

To: ALI Director, Deputy Director, Project Reporters, Council and Members
From: Undersigned ALI Members and Advisers
Date: February 22, 2021
Re: Revisions to Sexual Assault Provisions of
Model Penal Code; *Mens Rea* Concerns

Dear Colleagues:

We have received multiple memoranda addressed to the *mens rea* standard that should apply to the various offenses in the Sexual Assault provisions of the Model Penal Code. If there is a single concern that has united the Membership in this project, it has been the concern regarding over-criminalization which results in massive over-incarceration in the United States.

Recognizing the inherent subjectivity of physical interactions between two persons, it is essential to avoid an over-expansive Black Letter that will exacerbate the over-criminalization problem. Depending wholly upon the mental state of the participants, equal physical contact has widely differing significance ranging from joyful delight to abject horror. This is why the *mens rea* issue is so important.

Establishing the correct *mens rea* cannot be done until the remainder of the offense is defined and the current draft, Council Draft No. 11 (CD 11), has continuing structural problems that impede establishment of the correct *mens rea*. The fundamental problem is that the draft continues to ignore the definition of consent adopted by the Membership, 213.0(d), and uses complex circumlocutions to avoid making absence of consent an explicit element of the crimes. Consider first Section 213.1(1) which provides:

- (1) Sexual Assault by Aggravated Physical Force or Restraint. An actor is guilty of Sexual Assault by Aggravated Physical Force or Restraint when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:
 - (a) the act is without effective consent **because** the actor uses or explicitly or implicitly threatens to use aggravated physical force or restraint against any person; and
 - (b) the actor knows that the other person submitted to or performed the act of sexual penetration or oral sex **because** of the actor's use of or threat to use aggravated physical force or restraint.
- (3) Effective consent. Consent is ineffective when the other person submitted to or performed the act of sexual penetration or oral sex **because** the actor used or threatened to use aggravated physical force or restraint. Submission, acquiescence, or words or conduct that would otherwise indicate consent do not constitute effective consent when occurring in a circumstance described in subsection (1). If applicable, the actor may raise an affirmative defense of Explicit Prior Permission according to the terms of Section 213.10

Note that the word "because" is used three times, but is not used consistently. In the first use, an act is "without effective consent" simply "**because**" of the presence of threat or force. Under

this usage, there is no required connection between the sex and the use of force. Suppose John and Mary are preparing for bed and Mary makes a phone call to her sister in which she threatens the sister over an unrelated matter. Mary then initiates sex to take her mind off her intemperate threat against the sister. As 213.1 is currently written, there is no “effective consent” despite the complete lack of a connection between the sex and the threat. This is an absurd outcome, but it is what the text requires since the text says nothing about the threat or force being connected to the sex.

In the second and third uses of “because,” consent is “ineffective” if the person performed the sex act “**because**” of the use of threat or force. Those are very different things from the first use of the word “because,” but they still do not directly address willingness for the sex. Mary knows that John performed the act Mary initiated “because” of the threat that Mary had made against her sister. The sex occurred “because” of the threat, but 213.1 fails to ask the essential question of whether John was unwilling. The multiple, inconsistent uses of the word “because” create inappropriate ambiguity that undermine and contradict the Membership approved definition of consent. Consent is defined ((213.0(d)) as “willingness” and criminality should only attach if the threat or force caused the submission of an unwilling person. These inconsistencies and contradictions on the face of the text (real consent may not be “effective consent”) make it difficult to establish the appropriate *mens rea*.

Put even more fundamentally, the current draft does not require a finding of absence of consent.

We urge the Council to consider the following suggested revision for 213.1(1) as an example of the needed corrections:

- (1) Sexual Assault by Aggravated Physical Force or Restraint. An actor is guilty of Sexual Assault by Aggravated Physical Force or Restraint when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:
- (a) the actor uses or explicitly or implicitly threatens to use aggravated physical force or restraint against any person to compel the act; and
 - (b) the act is without consent; and
 - (c) the actor knows that the other person submitted to or performed the act of sexual penetration or oral sex because of the actor’s use of or threat to use aggravated physical force or restraint.

This formulation covers the full offense without internal contradiction, redundancy or ambiguity. The conduct is described, the lack of willingness is described, and the *mens rea* is described.

The confusion created by the inconsistent use of the word “because” can be seen elsewhere in the current draft. Thus, 213.1(1) currently requires a “knows” standard for *mens rea* while 213.2 which has the same contradictory use of the word “because” requires an “aware of, yet recklessly disregards” *mens rea* standard. Before setting the *mens rea* standard, it is necessary to solve the problems caused by the contradictory uses of the word “because” and the failure to make absence of consent a clear element of the crime.

Note further that the insertion of Subparagraph 3 (“Effective Consent”) in 213.1 heightens the confusion caused by the multiple uses of the word “because” by adding complexity and straddling the different meanings of “because.” Subparagraph 3 (and the equivalent provision used in many places throughout the draft) is either redundant or contradictory to the remainder of the definition of the offense and to the Membership approved definition of consent by denying “effective consent” where actual consent (willingness, 213.0(d)) exists.

Throughout the current draft, clarity and certainty are lost by the introduction of “effective consent” rather than reliance upon the simple standard of willingness as articulated in the Membership approved definition of Consent. (213.0(d)). As used in some sections, “without effective consent” is used to indicate a situation where consent is legally impossible (e.g., unconscious person in Section 213.3 or minor in Section 213.8). In other sections such as 213.4, “without effective consent” is used too loosely in situations where legal consent may exist because capacity and willingness are present despite the cited factor that purportedly prevents “effective consent.” For example, in 213.4, a “threat” of one person to make an accusation against another person prevents “effective consent” even though the second person may remain willing, even though the “threat” may have been trivial, and even though the threat occurred long ago.

Finally, note that Section 213.6 avoids the multiple “because” problems and avoids the “effective consent” problems found in 213.1. Section 213.6 is written in a much more straightforward manner that avoids these problems and should be considered as a model for all of the sections. Section 213.6 is based on the absence of consent, the very thing that should be the core element of every offense but is missing from many offenses in the current draft.

Section 213.2 suffers from the same multiple, inconsistent uses of the word “because” as well as the redundancy and confusion created by “effective consent.” We urge the Council to consider the following suggested revision for 213.2

- (1) Sexual Assault by Physical Force or Restraint. An actor is guilty of Sexual Assault by Physical Force or Restraint when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:
 - (a) the actor uses or explicitly or implicitly threatens to use physical force or restraint against any person to compel the act; and
 - (b) the act is without consent; and
 - (c) the actor [insert *mens rea* standard] that the other person submitted to or performed the act of sexual penetration or oral sex because of the actor’s use of or threat to use physical force or restraint.

Section 213.3 deals with persons who cannot give consent. For reasons previously stated in co-signed memoranda, this section is over-broad. A lightly sleeping spouse with a years’ long history of morning sex is simply not in the same category as the unconscious victim of a “surreptitiously administered” drug. The absence of “explicit prior permission” for sex in a dressing room is not in the same category as a person “passing in and out of consciousness.” These over-broad provisions are another iteration of the reversion to “affirmative consent” that

has been overwhelmingly rejected by the Membership. Section 213.3 should be revisited and narrowed

Section 213.4 has the same problem with multiple usages of “because” that are found in 213.1 and 213.2. Again, “effective consent” creates confusion and redundancy. A threat, of any degree, at any time, prohibits “effective consent” even though the person remains willing, even eager for the sexual activity. 213.4 does not require the threat to cause the sexual activity. 213.4 does not require the person to be unwilling. This is a *per se* crime if any sexual activity occurs at any time after a “threat.”

Section 213.5 has the same problem with multiple usages of “because” that are found in 213.1 and 213.2. Again, “effective consent” creates confusion and redundancy. The provision imposes liability without requiring a finding of unwillingness. A person may have been lied to and may have believed the lie while still being willing to engage in sexual activity.

Section 213.6 avoids the “because” problems and the “effective consent” problems. This section should be considered as a model for all sections. The clarity of Section 213.6 allows better focus on the appropriate *mens rea* standard. People can disagree about which standard should apply, but the clarity of 213.6 allows clear analysis and avoids the sort of odd results found in 213.1 and 213.2 which adopt different *mens rea* standards as a result of the confusion introduced by the “because” and “effective consent” problems.

As stated at the outset, the Membership is gravely concerned about the problem of over-criminalization. Establishing the correct *mens rea* is essential to reducing the over-criminalization problem. Solving the “because” and “effective consent” problems is essential to rational discussion of the correct *mens rea* standard. When the parties are competent adults, making absence of consent an explicit element of each crime is a core constitutional requirement.

Respectfully submitted,

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