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# 2020 Interim Study

Committee on Corrections and Criminal Code:  
**CONSENT**



Indiana Coalition to  
**End Sexual Assault  
& Human Trafficking**

Engage. Educate. Empower.

9245 N. Meridian Street, Suite 227  
Indianapolis, IN 46260  
317.624.2370

[icesaht.org](http://icesaht.org)

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## It's Simple

“It’s time to recognize that physically penetrating another person’s body without their permission is serious misconduct that our society and our criminal law ought to condemn.

The need for permission is elementary, and it need not be understood in terms of written contracts, artificial verbal formulas, or any other unrealistic behavioral ritual.

Ordinary citizens know what it means to have permission, expressed or implied, and they know that it is unacceptable to take liberties with someone’s person or property without permission.

That’s all that consent means, and it’s a matter of simple justice to require it.”

– *Stephen J. Schulhofer*

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## STATES WITH CONSENT LEGISLATION

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State	Statute	Definition <i>All of these states have a definition requiring “freely given consent” or “affirmative consent”</i>
<b>Illinois</b>	720 ILCS 5/11-1.70. People v. Roldan, 2015 IL App (1st) 131962, ¶ 19.	“Consent” means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent. A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct. 720 ILCS 5/11-1.70.  “The focus is on what the defendant knew or reasonably should have known regarding the victim’s willingness or ability to give knowing consent.”
<b>Wisconsin</b>	Wis. Stat. Ann. § 940.225(4).	“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 or sexual contact.
<b>California</b>	California Penal Code § 261.6.	“Consent” is defined to mean positive cooperation in act or attitude pursuant to the exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved. (California Penal Code § 261.6.) Consent cannot be procured through inducing fear in the victim. (West’s Ann.Cal.Penal Code § 266c.)  “Every person who induces any other person to engage in sexual intercourse, sexual penetration, oral copulation, or sodomy when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person’s free will, and does cause the victim to so act, is punishable by imprisonment...As used in this section, “fear” means the fear of physical injury or death to the person or to any relative of the person or member of the person’s family.”
<b>Florida</b>	Florida Statutes § 794.011.	“Consent” means intelligent, knowing, and voluntary consent and does not include coerced submission. “Consent” shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender.
<b>Minnesota</b>	Minn. Stat. § 609.341(4).	“Consent” means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act.

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## STATES WITH CONSENT LEGISLATION (continued)

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State	Statute	Definition <i>All of these states have a definition requiring “freely given consent” or “affirmative consent”</i>
<b>Colorado</b>	Colorado Revised Statutes Annotated § 18-3-401(1.5).	“Consent” means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. (Colorado Revised Statutes Annotated § 18-3-401(1.5).) A current or previous relationship shall not be sufficient to constitute consent. Submission under the influence of fear shall not constitute consent.
<b>Washington D.C.</b>	D.C. Code § 22-3001(5).	“Consent” means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent. “Force” means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.
<b>New Hampshire</b>	N.H. Rev. Stat. Ann. § 632-A:2(m).	A person commits aggravated felonious sexual assault if he or she engages in sexual penetration with a person that indicates by speech or conduct that there is not freely given consent to performance of the sexual act.
<b>Oklahoma</b>	Okla. Stat. tit. 21, § 113.	The term “consent” means the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter which can be revoked at any time.
<b>Washington</b>	Wash. Rev. Code Ann. § 9A.44.010(7).	Consent requires that there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact at the time of the act.

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# **The Fundamental Five**

## Implications of Not Having a Consent Law

## THE FUNDAMENTAL FIVE

### Implications of Not Having a Consent Law

1

Without a consent law, there is a presumption that all individuals are open to sexual intercourse (at any time and with any person) **until they communicate their unwillingness.**

- ▶ The law presumes that an adult is willing to have sex, even with strangers, or multiple strangers at one time, and in unexpected encounters, until the individual specifically indicates otherwise.

2

**Sex without consent is NOT a crime.** Instead, an additional element must be proven such as force or threat of force or incapacitation for a crime to be committed.

- ▶ What this means: you can say NO or any version of NO (i.e. stop, I don't want to, get away, get off of me) and your words simply do not matter.
- ▶ When it comes to rape - the law does not recognize the word NO.

3

For victims to **“prove”** that they did not “consent” to being raped they essentially have to **fight off their rapist.**

- ▶ The expectation that a sexual assault victim should not only have to but be able to fight off their attacker is in stark contrast to years of research on trauma and the neurobiology of trauma victims.
- ▶ What other crime scenario is there a legal expectation of you to fight your attacker to prove that in fact, a crime was perpetrated on you?

4

When the law (and society) only see rape as occurring under physically violent conditions, we are **remarkably undermining and devaluing the seriousness of this crime.**

- ▶ Many offenders are classified as “nonviolent”. These offenders are not “nonviolent”. It is more accurate to say that they don't involve what the law regards as the “required kind of force.” The force that is involved is seen as normal and therefore permissible.
  - Offenders demonstrate:
    - Planning and calculation
    - Wanton disregard for human life
    - Willful intent
- ▶ When we undermine and devalue the seriousness of this crime, we also minimize the life altering harm on a victim emotionally, spiritually, physically and economically, as well as the harm this causes us (society) collectively.

5

**Without defining consent and having strong laws, it is increasingly difficult to hold perpetrators accountable which increases the risk of repeatedly offending.**

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# The Comparison of Criminal Law and Rape Law

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## THE COMPARISON OF CRIMINAL LAW & RAPE LAW

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### Protection of Physical Safety

#### Robbery & Assault

- Non-consensual
- Courts set a low standard of force to prove fear and non-consent
- Applies the Reasonable Man Test
- Law does not expect a person to risk serious injury or death in defense of self or property

#### Rape

- Non-consensual
- Only the law of rape makes unjustified adverse assumptions about the general sincerity of victims
- Lead to requirements of much higher levels of proof of force and resistance.
- Physical safety of victims less protected in cases of rape than in cases of robbery or simple assault

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**Consent serves to protect physical safety and freedom of choice by setting limits on the scope of injury to which an individual can effectively consent.**

#### Hazing/Aggravated Assault

- Pledge consents to undergo initiation
- Initiation = pledge brutally beat by current members
- Willingness to undergo initiation rites is not a defense to a prosecution of the existing members for assault.

#### Rape

- Individuals who agree to have a drink, go for a ride, or engage in petting are often held to have consented, by those actions, to intercourse or other sexual contact.
- Freedom of choice is no less violated than that of the pledge who consents to initiation.

Law of rape demonstrates little sensitivity to the idea of limited consent and only the victim is held legally responsible for unlimited consent to harm

## THE COMPARISON OF CRIMINAL LAW & RAPE LAW

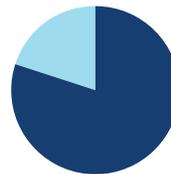
### Consent in Relation to Coercion

Search and seizure	Rape
<ul style="list-style-type: none"><li>▪ Warrantless searches by state officers are legal under the 4th and 14th amendments only if the person whose privacy interests are encroached voluntarily submits to the search.</li><li>▪ Courts require effective consent be: <i>“Informed, specific to the scope of the search, and uncontaminated by any physical or mental coercion.”</i></li><li>▪ Courts do not require a showing that physical force was used, or resistance mounted as evidence that consent to search was withheld.</li></ul>	<ul style="list-style-type: none"><li>▪ No definition or requirement of consent.</li><li>▪ Requires a showing of physical force and/or resistance.</li><li>▪ Argument: If it is not in accordance with human experience for a person subjectively to consent to searches made under clear, if unspoken, threats of physical harm it is NOT unrealistic to expect a victim to “consent” when confronted by similar threats.</li><li>▪ Since the basic element of rape is non-consent and the basic value protected by that element is Freedom of Choice, then the law should recognize that forms of coercion, other than threats or infliction of bodily harm preclude effective consent to intercourse.</li></ul>

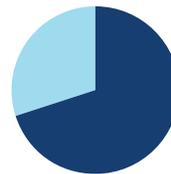
### ADDITIONAL INFORMATION

Tonic Immobility: An involuntary, temporary state of motor inhibition in response to situations involving intense fear. It has been further described as a catatonic-like state with muscle hyper- or hypo-tonicity, tremor, lack of vocalization, and relative unresponsiveness to external stimuli.

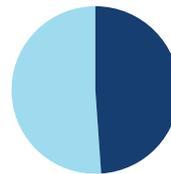
- 80% reported significant fear during sexual assault
- 70% reported significant immobility
- Nearly 50% reported extreme immobility



**80%**  
reported significant fear during  
sexual assault



**70%**  
reported significant immobility



**Nearly 50%**  
reported extreme immobility

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## UNDERSTANDING THE HORMONAL RESPONSE DURING TRAUMA

Hormonal/Chemical	Function	Impact on Victim
<b>Catecholamines</b>	Adrenaline - Fight/Flight	<ul style="list-style-type: none"><li>▪ Difficulty thinking rationally</li><li>▪ Jumbled up thoughts “I can't think straight.”</li></ul>
<b>Cortisol</b>	Primary stress hormone suppresses the body from doing anything which isn't necessary, allows the brain and body to focus all of its resources into dealing with the threat at hand. Curbs functions that would be nonessential or detrimental in a fight-or-flight situation.	<ul style="list-style-type: none"><li>▪ Victim's body was frozen “I couldn't move or scream.”</li></ul>
<b>Opiates</b>	Body's natural morphine counteracts physical pain/numbs the pain	<ul style="list-style-type: none"><li>▪ Victim appears emotionless or “flat” “I don't feel anything at all.”</li></ul>
<b>Oxytocin</b>	Increases positive feelings, the feel-good hormone to counteract physical pain	<ul style="list-style-type: none"><li>▪ Smiling, laughing, giggling</li></ul>

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## REFERENCES

Stephen J. Shullhofer, “Consent: What It Means and Why It's Time to Require It.” *The University of the Pacific Law Review*, vol 47, 2016, pp 1-17.

Klein, Richard (2008) “An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness,” *Akron Law Review*: Vol. 41: Iss. 4 , Article 7.

Møller A, Søndergaard HP, Helstrøm L. “Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression.” *Acta Obstet Gynecol Scand* 2017; 96:932–938.

Stephen J. Schulhofer, “Reforming the Law of Rape,” 35 *Law & Ineq.* 335 (2017).

Reed Harris, Lucy. “Towards a Consent Standard in the Law of Rape.” *The University of Chicago Law Review*, vol. 43, no. 613.

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## Previously Introduced Bills

# 2020 Legislative Session

\*IPAC Support of this Bill\*

Introduced Version

## House Bill 1160

**Citations Affected:** IC 35-31.5-2-57.5; IC 35-42-4.

**Synopsis:** Consent. Defines "consent" for an offense involving a sex crime. Provides that a person commits rape if the person engages in sexual activity with another person and the other person: (1) has not given consent; or (2) submits to the sexual activity under the belief that the person committing the act is someone the victim knows, other than the person committing the act, and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the person.

Effective: July 1, 2020.

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**Errington, Negele, Campbell,  
Schaibley**

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HOUSE BILL No. 1160

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 35-31.5-2-57.5 IS ADDED TO THE INDIANA  
2 CODE AS A **NEW** SECTION TO READ AS FOLLOWS  
3 [EFFECTIVE JULY 1, 2020]: **Sec. 57.5. "Consent", for purposes of**  
4 **IC 35-42-4, has the meaning set forth in IC 35-42-4-0.5.**  
5 SECTION 2. IC 35-42-4-0.5 IS ADDED TO THE INDIANA CODE  
6 AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY  
7 1, 2020]: **Sec. 0.5. (a) As used in this chapter, "consent" means a**  
8 **freely given agreement to the conduct at issue by a competent**  
9 **person.**  
10 **(b) A person cannot consent if:**  
11 **(1) the person expresses a lack of consent through words or**  
12 **conduct;**  
13 **(2) the person is sleeping, unconscious, or incompetent; or**  
14 **(3) the force to the person causes or is likely to cause death or**  
15 **serious bodily injury.**  
16 **All of the surrounding circumstances shall be considered in**  
17 **determining whether a person gave consent.**

- 1       **(c) The following does not constitute consent:**  
 2       **(1) Lack of verbal or physical resistance.**  
 3       **(2) Submission resulting from the use of force ,threat of force,**  
 4       **or placing another person in fear.**  
 5       **(3) A current or previous marital, dating, social, or sexual**  
 6       **relationship by itself.**  
 7       **(4) The manner of a person's dress.**  
 8       SECTION 3. IC 35-42-4-1, AS AMENDED BY P.L.168-2014,  
 9       SECTION 6 7, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
 10       JULY 1, 2020]: Sec. 1. (a) Except as provided in subsection (b), a  
 11       person who knowingly or intentionally has sexual intercourse with  
 12       another person or knowingly or intentionally causes another person to  
 13       perform or submit to other sexual conduct (as defined in  
 14       IC 35-31.5-2-221.5) when:  
 15       (1) the other person is compelled by force or imminent threat of  
 16       force;  
 17       (2) the other person is unaware that the sexual intercourse or other  
 18       sexual conduct (as defined in IC35-31.5-2-221.5) is occurring; or  
 19       **(3) the other person has not given consent;**  
 20       **(4) the other person submits to the sexual intercourse or other**  
 21       **sexual conduct (as defined by IC 35-31.5-2-221.5) under the**  
 22       **belief that the person committing the act is someone the**  
 23       **victim knows, other than the person committing the act, and**  
 24       **such belief is intentionally induced by any artifice, pretense,**  
 25       **or concealment practiced by the person; or**  
 26       ~~(5) the other person is so mentally disabled or deficient that~~  
 27       consent to sexual intercourse or other sexual conduct (as defined  
 28       in IC 35-31.5-2-221.5) cannot be given;  
 29       commits rape, a Level 3 felony.  
 30       (b) An offense described in subsection (a) is a Level 1 felony if:  
 31       (1) it is committed by using or threatening the use of deadly force;  
 32       (2) it is committed while armed with a deadly weapon;  
 33       (3) it results in serious bodily injury to a person other than a  
 34       defendant; or  
 35       (4) the commission of the offense is facilitated by furnishing the  
 36       victim, without the victim's knowledge, with a drug (as defined in  
 37       IC 16-42-19-2(1)) or a controlled substance (as defined in  
 38       IC 35-48-1-9) or knowing that the victim was furnished with the  
 39       drug or controlled substance without the victim's knowledge.

# 2019 Legislative Session

Introduced Version

House Bill No. 1489

**Citations Affected:** IC 35-31.5-2-57.7; IC 35-42-4.

**Synopsis:** Rape and sexual battery. Defines "consent". Provides that a person commits rape if the person engages in sexual activity without the consent of the victim, and that a person commits sexual battery if the person, with intent to arouse sexual desires, touches another person without the consent of the person

**Effective:** July 1, 2019

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## Errington, Campbell

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HOUSE BILL No. 1489

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 35-31.5-2-57.7 IS ADDED TO THE INDIANA  
2 CODE AS A **NEW** SECTION TO READ AS FOLLOWS  
3 [EFFECTIVE JULY 1, 2019]: **Sec. 57.7. "Consent" means a free,**  
4 **voluntary, knowing, and mutual agreement to engage in a specific**  
5 **sexual act or contact, including positive and affirmative**  
6 **cooperation in words, act, or attitude pursuant to the exercise of**  
7 **free will. Consent may be withdrawn at any time, and any**  
8 **expression of lack of consent, by words, act, or attitude, means that**  
9 **consent does not exist or has been withdrawn. The:**  
10 **(1) existence of a current or previous dating, social, sexual, or**  
11 **marital relationship by itself; or**  
12 **(2) manner of a person's dress;**  
13 **does not constitute consent. Submission under the influence of fear,**  
14 **deception, coercion, or surprise does not constitute consent.**

15 SECTION 2. IC 35-42-4-1, AS AMENDED BY P.L.168-2014,  
16 SECTION 67, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
17 JULY 1, 2019]: Sec. 1. (a) Except as provided in subsection (b), a

1 person who knowingly or intentionally has sexual intercourse with  
 2 another person or knowingly or intentionally causes another person to  
 3 perform or submit to other sexual conduct (as defined in  
 4 IC 35-31.5-2-221.5) when:

5 **(1) the other person has not given consent;**

6 ~~(1)~~ **(2)** the other person is compelled by force or imminent threat  
 7 of force;

8 ~~(2)~~ **(3)** the other person is unaware that the sexual intercourse or  
 9 other sexual conduct (as defined in IC 35-31.5-2-221.5) is  
 10 occurring; or

11 ~~(3)~~ **(4)** the other person is so mentally disabled or deficient that  
 12 consent to sexual intercourse or other sexual conduct (as defined  
 13 in IC 35-31.5-2-221.5) cannot be given;

14 commits rape, a Level 3 felony.

15 (b) An offense described in subsection (a) is a Level 1 felony if:

16 (1) it is committed by using or threatening the use of deadly force;

17 (2) it is committed while armed with a deadly weapon;

18 (3) it results in serious bodily injury to a person other than a  
 19 defendant; or

20 (4) the commission of the offense is facilitated by furnishing the  
 21 victim, without the victim's knowledge, with a drug (as defined in  
 22 IC 16-42-19-2(1)) or a controlled substance (as defined in  
 23 IC 35-48-1-9) or knowing that the victim was furnished with the  
 24 drug or controlled substance without the victim's knowledge.

25 **(c) In determining whether consent exists, the trier of fact shall**  
 26 **consider whether a reasonable person would understand the**  
 27 **words, acts, or attitudes to constitute consent under all of the**  
 28 **circumstances.**

29 SECTION 3. IC 35-42-4-8, AS AMENDED BY P.L.158-2013,

30 SECTION 444, IS AMENDED TO READ AS FOLLOWS

31 [EFFECTIVE JULY 1, 2019]: Sec. 8. (a) A person who, with intent to  
 32 arouse or satisfy the person's own sexual desires or the sexual desires  
 33 of another person:

34 (1) touches another person when that person: is:

35 **(A) has not given consent;**

36 ~~(A)~~ **(B)** is compelled to submit to the touching by force or the  
 37 imminent threat of force; or

38 ~~(B)~~ **(C)** is so mentally disabled or deficient that consent to the  
 39 touching cannot be given; or

40 (2) touches another person's genitals, pubic area, buttocks, or  
 41 female breast when that person is unaware that the touching is  
 42 occurring;

1 commits sexual battery, a Level 6 felony.  
2 (b) An offense described in subsection (a) is a Level 4 felony if:  
3 (1) it is committed by using or threatening the use of deadly force;  
4 (2) it is committed while armed with a deadly weapon; or  
5 (3) the commission of the offense is facilitated by furnishing the  
6 victim, without the victim's knowledge, with a drug (as defined in  
7 IC 16-42-19-2(1)) or a controlled substance (as defined in  
8 IC 35-48-1-9) or knowing that the victim was furnished with the  
9 drug or controlled substance without the victim's knowledge.  
10 **(c) In determining whether consent exists, the trier of fact shall**  
11 **consider whether a reasonable person would understand the**  
12 **words, acts, or attitudes to constitute consent under all of the**  
13 **circumstances.**