CONSENT

Defining proscribed sexual misconduct is difficult. Many colleges adopt definitions derived from state laws. Yet, many state criminal codes are antiquated, at best. Colleges are on the cutting edge with so many issues, ideas, and research. Sexual misconduct should be no different, and is an area in which colleges really can and do lead the way. The shift in this country away from defining sexual violence as force-based conduct has been championed by many colleges, and is now the law in a majority of states. Consent-based definitions of sexual violence should be the basis for college misconduct policies. The distinction is a subtle, but all-important one. Such a concept violates basic notions of our personal sovereignty. We have the right not to be acted upon unless we permit it. If a would-be mugger demands your wallet, he has no right to take it unless you permit it. Your silence is not consent to be robbed. Similarly, the silence of a victim is not consent to have sexual intercourse.

Often, force-based policies contain an evidentiary standard that the sexual action is against the will of the victim. This starts us sliding down a very slippery slope. How do we know if it is against the victim’s will? If she says "No?" If she fights back? Must she leave a scratch or bite mark, or have his skin under her fingernails to prove her resistance? Might that provoke a sadistic perpetrator to cause greater harm? What if she is having a flashback to an instance of childhood sexual abuse? Should we still require her to fight back or otherwise demonstrate that the sexual action is against her will?

Or, is there a higher standard of personal sovereignty that shifts responsibility in these cases? Should it be the responsibility of the person being acted upon to announce their intention, or should it be the responsibility of the sexual initiator, the sexual aggressor--the one who wants to do the act--to get consent before proceeding? Put another way, if a fraternity brother awakens after passing out in the middle of the party to find a naked, HIV-positive woman on top of him having unprotected sex, is it okay if she stops when he objects, or should she be required to get his permission first? Why should sex offenses be the only offense where the resistance of the victim is required? Should we say that it is not murder unless the victim tried to stop it? You are not mugged unless you tried to thwart the thief. For all of these reasons, defining sexual misconduct as an offense of force is an antiquated, outmoded, senseless structural impediment to a victim’s ability to self-identify and report incidents of sexual violence. Please consider adopting consent-based definitions for sexual violence.

WHAT CONSENT MEANS

- In the absence of mutually understandable words or actions (a meeting of the minds on what is to be done, where, with whom, and in what way), it is the responsibility of the initiator, or the person who wants to engage in the specific sexual activity to make sure that he or she has consent from their partner(s).
- Consent to some form of sexual activity does not necessarily imply consent to other forms of sexual activity.
- Mutually understandable consent must be obtained by the initiator at every stage of sexual interaction.
- Mutually understandable consent is almost always an objective standard. Consent is mutually understandable when a reasonable person would consider the words or actions of the parties to have manifested a mutually understandable agreement between them to do the same thing, in the same way, at the same time, with one another. The only context in which mutually understandable consent may be considered in its subjective sense (what did Tom and Sue understand their words/actions to mean) is in the context of long-term relationships where
couples have established patterns of communicating consent that alter/replace the consent construct elaborated here.

- Consent which is obtained through the use of fraud or force (actual or implied) whether that force be physical force, threats, intimidation, or coercion, is ineffective consent:
  - physical force exists, for example, when someone acts upon you physically, such as hitting, kicking, restraining or otherwise exerting their physical control over you through violence.
  - threats exist where a reasonable person would have been compelled by the words or actions of another to give permission to sexual contact they would not otherwise have given, absent the threat. For example, threats to kill you, themselves, or to harm someone your care for are sufficient to constitute threats.
  - intimidation (implied threat) exists where someone uses their physical presence to menace you, though no physical contact occurs, or where your knowledge of prior violent behavior by an assailant, coupled with menacing behavior, places you in fear as an implied threat.
  - coercion exists when a sexual initiator engages in sexually pressuring and/or oppressive behavior that violates norms of respect in the community, such that the application of such pressure or oppression causes the object of the behavior to engage in unwanted sexual behavior. Coercion may be differentiated from seduction by the repetition of the coercive activity beyond what is reasonable, the degree of pressure applied, environmental factors, such as isolation, and the initiator’s knowledge that the pressure is unwanted.

- Consent may never be given by:
  1) A minor to an adult
  Someone under the age of ?? (depends on the state) cannot give consent to someone over the legal age of consent (18), absent a legally valid marriage or court order.
  2) Mentally disabled persons
  Cannot give consent to sexual activity if they cannot appreciate the fact, nature, or extent of the sexual situation in which they find themselves. The mental disability of the party must be known or reasonably knowable to the non-disabled sexual partner, in order to hold them responsible for the violation. Therefore, when mentally disabled parties engage in sexual activity with each other, such knowledge may not be possible.
  3) Physically incapacitated persons
  One who is physically incapacitated as a result of alcohol or other drug consumption (voluntary and involuntary), or who is unconscious, unaware, or otherwise physically helpless, is incapable of giving consent. **One may not engage in sexual activity with another who one knows or should reasonably know to be physically incapacitated. Physically incapacitated persons are considered incapable of giving effective consent when they lack the ability to appreciate the fact that the situation is sexual, and/or cannot rationally and reasonably appreciate the nature and extent of that situation.**

- How incapacitation complaints are addressed

This should be a part of your conduct training, but you will need to decide if it merits inclusion in the policy or as an appendix to provide additional guidance and information to students. Selective editing and inclusion of certain parts may be the best approach):
Incapacitation is a determination that will be made after the incident, in light of all the facts available. Incapacitation is difficult to assess because people reach incapacitation at different points and as the result of different stimuli. They exhibit incapacity in different ways. Incapacity is dependent on many or all of the following factors:

1. Body weight, height and size;
2. Tolerance for alcohol and other drugs;
3. Amount/type of alcohol/other drugs consumed/mixture taken;
4. Amount of food intake prior to consumption;
5. Voluntariness of consumption;
6. Vomiting;
7. Propensity for blacking-out (mentally or physically);
8. Genetic predisposition.

Assessing incapacity is completely fact-dependent. For complex allegations, the conduct board may ask an independent substance abuse, toxicology or chemistry expert to render an opinion. Understanding terms is important. With regard to alcohol, there are multiple levels of effect, along a continuum. The lowest level is impairment, with occurs with the ingestion of any alcohol at all. A synonym for impairment is "under the influence." Intoxication is the next higher level of alcohol ingestion. Also called drunkenness, intoxication corresponds to the state's drunk driving limit, and a blood alcohol level of .08 or .10. Incapacity is the next higher level of alcohol ingestion. The highest level is overdose, or alcohol or blood poisoning, which may lead to coma or death. Incapacity is a hazier state than drunkenness. Some drunk sex will violate this policy, but not all. Only when the drunkenness produces incapacity will the standard be reached. Evidence of incapacity can be detected from context clues, such as:

1) One person may know how much the other person has consumed;
2) slurred speech;
3) bloodshot eyes;
4) the smell of alcohol on the breath;
5) shaky equilibrium;
6) vomiting;
7) outrageous or unusual behavior;
8) unconsciousness.

None of these facts, except for the last, will constitute--in and of itself--incapacitation. The process of finding someone responsible for a violation of the incapacitation clause of the sexual misconduct policy involves an accretion of evidence, amounting to a sufficient or insufficient meeting of the standard of proof. This standard may be met with some combination of the first seven, or all eight factors. For example, incapacity might exist if someone is passing in and out of consciousness, and there is a high probability they could pass out again. Or, it might exist if someone is vomiting so violently and so often that they are simply in such bad shape that they cannot be said to have capacity. Sometimes, it may happen that a student has done things that, in the absence of the alcohol, would be clear indications of consent. There may even be unmistakable evidence of verbal and non-verbal consent. If the complainant is incapacitated, and the respondent knows or should reasonably have known of the incapacity, the indications of consent are irrelevant.

Because of the incapacity, the complainant is held at a disability where he/she cannot give effective consent, thus nullifying any factual consent that may be given.
The eight context clues listed above will help the conduct board to assess and determine the extent of the respondent’s knowledge, given her/his awareness of whether the complainant exhibited any of these "symptoms." Another issue that often deserves attention in these cases is what toxicologists call "blacking out" or "black time." Blacking out or black time has two different possible manifestations, apart from being obviously unconscious. Black time does not affect all drinkers (only about 16%), but some will lose all conscious awareness or memory of their actions, though they may maintain physical ability and control. Thus, they do things that they cannot remember doing. In contrast, some people who experience black time experience it as physical paralysis, with mental clarity. Thus, they have a mental awareness of the situation, but a physical inability to react to it, because the alcohol is inhibiting their motor skills. It is important to realize that both manifestations are possible, and that both describe someone who is incapacitated and cannot give effective consent.

**ADDITIONAL CLARIFYING RULES OF CONSENT**

- A person who is the object of sexual aggression is not required to physically or otherwise resist a sexual aggressor;
- Silence, previous sexual relationships, and/or current relationship with the respondent (or anyone else) may not, in themselves, be taken to imply consent. Consent cannot be implied by attire, or inferred from the buying of dinner or the spending of money on a date.
- Intentional use of alcohol/drugs by the respondent is not an excuse for violation of the sexual misconduct policy.
- Attempts to commit these offenses are also prohibited under this policy, as is aiding the commission of sexual misconduct as an accomplice.
- Consent to sexual activity may be withdrawn at any time, as long as the withdrawal is communicated clearly (because you cannot be expected to read the mind of your sexual partner(s)), and all sexual activity must cease.
- “intent” is not required under the Non-Consensual Sexual Intercourse policy. Unlike murder, for which there must be an intent to kill, sex offenses are not an intent-based concept. The requisite intent for Non-Consensual Sexual Intercourse is demonstrated by engaging in the act of intercourse intentionally. Intent may be an appropriate consideration in some Non-Consensual Sexual Contact complaints (such as when a man brushes up against a woman in a sexual manner in a crowded room), and in attempt-based offenses.

**In the absence of the use of any type of force, a capable complainant’s unreasonable failure to communicate his/her expectations to his/her partner may be grounds for departure from the standard recommended sanctions of this policy, but it is not, alone, grounds for a finding of no policy violation. This clause works together with the rules above regarding silence and resistance. It is to be applied to situations where there is some--usually nonverbal--communication from the complainant, but that communication is ambiguous. Instead of clarifying, the respondent acts on his/her incorrect assumptions, and engages in or heightens the level of sexual activity. The complainant, though not wanting to engage in this behavior, or heighten the level of sexual activity, does not indicate this clearly to the respondent, and passively endures the sexual activity. For example, this rule would not apply to a situation where two students are fooling around, they mutually kiss, mutually pet, and then the respondent simply engages in intercourse with an unresponsive complainant. In this case, the rules on silence and resistance would indicate a clear policy violation. However, it would apply to the case where the two students are fooling around, the respondent asks for sex (meaning vaginal intercourse, but an ambiguous demand), and the complainant responds by removing her clothes (an easily misunderstood response, but one meaning to her that she is willing to engage in mutual oral sex, but go no further), but the complainant does not communicate this to the respondent. He then engages in vaginal intercourse with her,
during which she is passive, and to which she does not voice any complaint. This still represents an improper assumption on the part of the respondent, but it may not be a violation that warrants a sanction as strong as the standard recommended sanction.

• Consent has an expiration date. Consent lasts for a reasonable time, depending on the circumstances. For example, On Thursday night, Rob and Jenn are together in Jenn's room. Jenn consents to sex with Rob, but just at the point of intercourse, the phone rings. Jenn is on the phone with her mother for an hour. After the phone call, Rob and Jenn can engage in intercourse without re-consenting, though it is safest to check, just to be sure. However, suppose that after the phone call, Jenn is no longer in the mood. Rob goes home. He comes over again on Friday night. He cannot apply Thursday's consent to Friday night like a coupon. Jenn's consent on Thursday has probably expired, and they should check with each other before engaging in sexual activity.

This section excerpted from Creating a Proactive Campus Sexual Misconduct Policy, Brett A Sokolow, J.D., author