

August 8, 2019

By Regular Mail and Email

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RE: ABA Proposed Resolution 114

Dear President Carlson:

The undersigned members of the American Law Institute (ALI) have recently learned of proposed Resolution 114. We write both because the content of Resolution 114 is directly contrary to the position taken by ALI and because the “Report” submitted by the supporters of Resolution 114 inaccurately describes the actions and positions taken by ALI.

Resolution 114 seeks to adopt what is generally known as “affirmative consent” with respect to sexual behavior (the phrasing used in Resolution 114 is, “define consent in sexual assault cases as the assent.... expressed by words or action”). The “Report” makes clear that an “affirmative consent” standard is sought. The “Report” essentially has two components: 1) Claims about the position of ALI and 2) claims about “neurobiology.” This letter primarily addresses the inaccurate information in the “Report” regarding ALI, but ends with a brief discussion of the asserted “neurobiology” since the same claims were made during the ALI discussions.

The “Report” correctly identifies Professor Stephen Schulhofer as the Reporter of the ALI Model Penal Code Sexual Assault and Related Offenses revision project.

When Professor Schulhofer began presenting drafts to the ALI Members Consultative Group and to the full ALI membership, the drafts contained commentary and “black letter” endorsing “affirmative consent.” The reaction to this approach was strongly negative as Professor Schulhofer confirmed in Tentative Draft No. 2 (April 2016):

“The treatment of consent and associated offenses in Preliminary Draft No. 5 provoked great controversy at the last Annual Meeting and at the 2015 October meetings of the Advisors/MCG and also the Council. Many argued that the proposed definition of consent adopted an ideal of “affirmative consent” at the expense of the largely tacit ways that people engage in sexual behavior in the real world. There was concern expressed that the definition covered behavior that was innocent, and that the criminal law should not

dictate sexual mores in this evolving era.” (Tentative Draft No. 2 at xv)

At the ALI Annual Meeting in May 2016, a formal vote was taken. The “affirmative consent” approach was rejected and the following definition of consent was adopted as the Membership Approved definition of consent:

SECTION 213.0. DEFINITIONS AND GENERAL PRINCIPLES OF LIABILITY...

(6) Definitions....

(d) “Consent”

(i) “Consent” for purposes of Article 213 means a person’s willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.

(ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

(iii) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.

(iv) Notwithstanding subsection (6)(d)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in Sections 213.1, 213.2, 213.3, 213.4, 213.5, 213.7, 213.8 [reserved], and 213.9.

(v) Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as “No,” “Stop,” or “Don’t”—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent given prior to the act of sexual penetration, oral sex, or sexual contact.

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For reasons that have not been explained to us, the ABA “Report” in support of Resolution 114 reveals no part of this history. Instead, the “Report” cites no ALI materials after 2014 and, as a result, is highly misleading.

This is very troubling. The ABA should not consider moving forward with an important matter where the “Report” purporting to justify the action is so obviously deficient. This is a matter of the essential integrity of the ABA. A vote based upon the current “Report” is not defensible because the “Report” absolutely excludes all relevant information about ALI’s actual position while repeatedly claiming support from ALI.

ALI has carefully considered exactly this issue and we have attached to this letter various ALI record documents memorializing the deficiencies with “affirmative consent” that led to its rejection by ALI. These attachments also address the “neurobiology” issue of “frozen fright.” This also was rejected by ALI which explicitly adopted the position that, “Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.” Much more could be said about the deficiencies of the “Report” with respect to neurobiology, including the fact that the principal proponent of the “frozen fright” theory is Rebecca Campbell who is not a neurobiologist. *See, e.g.*, Emily Yoffe, The Bad Science Behind the Campus Response to Sexual Assault, The Atlantic, September 8, 2017 (“In her 2012 talk, Campbell acknowledged that she is not a neuroscientist, but rather is translating others’ work.”) <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/> The Yoffe article contains highly detailed examination and refutation of the “frozen fright” claims that must be examined and assessed by the ABA before permitting the “Report” to be a basis for ABA action.

In short, the “Report” is based on bad history and bad science. We respectfully submit that Resolution 114 is not appropriate for consideration by the ABA at this time. It should be withdrawn and, if its proponents desire further consideration, it merits a fair and balanced report that will allow informed consideration before any vote is taken.

Respectfully submitted,

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