

August 8, 2019

By Regular Mail and Email

Robert M. Carlson, Esquire

President

American Bar Association

321 North Clark Street

Chicago, IL 60654

Email: abapresident@americanbar.org.

bcarlson@cpklawmt.com

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.

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,

Frederic N. Smalkin

Chief U.S. District Judge,
D.Md. (Ret.)
Jurist-in-Residence
and Professor of Law
University of Baltimore
School of Law
Baltimore, MD

Kathryn M. Kase

Law Office of Kathryn M.
Kase
3720 Greenbriar
Houston TX

Tyler Baker

ALI Life Member
Carmel Valley, CA

Thomas R. Newman

ALI Life Member
New York, NY

Edwin Williamson

Sullivan & Cromwell LLP
Washington, DC

Donna Elm

Tampa, FL

Jon M. Sands

Phoenix, AZ

Hon. Evelyn Keyes

Justice, First Court of
Appeals
Houston, TX

Stephen K. Huber

ALI Life Member
Professor Emeritus
University of Houston Law
Center
Houston, TX

Daniel S. Kleinberger

Professor Emeritus, Mitchell
Hamline School of Law
Reporter, Uniform Law
Conference Drafting
Committee on the Uniform
Limited Liability Company
Protected Series Act
St. Paul, MN

Margaret Love

Law Offices of Margaret Love
Washington, DC

Victor Vilaplana

Of Counsel
Foley and Lardner LLP
San Diego, CA

Kate Stith

ALI Life Member
Lafayette S. Foster Professor
of Law
Yale Law School
New Haven, CT

A.N. Field

New York, NY

Herb Fenster

ALI Life Member
Covington & Burling LLP
Washington, DC

Alfred W. Putnam

Drinker Biddle & Reath LLP
Philadelphia, PA

Michael P. Van Alstine

Professor of Law
University of Maryland

Carey School of Law
Baltimore, MD

Christopher Zampogna
Zampogna, PC
Washington, DC

John H. Cayce
Chief Justice, Texas Court of
Appeals, Second District
(Retired)
Partner, Kelly Hart LLP
Fort Worth, TX

Steve Hut
Chevy Chase, MD

William J. Leahy
Director, Office of Indigent
Legal Services
Albany, NY

George Davidson
New York, NY

Charles Fried
Beneficial Professor of Law
Harvard University Law
School
Cambridge, MA

Henry R. Lord
ALI Life Member
Partner Emeritus
DLA Piper LLP (U.S.)
Baltimore, MD

Robert A. Helman
ALI Life Member
Partner and Former
Chairman
Mayer Brown LLP
Chicago, IL

Kenneth G. Dau-Schmidt
Carr Professor of Law
Indiana University--
Bloomington

Bloomington, IN

Brian D. Shannon
Paul W. Horn Professor
Texas Tech University School
of Law
Lubbock, TX

Donna Elm
Tampa, FL

Kenneth C. Kettering
Short Hills, New Jersey

Ralph Reisner
ALI Life Member
Professor Emeritus
University of Illinois College
of Law
Champagne, IL

James B. Craven III
ALI Life Member
Durham, NC

Rob Goodin
ALI Life Member
San Francisco, CA

Marie T. Reilly
Professor of Law
Penn State University School
of Law
University Park, PA

David Aronofsky
Retired General Counsel and
Law Faculty Member
University of Montana
Austin, TX

Arthur D. Hellman
ALI Life Member, Professor
Emeritus
University of Pittsburgh
School of Law
Pittsburgh, PA

Anne Gardner
Justice, Second Court of
Appeals
Fort Worth, TX

Bradley Y. Smith
New York, NY

Hon. Evelyn Keyes
Justice, First Court of
Appeals
Houston, TX

John H. Cayce
Chief Justice, Texas Court of
Appeals,
Second District (Retired)
Partner, Kelly Hart LLP
Fort Worth, TX

Michael Greenberger
ALI Life Member
Law School Professor
University of Maryland
Francis King Carey School of
Law
Baltimore, MD

John F. Olson
Distinguished Visitor from
Practice
Georgetown Law Center
Partner Gibson, Dunn &
Crutcher, LLP
Washington, DC

Amon Burton
ALI Life Member
Austin, TX

Manning G. Warren
ALI Life Member
H. Edward Harter Chair
of Commercial Law
Brandeis School of Law
University of Louisville
Louisville, KY

Thomas R. Newman

ALI Life Member
New York, NY

Ira Ellman

Charles J. Merriam
Distinguished
Professor of Law
Sandra Day O'Connor College
of Law
Arizona State University
Tempe, AZ

Stephen Lee Saltonstall

ALI Life Member
Tucson, AZ

Sheldon Raab

ALI Life Member
New York, NY

Nicholas L. Georgakopoulos

Harold R. Woodard Professor
of Law
Indiana University
McKinney School of Law
Indianapolis, IN

Dianne Bennett

Retired, Managing Partner
Hodgson Russ LLP
Buffalo, NY

Bill Brewbaker

Rose Professor of Law,
University of Alabama Law
School
Tuscaloosa, AL

Christie George

James B. Duke Professor
Emeritus of Law
Duke University School of
Law
Durham, NC

Noel Fidel

ALI Life Member
Retired Judge
Arizona Court of Appeals
Law Office of Noel Fidel
Phoenix, AZ

George W. Liebmann

ALI Life Member
Liebmann and Shively, P.A.
Baltimore, MD

G. Robert Blakey

William J. & Dorothy
T. O'Neil Professor of Law
Emeritus
Notre Dame Law School
Notre Dame, IN

Robert Newman

ALI Life Member
San Antonio, TX

Dean A. Strang

Strang Bradley, LLC
Madison, WI

Robert A. James

Pillsbury Winthrop Shaw
Pittman LLP
San Francisco, CA

David Shapiro

William Nelson Cromwell
Professor of Law Emeritus
Harvard University School of
Law
Cambridge, MA

James Felman

Partner, Kynes,
Markman, & Feldman
Tampa, FL

Catherine L. Carpenter

Vice Dean and The Hon.
Arleigh M. Woods and
William T. Woods Professor
of Law

Southwestern Law School
Los Angeles, CA

Michael G. Goldstein

ALI Life Member
Newport Beach, CA

Joan Wexler

ALI Life Member
Dean and Professor of Law
Emerita
Brooklyn Law School
Brooklyn, NY

William Hodes

Professor Emeritus of Law
Indiana University
Lady Lake, FL

Judge Benjamin Lerner

Philadelphia, PA

Patrick Daugherty

Partner, Foley & Lardner LLP
Chicago, IL

Michael Zimmerman

ALI Life Member
Partner
Zimmerman Jones Booher
Chief Justice, Utah Supreme
Court (Ret.)
Salt Lake City, UT

Robert Cottrol

Harold Paul Green Research
Professor of Law, The George
Washington
University Law School
Washington, DC

Theodore H. Frank

Washington, DC.

Arthur T. Donato

Law Offices of Arthur
Thomas Donato
Media, PA

William Reynolds

ALI Life Member
Jacob A. France Professor of
Judicial Process Emeritus
University of Maryland
School of Law
Baltimore, MD

Laird Kirkpatrick

ALI Life Member
Louis Harkey Mayo Research
Professor of Law
George Washington
University Law School
Washington, DC

Ronald J. Allen

John Henry Wigmore
Professor of Law
Northwestern University
Chicago, IL

Leonard P. Strickman

Professor, Founding Dean
Emeritus
Florida International
University College of Law
Miami, FL

William Funk

Lewis & Clark Distinguished
Professor of Law
Lewis & Clark Law School
Portland, OR

John L. Warden

ALI Life Member
New York, NY

Warren Belmar

ALI Life Member
Washington, DC

Ronald Rolfe

ALI Life Member
New York, NY

Thomas D. Waterman

Justice, Iowa Supreme Court
Des Moines, IA

Larry Catá Backer

W. Richard and Mary
Eshelman Faculty Scholar
& Professor of Law
Professor of International
Affairs

Pennsylvania State
University
University Park, PA

Joseph Goldberg

ALI Life Member
Albuquerque, NM

Mary Massaron

Shareholder and Appellate
Practice Group Leader
Plunkett Cooney PC
Bloomfield Hills, MI

Robert W. Hillman

ALI Life Member
Distinguished Professor of
Law
University of California-Davis
Davis, CA

Ellen S. Podgor

Gary R. Trombley Family
White-Collar Crime Research
Professor
Stetson University College of
Law
Gulfport, FL

William D. Dolan, III

William D. Dolan, III, PC
Tysons Corner, VA

Allen E. Shoenberger

Professor
Loyola Chicago School of
Law
Chicago, IL

Christopher M. Newman

Associate Professor of Law,
Antonin Scalia Law School at
George Mason University
Arlington, VA

John S. Beckerman

Morristown, NJ

Peter J. Kalis

Partner and Former
Chairman and Global
Managing Partner
K&L Gates LLP
Pittsburgh, PA

Bridget M. McCormack

Justice, Michigan Supreme
Court
Lansing, MI

Stephen Lee Saltonstall

ALI Life Member
Tucson, AZ

Arthur B. Spitzer

ALI Life Member
Professor of Law and
University Distinguished
Professor
Chicago-Kent College of Law
Illinois Institute of
Technology
Chicago, IL

Adriane Dudley

Dudley Rich David LLP
St. Thomas, VI

Amon W. Burton

ALI Life Member
Austin, TX

Mark J. Loewenstein

ALI Life Member
Monfort Professor of
Commercial Law
University of Colorado

Boulder, CO

Glenn Koppel
Professor of Law
Western State College of
Law
Fullerton, CA

“CC:”

President-Elect
Judy Perry Martinez
judym@spsr-Law.com

Chair, House of Delegates
William R. Bay
wbay@thompsoncoburn.com

ABA Rules and Calendar
Committee
Rules@mail.americanbar.org
Section of Civil Rights and
Social Justice
Estelle H. Rogers
Forestville, CA
1estellerogers@gmail.com

Mark I. Schickman
San Francisco, CA
mis@freelandlaw.com

Criminal Justice Section
Neal R. Sonnett
Miami, FL
nrslaw@sonnett.com

Stephen A. Saltzburg
Washington, DC
ssaltz@law.gwu.edu

Kevin Scruggs
Kevin.Scruggs@AmericanBar.org

Lucian Dervan
Lucian.Dervan@Belmont.edu

Ira Robbins
ALI Life Member
Barnard T. Welsh Scholar and
Professor of Law
American University
Washington College of Law
Washington, DC

Section of Litigation
Dennis J. Drasco
Roseland, NJ
ddrasco@lumlaw.com

Judith A. Miller
Chevy Chase, MD
judith.miller3@gmail.com

Don Bivens
Phoenix, AZ
dbivens@swlaw.com

Judicial Division
Richard N. Bien
Kansas City, MO
rbien@lathropgage.com

National Conference of
Federal Trial Judges
Elizabeth Snow Strong
Brooklyn, NY
elizabeth_stong@nyeb.uscourts.gov

National Conference of State
Trial Judges
Christopher T. Whitten
Phoenix, AZ
whittenc@superiorcourt.maricopa.gov

Law Practice Division
Thomas C. Grella
Asheville, NC
tgrella@mwblawyers.com

Thomas C. Arthur
ALI Life Member, L.Q.C.
Lamar Professor
Emory University School of
Law
Atlanta, GA

Joan Rose Marie Bullock
San Diego, CA
joan.bullock@tmslaw.tsu.edu

Law Student Division
Ashley Baker
Stone Mountain, GA
ashley_baker@sulc.edu

Erika Lessane
Chicago, IL
Erikalessane2020@nlw.northwestern.edu

Solo, Small Firm and General
Practice Division:
Stephen B. Rosales
Belmont, MA
s.rosales@rosalesandrosales.com

James M. Durant III
Lemont, IL
james.durant@science.doe.gov

Jennifer A. Rymell
Fort Worth, TX
jarymell@msn.com

Young Lawyers Division
Lacy L. Durham
Dallas, TX
lacydurhamlaw@yahoo.com

Stefan Palys
Phoenix, AZ
stefan.palys@stinson.com

Shenique A. Moss
Detroit, MI
sheniquemoss@gmail.com

Anna McMahan Romanskaya
San Diego, CA
aromanskaya@starkllp.com

Dana M. Hrelc
Hartford, CT
dhrelc@hdblfirm.com

American Immigration
Lawyers Association
Robert E. Juceam
New York, NY
robert.juceam@friedfrank.com

Conference of Chief Justices
Gerald W. VandeWalle
Bismarck, ND
gvandewalle@ndcourts.gov

The Federal Bar Association
Ashley L. Belleau
New Orleans, LA
abelleau@lawla.com

The Federal Circuit Bar
Association
Kristin L. Yohannan
Washington, DC
kristin.yohannan@gmail.com

Hispanic National Bar
Association
Peter M. Reyes, Jr.,
Saint Paul, MN
peter.reyes@courts.state.mn.us

National Asian Pacific
American Bar Association
Wendy C. Shiba
Altadena, CA
wendy.shiba@me.com

National Association of
Attorneys General
Ellen F. Rosenblum,
Salem, OR
ellen.f.rosenblum@doj.state.or.us

National Association of
Women Judges
Toni E. Clarke
Upper Marlboro, MD
tclarke.ncstj@comcast.net