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| To: | ALI Director, Deputy Director, Project Reporters, Council and Members |
| From: | Undersigned ALI Members and Advisers |
| Date: | October 9, 2018 |
| Re: | Preliminary Draft No. 9; Revisions to Sexual Assault Provisions of  Model Penal Code |

Dear Colleagues:

We have received Preliminary Draft No. 9 (PD9) for the Model Penal Code: Sexual Assault and Related Offenses project. We respect the magnitude of the new effort that has gone into preparation of PD9. It is very extensive (278 pages) and massively altered from prior drafts (the redline is 656 pages). We also were pleased to be informed a few days after receipt of PD9 that the ALI Council and leadership have recognized that this project should not be on the Agenda for the 2019 Annual Meeting in order to allow more time for analysis and revision.

We very much appreciate that recognition because, regrettably, much work remains to be done before the content of the Project is prepared to move forward. Given the massive size of PD9 in absolute terms and given the massive alterations from prior drafts, it is inevitable that this co-signed memorandum can only provide preliminary analysis of a limited number of the challenges created by PD9.

Ten prior co-signed memoranda as well as participation at Project Meetings and Annual Meetings have made clear the Membership’s concerns about a number of core issues including overcriminalization and the repeatedly rejected “affirmative consent” standard. We are compelled to inform you that those problems (and others) remain and are accompanied by the introduction of new problems. Accordingly, we urge continued consideration of the previously submitted co-signed memoranda along with this new submission. We begin with an illustrative example. Section 213.3(1) provides:

(1) Sexual Assault of a Vulnerable Person in the First Degree. An actor is guilty of Sexual Assault of a Vulnerable Person in the First Degree if the actor causes another person to engage in or submit to an act of sexual penetration or oral sex and knows there is a substantial risk that the other person at the time of the act:

(a) is sleeping, unconscious, or physically unable to communicate unwillingness; or

(b) lacks substantial capacity to appraise or control his or her conduct because of a substance that the actor administered or caused to be administered, without the other person’s knowledge, for the purpose of impairing the person’s ability to communicate unwillingness…..

(4) If the prosecution proves beyond a reasonable doubt the elements of the offense described in subsections (1), (2), or (3), then that proof establishes that the other person did not validly consent to that act. Even apparent consent is invalid and ineffective when given by or elicited from a vulnerable person as described in those subsections.

There are many things to note in this provision. First is that this provision creates criminal liability if the defendant “knows there is a substantial risk” that the other person is incapacitated. The offense is committed even if the other person in fact is not incapacitated because no element of the crime requires incapacity. If you know there is a “substantial risk” the other person has been drinking and might be “unable to communicate unwillingness,” you are guilty even if the other person is not actually incapacitated.

Second, the provision relies upon many defined terms (none of which are capitalized) that mask its full scope by conflating widely different situations. The offense is committed by either “penetration” or “oral sex” but “oral sex” is defined as mere superficial oral “touching” of genitalia without penetration.[[1]](#footnote-1) The public does not view sexual penetration and a superficial kiss as being the same thing and worthy of the same culpability, but they are defined as identical in PD9.

Third, note that 213.3(1) creates a *per se* offense that is committed simply on the finding that the defendant was aware there was a risk of incapacity. If you know of a “substantial risk” that your spouse might be sleeping when you begin a genital kiss, you are guilty even if your spouse actually was wide awake. No criminal intent toward that spouse is required.

Fourth, the provision relies on multiple undefined terms that also conflate radically different things. To waken a “sleeping” spouse with a kiss or other “touching” is fundamentally different from penetrative sex with a person who is “unconscious or physically unable to communicate unwillingness” yet 213.3 treats them as being exactly the same.

Fifth and most disturbingly, this section (like many others) removes lack of consent as an element of the offense. The Membership in 2016 approved a definition of “Consent” which includes the possibility that an act initially unwanted can be approved by “subsequent consent.” Even if it made sense to criminalize the touching of a sleeping spouse, that spouse certainly should be able to waken and subsequently consent to continuing the sexual activity. Under subsection 4 of 213.3, however, this vote of the membership is overridden and lack of consent is excluded as an element of the offense or even as an affirmative defense. At the instant of the sexual act, the offense is complete and consent is prohibited from consideration (“Even apparent consent is invalid and ineffective”).

Before further addressing problems in individual sections, we suggest that one problem may be in the order of presentation of the sections. Because the offenses are listed with the most severe coming first, there are inconsistencies further down the chain of lesser severity offenses causing inconsistency and confusion about which subtraction of blame justifies imposition of a lesser penalty. Analytically, it might be better to build up from the lower level to the higher and explain what each specific added element contributes to justify a higher grading. Thus, the draft might proceed:

Penetration without consent

Penetration without consent and with the use of force

Penetration without consent and with the use of deadly force

Given the large number of defined terms, it also is extremely difficult to understand the precise meaning of each Black Letter offense because the defined terms are not capitalized and their defined meanings differ widely from the common understanding of the words being used (*e.g.*, “oral sex”). If specialized meanings are to be used, we respectfully suggest that defined terms should be marked. While we have heard some say that use of capitalized terms has not been standard for ALI, times have changed. No one in a commercial contract transaction would dare to ignore capitalization of defined terms and this project demonstrates the need for better clarity of meaning in the Black Letter.

We also note that PD9 contains deviations from the existing MPC. The Reporters state that their “restyling is not intended to be substantive, but rather is an effort to clarify or simplify the original language.” PD9 at 6. A first question is whether it makes sense to develop a two tier MPC with one set of rules of construction, culpability standards, standards of proof and defenses for most crimes and a different set for crimes that have the word “sex” in them. The risk of confusion and misconstruction seems very great. If the words are being changed, judges and juries will think that the meaning is being changed and the Reporters’ brief statement that “restyling is not intended to be substantive” is not going to avert great argument about the precise substance of the changes.

Moreover, there is grave concern that the “restyling” is substantive. Consider just one example. The current MPC says:

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant **circumstances**, he is aware that his conduct is of that nature or that such circumstances exist; **and**

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result. (emphasis added) (MPC 2.02(2)(b)).

While PD9 says:

(i) Knowledge. An actor acts knowingly when the actor is certain or practically certain that the actor’s conduct is of the described nature; when the actor is aware that **an** attendant circumstance exists; **or** when the actor is certain or practically certain that the actor’s conduct will cause a described result—even if that result was not the actor’s conscious object. (emphasis added) (PD9 213.0(4)(b)(ii)).

Under the current MPC, an actor must be aware of the “circumstances” (plural). Under PD9, the actor need only be aware of any singular (“an”) “attendant circumstance.” Under the current MPC, “knowingly” requires establishing both of clauses (i) “and” (ii), a conjunctive requirement. Under PD9, the prongs of “knowingly” are stated as “or” which is disjunctive rather than conjunctive. Other differences in these terms and in other terms will be identified as PD9 is more closely examined (*e.g.*, PD9 213.0(1), (4) and (5) do not appear to fully comport with MPC 1.12, 2.02 and 2.03), but it simply is not possible to say that the “restyling” is not “substantive.”

At this point, only three definitions have been approved by the Membership. With respect to those, the issue is not the definition but how the definition is used or not used. As noted above, “oral sex” is defined as mere superficial contact with no penetration and may even include contact through clothing (*see* note 1 above). Nevertheless, the Black Letter offenses use this term as being criminal in every way as severe and exactly the same as penetration. This is a huge increase beyond current levels of criminalization.

At the other end of the spectrum, the Reporters make Herculean efforts to avoid use of the Member approved definition of “consent,” even going to repeated lengths to say that lack of consent is an implicit part of some other element of the crime and need not be explicitly named as an element (*e.g.*, phrasings to the effect that the defendant “caused” the sex to occur). We respectfully suggest that the drafting of proposed legislation, especially criminal legislation, needs to be absolutely clear about identifying all elements of the crime. Elements of crimes should not be implicit or in any way held from visibility inside of something else. The proper way to define the crime is to specify that lack of consent is a formal element of each crime and to thereafter explain that consent can be invalidated in various ways.

The remaining definitions proposed in PD9 are problematic, vague or unduly expansive for various reasons. For example, “physical force” includes anything that   
“significantly impedes a person’s ability to move freely” which can include a hug. “Deadly weapon” includes anything known to be “capable of causing serious bodily injury” which can include alcohol. The heavy drinker and that drinker’s sexual companion both know alcohol’s capacity for “causing serious bodily injury” in many ways ranging from liver damage to drunk driving. The definition of “sexual contact” is unusually expansive (*e.g*., by adding “for the purpose” of undefined “sexual abuse”) and other definitions require detailed attention inside the context of their usage in the Black Letter offenses,

Consider the problems of overly expansive definitions combined with the failure to consider lack of consent as an explicit element of the offense. Assume that a wife is frustrated by the lack of intimacy in her marriage. They quarrel. She slaps his face. He is startled and aroused by her passion. They have sex. She is guilty of Sexual Assault in the Third Degree under 213.2 which states:

(1) Sexual Assault in the Third Degree. An actor is guilty of Sexual Assault in the Third Degree if the actor causes another person to engage in or submit to an act of sexual penetration or oral sex:

(a) by knowingly or recklessly using or explicitly or implicitly threatening to use physical force or restraint against that person or anyone else; and

(b) the actor knows there is a substantial risk that the other person engaged in or submitted to the act of sexual penetration or oral sex because of the actor’s use or threat of physical force or restraint.

Sexual Assault in the Third Degree is a felony of the third degree [10-year maximum].

(2) If the prosecution proves beyond a reasonable doubt that the other person engaged in or submitted to the act of sexual penetration or oral sex because of the actor’s use or threat of physical force or restraint, then that proof establishes that the other person did not validly consent to that act. Even apparent consent is invalid and ineffective when elicited through the impermissible means described in subsection (1). If applicable, the actor may raise an affirmative defense of Permission to Use Force according to the terms of Section 213.10.

She is guilty because she used physical force (a slap is explicitly defined as constituting physical force; PD9 Section 213.0(6)(e)(i)). She knew she was using force. She knew there was a “substantial risk” since the slap originated in her anger over the lack of intimacy during the argument. She “caused” the sex to occur. Note that his consent is never considered. Indeed, his consent is explicitly removed from consideration because “Even apparent consent is invalid and ineffective when elicited through the impermissible means.”

Her only hope is that she can invoke the so-called “BDSM” defense of Section 213.10. In other words, she has to show prior affirmative consent which now reappears in new guise in PD9 after repeated rejection.

The discussion at the outset noted the numerous problems in 213.3(1), the most stunning of which is that the person need not be actually incapacitated if the defendant knew of a “substantial risk” that the other person could be in some way incapacitated. Actual incapacitation is not an element of the offense and the provision creates a *per se* crime that treats competent people as if they were incompetent. All of the problems in 213.3(1) also recur in other offenses. For example, Section 213.3(2) provides:

(2) Sexual Assault of a Vulnerable Person in the Second Degree. An actor is guilty of Sexual Assault of a Vulnerable Person in the Second Degree if the actor causes another person to engage in or submit to an act of sexual penetration or oral sex, and knows

(a) there is a substantial risk that the other person has an intellectual, developmental, or mental disability or a mental illness that renders the person substantially incapable of appraising the nature of the sexual activity involved or understanding the right to give or withhold consent in sexual encounters, and the actor has no equivalent disability; or

(b) there is a substantial risk that the other person is passing in and out of consciousness, vomiting, or lacking the ability to communicate unwillingness at the time of the act.

Sexual Assault of a Vulnerable Person in the Second Degree is a felony of the third degree…..

(4) If the prosecution proves beyond a reasonable doubt the elements of the offense described in subsections (1), (2), or (3), then that proof establishes that the other person did not validly consent to that act. Even apparent consent is invalid and ineffective when given by or elicited from a vulnerable person as described in those subsections.

Section 213.3(2) does not require that the other person actually have a mental disability or any other incapacity to consent. The defendant is guilty because she knew there was a substantial risk of a disqualifying disability in her date who self-identified as “on the autistic scale.” His actual consent is disregarded because “Even apparent consent is invalid or ineffective.” Again, PD9 has vastly expanded *per se* crimes, this time going so far as to impose incapacity upon a person who lawfully could (and did) consent.

This provision also adds great risk to sexual relations among spouses in their later years when there quite commonly exists a “substantial risk” of some sort of incapacity whether due to physical or mental decline. If the nursing home director alleges that Mr. Smith was not competent, Mrs. Smith is guilty if she knew of a substantial risk that Mr. Smith could be incompetent. Actual incompetence never needs to be proved.

Again, all of the problems stated above regarding 213.3(1) reemerge in 213.3(3) with a possibly more bizarre twist. 213.3(3) provides:

(3) Sexual Assault of a Vulnerable Person in the Third Degree. An actor is guilty of Sexual Assault of a Vulnerable Person in the Third Degree if the actor, who did not have a consensual sexually intimate relationship with the other person at the time that the restriction on that person’s liberty began, causes that person to engage in or submit to an act of sexual penetration or oral sex and knows there is a substantial risk that the other person is:

(a) detained in a prison, hospital, or other custodial environment in which the actor holds a position of authority; or

(b) in custody, on probation, on parole, or in a pretrial diversion program, treatment program, or any other status involving state-imposed restrictions on liberty, and the actor holds or purports to hold any position of authority or supervision with respect to that person’s status or compliance with those restrictions. Sexual Assault of a Vulnerable Person in the Third Degree is a felony of the fourth degree.

(4) If the prosecution proves beyond a reasonable doubt the elements of the offense described in subsections (1), (2), or (3), then that proof establishes that the other person did not validly consent to that act. Even apparent consent is invalid and ineffective when given by or elicited from a vulnerable person as described in those subsections.

If the defendant works in the state’s criminal justice system and knows there is a “substantial risk” that her date is on probation, she is guilty even if, in fact, he is not on probation. Like all of the other provisions, this provision imposes a *per se* incapacity to consent in situations where the person absolutely did have capacity to consent. Still, the provision insists, “Even apparent consent is invalid and ineffective.”

Section 213.4 continues the previously noted problems and adds still more. Section 213.4 provides:

(1) Sexual Assault by Extortion. An actor is guilty of Sexual Assault by Extortion if the actor causes another person to engage in or submit to an act of sexual penetration or oral sex and knows there is a substantial risk that the other person engaged in or submitted to the act because the actor explicitly or implicitly threatened:

(a) to accuse that person or anyone else of a criminal offense or of a failure to comply with immigration regulations; or

(b) to take or withhold action as an official, or cause an official to take or withhold action; or

(c) anything that would cause submission to or engagement in such act by an individual of ordinary resolution in that person’s situation under all the circumstances as that person believes them to be.

Sexual Assault by Extortion is a felony of the third degree [10-year maximum].

(2) If the prosecution proves beyond a reasonable doubt that the other person engaged in or submitted to the act because the actor explicitly or implicitly threatened any of the actions enumerated in subsection (1), then that proof establishes that the other person did not validly consent to that act. Even apparent consent is invalid and ineffective when elicited through extortion as described in that subsection. If applicable, the actor may raise an affirmative defense of Permission to Use Force according to the terms of Section 213.10.

Again, there is no requirement that the defendant overcame a lack of consent by actual or threatened extortion. There is no requirement that extortion was the cause of the sex. The defendant is guilty if she was aware of a “substantial risk” that extortion could be the cause of the sex. If she thought he might fear being turned in for Criminal Non-Support after she complained about the late alimony check, she is guilty even though their actual sex was merely an attempt to explore the possibility of reconciliation. The offense does not require the “extortion” to have been the cause of the sex. It merely requires the defendant to be aware that it might be risky to have sex with this person who could turn against her.

Subsection (c) adds delusion to the risks of sex. If the defendant knows that her partner is sometimes “off his meds,” she is at risk of an accusation of extortion from the other person who delusionally believes extortion occurred “under all of the circumstances as that person believes them to be.” Under this provision, the jury can agree that the accusation was nuts but “extortion” occurred “under all of the circumstances as that person believes them to be.”

And again, consent is scrubbed out of the elements of the offense. If she believed in good faith that he consented, she still remains guilty because, “Even apparent consent is invalid and ineffective.”

Section 213.5 also overcriminalizes. Section 213.5 provides:

(1) An actor is guilty of Sexual Assault by Exploitation if the actor causes another person to engage in or submit to an act of sexual penetration or oral sex and the actor:

(a) knowingly misrepresented that the act has diagnostic, curative, or preventive medical properties; or

(b) knowingly led the other person to believe falsely that the actor is someone else who is personally known to that person; or

(c) knows that the other person is wholly or partly undressed, or in the process of undressing, for the purpose of receiving nonsexual professional or commercial services from the actor and has not given the actor explicit prior permission to engage in that act.

Sexual Assault by Exploitation is a felony of the fourth degree [five-year maximum].

(2) If the prosecution proves beyond a reasonable doubt that the actor engaged in any of the exploitative conduct in subsection (1), then that proof establishes that the other person did not validly consent to that act. Even apparent consent is invalid and ineffective when elicited through exploitation as described in that subsection

As written, the defendant is guilty under Section 213.5(1)(a) if she “causes” the other person to have sex even if the knowing misrepresentation was not at all a part of the cause of the sex. The section creates a crime if the defendant lies and has sex even if the lie was just a joke between the two people that did not cause the sex. The same defect is in subsection (c) which does not require that the sex be caused by the undressing. It just says the defendant caused sex while the other person was undressed. Note also that “explicit prior permission,” the rejected “prior affirmative consent” standard, is expressly imposed here. And, again, ordinary consent is prohibited from consideration in all of these *per se* crimes because, “Even apparent consent is invalid and ineffective.”

Concerns about 213.6 and 213.7 have been expressed elsewhere and will not be repeated here in the interest of brevity.

Section 213.9 is also overbroad in many respects. Consider just this portion by way of illustration:

(1) Sex Trafficking. An actor is guilty of Sex Trafficking if the actor knowingly recruits, entices, transports, transfers, harbors, provides, receives, obtains, isolates, or maintains by any means a person knowing or recklessly disregarding the risk:

(i) that coercion will be used to cause the person to submit to or engage in a commercial sex act; or

(ii) that the person is less than 18 years of age and will be caused to submit to or engage in a commercial sex act.

Any person who takes a runaway into her home or into a shelter in an attempt to assist that runaway is guilty of “sex trafficking” by “maintaining” that runaway while aware of a risk that some other person might try to traffic the runaway. The section does not require that the person doing the “maintaining” have any relationship to the “coercion.”

Finally, Section 213.10, the “BDSM” defense, has been set up as a vehicle for reinstating “affirmative consent.” As noted above, section after section of the Black Letter offenses recites the position that ordinary consent is “invalid and ineffective.” Since ordinary consent is invalid and ineffective, the defendant is forced into an attempt to establish the affirmative defense stated in 213.10. The need to seek shelter in this affirmative defense means that “prior affirmative consent” has been reinstated as the *de facto* standard for allegations of sex crimes.

We regret that time limits prevent a more thorough review of PD9, but we hope these comments are useful to the process and we reaffirm our appreciation for the decision to not place this project on the agenda of the 2019 Annual Meeting.

Respectfully submitted

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1. “Touching” expressly includes touching through clothing (“whether clothed or unclothed”) in 213 (0)(6)(c). “Touching” in 213 (0)(6)(b) (“oral sex”) is less clear about whether a kiss through underwear differs from a kiss without underwear. [↑](#footnote-ref-1)