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Commentary From the Editor

Balancing Legalism and Developmentalism in Campus Judicial Proceedings

by Brett A. Sokolow, JD

For those with a keen eye on judicial affairs, the issue of creeping legalism or judicializing the campus conduct process is receiving some due attention. Commentators are weighing in, and a consensus is forming. Most will agree that a balance between legalism with developmentalism is desirable. (Developmentalism refers to the approach taken in enforcing campus conduct codes in which the goal is not punishment for the violator but rather the protection of the community and the encouragement of the violator in moral and ethical development.) The debate focuses on how that balance will be struck. I think the underlying supposition has merit: judicial proceedings exist on a continuum where legalism and developmentalism lie at opposing poles. Most judicial procedures are out of balance.

Some err on the side of creeping legalism. Some err by being excessively developmental at the expense of vital legal safeguards. The dichotomy is not born of a distinction between public and private institutions; rather it is born of historical practices, sedentary procedural revision practices, the sway of campus interest groups, the role of faith and rehabilitation, and the fear of litigation, among other competing factors.

Finding the Balance Requires Much Effort and Skill

Mostly though, judicial procedures are out of balance because
See BALANCING, page 62

Guidelines for Consent in Intimate Relationships

by Alan D. Berkowitz, Ph.D.

Editor's Note: The author is the subject of the interview "Someone You Should Know: Alan David Berkowitz, Ph.D.," which appears on page 51 in this issue of CS&SD.)

Healthy sexual intimacy can be characterized, in part, by the fact that it is mutual, uncoerced, and consenting. Many sexual assaults take place because one of the parties (usually the male if it is a heterosexual couple) thinks that he has consent when he does not. Academics call this "misperception of sexual intent." Establishing clear guidelines for ensuring that consent is present is thus an important goal of sexual assault prevention workshops.

Determining Consent

Consent can be defined as present if four conditions are met. These conditions are not absolutes, but the greater the degree to which they are present, the greater the chance that both parties are consenting. They can be used as guidelines for achieving mutual, uncoerced consent in intimate relationships. The four conditions are the following:

1. Both participants are fully conscious;
2. Both participants are equally free to act;
3. Both parties have clearly communicated their willingness/permission; and
4. Both parties are positive and sincere in their desires.

Both Participants Are Fully Conscious

College students usually laugh when they hear this guideline. It is commonly believed that most sexual activity in college takes place during "hook-ups" when both parties have been drinking. Thus, many students cannot imagine two completely sober people having sex. In fact, most college students are not as sexually active as is thought, and most sexual activity involves very small quantities of alcohol or none at all. In any case, this guideline suggests that the greater the extent to which alcohol or other drugs are consumed, the greater the impairment of consent. Less consumption of alcohol or other drugs means that there is a greater chance that consent is present.

Discussion of effects of alcohol on consent. Discussion scenarios can be developed in which the effects of varying amounts of alcohol are used to engage students in a thoughtful application of this guideline. This condition does not mean that consent is not possible if alcohol has been consumed. It just means that the greater the alcohol consumption, the less likely that consent is possible. This guideline forces students to grapple with and confront ambiguity, which is at the heart of managing healthy intimate relationships.

Drunken state and personal responsibility. Another common comment is that if women cannot consent when they are

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drunk, then men should not be held responsible for assault if they are also drunk. One answer to this question is that the person who initiates should take responsibility for ensuring that the intimacy is mutual. Since men often initiate in the situation in question, alcohol impairment is not a sufficient excuse for not obtaining consent.

Both Participants Are Equally Free to Act

The ability to consent implies that one is free to choose whether or not to consent. If I agree to be intimate without coercion, I must be free to choose other options that are equally possible. There are many factors that limit the ability to act freely that are often not known to the potential perpetrator:

- **Body size:** One factor is body size. A smaller person may fear bodily injury from a larger (possibly drunk) person, and comply to avoid hurt.
- **Previous victimization:** A person who has been previously victimized may "freeze."
- **Fear of other factors:** Someone may not have a safe way to get home and be afraid to leave a coercive environment.

Each of these situations may result in passivity that is incorrectly interpreted as consent. Consent is an active process, and not saying "no" does not mean yes. Threats to someone's reputation can also create a coercive situation (e.g., lying to friends about what happened, threatening to "out" a closeted gay person, etc.)

In some of these situations, the potential perpetrator may not be aware there

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are not signs of consent;
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affirmative intent.***

are coercive forces at play that impair the other person's ability to consent. Willful ignorance of these conditions is not an excuse. If open and free communication is present, then there will no longer be a chance of coercion, and it is the responsibility of both parties (but particularly the person who initiates) to create this.

Both Parties Have Clearly Communicated Their Willingness/Permission

It is fun to ask students how they know if someone is sexually interested in them. Many of the responses rely on guesswork and inference to determine sexual willingness/permission. In fact, sexual willingness/permission can only be determined by clear and unambiguous communication about what is desired. This communication may be impaired by cultural and gender differences and other factors. Clear willingness/permission can be communicated verbally and nonverbally (though some colleges have adopted a verbal-only consent requirement. Nonaction and passivity are not signs of consent; consent can only be given by an action with clear affirmative intent.

For example, if some degree of sexual activity is present, does that imply con-

sent to further activity? If one person brings a condom, does that signify agreement to intercourse? If one partner puts a condom on the male, does that signify consent to intercourse? There are inherent ambiguities in any discussion of intent. What is important is that students are aware of the ambiguity and learn to address and clarify it.

Both Parties Are Positive and Sincere in Their Desires

Honesty is the basis of a healthy relationship. Insincerity makes it impossible for the other person to respond with integrity. Thus, saying things you do not mean to "get sex" undermines the possibility of freely given consent.

Guidelines Apply to Many Life Experiences

These guidelines can be applied to any activity that is mutual between two people. For example, are decisions about where to go out to dinner or what movie to see made with the full and equal participation of both parties? If I want to hold someone's hand, how do I know if it is mutual?

Finding creative ways to get students to understand and observe these guidelines is the challenge for those who are responsible for campus programming. A clear, consistent and consistently repeated message will help to equip students with these tools of healthy sexuality.

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