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DEATH PENALTY INFORMATION CENTER

Media Advisory: November 12, 2009

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Leading Law Group Withdraws Model Death Penalty Laws

Model Penal Code Provided Basis for Supreme Court's Approval of the Death Penalty in 1976

In a lightly noted but legally important action late last month, the Council of the American Law Institute (ALI) voted to withdraw the part of its Model Penal Code concerned with capital punishment because of the "current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." ALI's recommendations for making the death penalty less arbitrary had been adopted in 1962 and were cited repeatedly and extensively by the U.S. Supreme Court in *Gregg v. Georgia* (1976), the decision that allowed a reformed death penalty to be reinstated. Now that legal framework is no longer supported by the very organization that proposed it because the guidelines have failed to produce the fairness it sought to ensure.

Section 210.6 of the Model Penal Code defined cases appropriate for capital punishment, aggravating and mitigating circumstances, and special sentencing procedures, and was intended to meet significant concerns regarding death penalty practice. The withdrawal of this section disassociates ALI from any attempt to fashion an acceptable death penalty because the system has proven to be unworkable.

ALI's decision to withdraw its model death penalty provisions was based in part on a study commissioned by the Institute and prepared by Professors Carol and Jordan Steiker. The study concluded:

The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment,

either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, these conditions strongly suggest that the Institute recognize that the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.

The ALI Council recommended that the Membership withdraw the death penalty section from the Model Penal Code. The report submitted by the Council to the Members of ALI stated, "Unless we are confident we can recommend procedures that would meet the most important of the concerns, the Institute should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code." After the Membership concurred in May, the Council made the policy official on October 23, 2009. (Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty, April 15, 2009; Annual Meeting, May 19, 2009; final Council vote, Oct. 23, 2009).

The Supreme Court has also relied on the American Bar Association for guidance on the death penalty. Since 1997, the ABA has called for a moratorium on all executions.

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