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| To: | ALI Director, Deputy Director, Project Reporters, Council and Members |
| From: | Undersigned ALI Members and Advisers |
| Date: | January 15, 2019 |
| Re: | Council Draft No. 8; Revisions to Sexual Assault Provisions of the Model Penal Code |

Dear Colleagues:

We have received Council Draft No. 8 (CD8) and we are grateful for the Council’s upcoming attention to this project.  We also are grateful for the Council’s recognition that this project needs more work than can be accomplished before the next Annual Meeting and that it will not be on the 2019 agenda.

The Council meeting to review CD8 follows closely after the review of Preliminary Draft No. 9 (PD9) at the October Meeting of the Advisers and Members Consultative Group (MCG).  Regrettably, we must advise you that CD8 does not well reflect the input of the Advisers and MCG from that meeting.  To avoid repetition in this memorandum, the October 9, 2018 Co-Signed Memorandum addressing deficiencies in PD9 is attached.  Of particular concern both then and now is the Reporters’ tendency to increase overcriminalization by lowering the *mens rea* standard in the offenses when compared to the *mens rea* elements in the offenses of the existing MPC.

Most importantly, CD8 does not well reflect the repeated admonitions of the Membership at each Annual Meeting reviewing Discussion Drafts and Tentative Drafts to guard against overcriminalization. If there is any area of political consensus in the United States today, it is the agreement across the political spectrum that our nation incarcerates too many for too long with too many life damaging collateral consequences after release from prison and ALI should not contribute to further overcriminalization.

While CD8 does include some improvements urged by the Advisers and MCG, CD8 unfortunately introduces new movements toward overcriminalization even beyond PD9. While these are numerous, many fall into two categories:  1) lowering of the *mens rea* standard compared to previous drafts and 2) creation or expansion of inappropriate *per se* crimes.

Persons who have followed this project closely will recall that the most recent Membership vote expressly and overwhelmingly demanded use of the “knowingly” *mens rea* standard in the section presented at the Annual Meeting and rejected provisions in Tentative Draft No. 3 (TD3) that imposed liability under a standard of “recklessly.”  In contrast to that expressed Membership concern, CD8 actually lowers the *mens rea* standard for many offenses even when compared against the quite recent PD9.

Further, it is critical to note that “knowingly” or “knows” is the *mens rea* standard utilized in almost all provisions of the MPC and the Reporters have provided no basis for increasing overcriminalization by lowering the *mens rea* in this project.

CD8 also has a troubling expansiveness in its creation of inappropriate *per se* crimes.  Consider a family or a charitable organization that provides food or shelter to a runaway teenager who has been coerced into commercial sex work by others.  The family and the charity had absolutely nothing to do with the coercion and, in fact, are trying to aid the runaway teenager in exiting from commercial sex work, but under Section 213.9, both the family and the charity are *per se* felons, treated as guilty of “sex trafficking.”  The problem is that 213.9 makes no distinction between persons engaged in coercion and persons trying to remove the runaway teenager from coercion.  The family and the charitable shelter that “harbor” or “maintain” the runaway teenager are *per se* felons merely because they are “aware” that the runaway teenager has been subjected to coercion by others.

The shortness of time prohibits complete analysis of our concerns regarding CD8, but we hope the following short explanations when combined with the analysis contained in the attached October 9, 2018 Co-signed Memorandum will be useful in the Council’s deliberations.

Section 213.04(b)(iii) proposes a reformulation of the definition of “recklessly.”  This reformulation arguably improves clarity, but stunningly, the term “recklessly” has disappeared from the black letter offenses.  Instead, many offenses now carry a new *mens rea* stated as a phrase, “aware of a substantial, unjustifiable risk.”  This phrase is never capitalized in the black letter but it turns out to be a subsidiary definition that comprises part of the definition of “recklessly,” thereby rendering the statutory interpretation inordinately difficult.  A reader must guess that a lengthy non-capitalized phrase is actually a defined term but that it is not listed as a defined term and exists only as a subsidiary term under the definition of “recklessly.”  This is not a path toward improving judicial or juror understanding of the elements of the offenses.

Section 213.0(4)(d)(iii) provides a rule for setting the *mens rea* standard for an element of an offense when the statute does not specify the appropriate *mens rea* for that element.  The existing MPC specifies “recklessly” as the minimum *mens rea* in such circumstances.  MPC 2.02(3).  CD8 proposes what appears to be a lower *mens rea* standard of “awareness of a substantial, unjustifiable risk.”  This lowering of the *mens rea* requirement is inappropriate because it will further overcriminalization by including a wider range of ambiguous situations as crimes on a slope down toward mere negligence.  The proposed new standard also is inappropriate since it introduces a new *mens rea* standard that deviates from the remainder of the MPC.  The new standard is mere confusion if it means the same as “recklessly” and is problematic if it means something less than “recklessly.”  The standard of “recklessly” is well understood and does not need a new sibling. Moreover, as stressed by the Membership in its vote and stressed repeatedly at meetings of the Advisers and MCG, the Reporters are advancing overcriminalization inappropriately by lowering the *mens rea* of many offenses from “knowingly” as utilized for most offenses under the existing MPV to the lesser “recklessly” standard.

Section 213.0(6)(e)(ii) defines “Significant bodily injury” (a new term) at too low a threshold as being anything that is “more than negligible.”  The specific examples of what is intended (*e.g.*, black eye) may be reasonable, but a better description than “more than negligible” should be chosen.  Possibly, “a physical injury that would cause submission in a reasonable person.”

Section 213.0(6)(e)(iv) defines “Serious bodily injury” in a way that is both much different and much more broad than in the existing MPC at 210.0(3).  There is no reason to introduce a widely divergent second meaning only for sex crimes for a term that is already well understood and in wide use throughout the MPC.

Section 213.0(6)(f) defines “Deadly weapon” inappropriately.  Again, this term already exists in the MPC and is in wide use throughout the MPC.  There is no reason to create a second meaning of the term solely for sex crimes.  Moreover, the definition proposed in CD8 is likely to be unconstitutionally vague since it defines “deadly weapon” as anything that is “perceived” to be capable of producing death or serious bodily injury.

Section 213.1(1)(a) should delete the second use of the word “by.”  This extra word causes the clause to have a different phrasing than similar clauses used elsewhere (e.g. 213.1(2)(a); 213.7(1)(a)(i), etc.).  The extra “by” also creates ambiguity that could be misconstrued as indicating that the “knowingly” *mens rea* does not apply to threats.

Section 213.1(2)(c) is an instance where CD8 lowers the *mens rea* from “knowingly or recklessly” as it appeared in prior drafts including as recently as PD9.  Note that the Annual Meeting ran out of time before the vote on a motion to utilize only the “knowingly” standard in this provision.  As explained above, this is one of many sections where CD8 lowers the *mens rea* compared to previous drafts and compared to the position taken by the members where a vote has occurred.

Section 213.2(1)(a) is not comprehensible.  Possibly the intent was to place the *mens rea* at the beginning of the clause rather than the end.  If so, the *mens rea* is inappropriate and should be “by knowingly using….”  Again, the second “by” should be deleted for the reasons stated above.

Section 213.2(1)(b) should have a *mens rea* of “the actor knows that the other person……” rather than a mens rea that is somewhere below “recklessly.”  The formulation used in 213.1(1)(b) and 213.7(1)(a)(ii) is “the actor knows that the other person…”  That formulation should be used here as well.

Section 213.3(1)(a)(i) wrongly treats “sleeping” as identical to “unconscious” or “unable to communicate.”  A spouse who commences sexual activities before confirming that the other spouse has had a first cup of coffee and reached full alertness is simply not the same as a rapist of an unconscious person.  Indeed, many couples use sex as a way to transition from slumber to alertness.

Section 213.3(1)(b) should have a *mens rea* of “the actor knows that the other person…”  This is another section in which the *mens rea* has been lowered from previous drafts, including PD9.  The formulation used in 213.1(1)(b) and 213.7(1)(a)(ii) is “the actor knows that the other person…”  That formulation should be used here as well.

Section 213.3(2)(b) should have a *mens rea* of “the actor knows that the other person…”  This is another section in which the *mens rea* has been lowered from previous drafts, including PD9.  The formulation used in 213.1(1)(b) and 213.7(1)(a)(ii) is “the actor knows that the other person…”  That formulation should be used here as well.

Section 213.3(3) has a basic premise that sex between jailer and prisoner should be prohibited, but it goes far beyond that non-controversial position by creating *per se* crimes much more broadly.  Assume that A is on a multi-year probation and B works in the probation office as a records clerk processing status and compliance information. Several years into the probation, they marry.  If after marriage they have sex, B is a *per se* felon. Yes, B could have moved to a different job or found a different spouse, but ALI should not propose black letter with both overreach and the rigidity of *per se* offenses. *Per se* offenses in particular need narrow and precise drafting.

Section 213.4(1)(a)(iii) is another provision that is likely to be unconstitutional.  This provision states that the existence of the crime is determined by the accuser’s “situation under all the circumstances as that person believes them to be.”  This does not require any facts, just the accuser’s subjective, unfounded belief.

Section 213.4(1)(b) could ameliorate the preceding problem to a degree if the *mens rea* is corrected to “the actor knows that the other person….”   The formulation used in 213.1(1)(b) and 213.7(1)(a)(ii) is “the actor knows that the other person…”  That formulation should be used here as well.

Section 213.5 (1)(a)(i) and (ii) require a misrepresentation by the defendant but do not require a finding that the accuser believed the misrepresentation.  Many thousands of people “misrepresent” the benefits of sex and both parties are in on the joke and it “causes” sex.  Many thousands of people “misrepresent” themselves with or without cosplay costumes and it “causes” sex. As written, these provisions do not require the accuser to have been genuinely misled by the misrepresentation.

Section 213.5(1)(a)(iii) infantilizes adults and brings back “affirmative consent” yet again after repeated rejection by the Membership.  If one person is undressed and ends up having sex with another person, the question of consent is no different than in any other setting.  There is no reason to call out this circumstance as requiring “explicit prior permission to engage in that act.”

Section 213.5(1)(b) should have the *mens rea* “the actor knows that the other person…”  The formulation used in 213.1(1)(b) and 213.7(1)(a)(ii) is “the actor knows that the other person…”  That formulation should be used here as well.

Section 213.6(1)(b) should have the *mens rea* “the actor knows that the other person…”  The formulation used in 213.1(1)(b) and 213.7(1)(a)(ii) is “the actor knows that the other person…”  That formulation should be used here as well.

Section 213.6(2)(b) should have the *mens rea* “the actor knows that the other person…”  The formulation used in 213.1(1)(b) and 213.7(1)(a)(ii) is “the actor knows that the other person…”  That formulation should be used here as well.

Section 213.7(1)(a)(ii) properly uses the formulation “the actor knows that the other person…”

Section 213.7(2)(a) should have the *mens rea* “the actor knows that the other person…”  The formulation used in 213.1(1)(b) and 213.7(1)(a)(ii) is “the actor knows that the other person…”  That formulation should be used here as well.

Section 213.7(2)(b) should have the formulation “the actor knows that one or more of the circumstances…”

Section213.9.  As described above, this provision is a massive overreach in creating inappropriate *per se* crimes.  If an individual coerces another individual, a criminal remedy is appropriate.  It is not appropriate to cast the net so wide that any innocent person whoever has any contact with a coerced person becomes a *per se* felon simply by being “aware” that coercion may have been committed by someone else.

Again, we thank the Council for its attention to this project and for its decision to defer presentation to the Membership pending further development.  We hope that our comments will help to advance the project and we stand ready to provide continuing support to ALI .

Respectfully submitted,

**Daniel S. Kleinberger**

Professor Emeritus, Mitchell Hamline

School of Law

Reporter, Uniform Law Conference

Drafting Committee on the Uniform

Limited Liability Company

Protected Series Act

St. Paul, MN

**Dianne Bennett**

Retired, Managing Partner  
Hodgson Russ LLP  
Buffalo, NY

**Brian D. Shannon**

Paul W. Horn Professor

Texas Tech University School of Law

Lubbock, TX

**Christopher Zampogna**

Zampogna, PC

Washington, DC

**Christopher B Mueller**

ALI Life Member

Henry S. Lindsley Professor of Law

University of Colorado

Boulder, CO

**Adriane Dudley**

Dudley Rich David LLP

St. Thomas, VI

**Arthur B. Spitzer**

Washington, DC

**Daniel J. Bussel, Esq.**Professor of Law

UCLA School of Law

Los Angeles, CA

**Cyril A. Fox**

ALI Life Member

Professor Emeritus of Law

University of Pittsburgh School of Law

Pittsburgh, PA

**David W. Maher**

Chicago, IL

**David A. Brownlee**

ALI Life Member,

Pittsburgh, PA

**David B. Wilson**

Sherman & Howard, LLC,  
Denver, CO

**Henry R. Lord**ALI Life Member  
Partner Emeritus  
DLA Piper LLP (U.S.)  
Baltimore, MD

**David Callies**

Kudo Professor of Law

William S. Richardson School of Law

Honolulu, HI

**Arthur D. Hellman**

ALI Life Member

Professor Emeritus

University of Pittsburgh School of Law

Pittsburgh, PA

**Amon W. Burton**

ALI Life Member

Austin, TX

**Allison Hayward**

Cambria, CA

Arthur Norman Field, Esq.

New York, New York

**Hon. Evelyn Keyes**

Justice, First Court of Appeals

Houston, TX

**William R Newlin**

ALI Life Member

Former Chief Executive Officer

Buchanan Ingersoll LLC.

Pittsburgh, PA

**D. Michael Risinger**

ALI Life Member

John J. Gibbons Professor of Law

Associate Director

Last Resort Exoneration Project

Seton Hall University School of Law

Newark, NJ

**Arthur T. Donato**

Law Offices of Arthur Thomas Donato

Media, PA

**George W. Liebmann**ALI Life Member  
Liebmann and Shively, P.A.  
Baltimore, MD

**Dean A. Strang**

StrangBradley, LLC

Madison, WI

**William J. Leahy**

Director, Office of Indigent Legal Services

Albany, NY

**David Aronofsky**  
Retired General Counsel and  
Law Faculty Member  
University of Montana  
Austin, TX

**Glen Koppel**

Professor of Law

Western State College of Law

Fullerton, CA

**Donald B. Ayer**

ALI Life Member

Jones Day

Washington, DC

**Ronald Henry**

Washington, DC

**Peter J. Kalis**

Partner and Former Chairman and

Global Managing Partner

K&L Gates LLP

Pittsburgh, PA

**Leonard P. Strickman**

Professor, Founding Dean Emeritus

Florida International

University College of Law

Miami, FL

**Ronald Rolfe**

ALI Life Member

New York, NY

**John G. Crabtree**

Crabtree & Auslander

Key Biscayne, FL

**Larry Catá Backer**

W. Richard and Mary Eshelman Faculty Scholar

& Professor of Law

Professor of International Affairs

Pennsylvania State University

University Park, PA

**Tyler Baker**

ALI Life Member

Carmel Valley, CA

**Thomas C. Arthur**

ALI Life Member, L.Q.C.

Lamar Professor

Emory University School of Law

Atlanta, GA

**Brian Bix**

Frederick W. Thomas

Professor of Law and Philosophy

University of Minnesota

Minneapolis, MN

**David Aronofsky**

Retired General Counsel

and Law Faculty Member

University of Montana

Austin, TX

**Joan Wexler**

ALI Life Member

Dean and Professor of Law Emerita

Brooklyn Law School

Brooklyn, NY

**Cecil Jay Olmstead III**

ALI Life Member

Houston, TX

**Thomas D. Waterman**

Justice, Iowa Supreme Court

Des Moines, IA

**Marie Reilly**

Professor of Law

Penn State University School of Law

University Park, PA

**Steve A. Hut, Jr.**

Chevy Chase, MD

**Allen C. Foster**

ALI Life Member

Washington, DC

**Nicholas L. Georgakopoulos**

Harold R. Woodard Professor of Law

Indiana University

McKinney School of Law

Indianapolis, IN

**Thomas R. Newman**

ALI Life Member

New York, NY

**Theodore H. Frank**

Washington, DC

**Mary Massaron**

Shareholder and Appellate Practice Group Leader

Plunkett Cooney PC

Bloomfield Hills, MI

**Stephen K Huber**

ALI Life Member

Professor Emeritus

University of Houston Law Center

Houston, TX

**Robert A. Goodin**

ALI Life Member

San Francisco, CA

**John Beckerman**

Morristown, NJ

**Joseph Goldberg**

ALI Life Member

Albuquerque, NM

**Marshall Breger**

ALI Life Member

Professor of Law

Columbus School of Law

Catholic University of America

Washington, DC

**Bridget M. McCormack**

Justice, Michigan Supreme Court

Lansing, MI

**Frederic N. Smalkin**

Chief U.S. District Judge, D.Md. (Ret.)

Jurist-in-Residence

and Professor of Law

University of Baltimore School of Law

Baltimore, MD

**Patrick Daugherty**

Partner, Foley & Lardner LLP

Chicago, IL

**Ronald J Allen**

John Henry Wigmore Professor of Law

Northwestern University

Chicago, IL

**Jon M. Sands**

Phoenix, AZ

**Micalyn S. Harris**

Ridgewood, N

**Anne Gardner**

Justice, Second Court of Appeals

Fort Worth, TX

**Robert Newman**

ALI Life Member

San Antonio, TX

**Christopher B. Mueller**

ALI Life Member

Henry S. Lindsley Professor of Law

University of Colorado

Boulder, CO

**James Felman**

Partner, Kynes,

Markman, & Feldman

Tampa, FL

**Alfred W. Putnam**

Drinker Biddle & Reath LLP

Philadelphia, PA

**Roger S. Clark**

Board of Governors Professor

Rutgers School of Law

Camden, NJ

**James B. Craven III**

ALI Life Member

Durham, NC

**Robert M. Berger**

Retired Partner

Mayer Brown LLP

Senior Counsel

Krasnow Saunders Kaplan &

Beninati LLP Lecturer

University of Chicago Law School

Chicago, IL

**Robert Creamer**

Cambridge, MA

**Andrew D Leipold**

Edwin A. Adams Professor

University of Illinois College of Law

Champaign, IL

**Herb Fenster**

ALI Life Member

Covington & Burling LLP

Washington, DC

**Neal S. Millard**

Partner, Musick

Peeler & Garrett LLP

Los Angeles, CA

**Noel Fidel**

ALI Life Member

Retired Judge

Arizona Court of Appeals

Law Office of Noel Fidel

Phoenix, AZ

**Kenneth C. Kettering**

Short Hills, New Jersey

**Robert A. James.**

Pillsbury Winthrop Shaw Pittman LLP

San Francisco, CA

**Koppel, Glenn**

Professor of Law

Western State College of Law

Irvine, CA

**Neal Millard**

Partner, Musick,

Peeler & Garrett LLP

Los Angeles, CA