

**MOTION CONCERNING § 213.0(3) AND § 213.2, TENTATIVE DRAFT #2,  
MODEL PENAL CODE: SEXUAL ASSAULT**

**TO:** Members of the American Law Institute

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**DATE:** May 6, 2016

**MOTION:** Concerning Tentative Draft No. 2, Model Penal Code: Sexual Assault and Related Offenses, we move that the text of §213.0.3 and §213.2 be amended to read as follows:

**SECTION 213.0. DEFINITIONS**

**(3) "Consent"**

**(a) "Consent" means a person's ~~behavior, including words and conduct—both action and inaction—that communicates the person's~~ willingness to engage in a specific act of sexual penetration or sexual contact.**

**(b) Notwithstanding subsection (3)(a) of this Section, behavior does not constitute consent when it is the result of conduct specifically prohibited by Sections [reserved].**

**(c) Consent may be ~~express, expressed~~ or it may be inferred from a person's ~~behavior, words, conduct, or both, including acts and omissions, under the totality of the circumstances.~~ Neither verbal nor physical resistance is required to establish the absence of consent; ~~the person's behavior must be assessed in the context of but~~ lack of physical or verbal resistance may be considered, together with all the other circumstances ~~to determine, in determining~~ whether ~~the~~ person has consented.**

**(d) Consent may be revoked at any time before prior to or during ~~the a consented-to~~ act of sexual penetration or sexual contact, by ~~behavior communicating that the person is no longer willing. A clear verbal refusal—such as "No," "Stop," or "Don't"—suffices to establish the lack of expression of lack of consent. A clear~~ through words, conduct, or both. A clear verbal refusal ~~also~~ expression of unwillingness suffices to ~~withdraw previously communicated willingness establish revocation of consent,~~ in the absence of subsequent ~~behavior that communicates willingness before the sexual words or conduct indicating consent prior to or during the act~~ occurs in question.**

## SECTION 213.0. DEFINITIONS

### (3) "Consent"

(a) "Consent" means a person's willingness to engage in a specific act of sexual penetration or sexual contact.

(b) Notwithstanding subsection (3)(a) of this Section, behavior does not constitute consent when it is the result of conduct specifically prohibited by Sections 13 [reserved].

(c) Consent may be expressed or it may be inferred from a person's words, conduct, or both, including acts and omissions, under the totality of the circumstances. Neither verbal nor physical resistance is required to establish the absence of consent; but lack of physical or verbal resistance may be considered, together with all other circumstances, in determining whether a person has consented.

(d) Consent may be revoked at any time prior to or during a consented-to act by expression of lack of consent through words, conduct, or both. A clear verbal expression of unwillingness suffices to establish revocation of consent, in the absence of subsequent words or conduct indicating consent prior to or during the act in question.

## SECTION 213.2 - SEXUAL PENETRATION WITHOUT CONSENT

Sexual Penetration Without Consent. An actor is guilty of Sexual Penetration Without Consent if he or she engages in an act of sexual penetration when the other person has not consented to that act, and the actor knows, or recklessly and knows, or consciously disregards a substantial risk, that the other person has not ~~given consent~~consented.

Sexual Penetration Without Consent is a ~~felony of the fourth degree~~misdemeanor.

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Sexual Penetration Without Consent is a misdemeanor.

## STATEMENT IN SUPPORT OF PROPOSED AMENDMENTS TO § 213.0(3) AND § 213.2

The principal concerns that prompt these proposed amendments are three:

*First*, the provision as contained in Tentative Draft #2 (“TD2”) effectively places the burden of proof on the defendant, in violation of longstanding, fundamental, and universally recognized principles of American criminal law, by virtue of its focus on whether consent was communicated rather than simply whether it existed.

*Second*, the focus on communication represents too great a departure from existing cultural norms and legal standards, and from appropriate criteria for criminal liability, to justify approval by the Institute. Under the proposed language of TD2, an actor can be guilty of a crime even though the other party in fact consented to the sexual contact or penetration and the actor believed that the person had consented. This effectively eliminates both the *mens rea* and the *actus reus* that we believe should be required for criminal liability for this offense.

*Third*, grading the offense of “Sexual Penetration Without Consent” as a felony is too severe. We do not suggest that the aggravated versions of unconsented penetration reserved in § 213.0(3)(b) are not appropriately classified as felonies, but they are covered by other provisions not at issue in TD2. Section 213.2 reaches situations that are either not criminal offenses at all or are not felonies in most states. Moreover, it seeks to use the criminal law as a means of reforming and improving norms of social behavior. This is not a situation in which classification of the offense as a felony, with the severe post-release collateral consequences that attach, is justified.

### **Section 213.0(3)**

**Subsection (a)**. The proposed amendment eliminates the concept of “communicated willingness” from § 213.0(3)(a) and defines “consent” as simply a “person's willingness to engage in a specific act of sexual penetration or sexual contact.” In previous drafts, the Reporters have attempted to have the Institute endorse the controversial concept of “affirmative consent” by defining “consent” to require a person's “positive agreement” before any act of sexual contact or penetration could lawfully occur. After extensive opposition was expressed at the 2015 Annual Meeting, as well as from members of the Advisory Committee and the Members Consultative Group, the Reporters state that they have abandoned that proposal. In their Memorandum (p. xv) they say that they have now “reframed” the consent issue and have rejected an “affirmative consent” requirement. On page 2 of the Comment to § 213.0(3) they acknowledge that an “affirmative consent” standard “may result in unjust convictions merely for lack of affirmative expressions of consent.” However, the “communicated willingness” standard they now propose is functionally equivalent to the rejected affirmative consent standard and is subject to the same infirmities and objections as affirmative consent.

By focusing on communication of consent rather than existence of consent, the definition of consent in TD2 contains no requirement that there actually have been an unconsented sexual act. A conviction can be obtained without the prosecution ever establishing that the complainant

did not consent. The complainant need testify only that no consent was communicated. The notion that a person who engages in a sexual act with someone whom that person correctly believes has consented to it can be guilty of a felony, or any crime, is unacceptable.

Another serious problem with the “communicated willingness” approach is that it effectively shifts the burden of proof to the defendant. If the complainant testifies that there was no communicated consent, the burden is then on the defendant to produce evidence of all the details of their relationship and all the relevant circumstances that produced a belief that consent existed. The Reporters state on p. xv of their Memorandum that they are proposing a standard of “*contextual consent*, assessed under the totality of circumstances.” The problem is that as a practical matter it is the defendant, not the prosecutor, who will have the burden of establishing that context and proving the “totality of circumstances.” This is entirely improper. Under the amended version, the prosecution must establish not only that the sexual act occurred but that the other person did not consent to it and that the defendant knew, or recklessly disregarded a substantial risk, that the other person had not actually consented; the defendant is not required to prove anything. This restores consistency with basic principles of American criminal law.

The Reporters cite no state that defines consent as “communicated willingness,” and the 12 jurisdictions cited in footnote 6 as being supportive of this new standard (excluding the U.S. Military, which is not comparable for MPC purposes) are mostly the same jurisdictions that were cited in the last draft as supporting an “affirmative consent” standard. Not even all of those jurisdictions can be cited as authority, however, because as footnote 7 acknowledges a number of them require an additional element beyond absence of consent, such as coercion or duress, that drastically transforms the character of the offense. Moreover, a number of the state statutes quoted in note 6 require only that the consent be “knowing” and “voluntary” (Florida and Hawaii), or “freely given” (Illinois). They do not require that it be “communicated.” Footnotes 8 and 9 list states having other definitions of consent, such as “express or implied acquiescence.” Certainly “express or implied acquiescence,” which is perhaps the most widely recognized form of consent, requires a contextual analysis, as do other similar definitions, but this does not make such definitions a precedent for the language in § 213.0(3) requiring “communicated willingness.” There is a significant difference between “contextual consent,” which is commonly required under the law of most states, and “communicated consent,” which is the standard in only a very small number of states.

In sum, the proposed new requirement of “communicated willingness” is at best a distinctly minority view and is essentially a reworded but not functionally different version of the “affirmative consent” requirement that generated substantial opposition at the 2015 Annual Meeting. The proposed amendment is designed to eliminate from § 213.0(3) the problematic requirement of “communicated willingness” in favor of a requirement of knowledge or reckless disregard of the existence or substantial risk of actual non-consent.

**Subsection (c).** The amendment adds an important provision to the definition of “consent” in § 213.0(3). While retaining the language that “Neither verbal nor physical resistance is required to establish the absence of consent,” it restores the correlative principle that “lack of physical or verbal resistance may be considered, together with all other circumstances, in determining

whether a person has consented.” This additional language is necessary to prevent the definition from being unfairly one-sided.

This language was included in earlier drafts. It was part of the Commentary to Preliminary Draft No. 5. On the recommendation of members of the Advisory Committee and Members Consultative Group, it was added to the Black Letter definition of “consent” in Council Draft #3 (CD3). However, in this version, TD2, the Reporters have deleted it from both the Black Letter and the Comment. It should be restored.

**Subsection (d).** The changes in this section were primarily to conform its language to sections (a) and (c). It retains the principle that consent may be revoked at any time by a clear statement of unwillingness to continue.

### Section 213.2

Two relatively minor changes are proposed to the definition of the offense. First, the phrase “consciously disregards” would be changed to “recklessly disregards.” This restores the language from Preliminary Draft #6 and employs one of the recognized forms of culpability, thus retaining parallelism with the knowledge element. Recklessness is defined elsewhere in the MPC and includes “conscious disregard” as one of its components. Second, the phrase “and the other person has not consented” is added to the end of the provision. This is done to ensure, consistent with one of the objectives of the proposed amendments, that a crime occurs only when consent is in fact absent.

The proposed amendment also would change the punishment for conviction under § 213.2 from a felony of the fourth degree to a misdemeanor. Only half the states whose statutes punish sexual penetration without consent do so in the absence of other elements such as the use of force. Reporters' Notes, p. 2. And, as the Reporters acknowledge in footnote 24, only 14 of those jurisdictions punish the offense as a felony. They further concede that only 12 do so by statute and that they are counting two additional states on the basis of judicial decisions “that the legislature has not overturned.” They also count among the 14 the Uniform Code of Military Justice, which is normally not considered an authority for a Model Penal Code project. If these three “jurisdictions” are not counted, there are at most 11 jurisdictions in which a legislature has enacted a statute punishing sexual penetration without consent as a felony. The actual number of jurisdictions with fairly comparable felony provisions may be significantly lower. As the Reporters concede at the end of footnote 24, in three states that they include the statute does not define consent. Thus courts in those states may adopt a definition of consent inconsistent with proposed § 213.0(3), thereby removing them as authority for proposed § 213.2; at present, they have equivocal value at best. Some of the other states being counted also have consent definitions different from § 213.0(3). Thus it is clear that punishment of this offense at the felony level in the absence of any aggravating factors, as is proposed in § 213.2, is a distinct minority view. At a time of increasing concern about mass incarceration and over-criminalization, it is unclear why the ALI would want to encourage all 50 states to enact a new felony statute that has so little recognition in existing law.

Moreover, the conditioning of sexual acts on communicated consent is far from a social norm. And as Justice Breyer recently observed during an oral argument in the Supreme Court, a criminal statute that “puts at risk behavior that is common \* \* \* is a recipe for giving \* \* \* prosecutors enormous power over [the citizenry].”

To make this a felony is problematic for several additional reasons. To begin with, the statute as proposed in TD2 permits conviction on the basis of a reckless disregard of the risk that the complainant had not communicated consent. Absent a clear and unequivocal communication of consent, such a *risk* will often be present, especially where the other person’s conduct was ambivalent or passive, creating great uncertainty as to the boundary between lawful and unlawful conduct. But even if the less radical version of the offense proposed by this motion were adopted, the offense should still be classified as a misdemeanor. First, a conviction may be obtained even though no physical force or threat of force or means of incapacitation was used. (Rape by use of force is a separate felony under § 213.1 and rape of a vulnerable person, such as one who has been incapacitated by drugs, is a separate felony under § 213.3). Second, a felony conviction can hang over a defendant for the rest of his life. It can bar a defendant (perhaps a college student who was himself intoxicated when the offense was committed) from a wide variety of employment opportunities, including most of the licensed professions. It can put a defendant on a registry of sex offenders for many years or even life (many states may fail to implement the commendable attempt of ALI in this project to narrow the scope of collateral consequences for criminal convictions). Finally, because the threat of a felony conviction is such a powerful weapon for prosecutors, innocent defendants may feel compelled to waive their right to a trial and plead guilty to a lesser charge to avoid the lifetime consequences of being a convicted felon.

In closing with regard to this point, we note that “Sexual Penetration Without Consent” was originally graded as a misdemeanor (most recently in Preliminary Draft #5 discussed at the October Advisers meeting), but was changed to a felony in CD3. The only explanation for this upgrading in the Reporters’ Notes stated that because the provision was broad enough to encompass cases in which the actor had disregarded clear verbal resistance or employed surprise or shock to gain a sexual advantage, which the Reporters plainly believed warranted felony treatment, it was appropriate to treat all cases covered by the provision as felonies. This proffered rationale cannot in our view justify felony treatment of the less serious acts covered by the provision. If some subset of covered conduct warrants classification as a felony, it should be carved out for separate treatment, not used as an excuse for misclassification of other types of offenses covered by the statute.