



# MACDL

Massachusetts Association of  
Criminal Defense Lawyers

From: MACDL Board of Directors  
To: Massachusetts Representatives in the ABA House of Delegates  
Date: August 7, 2019  
Re: ABA Resolution 114

The Massachusetts Association of Criminal Defense Lawyers (“MACDL”) calls on Massachusetts representatives in the ABA House of Delegates to oppose the ABA’s Resolution 114, which urges state legislatures to adopt an affirmative consent requirement for sexual assault cases. We ask that you vote against Resolution 114, and that you contact your colleagues in the House of Delegates and the Criminal Justice Section to express your opposition to the resolution.

As our colleagues in the National Association of Criminal Defense Lawyers (“NACDL”) have pointed out in opposing the resolution, it unconstitutionally shifts the burden of proof to the accused in criminal sexual assault cases. *NACDL Opposes Affirmative Consent Resolution ABA Resolution 114* (July 25, 2019). It should go without saying that in a criminal case, the burden of proving each element of an offense, beyond a reasonable doubt, must rest on the prosecution. This principle is absolutely fundamental under both the United States Constitution and the Massachusetts Declaration of Rights. But Resolution 114 would define consent 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,” and would “provide that consent is expressed by words or action in the context of all the circumstances . . .” This formulation would allow the prosecution to obtain a conviction of sexual assault by simply proving sexual contact, unless the defendant could show that the contact was consensual. It would thus place the burden of demonstrating consent on the defendant, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments and the Presumption of Innocence and of art. 12 of the Massachusetts Declaration of Rights, and further would in practice almost inevitably require the defendant to testify in order to provide proof of consent, in violation of the Fifth Amendment and art. 12 of the Massachusetts Declaration of Rights.

Resolution 114 will make the crimes of rape and sexual assault so overbroad that it risks criminalizing sexual behavior without regard to the intent of the accused person. It fails to answer or even acknowledge basic questions that will inevitably arise under its proposed standard about how to interpret non-verbal communications of consent. As numerous members of the American Law Institute (“ALI”) wrote regarding the proposal to insert an affirmative consent provision into the Model Penal Code—which the ALI ultimately squarely rejected—adoption of this standard could lead to absurd results, such as situations in which both parties to a sexual interaction could plausibly claim that elements of sexual activity occurred without their prior express consent. Memorandum from Undersigned ALI Members and Advisers to ALI

Director et al. (May 12, 2015) (available online at <http://lbackerblog.blogspot.com/2015/05/sexual-assault-at-american-law.html>.) In practice, its breadth will give police and prosecutors enormous discretion to apply their own biases and views of morality, leading to the risk that sexual assault prosecutions will disproportionately target racial or sexual minorities.

Many of our members, including members of our board, represent students accused of sexual misconduct in campus disciplinary proceedings at colleges and universities that have adopted affirmative consent standards. Harvard Law School Professor Janet Halley's caution that affirmative consent standards "will foster a new, randomly applied moral order that will often be intensely repressive and sex-negative" is very well-taken. Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS CURRENTS (2016). This has proven so true that the NCHERM Group, a major proponent and architect of campus affirmative consent policies, in 2017 devoted its annual whitepaper to exhorting Title IX administrators and investigators not to use those policies to act as the "sex police." Nedda Block et al., *The NCHERM Group 2017 Whitepaper: Due Process and the Sex Police* (2017). Our experience, as counsel privy to the details of numerous cases, is that parsing the details of real human sexual activity to determine whether consent was present for every escalation of sexual activity is difficult, sometimes impossible, and application of the affirmative consent standard in practice frequently leads to injustice. The criminal law should not emulate universities in adopting this standard.

While more and better communication in all sexual interactions is a laudatory and important goal, criminal law is not the way to reshape our society's sexual mores. Resolution 114 ignores the difficulties that will attend its implementation, scoring political points at the expense of thoughtfully grappling with the likely practical consequences of its wording for individual defendants and for our legal system. On behalf of our clients and our members, the Massachusetts Association of Criminal Defense Lawyers Board of Directors urge you to strenuously oppose the resolution.