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## National Association of Criminal Defense Lawyers

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**Norman L. Reimer**  
Executive Director

22 March 2016

**To: ALI Director, Deputy Director, Project Reporters, Council and Members**

**From: Norman L. Reimer**

**Subject: Preliminary Draft No. 6; Revisions to Sexual Assault Provisions of Model Penal Code**

The National Association of Criminal Defense Lawyers (NACDL) has a keen interest in the development of the nation's penal law. NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 9,000 direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

Under the direction of NACDL President E. G. “Gerry” Morris, NACDL’s Sex Offender Policy Committee was directed to consider the latest draft of the American Law Institute’s proposed reform of the Model Penal Code with respect to sexual assault and related offenses. The Committee has prepared these comments which have been authorized for public release by President Morris:

**“Liberty’s Last Champion”™**

**NACDL COMMENTS ON  
MODEL PENAL CODE:  
SEXUAL ASSAULT AND RELATED OFFENSES  
PRELIMINARY DRAFT NO. 6  
(March 2, 2016)**

NACDL has long expressed concerns about an increasing trend to dilute or neglect to include clear intent requirements in the criminal law. The issue of inadequate intent – or *mens rea* – was addressed by NACDL in 2010 in an in-depth, study and report. See Brian W. Walsh and Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Intent Requirement in Federal Law* (2010), available at [www.nacdl.org/withoutintent](http://www.nacdl.org/withoutintent). Since then, NACDL has testified on numerous occasions before a congressional task force looking at the problem, has filed numerous amicus briefs on the subject, and has participated in myriad public events to highlight the problem. The current draft on sexual assault and related offenses would perpetuate the disturbing tendency to dilute intent requirements in the criminal law, and would take that trend into an area of the law that carries

grave and life-altering penalties.

Yes means yes and no most certainly means no. But between yes and no lies the very real but vague and ambiguous concept of maybe. No person should face prosecution, conviction and imprisonment based upon a vague and ambiguous law.

Proposed Section 213.0(3) of Preliminary Draft 6 of the Model Penal Code does exactly that. The draft fails to provide clear guidance to society as to what may constitute criminal sexual conduct and it employs an inappropriate and inadequate mental state. The draft as constructed encourages a shifting of the burden of proof to the accused. If adopted the proposed consent provision will lead to prosecutions of men and women who acted without fair warning that their conduct may be criminal in nature. The draft also fails to mirror existing sexual mores and attempts to use the bludgeon of criminal sanctions to impose the new and yet untested concept of “affirmative consent” upon society.

Proposed Section 213.0(3) is vague and ambiguous. It defines consent as “behavior” “that communicates willingness.” In other words in

the absence of “behavior” that “communicates willingness” a sexual act is a crime. According to the commentary the proposed section requires the actor to interpret what another person “intends or feels” yet, unlike existing law, provides no bright line upon which to make such a determination. The actor and ultimately the finder of fact is left with the amorphous “totality of the circumstances” test – a test that does not easily translate to the reality of sexual encounters. The proposed section leaves a person at risk of criminality in the event that he or she does not properly discern what another intends or feels. The reliance on the concept of “communication” in the totality of the circumstances is particularly troubling. While entire courses of post-secondary study are dedicated to communication it is still recognized that communication is an imperfect art. It has been said that: “The single biggest problem in communication is the illusion that it has taken place.<sup>1</sup>”

The law has long recognized that statutes that subject the accused to vagueness and ambiguity are patently unfair and violate the due process

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<sup>1</sup> This quotation is attributed to William H. Whyte in his article entitled “Is Anybody Listening” first published in Fortune Magazine in September, 1950.

clause. “(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322, 328, (1926). The void for vagueness doctrine was reaffirmed by the Supreme Court last term in *Johnson v. United States*, 576 U.S. \_\_\_\_, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). In *Johnson* the Court held that the “residual clause” of the Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(B)) was unconstitutionally vague. The residual clause in *Johnson* was a sentencing provision. The provision required an increased sentence for an individual with three or more prior convictions for serious drug offenses or crimes of violence. The statutory term “crime of violence” was defined to include the crimes of burglary, arson, extortion, use of explosives, and any offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” See 18 U.S.C. § 924(e)(2)(B). The *Johnson* court determined that the application of the ACCA residual clause required such a “wide ranging inquiry” that it

denied “fair notice to defendants and invites arbitrary enforcement by judges.” *Johnson* at 135 S.Ct. 2551, 2557. The “contextual consent” provision of Section 213 creates a similarly “wide ranging” inquiry which is readily apparent from the Reporter’s comment:

In contrast to these sharply divergent alternatives, the contextual consent standard takes into account the complexities of sexual interactions, while endorsing the prevailing norm of requiring each party to be alert to the other’s wishes. Rather than prescribing specific behavior that must be present to satisfy consent, contextual consent requires the trier of fact to examine the parties’ observable behavior in the context of all the circumstances leading up to and during the sexual act as the best way to determine whether a party consented to that act and whether the defendant exceeded lawful limits with a culpable *mens rea*. In making these judgments, the factfinder’s examination of the totality of the circumstances may include the nature, duration, and quality of the parties’ relationship, any history of sexual activity between them, the actor’s awareness of any limits on the other’s capacity to consent, and other relevant circumstances.

Comment, P. 2. The comment unabashedly requires an accused to assess the complexities of sexual interactions, examine the observable behavior (which in many instances can be contradictory from moment to moment) and determine whether the other party intends and/or feels that the act is consensual. If the accused makes an incorrect assessment he or she faces imprisonment. Likewise judges and juries are then required to use an

amorphous “contextual” standard to try to understand and determine whether a party to the sexual encounter was “communicating willingness” to the encounter. The “contextual consent” determination contained in the proposed section is far more wide-ranging than the “potential risk of physical injury” addressed in the *Johnson* case. It is also far vaguer. The definition of consent as expressed in the proposed section leaves grave uncertainty for the participants in a sexual encounter as well as for a judge or jury that ultimately will be charged with determining contextual consent based on historical facts and memories. The proposed section fails to provide a fair warning of criminality. It fails to make reasonably clear when sexual conduct is criminal in nature. *See United States v. Lanier*, 520 U.S. 259, 266-267, 117 S. Ct. 1219, 1225, 137 L. Ed. 2d 432, 442-443 (1997).

The wide ranging and grave ambiguity created by the proposed Section 213.0(3) is aggravated by the fact that the crime of non-consensual sexual penetration codified in Section 213.2 of Preliminary Draft 6 carries a non-intentional *mens rea* – recklessness. The combination of a vague consent standard and a reckless *mens rea* compounds the ambiguity and

vagueness of the new section. In 2015 the United States Supreme Court reaffirmed the fundamental notion that “wrongdoing must be conscious to be criminal.” See *Elonis v. United States*, 135 S.Ct. 2001, 2009, 192 L. Ed. 2d 1, 12 (2015) citing *Morrisette v. United States*, 342 U.S.246, 250, 72 S.Ct. 240, 96 L.Ed.2d 288 (1952). *Mens rea* or mental state is generally required to be attached to “crucial elements separating legal innocence from wrongful conduct.” *United States v. X-Citement Video*, 513 U.S. 64, 73 (1994). Under the proposed section the single most important element of the offense is whether the alleged victim consented to the sexual act. If the alleged victim consented then there is no crime. If the alleged victim did not consent then a crime was committed. If consent is to be determined by way of a contextual analysis (whether that analysis requires “affirmative consent” or not) it follows that a knowing or intentional *mens rea* should be attached to the offense. Determining disregard of a risk of lack of contextual consent creates a complicated stew that is far beyond the understanding of the average adult in a sexual encounter. It is even more complicated when the sexual interaction is between young and inexperienced adults.



It is also worth noting that “*mens rea* reform” is the subject of pending legislation in the federal congress. Pending legislation in Washington favors the use of a willful state of mind when considering conduct to be criminal. The mental state known as willful is a mental state that requires more than recklessness and is more akin to the Model Penal Code *mens rea* concept of “knowingly.”

The “affirmative contextual consent” required by proposed section 213.0(3) alone and when combined with a reckless *mens rea* tends to shift the burden of proof to the accused. The proposed section without more assumes guilt in the absence of any evidence. Rather than requiring the prosecution to prove that consent was not given, by definition, the offense would be proved merely upon the proof of a sex act with nothing more. The result is an unconstitutional shifting of the burden of proof requiring the accused to prove that consent was affirmatively given. This approach violates the “bedrock and axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law” – the presumption of innocence. See *In re Winship*, 397 U.S. 358, 363

(1970).

Finally there is incongruity between the black letter law of the proposed section and the commentary. The comments claim that the section does not adopt the concept of “affirmative consent.” Comment, p. 1, line 29 – 30. However the commenter limits the definition of the “affirmative consent” standard to require an explicit statement of consent or a specific act of consent. The proposed black letter law section requires an affirmative communication of willingness to engage in the act. The suggestion that this is not an affirmative consent statute is simply not supported.

Similarly the commentary suggests parenthetically that “silent acquiescence” is behavior that can communicate willingness to engage in a sexual act. However, the plain language in the proposed black letter law section makes no mention of acquiescence while specifically listing other “behaviors” that purportedly communicate willingness to engage in a sex act. The concept that silent acquiescence, or any type of acquiescence, can demonstrate consent gets lost in the black letter section. It is likely to get

lost in jury instructions based upon the section as well. Acquiescence is further minimized in the reporter's notes. On page 3, lines 8-9, the reporter states: "Observable behavior is the fairest and most reliable way to determine the existence of consent and whether the defendant transgressed lawful boundaries." Acquiescence is not commonly thought of by the public as observable behavior.

Similarly the black letter law portion of the proposed section does not effectively reveal the types of criteria or conduct that can demonstrate consent as set forth in the Comments on Page 2, line 7-10. (In making these judgments, the factfinder's examination of the totality of the circumstances may include the nature, duration, and quality of the parties' relationship, any history of sexual activity between them, the actor's awareness of any limits on the other's capacity to consent, and other relevant circumstances.) It is the black letter law sections that are generally adopted by legislatures and in this case the black letter law fails to provide sufficient guidance.

Despite the reporter's claims to the contrary, the differences between the comments, the reporter notes and the black letter proposed section on consent reveal a preference for an "affirmative consent" statute.

Affirmative consent does not reflect current day sexual mores. In a utopian society transparent and free flowing communication about sexual activity would be a beneficial goal but we are hardly a utopian society. Sexual communication is often stilted by common emotions including shyness, embarrassment, shame, self-consciousness, and anxiety. Sexual encounters are often fueled by or accompanied by the use of alcohol or other intoxicants to one degree or another. While increased communication about sexual behavior is a generally beneficial aspiration it cannot and should not be accomplished through the use of criminal laws. Preliminary Draft No. 6 requires substantial revision.