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

From: Undersigned ALI Members and Advisers

Date: May 18, 2017

Subject: Tentative Draft No. 3; Revisions to Sexual Assault Provisions of Model Penal Code

Dear Colleagues:

We thank the Council for its continuing effort to assist in the updating of the Model Penal Code and we appreciate the challenges of addressing complex and sensitive subjects such as sexual assault.

Many of the undersigned Members and Advisers have joined prior co-signed memoranda related to this project and the ALI Membership has spoken clearly at successive Annual Meetings about the importance of guarding against overcriminalization. As all who were in attendance will recall, last year's Annual Meeting resulted in adoption of a substitute definition of "Consent" precisely because the definition offered in Tentative Draft No. 2 increased the risk of overcriminalization. Following last year's Annual Meeting, extensive subsequent discussions were held and a meeting of the Advisers and Members Consultative Group led to hope that Tentative Draft No. 3 (TD3) would remove specific problems that had been identified in prior drafts and had contributed to the overcriminalization problem.

Regrettably, a review of TD3 demonstrates that the known problems have not been cured. Space does not permit a full recitation of the continuation of known problems, but the following examples are illustrative and seven prior co-signed memoranda are posted on the ALI website to minimize the need for repetition in this memorandum.

In the January 16, 2017 co-signed memorandum, for example, we wrote:

> The further problem with the proposed definition of "penetration" is that it does not require any "penetration" at all. As defined, "penetration" (Section 213.0(7)) means "contact" including, "any touching of the anus or genitalia of one person by the mouth or tongue, of another person…"
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> By the express terms of Council Draft No. 5, a kiss on the thigh or abdomen that strays an inch too far becomes "penetration" that is treated for all purposes in the remainder of the draft as the exact equivalent of extended genital to genital intercourse. Thus, the concern about overcriminalization.
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> The problem is overbreadth. An enormous range of sexual behavior is reduced to a single word, "penetration," and all "penetration" is treated as identical. This is an excessive economizing of words that will have very serious real world consequences if ever enacted as legislation because Council Draft No. 5 grades all conduct at the most serious end of the covered spectrum rather than at the lowest

> end of the covered spectrum. In most criminal statutes, the offense is graded to be appropriate to the least severe act that is covered by the offense. If a more severe act occurred, the prosecutor will also charge a higher level offense. By contrast, Council Draft No. 5 grades everything as if all acts were equal to the most severe act that is covered by the offense. The public will largely agree that genital intercourse without consent as defined in the ALI proposal constitutes a felony. Few in the public will agree that a kiss in the wrong spot or a wedgie is a felonious sex offense, yet Council Draft No. 5 treats the full range of behaviors as if they were identical. As noted by several speakers during the meeting of Advisers and Members Consultative Group in October, not every sexual act is "rape."

TD3 purports to cure this serious problem of overbreadth by creating a definition for "Oral Sex" (213.0(2)) that is separate from the definition of Sexual Penetration (213.0(1)), but it changes absolutely nothing in the substantive offenses or their grading. While "Sexual Penetration" was previously defined to include non-penetrative "touching of the anus or genitalia of one person by the mouth or tongue, of another person…," exactly the same words have become the new definition of "Oral Sex" as a "touching of the anus or genitalia of one person by the mouth or tongue of another person." (213.0(2)). Although the words have been moved and given a new name, they are proposed to have exactly the same criminal consequence as they had in the prior draft. Both penetrative and non-penetrative contact (now renamed as "Oral Sex" contrary to the ordinary meaning of that term) has exactly the same treatment in 213.1 and 213.4. Indeed, the title of 213.4 is "Sexual Penetration or Oral Sex Without Consent" and non-penetrative contact such as a kiss is graded exactly the same as extended genital to genital penetration. The new placement and relabeling of old words preserves precisely the old problems.

It is no longer possible to be surprised that outside reviewers have criticized this project and its drafts as "a game of Whack-a-Mole" that reshuffles the old deck of ideas rather than propose new solutions to the problems that have been identified. 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 5, ("ALI critics of the sexual assault proposal could not be faulted for feeling as if they are in a game of Whack-a-Mole…."), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753718, footnotes omitted.

TD3 also continues the problem of explicitly defining as felonies a wide range of very inconsequential acts. TD3 expressly acknowledges its purposeful overbreadth:

> An example is a schoolchild who at recess pulls upward on another child's underwear, an act colloquially known as a "wedgie." The problem of conduct that is technically covered by the language of a criminal offense but clearly not intended to be punished pervades the law. Relying solely on prosecutorial discretion to solve this problem is in tension with the rule of law and is an insufficient guarantee against overreaching. To place the solution to this problem on a firmer footing, Section 2.12 of the Model Penal Code requires a court to dismiss a prosecution in the case of acts that, while technically within the terms of a statute, are *de minimis* infractions. An alternative approach of addressing the *de*

> *minimis* problem within the definition of penetration would cause more difficulty than it would avoid. (213.0 Comment at 4)(footnotes omitted).

Respectfully, this is not sufficient. ALI should never be in a position of saying that it does not know how to draft with precision and clarity to avoid overbreadth in matters with felony criminal consequence. Indeed, TD3 acknowledges that "purpose" requirements such as "for purposes of sexual gratification" are used in a variety of settings to avoid exactly this sort of overbreadth. (*see, e.g.*, 213.0 Comment at 3-4 and 11-12). TD3 criticizes those existing statutes but makes no effort to improve upon their phrasings.

TD3 also asserts that there should be no concern about this intentional overbreadth because Model Penal Code Section 2.12 instructs courts to dismiss improper prosecutions where, *inter alia*, "it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense." Again respectfully, this also is not sufficient. Model Penal Code Section 2.12 obviously has not been adopted in all states. TD3 does not even purport to have measured the extent to which this rule has been adopted. Further, TD3 does not condition its intentional overbreadth upon a state's commitment to adopt Section 2.12. We need not look far for the problems of overbreadth and the damage it can cause.

Many are aware of the recent rape allegations and indictments in Maryland involving two immigrant teenagers. When the rape allegations collapsed due to proof from text messages and the school's surveillance cameras, the prosecutors lodged new charges for "possession of child pornography" consisting of video the girl had taken of herself and sent to the accused. "Maryland high school rape case refocuses sexting debates," Washington Times, May 11, 2017 ("But the girl — who recorded and first sent the video — has not been charged.") http://m.washingtontimes.com/news/2017/may/11/rockville-high-school-student-who-sent-sex-video-n/ As this memorandum is being circulated, those charges continue to be in place, no court has dismissed them as unjust and the defendants continue to endure all the cost and opprobrium of living under the cloud of sex crime allegations.

A difficulty in addressing TD3 is that so little has been done to address long known problems. For example, the January 16, 2017 co-signed memorandum addressed the history of the overbreadth concern:

> While there have been periodic statements of reassurance that ALI should not be concerned about overcriminalization, the facts are otherwise. Indeed, concerns about overcriminalization of sexual behavior have only increased as more information has become available. For example, there has been little research into the collateral consequences of sex offense convictions but recent research has revealed that over 750,000 Americans are currently on sex offender registries with all the collateral consequences for jobs, education, housing and virtually every aspect of life that flow from such registration. *See, e.g.*, "The War on Sex Offenders is the New War on Drugs, Which Means it's About Race," https://www.inverse.com/article/16109-the-war-on-sex-offenders-is-the-new-war-on-drugs-which-means-it-s-about-race
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> Even more disturbingly, it has been reported that the lowering of definitions for what constitutes a sex crime combined with zealous prosecution has resulted in

the stunning situation where the single most common age for law enforcement pursuit against a sex offender is age 14. Age 14. That is not a typo: http://nypost.com/2016/07/25/bogus-sex-offender-labels-are-ruining-lives/. Similarly, *see* Prosecutor Wants to Charge 14-Year-Old Girl with Sexual Exploitation for Taking PG-13 Pictures of Herself; http://reason.com/blog/2016/10/04/prosecutor-wants-to-charge-14-year-old-g.

Whether age 14 is the most common age for "wedgies" or "humping" or "grinding" or "petting" or any of the other common activities that can result in "penetration" (Section 213.0(7)) through the other person's clothing, the simple fact is that Council Draft No. 5 does not align with what most of the population views as a felony sex crime. Even a "piggy-back ride" or a lifting up a child for a hug can shift the clothing and cause "penetration" as defined in Section 213.0(7). This is one of the reasons for statutory drafting that requires something like "for the purpose of sexual gratification" as an element of offenses that are punished as sex crimes. Council Draft No. 5 contains no such limiting element in any of its proposed offenses.

None of this is said to suggest that overbroad definitions are the only problem in TD3. Something as simple as the positioning of words in a sentence stating the elements of an offense can make an enormous difference that must be thoughtfully considered. Here is just one example.

SECTION 213.1. FORCIBLE RAPE

(1) *Forcible Rape*. An actor is guilty of Forcible Rape if he or she causes another person to engage in an act of sexual penetration or oral sex by **knowingly or recklessly**:

(a) using physical force or restraint, or making an express or implied threat of bodily injury or physical force or restraint; or

(b) making an express or implied threat to inflict bodily injury on someone else. (emphasis added)

Compare the same provision after simply moving the phrase "knowingly or recklessly" to a different location in the sentence:

SECTION 213.1. FORCIBLE RAPE

(1) *Forcible Rape*. An actor is guilty of Forcible Rape if he or she **knowingly or recklessly** causes another person to engage in an act of sexual penetration or oral sex by:

(a) using physical force or restraint, or making an express or implied threat of bodily injury or physical force or restraint; or

(b) making an express or implied threat to inflict bodily injury on someone else. (emphasis added)

Only the location of the words "knowingly or recklessly" has been changed. Now consider the consequence. Facts:

> She says, "I know that I screamed and slapped him and threatened to file for divorce and sole custody, but when we had sex that night, I thought we were having "make-up" sex after the fight. It never occurred to me that he would say my behavior "caused" him to have sex with me."

Result under TD3: She is guilty of forcible rape because she "knowingly" acted (slap) even though she did not know it would "cause" sexual penetration.

Result under a revision simply moving the phrase "knowingly or recklessly" to a different spot in the sentence: She may be guilty of misdemeanor domestic violence but she is not guilty of forcible rape.

It should not be enough to say that the accused knew an action (*e.g.,* a slap) was being taken. The forcible rape charge should require a *mens rea* element for the sex, not just for the slap. TD3 requires no proximity in time between the slap and the sex. TD3 requires no reasonable person standard.

Moreover, TD3 says that "consent" to the sex is expressly removed from consideration and the jury may consider only whether the slap "caused" the sex. (*See* 213.1 Comment at 14, "Consent is not an element of any of the crimes in Section 213.1"). If the accuser says the slap was the "cause" of the sex, what chance does the defendant have? Last year's Annual Meeting adopted a definition of "Consent" based on the willingness of the participants. TD3 expressly says that consent and willingness are excluded from the offense even if the only thing "caused" by the slap was a session of "make-up" sex later that evening. This is overbreadth of monumental proportion and is directly contrary to the membership vote at last year's Annual Meeting to establish lack of willingness as the standard for criminal liability.

The limitations of restricting ourselves to a moderate length for this memorandum prevent a more complete listing of the problems that exist on the face of TD3, but those problems are numerous.

While we are grateful for the progress that was made at last year's Annual Meeting, TD3 both fails to make progress toward resolution of the other flaws previously identified in prior drafts and directly undercuts the progress that was made at last year's Annual Meeting.

Respectfully submitted,

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