

# Eliminating Force From Campus Sexual Misconduct Policies: The Rise of The Consent Construct.

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The most significant change to the reality of sexual violence in the last ten years has been a reformulation of the definitions we use to proscribe sexually violative behaviors in our society. More accurately, this decade has brought us a retreat from the legislative baggage that has been tacked onto statutory definitions of rape and sexual assault over many decades, in deference to a re-emergence and modernization of the common law definitions of these crimes. Before states enacted voluminous criminal codes, our law was taken from a basic set of rules that were borrowed from England and known as the common law. At common law, most crimes could not be consented to, though most intentional torts and a select few crimes were exceptions to the rule. For example, when two boxers brutalize each other on Pay-Per-View, the common law would have considered those boxers to have committed criminal battery as well as the tort of battery upon each other. Yet, the boxers' consent to the prize fight effectively abrogates any illegality that might otherwise have existed. Like battery, common law rape--the carnal knowledge of a woman by a man, not her husband--was a crime unless it was effectively consented to.

Over time, as these common law rules became codified by states, they collected moral, religious and evidentiary baggage that transformed this consent construct into a definition requiring the use of force, a showing of resistance, or other physical harm in addition to that caused by the act of forced intercourse. Force was often defined very narrowly, as physical

force. Under these codes, only women could be raped, and rape was limited to vaginal penetration exclusively. Degrees upon degrees of sexual misconduct, sexual battery, sexual assault, forcible intercourse, and involuntary intercourse became part of the legal lexicon.

To a great extent, we are still today saddled with statutory definitions of multivariate complexity, but states are beginning to reclaim the consent concept of the common law. At least for some degrees of sexual assault, a majority of states now have adopted consent-based definitions. Force may be an aggravating factor, or may serve as additional proof, but it is increasingly being abandoned as the *sine qua non* of rape. Where codes previously provided that sex against one's will constituted rape, modern revision now holds that rape is sexual intercourse without one's consent.

This shift represents a subtle yet all-important change. The onus of giving consent is taken away from the object of the sexual initiator, instead requiring that the initiator gain that consent from the object of the sexual attention before any permissible sexual activity may take place. This re-emergence of consent-based doctrine recognizes and ratifies a simple principle of the common law--our personal sovereignty. We have the right not to be acted upon unless we wish to be acted upon, and communicate that wish to the actor. Our silence is not our permission. You may not take my wallet simply because I have not said you cannot have it. Moreover, this restoration of the common law principles of consent aids in the uniform application of the laws. A murder victim never was required to resist an attacker in order to prove it was murder. A mugging victim need not resist a thief in order for the theft to occur. So, this reformulation restores a sense of symmetry to sex crime codes where anomaly has heretofore reigned.

College campuses are grappling with how to incorporate notions of consent into student conduct codes. While a majority of colleges today have consent-based definitions in their sexual misconduct policies, many colleges are “gun shy” about actually defining consent. They fear the backlash visited upon colleges like Antioch, for what many perceived to be an artificial and stilted attempt to regulate student sexual mores in the early 1990s. Yet, consent is a vital concept when it is viewed in a broader context. In many respects, the consent needed to marry, to bind a contract, or to assent to a medical procedure works in much the same way as consent to sex. Establishing a policy-based definition can be a very useful tool, such as this example of model language:

Effective Consent is:

- Informed;
- Freely and actively given;
- Mutually understandable words or actions;
- Indicating an agreement to engage in mutually agreed upon (sexual) activity.

This definition is a clean and forthright way to embody consent for policy purposes, but there is much more embedded within the four bullets above, discussed below, which can serve as excellent tools for adjudication and education on campuses.

## **EVERYTHING YOU NEED TO KNOW ABOUT CONSENT**

- At the heart of the idea of consent is the idea that every person, man or woman, has a right--to personal sovereignty--not to be acted upon by someone else in a sexual manner unless he or she gives clear permission to do so.
  
- With this idea comes the concomitant notion that consent can be broad or narrow, and can be limited, such as in cases where someone is willing to engage in some forms of sexual activity, but not in others.
  
- Consent to one form of sexual activity never can imply consent to other forms of sexual activity.
  
- Consent may be given verbally or nonverbally, based on an active, informed, freely decided choice.
  
- Consent means you can't make assumptions about what your partner does or does not want. Absence of clear signals means you can't touch someone else, not that you can.
  
- Consent means two people deciding together to do the same thing, at the same time, in the same way, with each other.
  
- The idea of consent completely rules out any need to show the use of force, or any type of resistance.

- Consent requires that the person initiating the sexual activity get permission to do so, and that permission does not exist in the absence of resistance.
- Passively allowing someone to touch you in a sexual manner is not consent.
- There is no duty for an alleged victim to fight off or act in any way to stop a sexual aggressor.
- There must be a verbal or nonverbal "Yes" in order for any permissible sexual activity to take place.
- There are circumstances, as well, where even when consent is given, it is not valid. Consent would be invalid when forced, threatened, intimidated, coerced, when given by a mentally or physically incapacitated person, or when given by a minor.
- We can't play the game of "If she doesn't want it, she'll stop me." That's based on antiquated resistance requirements. It's not her (or his) job to resist, but yours to respect her (or his) boundaries, and to find out what they are if they are unclear.
- No means no, but nothing also means no. Silence and passivity do not equal permission.
- We are not entitled to engage in or heighten levels of sexual activity like we are running through the bases. The idea that kissing always leads to fondling, which always leads to

petting/fingering, which leads to some sort of intercourse is a notion that is based on male sexual patterns and beliefs, only. Mutual exchanges must involve the expectations and desires of each person involved.

- To be valid, consent must be given prior to or contemporaneously with the sexual activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.
- Men often ignore the subtle signals sent by women that what is happening is not okay with them, and vice versa as well.
- Where you see assumptions being made by someone in a sexual context, this is an alarm. Look at those assumptions and see if they are reasonable.
- When you get to a point where someone says no, it's time to back off completely, or have a conversation about where the interaction is going.
- Pushing ahead after someone says or indicates "no" crosses the line.
- If you get a "No" and keep right on pressuring and continuing to interact sexually, you run the risk that your behaviors are creating a coercive influence on the other party.

- Respect for another member of the community is an expectation that all members are expected to uphold at all times, including in the context of sexual interaction. Respect means paying heed to verbal and non-verbal cues, desires, boundaries, and behaviors of others.
  
- Just because someone wants to be alone with you doesn't mean that you have a sexual license.
  
- Just because someone kisses you doesn't mean it's automatically going any farther.
  
- Making someone touch you is as bad as touching someone else, where no consent is given.
  
- If someone won't touch you, and you have to physically manipulate them to get them to touch you sexually, you automatically have a consent problem. Unless they freely give consent, you can't take it.