



June 4, 2021

Re: ALI Model Penal Code: Sexual Assault and Related Offenses,  
Tentative Draft No. 5, May 4, 2021

Dear American Law Institute Member:

The undersigned are attorneys, academics, and other stakeholders writing to express our grave concerns with the proposed ALI Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5, May 4, 2021 (“the Draft”)

We recognize that the Reporters, Advisers and Members Consultative Group have invested significant time in development of the Draft. We also acknowledge that the Draft might mitigate some aspects and consequences of sex offense registration statutes and related laws. However, despite our respect for that work, we believe that on balance ALI’s approval of this Draft will do far more harm than good. For that reason, we ask that the Draft be withdrawn and reconsidered.

ALI’s suggestion in this Draft that it is possible to construct a legally and ethically defensible registry will only serve to put a current-day seal of approval on a system that, as the overwhelming evidence shows, destroys families and individuals without measurably advancing public safety. For that reason, and for the very serious problems with the statutory schemes that the Draft itself acknowledges, we urge you to reject and vote against Section 213.11.

Sex offense registries (hereafter “the registry”) are in the news every day, but rarely is there much discussion of how they operate and whether they are wise policy. Scholarly studies have found no rigorous evidence that the registry reduces recidivism or improves public safety. Registries cost a lot of taxpayer money to operate and maintain while causing profound damage to the lives and future prospects of individuals required to register. This is no small matter; registries in 50 states and Washington, DC have more than 900,000 listings. Counting registrants’ families, several million Americans are personally affected.

The Draft’s proposal for a registry accessible only to law enforcement with the stated purpose to “facilitate high-priority investigations of serious sexual offenses” in fact would serve as a police “blacklist,” a surveillance scheme of dubious constitutionality. Those listed would become perennial instant suspects, much as other non-public registries functioned in the past. California’s registry, for example, which began in the 1940s, was used to track gay men. And 15 years — the Draft’s proposed length of registration — amounts to mandatory law enforcement supervision, and the threat of arrest and prosecution, for a significant part of a person’s life.

It is time for thoughtful, courageous resistance to a profoundly harmful and ineffective response to sexual violence that reflects political and reactionary rationales rather than science, public safety and reason. Grassroots opposition to registries is building, and voices [calling](#) for an end to the registry are getting [louder](#). This is not the time for the ALI to undermine this advocacy for substantive change by approving the current Draft.

Like ALI’s Draft, legislative commissions and other parties have advanced “reform” proposals — to very little effect. By endorsing the registry, ALI will further entrench the status quo and short circuit nascent and developing discussions about whether the registry can and should be ended.

As an alternative to advancing this Draft, ALI can replicate the good it has done in the past by tabling the Draft pending a broader consideration of the registry’s costs and collateral consequences, including the economic and psychological impact on the partners and children of registrants. In 2009 ALI removed from the Model Penal Code protocols for state-sanctioned executions, giving a boost to the long-running campaign to end a serious violation of human rights, capital punishment. Decades earlier, an ALI criminal law restatement was deliberately silent on an important matter of sexual freedom. Following ALI’s lead, Illinois became the first state to decriminalize sodomy in 1962. Like the death penalty, experience shows that the registry — whose enforcement hinges on subjective assessments of “dangerousness” — will land most heavily on those who already are regular targets of bias, Black and gay men.

As you prepare for the June 7-8 membership meeting we ask you to take into account the following points:

1. The registry has no rehabilitative purpose. It makes reentry and reintegration an obstacle course.

2. “Paying a price” for wrongdoing and then being able to move on with one’s life provides an incentive for change and reformation. This is an important principle of law and policy. The registry is a prime example of endless punishment.
3. The registry is a post-conviction measure. If the registry were to vanish, there is a raft of criminal statutes in every jurisdiction for sexual offenses, all with substantial penalties for those convicted, and extra penalties for subsequent offenses.
4. Beware of emotion. In fashioning accountability for sex crimes, it is especially important to beware of the role that emotion and political expedience play in the process.
5. At issue here is more than just a database, community notification mechanisms, and various other collateral consequences. Some among us have been turned into the “other” by the use of indelible labels and other techniques. “Sex offender” is one of the most powerful and destructive phrases in the English language. A ruling by the US Court of Appeals for the Sixth Circuit declared that Michigan’s Sex Offender Registration Act “brands registrants as [moral lepers](#) solely on the basis of a prior conviction.” Once their humanity is gone, it becomes much easier to strip away their rights.
6. Those required to register routinely experience harassment and discrimination. These are not “bugs” of the registration system; these are features. Physical attacks are not unknown. An alleged vigilante killing last year of a registrant in Nebraska drew public support and an alarming nationally syndicated column, “[Murder as a Public Service?](#)”
7. Sex offense registries have a corrosive effect on legal norms; they are causing a proliferation of other [conviction registries](#) in the US. Past offenses — criminal records — cast long shadows on the future; in the internet age, the past can wreck the future. There’s increasing momentum among scholars and activists to make sealing and expungement available to those with past offenses. Sex offense registration should be included in those efforts.

We ask that you follow the logic of your own best work and hold back a recommendation that will perpetuate irrational harm to individuals and families. Instead, we ask that you re-examine approaches for dismantling these expensive and ineffective practices. We stand ready to assist with such an effort in any way possible.

Respectfully,

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