Rape = (Bruises + Cuts) = Not Rape
Action = Consent
Inaction = Consent

Silence ≠ Consent

"...consent can only be given by someone who is competent to give it, expressed by their clearly articulated words and actions."

—Resolution 114

Inaction Is Not Consent
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Inaction Is Not Consent

By Ann Farmer

Based in Brooklyn, New York, Ann Farmer is an independent journalist who used to cover breaking news for The New York Times and did reporting and producing for Court TV.

It wasn’t long ago that women and men who had been raped needed the bruises and cuts to prove the assault. Some states even mandated that they “resist to the utmost.” As courts and legislatures, however, have become more cognizant of the multiple factors that can prevent sexual assault victims from fighting back, that dictate has been scratched from most state statutes.

So it may come as a surprise that the independent Philadelphia-based American Law Institute—which prides itself on clarifying laws and prescribing to legislatures and courts the proper language to use when formulating or revamping statutes—uses the term resistance in its updated definition of consent to engage in sexual activity. This subsection, adopted in 2016, states: “Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.”

“This confusing incorporation of resistance is very troublesome,” says Terry Fromson, managing attorney for the Pennsylvania-based Women’s Law Project, noting that it infers consent from both action and inaction, thereby posing the same potential evidentiary trap upon rape victims as before. “It is completely self-contradictory,” she says, “and will be incredibly confusing to apply.”

Many rape victims, of course, do yell and fight back. But scientific studies have shown that people under attack also react in ways that appear counterintuitive to the situation. For instance, some lapse into a state of “frozen fright.” Consider the 2015 rigorously researched report by the psychiatrist Kasia Kozlowska, a clinical associate professor at the University of Sydney (Australia), which identified specific defenses that are activated in humans in the context of danger.

Published in the Harvard Review of Psychiatry, the report notes that tonic immobility and collapsed immobility, for example, are psychophysical states akin to paralysis and faintness. Other victims may retreat into a passive, dissociative condition similar to a dream state that makes them feel as though the sexual assault weren’t actually happening.

“All of these are things that can help you survive when you are in the jaws of a predator or when a predator is just about to attack you,” says Jim Hopper, PhD, a clinical psychologist, independent consultant, and teaching associate at Harvard Medical School.

Hopper, an expert on the neurobiology of trauma as it relates to sexual violence, says that in fear-heightened, stress-infused situations, people often instinctively react with reflex and habit behaviors as opposed to rationally chosen ones. “Reflexes are the oldest of all,” he explains. “If someone suddenly runs into a courtroom with an AK-47 and starts shooting at you, what’s going to save your life, if you’re lucky, is reflexive responses and perhaps some habit responses.”

These type of responses, Hopper observes, are “automatic and unchosen” in contrast to someone pausing in such a dire situation and employing higher cognitive abilities to make a reasoned decision about what
to do next. “If you stop to think,” he says, “you’re lunch.”

Submission, Hopper says, is a common habitual reaction for women and girls long socialized to tiptoe around the male ego. Faced with an unwanted sexual advance, a woman might instinctively respond by trying to say no nicely to avoid bruised feelings or the man’s wrath. In the case of someone who was sexually abused as a child, she may have felt powerless to do anything except surrender.

“And now they’ve got a boyfriend or a date holding them down on a couch and doing things to them and, just like that, in a flash, their brain cues up those habits of submission from when they were six years old,” Hopper says.

Some people threatened with rape will make a strategic decision to acquiesce to avoid death or physical injury to themselves or to protect someone else. Amy Castillo, a Baltimore pediatrician separated from her mentally unstable husband, surrendered to his demand for sex after he threatened to kill their children as punishment for seeking a divorce. That sexual encounter was noted by a judge in his reasoning to deny her a permanent protective order. Not long after that denial in 2008, the father drowned all three adolescent children in a hotel bathtub.

Recognizing the wide spectrum of ways that sexual assault victims can respond to an attack, the ABA Commission on Domestic and Sexual Violence (CDSV) introduced Resolution 115 at the 2019 ABA Midyear Meeting. As adopted, it states that the ABA “opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches.”

In August at the ABA Annual Meeting, that commission and the Section of Civil Rights and Social Justice attempted to go further by cosponsoring Resolution 114, which defines affirmative consent as a standard to be used in sexual assault accusations. Similar to actions taken by colleges and universities in defining consent, it states that consent can only be given by someone who is competent to give it, expressed by their clearly articulated words and actions.

The ABA Criminal Justice Section (CJS), however, under pressure from organizations like Washington, D.C.-based National Association of Criminal Defense Lawyers, raised objections. They argued that it could undermine defendants’ constitutionally guaranteed presumption of innocence by shifting the burden of proof onto the defense to prove that a sexual encounter was consensual, potentially resulting in innocent individuals being convicted of sexual assaults.

The CJS’s “ultimate concerns,” e-mailed Mark Schickman, who chairs the CDSV, were that: “(1) inaction or failure to vigorously resist should be an admissible factor that indicates consent; (2) the ‘affirmative consent’ concept is flawed, inconsistent with human experience, and requires an artificial and mechanistic preamble to every touching (i.e., every morning that I want to touch my wife of 25 years who is lying next to me, I must first ask ‘may I touch you this morning?’)”

“It was quite contentious in that we disagreed strongly,” says Laurel Bellows, former ABA president and former chair of the ABA Commission on Women in the Profession, who supported the resolution. She believes it was the first time that the ABA had a debate on consent. Her observation is that it became divided largely along gender lines. “Primarily the men were voting for silence was consent,” she says, “and the women understood that silence is not consent.”

Unable to reach a consensus, the motion was tabled for the time being. Stephen Saltzburg, a delegate for the CJS, indicated that the section is open to a revision that elicits its members’ support. “It would be a
lot better to get this done right,” he is reported to have said at the meeting. Schickman also indicated that passage of Resolution 114 remains a priority, saying, “At the fall meeting, we’ll have a discussion of when and how to reintroduce it.”

Legal definitions of consent have shifted over the years. It used to be that wives had no legal grounds to deny their husbands sex, even by force. Spousal rape only became a crime in all 50 states in 1993. California became the first state, in 2014, to enact a “Yes Means Yes” law, which requires voluntary, affirmative, and conscious consent to engage in sexual activity, which can be withdrawn at any point.

But stereotypes and misbeliefs persist. New Jersey Superior Court Judge John Russo Jr. suggested to a rape victim in 2016 that she could stop an assault by closing her legs and blocking her body parts. California Judge Derek Johnson remarked that if someone doesn’t want to have sexual intercourse “the body shuts down. The body will not permit that to happen unless a lot of damage is inflicted. . . .”

To curtail that kind of thinking, Lynn Hecht Schafran, who serves on the editorial board of Perspectives and directs the National Judicial Education Program (NJEP) at Legal Momentum in New York City, created a seminar for judges, lawyers, and others to educate them on the behaviors of sexual assault victims. A participant survey resulted in the NJEP publication Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case, where they describe learning, for instance, that sexual assault is far more prevalent than the general public believes and that it’s common for a victim to display a flat affect while testifying.

“Judges have found this information very helpful in understanding victim behaviors that don’t match common expectations about how sexual assault victims should behave during and after an assault,” Schafran notes.

Other conduct ripe for misinterpretation is the manner in which victims develop, store, and retrieve traumatic memories. Hopper says traumatic memories often return in incomplete, inconsistent, or fragmentary ways, which police and others have construed as the victim not telling the truth, generating a more adversarial inquiry.

The Women’s Law Project works with Pennsylvania police to help them adopt victim-centered interview techniques that support and help victims to recall details of the crime. “They need to interview and not interrogate,” Fromson says.

How police mistreat victims is vividly demonstrated in the acclaimed Netflix series, Unbelievable, based on the true case of Marie, an 18-year-old Washington state woman who was raped and then falsely accused of lying. (ProPublica collaborated with the Marshall Project on the original 2016 Pulitzer Prize–winning story, which has galvanized considerable attention to this issue.)

During heavy-handed police interrogations, Marie (a pseudonym to protect her identity) jumbles up some of her recollections, such as whether she made a phone call while her hands were still tied or not. She, in fact, becomes so rattled by their grilling, she suggests it could have been a dream. Marie quickly recants her dream statement, but the male officers intimidate her into dropping her case, saying that if she fails a lie detector test, she could lose her subsidized housing.

Marie also comes under suspicion for her seemingly detached manner. For someone like her, though, who’d been shuffled through the foster care system and abused along the way, it was simply her way of coping.
“You may have victims for whom violence is so normalized. Sometimes the behaviors you’ll see is not just the trauma from this event, it’s from a lifetime of trauma,” says Jennifer Long, the CEO of Washington, D.C.-based AEquitas, a team of former prosecutors who work to improve prosecution practices related to gender-based violence and human trafficking.

“It is across the board. You may see people joking,” Long says, to make their investigators feel better. Others might cry hysterically. “Often there is shame,” she says, “and information is withheld because victims are embarrassed to talk about the assault. Some may feel they are responsible for what happened because they willingly went with their perpetrator.”

Long notes that she has seen some victims recant just to put an end to the humiliation they feel.

“Everyone wants to talk about—oh, a victim is lying or someone is falsely accused—and that’s important,” Long says. “We don’t want to falsely accuse anyone. But that’s such a tiny part of the narrative and happens so infrequently, [and] it becomes frustrating that that becomes the focus.”
I received the call midmorning on a beautiful fall day in 2012. The principal of one of our six original high school law academies had bad news. That morning, the history teacher who had taken over the law class had quit. He refused to take over a class that took too much in preparation on top of his full load of history classes. The principal asked if I would consider stepping in to teach the class.

Let’s step back for some background. In 2010, I received an offer of six uncontested grants to build the first six high school law academies in California. These grants were part of the California Partnership Academy (CPA) model that was created by the California Legislature in 1984 as a three-year program (grades 10 through 12) structured as a “school-within a school.” Academies incorporate academic and career technical education, business partnerships, mentoring, and internships. One of the requirements for program participation included that at least 50 percent of the students be “at risk” and that high schools have at least 350 students in attendance. These two requirements produced classrooms that were more than half students of color.

At that time, the State Bar of California (Bar) was looking for a “boots on the ground” project to have direct impact on diversity in the legal profession. This educational model was a perfect fit for the legal profession in California to be directly involved with the future of the profession. The Bar eagerly accepted the offer and we set off to build the first six law academies, opening our doors for our first classes in fall 2011.

With a fool’s confidence, I accepted the job offer at De Anza High School Law Academy in Richmond, California. I knew I could teach the substantive part of law academy and was assured I would be fine in the classroom. All I needed was a Career Technical Education Certificate. Within weeks, I was ready to step into the classroom. Or so I thought.

Armed with a smile and eager to get to know the students, I stood at the door of the classroom waiting for my first students. I was scheduled to teach four classes—two 10th-grade and two 11th-grade classes averaging 33 students per class.

My first inclination: This was not going to be easy, as the students filed past me. Few made eye contact, few said hello, many had earbuds in, and they proceeded to congregate in groups chatting and eating snacks. I was coming in after three weeks of substitute teachers and had no clue what would happen in the next few months. This would turn out to be my toughest job ever.

My early confidence faded quickly, and I learned trust does not come easily. These students were used to people coming and going. Why would I be any different? I decided that I would fight to stay and that I could not and would not leave.

Every afternoon, I would drive home exhausted and defeated. My last class of the day had students who...
could have easily been sent to detention on a regular basis. Instead of teaching, more disciplining—and yes, yelling—occurred. I wondered if I could survive the year.

Then slowly, change started to happen. Students started standing up for me and getting the other students to listen. A change in classroom seating into a law school classroom style engaged more students. I stayed up nights learning names and shared leadership with newly elected officers. A field trip to the Supreme Court and a talk with the chief justice awed and inspired them. Some had never crossed a bridge before that trip into San Francisco. Friends came to speak and do oral arguments for the students. It was an election year, and law academy students gave a comprehensive election program to the entire school—some for the first time had to deal with a fear of public speaking. We created a mock trial team and competed in the regionals.

By the end of the year, I was exhausted, but not defeated. This turned out to be the most rewarding experience of my life. I am in contact with many of the students still and am so proud of those who are finishing undergraduate degrees and are either entering or are in law school. These students taught me more than I taught them—and I will remember and love them forever.
Finding common ground—so much of what we do in the legal profession depends on understanding and acting on shared experiences and goals. Over the past several decades, as the legal profession increasingly opened to women and people of color, there was the recognition that a person’s experiences, understanding of others, actions, and reactions depend at least in part on one’s gender, race, and ethnicity. Several years ago, to better understand how diversity and inclusion work in the legal profession, the ABA Commission on Women in the Profession published its Visible Invisibility studies, which describes the very different experiences that women of color may face, such as exclusion from informal networks, inadequate institutional support, and challenges to their competence, authority, and credibility.

This year, the Commission has taken another step toward understanding the paths to diversity and inclusion. The Commission will soon release a report entitled This Talk Isn’t Cheap: Women of Color and White Women Attorneys Find Common Ground. The vision of former Commission Chair Michele Coleman Mayes, This Talk Isn’t Cheap was developed by the Commission’s Guided Conversations Project, which explores cross-cultural conversations, the ways that women experience race and ethnicity (which is sometimes referred to as intersectionality), and how all women can engage in meaningful discussions about race, ethnicity, gender, and the legal profession. This Talk Isn’t Cheap shares the results of focus group research about the differing experiences of gender and race, as well as guidance for structured discussions to foster greater trust and openness in holding hard conversations. We all know these conversations are not easy. Women lawyers might be concerned about alienating colleagues, jeopardizing their careers, embarrassing themselves, or being labeled prejudiced. But those feelings pale in the face of the personal and social benefits from listening, learning, and understanding another’s experience.

To kickstart this initiative, in September, the Commission on Women had the honor of hosting playwright, actor, author, and educator Anna Deavere Smith for an intimate presentation and discussion about the dynamics of race, ethnicity, and gender in the legal profession. Smith presented her singular brand of theater to an audience of 125 attorneys hosted by Skadden, Arps, Slate, Meagher, & Flom, LLP, New York, exploring issues of anxiety, trauma, humility, identity, and racial discrimination. Following Smith’s presentation, a panel of women of color and white women attorneys candidly reflected on their own experiences with gender, ethnicity, and race, and considered best practices for engaging in meaningful dialogue with their colleagues. The Commission looks forward to sharing the recording of this program along with the publication of This Talk Isn’t Cheap and a facilitator’s guide in late 2019/early 2020.

Diversity, with inclusion of the broadest possible range of talent at all levels of the profession, enriches our work experiences, our life experiences, and the law itself. I encourage each of you to read This Talk Isn’t Cheap as a guide for reflection on your own experiences with gender, ethnicity, and race, and so that these meaningful conversations continue.
Women Lawyers Lead ABA’s Efforts to Ensure Due Process for Migrants

The Perspectives’ September feature highlighted how volunteer lawyers are helping migrants seeking asylum. The ABA’s Commission on Immigration also empowers immigrants and asylum seekers through its two direct service projects on the southern border and a legal resource center located in Houston. All three projects are led by dynamic and inspiring women who have devoted their careers to advocating for the migrant community.

This month, the Commission’s South Texas Pro Bono Asylum Representation Project (ProBAR) is celebrating 30 years of representing and empowering adult migrants and unaccompanied children detained in the Rio Grande Valley with the legal knowledge they need to make informed decisions about their immigration cases. Most of ProBAR’s nearly 200 staff members work with unaccompanied children residing in shelters operated by the Department of Health and Human Services’ Office of Refugee Resettlement. ProBAR also recently expanded its services to include representation of asylum seekers forced to remain in Mexico for the duration of their cases. These individuals will have their cases heard not in a regular immigration court, but in a tent court connected to the International Bridge between Brownsville, Texas, and Matamoros, Mexico. These asylum seekers represent some of the more than 50,000 individuals who have been returned to Mexico to wait for their court dates under the Trump administration’s “Remain in Mexico” policy, formally known as the “Migrant Protection Protocols.” Director Kimi Jackson has led ProBAR through five years of rapid expansion, as the need for ProBAR’s services continues to grow. Ms. Jackson’s leadership team includes Director of Programs Brenda I. Piñero Carrasquillo and Legal Director Carly Salazar, both of whom are women.

Last year, the Commission’s Immigration Justice Project (IJP) marked 10 years of promoting access to justice for indigent immigrants and asylum seekers. In addition to providing pro bono representation to indigent immigrants appearing before immigration courts and U.S. Citizenship and Immigration Services, IJP serves as appointed counsel for detained individuals who are determined to be mentally incompetent. Every year, IJP’s Legal Orientation Program also works with several thousand adults in immigration custody who cannot secure counsel and arms them with tools to represent themselves before the immigration court. IJP Director Adela Mason was one of 20 Latinos in the country recently honored by http://NBCNews.com and NBC Latino for her commitment, drive, and passion to help make our communities and our nation better.

The Commission’s newest project, the Children’s Immigration Law Academy (CILA), opened in 2015 in response to the large numbers of children from Central America who were coming to the United States fleeing violence and abuse in their home countries. CILA empowers lawyers with the tools they need to represent unaccompanied migrant children in humanitarian applications, including asylum. Dalia Castillo-Granados, CILA’s director, previously served as the chair of the State Bar of Texas’s Immigration Law Task Force and is currently an executive committee member of the Houston Immigration Legal Services Collaborative. As part of its effort to encourage more attorneys to represent children pro bono, CILA recently launched Pro Bono Matters for Children Facing Deportation (http://www.cilacademy.org/pro-bono). The website enables attorneys to search and share available pro bono cases for unaccompanied children.

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Do you want to help? Go to CILA’s Pro Bono Matters website, sign up to volunteer with the Commission, or e-mail Commission Staff Attorney Jennie Kneedler to learn about potential opportunities.
Margaret Brent Awards Nominations Open for 2020

Nominations for the 2020 Margaret Brent Women Lawyers of Achievement Award are now open. In 2020, the Commission on Women in the Profession will celebrate the 30th anniversary of the Margaret Brent Awards. Established in 1991 to recognize and celebrate the accomplishments of women lawyers, each year this prestigious award honors up to five outstanding women lawyers who have achieved professional excellence within their area of specialty and who have actively paved the way to success for other women lawyers. These women demonstrate excellence in a variety of professional settings and personify excellence on the national, regional, or local level. More information about the criteria for the award and the application process can be found at www.ambar.org/brentawards. Nominations will close on January 24, 2020 at 5:00 p.m. CST.
Commission Cosponsors “Competition Policy and Economics: What’s Gender Got to Do With It?”

The Commission will cosponsor with the ABA Section of Antitrust Law an exciting half-day program on November 19 in Washington DC that will explore the ties between gender and competition policy, enforcement, and economics. Following opening remarks from Federal Trade Commission Commissioner Rebecca Slaughter, attendees will hear U.S., Canadian, and international speakers (including from the Organization for Economic Cooperation and Development (OECD) and Canadian Competition Bureau) discuss whether gender gaps exist in data and enforcement decisions and whether that should drive competition policy. A second panel will discuss whether traditional antitrust economics has built-in biases and whether we should rethink our analysis of markets or harms. For more information and to register go to: https://www.americanbar.org/events-cle/mtg/inperson/383897279 or for a teleconference option go to https://www.americanbar.org/events-cle/mtg/teleconference/383798079. This event is also cosponsored by the Canadian Bar Association’s Competition Law Section.
Men in the Mix Project Will Release Preliminary Results in February

The preliminary data from the Men in the Mix focus groups will be unveiled during a program at the ABA Midyear Meeting in Austin, Texas. The program, “Men in the Mix: How to Engage Men on Issues Related to Gender in the Profession,” is slated to take place on Saturday, February 15, 2020 from 2:30 to 4:00 p.m. More details about this exciting program will be revealed in the next issue.