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**Date:** Thursday, August 8, 2019 at 6:42 PM  
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**Subject:** Resolution 114 and the Campaign Against It

Dear Fellow Delegates:

At the Las Vegas meeting in February, the Commission on Domestic and Sexual Violence presented to you Resolution 115, providing that (1) **consent to sexual activity must be expressed by words or conduct.** and (2) “active resistance” should not be a condition for legal protection. As you will recall, we passed the second part and agreed to pull back the “consent” definition for six months -- -- until this meeting -- -- at the request of the Criminal Justice Section so that we could coordinate with them on a joint product.

We and CJS spent two months doing so, drafting, editing and Cosponsoring current Resolution 114, along with the Section of Civil Rights and Social Justice. It stands for the proposition that “**consent to sexual activity is expressed by words or conduct, in the context of all of the circumstances**”. It does not change the burden of proof or the presumption of innocence. We believe that this straightforward principle is supported a wide majority of the house. The claim that it has been brought by surprise or without adequate time for review is untrue, as this House knows; the opponents will fight against it whenever it is presented -- -- now, a year from now, 100 years from now.

### **The Principle Behind The Opposition**

In the past weeks, several interest organizations including the National Association of Criminal Defense Lawyers (NACDL) launched a letter and internet campaign against this Resolution. The heart of the dispute is their objection to the core principle of this resolution, that **assent** to sexual activity is expressed by **words or conduct in the context of all of the circumstances.** They have mobilized their members and solicited mail and social media posts to lobby House

members to vote against Resolution 114. We recognize the centuries old assumptions upon which this opposition is based -- that in our society, and in societies throughout history, sex is considered there for the taking. This resolution seeks to change those assumptions, to suggest that sex is not a matter of force or acquiescence but, rather, the right word is assent. That is the modern trend of the law, and this resolution asks the ABA to support it. The opponents' stated goal is to eliminate "the divisive concept" consent from the resolution; this point of principle cannot be avoided and will be presented to the House.

We disagreed with their view that "the law is not a vehicle to change social mores"; we think it is. We also take issue with their regressive proposition that "the concept of affirmative consent contradicts common understanding" in the "volatile area of human sexual relations." Again, their campaign has history on its side, a long understanding that women were spoils of war, that rape of a woman a property offense against her husband if she were married and her father if she were not, and which in some jurisdictions still protects forced sex in the absence of earnest resistance. We **DO** want to contradict such anachronistic "common understandings", and **DO** believe that the law is an appropriate vehicle to do so. That is the true point of dispute

### **The Empirical and Scientific Proofs of Multiple Fear Reactions**

The letters and tweets challenge the biological reality of a victim being immobilized by fear or danger as "red herring science" -- a dismissive argument which may well convince a jury, but is plainly untrue. There are several proven neurological and physiological bases for that fact. I have experienced moments being incapacitated by fear -- haven't you? It's hard to pick one source to present, but see the training at [https://www.youtube.com/watch?v=dwTQ\\_U3p5Wc&t=334s](https://www.youtube.com/watch?v=dwTQ_U3p5Wc&t=334s) and scientific literature at <https://www.sciencedirect.com/science/article/pii/S1053811917305268> or <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2489204/>. For broad layman's explanations,

see <https://www.psychologytoday.com/us/blog/sexual-assault-and-the-brain/201804/freezing-during-sexual-assault-and-harassment> or <http://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/>. A specific rebuttal to the Emily Yoffe article raised in the opponents' recent posts and letters, published in Psychology Today, is attached.

People react differently to major stress. Stress rapidly impairs the brain's rational prefrontal cortex, shifting the brain to reflex and habit responses that are automatic and involuntary, and often immobile or passive, precluding resistance. Again, scientific support for this includes the work of Amy Arnsten, an influential Yale neuroscientist (Arnsten, A.F.T. (2009). Stress signaling pathways that impair prefrontal cortex structure and function. *Nature Reviews Neuroscience*, 10, 410-422.; Arnsten, A. F. (2015). Stress weakens prefrontal networks. *Nature Neuroscience*, 18, 1376-1385.; Arnsten, A. F., Lee, D., & Pittenger, C. (2017). Risky business: The circuits that impact stress-induced decision-making. *Cell*, 171, 992-993). A review of the extensive behavioral and neuroscientific research on animals' and humans' reflexive immobility responses to inescapable danger (e.g., freezing, tonic immobility, and collapsed immobility) is published in Kozłowska, K., et al. (2015). Fear and the defense cascade: Clinical implications and management. *Harvard Review of Psychiatry*, 23, 263-287). One cannot deny the often immobilizing effect of fear or danger.

### **The Non Issues Raised in Opposition**

The opposing groups covers their opposition with stated concerns which are no part of this resolution. They say this resolution shifts the burden of proof, or eliminates the presumption of innocence; it does neither. To be clear: using the definition in the resolution, the prosecution has to prove beyond a reasonable doubt that consent was absent. It remains the prosecutor's burden to present such evidence, and to convince the jury beyond a reasonable doubt to believe it. Otherwise, the defendant gets acquitted; the defendant never needs to prove anything. Every procedural protection and presumption of the system

remains. Beyond question, we agree it would be unconstitutional to do otherwise.

We have told this to the NACDL when it launched the instant opposition, and offered to state that proposition in the text *if that would eliminate its objection to the resolution*. The NACDL refused, as that obviously true proposition is not their actual concern. As they wrote, their problem is our use of the word “assent” and “the divisive concept” of requiring words or actions indicating consent. The burden of proof and presumption of innocence remain in full force!

The opponents then suggests in passing, that this resolution presents a racial justice issue. Of course, serious equal justice considerations pervade the criminal justice system as a whole, require remedy and should always be addressed. Here, white men most often commit rape, rape is the 5th most common crime charged against white men, and the 18th among people of color. Importantly, women of color are *less* likely to report and *less* likely be believed when they are victims of sexual assault. A report published by Georgetown Law Center found that “adults view Black girls as less innocent and more adult-like than their white peers” and they are “perceived to be more independent, more knowledgeable about sex, and in less need of protection”. Reinforcing a rule requiring consent to sexual activity is a justice issue as much to people of color as it is to any segment of our society.

Finally, we proponents made the deliberate decision to make this resolution about its merits and not the ALI process; the issue here is principle, not the ALI. But the opponents now argue that we focused insufficiently on the ALI and that the ALI's product differs from ours, and that statement is half true. The ALI engaged in the full, lengthy, detailed expert committee process for which it is known, taking comments and crafting a rule which embodied the need for words or acts of consent. When that product of the ALI process was submitted to the ALI membership for approval, it was subjected to the same lobbying as the HOD receives now; and the membership did not adopt the committee report in its current draft. As our report notes, the ALI's revision of The Model Penal Code on Sexual Assault and Related

Offenses is not complete, and we hope it ultimately adopts a rule requiring consent to sex. But this resolution is not about the ALI, but a much more important principle.

A small but organized opposition has taken to the Twittersphere and asked its members around the country to lobby the members of this House, and we have no doubt that this will continue for the next week. Typical of twitter campaigns, it uses buzzwords instead of reason, and polarization rather than analysis. We understand. Entitlements are hard to lose, and this resolution seeks to limit one of the most longstanding entitlements in human history. But it is neither radical nor “divisive” to suggest that there should be assent to sexual activity, rather than simply a failure or inability to adequately resist. It is the right proposition, and we look forward to presenting it to, and obtaining the approval of, the House, through our regular, reasoned process..

Best regards, and welcome to San Francisco. Mark Schickman,  
Chair ABA Commission on Domestic and Sexual Violence.