



July 25, 2019

## **NACDL OPPOSES AFFIRMATIVE CONSENT RESOLUTION ABA RESOLUTION 114**

NACDL opposes ABA Resolution 114. Resolution 114 urges legislatures to adopt affirmative consent requirements that re-define consent 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 . . .

The word “assent” generally refers to an express agreement. In addition the resolution dictates that consent must be “expressed by words or actions.” The resolution calls for a new definition of consent in sexual assault cases that would require expressed affirmative consent to every sexual act during the course of a sexual encounter.

**1. Burden-Shifting in Violation of Due Process and Presumption of Innocence:** NACDL opposes ABA Resolution 114 because it shifts the burden of proof by requiring an accused person to prove affirmative consent to each sexual act rather than requiring the prosecution to prove lack of consent. The resolution assumes guilt in the absence of any evidence regarding consent. This radical change in the law would violate the Due Process Clause of the Fifth and Fourteenth Amendments and the Presumption of Innocence. It offends fundamental and well-established notions of justice. Specifically, Resolution 114 urges legislatures to re-define consent 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 . . .” The phrase “expressed by words or action” shifts the



burden entirely to the accused. Under Resolution 114 the offense is proven merely upon evidence of a sex act with nothing more. This approach violates the "bedrock and axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law" - the presumption of innocence. *See In re Winship*, 397 U.S. 358, 363. As a corollary the provision also guts the accused's Fifth Amendment right to remain silent. The resolution will often force the defendant to testify in order to present evidence that consent was expressed.

**2. Strict Criminal Liability:** In flipping the burden of proof the resolution essentially renders sexual assault statutes to be strict liability crimes that focus only the victim and disregard the mental state of the accused. Criminal liability should rarely be based upon an act without considering the mental state of the accused. *See Elonis v. United States*, 575 US \_\_\_\_, 135 S.Ct. 2001 (2015). The affirmative consent doctrine focuses on the actions and mental state of the complainant without regard for the mental state of the accused.

**3. The American Law Institute (ALI) Got It Right:** Resolution 114 is a redux of the lengthy and divisive debate that occurred at the American Law Institute concerning the definition of consent. The report supporting the resolution misrepresents the ALI's final determination. ALI rejected affirmative consent because it risks convictions with harsh penal sanctions for sexual encounters commonly thought to be consensual. The report misrepresents the outcome of the affirmative consent debate at ALI by stating that the ALI revision of the MPC is not yet final. In fact it is final as far as affirmative consent goes – the concept was rejected in a landslide vote. Instead the ALI membership adopted a consent definition that states, in pertinent part:

(i) "Consent" for purposes of Article 213 means a person's willingness to engage in a specific act of 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.



*See* ALI, Model Penal Code, Sexual Assault and Related Offenses, Council Draft 8, §213.0 (6)(d)(noting that the above language was approved by the ALI membership in May 2016.)

4. **Social and Sexual Engineering:** The criminal law is an incorrect vehicle to impose novel social legislation designed to dictate social mores. The concept of affirmative consent contradicts common understanding and seeks to impose uncommon requirements in the volatile area of human sexual relations. This is not the equivalent of ordinances that ban smoking in public buildings. Incarceration is usually not a result of violating such ordinances and certainly not felony level incarceration which can include, in some jurisdictions, a term of life imprisonment.

5. **Red Herring Science:** The science cited by the report supporting the resolution is a red herring. The idea that a person may freeze when frightened - commonly known as the “deer in the headlights” reaction – is common knowledge. The alleged neuro-biological explanation for the reaction is merely a false veneer designed to distract the reader and suggest this is some new science or that it is a frequent occurrence. It is not. In order for one to suffer tonic immobility or tonic collapse the person must first suffer a traumatic event. In cases where there is sufficient trauma to trigger such parasympathetic responses the lack of consent is usually apparent from the facts, i.e. a brutal rape with force. The vast majority of consent cases do not include such traumatic events. The fact that some people when traumatized will suffer a parasympathetic response does not justify the sweeping change represented by the resolution. The ABA has passed a resolution that “opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches.” *See* ABA Mid-Year Meeting 2019 Resolution 115 (Revised). Resolution 115 is more than adequate to communicate there should be no legal burden of resistance, verbal or physical, when faced with a sexual assault.



6. **Earnest Resistance:** NACDL does not oppose the last clause of Resolution 114 urging legislatures and courts to reject requirements that sexual assault victims have a legal burden of verbal or physical resistance. Some have misunderstood the purpose of the resolution to concern only the rejection of the earnest resistance doctrine. The resolution clearly attempts to import affirmative consent into criminal sexual assault law. Any doubt about this is belied by the report in support of the resolution. ABA Mid-Year Meeting Resolution 115 already addresses this issue and a further resolution, especially one that impermissibly shifts the burden of proof, is unnecessary.

#### **ALTERNATIVE OR PROPOSED AMENDMENT**

NACDL offers the following as an alternative resolution or an amendment to Resolution 114:

- (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 action 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.

This alternative adheres to the constitutional burden of proof, avoids the imposition of the divisive concept of “affirmative consent” and maintains the proposition inherent in the previous resolution (MYM 115) that physical or verbal resistance is not necessary for the prosecution to meet its prima facie burden while recognizing that the jury may consider the entire context of the evidence.