

**Testimony Regarding American Law Institute’s Withdrawal of Capital Punishment
Provision from Model Penal Code and Accompanying Statement Regarding
Prevailing Inadequacies of American Death Penalty System
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I am here to share my perspective on the recent decision of the American Law Institute to withdraw the capital punishment provision (MPC § 210.6) from the Model Penal Code in light of what the ALI regards as “the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” First, a few brief words about the ALI. The ALI is an independent organization of lawyers, judges, and academics devoted to “clarifying, modernizing, and otherwise improving” the law. The organization, founded in 1923 by some of the most distinguished lawyers in the country, including Chief Justice (and former President) William Howard Taft and future Chief Justice Charles Evan Hughes, is the most prestigious law reform organization in the United States. Two of its early leaders were Judges Benjamin Cardozo and Learned Hand. It currently has an elected membership of about 3000 attorneys. The ALI’s work comes in the form of its famous Restatements of Law (such as the Restatements of Contracts, Torts, Restitution, and Trusts), its collaboration on the Uniform Commercial Code, and its Model Statutory Formulations, including the Model Code of Evidence and the Model Penal Code. Under its bicameral structure, ALI projects become the official work of the Institute when approved by both the ALI membership and the ALI Council (a smaller group of about 60 elite members).

The ALI adopted the Model Penal Code in 1962. The Institute describes the MPC’s purpose as follows: “to stimulate and assist legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment – the prohibitions it lays down, the excuses it admits, the sanctions it employs, and the range of authority that it distributes and confers.” Over the past half century, the MPC has been extraordinarily influential in states’ efforts to codify and revise their criminal statutes.

In 2001, the Institute undertook a project to revise some of the criminal sentencing provisions of the MPC. At that time, the Director of the Institute, the Council, and the Reporter of the sentencing project decided not to revisit the capital sentencing provisions. When a tentative draft of the sentencing project came before the membership in 2007, a motion was made for the Institute to call for the abolition of the death penalty. The Institute did not act on the motion, but instead referred to the Program Committee and the Council the question “whether the ALI should study and make recommendations about the death penalty.” An ad hoc committee of Council members was appointed to advise the Program Committee in the matter. That committee identified three possible courses of action: (a) call for abolition of the death penalty; (b) withdraw § 210.6 from the Model Penal Code (the capital sentencing provision); and/or (c) undertake a project to revise § 210.6.

The Institute then chose to study the matter further, and engaged my sister, Carol Steiker (Professor at Harvard Law School), and I to prepare a substantial paper

addressing these proposed courses of action. The Institute also assembled a diverse group of criminal justice experts, including judges, lawyers, and academics, to advise us on our report. After our report was completed, in the fall of 2008, the Council recommended to the membership that the Institute should withdraw the capital sentencing provisions from the Model Penal Code; that the Institute should not take a position on capital punishment itself; and that the Institute should not engage in a project on capital punishment (either to revise or replace § 210.6). In May, 2009, the membership of the ALI ultimately adopted a somewhat broader position that underscored the prevailing inadequacies of the prevailing American death penalty: “For reasons stated in Part V of the Council’s report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.” The Council approved the membership’s position in October, 2009, and that is now the official Institute position regarding capital punishment.

My comments today will explain the basis of the Institute’s decision and its broader significance. I want to begin by pointing out the MPC death penalty provision was critical to the reinstatement of the death penalty in 1976. At the time the ALI adopted the MPC in 1962, state death penalty statutes provided essentially no guidance to capital sentencers. Typical state statutes simply allowed jurors to choose between life or death based on their “conscience” and their own “moral light.” The drafters of the MPC viewed the absence of guidance as problematic because it seemed to ensure the arbitrary administration of the punishment. Section 210.6, by specifying relevant aggravating and mitigating factors, sought to ameliorate these concerns about the arbitrary administration of the punishment. The MPC provision was essentially ignored until the Supreme Court invalidated all existing capital statutes in *Furman v. Georgia* in 1972. *Furman* raised concerns about the arbitrary and discriminatory administration of the death penalty. These concerns stemmed from the interplay of extremely broad death eligibility in state schemes, the fact of its rare imposition, and the absence of any standards guiding charging or sentencer discretion. After *Furman*, states sought to resuscitate their capital statutes by revising them to address the concerns raised in *Furman*; many of the states turned to § 210.6 as a template for their revised statutes, hoping in part that the prestige of the Institute would help to validate these new efforts. In the 1976 cases addressing five of the revised statutes, state advocates drew particular attention to the fact that many of their provisions were modeled on § 210.6. The Court in turn relied on the expertise of the Institute – particularly its view that guided discretion could improve capital decisionmaking – when it upheld the Georgia, Florida, and Texas statutes. Those statutes, and the decisions upholding them, have provided the blueprint for the modern American death penalty, and indeed, the current Kentucky statute likewise borrows heavily from the MPC framework.

As our Report recounts, it is now clear that the Court’s efforts over the past 35 or so years to regulate capital punishment – largely on the model provided by the MPC – has been unsuccessful on its own terms. The guided discretion experiment has not solved the problems of arbitrariness and discrimination that figured so prominently in *Furman*; nor has the Court’s regulation proven able to ensure the reliability of verdicts or the

protection of fundamental due process in capital cases. An abundant literature, reviewed in our Report, reveals the continuing influence of arbitrary factors (such as geography) and invidious factors (most prominently race) on the distribution of capital verdicts. Most disturbing is the evidence of numerous wrongful convictions of the innocent, many of whom were only fortuitously exonerated before execution, and the continuing concern about the likelihood of similar miscarriages of justice in the future. These failures of constitutional regulation are due in part to the inherent difficulty and complexity of the task of rationalizing the death penalty decision, given the competing demands of even-handed administration and individualized consideration. But such a difficult task is compounded by deeply rooted institutional and structural obstacles to an adequate capital justice process, such as the intense politicization of the capital justice process and the inadequacy of resources for capital defense services.

I will speak briefly about these conclusions.

First, on the effort to reconcile the competing concerns of “guidance and structure,” on the one hand, to ensure equal treatment of offenders, and “individualization,” on the other, to ensure adequate consideration of aspects of an offender’s character, background, and circumstances of the offense. Despite serious efforts by states and the courts to mediate this tension, almost no one believes that our current system does this well, or is even capable of reconciling these competing interests. The best evidence of the inadequacies of constitutional regulation in this regard is the sheer number of Justices who have either abandoned the enterprise, in whole or in part, or raised serious questions about its feasibility. The attempt to regulate the capital justice process through constitutional supervision is not in its infancy; the Court has had nearly four decades of experience in implementing it. Notably, two of the four Justices who dissented in *Furman* in 1972 eventually came full circle and repudiated the constitutional permissibility of the death penalty. Justice Blackmun did so in a long and carefully reasoned dissent from denial of certiorari, concluding twenty-two years after *Furman*, that “the death penalty experiment has failed.” Justice Powell did so in reviewing his career in an interview with his official biographer after his retirement. Justice Stevens, one of the three-Justice plurality that reinstated the death penalty in the 1976 cases, recently concluded that the death penalty should be ruled unconstitutional, though he has committed himself to *stare decisis* in applying the Court’s precedents. In explaining his own change in constitutional judgment, Justice Stevens offers a long list of concerns about the administration of the death penalty and notes that the Court’s 1976 decisions relied heavily on the now untenable belief “that adequate procedures were in place that would avoid the [dangers noted in *Furman*] of discriminatory application . . . arbitrary application . . . and excessiveness.”

Second, the fair and accurate administration of the death penalty has been undermined by the intense politicization of the capital process. Capital punishment is politicized *institutionally*, in that some or all of the most important actors in the administration of capital punishment are elected (with the exception of lay jurors). At the same time, capital punishment is politicized *symbolically*, in that it looms much larger than it plausibly should in public discourse because of its power as a focus for fears of

violent crime and as political shorthand for support for “law and order” policies generally. These two aspects of politicization ensure that the institutional actors responsible for the administration of the capital justice process are routinely subject to intense pressures, which in turn contribute to the array of problems that plague the current system, including inadequate representation, wrongful convictions, and disparate racial impact. There is little hope of successfully addressing these problems in the absence of profound change on the politicization front.

Third, the persistence of race discrimination. Race discrimination has cast a long shadow over the history of the American death penalty. The central question today is whether efforts to guide sentencer discretion – such as the one embodied in the MPC death-sentencing provision – successfully combat the sort of discrimination documented in earlier studies. The current empirical assessment is “no” – that race discrimination still plagues the administration of the death penalty, though the evidence suggests that race-of-the-victim discrimination is of a much greater magnitude than race-of-the-defendant discrimination.

Fourth, the inadequacy of resources. Capital prosecutions are expensive. A number of studies have tried to ascertain the relative expense of capital prosecutions vis-a-vis non-capital prosecutions, using a variety of methodologies. What emerges from these studies is a consensus that capital prosecutions generate much higher costs at every stage of the proceedings, and that the total costs of processing capital cases are considerably greater than those of processing non-capital cases that result in sentences of life (even life-without-possibility-of-parole). Increased costs are attributable, among other things, to the relatively high costs of capital trials (bifurcated proceedings, investigation costs, voir dire costs, expert costs -- particularly for development of mitigation, etc.), the costs of mandatory appeals and multi-layered postconviction review, and the comparatively high costs of death-row incarceration.

Despite the very large costs that are currently incurred in the administration of capital punishment, there is also good reason to believe that the capital process remains substantially under-funded, especially in the area of defense counsel services. The best reference point for what constitutes minimally adequate defense counsel services in capital cases has been provided by the American Bar Association. The Supreme Court has repeatedly endorsed the ABA’s performance standards for capital defense counsel as a key benchmark for assessing the reasonableness of attorney performance in a series of recent cases addressing claims of ineffective assistance of counsel in capital cases.

Nonetheless, it is obvious that the vast majority of states do not comply with the ABA *Guidelines*, and many do not come even close.

Lastly, concerns about wrongly convicting and executing the innocent. Although there is debate about what constitutes a full “exoneration,” it is beyond question that public confidence in the death penalty has been shaken in recent years by the number of people who have been released from death row with evidence of their innocence.

Because exonerations of death-sentenced prisoners are such dramatic events, they have generated extensive study of the causes of wrongful convictions, in capital cases and more generally. There is widespread consensus about the primary contributors to wrongful convictions: eyewitness misidentification; false confessions; perjured testimony by jailhouse informants; unreliable scientific evidence; suppression of exculpatory evidence; and inadequate lawyering by the defense.

In light of the well-known causes of wrongful convictions and the great public concern that exonerations generate, especially in capital cases, one might expect that this would be an area in which remedies should be relatively easy to formulate and achieve without much resistance in the judicial or legislative arenas. In fact, remedies have proven remarkably elusive, despite the clarity of the issues and degree of public sympathy.

Overall, these considerations (and others I have not discussed for lack of time) prompted the ALI to adopt its three-fold position of withdrawing the capital sentencing provision, declining further study of the death penalty, and issuing its statement regarding the current intractable obstacles to a minimally adequate death penalty system. A brief word on each of these decisions.

Withdrawal of the capital sentencing provision constitutes recognition that the provision has not and cannot satisfactorily solve the problems of arbitrariness and fairness undermining the past and present system of capital punishment. The Institute wished to disassociate itself from the system of capital punishment that its provision had been crucial to sustaining.

The decision not to study the death penalty further was supported by the view that the problems of the prevailing system were not likely to be solved by new and better ideas; rather, some of those difficulties are likely ineradicable, whereas others, though curable, face insurmountable institutional structures that prevent well-known solutions from being adopted and appropriately implemented.

Finally, the decision to accompany the withdrawal of the MPC provision with a statement regarding the inadequacy of prevailing practices represented a judgment about the Institute's appropriate role. The Institute rejected issuing a call for outright abolition because it was rightly concerned that such a call would be read as a broad pronouncement regarding the morality of capital punishment rather than an appraisal of its administration within our society. The Institute did not endeavor to consider whether the death penalty is justified retributively or serves as a deterrent or violates basic human rights. Rather, it started with the assumption that states might believe the death penalty to serve important interests and then evaluated whether, given its present administration, it can reasonably be maintained. The language adopted by the Institute makes clear that the answer to that question is "no," and that the entrenched obstacles to the fair and accurate administration of the death penalty provide reason enough (wholly apart from broader moral considerations) to revisit whether capital statutes remain on books.

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