RESOLVED, That the American Bar Association opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches; and

FURTHER RESOLVED, That the American Bar Association opposes, and urges federal, state, local, territorial, and tribal jurisdictions to oppose, laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.
I. Introduction

Given the ongoing and contemporary discussions around sexual violence and consent in our society, recognition that consent to sexual activity may not be inferred from the absence of resistance is long past due.

Survivors of sexual violence experience profound violations of their autonomy that shatter the “very foundation of their identity.”¹ As scholar Sarah Deer recognized: “If our sexuality is part of that which defines who and what each of us is, then it is at the very core of our self-identity…[T]his is because the very nature of sexuality represents the best of humanity—the creation of new life, or the sharing of deep mutual affection and attraction. When this manifestation of our humanity is violated, it has life-changing ramifications for one’s feelings about self, others, justice, and trust. In consequence, rape damages something critical to our being and personhood.”²

Similarly, the American Law Institute has noted:
Basing liability on lack of consent […] is consistent with the social recognition that the criminal law must protect individuals against violations of their sexual autonomy, not merely against sex obtained by physical force or coercion. The decision to share sexual intimacy with another, whether made spontaneously or with great deliberation, is a core feature of our humanity. The decision must always be a matter of individual choice.³ A person who seeks sexual intimacy with another must heed the other person’s right to decide whether to engage in, refuse, or defer sexual acts, including penetration or oral sex.⁴

The ALI goes on to document the current state of the law globally, recognizing the shift away from centering sexual assault inquiries on the victim’s supposed responsibility to resist forcible assault, to focus instead on the the perpetrator’s responsibility to know they are acting with consent.

Well over half of American jurisdictions currently treat penetration without consent as a crime, even in the absence of other aggravating circumstances.
This is the prevalent trend, not only nationally but elsewhere around the world.

¹ Sarah Deer, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA xvi (University of Minn. Press 2015).
³ See generally Stephen J. Schulhofer, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998) (discussing authorities that document the emergence of autonomy as the principal interest to be protected by the law of sexual assault). See also M.C. v. Bulgaria, [2003] ECHR 39272/98, ¶ 106, ¶¶ 163-165 (canvassing legal systems worldwide and concluding that “[t]he basic principle which is truly common to [the reviewed] legal systems is that serious violations of sexual autonomy are to be penalized.” (internal quotation marks omitted)).
⁴ American Law Institute, Model Penal Code: Sexual Assault and Related Offenses Revision Project, Reporters’ Notes to Section 213.6 (forthcoming).
In 2012, the FBI amended the rape definition used for its national crime statistics to include any act of “penetration, no matter how slight, of the vagina or anus …, or oral penetration by a sex organ of another person, . . . without the consent of the victim.”5 In 2003, the European Court of Human Rights observed that “[e]ven where the definition of rape [in European countries] contains references to the use of violence or threats of violence . . . , in case-law and legal theory lack of consent, not force, is seen as the constituent element of the offence. [T]he prosecution of non-consensual sexual acts [even in the absence of force] is sought in practice by means of interpretation of the relevant statutory terms . . . and through a context-sensitive assessment of the evidence. [T]here is a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse . . . .”6 In 2011, the Council of Europe adopted the Istanbul Convention, which requires member states to criminalize all “non-consensual acts of sexual nature” and stipulates that “[c]onsent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.”7 The convention, signed by 45 of the Council’s 47 member nations, entered into force in 2014;8 in consequence a number of European states have recently revised their domestic legislation to make sexual penetration and oral sex without consent the equivalent of a serious felony.9


“Parties shall take the necessary legislative or other measures to ensure that the following intentional conduct are criminalised: (a) engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object; (b) engaging in other non-consensual acts of a sexual nature with a person; …. Consent must be given voluntarily as the result of the person’s free will assessed in the context of the surrounding circumstances.”


This recognition that sexual penetration and oral sex without consent should be treated as serious criminal offenses, even in the absence of force or other coercion, is widespread and growing. Popular press reports on the FBI’s new definition of rape did not describe it as an outlier or on the vanguard in defining rape, but rather as harmonizing with existing law, and several states have recently updated their codes to make absence of consent sufficient for conviction of a sexual offense.

II. The Requirement of Resistance Effectively Authorizes the Use of Force, Coercion, and Abuse to Secure Sexual Access

The history of rape law is both shameful and brutal. As originally defined under the law, rape prohibited only “[c]arnal knowledge of a woman forcibly and against her will” outside of a marital relationship with her husband and was considered a crime perpetrated against the property of fathers and husbands. Historically, the law imposed unique obstacles for rape victims that other crime victims did not have to overcome:


The recent Icelandic legislation likewise defines consent in terms of affirmative permission. See Paul Fontaine, Iceland Unanimously Passes Landmark Law On Sexual Consent, The Reykjavik Grapevine, March 23, 2018 (reporting that “[t]oday, Iceland’s Parliament [unanimously] passed a law putting the onus of consent on being told ‘yes’; rather than not being told ‘no’.”).


In contrast, the 2016 German enactment appears closer to adopting a “no means no” standard. See STRAFGESETZBUCH [StGB] [Penal Code] §§ 177 (2016) (amendment deleting requirement to prove force and providing that “[w]hoever, against the recognizable will of another person, performs sexual acts with this person or makes her act sexually or induces the other person to suffer sexual acts by a third person or to perform sexual acts with a third person, will be punished with imprisonment between six months and five years.” See Tatjana Hörnle, The New German Law on Sexual Assault and Sexual Harassment, 18 GERMAN L.J. 1309 (2017).

See, e.g., Charlie Savage, U.S. to Expand Its Definition of Rape in Statistics, N.Y. Times (Jan. 6, 2012) (“Many states have long since adopted a more expansive definition of rapes in their criminal laws, and officials said that local police departments had been breaking down their numbers and sending only a fraction of the reported rapes to the F.B.I. to comply with outdated federal standards.”); Kevin Johnson, FBI changes definition of rape to include men as victims, USA Today (Jan. 6, 2012) (reporting that “a survey of major city police chiefs found that 80% believed the old definition was ‘not adequate’”). See also, e.g., 2015 La. Sess. Law Serv. Act 256 (S.B. 117) (West) (amending state’s third-degree rape law, which carries up to 25 years of imprisonment, to include a consent-based subsection, namely “(4) When the offender acts without the consent of the victim,” now codified as La. Stat. Ann. § 14:43(A)(4)).


American Law Institute, Model Penal Code: Sexual Assault and Related Offenses Revision Project, Reporters’ Notes to Section 213.6 (forthcoming).

See e.g. Susan Estrich, Rape, 95 YALE L.J. (1986).


Sarah Deer, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 17 (University of Minn. Press 2015).
Derived from English common law and applicable in most jurisdictions until the mid to late 1970s, these formal rules embodied clear presumptions against women who complained of having been raped. These rules included absolute exemptions from criminal liability for men who raped their wives. They included requirements that the victim establish that she resisted her attacker to the utmost, freshly complained of having been raped and corroborated her testimony with other evidence.¹⁶

Courts routinely failed to prohibit the use of force or threats by perpetrators and instead placed the burden of resistance on female victims before they could secure the law’s protections—which they often could not¹⁷: “coercive, aggressive, overbearing and even frightening actions, if not physically brutal, were legally permissible.”¹⁸ This left countless victims unprotected by criminal law over the centuries and created an appalling norm that allowed sexual aggression to go unchecked in the majority of cases.

As a product of its time, it is not surprising that the 1962 Model Penal Code on Sexual Assault and Related Offenses ("MPC") codified this distressing history and continued to impose legal burdens on rape victims of demonstrating more than "token initial resistance." Unfortunately, many jurisdictions followed the example of the MPC and "require at least ‘reasonable resistance’" to be demonstrated¹⁹.

Despite the modern legal trend towards the removal of force and resistance as essential elements of sexual assault, many current codes and pending legislative proposals, including the 2018 draft of the MPC Sexual Assault and Related Offenses Revision Project, still allow both "inaction" and the lack of "verbal or physical resistance" to serve as evidence of consent. This is contrary to the FBI Uniform Crime Reports (UCR) which, in 2012, re-defined rape simply as “any sexual penetration without consent.”²⁰ The incorporation of resistance into the very definition of consent contradicts contemporary notions of consent. It also ignores significant scientific research on the neurobiology of

¹⁷ "In an 1880 case, the Wisconsin Supreme Court reversed a rape conviction despite the complainant’s testimony that "He had my hands tight, and my feet tight and I couldn’t move…I got so tired out. I tried to save me as much as I could, but…he held me, and…I worked so much as I could, and I gave up." The court reversed the conviction, holding that "she ought to have continued [resisting] to the last... [T]he testimony does not show that the threat of personal violence overpowered her will." Whittaker v. State, 50 Wis. 519, 520, 522 (1880). In a similar 1906 case, typical for the period, the court reversed a rape conviction because the victim had failed to make “the most vehement exercise of every physical means or faculty within the woman’s power.” Brown v. States, 127 Wis. 193 (1906); id. at 199–200 (explaining “[a] woman is equipped to interpose most effective obstacles by means of hands and feet and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in the absence of more than the usual relative disproportion of age and strength between man and woman.”).
¹⁸ American Law Institute, Model Penal Code Preliminary Draft No. 3 (October 30, 2013).
trauma, which shows that resistance by a sexual assault victim is often impossible, and is evidence of disabling fear rather than consent.

III. Research on the Varying and Individualized Responses by Victims of Sexual Violence Should Preclude Any Consent Definition that Relies on Inaction or a Lack of Resistance

Common myths persist about sexual violence victim behavior and veracity, such as whether they failed to physically resist the attacker, did not sustain significant injury, failed to report the assault immediately, continued to associate with the offender, recanted an initial report, or provided a statement or testimony in support of the offender. When a victim’s behavior may appear to be “counterintuitive,” and the reasons for the behavior are not adequately explained, our system of justice is compromised and supplanted by the court of popular (and uninformed) opinion.

The impact of rape myths and a misunderstanding of “counterintuitive” victim behavior was revealed in a study undertaken by British researchers. The study involved presentation of mock testimony in a sexual assault trial in which the victim had delayed her report of the assault, displayed a flat emotional affect on the witness stand, and suffered no physical injury beyond the act of penetration. The researchers observed jurors’ deliberations when they received no expert instruction, as well as when they received education in the form of either expert testimony or a detailed jury instruction. In State v. Obeta, 796 N.W.2d 282 (Minn. 2011), the Minnesota Supreme Court described in its opinion the findings of the study as follows:

Drs. Ellison and Munro examined the deliberations of the groups that did not receive any educational information to determine whether the mock jurors subscribed to rape myths. Ellison & Munro, Reacting to Rape, supra, at 206. They found that mock jurors’ “commitment to the belief that a ‘normal’ response to sexual attack would be to struggle physically was, in many cases, unshakeable.” Id. Additionally, jurors harbored “strong, but unfounded, convictions that vaginal tissues are easily torn, that pelvic muscles can be rigidified at will and that intercourse without trauma only occurs where a

21 Behavior may seem “counterintuitive” when the actual experiences and behaviors of victims of sexual violence clash with the expectations of jurors, whose notions about rape and sexual assault have been unconsciously influenced by widespread societal myths concerning how someone becomes a victim of sexual violence, how victims respond during the assault itself, the resulting physical injury (or lack of injury) as a result of the assault, the victim’s behavior following the assault, and the ability of the victim later to recall and recount details of the assault.

22 Even victims themselves are not immune to the effects of rape myths. Victims may blame themselves for the assault or—realizing that police, prosecutors, and jurors may be influenced by those erroneous beliefs—become convinced that they will never receive justice for the violence and indignity they have suffered.

woman is aroused, which, in the jurors' minds, was wholly inconsistent with rape.” *Id.* at 207. The study also yielded support for the proposition that jurors view delayed reporting as indicative of a fabricated report, although the jurors were receptive to the idea that a victim may delay reporting for other reasons. *Id.* at 209–10. [Obeta, 796 N.W.2d at 285.]

Many jurisdictions stress the importance of understanding victim behavior in crimes of sexual violence, including the need for expert testimony on the subject, in their benchbooks on crimes of sexual violence.24 Pennsylvania’s Benchbook has devoted many pages to the contrast between rape myths and reality, as borne out by studies and statistics.25 The PA Benchbook also discusses the physical, emotional, and psychological effects of sexual assault on victims and their behavior during and after the assault, including the traumatic effects of testifying in court.26

Authorities and experts responsible for training law enforcement officers investigating these cases, prosecutors who must try them, and medical personnel responsible for treating victims of sexual violence also emphasize the need to understand the traumatic effects of violence on the ability of victims to recount what has happened to them, as essential knowledge required for these professionals to properly perform their duties.27

When the need to educate judges, police officers, prosecutors, and medical professionals about victim behavior and the effects of traumatic victimization is so widely and universally recognized, it is clear that a legal definition of consent must reflect the realities of sexual victimization—rather than perpetuate myths that victims should be required to physically resist their attacker.


26 *Id.* at 1-17 to 26.

IV. Affirmative Consent Better Protects Sexual Autonomy than Resistance Requirements

The criminal law has too often failed to fully recognize that “no means no”—to the “great surprise of many lawyers, law students, and members of the general public.” For example, jurisdictions like New York (and until recently Maryland) require something in excess of express unwillingness to sexual contact before the law protects against sexual violence. In juxtaposition, states like Wisconsin and Colorado represent the modern view of sexual autonomy within American criminal law, recognizing not only that “no means no,” but also that “yes means yes.” Specifically, the codification of affirmative consent, which requires an individual to indicate willingness through words or action before another may engage in sexual contact or activity with them, is the proper, and increasingly common, legal and policy requirement to address sexual violence.

Affirmative consent offers greater protection against sexual violence because it avoids a requirement that victims take some action before the law will protect them, or that, absent a clear “no”, sexual access may be inferred. An affirmative consent rule begins to reverse the unacceptable history of burdening victims rather than constraining perpetrators of sexual violence, and recognizes the significant scientific research on the neurobiology of trauma.

V. Conclusion

The appalling history of sexual violence, and of the status of women as the sexual property of men, should no longer form the basis of the law governing sexual assault. No longer should the law countenance consent to sexual activity being inferred absent resistance. Rather, as is the case in all other human relationships, freely given consent should not be inferred, but sought. The ABA should recognize every individual’s inherent right of sexual autonomy, acknowledging that victims have no prior burden of

28 ALI Prospectus for a Project Revision (May 14, 2012).
30 N.Y. Penal Law § 130.05(2)(d) (2011); MD
31 Wis. Stat. § 940.225(4) (2011) (“Consent…means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse…”); Colo. Rev. Stat. Ann. § 18-3-401 (West 2011). (“Consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part. Submission under the influence of fear shall not constitute consent.”)
demonstrating resistance, and oppose laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

Respectfully submitted,

Mark I. Schickman
Chair, Commission on Domestic & Sexual Violence
January 2019
GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic & Sexual Violence
Submitted By: Mark I. Schickman, Chair

1. Summary of Resolution(s). The resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and calls upon all jurisdictions to oppose any laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

2. Approval by Submitting Entity. The CDSV approved this resolution at its Fall Business meeting, October 19, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously? No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There are no ABA policies related to the burden of demonstrating resistance to sexual assault, or to the principle that consent to sexual activity may not be inferred from inaction or lack of resistance.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? n/a

6. Status of Legislation. (If applicable) Changes in the definitions of consent in the Model Penal Code are currently being considered by the ALI.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Following adoption, this policy will be presented to model code drafters and legislative bodies to support widespread adoption.

8. Cost to the Association. (Both direct and indirect costs) None.

9. Disclosure of Interest. (If applicable) n/a

10. Referrals. Criminal Justice Section; Civil Rights and Social Justice Section; Commission on Women in the Profession; Commission on Youth at Risk; Family Law Section; Young Lawyers Division; Law Student Division; Judicial Division; Tort Trial & Insurance Practice Section; Solo, Small Firm and General Practice Division; Litigation Section.

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address) Vivian Huelgo, Chief Counsel, Commission on Domestic & Sexual Violence, 1050 Connecticut Ave. NW, Washington, DC 20036, 202-662-8637, vivian.huelgo@americanbar.org
12. **Contact Name and Address Information.** (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*) Mark Schickman, Chair, Commission on Domestic & Sexual Violence, [schickman@freelandlaw.com](mailto:schickman@freelandlaw.com)
EXECUTIVE SUMMARY

1. Summary of the Resolution
The resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and calls upon all jurisdictions to oppose any laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

2. Summary of the Issue that the Resolution Addresses
The resolution opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches, and calls upon all jurisdictions to oppose any laws or rules that allow consent to sexual activity to be inferred in whole or in part from inaction or lack of verbal or physical resistance.

3. Please Explain How the Proposed Policy Position Will Address the Issue
The ABA’s adoption of the proposed policy will provide the proper policy rule regarding consent to sexual conduct, and the platform to seek change to or rejection of conflicting policy.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified
None.