Date: October 5, 2015 (with Co-Signers as of October 30, 2015)

From: Undersigned ALI Members and Advisers

To: ALI Director, Deputy Director, Project Reporters, Council and Members

Subject: Revisions to Sexual Assault Provisions of the Model Penal Code

Dear Colleagues:

The undersigned ALI members and advisers write to express concerns with respect to Preliminary Draft No. 5 of the Model Penal Code: Sexual Assault and Related Offenses project. Although the draft has been in circulation only for a few weeks and although it has been reviewed by few other than ourselves, we write now because a meeting of the Advisers and Members Consultative Group is impending and because of the unusual scheduling of a Council meeting to discuss the draft just one week later. As a result, there is insufficient time between the first and second meetings for the submission of comments and we believe it is necessary to attempt to explain certain important points now.

Before beginning, we note and appreciate the new addition of Section 213.11 which begins the needed discussion for reform of offender registries. We also acknowledge and appreciate the Reporter's statement that "Taking into account the concerns about overbreadth and over-criminalization forcefully expressed at the last Annual Meeting, Article 213 has been revised." Reporter's Memorandum at *xi*. The changes are generally positive but, as set forth below, the changes do not resolve the fundamental concerns.

Many of us were signatories to the May 12, 2015 co-signed memorandum previously distributed and we urge continued consideration of the objections raised therein. Given the shortness of time and the massive undertaking required, this memorandum will not address in detail all of our concerns about the new 294 page draft. Rather, we write to express concern about the overall development of the project and its deviation from ALI standards.

We begin with reference to A Handbook for ALI Reporters and Those Who Review Their Work, https://www.ali.org/media/filer_public/08/f2/08f2f7c7-29c7-4de1-8c02-d66f5b05a6bb/ali-style-manual.pdf as published on the ALI website, which provides with respect to model code projects:

> "2. **Legislative Recommendations**
>
> **Model or uniform codes or statutes and other statutory proposals are addressed mainly to legislatures, with a view toward legislative enactment.**
>
> a. *Nature of Model Codes*. Unlike its Restatements, the Institute's legislative recommendations are written with a view toward their formal legislative enactment. Nevertheless, in many respects the formulations in these projects do not differ from the Restatements.
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> Although soon after its creation the Institute began to draft model and uniform laws, it has avoided involving itself in "novel social legislation." Codifications such as the Uniform

> Commercial Code, the Model Penal Code, and the Federal Securities Code have built upon, rationalized, and synthesized previous legislation in these areas rather than proposing legislation in fields where it had not previously existed. A more recent initiative, the Federal Judicial Code Revision Project, has proposed modest incremental improvements in the Judicial Code rather than a comprehensive revision. Although the Institute's founders considered advocacy of "any change in the law pertaining to taxation" as inappropriate, the Institute's subsequent extensive involvement in federal tax projects has also come to exemplify this incremental approach to legislation. A proposed Income Tax Statute influenced the 1954 Internal Revenue Code by way of clarification, and selective tax proposals developed subsequently have also mainly sought to clarify established and widely accepted tax policy." (*id*. at 11-12).

In sum, the Handbook states that "in many respects the formulations in these projects do not differ from the Restatements;" that ALI "has avoided involving itself in 'novel social legislation;'" that "Codifications such as the Uniform Commercial Code, the Model Penal Code, and the Federal Securities Code have built upon, rationalized, and synthesized previous legislation;" that ALI has "proposed modest incremental improvements in the Judicial Code rather than a comprehensive revision;" that other projects have "also come to exemplify this incremental approach to legislation;" and that, by way of example, "tax proposals developed subsequently have also mainly sought to clarify established and widely accepted tax policy."

In contrast, Preliminary Draft No. 5 expressly states that:

> "… the problem calls for an entirely fresh start. Accordingly, it was judged best to strike the [Model Penal Code] 1962 text and Commentary in their entirety. The remainder of the present Commentary presents and explains the newly revised Article 213 that replaces them." (Preliminary Draft No. 5 at 30).

Many states adopted variations of the 1962 Model Penal Code and, over the years, each state has undertaken extensive revisions based upon experience in large numbers of cases. Rather than setting out a rationalized and synthesized body of the law as it is, Preliminary Draft No. 5, like its predecessors, sets out an entirely new vision as if it were writing on a blank slate. Preliminary Draft No. 5 does not thoroughly survey the existing law of the fifty states as would a Restatement in a search for commonalities and majority positions and successful practices.

To the contrary and in opposition to the guidance of the Handbook for ALI Reporters in seeking the avoidance of "novel social legislation," Preliminary Draft No. 5 explicitly states its intention to impose new social norms through the force of criminal sanction:

> "[A] vitally important function of the criminal law is to identify and seek to deter behaviors that pose unjustifiable risks, even when those risks are not yet universally understood…. Because criminal law is the site of the most afflictive sanctions that public authority can bring to bear on individuals, it necessarily must and will reflect prevailing social norms. But for the same reason, it must often be called upon to help shape those norms by communicating effectively the conditions under which commonplace or seemingly innocuous behavior can be unacceptably abusive or dangerous.

> Nearly all law-reform efforts addressed to the sexual offense are met at some point by the objection that they go beyond social standards currently accepted by a good many law-abiding citizens…. Where deeply felt injuries are not yet fully appreciated by the general public, the criminal law may at times properly carry the burden of insuring that appropriate norms of interpersonal behavior are more widely understood and respected." Preliminary Draft No. 5 at 15.

While the "forcefully expressed" opposition to the so-called "affirmative consent" standard was heard and acknowledged, Preliminary Draft No. 5 does not retreat from that standard, but merely changes the specific offenses to which it applies, *see, e.g.*, Section 213.2(2).

While the Supreme Court has completed its dismantling of per se sexual offenses (same sex, inter-racial, use of sex aids, non-marital sex…..), Preliminary Draft No. 5 seeks to create new *per se* offenses, *see, e.g.*, Section 213.4(2)(a).

While the law has moved to grant equal respect to all crime victims, Preliminary Draft No. 5 creates a conclusive presumption that an offense committed during a "commercial sex act" is automatically "one degree higher than that otherwise provided in this article." Section 213.8.

For these and other reasons, the proposed Black Letter of Preliminary Draft No. 5 does deviate from the Handbook for ALI Reporters and contributes to the problem of overcriminalization that has been acknowledged across the political spectrum.

Quite apart from the Black Letter rules propounded in Preliminary Draft No 5, there are concerns about how those rules are derived and supported (or not supported) in the commentary. There are also serious disconnects between the commentary and the plain reading of the Black Letter. The Handbook for ALI Reporters addresses these important considerations:

> "The persuasiveness of the Institute's recommendations to lawmakers depends upon the objectivity and thoroughness of its procedures and the demonstrable quality of its work product. Commentary and Reporter's Notes in legislative projects should therefore be as fully developed and informative as those found in the Restatements and should include thorough consideration of the policy choices reflected in the proposed statute. Because, however, some courts refuse to consider supplemental material of this nature in interpreting statutory language, Reporters for the Institute's legislative projects should take care that everything intended to be covered by a proposed statute is clearly expressed in the black letter." See II.B.3.a. (*id*. at 11-12).

This brief memorandum cannot fully elucidate our concerns about the Black Letter and commentary in the 294 pages of Preliminary Draft No. 5 but an example is illustrative. The prior draft's push for adoption of the concept of "affirmative consent" was at the core of the "forcefully expressed" opposition at the last Annual Meeting. Preliminary Draft No. 5 narrows but retains the applicability of that contentious concept. Preliminary Draft No. 5 purports to dispense with the objections to "affirmative consent" on pages 64 through 73 but those pages are most remarkable for what they do not contain.

Except for a single footnote reference to a 1993 book titled "The Morning After" by Katie Rophie, pages 64 through 73 do not identify any source of opposition to affirmative consent.

At no place on pages 64 through 73 is any opposition to affirmative consent stated other than in the Reporter's paraphrasing and shaping of the objections, often negatively characterized ("common misunderstandings," "misconceptions," "highly misleading," "simply begs the question," "meaningless rhetoric," "considerable exaggeration," "incoherent," etc.)

Pages 64 through 73 are devoid of any citation to legal authorities except one footnote citing one inapposite Supreme Court case, *Lawrence v. Texas*, 539 U.S. 558 (2003) (same sex couple right to privacy) that does not address affirmative consent and one footnote citing a UK case and a Canadian case, neither of which utilized the standard proposed in Preliminary Draft No. 5 but which are said to have some similarity to it. In other places, e.g., p. 66, the only citation is to a book by one of the Reporters, Unwanted Sex: The Culture of Intimidation and the Failure of the Law. This book appears to be cited 18 times in Preliminary Draft No. 5, with 13 of those being the only support for the assertion being presented.

Pages 68 through 71 which purport to refute six major arguments in opposition to "affirmative consent" have no citations whatsoever except a single footnote referring back to a prior discussion of a public opinion survey.

Preliminary Draft No. 5 fails to mention the concern that "affirmative consent" begins with a presumption of guilt. Consider a prosecutor who merely says:

> "Ladies and Gentlemen of the jury. There were 127 digital, oral or genital sexual contacts during the night in question and the record contains no proof of prior continuous affirmative consent for any one of those 127 contacts, much less all of them. The prosecution rests."

While failing to identify this objection, Preliminary Draft No. 5 unambiguously admits that the objection is correct and is, in fact, the intention of the draft. The defendant must negate the presumption that sex by itself is a crime for which the defendant find some exculpation:

> "Prosecutors in affirmative-consent jurisdictions explain that defense counsel often rely on cross-examination and other evidence to challenge the complainant's testimony ("Didn't you text him flirtatiously the next day? Are you sure you weren't the one who unbuttoned your blouse? ... Didn't you kiss back?"). Moreover, the pressure on a defendant to take the stand is no different from that which arises in any other context where the prosecution presents prima facie evidence of guilt…"
>
> "An affirmative-consent requirement deliberately shifts that burden; it requires the person who takes the initiative to ascertain whether the other party is willing." (*id*. at 68).

The presumption of guilt is expressly intended to coerce guilty pleas:

> "It is true that in such cases prosecutors in an affirmative-consent jurisdiction will find it easier to obtain guilty pleas because they need only prove absence of consent. But this impact is precisely the one that an affirmative-consent standard aims to achieve." (*id*. at 69).

Prosecutorial power in coercing pleas by charging multiple offenses is seen by the draft as a useful tool and the presumption of guilt is explained as just one more addition to the toolbox:

> "The criminal code of every jurisdiction affords prosecutors a wide range of fallback offenses (including sexual offenses) to wield strategically if they seek to insure a guilty plea in a factually disputed case—charges such as attempted rape, attempted sexual assault, assault with intent to commit a sexual offense, unlawful sexual contact, and so on. Whatever a prosecutor's strategic calculus and policy preferences, it is not apparent why the prosecutor's desire or ability to secure a lesser-offense plea would be significantly affected by adding one more fallback offense to the prosecutor's already-long list of bargaining options." (*id*. at 69).

The objection about the creation of an improper presumption is far from rare or secret. For example, Nadine Strossen, former President of the ACLU and a faculty member at New York Law School recently said:

> "These affirmative consent rules [in colleges] violate rights of privacy and due process. They reverse the usual presumption of innocence. Unless a guy can prove that his sexual partner affirmatively consented to every single contact, he is presumed guilty of sexual misconduct. Will people have to wear body cameras?" http://news.hamlethub.com/ridgefield/events/48981-former-aclu-president-nadine-strossen-will-be-the-keynote-speaker-at-wcsu-s-constitution-day

Other serious concerns about "affirmative consent" and its presumption of guilt are not hard to find. *See, e.g.*, http://prawfsblawg.blogs.com/prawfsblawg/2015/09/affirmative-consent-and-switching-the-burden-of-proof.html; http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1075&context=scholarlyworks; https://kcjohnson.files.wordpress.com/2013/08/memorandum-mock.pdf

As noted in the comment previously posted by Professor Kirkpatrick, the draft here adopts distinctly small minority positions and even overstates those minority positions. As the Reporter's Memorandum preceding Preliminary Draft No. 5 acknowledges, after the opposition "forcefully expressed at the last Annual Meeting" (*id*. at xi) "The reporters investigated and found to be well-founded the concerns about overbreadth expressed at the Annual Meeting" (*id*.), and "Based on further research" (*id*. at xii) the Reporters acknowledged that the case law in the minority jurisdictions does not support important positions taken in the prior draft.

The Advisers and MCG have never been presented an alternative to "affirmative consent" and have never been presented anything other than arguments in favor of "affirmative consent." The Advisers and MCG have not received or had opportunity to review any source material from opponents of the Reporters' point of view other than items these volunteers have found on their own and brought forward. That is not the standard envisioned in the Handbook for ALI reporters which states:

> "The persuasiveness of the Institute's recommendations to lawmakers depends upon the objectivity and thoroughness of its procedures and the demonstrable quality of its work product." (*id*. at 12).

While the preceding demonstration was limited by time and space to just a few of the problems with Preliminary Draft No. 5, the draft is too flawed to proceed.

It has been suggested that certain topics are ripe for final discussion. Nothing could be further from the truth not only for the reasons demonstrated above but also from the representations previously made to

all ALI members that prior exposure of the material was merely exploratory and had not been subjected to any serious review:

> "Let me say, before I turn the floor over to the Reporters for a few minutes, that we are truly just in the discussion phase. Much of what has caused a great deal of very helpful comment has not been approved by anybody. It's just kind of a first draft, and the Reporters have been wonderful in wanting to hear from everybody, but I think everybody needs to understand that the discussion we have today is to inform the Reporters and the Advisers about what their views are at some of this very first effort to try to restate, in more modern ways, some of the issues in the sexual assault area or the Model Penal Code. (President Ramo; May 2015 Annual Meeting Tentative Transcript of Session at 1).
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> "…Now, the other two topics that were omitted last year, the contact offenses and the marital exemption, they are now included for the first time, but they have not yet been vetted by our advisory panels. They have not been discussed by the Council."
>
> And I wanted to stress that, because the memos that we've received prior to today's meeting raised a number of important concerns about the draft in general, and a lot of the most telling points were addressed particularly to the contact offenses. Those are, as I say, issues that have not yet been discussed with our advisory group, and many of the points that were raised have not yet been considered or thought about by the Advisers or by ourselves, in part because the scope of the contact offenses is one of our major priorities for continuing work over the year to come. So we welcome comments on that. (Reporter Schulhofer; May 2015 Annual Meeting Tentative Transcript of Session at 2-3).

We are unanimous in our belief that no part of this project is ready for Council action. Too much has not yet been discussed. The absence of explanation and analysis of modern practices in the fifty states is troubling as is the absence of citations to contrary authorities and analyses. As expressly acknowledged at the Annual Meeting, *see* above, discussion is only beginning. The Reporters' further acknowledgement that they "investigated and found to be well-founded the concerns about overbreadth expressed at the Annual Meeting" (*id*. at xi) and, as a result of "further research" (*id*. at xii), made important discoveries about the lack of support for the "affirmative consent" position shows that the draft is not ripe for decision.

While this memorandum begins to address some of the most fundamental flaws in Preliminary Draft No. 5, that draft has only been available for a few weeks and much analysis remains to be done, but cannot be done before the Advisers/MCG meeting or before the surprisingly scheduled and premature presentation to the Council. If this project is to continue at all, it must continue with greater deliberation and analysis than has occurred or can occur in the proposed schedule.

Respectfully submitted,

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