Date: April 4, 2016

From: Undersigned ALI Members and Advisers
To: ALI Director, Deputy Director, Project Reporters, Council and Members
Subject: Preliminary Draft No. 6; Revisions to Sexual Assault Provisions of Model Penal Code

Dear Colleagues:

At the Director's suggestion, we write to summarize concerns about Preliminary Draft No. 6 in light of the March 23, 2016 special meeting of the Advisers and Members Consultative Group.

We thank the Council for directing the early release of Preliminary Draft No. 6 and for scheduling the March 23 special meeting of the Group for a first discussion of the new draft. We also appreciate the candid acknowledgement that "Preliminary Draft No. 5 provoked great controversy at the last Annual Meeting, at the October meeting of the Advisers/MCG, and at October's meeting of the Council." (Preliminary Draft No. 6 at *xi*). Finally, we are pleased to see that there are stated intentions to reject the "affirmative consent" standard. *Id*. at xi and 1.

We write because of concerns that the stated intentions have not been achieved and because of continuing fundamental concerns about the Reporters' approach and intended expansion of the criminalization of sexual behavior. Because only § 213.2 is under current review, we do not address the increased criminalization of sexual behavior at the misdemeanor level. But it is unambiguously clear that Preliminary Draft No. 6 will sharply increase the criminalization of sexual behavior at the felony level. Even as compared to earlier drafts, Preliminary Draft No. 6 moves more sexual behavior to the felony level. For example, as noted at Preliminary Draft No. 6, page xii, behavior treated as a misdemeanor in earlier drafts is now treated as a felony. The combined expansions of criminal coverage and the heightened severity of punishments are matters of grave concern that call for a serious rethinking of this project.

As noted repeatedly in this project, there is broad consensus that the States have criminalized too much behavior and have incarcerated too many people. Hardly a week goes by without reports of new developments to scale back the problems of overcriminalization, overincarceration, and post-incarceration disablements. For example, just three days ago the *Washington Post* carried an extensive examination of the post-release, life-long difficulties faced by the 23 million felons who have already completed their prison sentences:

> If America's non-institutionalized felon population today were a state, it would be the third largest in the country — about the same size as Florida, and larger than New York. The adult population of this "state" would be the country's second largest — nearly tied with Texas. And its adult male population would be by far the nation's biggest — at least 5 million ahead of California. By the same token: If released felons were regarded as a minority, their numbers would well exceed the size of our Asian American population.

https://www.washingtonpost.com/opinions/why-is-the-american-government-ignores-23-million-of-its-citizens/2016/03/31/4da5d682-f428-11e5-a3ce-f06b5ba21f33_story.html

Almost no one, across the political spectrum, today argues for increasing the number of incarcerated and post-incarceration felons, yet the current draft proposes exactly that. We continue to question the wisdom of this approach.

The current draft (like earlier drafts) seeks to impose new social norms rather than improve the administration of justice to punish violations of existing norms. That is a fundamental problem. While we respect the Reporters' decades-long commitment to expanded criminalization of sexual behavior, *see, e.g.*, Schulhofer, "Unwanted Sex: The Culture of Intimidation and the Failure of Law," 1998 (Chapter 12 attached), we respectfully disagree. In a society that already incarcerates a frightful and disproportionate number of low-income, poorly educated individuals, we do not believe that ALI's Model Penal Code should be used as a vehicle to impose new social norms and new behavioral standards that are, as shown below, hard to articulate and hard to apply even in discussions among the highly trained professionals making up the ALI membership.

As to the provisions of Preliminary Draft No. 6, we first note that a mere glance at the redline shows this to be a massive rewrite compared to the prior draft. We cannot hope to have caught all the matters that need further consideration beyond those we identify here. The March 2, 2016 early release of Preliminary Draft No. 6, while illuminating, provides far too little time for the Advisers/MCG to fully "beta test" the draft against multiple fact patterns and to identify all of its implications.

To date, we know of only two external reviews of Preliminary Draft No. 6, both of which are highly critical. The National Association of Criminal Defense Lawyers (NACDL) submitted comments (attached) concluding that Preliminary Draft No. 6:

- Dilutes intent requirements (inadequate *mens rea* standard);
- Is unduly vague and ambiguous about what constitutes an offense;
- Encourages shifting the burden of proof of consent to the accused;
- Fails to give fair warning that common conduct may now be criminal;
- Imposes new standards of social and sexual mores; and
- Returns to the "affirmative-consent" standard despite an expressed intention not to do so.

The second external review, by Professor Kevin Cole, opines that:

> In some respects, the current draft reverses course on concessions previously made to critics. In others, the current draft makes changes that appear to respond to concerns but couples them with other changes that undermine the reform.

See Kevin Cole, "Like Snow to the Eskimos and Trump to the Republican Party: The ALI's Many Words for and Shifting Pronouncements About 'Affirmative Consent,'" at 1 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753718, and attached. Professor Cole's conclusion is not kind:

> ALI critics of the sexual assault proposal could not be faulted for feeling as if they are in a game of Whack-a-Mole…. High penalties for sex in the absence of affirmative consent were replaced with misdemeanor penalties, but have now risen to the felony level again…. Critics concerned that commentary favorable to defendants did not match the statutory text saw the text amended to include some of those ideas [Council Draft No. 3], only to see that text disappear in the most recent draft. Bold proclamations of a shift from "affirmative" to "contextual" consent end up, on examination, to have changed very little.

Id at 6, footnotes omitted.

For now, we need not argue whether each criticism in these reviews is irrefutably and perfectly correct. The mere fact that reputable reviewers can reach these conclusions at all is enough to show that the draft is worrisome and ambiguous — and not appropriate for consideration and vote by the membership.

Again, it is not possible to fully review Preliminary Draft No. 6 and offer an exhaustive listing of concerns, but we respectfully suggest a few illustrations.

"Against the will" is the standard in widest use in the States. It is the standard used by the Reporters in Preliminary Draft No. 5, Section 213.2(1) for a felony offense. When that standard was eliminated as the standard for felonies in § 213.2 of Council Draft No. 3, many of us joined a cosigned memorandum asserting that "willingness" is a better standard than "agreement." While there was nominally a shift from "agreement" to "willingness" in Preliminary Draft No. 6, we were disappointed to see how the concept was altered.

Now — rather than using the well-known standard of "against the will" or clearly explaining why "willingness," not "agreement," should be the operative standard — the phrase "communicates willingness" appears for the first time in any draft. In other words, the alleged victim must not only be willing but must have effectively communicated that willingness. This is precisely the root of the external reviewers' conclusion and our conclusion that "communicates willingness" is merely a rebranding of "affirmative consent."

The operative phrase "communicates willingness" is also one root of the external reviewers' concern and our concern about burden-shifting. If the standard is "communicates willingness," the starting presumption is that sex is a crime. The prosecutor need only say,

"Ladies and Gentlemen of the Jury, under the State's definition, it does not matter whether the complainant actually was willing. It is undisputed that the sex act occurred and there is no evidence in the record that the complainant *communicated* willingness. There is no consent if the complainant has not *communicated* willingness. You must convict if you find that the defendant recklessly disregarded that absence of consent."

Because the prosecution's case is sufficient to go to the jury upon a bare showing that the sex act has occurred, the defendant effectively has the burden of putting something into evidence to establish "communicated willingness." How great that burden will be is unstated by the draft. Whether it is a burden of going forward, a burden of proof, a burden to establish an affirmative defense or something else, the defendant has been burdened to disprove guilt. As the NACDL argues, at page 9 of its comments, this burden-shifting is an unconstitutional infringement on the presumption of innocence. It also works to coerce a waiver of Fifth Amendment rights by forcing the defendant to testify in many cases — not because of the prosecution's proof but because of the absence of proof that willingness was "communicated."

Compare the "against the will" standard, in which it is universally understood that the prosecution has the burden of proof. Although the law has shifted in such ways as not requiring resistance to establish that an act was "against the will," the "against the will" standard remains well understood and strongly embedded in the law of the States. The "against the will" standard was used even in earlier drafts of this project, but that standard disappears without trace or analysis in Preliminary Draft No. 6.

The Reporters assert that "communicates willingness" should be an acceptable new standard because state law is too muddled and divergent to discern any patterns (*e.g.,* "The current state of the law does not lend itself to clear assessment," *id.* at 3). Yet they assiduously avoid discussion of "against the will" as a potential operative standard or as a starting point for analysis. This is utterly inappropriate under the clear standards set forth in 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 and analyzed in a previous co-signed memorandum dated October 5, 2015 (attached).

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." *Id.*

In contrast, Preliminary Draft No. 6 proposes "novel social legislation" by creating an operative phrase that is not known to exist in any state, does not rationalize or synthesize previous legislation, does not propose modest incremental improvements, does not clarify established and widely accepted policy, and declines even to acknowledge the existence of the

most widely used standard in the States. We respectfully submit that Preliminary Draft No. 6 fails to meet even the lowest threshold for further consideration.

Note also that Preliminary Draft No. 6 contains other changes that make it harder for the defendant to establish consent. Council Draft No. 3, Section 213.0(3) contained the sentence, "Neither verbal nor physical resistance is required to establish lack of consent, *but lack of physical or verbal resistance may be considered*, together with all other circumstances, in determining whether a person has given consent" (emphasis added). In other words, both resistance and lack of resistance expressly were to be considered within the totality of the circumstances. In Preliminary Draft No. 6, however, the highlighted phrase, "*but lack of physical or verbal resistance may be considered*," has been deleted, imposing an imbalance in the definition and raising doubt about whether lack of resistance will be evaluated within the totality of the circumstances. *See also* attached comments of Abbe Smith and David Rudovsky. Possibly a good defense attorney will argue past the unbalanced definition, but the definition has unquestionably been rendered unbalanced by the alteration.

In all, the definition of consent has moved toward greater imbalance. Each elaboration within the definition describes circumstances that negate or revoke consent ("verbal or physical resistance," "circumstances preventing or constraining resistance," "behavior communicating unwillingness," "a verbal expression of unwillingness," "force, fear, restraint, threat, coercion, or exploitation"), while nothing supports consent or explains under what circumstances a person is safe from criminal accusation. Although some of the Reporters' Illustrations claim an intention that the defendant should not be guilty on the stated facts, there is nothing in the black letter that mandates that outcome or allows the defendant to request a directed verdict. The Illustrations are not part of any statute. Only the blackletter is enacted, not the Illustrations and not the Commentary.

Even if the proposal were not otherwise so grievously flawed, we are also concerned that all the conduct covered by § 213.2 is classified as a felony. From a fleeting penetration, "however slight," with a tip of a feather during a tickle to prolonged abuse that barely avoids the aggravating circumstances stated in § 213.1, all offenses are felonies in § 213.2. This section contains a stunningly wide range of behaviors with radically different social expectations under current norms. When one adviser at the March 23 meeting noted the number of suicides among his accused clients, another was unconcerned, saying that the differences in the severity of the offenses would be handled during sentencing. With all due respect, that is not a sufficient answer. All of the offenses in § 213.2 are denominated as five-year imprisonment felonies and would be registrable offenses with lifetime consequences in most states. Although the Reporters do not recommend classifying the offenses in§ 213.2 as registrable offenses, they would be such under the laws of many states, and ALI cannot assume that those laws will be ameliorated.

While we understand and have concern for the humanity of complainants, we need also to understand the humanity of defendants. This draft is very broad in treating sexual behavior as felonious. It will destroy lives, and we have a responsibility to consider all the lives that will be affected — lives of both complainants and defendants. Any product of ALI should be much more discerning and much less a one-size bludgeon.

Finally, we note an awkward element of sexism that permeates the draft. Male and female are not equal in the eyes of the Reporters. Consider just one example. During petting, his fingernail tip, "however slight," momentarily penetrates the vulva while her full two hands firmly and persistently grip his penis and scrotum. He is at risk of a conviction under § 213.2 if she did not consent. She is not at risk under § 213.2 because his genitals are not equally protected under the draft's supposition of the male as active and the female as inactive.

Regrettably, much more could be said about Preliminary Draft No. 6, but as noted, there is not enough time for a full analysis or for the "beta testing" under multiple fact settings that is needed before any proposal moves forward.

Much effort has gone into this project but it has been infected from the outset by fundamental flaws that keep reappearing in different guises, draft after draft, as in Professor Cole's colorful "Whack-a-Mole" description. The emergence of "communicates willingness" in a draft that purports to reject "affirmative consent" only confirms the negative assessments of the project and makes it necessary to assert the need for this project to be suspended.

We thank the Council for instructing the Reporters to make Preliminary Draft No. 6 available earlier than normal and thank the Council for scheduling the March 23 special meeting of the Advisers and Members Consultative Group. We hope that our efforts have been helpful, and we will remain engaged in service to ALI.

Respectfully submitted,

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