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Introduction

Consent

The Four I’s

Blackout & Brownout

Case Study

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Introduction

• It can be difficult, if not impossible, for another person to recognize that the individual is experiencing a blackout and will not recall these events later.

• How do we approach a case where the victim has no memory of giving consent? In other words, if a person gives consent, but then cannot recall this the next day—does that consent stand?
Introduction

From the article by Roland Hulme, Alcohol & Consent: Why the Double Standard?

“If you’re blacked-out drunk, but still capable of talking, walking and doing things, you’re still responsible for your actions and your decisions.”

Amherst College includes the following in its definition of incapacitation:

“An individual may experience a blackout state in which he/she/they appear to be giving consent, but do not actually have conscious awareness or the ability to consent. It is especially important, therefore, that anyone engaging in sexual activity be aware of the other person’s level of intoxication.”

Consent

• Consent is...
  ✓ Voluntary.
  ✓ Enthusiastic/positive.
  ✓ Ongoing.
  ✓ Can’t occur with minors.
  ✓ Can’t occur when incapacitated.

• Consent is...
  ✓ Not be taught in the negative.
  ✓ Part of a positive discussion.

Investigation in a Box: A toolkit from ATIXA, page 153.
Consent

Consent is:

- Clear, and
- Knowing, and
- Voluntary (or affirmative, conscious, and voluntary),
- Words or actions,
- That give permission for specific sexual activity.

Investigation in a Box: A toolkit from ATIXA, page 153.
Consent

• The expectations of our community regarding sexual misconduct can be summarized as follows: In order for individuals to engage in sexual activity of any type with each other, there must be clear, knowing (or affirmative, conscious, if you wish to track the California affirmative consent statute), and voluntary consent prior to and during sexual activity.

Investigation in a Box: A toolkit from ATIXA, page 153.
Consent

• Consent is sexual permission. Consent can be given by word or action, but non-verbal consent is not as clear as talking about what you want sexually and what you don’t. Consent to some form of sexual activity cannot be automatically taken as consent to any other form of sexual activity. Previous consent does not imply consent to sexual activity in the future.

Investigation in a Box: A toolkit from ATIXA, page 153.
Consent

• Silence or passivity — without actions demonstrating permission — cannot be assumed to show consent. Consent, once given, can be withdrawn at any time. There must be a clear indication that consent is being withdrawn.

Investigation in a Box: A toolkit from ATIXA, page 153.
Consent

• **Incapacitation**: A state where someone cannot make rational, reasonable decisions because the person lacks the capacity to give knowing consent (e.g., to understand the “who, what, when, where, why, or how” of the sexual interaction).

• **Coercion**: Unreasonable pressure for sexual activity. When individuals make it clear to you that they do not want sex, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.

Investigation in a Box: A toolkit from ATIXA, page 153.

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One area of innovation ATIXA has been pushing forward is targeted questions to see how students understand the existing sexual assault, harassment, stalking and intimate partner violence policy.

This involves a survey question with an imbedded link asking first if the student is familiar with the policy and then asking them more specifics about the policy being fair to the accused, the victim and its application on campus.
• There are five i-words campuses confusingly use or combine in policy: (under the) influence, impairment, intoxication, inebriation and incapacitation.

• These terms are generally alcohol-specific, which is unnecessarily limiting. Drugs, sleep and other forms of physical incapacitation are possible, therefore the term incapacitation, as more generic, is preferred.
• “Too intoxicated to consent” or “unable to consent as a result of AOD” are too limiting as policy standards, because they cannot cover the blackout situation where someone does consent to sex, but does not know that they are.

• Incapacitation is a state beyond drunkenness or intoxication, where decision-making faculties are dysfunctional.
The Incapacity Question

- Is there a preponderance of evidence that the alleged victim was incapacitated by alcohol, other drugs, or sleep?

  **AND**

- Did the accused student know as a fact that the alleged victim was incapacitated?

  **OR**

- Should the accused student have known from the circumstances that the alleged victim was incapacitated?
The Incapacity Question

• ‘Should have known’ is an objective standard, posing the question of whether a reasonable person in the position of the accused student would have known, given the context.
  – Not allowed to be willfully oblivious of the obvious
• A reasonable person is always sober, and using good judgment. Thus, the fact that the accused student is drunk is rarely material.
Incapacitation Defined

- Where someone lacks the ability to make rational, reasonable judgments as a result of alcohol (or other drug) consumption, they are incapacitated.
- A sleeping person is also incapacitated.
- In order to consent effectively to sexual activity, you must be able to understand Who, What, When, Where, Why and How with respect to that sexual activity.
More on Incapacity

• Any time sexual activity takes place where the alleged victim did not understand any one of these six conditions, incapacity is at issue.
• An awareness of all six must be present.
• This is another way of stating the law’s expectation that consent be knowing or informed, and any time it is not, consent cannot be effective.
• To be more precise, an incapacitated person cannot give a valid consent.
An incapacitated person could be stark naked, demanding sex, but if they are incapacitated at the time, and that is known or knowable to the accused student, any sexual activity that takes place is misconduct, and any factual consent that may have been expressed is IRRELEVANT.

This is the complication of the Blackout.
Factors Indicating Incapacity

- Incapacity is dependent on many or all of the following factors:
  - Body weight, height and size;
  - Tolerance for alcohol and other drugs;
  - Amount, pace and type of alcohol or other drugs consumed;
  - Amount of food intake prior to consumption;
  - Voluntariness of consumption;
  - Vomiting;
  - Propensity for blacking-out (mentally or physically);
  - Genetics.
As BAC Increases, So Does Impairment

**Blood Alcohol Content (BAC)**

- **Life Threatening**
  - Loss of consciousness
  - Danger of life-threatening alcohol poisoning
  - Significant risk of death in most drinkers due to suppression of vital life functions
  - 0.31–0.45%

- **Severe Impairment**
  - Speech, memory, coordination, attention, reaction time, balance significantly impaired
  - All driving-related skills dangerously impaired
  - Judgment and decisionmaking dangerously impaired
  - Blackouts (amnesia)
  - Vision and other signs of alcohol poisoning common
  - Loss of consciousness
  - 0.16–0.30%

- **Increased Impairment**
  - Perceived beneficial effects of alcohol, such as relaxation, give way to increasing intoxication
  - Increased risk of aggression in some people
  - Speech, memory, attention, coordination, balance further impaired
  - Significant impairments in all driving skills
  - Increased risk of injury to self and others
  - Moderate memory impairments
  - 0.06–0.15%

- **Mild Impairment**
  - Mild speech, memory, attention, coordination, balance impairments
  - Perceived beneficial effects, such as relaxation
  - Sleepiness can begin
  - 0.0–0.05%

**Identifying Alcohol Poisoning**

**Critical Signs and Symptoms of Alcohol Poisoning**

- Mental confusion, stupor, coma, or inability to wake up
- Vomiting
- Seizures
- Slow breathing (fewer than 8 breaths per minute)
- Irregular breathing (10 seconds or more between breaths)
- Hypothermia (low body temperature), bluish skin color, paleness

http://pubs.niaaa.nih.gov/publications/AlcoholOverdoseFactsheet/Overdosefact.htm

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Evidence of Incapacity

- Evidence of incapacity will come from context clues, such as:
  - a witness or the accused may know how much the other party has consumed;
  - slurred speech;
  - bloodshot eyes;
  - the smell of alcohol on the breath;
  - shaky equilibrium; vomiting;
  - outrageous or unusual behavior;
  - unconsciousness (including Blackout).
Confusing “I” Words

Final Incapacity Issues

• But, I was drunk too…
• Jumping to conclusions…
  – 90% -- One is drunk, one is incapacitated
  – 9% -- One sober (relatively), one is incapacitated
  – 1% (or less) mutual incapacitation
• Self-incapacitation
• Poor judgment by the accused student
  – Too drunk to have known
Questions?
Blackout – Amnesia for places a person went or things they did while intoxicated; can involve spotty memory (fragmentary blackout, brownout, or grayout) or large missing chunks of time (en bloc blackout).

Blacking out vs. Passing out – Blacking out from alcohol implies that a person is awake and functioning but unable to create memories for events and actions. Passing out from alcohol implies a person is asleep or unconscious from drinking too much. The two states are quite different.
“Across four waves of the Harvard College Alcohol Study, which spanned the 1990s, roughly 1 in 4 male and female students each year experienced a blackout—defined as not being able to remember places that they went or things they did while drinking.

Smaller studies by researchers at Duke University report that roughly 1 in 10 male and female college students and recent high-school graduates experienced at least 1 blackout in the 2 weeks before being surveyed.”
“Blackouts are periods of amnesia during which a person actively engages in behaviors like walking and talking but does not create memories for these events as they transpire.

This results in missing periods of time in the person’s autobiographical record.

Blacking out is quite different from passing out, which means either falling asleep from excessive drinking or literally drinking oneself unconscious.”
Blackout & Brownout

• “The most common form of blackout involves spotty memories for events, with islands of memories separated by missing memories in between.

• This form often is referred to as a *fragmentary blackout*, a *grayout*, or a *brownout*.

• With this type of blackout, focusing on the islands of memories often helps cue recall for some, but not all, of the missing pieces.”
Blackout & Brownout

• “Full and complete amnesia often spanning hours or more is known as an en bloc blackout.

• With this severe form of blackout, trying to fill in the missing pieces typically is fruitless.

• The memories were never formed and so no amount of digging will uncover them.

• They simply don’t exist.”
Blackout & Brownout

• “During a blackout, the ability to remember things that happened before the blackout typically is spared.

• Because of this, even in the midst of a blackout, a person can carry on conversations and even tell stories about events that happened years ago or earlier in the evening while they were intoxicated but not yet in the blackout.”
• Anything a person can do while they are drunk and not blacked out they can do while they are blacked out—they just won’t remember it the next day.

• Depending on how impaired the brain regions involved in decision making and impulse control are, the missing events could range from mundane behaviors, like brushing teeth, to dangerous and traumatic events like driving a car, getting into a fight, or committing—or being the victim of—a sexual assault or other crime.
Blackout & Brownout

• “En bloc” blackouts are stretches of time where the drinker has absolutely no memory at all. Blackouts do not involve a loss of consciousness. However, blackouts may precede passing out or losing consciousness.

• A subject, who has usually consumed large quantities of alcohol rapidly, can still engage in complicated activities from holding a conversation, to driving, to dancing, to having sexual relations, etc. However, he/she may not remember all, most, or even any of his/her actions or behaviors.

http://www.officer.com/article/10959606/blood-alcohol-levels-and-blackouts
Blackout & Brownout

| 0.14 - 0.17 | Gross motor impairment and lack of physical control. Blurred vision and major loss of balance. Your euphoric feelings may give way to unpleasant feelings. Your judgment and perception are severely impaired. You may become more aggressive, and there is an increased risk of accidentally injuring yourself or others. This is when you may experience a blackout. |

http://www.officer.com/article/10959606/blood-alcohol-levels-and-blackouts
• Since black outs only occur when the blood alcohol level reaches between .16-.3, it would be reasonable to conclude that the individual would be incapacitated.

• The challenge becomes ensuring the person initiating sex has an understanding about the level of intoxication with their partner.

• The difficult case is someone who has a high tolerance for alcohol, but doesn’t display the traditional symptoms due to their tolerance level.
Presenters will provide example of Case Study during the online training.
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www.studentaffairsenews.com
Upcoming Programs:

http://www.ncherm.org/online-trainings/upcoming-online-trainings/

Questions for this Program?

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