

AMERICAN BAR ASSOCIATION
COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE
CRIMINAL JUSTICE SECTION
CIVIL RIGHTS AND SOCIAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges legislatures and courts to define
2 consent in sexual assault cases as the assent of a person who is competent to give
3 consent to engage in a specific act of sexual penetration, oral sex, or sexual contact, to
4 provide that consent is expressed by words or action in the context of all the
5 circumstances, and to reject any requirement that sexual assault victims have a legal
6 burden of verbal or physical resistance.

REPORT

I. Introduction

Given the ongoing and contemporary discussions around sexual violence and consent in our society, the recognition that consent to sexual activity may not be assumed or premised is long past due. The time has come to expressly reject the “traditional premise in the law...that individuals are presumed to be sexually available and willing to have intercourse—with anyone, at any time, at any place—in the absence of clear indications to the contrary.” This traditional premise of willingness condones, and encourages, sexual intrusion regardless of the fact that such intimacy was entirely unwanted. This premise is manifested in the enormous number of victims subjected to unwanted sexual intimacy whose experience has been documented in the #MeToo Movement. The proposed definition of consent rejects any traditional premise of willingness, and requires words or action considered in the context of the totality of the circumstances to express a person’s willingness to engage in sexual activity.

As noted by Stephen J. Schulhofer and Erin Murphy, the Reporters for the American Law Institute’s Model Penal Code Sexual Assault Offenses Revision Project, “[t]he decision to share sexual intimacy with another person is a core feature of our humanity and personhood and thus should always be a matter of actual individual choice.” Survivors of sexual violence experience profound violations of their autonomy that shatter the “very foundation of their identity.”¹

II. Our history, and legal trend

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 husband² and was considered a crime perpetrated against the property of fathers and husbands.³ Historically, the law imposed unique obstacles upon rape victims that other crime victims did not have to overcome.

Derived from English common law and applicable in most jurisdictions until the mid to late 1970s, these formal rules embodied 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.⁴

¹ SARAH DEER, *THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA* xvi (2015).

² WILLIAM BLACKSTONE, *4 COMMENTARIES ON THE LAWS OF ENGLAND* *210 (1765) (University of Chicago Press ed., 1979).

³ DEER, *supra* note 1, at xvi–xvii.

⁴ Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence against Women and the State Action Doctrine*, 46 *VILLANOVA L. REV.* 907, 924–25 (2001).

Courts routinely failed to prohibit the use of force or threats by perpetrators and placed the burden of resistance on female victims before they could secure the law's protections—which they often could not.⁵ “[C]oercive, aggressive, overbearing and even frightening actions, if not physically brutal, were legally permissible.”⁶ 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 (MPC) on Sexual Assault and Related Offenses codified this distressing history and continued legal burdens on rape victims of demonstrating more than “token initial resistance.” A significant number of jurisdictions followed the example of the MPC and “require at least ‘reasonable resistance.’”⁷

Fortunately, in reaction to the horrific history of rape law, the recent trend in the states has been clearly and consistently in the direction of requiring words or actions to establish consent. Wisconsin, for example, defines consent as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.” Wis. Stat. §940.225(4). California defines consent as “positive cooperation in act or attitude pursuant to an exercise of free will.” Cal. Penal Code. §261.6.

III. The Position of the ALI Reporters and Council.

In 2012, the American Law Institute (“ALI”) undertook the revision of its Model Penal Code (“MPC”) on Sexual Assault and Related Offenses, which has not been updated since 1962. The related May 14, 2012 Prospectus for a Project Revision recounted the reasons for this revision:

When drafted in the 1950s, Article 213 of the Model Penal Code was a forward-looking document, well ahead of its time. Yet shortly after the ALI approved it in 1962, dramatic social and cultural changes quickly overtook its once-progressive formulations, rendering them outmoded and in some instances even offensive to new sensibilities. A half-century has passed since the adoption of Article 213. Much of it no longer reflects American law or the best thinking about the desirable

⁵ “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. State*, 127 Wis. 193, 199 (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.”).

⁶ MODEL PENAL CODE (Preliminary Draft No. 3, Oct. 30, 2013).

⁷ *Id.* (citing Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 966 (1998)).

shape of a penal code applicable to sexual offenses. As a result, that Article 213 no longer serves as a reliable guide for legislatures and courts confronting contemporary legal issues in this arena.

On April 22, 2013, Columbia Law School Dean Lance Liebman acknowledged within the ALI Discussion Draft's Foreword that "[f]or some time experts have told us that this portion of the MPC needed to be rewritten to fit with contemporary knowledge and values".⁸ To lead this revision effort, the ALI selected NYU Law School Professors Stephen Schulhofer and Erin Murphy.

After considering the current state of the law, societal attitudes, advances in neurobiology, and harm from violations of sexual autonomy, in 2014, the ALI Reporters proposed revising the Model Penal Code. The ALI engaged in rigorous debate over a period of several years to determine the best way to define consent. The ALI revision of the MPC is not yet final.

The ALI review has explored territory that scholars have pondered for some time. Compare, e.g., Lani A. Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1130 (1993) (arguing for an affirmative consent requirement) with Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 75–76 (Winter-Spring 1988) (arguing that an express consent requirement patronizes and over-protects women).

IV. A Definition Requiring Consent By Words or Action Considered in the Totality of the Circumstances is Supported by Current Research on the Neurobiology of Trauma.

The ALI Reporters highlighted the significance of recent studies recognizing the "well-documented phenomenon of 'frozen fright': a person confronted by an unexpectedly aggressive partner or stranger succumbs to panic, becomes paralyzed by anxiety, or fears that resistance will engender even greater danger."⁹ "Frozen fright" has been well-documented by researchers in the neurobiology of trauma.

Researchers such as Dr. Judith Herman and Dr. Jim Hopper of Harvard Medical School, as well as Dr. Rebecca Campbell of Michigan State University¹⁰, are among the nationally recognized experts writing about the neurobiology of trauma as it relates to sexual violence. This body of work can be simplified as identifying three common states of "inaction" that can affect victims: (1) Dissociation, (2) Tonic Immobility, and (3) Collapsed Immobility.

⁸ See, e.g., Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. L.J. 207 (2003).

⁹ *Id.* at 108.

¹⁰ Rebecca Campbell, *The Neurobiology of Sexual Assault*, Presentation for Nat'l Inst. of Just. Translational Criminology Seminar Series (Dec. 3, 2012).

Dissociation is a state of “profound passivity in which the victim relinquishes all initiative and struggle” to mentally disconnect from the trauma experienced by the body.¹¹ Tonic Immobility, which is commonly referred to as “frozen fright,” leaves a victim temporarily paralyzed.¹² Collapsed Immobility has a more sudden onset than tonic immobility, but more gradual offset, and it is hallmarked by an extreme drop in heartrate and blood pressure to create faintness, “sleepiness,” or loss of consciousness.¹³

As described by researchers:

The fear-induced psychophysical states that impact a victim’s ability to react at the onset of or during a sexual assault are not unique to any one type of victim. They are seen in situations of extreme fear and (perceived) inescapable danger ranging from rape to combat. Nor are these reflexive reactions unique to humans. The deer in the headlights is the paradigm of Freeze...These psychophysical states are automatic, uncontrollable responses, the purpose of which is self-preservation. They have been repeatedly studied, described, and discussed in the professional literature, and are fully accepted in the field as required by the Frye test.¹⁴

Law enforcement professionals, including police, prosecutors, and judges, now receive training on the neurobiology of trauma to better understand the response of victims to sexual violence.

The consent rule must recognize the significance of modern understandings of the neurobiological impact of trauma on victims and avoids the dangers inherent in a consent standard that assumes consent absent expressions of unwillingness. As the ALI Reporters noted, “[t]o permit an inference of consent in these circumstances, when that person’s actual desires are relatively easy to clarify, is to expose individuals at risk to severe and readily avoidable danger.”¹⁵ Inherent in the consent definition is that “passivity cannot be equated with willingness.”¹⁶ In the face of passivity due to frozen fright (dissociation, tonic immobility, or collapsed immobility), inaction does not and should not imply the passive person’s desire to engage in sexual activity.

As the ALI Reporters recognized, “evolving social standards around sexual behavior have increasingly favored more open and honest expressions of sexual needs and stressed the importance, in ambiguous circumstances, of discouraging sexual intimacy without first seeking greater clarity.”¹⁷

¹¹ JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 42–43 (1992).

¹² See, e.g., Brian P. Marx et al., *Tonic Immobility as an Evolved Predator Defense: Implications for Sexual Assault Survivors*, 15 *CLINICAL PSYCHOL.: SCI. & PRAC.* 74 (2008).

¹³ See, e.g., Kasia Kozłowska et al., *Fear and the Defense Cascade: Clinical Implications and Management*, 23 *HARVARD REV. PSYCHIATRY* 263 (2015).

¹⁴ See, e.g., David Baldwin, *Primitive mechanisms of trauma response: an evolutionary perspective on trauma-related disorders*, 37 *NEUROSCI. & BIOBEHAVIORAL REVS.* 1549 (2013).

¹⁵ MODEL PENAL CODE 108 (Council Draft No. 2, Sept. 23, 2014).

¹⁶ MODEL PENAL CODE 109 (Council Draft No. 2, Sept. 23, 2014).

¹⁷ MODEL PENAL CODE 107–108 (Council Draft No. 2, Sept. 23, 2014).

In a 2015 Henry Kaiser Family Foundation/Washington Post poll, students aged 17 to 26 overwhelmingly understood that the absence of a “no” did not equate to consent and that consenting to some sexual activity does not give consent to other sexual activity.¹⁸ This proposed definition is part of the next generation’s understanding of sexual autonomy.

This resolution urges several steps to define consent so that the focus is on the willingness of a person who is competent to give consent to engage in a specific act of sexual penetration, oral sex, or sexual contact. It makes clear that there should be no requirement that a victim resist, verbally or physically, to demonstrate unwillingness to engage in sexual activity. It recognizes that it is important to consider the totality of the behavior of both a defendant and a victim in the context of all the circumstances.

Conclusion

A history of sexual violence, and of the status of women as the sexual property of men, still informs the law governing sexual assault, and that should stop. The proposed definition is a step in that direction. The ABA should recognize the inherent right of sexual autonomy and lead the way toward the implementation in legal codes in every jurisdiction of requiring words or action to express consent to sexual activity.

Respectfully submitted,

Mark I. Schickman
Chair, Commission on Domestic & Sexual
Violence

Lucian Dervan
Chair, Criminal Justice Section

August 2019

¹⁸ BIANA DIJULIO ET AL., HENRY KAISER FAMILY FOUNDATION, SURVEY OF CURRENT AND RECENT COLLEGE STUDENTS ON SEXUAL ASSAULT (2015), available at <https://www.kff.org/other/poll-finding/survey-of-current-and-recent-college-students-on-sexual-assault/>.

GENERAL INFORMATION FORM

Submitting Entity: Commission on Domestic and Sexual Violence
Criminal Justice Section

Submitted By: Mark I. Schickman, Chair, Commission on Domestic & Sexual Violence
Lucian Dervan, Chair, Criminal Justice Section

1. Summary of Resolution(s). The ABA urges legislatures and courts to define consent in sexual assault cases 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, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. Furthermore, the ABA urges all legislatures and courts to enact legislation or to adopt court rules that require judges in sexual assault cases in which consent is a disputed issue to specifically instruct juries that “the fact that a person did not resist, verbally or physically, to a specific act of sexual penetration, oral sex, or sexual contact does not mean that the person consented to that act.”
2. Approval by Submitting Entity. The Commission on Domestic and Sexual Violence approved sponsorship of the Resolution on April 2, 2019.

The Criminal Justice Section approved sponsorship of this resolution on April 5, 2019.

The Council of the Section of Civil Rights and Social Justice approved sponsorship of this resolution on April 13, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously?
n/a
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? ABA Policy 115 (MY 2019) states that the American Bar Association opposes the imposition upon sexual assault victims of a legal burden of resistance before legal protection attaches.¹⁹ This policy relates to the present resolution as it opposes the imposition of a legal burden of resistance upon sexual assault victims. This parallels with the current resolution as it expands on it to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. Furthermore, it expands on policy 115 to state that consent is expressed by words or action in the context of all the circumstances. The new resolution updates existing ABA policy to include the inherent right of sexual autonomy and explicitly recognize how consent is expressed.
5. If this is a late report, what urgency exists which requires action at this meeting of

¹⁹ [ABA Policy 115 \(MY 2019\)](https://www.americanbar.org/content/dam/aba/images/news/2019mymhodres/115.pdf)
<https://www.americanbar.org/content/dam/aba/images/news/2019mymhodres/115.pdf>

the House? n/a

6. Status of Legislation. Various legislatures and code bodies are considering changes to the Model Penal Code, and this resolution will make the ABA's views known.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Passing this resolution will allow the ABA to recognize the inherent right of sexual autonomy, and urge code bodies, legislatures and courts towards the implementation in legal codes in every jurisdiction of requiring words or action to express consent to sexual activity.
8. Cost to the Association. (Both direct and indirect costs) Adoption of this proposed resolution would result in only minor indirect costs associated with staff time devoted to the policy subject matter as part of the staff members' overall substantive responsibilities.

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

10. Referrals.

- Center for Human Rights
- Coalition on Racial and Ethnic Justice
- Commission on Sexual Orientation and Gender Identity
- Commission on Women in the Profession
- Section on Health Law
- Section of State and Local Government Law
- Government and Public Sector Lawyers Division
- Law Student Division
- Young Lawyers Division
- Judicial Division

11. Contact Name and Address Information. (Prior to House of delegates)

Mark I. Schickman, Chair, Commission on Domestic & Sexual Violence
 Freeland Cooper & Foreman LLP
 150 Spear St Ste 1800
 San Francisco, CA 94105-1541
 Tel.: 415-541-0200
 E-mail: schickman@freelandlaw.com

Vivian Huelgo, Director
 Commission on Domestic & Sexual Violence
 1050 Connecticut Avenue NW
 Washington, DC 20036
 Tel.: (202) 662-8637
 E-mail: Vivian.huelgo@americanbar.org

Kevin Scruggs, Section Director
Criminal Justice Section
1050 Connecticut Avenue NW
Washington, DC 20036
Tel.: (202) 662-1503
E-mail: kevin.scruggs@americanbar.org

Paula Shapiro, Acting Section Director
Section of Civil Rights and Social Justice
1050 Connecticut Avenue NW
Washington, DC 20036
Tel.: (202) 662-1029
E-mail: paula.shapiro@americanbar.org

12. Contact Name and Address Information.

Mark I. Schickman, Chair, Commission on Domestic & Sexual Violence
Freeland Cooper & Foreman LLP
150 Spear St Ste 1800
San Francisco, CA 94105-1541
Tel.: 415-541-0200
Email: schickman@freelandlaw.com

Stephen Saltzburg, CJS Delegate
2000 H Street, NW
Washington DC 20052
Tel.: 202-994-7089
Email: ssaltz@law.gwu.edu

EXECUTIVE SUMMARY

1. Summary of the Resolution

The ABA urges legislatures and courts to define consent in sexual assault cases 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, and to reject any requirement that sexual assault victims have a legal burden of verbal or physical resistance. Furthermore, the ABA urges all legislatures and courts to enact legislation or to adopt court rules that require judges in sexual assault cases in which consent is a disputed issue to specifically instruct juries that “the fact that a person did not resist, verbally or physically, to a specific act of sexual penetration, oral sex, or sexual contact does not mean that the person consented to that act.”

2. Summary of the Issue that the Resolution Addresses

Some jurisdictions and codes still assume a willingness to engage in sexual activity, even without any indication of consent absent significant resistance. The proposed definition of consent rejects that premise of willingness, and requires words or action to express a person’s willingness to engage in sexual activity.

3. Please Explain How the Proposed Policy Position Will Address the Issue

The proposed policy proposition addresses this issue by supporting a definition of consent that requires words or action to express a person’s willingness to engage in sexual activity, and cautions that the absence of verbal or physical resistance does not mean that the victim consented to the sexual act.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

n/a