



**PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (PACDL)
STATEMENT OF OPPOSITION TO ABA RESOLUTION 114
August 8, 2019**

ABA Resolution 114 urges legislatures and courts to define consent in sexual assault cases as:

the assent of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to provide that consent is expressed by words or action in the context of all the circumstances...

Standard definitions of consent make clear that it is an “express agreement” made “after thoughtful consideration.” *See, Merriam Webster Dictionary and Oxford Dictionary.* ABA Resolution 114 would require expressed affirmative consent to every sexual act during a sexual encounter.

One of PACDL’s stated missions is to protect and defend constitutional freedom and protection. PACDL opposes ABA Resolution 114 because it clearly violates fundamental constitutional principles underlying our criminal justice system. The resolution offends the presumption of innocence by relieving the prosecution of its burden to prove lack of consent and shifting the burden to the defendant to prove affirmative consent. Should states adopt the ABA’s recommendations regarding consent, criminal offenses could be proven by the mere presentation of evidence of a sexual act. Guilt would be assumed in the absence of evidence of affirmative consent. By forcing defendants to present evidence, or testify themselves, to establish consent, ABA Resolution 114 violates the Fifth and Fourteenth Amendments to the United States Constitution.

Criminal liability should rarely be based upon an act without consideration of the mental state of the accused. *Elonis v. United States*, 135 S. Ct. 2001 (2015). ABA Resolution 114 focuses entirely on the mental state of the complainant without regard to the mental state of the accused. The ABA’s report in support of the resolution explicitly cites to the many documented instances of sexual assault arising from the #MeToo Movement in “reject[ing] any traditional premise of willingness.”

It is inarguable that much can be learned from the reports of individuals who have been subject to unwanted sexual advances. Those stories have value in educating ourselves so that everyone’s rights are respected, and the instances of assault and perceived assault are minimized. However, criminal statutes must first and foremost comport with fundamental principles of justice and constitutional law. Sexual assault crimes are serious. Convicted sex offenders go to prison, are subject to sexual offender registration and notification laws and spend years on probation and parole supervision. These consequences destroy lives and families and do so at great taxpayer expense. ABA Resolution 114, in its effort to exact social change, will ensure that criminal defendants suffer these fates regardless of whether they possessed any criminal intent. Sexual encounters without evidence of affirmative consent will essentially become strict liability crimes. The criminal justice system has never been, and should never be, about punishing people who never formed the intent to commit a crime.

It is for this very reason that the American Law Institute (ALI) rejected the concept of affirmative consent. By an overwhelming majority, ALI determined that affirmative consent risks convictions with harsh penalties for sexual encounters lacking proof of lack of consent despite evidence of a reasonable belief of consent on the part of the accused. Nonetheless, the ABA report in support of Resolution 114 disingenuously informed its delegates that “the ALI revision of the [Model Penal Code] is not yet final.”

In fact, the revisions concerning affirmative consent are final. In May 2016, ALI membership approved the following definition of consent:

- (i) Consent for purposes of Article 213 means a person’s willingness to engage in a specific act or sexual penetration, oral sex, or sexual contact.
- (ii) Consent may be express or it may be inferred from behavior - both action and inaction – in the context of all the circumstances.

Finally, the ABA Report goes to great lengths in detailing alleged neuro-biological explanations for why one may not demonstrate resistance to unwanted sexual advances. Assuming the legitimacy of the science, the Report’s concern is that alleged victims will not offer physical resistance to a perceived assault and may not offer verbal resistance due to “tonic immobility.”

Regardless of the viability of the science, criminalizing behavior which would not be perceived as criminal by the objective person serves no legitimate criminological or penal interest. Society should understand these concepts so that well-meaning people enter these situations more informed and we hopefully see a reduction in the number of people who feel they have been assaulted. However, under no circumstance should the criminal justice system seek to solve this societal problem by abandoning fundamental principles of justice embodied in our Constitution.

Furthermore, the ABA has already passed a resolution which adequately addresses this issue. ABA Resolution 115 (Revised) makes clear that there should be no legal burden of resistance, verbal or physical, when faced with a sexual assault. Resolution 115 “opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches.” PACDL does not oppose Resolution 115, nor does it oppose the final clause of Resolution 114, rejecting “any requirement that sexual assault victims have a legal burden of verbal or physical resistance.” The remainder of Resolution 114 is entirely superfluous and only results in impermissible and unconstitutional burden shifting and strict criminal liability without intent.

Therefore, PACDL fully supports the alternative to Resolution 114 proposed by the National Association of Criminal Defense Lawyers (NACDL) in its statement of opposition dated July 25, 2019. NACDL’s proposed language maintains a respect for the burden of proof and presumption of innocence while also adhering to Resolution 115’s mandate that neither physical nor verbal resistance should be necessary to establish consent. NACDL’s proposes the following language:

- (1) The prosecution must prove all elements of a charged offense, including the absence of consent, beyond a reasonable doubt.

- (2) Consent may be expressed by words or actions or it may be inferred from behavior – both action and inaction – in the context of all the circumstances.
- (3) While physical or verbal resistance, in and of itself, is not necessary to prove lack of consent, the absence of physical or verbal resistance may be considered by the jury in the context of all the facts and circumstances to determine whether the prosecution has proven lack of consent beyond a reasonable doubt.

PACDL strongly urges the ABA House of Delegates to consider the damage to our constitutional principles which will result from adoption of Resolution 114. Persons who evidenced no criminal intent will surely suffer criminal convictions, incarceration, and other consequences of conviction as a result of it. Instead, the reasonable alternative proposed by NACDL should be the model for any such ABA Resolution.