhelming verbal or physical pressure” or incapacitation.<sup>192</sup>

Sometimes the sexual behavior is desired at the moment it takes place, but one or both of the participants come to regret a hookup.<sup>193</sup> Over three-quarters of the

191. Flack et al., *supra* note 177, at 148. One student who engaged in what might be termed “sexual compliance” described her experience this way:

“I feel like you want me to make a move, just so you can turn me down,” he said.

Before I even had a chance to decide if he was right, we were making out. In my state of extreme intoxication, my mind was racing in search of a decision. This was exciting. This was fun. But this was also really, really weird, and ultimately, not a road I wanted to go down. I couldn’t decide if the excitement and lust in the air would win over the pit in my stomach. It wasn’t until he grabbed a condom that I really knew how I felt. I was not okay with this. I did not want to have sex with him.

But I did.

He slid inside me and I didn’t say a word. . . .

I stared at the ceiling the whole time, occasionally flashing him the fake smile reserved for people you accidentally make eye contact with in the grocery store. I don’t think I moved the entire time, and I didn’t care if he noticed. I just wanted it to end, and I knew it wouldn’t be long. I just had to suck it up for a few minutes, let him do his thing, and it would be over. When it finally was, he smiled at me, kissed my forehead, and asked how it was. As we cuddled, I realized that what we had done was no different to him than the sex he’d had with anyone else. Overnight, I convinced myself it was no different to me, either.

I woke up with an “oh shit” feeling that quickly turned into an “oh well.” I didn’t really feel I’d been violated, though part of me knew I had. I wasn’t mad. I wasn’t hurt. I didn’t want vengeance. I didn’t even feel weird around him soon after. I didn’t feel much of anything. I certainly didn’t feel like I’d been raped. But what had happened the night prior was not consensual sex, and I didn’t like it. I wanted the flirting. I wanted the kissing. I wanted the sleepover. But I didn’t want to go all the way. And that’s very hard to explain to a man who is just as drunk as you are.

There is not a word for my experience. The fact that there’s not a word for it makes us feel like it doesn’t exist. Or maybe there’s not a word for it because we’re pretending it doesn’t exist. But this weird place in between consensual sex and rape? It’s there. It *does* exist. And it’s happening all the time.

Veronica Ruckh, *Is It Possible That There Is Something Between Consensual Sex and Rape . . . And That It Happens to Almost Every Girl Out There?*, TOTAL SORORITY MOVE, <http://totalsororitymove.com/is-it-possible-that-there-is-something-in-between-consensual-sex-and-rape-and-that-it-happens-to-almost-every-girl-out-there/> [https://perma.cc/4BQG-ZVXX] (emphasis in original).

192. Katz et al., *supra* note 73. What constitutes “overwhelming” verbal pressure is open to debate—the pressure may be anywhere on the spectrum from “I will physically harm you if you do not have sex with me” to “I will not go out with you again if you do not have sex with me.” See Susan Leahy, *No Means No’, But Where’s the Force? Addressing the Challenges of Formally Recognising Non-violent Sexual Coercion as a Serious Criminal Offence*, 78 J. CRIM. L. 309, 310–14 (2014).

193. Flack et al., *supra* note 177, at 153–54.

sexually-active participants in one study of college students voiced regret about at least one decision to engage in sexual activity.<sup>194</sup>

Sexual assault is the most harmful and traumatic form of unwanted sex, but every incident of unwanted sex has the potential to cause severe emotional distress.<sup>195</sup> It is difficult to describe the mix of bewilderment, sadness, hurt, anger, and guilt in the voices of students who did not desire a particular sexual contact, but complied because they did not know what else to do. Saying “no,” might “seem impolite,” “hurt his feelings,” “make him mad,”<sup>196</sup> or “disappoint him.”<sup>197</sup> A daunting challenge faced by schools is how to create messaging, educational programming, and policies that effectively address the different types of unwanted sex. Attempting to solve one problem can easily create others.

For instance, among the more popular messages being promoted on college campuses today is the idea that “yes means yes.”<sup>198</sup> Creating a culture in which men

194. Oswalt et al., *supra* note 115, at 666.

195. Flack et al., *supra* note 177, at 155. For example, one “counseling center’s internal reports show rapidly rising numbers of women clients presenting with symptoms generally considered sequelae of sexual assault. Yet, it is increasingly common for these same women to outwardly deny having been sexually assaulted.” Reiber & Garcia, *supra* note 102, at 399. One possible explanation is that college women do not always recognize sexual assault when they experience it, but another possible explanation is that other types of unwanted sex can also produce profound psychological distress.

196. The fear in this type of compliance situation is not that a partner will become angry and pose a physical threat, but rather that that he will view the compliant student as a “tease” or like her less.

197. This tendency towards compliance can also place students in dangerous situations. A student may have no desire to be alone with this stranger, but go along with his request to take her to an isolated spot where he then proceeds to sexually assault her.

198. Schools across the country have created educational programming around the “yes means yes” slogan aimed at encouraging students to actively seek their partners’ consent to sexual activity. Colgate University, for example, has developed “an interdisciplinary five-week positive sexuality course” around the “yes means yes” theme. Dawn E. Lafrance, Meika Loe & Scott C. Brown, “*Yes Means Yes: A New Approach to Sexual Assault Prevention and Positive Sexuality Promotion*,” 7 AM. J. SEXUALITY EDUC. 445, 447 (2012). The Ohio State University has instituted a “Consent Is Sexy” campaign. Jake New, *The ‘Yes Means Yes’ World*, INSIDE HIGHER ED (Oct. 17, 2014), <https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> [<https://perma.cc/9YFY-24CF>]. The “yes means yes” slogan has also been used to denote a movement to encourage schools to adopt an affirmative consent standard in their sexual assault policies. *Id.* Over 800 schools have adopted an affirmative consent standard in some form. *Id.*

This Article does not question the value of encouraging and educating students to obtain affirmative consent. Rather, it questions whether an affirmative consent, “yes means yes,” standard is fair and feasible *as a quasi-legal standard*. In August 2015, a Tennessee trial court ordered the reinstatement of a student expelled under such a standard:

“Affirmative consent effectively shifts the burden of proof to the accused, making him or her guilty until proven innocent,” wrote the judge, Carol L. McCoy of the chancery court in Nashville. She ruled in a case involving Corey Mock, a senior whom the university had found responsible for sexual misconduct because he was unable to prove that he had obtained consent from a woman who said she was too drunk at the time to remember clearly what had happened.

and women are taught to communicate about sexual encounters is a very positive step. Miscommunication can be a huge issue in a hookup situation where two virtual strangers attempt to use subtle, nonverbal cues to indicate an interest (or lack of interest) in sexual activity.<sup>199</sup> Confusion can arise even where the participants make some attempt to verbalize their desires. Among college students, there is no commonly accepted definition of a “hookup.”<sup>200</sup> It can mean anything from kissing to engaging in sexual intercourse.<sup>201</sup> An agreement to “hookup” can mean entirely different things to the hookup partners.

But are we harming students by failing to teach them the importance of saying “no”? Are we sacrificing the good to our attempt to achieve the perfect? The existence of compliant sex evidences that requiring affirmative consent<sup>202</sup> is not going to eliminate unwanted sex—countless college women are saying or otherwise indicating “yes” when they have no desire for sex.<sup>203</sup>

If schools are ever going to defeat the problem of compliant sex, we need to empower young women (and men) to say, “No, I own my body, and that’s not okay.” A “yes means yes” campaign can encourage passive behavior. Instead, we need a “yes means yes and no means no” campaign, a campaign that encourages students to both ask what their partner wants and voice what they want. We need to educate students that where there is no physical threat, a good old-fashioned “no” or even “hell, no” is not “mean,” “impolite,” or otherwise unacceptable and may stop an unwanted advance dead in its tracks.<sup>204</sup>

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“The question,” the judge added, “is no longer whether or not someone actually consented to a sexual act; it’s whether the accused can prove that they received such consent—and short of a videotape of the entire encounter, that proof is unlikely to exist.”

Katherine Mangan, *What ‘Yes Means Yes’ Means for Colleges’ Sex-Assault Investigations*, CHRON. HIGHER EDUC., Sept. 11, 2015, at 10, available at Professional Development Collection, EBSCOHOST. The court’s opinion can be accessed at <https://kcjohnson.files.wordpress.com/2013/08/memorandum-mock.pdf> [<https://perma.cc/7H29-WSF2>].

199. See *supra* notes 93–98 and accompanying text.

200. BOGLE, *supra* note 74, at 24–25.

201. *Id.* I started a spirited debate at my own school when I asked a group of students with whom I was chatting what a “hookup” meant on our campus. When one student answered, “Oh, it’s just kissing and making out,” another immediately jumped in and said, “No. It means having sex, intercourse.” Confusion exists even among students at the same school.

202. Most “yes means yes” policies require “affirmative consent,” not verbal consent. *E.g.*, CAL. EDUC. CODE § 67386 (West 2016). Many schools have adopted a version of the ATIXA Gender-Based and Sexual Misconduct Model Policy and Model Grievance Process, under which “[c]onsent can be given by word or action.” BRETT A. SOKOLOW, W. SCOTT LEWIS & SAUNDRA K. SCHUSTER, *ATIXA GENDER-BASED AND SEXUAL MISCONDUCT MODEL POLICY AND MODEL GRIEVANCE PROCESS 4* (2014).

203. See *supra* notes 190–91 and accompanying text.

204. I understand and respect the argument that asking women to say “no” reinforces the traditional power imbalance between the genders.

The law responds to a status quo where sexual predators can claim “to see consent in everything except continuous, unequivocal rejection.” Women thus have to “constantly police their own behavior” in order to avoid the appearance of giving passive consent. “That’s not only exhausting; it’s limiting,” Ms.

Schools should be actively educating students to prevent victimhood. When I was six and learning how to safely cross the street, my father taught me an invaluable lesson about law and reality. My teacher had taught me all about the “law” of walk signs. My father taught me that even if the sign said “walk,” I should never cross the street without looking. Being in the right does not help you when you are hit by a bus, and being in the right does not help you when you are sexually assaulted. The message that “no” can be a valuable tool is not intended to burden women or blame victims—it is intended to prevent students from becoming victims.<sup>205</sup>

We need to be equally careful about the messages we send about intoxicated sex. The great cry of “don’t blame the victim” is preventing educators from sharing some home truths with students, including the truth that reducing alcohol intake could prevent many instances of unwanted sex, including many instances of sexual assault.<sup>206</sup> Women need and deserve to know what educators already know: frequent

[Amanda] Taub writes. “It reinforces power imbalances that keep women out of positions of success and authority.”

Hanna Kozłowska, *Yes Means Yes: The Big Consent Debate*, N.Y. TIMES (Oct. 15, 2014), [http://op-talk.blogs.nytimes.com/2014/10/15/yes-means-yes-the-big-consent-debate/?\\_r=0](http://op-talk.blogs.nytimes.com/2014/10/15/yes-means-yes-the-big-consent-debate/?_r=0) [<https://perma.cc/6QVB-RWQY>]. But I quite frankly disagree that teaching a young woman (or a young man) to say “no” is anything but empowering.

205. Researchers recently reported substantial success in preventing sexual assaults in a pilot sexual assault resistance program undertaken at three Canadian universities. Charlene Y. Senn, Misha Eliasziw, Paula C. Barata, Wilfreda E. Thurston, Ian R. Newby-Clark, H. Lorraine Radtke & Karen L. Hobden, *Efficacy of a Sexual Assault Resistance Program for University Women*, 372 NEW ENG. J. MED. 2326, 2326 (2015). The program focused on helping college women learn to “assess risk from acquaintances, overcome emotional barriers in acknowledging danger, and engage in effective verbal and physical self-defense.” *Id.* The program has been criticized for focusing on altering the behaviors of potential victims, rather than potential perpetrators, but training potential victims to protect themselves does not prevent a school from also implementing programs intended to address the behaviors of perpetrators. See Jan Hoffman, *College Rape Prevention Program Proves a Rare Success*, N.Y. TIMES (June 10, 2015), <http://www.nytimes.com/2015/06/12/health/college-rape-prevention-program-proves-a-rare-success.html> [<https://perma.cc/FK2B-A57S>].

206. See, e.g., Emily Yoffe, *College Women: Stop Getting Drunk*, SLATE (Oct. 15, 2013, 11:55 PM), [http://www.slate.com/articles/double\\_x/doublex/2013/10/sexual\\_assault\\_and\\_drinking\\_teach\\_women\\_the\\_connection.html](http://www.slate.com/articles/double_x/doublex/2013/10/sexual_assault_and_drinking_teach_women_the_connection.html) [<https://perma.cc/CG6A-8TVL>] (“Let’s be totally clear: Perpetrators are the ones responsible for committing their crimes, and they should be brought to justice. But we are failing to let women know that when they render themselves defenseless, terrible things can be done to them. Young women are getting a distorted message that their right to match men drink for drink is a feminist issue. The real feminist message should be that when you lose the ability to be responsible for yourself, you drastically increase the chances that you will attract the kinds of people who, shall we say, don’t have your best interest at heart. That’s not blaming the victim; that’s trying to prevent more victims.”). One study found that “every drink consumed above [a college student’s] mean [average] was associated with a 13% increase in the likelihood of experiencing a negative sex-related consequence [such as unprotected sex or regretted sex] on that drinking occasion.” Nichole M. Scaglione, Rob Turrisi, Kimberly A. Mallett, Anne E. Ray, Brittney A. Hultgren & Michael J. Cleveland, *How Much Does One More Drink Matter? Examining Effects of Event-Level Alcohol Use and Previous Sexual Victimization on Sex-Related Consequences*, 75 J. STUD. ON ALCOHOL & DRUGS 241, 245 (2014).



drinking enhances the risk of sexual assault and binge drinking makes the risk even greater.<sup>207</sup>

The often vague and confusing standards relating to effective consent and incapacitation contribute to a culture in which college students already view alcohol use as an excuse to engage in risky behaviors.<sup>208</sup> I cringe every time a school or media outlet implies that consent is not effective if the person was drunk.<sup>209</sup> Drunkenness and incapacitation should never be conflated. It is entirely possible to be drunk without being legally incapacitated.<sup>210</sup>

The last message we should be sending students is that they can and should delegate responsibility for their sexual decision making to others by drinking. From a legal standpoint, the idea that you can delegate responsibility in this manner is simply untrue. Most states do not treat voluntary intoxication as negating consent, and even in those that do, the intoxication must be extreme before any legal responsibility is placed upon a sexual partner.<sup>211</sup> The fact that a student's judgment was impaired does not make her a victim in the eyes of the law, and it is irresponsible to send the message that it does.

From a practical standpoint, the idea that you can delegate responsibility in this manner will only lead to more unwanted sexual contact. We already have students who drink for the purpose of providing an anticipatory excuse for sexual activities.<sup>212</sup> Teaching women students to assume the role of a child requiring and expecting the protection of others is demeaning and can lead them to engage in dangerous behaviors. Personal responsibility and control are essential to true empowerment.

All students, men and women, need to be taught that a friend is not a keeper. She will not always protect you. A sexual partner may be a predator who actively sought to take advantage of you.<sup>213</sup> They are certainly out there. On the other hand, he may be a perfectly nice person who had no idea that your "yes" might have been a "no" had you not consumed jungle juice. He may have no idea that you even consumed a glass of jungle juice. Whether the encounter is ultimately classified as a sexual assault or some other form of unwanted sex, you will have suffered harm. And if

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207. Mouilso et al., *supra* note 54, at 90.

208. *See supra* notes 156–59 and accompanying text.

209. *E.g.*, *University of Pennsylvania Sexual Violence, Relationship Violence and Stalking Policy*, U. PA. ALMANAC, Sept. 30, 2014, at 9, available at <http://www.upenn.edu/almanac/volumes/v61/n07/pdf/093014.pdf> [<https://perma.cc/EEQ9-PRPS>] (“‘Incapacity’ or ‘impairment’ includes but is not limited to being under the influence of alcohol or drugs or being too young to consent.”).

210. *See infra* Part III.B.

211. *See infra* Part III.B.

212. Kristen P. Lindgren, David W. Pantalone, Melissa A. Lewis & William H. George, *College Students' Perceptions About Alcohol and Consensual Sexual Behavior: Alcohol Leads to Sex*, 39 J. DRUG EDUC. 1, 8 (2009). One student described her mindset as follows:

I know people who will get drunk and who throw their inhibitions out . . . but they are also expecting to throw their inhibitions out. So you might not even be that drunk but they just assume that, “Oh, I can make up for that in the morning because I will say I was drunk,” and everyone will say, “Oh yeah, that sucks! ‘Cause I have been there, too . . . .”

*Id.* at 9 (alteration in original).

213. *See generally* Sutton & Simons, *supra* note 52.

your partner has been drinking to the point of incapacitation, *you* may be guilty of sexual assault.

The complex social and sexual relationships of our era require a uniform standard for effective consent that significantly clarifies exactly what is required for consent to exist and the point at which intoxication is sufficient to prevent someone from consenting. Obviously, students do not pull out the code of conduct for a quick review before hooking up, but what our standards say and omit to say impacts the culture of every campus. We cannot expect students to know what boundaries exist when we are still struggling to establish them and when they differ from one campus to another. Given the complexity of the issue, we may never be able to draw a bright line for students, but a carefully crafted standard for effective consent could eliminate much of the gray area and allow us to more effectively educate students about their responsibilities to themselves and their partners.

## II. TITLE IX AND THE STUDENT-CONDUCT SYSTEM

In making schools—rather than the criminal justice system—responsible for addressing the issue of sexual assault among students, the federal government has imposed a tremendous burden.<sup>214</sup> Student-conduct systems that have historically dealt with relatively minor behavioral issues are now being asked to bear the burden of both creating and enforcing standards for sexual assault, something that has proved to be a daunting task for legislatures and the courts.

The creation of the standard is well beyond their expertise and should become the responsibility of the DOE. Decisions as to the substance, structure, and style of the standard should be informed by the fact that it will often be enforced and applied by persons with limited or no legal training and that it must be understandable to students as young as seventeen. Any standard for “effective consent” established by the DOE must be clear and easily applied.

Part II first provides a brief overview of how student-conduct systems function.<sup>215</sup> It then explains the particular challenges involved in cases governed by Title IX and the desperate need for guidance from the DOE.<sup>216</sup>

### A. Student-Conduct Systems—A Brief Primer

A first step in understanding the challenges faced by campuses in handling sexual assault cases is to understand how student-conduct systems work. In part because institutions of higher learning can range in size from a few dozen students to tens of thousands and in part because of different philosophies and resources, there is no one-size-fits-all model. The objective of most institutions is to create a system that

214. Whether that burden was properly placed on schools is beyond the scope of this Article. See generally Joe Cohn, *Colleges Are Not the Place To Try Rape Cases*, WASH. POST (Jan. 16, 2015), [https://www.washingtonpost.com/opinions/colleges-are-not-the-place-to-try-rape-cases/2015/01/16/7d7e44be-9d87-11e4-a7ee-526210d665b4\\_story.html](https://www.washingtonpost.com/opinions/colleges-are-not-the-place-to-try-rape-cases/2015/01/16/7d7e44be-9d87-11e4-a7ee-526210d665b4_story.html) [https://perma.cc/XZG8-JB49].

215. See *infra* Part II.A.

216. See *infra* Part II.B.

allows students to learn from their mistakes—rehabilitation and deterrence, as opposed to retribution, are typically the end goals of any sanction.<sup>217</sup>

The law leaves schools largely to their own devices in creating student-conduct codes, systems, and processes.<sup>218</sup> Every school has different expectations for its students. Conduct codes are typically written by student-development professionals with a goal of using language that any first-year student could understand. There is no requirement of involvement by an attorney.<sup>219</sup> Depending on the processes employed by the school, their enactment may or may not require the review or approval of the school's legal counsel, chief officer, etc.

While it has become more common in recent years to see persons with juris doctor (JD) degrees working in the area of student conduct, a JD is by no means a requirement.<sup>220</sup> At many schools, no one working in the area of student conduct has a legal background.<sup>221</sup> Schools view the student-conduct system as one more piece

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217. The following excerpt from the Preamble to the Rutgers University Code of Student Conduct nicely summarizes the goal of most institutions:

The primary purpose of the student conduct process should be to foster the personal, educational, and social development of students. The process should also serve as deterrence to misconduct to enhance the safety and security of the community. Students are expected to take responsibility for their conduct. Disciplinary consequences therefore serve both educational and deterrence objectives.

RUTGERS UNIV., CODE OF STUDENT CONDUCT 2 (2014), available at <http://studentconduct.rutgers.edu/university-code-of-student-conduct> [https://perma.cc/2PS7-7JWD].

218. *E.g.*, *Sword v. Fox*, 446 F.2d 1091, 1096 (4th Cir. 1971) (noting that “the regulation of student conduct is ordinarily the prerogative of the college authorities, with judicial intervention only when the circumstances are such as to ‘directly and sharply implicate basic constitutional values’” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

219. WILLIAM A. KAPLIN & BARBARA A. LEE, 2 THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING 1173 (5th ed. 2013).

220. For example, in December 2014 Washington State University posted a position for a “Conduct Officer,” who would be responsible for enforcing its code of conduct. Washington State University, *Human Resource Services: Conduct Officer* (last visited Dec. 10, 2014, 11:25 AM). The listed educational requirement was a “Bachelor’s degree and three (3) years of professional work experience in student services or related education/experience.” *Id.*

221. There may also be no office of legal affairs available to assist student-development professionals in interpreting laws. “An e-survey conducted by Campus Legal Advisor found that many institutions lacked an in-house counsel. In fact, of the 87 campus presidents who responded to our survey, 45 percent said their institutions didn’t have a general counsel office.” Aileen Gelpi, *Special Report: Legal Counsel*, CAMPUS LEGAL ADVISOR (June 14, 2013), <http://www.campuslegaladvisor.com/m-article-detail/cla-finds-many-institutions-have-no-in-house-counsel-while-in-house-legal-units-often-sparsely-staffed.aspx> [https://perma.cc/NKF7-UHFH]; see also LAWRENCE WHITE, MANAGING YOUR CAMPUS LEGAL NEEDS: AN ESSENTIAL GUIDE TO SELECTING COUNSEL 2 (2008), available at <http://www.acenet.edu/news-room/Documents/Managing-your-Campus-Legal-Needs-An-Essential-Guide-to-Selecting-Counsel.pdf> [https://perma.cc/C67L-VMPE] (“Historically, many small private colleges have relied for legal services on retained outside counsel while most medium- to large-sized colleges (public as well as private) employ an in-house general counsel who is responsible for

of the educational process, and they seek educators—not prosecutors or judges—to achieve the end goal of helping students learn from mistakes.

In terms of the required processes, under the Due Process Clause, public school students facing discipline “must be given *some kind of notice* and afforded *some kind of hearing*.”<sup>222</sup> But the courts have long recognized that “[s]ome modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action.”<sup>223</sup> Thus, even public schools have been given very wide leeway in creating systems and processes:

Notice and an opportunity to be heard remain the most basic requirements of due process. Within this framework—and the generalized, though unhelpful observation that disciplinary hearings against students and faculty are not criminal trials, and therefore need not take on many of those formalities—the additional procedures required will vary based on the circumstances . . . .<sup>224</sup>

Private schools are given even more leeway in creating student disciplinary processes, needing to show only that they did not “act in bad faith or in an arbitrary or capricious manner” in disciplining students.<sup>225</sup>

Most schools adjudicate possible conduct violations in one or more of the following forums: informal administrative meetings, formal administrative investigations or hearings, or formal board hearings.<sup>226</sup> Administrative meetings and formal administrative investigations or hearings are conducted by professional staff serving as student-conduct officers.<sup>227</sup> In contrast, formal board hearings are facilitated by professional staff and feature boards of fact finders that consist of some mix of students, faculty, or staff.<sup>228</sup>

Informal administrative meetings (also known as “behavioral” hearings) are the most commonly used forums for adjudicating student-conduct cases.<sup>229</sup> The meetings allow a student-conduct officer to review any written report or documentation of the

managing the legal function internally, and who may engage outside counsel to perform some or even most of the legal work.”).

222. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (emphasis added).

223. *Id.* at 580.

224. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005).

225. *Coveney v. President & Trustees of Coll. of Holy Cross*, 445 N.E.2d 136, 139 (Mass. 1983).

226. See *Understand the Essential Elements of an Impartial Student Conduct System*, CAMPUS LEGAL ADVISOR, Dec. 2011, at 4, 5.

227. See generally Eugene L. Zdziarski & Nona L. Wood, *Forums for Resolution*, in STUDENT CONDUCT PRACTICE: THE COMPLETE GUIDE FOR STUDENT AFFAIRS PROFESSIONALS 97, 99–102 (James M. Lancaster & Diane M. Waryold eds., 2008).

228. *Id.* at 104.

229. E.g., *Disciplinary Hearing Types*, DUKE U. STUDENT AFFAIRS, <http://studentaffairs.duke.edu/conduct/undergraduate-disciplinary-system/disciplinary-process/disciplinary-hearing-types> [<https://perma.cc/QC3F-M889>]; *Frequently Asked Questions*, U. CENT. FLA. OFF. STUDENT CONDUCT, <http://osc.sdes.ucf.edu/faq> [<https://perma.cc/ZQE7-4A2Q>].

violation with the student, hear her side of the story, make determinations as to responsibility, and impose the appropriate consequences/sanctions, if any.<sup>230</sup> They are typically used where the conduct in question is objectionable, but does not rise to the level of a violation of the code of conduct,<sup>231</sup> where the violation at issue is not considered serious,<sup>232</sup> where the student is willing to admit to the violation,<sup>233</sup> or where the violation in question does not involve a victim/complainant.<sup>234</sup> For example, an informal administrative conference might be appropriate where a student is accused of some minor act of vandalism or of disorderly conduct.

Formal administrative hearings or investigations and formal board hearings are in essence mini-trials, with administrative hearings being the equivalent of a bench trial and board hearings being the equivalent of a jury trial. Administrative hearings may or may not be “live.” Without subpoena power and when battling things like varying class schedules, officials can face difficulty in getting parties and witnesses in the same room at the same time. As a result, schools may instead opt to adopt an administrative investigatory grievance procedure that affords each side the opportunity to be heard through interviews.

Whether a school uses a formal administrative hearing or investigation or a formal board hearing, the investigation conducted by the school is usually fairly minimal.<sup>235</sup> For example, if two students are caught fighting by a resident assistant (RA) and each claims he was acting in self-defense, the student-conduct office might simply compile the original report/complaint (i.e., the RA’s account) and any written accounts, witness statements, and other supplemental materials provided by the parties into a case file to be used by the fact finder.<sup>236</sup> Typically, no one is serving a prosecutorial function. The fact finder can gather additional information by questioning parties and witnesses.<sup>237</sup>

Schools may opt to engage in a more rigorous investigation of their own and supplement the case file created by the parties with additional materials,<sup>238</sup> but the

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230. See, e.g., UNIV. OF DAYTON, STUDENT HANDBOOK 2015–2016 33 (2015), available at <https://www.udayton.edu/studev/dean/civility/2014-2015StudentHandbookPDF2014.pdf> [<https://perma.cc/3FUX-Q36L>]. They also afford the student conduct officer the opportunity to assess and find ways to remedy the underlying causes of any underlying issues (i.e., to attend “to the developmental needs of the student”). Zdziarski & Wood, *supra* note 227, at 97.

231. *Understand the Essential Elements of an Impartial Student Conduct System*, *supra* note 226, at 5.

232. See, e.g., *Disciplinary Hearing Types*, *supra* note 229. Most violations of student conduct codes are minor in nature—in an effort to assist students in learning to adequately function in the adult world, schools step in where neither the civil nor the criminal law would become involved. For example, my own university includes the following in its prohibition of “Environmental Disrespect”: “Furniture intended/built for indoor use is not permitted outside or on porches.” UNIV. OF DAYTON, *supra* note 230, at 27.

233. See, e.g., *Frequently Asked Questions*, *supra* note 229.

234. See, e.g., UNIV. OF DAYTON, *supra* note 230, at 35.

235. Brett A. Sokolow, THE 2007 WHITEPAPER: “. . . SOME KIND OF HEARING . . .” 2–3 (2007) (“A hallmark of these hearings, whether formal or informal, is the passive receipt of information by the panel from the parties and their witnesses.”).

236. See, e.g., UNIV. OF DAYTON, *supra* note 230, at 35.

237. See, e.g., Sokolow, *supra* note 235, at 5.

238. See, e.g., UNIV. OF DAYTON, *supra* note 230, at 35.

resources available for such an investigation are often extremely limited.<sup>239</sup> Student-conduct professionals are often stretched to their limits,<sup>240</sup> and small institutions may not even have a dedicated student-conduct office, instead relying on an administrator with other duties.<sup>241</sup> Public safety officers can and do provide valuable investigatory assistance at many institutions, but if they are sworn police officers, they may face conflicting duties to the institution and to the local prosecutor, with their principal duty being to enforce the criminal law.<sup>242</sup>

Conduct hearings involving victims/complainants are a hybrid of a civil and criminal adversarial proceeding. They are like a civil proceeding in that the primary responsibility for gathering evidence is on the parties. They are like a criminal proceeding in that their focus is on punishing the respondent (with a goal of rehabilitation) rather than remediating any harm to the complainant. They work perfectly well for the typical simple, relatively minor infractions committed by a college student.

Schools have the ability to compel students and other members of the campus community to participate in investigations and disciplinary proceedings,<sup>243</sup> but many, if not most, choose not to do so.<sup>244</sup> Schools have no ability to compel persons outside

239. See, e.g., Sokolow, *supra* note 235, at 5–6.

240. *Id.*

241. See, e.g., CITRUS HEIGHTS BEAUTY COLL., STUDENT CATALOG 26 (2015), available at <http://nebula.wsimg.com/b603bb24f766c71a6e41d4dbf99cfb70?AccessKeyId=75A273C5753B2F56F493&disposition=0&alloworigin=1> [<https://perma.cc/7D3N-RLD9>].

242. In testimony before the Senate Committee on the Judiciary, Subcommittee on Crime & Terrorism, Kathy R. Zoner, Chief of the Cornell University Police, described the dilemma facing campus police when school and criminal investigations are taking place concurrently:

Concurrent investigations raise tricky issues for law enforcement and campus adjudicators to navigate. Campus police will, more likely than not, gather evidence that could be useful to the Title IX investigation. As a law enforcement officer conducting an investigation, my biggest concern is that sharing evidence may undercut a criminal case—which is on a much longer timeline—against a respondent. The collection and maintenance of evidence for a criminal prosecution is tightly controlled by procedural rules. This is not the case with administrative proceedings. The way that campus officials receive and treat evidence in an administrative investigation can negatively impact its admissibility in court, potentially undermining a criminal case. Additionally, if evidence is discovered after an administrative case is closed that would affect or overturn a decision, both parties may have already suffered irreparable consequences.

*Campus Sexual Assault: The Roles and Responsibilities of Law Enforcement: Hearing Before the S. Comm. on the Judiciary* 113th Cong. (2014) (statement of Kathy R. Zoner, Chief, Cornell University Police) (unpublished hearing), available at <https://www.judiciary.senate.gov/imo/media/doc/12-09-14ZonerTestimony.pdf>.

243. See, e.g., *Terms To Know for Students*, PA. STATE UNIV. STUDENT AFF. OFF., <http://studentaffairs.psu.edu/conduct/terms.shtml> [<https://perma.cc/F8HT-3S5K>] (“Witnesses can be brought forth by accused students or by the University, and can be required to participate in the conduct process or in hearings if it is determined that they have information to contribute that is important to the case.”).

244. See, e.g., *Rules, Procedures, Rights and Responsibilities, Part I, Article I: Rights Within University Hearing Processes*, U. KY. STUDENT AFF., <http://www.uky.edu>

the campus community to participate. For example, they cannot compel a student from another school who witnessed key events to participate.

Since sexual assault is a serious matter and a victim/complainant is involved, most schools opt to forgo any attempt at informal resolution and automatically send such cases to a formal administrative hearing or investigation or a board hearing.<sup>245</sup> Some schools require live hearings,<sup>246</sup> but some use what is commonly referred to as the “civil rights investigation model,” which tasks trained Title IX investigators with gathering information and making findings of fact.<sup>247</sup> Other schools take a hybrid approach under which trained Title IX investigators undertake the necessary fact gathering and then submit the materials gathered to a specially trained board, which serves as the finder of fact.<sup>248</sup>

Board members, including students, are every bit as qualified to serve as fact finders as any member of a civil or criminal jury. In my experience, they give willingly of their time and take their responsibilities seriously. However, like any jury, they can only function effectively if they are properly instructed as to the applicable standards in “clear, concise and succinct” language.<sup>249</sup> As discussed below,<sup>250</sup> unless and until national standards for sexual assault are adopted, such instruction will often be lacking.

### *B. The Requirements Imposed by Title IX*

The federal government<sup>251</sup> is employing the power of the purse to play an ever-expanding role in determining how postsecondary institutions receiving federal

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/StudentAffairs/Code/part1.html [https://perma.cc/K9RA-L72C].

245. See, e.g., UNIV. OF DAYTON, *supra* note 230, at 63–64.

246. E.g., *id.* at 60–62. The University of Dayton’s accountability hearing “consist[s] of a presentation of facts by members of the [Title IX] investigatory team, questions from the board to both the accused and the complainant, questions to any witness presented, and may include board members asking participants questions that have been submitted by one party to the other.” *Id.* at 42.

247. See e.g., *One Process: Procedures for Ensuring a Just and Humane Campus*, DOMINICAN U., <http://www.dom.edu/about/diversity/bias-related-complaints/process> [https://perma.cc/6RTX-HDCB].

248. E.g., UNIV. OF DAYTON, *supra* note 230, at 64.

249. *Williams v. Blue Bird Cab Co.*, 52 S.E.2d 868, 870 (Va. 1949).

250. See *infra* Part II.B.

251. Title IX is one of any number of federal laws directly affecting how campus conduct and judicial systems operate. For example, students attending public institutions who face possible suspension or expulsion are “entitled to the protections of due process” under the Fourteenth Amendment. E.g., *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988). Student disciplinary records are considered to be “education records” and are “protected from disclosure under FERPA, unless otherwise permitted by a statutory exception.” *United States v. Miami Univ.*, 91 F. Supp. 2d 1132, 1152 (S.D. Ohio 2000), *aff’d*, 294 F.3d 797 (6th Cir. 2002). Two such statutory exceptions relate directly to cases involving sexual assault. Pursuant to 20 U.S.C. § 1232g(b)(6) (2012):

(A) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing, to an alleged victim of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex

funds address the issue of sexual assault on campus.<sup>252</sup> In contrast to the traditional “hands off” approach taken by the courts in student-conduct cases,<sup>253</sup> the DOE takes a “hands on” approach to cases involving sexual harassment and violence.

On the process side, it requires that every school “have and distribute a policy against sex discrimination”;<sup>254</sup> designate a Title IX coordinator;<sup>255</sup> and “have and make known procedures for students to file complaints of sex discrimination.”<sup>256</sup> Schools are permitted to use their existing disciplinary processes to adjudicate complaints of sex discrimination,<sup>257</sup> but those processes must satisfy the following requirements:

- Every complainant has the right to present his or her case. This includes the right to adequate, reliable, and impartial investigation of complaints, the right to have an equal opportunity to present witnesses and other evidence, and the right to the same appeal processes, for both parties.
- Every complainant has the right to be notified of the time frame within which: (a) the school will conduct a full investigation of the complaint; (b) the parties will be notified of the outcome of the complaint; and (c) the parties may file an appeal, if applicable.
- Every complainant has the right for the complaint to be decided using a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred).
- Every complainant has the right to be notified, in writing, of the outcome of the complaint.<sup>258</sup>

This list is by no means all-inclusive. For example, the DCL of April 4, 2011, states that the “OCR strongly discourages schools from allowing the parties

offense, the final results of any disciplinary proceeding conducted by such institution against the alleged perpetrator of such crime or offense with respect to such crime or offense.

(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution’s rules or policies with respect to such crime or offense.

252. Along with Title IX, the federal government has increasingly asserted its powers under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”), which is codified at 20 U.S.C.A. § 1092(f) (Supp. 2015).

253. *See supra* notes 222–25 and accompanying text.

254. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCHOOL 1 (2011).

255. *Id.*

256. *Id.* at 2.

257. *Id.*

258. *Id.*



personally to question or cross-examine each other during the hearing.”<sup>259</sup> While this language does not directly impose a requirement that schools deny the right of cross-examination, few schools are bold enough to ignore such a strongly worded recommendation. Their federal funding depends on keeping the OCR happy.<sup>260</sup>

With few exceptions, the federal government’s requirements and recommendations are not found in any statute or regulation. Rather, the DOE imposes them as a fiat through “Dear Colleague” letters and resolution agreements.<sup>261</sup> For example, among the more controversial requirements is the requirement that schools apply a preponderance of the evidence standard when determining whether a sexual assault has occurred.<sup>262</sup> This requirement exists

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259. DCL, *supra* note 4, at 12.

260. Regardless of whether the OCR finds a school to be in compliance or not, schools tend to view the OCR investigation itself as an ordeal. In 2014, the average length of an OCR investigation was 1469 days. Jake New, *Justice Delayed*, INSIDE HIGHER ED (May 6, 2014), <https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-lasted-more-4-years> [https://perma.cc/JW92-RV6Q]. Investigators have the power to investigate not just the case about which the complaint was filed, but also other cases going back for a period of years and to review every policy and process relating to Title IX. Jennifer Garrett, *Office for Civil Rights (OCR) Title IX Investigations: What to Expect*, CAMPUS L. CONSIDERED (Jan. 13, 2016), <http://www.campuslawconsidered.com/office-for-civil-rights-ocr-title-ix-investigations-what-to-expect> [https://perma.cc/XNV4-BGRT ] (“If it believes the incident suggests a larger, systemic problem, the OCR will also conduct a broad systemic investigation. In that case, the OCR will include a Data Request Letter when it sends its notification. Data Request Letters require the collection and submission of comprehensive data, including three years of Clery data, information on the Title IX coordinator, institutional investigation records, rape crisis center information, Title IX and sexual violence awareness training programs, atmosphere evaluation results, details regarding policies and practices, and much more. The letters can be 10 pages long, and fulfilling the request for data is a massive undertaking.” (emphasis omitted)).

261. TASK FORCE ON FED. REGULATION OF HIGHER EDUC., *RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES: REPORT OF THE TASK FORCE ON FEDERAL REGULATION OF HIGHER EDUCATION* 35 (2015) (recognizing the problem of “agency overreach” in sub-regulatory guidance). In 2015, the Task Force on Federal Regulation of Higher Education, established by a bipartisan group of senators, released a report outlining the problem and recommending that “[t]he Department should not make significant changes in policy without following the APA’s notice and comment procedures.” *Id.* at 36.

In the more than 40 years since passage of Title IX, the Department has promulgated formal regulations on only three occasions: once, in 1975, when it issued the first set of regulations implementing the statute, and on two other occasions, in 2000 and 2006, when it issued technical clarifications on discrete issues. Since 2006, the Department has relied exclusively on OCR sub-regulatory guidance to create new Title IX requirements for institutions, with the 2011 “Dear Colleague” letter being the most frequently cited example. While OCR strenuously maintains that the letter does not add requirements to applicable law, the reality is that these standards impose serious additional responsibilities and break new policy ground.

*Id.*

262. Jake New, *The Wrong Standard*, INSIDE HIGHER ED (Nov. 6, 2014), <https://www.insidehighered.com/news/2014/11/06/princeton-title-ix-agreement-higher-standard>

because of the way the DOE is currently choosing to interpret Title IX, but the requirement could change under a different presidential administration.<sup>263</sup>

Complicating matters even more is the existence of a plethora of voluntary resolution agreements entered into by the DOE and individual schools.<sup>264</sup> Every time a new voluntary resolution agreement is reached and published, Title IX coordinators, seeking to ensure that their own institutions maintain compliance, agonize over whether new expectations are hidden within the agreement's terms.<sup>265</sup> Figuring out what the DOE expects is an art akin to reading tea leaves.<sup>266</sup>

Schools are hesitant to challenge the DOE on its requirements and recommendations out of the fear that they will lose federal funding, including federal loans and grants for students.<sup>267</sup> Essentially, when a complaint is filed against a

-proof-sexual-assault-cases-last-legs [<https://perma.cc/NB7L-KCAY>] (“About 70 percent of colleges were already using [this] lower standard by the time the department released its Dear Colleague letter in 2011 -- which went further than just recommending the standard and actually required it -- but the clear and convincing standard remained in place at elite institutions like Yale University, Harvard, and Princeton. Yale changed its policies soon after the letter’s release, but Harvard and Princeton did not follow suit until the department launched investigations into both colleges.”); *see also* Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 609–15 (2013).

263. *See* New, *supra* note 262.

264. To view a comprehensive case letter database, see *U.S. Department of Education: Title IX Office for Civil Rights (OCR) Case Letter Database*, NAT’L CENTER FOR HIGHER EDUC. RISK MGMT., <https://www.ncherm.org/resources/legal-resources/ocr-database/#letters> [<https://perma.cc/FG5M-E4XN>].

265. For example, a voluntary resolution agreement entered into with the University of Montana in 2013 raised a wide range of questions among university Title IX coordinators and counsel. Doug Lederman, *Into the Lawyers’ Den*, INSIDE HIGHER ED (June 21, 2013), <https://www.insidehighered.com/news/2013/06/21/ocr-official-explains-harassment-policies-skeptical-college-lawyers> [<https://perma.cc/4DS2-SGDM>].

266. In the words of Terry W. Hartle, Senior Vice President for Government Relations and Public Affairs at the American Council on Education: “In trying to better deal with allegations of sexual assault on campus, a lot of schools would probably try different approaches and consider different things, but a fear of vague federal mandates limits these efforts. They are hamstrung by uncertainty.” Jake New, *Must vs. Should*, INSIDE HIGHER ED (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance> [<https://perma.cc/GY89-33QC>].

267. Jacob E. Gerson, *How the Feds Use Title IX To Bully Universities: Lowering the Burden of Proof for Sex-Assault Cases Isn’t Required—But Schools Don’t Dare Challenge It*, WALL ST. J. (Jan. 24, 2016, 4:08 PM), <http://www.wsj.com/articles/how-the-feds-use-title-ix-to-bully-universities-1453669725> [<https://perma.cc/M9T2-XTXY>]. Catharine Lhamon, Assistant Secretary for Civil Rights at the U.S. Department of Education, has warned college administrators that “she would have no reservations about pulling a university’s funding if it showed a pattern of mishandling cases of sexual violence on campus.” Tyler Kingkade, *Colleges Warned They Will Lose Federal Funding for Botching Campus Rape Cases*, HUFFINGTON POST (July 14, 2014, 5:54 PM), [http://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit\\_n\\_5585654.html](http://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit_n_5585654.html) [<https://perma.cc/J5EV-2E2R>].

school, the choice is to agree to the voluntary resolution agreement proposed by the DOE or lose federal funding.<sup>268</sup>

One area in which neither the existing regulations nor sub-regulatory materials have provided significant guidance is in the substantive standards to be applied in determining whether a sexual assault took place. The April 4, 2011, DCL states:

Sexual violence, as that term is used in this letter, refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.<sup>269</sup>

Regrettably, in no rule, regulation, or other significant guidance instrument does the DOE even attempt to articulate under what circumstances “a person is incapable of giving consent due to the victim's use of drugs or alcohol.”<sup>270</sup> There is no definition of what is commonly known under the law as “incapacitation.” Nor is there a definition of “against the person's will.” That means that each of the approximately 7000 postsecondary institutions governed by Title IX (i.e., those that participate in student financial assistance programs)<sup>271</sup> must develop its own definition of these and other key terms.

The following standard was adopted by Wittenberg University:

Incapacitation: The physical and/or mental inability to make informed rational judgments. States of incapacitation include, without limitation, sleep, blackouts, and flashbacks.

268. See Michael Stratford, *OCR in the Hot Seat*, INSIDE HIGHER ED (June 27, 2014), <https://www.insidehighered.com/news/2014/06/27/senators-debate-whether-us-has-enough-power-or-too-much-combat-campus-sexual-assault> [https://perma.cc/4TQ4-FRXX]. During testimony before the Senate Health, Education, Labor & Pensions Committee on June 26, 2014, Catherine E. Lhamon, the Assistant Secretary for Civil Rights at the U.S. Department of Education, noted that “[t]he importance of the threat of withholding federal funds is something that should not be undermined, and that is something that has been an effective tool for us.” *Id.* She further testified that the guidance provided by the OCR “is actually what the law is,” not just her opinion. *Id.*

269. DCL, *supra* note 4, at 1–2.

270. *Id.* at 1. It also makes no attempt to clarify when sexual activity may be deemed as being “against a person's will.” *Id.* Is physical force required or is coercion of some other type also covered?

271. U.S. Dep't of Education: Office for Civil Rights, *Title IX and Sex Discrimination*, (Apr. 2015), [http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) [https://perma.cc/95WH-B4GN]. Title IX “condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). Institutions receiving federal funding in one form or another run the gamut from small vocational institutions to major research universities.

Where alcohol [or other drug] is involved, one does not have to be intoxicated or drunk to be considered incapacitated. Rather, incapacitation is determined by how the alcohol consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments . . . Because incapacitation may be difficult to discern, students are strongly encouraged to err on the side of caution; i.e., when in doubt, assume that another person is incapacitated and therefore unable to give effective consent.

Being intoxicated or drunk is never a defense to a complaint of sexual harassment or misconduct under this policy. A factor considered during sexual complaint hearings is whether the accused student knew, or a sober, reasonable person in the position of the accused student should have known, that the complainant was incapacitated.<sup>272</sup>

I include it here not because it is the worst possible example of a standard, but because it illustrates the shortcomings found in standards being used by schools large and small.<sup>273</sup>

One shortcoming is the vagueness of the standard. A factfinder asked to determine whether a complainant was incapacitated might well struggle with the question of whether she was capable of making "informed, rational judgments." What does that mean? Or, perhaps more to the point, what does it look like when someone is incapable of rational judgment? Without an answer to that question, factfinders (and students like Mae and Sam) are essentially left to their own devices. A single drink is sufficient to begin to impact "a person's decision-making capacity, awareness of consequences, and ability to make informed judgments."<sup>274</sup> Is that the standard to be

272. WITTENBERG UNIV., 2015–2016 STUDENT HANDBOOK 64–65 (2015), available at [http://www.wittenberg.edu/sites/default/files/media/student\\_development/Wittenberg%20StudentHandbook-8.7.15.pdf](http://www.wittenberg.edu/sites/default/files/media/student_development/Wittenberg%20StudentHandbook-8.7.15.pdf) [<https://perma.cc/P8J7-FYZ8>].

273. Other schools are currently using variations of the standard for incapacitation employed by Wittenberg. *E.g.*, GALLAUDET UNIV., 2015–2016 STUDENT HANDBOOK: SEXUAL MISCONDUCT POLICY DEFINITIONS 1 (2015), available at <https://www.gallaudet.edu/Documents/Student%20Affairs/Sexual%20Misconduct%20Policy%20Definitions.pdf> [<https://perma.cc/R4M5-YMDE>]; UNIV. OF NORTH CAROLINA PEMBROKE, 2015–2016 STUDENT HANDBOOK 72 (2015), available at <http://studentaffairs.uncp.edu/flips/StudentHandbookFS2015/> [<https://perma.cc/2RM4-T5AD>]. The University of Virginia employed a variation of this standard as recently as July 2015. UNIV. OF VIRGINIA, SEXUAL VIOLENCE EDUCATION & RESOURCES, <http://www.virginia.edu/sexualviolence/sexualassault/reportingoptions/sab.html> (last visited July 2, 2015). It continues to define incapacitation as the inability "to make informed, rational judgments about whether or not to engage in sexual activity." UNIV. OF VIRGINIA, POLICY ON SEXUAL AND GENDER-BASED HARASSMENT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 13, available at <http://vpsa.virginia.edu/sites/vpsa.virginia.edu/files/Title%20IX%20VAWA%20Umbrella%20Policy.pdf> [<https://perma.cc/LP3Y-LDG5>].

274. *See, e.g., The Truth About Holiday Spirits: How To Celebrate Safely This Season*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM (Dec. 2015), [http://pubs.niaaa.nih.gov/publications/RethinkHoliday/NIAAA\\_NYE\\_Fact\\_Sheet.htm](http://pubs.niaaa.nih.gov/publications/RethinkHoliday/NIAAA_NYE_Fact_Sheet.htm) [<https://perma.cc/7ZEE-7JB7>] (noting that "critical decision-making abilities . . . are already diminished long before a person shows physical signs of intoxication"). A blood alcohol concentration as low as .04, which most women have after one to two drinks, reduces inhibitions, and a blood alcohol

applied? If a factfinder concludes that a student had one drink, should there be a finding of incapacitation or is something more required?

Adding to the confusion is the statement, “Where alcohol [or other drug] is involved, one does not have to be intoxicated or drunk to be considered incapacitated.” Taken literally, this statement appears to support the idea that any impairment, including that caused by a single drink, creates incapacitation, but common sense and the knowledge that countless sexual encounters that would violate such a standard take place on college campuses every night would seem to dictate otherwise.

Imagine you were a factfinder in the Mae and Sam case and were asked to apply this standard. Was Mae incapacitated? Was Sam incapacitated? The vagueness of the standard would allow two reasonable hearing boards reviewing exactly the same facts to come to opposite decisions. What is needed is an evidence-based standard that provides factfinders (and students) with clear guidelines as to the relevant and observable signs of incapacitation.

Another shortcoming is the standard’s reliance on unsubstantiated scientific theories. As discussed above, the theory that blackouts establish an inability to engage in conscious thought is unsupported by scientific evidence.<sup>275</sup> Under the presumption created by this standard, Mae would automatically be deemed incapacitated, while Sam, who was arguably more intoxicated, would not. That is simply unfair.

Until and unless the DOE promulgates regulations establishing the standards to be applied in determining whether a sexual assault has occurred, schools, factfinders, and students will be awash in a sea of confusion.

### III. “EFFECTIVE CONSENT” AND THE LAW

Any standard established by the DOE for “effective consent” should be informed by the law of consent. Legislative bodies and courts of law, both criminal and civil, have grappled for centuries with the question of what constitutes effective consent,<sup>276</sup> and the DOE would be foolish to ignore the insights provided by statutes and the common law. It should strive to create standards that do not conflict with where the law draws the line between unwanted sexual contact and criminal sexual assault. Creating an expectation among students that something will be viewed as a sexual assault in the “real world” if it will not is wrong and dangerous.

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concentration as low as .06, which, again, most women have after one to two drinks, increases the likelihood of risk taking. *See generally* Catharine Montgomery, Katie V. Ashmore & Ashok Jansari, *The Effects of a Modest Dose of Alcohol on Executive Functioning and Prospective Memory*, 26 HUMAN PSYCHOPHARMACOLOGY: CLINICAL & EXPERIMENTAL 208 (2011).

275. *See supra* notes 29–42 and accompanying text.

276. *E.g.*, *Commonwealth v. Burke*, 105 Mass. 376, 377 (1870) (“The most ancient statute upon [rape and consent] is that of Westm. I. c. 13.”) The Statute of Westminster I, enacted in 1275, states in pertinent part, “And the King prohibiteth that none do ravish, nor take away by Force, any Maiden within Age (neither by her own Consent, nor without) nor any Wife or Maiden of full Age, nor any other Woman against her Will . . . .” Statute of Westminster I, The Rape Act, 1275, 3 Edw. 1, ch. 13 (Eng.).

I am not suggesting that every standard found within a student code of conduct should or must be consistent with the criminal law or even that a sexual assault standard must attempt to replicate the criminal law in every way. Schools have the right to set standards of conduct for their students that are consistent with their mission,<sup>277</sup> and these standards may be far stricter than those set by the criminal law. For example, it is perfectly appropriate for a faith-based institution to opt to prohibit premarital sex.<sup>278</sup>

But if a school is going to label a student as having committed a “sexual assault,” it is only fair to employ a standard that is consistent with the fundamental principles of criminal law. That label may well follow the student for the rest of his life.<sup>279</sup> If it is placed on a transcript,<sup>280</sup> he may have difficulty completing his education. The damage caused by the campus grapevine can also be enduring—twenty years later when a former classmate says, “He was booted out of school for raping some girl,” no one in the real world is going to distinguish between a criminal conviction and a violation of school policy.

Further, if society’s goal is to ensure that the boundaries set by society for sexual behavior are not violated, what better source for standards than those created by our elected representatives? Courts and legislatures not only have experience with the substantive issues involved, they have experience in drafting functional standards. The standards used in criminal law and student codes of conduct need not be identical—the states cannot even agree on every aspect of sexual assault law—but the differences should not be glaring.

This Part addresses two critical issues relating to effective consent. Part III.A tackles the issue of how the DOE might define consent in a way that is consistent with the criminal law, allows women and men to share in the responsibility for sexual decision making, and provides bright-line rules that will benefit both students and decision makers.<sup>281</sup> Part III.B speaks to the thorny issue of when severe intoxication

277. *See supra* note 218 and accompanying text.

278. *E.g.*, CEDARVILLE UNIV., THE CEDARVILLE EXPERIENCE 2015–16 STUDENT HANDBOOK 12, available at <http://publications.cedarville.edu/brochures/studentlife/studenthandbook/#12> [<https://perma.cc/P839-V4UL>].

279. Schools ordinarily do not publicly announce the outcomes of conduct proceedings. They have little to gain from publicizing bad acts on campus and potentially much to lose. Even assuming that a public announcement would not violate the Family Educational and Privacy Rights Act (FERPA), *see generally* 34 C.F.R. § 99.31(a)(14) (2014), it would increase the school’s potential liability should the respondent opt to bring a civil claim, such as defamation, against the school. However, nothing prohibits parties from sharing outcomes with anyone they wish. *See generally* OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *supra* note 254, at 2 (noting “colleges and universities may not require a complainant to abide by a non-disclosure agreement, in writing or otherwise.”). Both parties are likely to inform roommates, friends, and acquaintances of the outcome, particularly if those people provided support during the investigation, and it just takes one person to activate the campus grapevine.

280. Many schools do not include notations of disciplinary action on transcripts, but some do. *See supra* note 13 and accompanying text.

281. *See infra* Part III.A.

should preclude effective consent.<sup>282</sup> Part III.C proposes a standard that brings together the best of law and science.<sup>283</sup>

*A. Rape and Consent Under the Criminal Law*

The criminal law of rape varies substantially from one state to the next, and one area of difference relates to the issue of consent. Lack of effective consent lies at the heart of every claim for rape.<sup>284</sup> If a competent adult effectively consents to a sexual activity, there is no crime.<sup>285</sup> In most states, lack of consent is viewed as an element of the crime,<sup>286</sup> which places the burden on the prosecution to establish its existence.<sup>287</sup>

The real controversy arises and the genuine difference of opinion among states becomes evident when considering what exactly is required to show lack of consent.<sup>288</sup> It is impossible to imagine a more complicated and emotionally charged issue. Unlike a punch or other nonsexual form of battery, sex, far more often than not, is consensual, the natural result of a mutual desire, and the sexual script for consent often involves no dialogue.<sup>289</sup> In defining consent, the state is being asked to regulate the most intimate of all human activities, and lawmakers have been understandably reluctant to interfere with the sexual script.

As a result, the majority of states opt to focus not on the existence or nonexistence of actual consent (i.e., whether the alleged victim said or otherwise indicated “yes” or “no”), but rather on the existence of legal or effective consent (i.e., whether the defendant’s conduct constituted overreaching as defined by the state).<sup>290</sup> Focusing

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282. See *infra* Part III.B.

283. See *infra* Part III.C.

284. Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2689 (1991).

285. MODEL PENAL CODE § 213.1 cmt. 4 at 301 (Official Draft and Revised Comments 1980).

286. The requirement of lack of consent may be phrased in different ways. For example, the California courts have held that the statutory standard “‘against the victim’s will’ is synonymous with ‘without the victim’s consent.’” *People v. Giardino*, 98 Cal. Rptr. 2d 315, 320 (Cal. Ct. App. 2000) (quoting *People v. Cicero*, 204 Cal. Rptr. 582 (Cal. Ct. App. 1984)).

287. E.g., N.Y. PENAL LAW § 130.05(1) (McKinney 2009); *State v. W.R., Jr.*, 336 P.3d 1134, 1139 (Wash. 2014); *State v. Smith*, 626 S.E.2d 258, 260–61 (N.C. 2006). *But see* N.J. STAT. ANN. § 2C:2–10 (West 2015).

288. Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 158–59 (2011).

289. See *supra* notes 93–98 and accompanying text.

290. See Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN’S L. REV. 625, 628–34 (2005). For example, California’s rape statute makes no mention of actual consent. Rape of an adult requires a showing that the victim was “incapable, because of a mental disorder or developmental or physical disability, of giving legal consent”; the sexual intercourse was “accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another”; the victim was “prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance”; the victim was “unconscious of the nature of the act”; the victim submitted “under the belief that the person committing the act [was] someone known to the victim other than the accused”;

on legal consent allows lawmakers to avoid what some perceive to be the “problems of proof” relating to actual consent<sup>291</sup> and to avoid rewriting the sexual script by mandating that consent be provided in a particular form.

The public often misunderstands the law of rape, not grasping that in many states, even the fact that the “victim” clearly said “no” is insufficient to establish rape in the absence of something like physical force. The rule is a harsh one, but given the near impossibility of proving beyond a reasonable doubt what either party said in a he said/she said situation, the rule is a practical one. It also spares victims the ordeal of going through a criminal trial with no chance of conviction.

So, for example, New York’s penal code recognizes only two circumstances that may be used to establish lack of consent in cases involving first and second degree rape, “forcible compulsion” and “incapacity to consent.”<sup>292</sup> The law in essence presumes that if the alleged victim was an adult who was not mentally disabled, mentally incapacitated, physically helpless, etc., and the defendant was not using or threatening to use physical force, the victim had a meaningful choice as to whether to permit the sexual activity in question and, thus, impliedly consented to it.

New York has shown some movement towards considering actual consent. In 2001, it amended its definition of “lack of consent” to include situations in which there is a clear expression by the victim “that he or she did not consent to engage in such act,” and a showing that “a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances.”<sup>293</sup> However, this definition only applies to third degree rape.<sup>294</sup>

“the act [was] accomplished against the victim’s will by threatening to retaliate in the future against the victim or any other person”; or “the act [was] accomplished against the victim’s will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another.” CAL. PENAL CODE § 261(a) (West 2014).

291. See MODEL PENAL CODE § 213.1 cmt. 4 at 303 (Official Draft and Revised Comments 1980) (“[I]nquiry into the victim’s subjective state of mind and the attacker’s perceptions of her state of mind often will not yield a clear answer. The deceptively simple notion of consent may obscure a tangled mesh of psychological complexity, ambiguous communication, and unconscious restructuring of the event by participants.”).

292. N.Y. PENAL LAW § 130.05(2)(a)–(b) (McKinney 2009). Rape in the first degree exists when a defendant engages in sexual intercourse “by forcible compulsion” or with someone who is “physically helpless” or under a particular age. N.Y. PENAL LAW § 130.35 (McKinney 2009). Rape in the second degree exists when a defendant engages in “oral sexual conduct or anal sexual conduct” with someone who is “mentally disabled or mentally incapacitated” or under a particular age. N.Y. PENAL LAW § 130.45 (McKinney 2009). See generally Anderson, *supra* note 290, at 628–30 (“Setting aside those circumstances in which the victim *cannot* consent—such as when the victim is underage, mentally incapacitated, or physically helpless—in order to be convicted of a state’s highest, non-aggravated sexual offense, statutes in forty-three states and the District of Columbia require that the defendant use force against his victim. Although eight of these forty-four statutes appear to require only non-consent, they include the use of force in the definition of ‘non-consent.’” (emphasis in original) (citations omitted)).

293. N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2009).

294. *Id.*



Most states criminalizing sexual intercourse without actual consent have taken a similar approach, electing to make it a lesser offense than sexual intercourse resulting from force.<sup>295</sup> To date, only a handful of states have enacted statutes making sexual intercourse without actual consent their highest sexual offense.<sup>296</sup> The approach taken by New York is also consistent with that of a number of other states in that it takes into account what a reasonable person in the defendant's position would have believed on the issue of actual consent.<sup>297</sup>

When states do consider the existence of actual consent, they often require the prosecution to show that the victim somehow expressed nonconsent (e.g., said "no," physically resisted, etc.).<sup>298</sup> They take a "no means no" approach. In most states, anything less than a "no," including silence, is insufficient to establish lack of actual consent.<sup>299</sup>

Reformers advocating for states to adopt an affirmative consent requirement or "yes means yes" approach (i.e., a requirement that agreement be expressed through words or actions) have enjoyed some limited success.<sup>300</sup> For example, Wisconsin defines actual consent as requiring "words or overt actions . . . indicating a freely given agreement to have sexual intercourse,"<sup>301</sup> and California defines actual consent as requiring "positive cooperation in act or attitude pursuant to an exercise of free will."<sup>302</sup> No state has adopted a standard requiring a verbal "yes."<sup>303</sup> And even in California, the burden remains on the prosecution to show lack of consent as one of multiple required elements of proof—standing alone, lack of affirmative consent is insufficient to establish rape.<sup>304</sup>

Glaring differences exist between the standards employed under the criminal law discussed above and the standards employed under student codes of conduct. They are truly at opposite ends of the spectrum. Codes of conduct typically focus on the existence of actual consent, rather than legal consent,<sup>305</sup> and an affirmative consent requirement is becoming the norm.<sup>306</sup>

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295. Anderson, *supra* note 290, at 631–32 (noting that such offenses are often categorized as misdemeanors).

296. *Id.* at 632–33. *E.g.*, TENN. CODE ANN. § 39-13-503(a)(2) (2014).

297. N.Y. PENAL LAW § 130.05(2)(d); *see also* *People v. Sojka*, 126 Cal. Rptr. 3d 400, 402 (Cal. Ct. App. 2011).

298. *E.g.*, UTAH CODE ANN. § 76-5-406(1) (LexisNexis 2012).

299. Berliner, *supra* note 284, at 2689.

300. Buchhandler-Raphael, *supra* note 288, at 159–61.

301. WIS. STAT. ANN. § 940.225(4) (West 2005).

302. CAL. PENAL CODE § 261.6 (West 2014).

303. Stephen J. Schulhofer, *Rape in the Twilight Zone: When Sex Is Unwanted but Not Illegal*, 38 SUFFOLK U. L. REV. 415, 421 (2005).

304. CAL. PENAL CODE § 261 (West 2014).

305. ATIXA's Gender-Based and Sexual Misconduct Model Policy and Model Grievance Process provides one example of this approach. SOKOLOW ET AL., *supra* note 202, at 10–11.

306. *E.g.*, *id.* "An estimated 1,500 institutions of higher education now use some type of affirmative consent definition in their sexual assault policies, according to the National Center for Higher Education Risk Management, a consulting group." Bonnie Miller Rubin, *To Combat Sexual Assault, Colleges Say Yes to Affirmative Consent*, CHI. TRIB. (Oct. 29, 2015, 11:43 AM), <http://www.chicagotribune.com/news/ct-college-sexual-assault-affirmative-consent-met-20151029-story.html> [<https://perma.cc/Q5WD-M4R9>].

A good example of the problems created by such differences is found in New York, which recently enacted legislation mandating that colleges and universities require actual affirmative consent to sexual activity in their codes of conduct.<sup>307</sup> No such requirement exists under New York criminal law.<sup>308</sup> So, if Sally and Joe—two eighteen-year-old college students at NYU—hookup and have sexual intercourse without any real discussion, Sally may well be able to establish sexual assault under the code of conduct and have Joe expelled. In contrast, if Molly and Tom—two eighteen-year-old nonstudents—hookup on the same evening on the same street in the same way, Molly will have no legal remedy, and Tom will face no legal repercussions—sex without discussion is not a crime.<sup>309</sup>

The move to an affirmative consent standard for codes of conduct has become nothing less than a political juggernaut with California and New York leading the charge.<sup>310</sup> But I sincerely question whether this standard is the best standard for our students, and I urge the DOE and other lawmakers to give serious consideration to whether a nonconsent standard, like that proposed in this Article, might more effectively prevent sexual assaults and other forms of unwanted sexual behavior.

The best of intentions underlie the push for an affirmative consent standard: “Of all our rights and liberties, few are as important as our right to choose freely whether and when we will become sexually intimate with another person.”<sup>311</sup> The law requires affirmative permission for other invasions of bodily integrity, such as medical treatments; silence is not sufficient to denote consent.<sup>312</sup> Why treat this situation differently and require a victim to explicitly communicate a “no”?<sup>313</sup> While a requirement of express verbal permission might conflict with the “common modes of indicating a desire for intercourse,” a requirement of verbal consent and/or “unambiguous body language” appears consistent with the way humans interact in sexual situations.<sup>314</sup> Given that so many campus hookups involve strangers or near strangers,<sup>315</sup> it seems particularly important to require clear communication.

That having been said, adopting an affirmative consent standard poses significant practical problems for colleges and universities and, more importantly, the students

307. N.Y. EDUC. LAW § 6441 (McKinney 2015).

308. *See supra* notes 292–94 and accompanying text.

309. It is truly baffling that state legislators in states like New York and California are imposing an affirmative consent requirement on colleges and universities and touting the importance of the change while seemingly giving absolutely no thought to incorporating the same standard into the civil or criminal law. *See* Kevin de León & Hannah-Beth Jackson, *Why We Made “Yes Means Yes” California Law*, WASH. POST (Oct. 13, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/>. If an affirmative consent standard is a good and necessary thing on college campuses, why is not a good and necessary thing off college campuses? On the other hand, if legislators believe that affirmative consent is simply not a workable standard in the civil and criminal context, why is it viewed a workable standard for colleges and universities?

310. CAL. EDUC. CODE § 67386 (West 2016); N.Y. EDUC. LAW § 6441 (McKinney 2015).

311. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 274 (1998).

312. *Id.* at 270.

313. *Id.* at 271.

314. *Id.* at 272.

315. *See supra* Part I.B.

they serve. The crux of the problem is the fact that society has yet to agree upon what body language (i.e., conduct) “unambiguously” signals a willingness to engage in sexual intercourse. It is impossible to imagine a more nuanced scene than that which takes place in the bedroom, and our attempts to implement affirmative consent standards have seemingly only served to confuse students more about how to set and abide by sexual boundaries.<sup>316</sup>

Consider the results of a 2015 *Survey of Current and Recent College Students on Sexual Assault* conducted by *The Washington Post* and the Kaiser Family Foundation.<sup>317</sup> Eighty-three percent of students, both men and women, indicated they were familiar with the “yes means yes” standard.<sup>318</sup> While they were well aware of the standard, they differed greatly in its application. When asked if undressing, getting a condom, and/or nodding in agreement established consent for further sexual activity, over forty percent said “yes” and over forty percent said “no.”<sup>319</sup> How can we expect students to respect boundaries when no consensus exists as to what they are?

The same split exists among the campus community as a whole. Whether a respondent who believed the complainant’s act of undressing signaled consent to intercourse is found responsible for nonconsensual intercourse will depend on the subjective views of those who happen to serve on the hearing board.

Student-conduct systems simply are not equipped to be on the cutting edge of developing legal standards. Unless and until the criminal justice system more fully develops an affirmative consent standard, its application in the context of a student-conduct system is not practicable.

For the protection of all, students and hearing boards need a test for effective consent that draws bright lines. Any standard for effective consent should clearly delineate behaviors, such as use of force, that will be viewed as overreaching (i.e., negate consent).

The need for a bright-line test should not and does not preclude the application of a standard that considers the existence or nonexistence of actual consent. If society is truly willing to dictate behavior in the bedroom, it can require verbal consent to every sexual activity, but it should do so for everyone—not just college students—and it

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316. See Nick Anderson & Peyton M. Craighill, *College Students Remain Deeply Divided Over What Consent Actually Means*, WASH. POST (June 14, 2015), [https://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e\\_story.html](https://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e_story.html) [<https://perma.cc/8S3L-S3UA>].

317. WASHINGTON POST & KAISER FAMILY FOUNDATION, SURVEY OF COLLEGE STUDENTS ON SEXUAL ASSAULT (2015), available at <http://apps.washingtonpost.com/g/page/national/washington-post-kaiser-family-foundation-survey-of-college-students-on-sexual-assault/1726/> [<https://perma.cc/FFY2-GC93>].

318. *Id.* at 14; see also Anderson & Craighill, *supra* note 316 (describing the results of *The Washington Post* and Kaiser Family Foundation survey).

319. WASHINGTON POST & KAISER FAMILY FOUNDATION, *supra* note 317, at 13; see also Anderson & Craighill, *supra* note 316 (“Among women, 38 percent said it establishes consent for more sexual activity if someone gets a condom; 44 percent said the same is true if someone takes off his or her own clothes; and 51 percent said a nod of agreement signals consent. Women were much less likely than men to infer consent from sexual foreplay.”).

should do so knowing that such a standard may “implicitly criminalize most human sexual interaction.”<sup>320</sup>

In the alternative, society can adopt an actual nonconsent standard—a “no means no” standard—similar to that employed by New York’s penal code.<sup>321</sup> Given the number of states that do not require actual consent in any form,<sup>322</sup> seeking out a middle ground on the issue makes sense, and an actual nonconsent standard provides just that.<sup>323</sup>

A nonconsent standard provides clarity as to the acceptable boundaries for both participants in the sexual activity.<sup>324</sup> Given society’s lack of consensus as to what nonverbal cues indicate consent, we do an injustice to men when we assume that a man who mistakenly believes a woman consented is “ignorant and indifferent about a woman’s well-being.”<sup>325</sup> A clear “no” would stop many men in their tracks, particularly if they are properly educated as to the “no means no” standard. It would serve to reduce assaults and other forms of unwanted sex in a way that a vague affirmative consent standard would not. It will not prevent a true predator from committing an assault, but neither will an affirmative consent standard.

A nonconsent standard also makes it easier to gather evidence. No statute of limitations exists for bringing a Title IX complaint to school officials, and such complaints are commonly made weeks, months, and even years after the alleged assault. Respondents may have no idea that the complainant felt violated until the complaint is filed. Imagine being asked six months after the fact to recall exactly what nonverbal cues your partner provided that indicated consent. Even the complainant’s recollection of every bodily movement by each party may be blurry. A “no,” an attempt to leave, etc., would be far more memorable for both parties.

A nonconsent standard does place responsibility on a woman to make her feelings clear, but it also places responsibility on a man to pay attention to, understand, and abide by her wishes. It imposes “a duty on men to open their eyes and use their heads before engaging in sex—not to read a woman’s mind, but to give her credit for knowing it herself when she speaks it, regardless of their relationship.”<sup>326</sup> There is much to be said for shared responsibility,<sup>327</sup> particularly where, as in the case of a hookup, the encounter at least initially was desired and consented to by both parties.

Debate has long existed over “the degree of protection women truly need or desire.”<sup>328</sup> Many women feel demeaned by a standard that assumes they are incapable

320. Cathy Young, *Campus Rape: The Problem with ‘Yes Means Yes’*, TIME (Aug. 29, 2014), <http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes/> [<https://perma.cc/J8VB-HASV>].

321. N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2009).

322. See *supra* notes 290–95 and accompanying text.

323. See Leslie D. Robinson, Note, *It Is What It Is: Legal Recognition of Acquaintance Rape*, 6 AVE MARIA L. REV. 627, 639 (2008).

324. Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 425–29 (1998).

325. Sarah Gill, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN’S L.J. 27, 61–62 (1996).

326. SUSAN ESTRICH, REAL RAPE 98 (1987).

327. See Robinson, *supra* note 323, at 639.

328. Kathleen F. Cairney, Note, *Addressing Acquaintance Rape: The New Direction of the*

of standing up for themselves.<sup>329</sup> When asked in the 2015 *Survey of Current and Recent College Students on Sexual Assault* which is the “better standard to use when determining whether sexual activity is consensual,” thirty-four percent of women preferred “yes means yes,” forty-three percent preferred “no means no,” and twenty-one percent saw little difference between the two.<sup>330</sup>

The adoption of a non-consent standard does not mean that we should cease our efforts to promote better communication by men and women. “We would be better off if the culture taught [men] that permission is required before having sexual contact with a female, *and* if [women] were taught to make their wishes known—yes or no—plainly and truthfully to males.”<sup>331</sup> We should continue to educate students about the wisdom of obtaining affirmative consent, but the fact that it is unwise to fail to obtain such consent does not mean that any perceived failure to satisfy this nebulous standard should or must be sanctioned.<sup>332</sup>

### *B. Consent and Intoxication Under the Law*

An aspect of effective consent requiring special attention is the question of whether and when intoxication should negate consent. Alcohol abuse is ingrained in the hookup culture,<sup>333</sup> and cases like that of Mae and Sam—where the respondent claims, “she said ‘yes,’” and the complainant has no memory of what happened—are common. The standards for incapacitation applied by many schools<sup>334</sup> place a responsibility on respondents to avoid sex with an intoxicated individual that far exceeds that employed by any state’s criminal law<sup>335</sup> and that demands respondents to identify intoxication in a way humans cannot scientifically accomplish.<sup>336</sup>

#### 1. Consent and Intoxication Under the Criminal Law

Most states take one of three approaches to addressing sexual conduct that may have been induced by drug or alcohol use: 1) they include sexual activity with someone who is mentally incapacitated in the definition of sexual assault and address the use of intoxicants in the definition of “mental incapacitation”; 2) they include sexual activity undertaken “without consent” in the definition of sexual assault and address the use of intoxicants in the definition of “without consent”; or 3) they directly address the use of intoxicants in the definition of sexual assault.<sup>337</sup> The

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*Rape Law Reform Movement*, 69 ST. JOHN’S L. REV. 291, 312 (1995).

329. *Id.* at 314.

330. WASHINGTON POST & KAISER FAMILY FOUNDATION, *supra* note 317, at 14.

331. Dressler, *supra* note 324, at 427 (emphasis in original).

332. *See id.*

333. *See supra* notes 143–76 and accompanying text.

334. *See, e.g., supra* notes 272–73 and accompanying text.

335. *See infra* Part III.B.1.

336. *See infra* Part III.B.2.

337. *See* Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 157 (2002).

criminal laws of New York,<sup>338</sup> Texas,<sup>339</sup> and California<sup>340</sup> illustrate the three approaches.

New York is one of twenty jurisdictions that directly address intoxication in the context of mental incapacitation.<sup>341</sup> Under New York law: “A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person . . . [w]ho is incapable of consent by reason of being physically helpless . . . ,”<sup>342</sup> and “of rape in the second degree when . . . he or she engages in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.”<sup>343</sup>

A prosecutor can use intoxication to establish first-degree rape only if the intoxication was so severe as to render the victim physically helpless (i.e., “unconscious” or “physically unable to communicate an unwillingness to an act”).<sup>344</sup> In a scenario like that of Mae and Sam, where no witness saw the alleged victim unconscious or physically unable to communicate, the prosecutor could not meet this burden.

A prosecutor might be able to use intoxication to establish second-degree rape, but only if the intoxication rendered the victim “mentally incapacitated,”<sup>345</sup> (i.e., “temporarily incapable of appraising or controlling his conduct owing to the influence of a narcotic or intoxicating substance *administered to him without his consent*”).<sup>346</sup> Like New York, a majority of states addressing intoxication in the context of mental incapacitation only invalidate consent where the intoxication was involuntary.<sup>347</sup> In the Mae and Sam scenario, since the alleged victim was voluntarily intoxicated, the prosecutor could not meet this burden.

Texas is one of five states that include sexual activity undertaken “without consent” in the definition of sexual assault and address the use of intoxicants in the definition of “without consent.”<sup>348</sup> Under Texas law, “[a] sexual assault . . . is without the consent of the other person if . . . the other person has not consented and the actor knows the other person is unconscious or physically unable to resist,” or “*the actor has intentionally impaired the other person’s power to appraise or control the other person’s conduct* by administering any substance without the other person’s knowledge.”<sup>349</sup>

Thus, a prosecutor could use intoxication to establish lack of consent only if the intoxication was so severe as to render the victim “unconscious or physically unable to resist,” or if the defendant caused the victim’s involuntary intoxication.<sup>350</sup> Like

338. See *infra* notes 341–47 and accompanying text.

339. See *infra* notes 348–51 and accompanying text.

340. See *infra* notes 352–57 and accompanying text.

341. See Falk, *supra* note 337, at 158.

342. N.Y. PENAL LAW § 130.35 (McKinney 2009).

343. N.Y. PENAL LAW § 130.30 (McKinney 2009).

344. N.Y. PENAL LAW § 130.00(7) (McKinney 2009).

345. See PENAL LAW § 130.30.

346. PENAL LAW § 130.00(7) (emphasis added).

347. Falk, *supra* note 337, at 161.

348. *Id.* at 163–64.

349. TEX. PENAL CODE ANN. § 22.011(b)(3), (6) (West 2011) (emphasis added).

350. *Id.*

Texas, a majority of states addressing intoxication in the context of lack of consent only invalidate consent where the intoxication was involuntary.<sup>351</sup> In the Mae and Sam scenario where no witness saw the alleged victim unconscious, and the alleged victim was voluntarily intoxicated, the prosecutor could meet neither burden.

California is one of twenty-one jurisdictions that directly address the use of intoxicants in the definition of sexual assault.<sup>352</sup> Under California law, “Rape is an act of sexual intercourse accomplished . . . [w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused,” or “[w]here a person is at the time unconscious of the nature of the act, and this is known to the accused.”<sup>353</sup> Unlike California, most jurisdictions that directly address the use of intoxicants in the definition of rape require that the intoxication be involuntary for rape to exist.<sup>354</sup>

If the Mae and Sam scenario took place in California, whether either or both parties would be found guilty of rape would depend on two things: 1) how intoxicated one must be to be “prevented from resisting”; and 2) if one or both were sufficiently intoxicated, whether their partner should have been aware of their condition.

The requirement that the victim’s intoxication prevent her from resisting has been narrowly applied.<sup>355</sup> Although it allows a defendant to be found responsible in cases in which the victim was not unconscious or physically incapacitated, it does not extend nearly as far beyond that point as might be assumed:

It is not enough that the victim was intoxicated to some degree, or that the intoxication reduced the victim’s sexual inhibitions. “Impaired mentality may exist and yet the individual may be able to exercise reasonable judgment with respect to the particular matter presented to his or her mind.” Instead, the level of intoxication and the resulting mental impairment must have been so great that the victim could no longer exercise reasonable judgment concerning that issue.<sup>356</sup>

As one California prosecutor explained, “the intoxicated victim must be so ‘out of it’ that she does not understand what she is doing or what is going on around her. It is not a situation where the victim just ‘had too much to drink.’”<sup>357</sup> In the Mae and Sam scenario where both Mae and Sam were capable of carrying on conversations, and Mae was sufficiently cognizant of what was happening to lead Sam three blocks to her dorm, it seems highly unlikely a prosecutor could (or would even seek to) establish either was “prevented from resisting.”

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351. Falk, *supra* note 337, at 164.

352. *Id.* at 166–67.

353. CAL. PENAL CODE § 261(a)(3), (4) (West 2014).

354. *See* Falk, *supra* note 337, at 168.

355. *People v. Smith*, 120 Cal. Rptr. 3d 52, 56 (Cal. Ct. App. 2010) (“[E]ven a poor judgment is a reasonable judgment so long as the woman is ‘able to understand and weigh the physical nature of the act, its moral character, and probable consequences.’”).

356. *People v. Giardino*, 98 Cal. Rptr. 2d 315, 324 (Cal. Ct. App. 2000) (citations omitted).

357. Valerie M. Ryan, Note, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407, 416 (2004) (citing a 2003 telephone interview with Nancy O’Malley, Chief Assistant District Attorney, Alameda County District Attorney’s Office).

While the criminal law varies on the issue of incapacitation based on intoxication, two broad areas of agreement exist. First, virtually every state makes it a criminal offense to have sexual intercourse with a person to whom a defendant has administered an intoxicant without his or her consent.<sup>358</sup> The decision to drug someone without that person's knowledge prevents that person from having the capacity to offer any resistance. Therefore, nonconsent must be presumed.

The states differ on whether and how the involuntary intoxication must affect a victim's mental state, but given the heinousness of such behavior,<sup>359</sup> the particular vulnerability of college-aged men and women, and the need to develop bright-line standards in the campus setting, the DOE would be well advised to enact a standard that holds anyone who drugs another for the purpose of engaging in sexual intercourse strictly liable for sexual assault if such intercourse occurs.<sup>360</sup> The moment the respondent attempted to cloud the complainant's judgment, the complainant's right to a meaningful choice was violated.

Second, most states make it a criminal offense to have sexual intercourse with someone who is asleep, unconscious, or physically helpless, regardless of the reason for the condition.<sup>361</sup> The DOE's inclusion of a provision holding a person who engages in sexual intercourse with someone suffering from such a condition responsible for sexual assault would encompass situations involving extreme impairment resulting from voluntary intoxication.<sup>362</sup> If a student has passed out, there is no question that she lacks the capacity to consent.

The issue that challenges colleges and universities on a daily basis is how to deal with cases where a lesser degree of diminished capacity exists. What do you do with a Mae and Sam case? The DOE must determine whether to follow the majority of states by prohibiting sexual contact with a voluntarily intoxicated partner only when that partner is unconscious, asleep, or physically helpless, or follow a more modern approach—like that adopted by California—by prohibiting such contact when the intoxication prevents the partner from resisting.

The majority approach has been criticized for placing too much responsibility on the woman with the basic idea being that the criminal law does not hold victims responsible for crimes against them, and rape victims should be afforded the same protection.<sup>363</sup> The reasoning on which this argument is based is circular because it assumes that sexual intercourse with someone who is intoxicated automatically constitutes rape (i.e., that someone is a "victim").<sup>364</sup>

358. See, e.g., FLA. STAT. ANN. § 794.011(1)(c) (West 2007).

359. In many states, the administration of a drug for the purpose of committing a felony is a crime in and of itself. E.g., CAL. PENAL CODE § 222 (West 2014).

360. See, e.g., *infra* text accompanying note 393.

361. E.g., FLA. STAT. ANN. § 794.011(1)(e); IOWA CODE ANN. § 709.1(1) (West 2003).

362. See, e.g., *infra* text accompanying note 394.

363. Ryan, *supra* note 357, at 426; see e.g., ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE xxiv (Harper Perennial 1994) (1988) ("As to women's 'complicity,' when you drink and get drunk, you are responsible for what happens when you throw up or are too sick to go work. In our society, though, responsibility for crime falls on those who commit it.").

364. See Ryan, *supra* note 357, at 426.



Still, in this era of increased concerns about sexual assault, the majority approach may no longer reflect society's views. The modern approach appears a better fit. Most people would likely agree that under some circumstances, an intoxicated student could be conscious and still incapable of consent. The key questions for the DOE are where on the spectrum of diminished capacity to draw the line and how to clearly articulate the line.

## 2. Intoxication: Balancing the Rights of Complainants and Respondents

In setting the standard for determining to whom to allocate responsibility for sexual activity where one or both partners is intoxicated, the DOE is essentially being asked to determine whether someone is incapable of consent when her judgment is impaired (e.g., when alcohol has affected her decision-making ability by loosening inhibitions) *or* when her judgment is nonexistent (e.g., when alcohol has rendered her confused and incapable of understanding the world around her).

Ohio is among a handful of modern approach states that permits a finding of incapacitation where voluntary intoxication merely impairs decision-making ability: “[S]ubstantial impairment must be established by demonstrating a present reduction, diminution or decrease in the victim’s ability, either to appraise the nature of his conduct *or to control his conduct*.”<sup>365</sup> Significantly, even in Ohio, loss of control is viewed as something more than having “lowered inhibitions.”<sup>366</sup>

In other modern approach states, like Virginia,<sup>367</sup> incapacity to consent can only be established by demonstrating that intoxication prevented a person “from understanding the nature or consequences of the sexual act.”<sup>368</sup> What does it mean to say that someone understood the nature or consequences of sexual contact? Every modern approach state addressing this question considers whether the intoxicated person was able to understand the physical aspect of the contact (e.g., appreciating it was sexual in nature or knowing the sexual partner’s identity).<sup>369</sup> Broad acceptance also exists for the idea that the intoxicated person must understand she has the right to refuse the contact (i.e., to resist) and must have the ability to express that refusal (i.e., be coherent).<sup>370</sup> Not every state requires an understanding of the consequences of the contact,<sup>371</sup> and those that do typically require only a “rudimentary grasp”<sup>372</sup> that sex “may have some effect or residual impact upon the person, upon the person’s partner, or upon others.”<sup>373</sup>

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365. *State v. Zeh*, 509 N.E.2d 414, 418 (Ohio 1987) (emphasis added).

366. *State v. Martin*, No. CA99-09-026, 2000 WL 1145465, at \*5 (Ohio Ct. App. Aug. 14, 2000).

367. *See Molina v. Commonwealth*, 636 S.E.2d 470, 474 (Va. 2006).

368. VA. CODE ANN. § 18.2-67.10(3) (2014).

369. *See e.g.*, *Ragsdale v. State*, 23 P.3d 653, 657 (Alaska Ct. App. 2001); *People v. Giardino*, 98 Cal. Rptr. 2d 315, 324 (Cal. Ct. App. 2000).

370. *See e.g.*, *Adkins v. Commonwealth*, 457 S.E.2d 382, 388 (Va. Ct. App. 1995) (citing *State v. Olivio*, 589 A.2d 597, 604–05 (N.J. 1991)).

371. *See e.g.*, ALASKA STAT. § 11.41.470(2) (2014) (“‘[I]ncapacitated’ means temporarily incapable of appraising the nature of one’s own conduct . . .”).

372. *See State v. Ice*, 997 P.2d 737, 740 (Kan. Ct. App. 2000).

373. *Adkins*, 457 S.E.2d at 388.

So, under this view, the question is not whether the person could control her actions, but rather whether she was aware of her actions. Did she know she was having sex with this partner? Was she sufficiently aware and coherent that she could say “no” if she desired? Is there reason to believe she did not grasp that sex can have repercussions beyond the moment?

Virginia’s incapacity standard is consistent with that used in virtually every area of law. For example, under tort law, consent is effective if the person consenting “is capable of appreciating the nature, extent and probable consequences of the conduct consented to,”<sup>374</sup> and under contract law, a contract is voidable due to intoxication “only if ‘the intoxication [is] so excessive as to render the person incapable of exercising his judgment or understanding the nature of the agreement and the consequences of its execution.’”<sup>375</sup> The Virginia approach is also consistent with criminal law’s test for insanity, the *M’Naghten* Rule, under which insanity can only be established if “at the time of the committing of the act[,] the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing.”<sup>376</sup>

To be consistent with the civil and criminal law, the DOE should adopt a standard that invalidates consent only where the person making contact knows or should know that the other person is so disoriented<sup>377</sup> by the use of alcohol and/or other intoxicating substances that he or she cannot understand the nature or consequences of the sexual contact.<sup>378</sup>

Although the need for consistency with the law provides one basis for adopting such a standard, an even more compelling reason for its adoption exists: in developing the appropriate standard, the DOE must bear in mind the universally accepted requirement that for responsibility for the sexual assault to attach, the defendant/respondent must be at the very least negligent as to the complainant’s inability to effectively consent.<sup>379</sup> If a respondent could not have reasonably known<sup>380</sup> that a complainant was so intoxicated that she could not consent, it would

374. RESTATEMENT (SECOND) OF TORTS § 892A cmt. b (1979).

375. *In re ReadyOne Indus., Inc.*, 394 S.W.3d 680, 687 (Tex. App. 2012) (alteration in original) (quoting *Portwood v. Portwood*, 109 S.W.2d 515, 524 (Tex. Civ. App. 1937). Even marriage contracts may be invalidated only if the bride or groom were so intoxicated as to be non compos mentis. *Christoph v. Sims*, 234 S.W.2d 901, 903 (Tex. Civ. App. 1950).

376. *M’Naghten’s Case*, (1843), 8 Eng. Rep. 718, 719 (H.L.) (appeal taken from Eng.).

377. Having become synonymous with “intoxication,” the meaning of the term “incapacitation” has been distorted to such an extent that it should be excluded from the standard. The term “disorientation” is also far more descriptive of the required loss of awareness.

378. *See, e.g., infra* text accompanying note 396.

379. *See* Falk, *supra* note 337, at 162–63, 166, 171.

380. The standard should make clear that a respondent’s voluntary intoxication may not be used to excuse lack of knowledge of a relevant fact or circumstance, such as the fact that the sexual partner is unconscious, disoriented, etc. Recognizing intoxication as an excuse for overreaching would only encourage students to drink more, which in turn would create more unwanted sexual contact. A growing number of states have prohibited the introduction of evidence of voluntary intoxication in criminal cases. *See, e.g.,* FLA. STAT. ANN. § 775.051 (West 2010).

be patently unjust to punish him for taking her consent at face value. He did not overreach.

Unfortunately, society often grossly overestimates the ability of any human being to recognize intoxication. Any standard that requires a respondent to recognize when a complainant suffers from impaired judgment or loss of control is asking the impossible. Scientists have conducted numerous studies on the effectiveness of using visual observation techniques to identify intoxication, and they have uniformly shown that “‘obvious intoxication’ isn’t so obvious.”<sup>381</sup>

Even those with frequent exposure to intoxicated individuals and specialized training (e.g., bartenders, physicians, police officers, alcohol counselors) have extreme difficulty in correctly identifying moderate intoxication (i.e., BAC<.15%).<sup>382</sup> Similarly, “most university students are unable to recognize moderate intoxication that results from bingelike drinking (i.e., 3 to 5 standard drinks in [one hour]),” and training students to recognize the signs of intoxication does not appear to improve recognition over the long term.<sup>383</sup>

Complicating matters even more, a person who drinks heavily on a regular basis can develop a certain tolerance for alcohol.<sup>384</sup> The physical/observable manifestations of intoxication are impacted. So, for example, “the majority of chronic drinkers may not appear visibly intoxicated” when their BACs are less than .15%—such drinkers may even appear normal at levels of intoxication that are near lethal for most people.<sup>385</sup> A complainant like Mae, who regularly binges, may not even manifest the typical signs of intoxication.

It thus is understandable that the views of parties and witnesses vary widely when identifying an intoxicated individual: students simply cannot accurately assess the low and moderate levels of intoxication found in many cases.

For the standard to be fairly and consistently applied, the level of intoxication used to establish ineffective consent must be sufficiently high to be clearly visible. A standard requiring “disorientation,” a mental state that is accompanied by readily observable cues,<sup>386</sup> would clarify the rights and responsibilities of both sexual partners—it would provide a bright-line test.<sup>387</sup> A sexual partner should be able to

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381. See, e.g., Adam E. Barry, Robert M. Weiler & Maurice Dennis, “*Obvious Intoxication*” *Isn’t So Obvious*, 39 ADDICTIVE BEHAV. 1050 (2014).

382. See *id.* at 1051; see also Harold Rosenberg & Sandra Alexander Nevis, *Assessing and Training Recognition of Intoxication by University Students*, 14 PSYCHOL. ADDICTIVE BEHAV. 29, 29 (2000).

383. Rosenberg & Nevis, *supra* note 382, at 34. In fact, college students cannot even accurately identify their own level of intoxication. See generally Sean Grant, Joseph W. LaBrie, Justin F. Hummer & Andrew Lac, *How Drunk Am I? Misperceiving One’s Level of Intoxication in the College Drinking Environment*, 26 PSYCHOL. ADDICTIVE BEHAV. 51 (2012).

384. Barry et al., *supra* note 381, at 1050.

385. *Id.*

386. Disorientation usually manifests itself when someone’s BAC is between .16% and .19% and becomes severe between .20% and .24%. The Citadel, *Blood Alcohol Concentration*, CITADEL.EDU, <http://www.citadel.edu/root/images/Commandant/CADIC/blood%20alcohol%20concentration.pdf> [https://perma.cc/C22Z-PLMU].

387. See, e.g., *infra* text accompanying note 396.

recognize disorientation. If he chooses to ignore the complainant's confused condition, it is more than fair to say he overreached.

### *C. Proposed Standard*

The following proposed standard is intended to provide a starting point for the work of the DOE and other stakeholders:

Sexual contact, including sexual penetration, is made without the effective consent of the other person if any of the following apply:

- (1) The other person is under the age of [the age of legal consent within the jurisdiction].<sup>388</sup>
- (2) The other person says “no” or otherwise clearly verbally expresses lack of consent to the contact.<sup>389</sup>
- (3) The other person attempts to leave or otherwise clearly physically resists the contact.<sup>390</sup>
- (4) The person making contact:
  - a) uses or threatens to use physical force to restrain, overpower, or harm the other person;<sup>391</sup>
  - b) forces the other person to submit by any verbal threat that would prevent resistance by a reasonable person; or<sup>392</sup>
  - c) administers an intoxicating substance, including, but not limited to, alcohol, Ecstasy, Rohypnol, Ketamine, or GHB, to the other person without his or her consent.<sup>393</sup>
- (5) The person making contact knows or reasonably should know that the other person is:
  - a) unconscious or drifting in and out of consciousness;
  - b) asleep;

388. Consent provided by a person below a particular age is viewed as ineffective in every state. *See generally* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313 (2003). The DOE could either allow schools to adopt the age of consent for their state or set a uniform age.

389. This provision codifies the prohibition of sexual contact where there has been verbal resistance. It is featured as a stand-alone provision to emphasize that a verbal refusal is sufficient to satisfy the element of nonconsent.

390. This provision codifies the prohibition of sexual contact where there has been physical resistance. It is featured as a stand-alone provision to emphasize that words are not necessary to express nonconsent.

391. The use of force precludes legal consent in every state. *See* Anderson, *supra* note 290, at 629–33. This provision specifically mentions the use of force to “restrain,” “overpower,” or “harm” to help students recognize the types of prohibited behaviors.

392. Coercion invalidates consent in some—but not all—states, and many states limit coercion to a threat of physical harm, kidnapping, etc. *See e.g.*, TENN. CODE ANN. § 39-13-501 (2014). The DOE should carefully consider whether, and how much, to limit the scope of this provision.

393. *See supra* notes 358–60 and accompanying text.

- c) physically helpless (i.e., physically unable to communicate, effectively resist, sit, stand, or walk unassisted, and/or leave);<sup>394</sup>
- d) suffering from an intellectual or other disability that prevents him or her from understanding the nature or consequences of the sexual contact;<sup>395</sup> or
- e) so disoriented by the use of alcohol and/or other controlled or intoxicating substances that he or she cannot understand the nature or consequences of the sexual contact.<sup>396</sup>

#### Definitions

- (1) Disorientation exists when a person exhibits significant confusion or lack of awareness about what is happening around him or her and how it relates to him or her. A person is disoriented if he or she is:
  - a) incoherent (i.e., unable to converse clearly and logically); or
  - b) noticeably confused about his or her name, address, or current location, or the date and time.
- (2) Lack of understanding of the nature or consequences of sexual contact exists when a person is:
  - a) unaware the contact is taking place or is sexual in nature;
  - b) unaware of who is making the contact at the time it is made;
  - c) unable to comprehend and exercise the right to refuse the contact; or
  - d) unaware sexual contact may have long-term effects, such as pregnancy.<sup>397</sup>

#### Prohibited Excuses

- (1) In determining what facts or circumstances reasonably should have been known by the person making contact, that person's voluntary intoxication may not be considered. The question is what a sober person in his or her position reasonably should have known.<sup>398</sup>

The proposed standard is written in simple, evidence-based terms that both students and conduct board members should be able to understand and apply with

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394. *See supra* notes 361–62 and accompanying text.

395. An analysis of when sexual contact with a person with intellectual disabilities or mental health issues constitutes sexual assault is beyond the scope of this Article, but it is a concern for colleges and universities. The number of college students suffering from severe mental health issues is at an all-time high. American Psychological Association, *The State of Mental Health on College Campuses: A Growing Crisis*, AM. PSYCHOL. ASS'N, <http://www.apa.org/about/gr/education/news/2011/college-campuses.aspx>.

396. *See supra* notes 363–87 and accompanying text.

397. The proposed standard defines “disorientation” and “lack of understanding of the nature or consequences of sexual contact” in such a way that students and conduct boards have clear guidelines as to what they should observe in someone who is too intoxicated to provide consent.

398. *See supra* note 380 and accompanying text.

relative ease. It creates bright-line rules that empower women and men to forbid further contact with a simple “no,” and it clearly delineates the circumstances under which consent may never be obtained.

Under this standard, it is likely that neither Mae nor Sam would be held responsible for sexual assault. No evidence exists that either said “no” or physically resisted the contact. No evidence exists that any physical force was used, any verbal threat was made, or any intoxicants were administered without consent. Both Mae and Sam evidenced signs of voluntary intoxication, but no evidence exists that either was unconscious, asleep, or unable to leave.<sup>399</sup> Further, neither was disoriented—both engaged in conversations and seemed well aware of where they were, who they were with, etc.

#### CONCLUSION

I concluded my term as Title IX Coordinator thoroughly impressed by the concern of educators, scientists, and government officials for the welfare of college students, and thoroughly frustrated by their failure to work together to promote that welfare. Only by collaborating can they even begin to speak to the problem of campus sexual assault. The proposed standard provides a starting point for this collaboration, and I would welcome its rejection if it meant that these stakeholders had worked together to develop and adopt something better for our students. It should not be about power; it should not be about turf; it should be about the students.

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399. Mae believes that she may have passed out, but she has no evidence that she did pass out. Under any standard, a complainant who has drunk to the point of blacking out is not going to be a strong witness.