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| To: | ALI Director, Deputy Director, Project Reporters, Council and Members |
| From: | Undersigned ALI Members and Advisers |
| Date: | October 17, 2017 |
| Re: | Preliminary Draft No. 8 and Council Draft No. 6; Revisions to Sexual Assault Provisions of Model Penal Code |

Dear Colleagues:

We appreciate the continued attention and concern of the Council with respect to the Model Penal Code Project. In particular, we are pleased to have been informed that this Project will not be on the Agenda for the 2018 Annual Meeting because of recognition of the substantial amount of work remaining before Membership consideration is appropriate. Given the Membership’s strong negative reaction to prior drafts at each of the past several Annual Meetings, we agree that a pause and reassessment are wise.

At the same time, we have been informed that Council approval is being sought for certain sections in Council Draft No. 6 and that other sections are on the October 20 Council Agenda for discussion. We believe that none of the current sections are ripe for Council approval and we are concerned that even Council discussion will be impaired without the additional information provided in the following pages. Because of the short time provided to consider the drafts, we wish to be clear that we are not able to identify all of the existing problems, but we hope the information provided herein will be of benefit to you as you explore the drafts yourselves.

To begin, the ALI website states that, “A motion to remove ‘recklessly’ from Section 213.1 passed,” at the May 2017 Annual Meeting. That motion passed by approximately a 3 to 1 margin after extended discussion which renders us concerned upon finding that the new draft retains the “recklessly” standard and requests Council approval for the following:

SECTION 213.1. FORCIBLE RAPE

(1) Forcible Rape in the First Degree…..

(c) knowingly or recklessly causes serious bodily injury to the other person or to someone else

Of further concern is the fact that Section 213.1 has been expanded to add a new offense using the disapproved “recklessly” standard:

(3) Forcible Rape in the Third Degree. An actor is guilty of Forcible rape in the Third Degree if he or she recklessly causes another person to engage………..

We do not understand how either of these provisions can be appropriate in light of the clear vote by the Membership. Indeed, the “recklessly” standard permeates the new drafts across many of the listed offenses. While the Membership vote specifically applied to Section 213.1, we are concerned that the Reporters have not adequately understood the will of the Members because the concerns about the “recklessly” standard apply to other offenses as well as to the offenses in 213.1. This point was repeatedly urged upon the Reporters during the October 13 meeting of the Advisers and Members Consultative Group.

The treatment of the “recklessly” standard in Council Draft No. 6 seems to epitomize the academic observation from outside of ALI that:

ALI critics of the sexual assault proposal could not be faulted for feeling as if they are in a game of Whack-a-Mole….

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, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2753718, footnotes omitted.

Our concerns are heightened by review of a recent publication by the lead Reporter that both articulates an ideological goal and an apparent reluctance to accept the will of the Membership:

In this Article, I undertake two distinct tasks. First, I want to discuss what the laws against sexual assault ideally should look like….

I am exceptionally grateful to Professor Catharine A. MacKinnon for stimulating my interest in these issues several decades ago and for incisively challenging my current and prior efforts in this area over the many years we have been colleagues….

This Article then turns to the second large part of the rape reform story and discusses the work of getting progressive reform enacted in the face of strong and determined resistance. Part of that resistance is outright misogyny—unconscious or overt disrespect for women. Although it is important to acknowledge that fact, this Article will focus instead on resistance that is not attributable to misogyny….

So far, I have left out two important parts of this story. One is pushback based on the argument that women supposedly should not be pampered or “infantilized”—that nothing stops a woman from resisting a nonviolent sexual advance if she really wants to resist. I will say more about that below. But first, there was reform that came from the other side of the fence: the feminists and victim advocates who did not really get the full MacKinnon message—I am especially pointing to the slogan, “no-means-no.”…

That brings me to the current battle cry: “yes-means-yes.” Here, the problem is similar to the one we encountered with respect to no-means-no: a well-intentioned, ostensibly progressive rallying cry misleads and fosters assumptions that ultimately are antithetical to effective reform. The yes-means-yes slogan impedes genuine clarity in society’s understanding of the stakes. What the slogan is supposed to mean is that silence does not mean yes. People have to give permission; that’s the essential minimum. But again, the mantra, in this case “yes means yes,” is drastically incomplete…. We must be clear about this: for all the reasons that Professor MacKinnon shows, “yes” does not always mean yes. In situations dominated by disparities of power, merely saying yes is not saying that I have freely made a sexual choice…..

We therefore remain a long way from a proper social understanding of the issues and the law’s role in addressing them….

I will use three greatly oversimplified categories to describe groups that resist almost any reform of a relatively ambitious nature. I will call them the misogynists, the low-information opponents, and the well-informed, very thoughtful opponents.

Schulhofer, “Reforming the Law of Rape,” Law & Inequality: A Journal of Theory and Practice; Volume 35:2 (2017) at 335-336, 340-343, and 348.

It is in the context of this ideological stance that problems such as “recklessly” persist and invite the Whack-a-Mole analogy.

In addition to the persistence of the “recklessly” problem, the draft continues or repackages other problems too numerous and detailed for a memorandum of this type. A simple glance at the redline version of the draft demonstrates the near impossibility of tracking problems from draft to draft to determine which have been cured, which remain and which have simply changed shape or location. We admire the Council’s willingness to undertake its task, but we do not see how a thorough review can be accomplished during the limited time available to the Council on October 20, particularly in light of the Council’s other burdens on that day.

By way of comparison, the Advisers and Members Consultative Group spent a full, long day on the draft but were unable to conduct a thorough review. For each section, the Chair was forced to terminate discussion in order to move on. For each section, the discussion was almost exclusively limited to the Black Letter with very little examination of the problematic aspects of the Comment, Illustrations and Reporters’ Notes. This limited review is of grave concern given the previous analyses by Professors Stith and Kirkpatrick and Judge Keyes, plus a new analysis by Judge Keyes, all of which challenge the adequacy and accuracy of the Reporters’ citations and discussion.

While it is impossible to offer a comprehensive analysis, we hope it is instructive and useful to reference a few illustrations of the bases for continued concerns in addition to the “recklessly” issue and in addition to the repeated concerns about the adequacy and accuracy of the citations and discussions.

To begin, Section 213.1, Forcible Rape, explicitly removes absence of consent as an element of the crime of rape. The Comment at page 22 states:

Consent is not an element of the crimes described in Section 213.1. A person confronted with a weapon or the threatened use of force may appear to consent to engage in the sexual acts, but the conditions under which apparent consent occurs make it legally ineffective.

With all due respect, this is purely a strawman argument. No modern court is known to have found consent at the point of a gun. As the lead Reporter’s own article acknowledges:

Obviously, “yes” is not authentic consent when it is given at the barrel of a gun. (Id. at 345)

The strawman consists of using the most extreme form of “force” as the definitive example while criminalizing “force” down to whatever level of triviality a local prosecutor selects. Consider the following hypothetical: He is lying in bed, preparing for sleep. She comes out of the shower, drops her towel and forcefully flings her body on top of his. She forcibly presses their lips together while straddling him with the full force of her weight. Her force “causes” them to have intercourse. She is guilty of Forcible Rape under 213.1 which explicitly rejects consideration of his willingness.

The error of 213.1 is simple. Sex is not criminal. Physicality is not criminal. Sex and physicality become criminal only when pursued against the will of the other person, yet 213.1 explicitly requires disregard of the parties’ will and consent. After several unacceptable drafts, the Membership imposed a definition of Consent in this Project at the 2016 Annual Meeting. That definition is fully suitable for use in 213.1. To remove consent from 213.1 is both illogical and inconsistent with the manifested will of the Membership.

In 213.2(1)(a), there is a blurring of radically different conditions to treat as if identical various persons who are:

sleeping, unconscious, or physically unable to communicate

Initiating sexual penetration “however slight” (see 213.0(1)) with a comatose hospital patient is fundamentally different from a morning caress to a still dozing spouse who will quickly awaken and either desire or not desire to continue, but 213.2(1)(a) treats the dozing spouse as identical to the comatose hospital patient. Note further that 213.2(1)(a), like 213.1, omits consent from the definition of the offense. A spouse who has caressed her partner a thousand times during the morning transition from sleep is nevertheless a rapist if she does the same thing on the day her partner has secretly planned the filing of their divorce.

Additionally, 213.2(1)(b) and 213.2(2)(a) are “reserved,” rendering 213.2 absolutely inappropriate for Council approval despite the Reporters’ stated request for approval on the cover of Council Draft No. 6 Further, 213.2 also utilizes the “recklessly” standard to bizarre result. For example, 213.2(1)(c) correctly states (for a crime at this level of punishment) that the defendant must have administered a disabling substance “for the purpose” of disabling the other, but the offense then gets muddled by injecting “recklessly” as the mens rea standard.

In 213.3, “recklessly” is again injected to ill effect. For example, it is hard to understand the sense of a provision that creates liability for a person who “recklessly”…. “compels the other person to submit.” Compulsion is intentional, not reckless. 213.3(1)(b). Similarly, it is hard to see how a person could “recklessly” fail to notice the fact that the other person is in a prison. 213.3(1)(c)(i). Many problems with the draft as a whole would be greatly ameliorated by removal of the “recklessly” standard.

It is not sufficient to say that the 1962 Model Penal Code has a fairly stringent definition of “recklessly.” The word “recklessly” has to mean something less than “knowingly” and it does nothing in this context other than create risk of a slide toward a negligence standard in actual practice. Whatever the word “recklessly” meant in 1962, today it means “fifteen miles per hour over the speed limit” or “distracted driving” and nearly every driver in America has crossed the “recklessly” threshold. It is not an appropriate standard for intentional sexual assaults.

213.4was omitted from Council Draft No. 6, but it also has the “recklessly” problem. That problem will not be ignored or forgotten as demonstrated during the discussion of 213.4 at the October 13 meeting of the Advisers and Members Consultative Group.

Although 213.6(2), is presented to the Council “for discussion only,” we note that liability attaches if the complainant “is unaware of the sexual contact when initiated.” That is always going to be the case unless the defendant announces in advance to her spouse, “I am now going to touch you.” This, of course, would be another reversion to “affirmative consent” which has been definitively rejected by the membership.

213.8 was not discussed by the Advisers and Members Consultative Group in any way that would permit useful comment to the Council and that provision is apparently presented “for discussion only.”

213.9 presents a new defense primarily for members of the BDSM community, but its explicit interaction with 213.1, 213.4 and 213.6 is problematic. Because those sections either remove consent as an element of the offense or inject an inappropriate “recklessly” standard, 213.9 takes on the appearance of an affirmative defense in which a defendant is back to being required to show “affirmative consent” in an enormous range of ordinary sexual behavior between willing persons. The Whack-a-Mole problem returns again. Much of the problem with Council Draft No. 6 arises because there appears to be considerable effort to eliminate the word “consent” from each section of the draft. This is not appropriate. The Membership has clearly established consent as the touchstone for sexual behavior and has established a solid definition of Consent which, if utilized fairly and consistently, solves many of the problems in Council Draft No. 6.

Finally, we note that the definitions in 213.0(5) and (6) were not discussed at the meeting of Advisers and Members Consultative Group. Why age 12? Why are certain offenses exempted from the age cut-off? If force is the concern, why process the case as a sex crime before a child has even reached puberty? The short, conclusory Comment provides very little analysis, citation or rationale for the choices being made in matters that have a substantial frequency of occurrence.

Despite our concerns, we wish to finish with optimism. The lead Reporter’s article states:

The third group, the last source of resistance I want to discuss, is the hardest. These are well informed, highly sophisticated people with decent values. They are intensely concerned about the injustice to defendants that pervades our entire criminal justice system: abuses of prosecutorial discretion; shocking racial disparities; intense leverage deployed to coerce guilty pleas, especially when the evidence is the weakest; overly punitive sentencing; mass incarceration; and by no means least, our overly rigid, vastly over-inclusive system of sex-offender registration. This system often includes absurd, life-long restrictions on the offender’s residency, education, and employment, applied to offenders whose crimes, though serious to be sure, do not mark them with the potential for life-long violent recidivism….

When I’m being honest with myself, however, and when I am trying to reach people of good will who do worry about racial discrimination, people who do worry about sex-offender registration and harsh, inflexible punishments, I must acknowledge that there is no simple answer to their concerns…. victim advocates must be equally willing to acknowledge the opposing dynamic that exists side-by-side with that neglect [under-prosecution of offenses]: pervasive race bias and class bias in enforcement; pervasive abuse of charging power and plea bargaining; pervasive rigidity and disproportionality in punishment; pervasive overbreadth, overreaction, and inflexibility in the deployment of collateral consequences such as registration, community notification, and restrictions on public benefits, employment, and residency.

The vexing problem we reformers face in trying to craft a more protective law of sexual assault is resistance from decent people who are well aware of un-redressed victimization but at the same time are acutely aware of extreme racial disparities and the wildly inconsistent responses our media and our society have to sexual abuse…. (Id. at 350-352)

We appreciate the lead Reporter’s acknowledgement of our concerns about overcriminalization with one caveat about the phrase “we reformers.” In this project, we all are reformers and the Reporters’ personalized vision what constitutes reform does not override the repeatedly expressed will of the Membership. The question is how to manage reform in an area of law that the Reporters themselves acknowledge to be rife with all the known problems of overcriminalization. We respectfully submit that the best path to reform is with clarity and precision to identify the behavior that is needing of punishment; without vagueness and without overbreadth that exacerbate the acknowledged problems of overcriminalization.

Again, we appreciate the Council’s attention to these important issues and we stand ready to assist in ALI’s mission of harmonizing, synthesizing and advancing the law for the good of the nation.

Respectfully submitted,

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