



*Protecting people's rights.*

## ABA Resolution 114 NC Delegates & Talking Points in Opposition

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### Talking Points

1. The Resolution Would Shift the Burden of Proof in the Common He Said/She Said Scenario: The Resolution requires “consent expressed by words or actions in the context of all the circumstances.” This formulation would allow the prosecution to rest (and win) after putting on evidence of a sexual act *without more*. In that scenario, there would be no evidence of consent expressed by the words or actions of the complaining witness and, therefore, the accused would be compelled to present evidence to negate lack of consent. This radical change in the law would violate the Due Process Clause of the Fifth and Fourteenth Amendments and the Presumption of Innocence. As a leader in protecting the Constitution, the ABA should not endorse a Resolution which shifts the burden and will inspire laws which, sooner rather than later, will be overturned thereby tarnishing the reputation of the ABA.
2. The Resolution Would Contribute to Mass Incarceration, Generally, and of People of Color in Particular: Given the role of implicit and explicit bias in the criminal legal system, accused people of color will suffer a disproportionate harm because juries are more likely to assume lack of consent based on implicit biases where the complaining witness and accused person are of different races and, in particular, where the accused person is a person of color.
3. The American Law Institute (ALI) Got It Right: Resolution 114 is a redux of the lengthy and divisive debate that occurred at the ALI 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.
4. DNA Cannot Exonerate the Wrongly Convicted: Given the nature of these cases (consent defenses), DNA evidence, or exonerations, will not protect innocent persons in this context. These are not “stranger” assaults which can subsequently be challenged.