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The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code

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THE UNEXAMINED DEATH PENALTY: CAPITAL PUNISHMENT AND REFORM OF THE MODEL PENAL CODE

Franklin E. Zimring*

The American Law Institute has launched a revision of its Model Penal Code provisions on sentencing and punishment that will be comprehensive in almost all respects. Conspicuously missing from the new sentencing project, however, is any examination of the Model Penal Code's provisions on capital punishment. This Essay argues that a reexamination of capital punishment is both necessary and practical as part of the larger sentencing reform project. Avoiding the death penalty is unprincipled and would leave the Model Code's single weakest section standing while every other sentencing provision would be subject to scrutiny. Failure to consider capital punishment would also ignore forty years of radical change in both the penal policy of developed nations and the new vocabulary of concern that has redefined the death penalty as an issue of human rights and limits of government power. Ignoring the death penalty would launch a reform effort that ignores the punishment for murder while rethinking everything else. Nothing short of terror at the political cost can explain this retreat from the natural boundaries of sentencing reform. Yet fears of a principled reexamination of section 210.6 are not well founded. The Institute could both take a principled position on the death penalty itself and also recommend minimum standards for capital cases where the penalty remains. To ignore the most visible and troubling aspect of American criminal justice is a much greater threat to the legitimacy of the Model Penal Code revision project than to confront it.

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UNEXAMINED DEATH PENALTY

INTRODUCTION

Four decades after its completion, the American Law Institute's Model Penal Code remains a singular landmark of doctrinal rigor and conceptual clarity in its statement of the major elements of the substantive criminal law. Herbert Wechsler's mastery of the elements of offenses and the proper contours of defenses remains a mainstay in the criminal law classroom and a standard against which less-accomplished real-world statutes can be measured. The Code has had major influence in several states, but for the most part it remains more a model than a standard form of codification of the substantive criminal law.

Like most multifaceted and complicated undertakings, some aspects of the original Model Penal Code are stronger than others, and some parts of the law reform package have aged better than others. The Code's provisions on the general part of the criminal law and its approach to the definition and grading of offenses were exemplary when minted and have weathered well as time has passed. The sentencing criteria and processes outlined in 1962 were carefully crafted by Paul Tappan of New York University, in collaboration with Wechsler, and were quite sophisticated in their approach to the division of labor between sentencing judges and parole authorities. But because the sentencing structure of the Code was indeterminate and rehabilitative, its dominant purposes and institutions were under attack by the mid-1970s—an age favoring determinate sentencing and sentencing commissions—and soon out of fashion in law reform circles. The decades since 1962 have also witnessed an extraordinary expansion in the scale of imprisonment in the states and the federal system. So the idea of reopening those parts of the Model Penal Code relating to the purposes, procedures, and contents of criminal sentencing was proposed and, in due time, approved. The

2. See, e.g., Kevin Reitz, A Proposal for Revision of the Sentencing Articles of the Model Penal Code 1 (Apr. 16, 2001) (unpublished manuscript, on file with the Columbia Law Review) ("The most visible signals of a changing punitive environment have included massive expansions of the nation’s prison, jail, probation, and parole populations, increased severity in the sanctioning of some juvenile offenders, and the resurgence of the death penalty.").
3. See id.

There can be no doubt of the moral and political importance of the death penalty as an issue of domestic criminal justice and international relations. The primary question for the Institute, however, is whether it is capable of adding to the debate in a credible, constructive, and effective way. In earlier materials, the Reporter has taken the position that the death-penalty provision should not be revisited, in part because a strong abolitionist statement by the Institute would be
American Law Institute’s reconsideration of sentencing in the Model Penal Code is still in its early stages, but some critical decisions have already been made about which of the elements of the original Code should be reexamined in the current effort.

This Essay is about one of the critical early decisions made by the American Law Institute about the scope of its reexamination of sentencing. The Institute has apparently decided that neither the standards nor the procedures for choosing between imprisonment and capital punishment should be reviewed in its current reform effort. This Essay argues against the wisdom of that decision.

Part I of this Essay briefly outlines the Institute’s reasons for leaving the capital punishment provision unexamined. Part II reviews the process that produced the death penalty procedures in the 1962 Model Penal Code and compares the Code’s capital punishment standards to its other provisions on murder. Part III shows how drastically the climate of opinion and the definition of key elements of the death penalty debate have changed in the forty years since the Model Penal Code emerged. Given the ironic status of the death penalty provisions as the most influential of the Code’s elements on American criminal law, the inconsistency of the Code’s statements on this issue with its work on the definition of offenses and the purposes of punishment, and the tide of change throughout the developed world on both the meaning of the death penalty and its wisdom, the death penalty provisions are arguably the element of the original Code most in need of redrafting.

Part IV argues that the standards for capital punishment must also be considered in order to complete a principled reconstruction of a sentencing system in the code revision. Failure to decide whether death should be a punishment and on what grounds it is to be imposed would leave the rest of the sentencing system isolated from the law on punishment for murder. A sentencing reform that fails to address such issues is transparently truncated and patently unprincipled. For this reason, any attempt to reform sentencing law under the Code without examining death as a criminal punishment undermines the coherence and legitimacy of the reform process. The Essay’s final Part will consider the appropriate steps for the American Law Institute to take in considering capital punishment.

I. Scope of Reform: The Official Story

The document that most accurately portrays the official story of the Model Penal Code redrafting effort is a “prospectus” drafted by the project’s reporter, Professor Kevin Reitz, and circulated in 2001. This docu-

perceived as a political act rather than an expression of special competence or legal expertise, and in part because a foray into the explosive area of capital punishment would subtract from the influence of the remainder of the Code revision. The issue is far from closed, however. Wisdom and advice from the membership is solicited.

Id. at 12.
ment primarily focuses on making the case for reopening those provisions in the original document that concern sentencing and corrections while leaving undisturbed the substantive provisions dealing with the general part of the criminal law and the definitions of specific offenses. The prospectus argues that sentencing is a prime candidate for rethinking because of the rapid change in sentencing law and practice and the controversy surrounding appropriate sentencing: "Forty years of upheaval have so changed American sentencing practices as to make them unrecognizable to the policy maker of 1962. . . . This prospectus recommends a revision of the Code's sentencing and corrections provisions."5

The ordinary meanings of terms like "sentencing" and "corrections" suggest that "a revision" of these provisions would include an evaluation of the Code's treatment of capital punishment. The corrections provisions of the Code deal with the content of criminal punishments, and the sentencing provisions deal with the principles and procedures for choosing punishments in individual cases. While the terms are not formally defined in Professor Reitz's prospectus, there are also no indications that his use of the terms is in any way more limited than mine. Professor Reitz also makes clear that the revision must consider the variety of sanctions other than imprisonment that can be identified in current practice or reform advocacy.6

The prospectus does not address whether this broad reexamination of sentencing and punishment might involve the question of capital punishment until the last of its twenty-five pages. It considers the scope of the effort in the following terms: "Finally, it is possible that the alternative versions of section 210.6 concerning the death penalty could be reworked, but this prospectus does not recommend that the Institute return to such politically-charged terrain."7 This single sentence stands alone as the official basis for excluding the death penalty from the current American Law Institute initiative. The form and content of this swift dismissal invite three preliminary observations. The first and most obvious point is that there is no claim in the prospectus that excluding the death penalty from the sentencing and corrections review might have any principled basis. This would be worth noting in any institution's prospectus, but is of particular importance in the context of the American Law Institute, since principled argument is supposed to be its comparative advantage.

The second issue raised by the summary recommendation against thinking about the death penalty concerns the political risks of rethinking criminal sentencing. If "politically-charged terrain" should really be off-limits to the law reform process, then perhaps the American Law Insti-

5. Reitz, supra note 2, at 2.
6. Id. at 16–18 ("A revised Model Penal Code should do far more than the original Code to encourage the development and use of . . . sanctions less intrusive than incarceration but more punitive and restrictive than traditional probation or parole.").
7. Id. at 23–24.
tute should rethink the wisdom of trying to inject principle into sentencing systems that mindlessly expand prison populations, frequently name federal sentencing legislation after dead crime victims, and grace habitual criminal legislation with baseball terminology. If the political sensitivity of a topic is a disqualification for law reform, perhaps bills and notes would be a safer undertaking than criminal punishment.

Or maybe the situation is more complicated. My third preliminary observation is that, in general, political passions should not be permitted to generate a no-fly zone for the law reform process, or else those areas of American law most in need of scrutiny will remain untouched by rational discourse. To the extent that the single sentence in the sentencing prospectus suggests a cautionary political rationale for nonintervention, such a criterion for avoidance seems problematic.

II. The Bumpy Road to Section 210.6

The death penalty was an important part of the original Model Penal Code project, which, in turn, became an important part of the modern history of capital punishment in the United States. The Institute commissioned a major research report on capital punishment from Thorsten Sellin, a member of the Code's advisory committee and a distinguished criminologist at the University of Pennsylvania. His report, *The Death Penalty*, was the major social science research effort on capital punishment in the United States during an era that had been a relatively quiet period of declining executions but no legislative reform.

The Sellin report reads like a Brandeis brief prepared to support the abolition of the death penalty, with emphasis on empirical soundings on marginal deterrence that were avant-garde by the scholarly standards of the rest of the Code project. More than half of the document reported trends in homicide before and after shifts in death penalty policy and made comparisons between clusters of contiguous American states with and without capital punishment. Smaller sections of Professor Sellin's report dealt with issues like the inevitability of mistaken conviction and

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8. See id. at 1.
12. See Franklin E. Zimring & Gordon J. Hawkins, Deterrence: The Legal Threat in Crime Control 253-55, 263-66 (1973) (discussing Sellin’s use of matched group comparisons and the conclusion drawn from these comparisons “that capital punishment does not appear to have any influence on the reported rate of homicide”).
capital [p]unishment as [c]ause for [m]urder." While the report included a survey on the status of capital punishment, it presented no material on the definition of capital crimes in either common law or code nations, and no attention was devoted to the criteria for capital crimes, the allocation of sentencing responsibility in different legal systems, or any other issues of detail in comparative law and practice. Sellin’s report on capital punishment was a preparation for only one kind of policy statement by the American Law Institute: an abolition of capital punishment. There is thus almost no overlap between the background provided in the report and the detailed later work of the project on the death penalty.

The deliberations about capital punishment in the Model Penal Code show a fateful interaction of theory and political concern. The advisory committee of the Code, "[b]y a vote of 18-2 ... recommended that the Institute favor abolition" of the death penalty. But the Council of the Institute, representing elite practitioners and judges rather than academicians, was divided on the issue and "decided that the Institute should not take any position." Because the Institute would take no position on the ultimate substantive issue, its penal code draftsmen were suddenly thrust into the thicket of drafting principles and procedures for a penalty its advisors opposed. As might be imagined, the architecture of the provision drafted, section 210.6, reflected substantial ambivalence about the wisdom of execution as a criminal sanction. Because those United States jurisdictions that provided for death as a sanction for murder had left the choice between prison and death to a jury without any standards, the drafters of this section had to invent both standards and an allocation of responsibility between judge and jury in making decisions. Further, the expert’s report to the Institute by Thorsten Sellin provided no background for the creation of a novel capital punishment system.

Section 210.6 begins by providing six circumstances when defendants guilty of murder would not be eligible for a death penalty:

(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

14. Id. at 63–69.


17. I have made this argument elsewhere in a different context. See Franklin E. Zimring & Gordon Hawkins, Capital Punishment and the American Agenda 77–83 (1986) [hereinafter Zimring & Hawkins, American Agenda].
(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
(d) the defendant was under 18 years of age at the time of the commission of the crime; or
(e) the defendant's physical or mental condition calls for leniency; or
(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

Factfinding under subsection (1) is delegated to the judge, so that the court has a primary responsibility in every case to find facts on aggravation, mitigation, age, and the defendant's physical and mental condition.

In one of the two alternative systems proposed in subsection 210.6(2), should the case survive judicial scrutiny for exclusion from death eligibility, a jury would then be instructed to determine whether aggravating circumstances exist, to determine whether mitigating circumstances exist, and to balance the aggravating and mitigating factors it finds. A second alternative (never adopted by any state) provided that the judge should have this responsibility.18

Subsection 210.6(3) lists eight aggravating factors:

(3) Aggravating Circumstances.
(a) The murder was committed by a convict under sentence of imprisonment.
(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
(c) At the time the murder was committed the defendant also committed another murder.
(d) The defendant knowingly created a great risk of death to many persons.
(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
(g) The murder was committed for pecuniary gain.
(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.19

No single aggravating circumstance or combination of circumstances is suggested as a sufficient condition for a death sentence, even where no

18. Model Penal Code § 210.6(2).
19. Id. § 210.6(3).
substantial mitigation is found. There is no crime that explicitly deserves the death penalty and a whole group of settings where the court is instructed to reject it.\textsuperscript{20}

The Model Penal Code allocation of power between judge and jury is also a study in ambivalence and asymmetry. One alternative in subsection 210.6(2) provides no role at all for a jury. The second alternative allows the jury to consider a death sentence (after the judge has waived optional exclusion of the penalty under subsection 210.6(1)), but only a jury's vote against death is binding on the judge. If the jury recommends death, the question of the proper sentence returns to "the court," with no statement in the Code to indicate the weight that the sentencing judge should give to the jury's decision.

The substantive standards used to create the potential life or death distinctions in section 210.6 are in marked contrast to the style and conceptual logic of the rest of the Model Penal Code's approach to offenses against the person. The Code's Section 210.2 defines murder as a single grade of offense—it explicitly rejects degrees of the offense and provides an indeterminate sentence with a minimum of one to ten years in prison and a maximum of life. The description of murder is accomplished in eighty-three words\textsuperscript{21} that are justified with thirty printed pages of commentary,\textsuperscript{22} including a devastating commentary on the illogic of the felony murder rule.\textsuperscript{23}

By contrast, the laundry list of eight aggravating circumstances in subsection 210.6(3) is supported by a commentary which is less than one page in length. Having pleaded against the automatic liability of the felony murder rule under section 210.2, the Code then proposes a long list of felonies for automatic eligibility for a death penalty in subsection 210.6(3)(e). This single provision is probably responsible—in the states that use this style of statute—for more death sentences and executions than all the other aggravating factors combined.\textsuperscript{24}

Given the Code's hostility to felony murder logic generally, it is bizarre that the commentaries justify counterpoint liability for death in a

\textsuperscript{20} See Zimring & Hawkins, American Agenda, supra note 17, at 82 ("Nor does the Code ever indicate under what circumstances an offender should be sentenced to death; that decision is always discretionary. The Code indicates only when an offender cannot be sentenced to the death.").

\textsuperscript{21} Model Penal Code § 210.2(1).

\textsuperscript{22} Id. cmt. at 13-43.

\textsuperscript{23} Id. cmt. at 29-42.

\textsuperscript{24} See Samuel R. Gross and Robert Mauro, Death and Discrimination: Racial Disparities in Capital Sentencing 45 (1989) ("Although only a minority of all reported homicides in each state involved other felonies... the great majority of all death sentences fell in this category, over 80% in Georgia and Florida and about 75% in Illinois."); Editorial, Narrowing the Wiggle Room, Restoring Justice Series, Chi. Trib., Oct. 2, 2002, 1, at 18 (noting that 60% of the 307 death sentences in Illinois involved felony murder aggravators); cf. Zimring & Hawkins, American Agenda, supra note 17, at 77-91 (describing effect of section 210.6 provisions on use of death penalty).
single sentence: "[Felony murder] concerns murder committed in connection with designated felonies, each of which involves the prospects of violence to the person." The problems with this conclusory statement as a rationale for death eligibility under section 210.6 are twofold. First, since all acts that kill "involve the prospect of violence to the person," there is nothing in that statement to distinguish felony killings from all other forms of violence that intentionally, knowingly, or recklessly cause death. All murder implies "the prospect of violence to the person," and the listed felonies in subsection 210.6(3) are not more violent than assault. The commentary to section 210.6 had earlier suggested that a prior history of violence might be probative of a defendant's bad character or danger, but no such inference can be drawn from only a current felony context. So there is no logic to this most important life or death distinction, the felony murder list of subsection 210.6(3)(e).

The second problem with the "violence to the person" justification is that earlier parts of the commentary disprove it. Subsection 210.6(3)(e) provides an aggravation to death eligibility if the felony was a burglary, but ninety-eight pages earlier, the commentaries note that 27,669 reported burglaries had resulted in one homicide over a five-year period in Philadelphia, a percentage of 0.000036 that the commentary mistakenly overstates. The chance of an individual Philadelphia burglar killing his victim seemed closer to zero than being killed while crossing a busy street during rush hour. The Model Penal Code draftpersons had determined that burglary kills one victim in the fourth largest city of the United States only once every five years and then overlooked this calculation in justifying a new version of felony murder death sentence liability on the grounds that every such act "involves the prospect of violence to the person."

The conflict between the approach of the Model Penal Code to the definition of murder and its approach to aggravation of murder liability for the death sentence creates an ironic contrast. The more one accepts and admires the Code's single grade of murder and criticisms of felony murder, the greater the distrust of the logic and documentation for the death penalty in section 210.6. It should therefore be no surprise that many of Herbert Wechsler's greatest admirers are among the harshest critics of section 210.6. The central failure of section 210.6 is that it fails to live up to the standards the rest of the Code achieved.

The Code provisions and commentaries were far from clear on what penal theories or personal attributes might justify a death sentence. The commentaries did not discuss, let alone justify, the conflicts in analysis revealed by comparing the subsection 210.6(6) standards with the analysis of murder. Justifying a death penalty for murder was a task the archi-

25. Model Penal Code § 210.6 cmt. at 137.
26. Id. at 136.
27. Id. § 210.2 cmt. at 38 n.96.
tects of the Model Penal Code never wanted. No wonder, then, that the task eluded them.  

Nine years after the Model Penal Code was completed, Justices Harlan and Brennan debated whether due process required legal standards to guide jury discretion in capital cases. Justice Harlan, who had concluded, “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability,” included the Model Penal Code as an appendix to his opinion. Justice Brennan, who argued in dissent for the value of legal standards, did not mention section 210.6.  

The more recent literature on reform of the American death penalty also rejects the breadth and inclusiveness of section 210.6. In many ways, the 2002 reports of the Illinois Blue Ribbon Commission on Capital Punishment and the 2004 report of the Massachusetts Governor’s Advisory Commission are a study in contrasts. A majority of the Illinois Commission opposed capital punishment, while the Massachusetts group came close to endorsing a proposed statute. But both commissions demanded much narrower definitions of “capital offense,” a rejection of felony murder, and procedural safeguards of vastly greater rigor than those provided by the Model Penal Code. The substantive standards for death eligibility in section 210.6 are inconsistent with the Code’s work on murder, poorly explained, and provide, at the end of the day, no clear guidance on a life-or-death question.

III. Changes in Circumstances and Discourse Since 1962

The two elements emphasized in Professor Reitz’s argument for re-opening the sentencing provisions of the Model Penal Code were change in practice and shifting ideas of proper legal arrangements. Judged by those standards, the circumstances of the death penalty since 1962 make a case for reexamination of section 210.6 that cannot be equaled by any other topic within American criminal law. Both the policy of and the

28. For further elaboration of this point, see Zimring & Hawkins, American Agenda, supra note 17, at 82–83.
30. See also Zimring & Hawkins, American Agenda, supra note 17, at 82–83.
34. Reitz, supra note 2, at 2.
discourse about state execution have changed more radically in the past forty years than in the previous two centuries.

A short list of the enormous changes witnessed in four decades would include (a) the abolition of capital punishment in most developed countries, a significant cluster of European nations—Germany, Italy, and Austria—had abolished the death penalty just after World War II as part of a process of regime change. The pattern of abolition since 1960 is shown in Figure 1.

A. The Tide of Policy Change

When the Council of the American Law Institute voted on the death penalty in 1959, a total of twenty-three nations had abolished capital punishment in the 195 years since the 1764 publication of Cesare Beccaria’s *Crimes and Punishments* launched the movement to end state execution. A significant cluster of European nations—Germany, Italy, and Austria—had abolished the death penalty just after World War II as part of a process of regime change. The pattern of abolition since 1960 is shown in Figure 1.

**Figure 1: Number of Countries that Have Abolished the Death Penalty over Time**

![Figure 1](chart.png)


The number of abolition nations expanded from twenty-five around 1960 to ninety-six in 2004, just under fourfold. Two qualitative dimensions of the widespread abolition of the death penalty in recent years are of special significance to the Model Penal Code perspective. First, the English and Commonwealth nations are an important comparative standard for the Model Penal Code on a wide variety of matters. They are the "Anglo" in the phrase "Anglo-American legal heritage." Great Britain abolished the death penalty in 1965 and was followed closely by Canada and Australia.

The second qualitative dimension of abolition is the near unanimity of developed nations rushing to end the death penalty. In the "first world" of 2004, only the United States and Japan continue to administer punishment systems that include a death penalty. This criminal punishment, practiced in every major nation as recently as the end of World War II, is rapidly disappearing from the portfolio of developed nations. This overwhelming pattern was not even hinted at in the quiet decade after the Royal Commission on Capital Punishment reported in 1953. The pace of change on capital punishment since then is without precedent in comparative criminal justice.

B. The Changing Terms of Capital Punishment Discourse

The 1959 report to the American Law Institute faithfully reflected the topics that were regarded as important in the death penalty debate: deterrence, proportionality, error, finality, and discrimination against minorities. The table of contents of concerns had changed little in half a century of debate prior to 1959, and capital punishment as a topic was considered well within the confines of criminology and criminal law. By the 1990s, the frame of reference for discourse about capital punishment had shifted from domestic criminal justice to international human rights. The transition from criminal justice to human rights was reflected in Protocol Number Six of the European Convention for the Protection of Human Rights, commissioned in 1982. The strategic shift created in this Protocol was of extraordinary importance:

Papua New Guinea: Return to Executions Would Be a Retrograde Step (Apr. 16, 2004), at http://www.amnesty.org.au/resources/newsroom/news?cid=1&pid=101&MySourceSession=bc20928b69de8b360deb7cc31b5f5c148 (on file with the Columbia Law Review). Sources differ over whether specific countries have abolished the death penalty, and very little aggregated information is available. For lack of a better method of calculation, Figure 1 was created by aggregating the countries listed as having abolished the death penalty in each of these sources. Regardless of its precision, Figure 1 illustrates the clear trend away from use of the death penalty worldwide.

39. See Sellin, supra note 11, passim.
At once, the human rights framework was extended to provide for mandatory abolition of death penalties for all of the European nations involved in the Council of Europe. . . .

. . . Once a group of nations agrees that the standards governing the death penalty policy of individual states should be international, this creates the mandate to judge other countries on death penalties, whether or not those other states agree with the standards imposed.41

This transformation of both the framework for discussion of the death penalty and the forum for its determination (from national to international) was absent from the earlier discussion of the death penalty within the American Law Institute. What was to the Council a question of potential deterrence and states' rights in 1959 had become by 1983 an issue of the proper limits of government power, with an international standard of excluding execution becoming a norm among developed nations.

Discussion of whether this shift was appropriate is beyond the scope of this Essay. What is clear is that issues regarding human rights and the limits of government now dominate the discourse about capital punishment throughout the developed world. None of the materials before the ALI in 1959 even hinted at this context for considering the death penalty. So whatever else may be said about the Model Penal Code, it did not consider any of the questions that most developed nations regard as centrally important to informed policy choice.

In this important sense, the discussion of the death penalty that produced the ALI position in 1959 can rightfully be regarded as prehistoric. This shift in the terms of discourse on the death penalty makes the changing fashions of questions such as determinant sentencing look quite modest by comparison: At least most other sentencing issues are still regarded as within the proper scope of criminal justice in civilized nations.

C. The Operational Crisis

Several generations of change in law and policy separate the 1959 attempt to legislate order for capital punishment from the peculiar present death penalty law and procedures. The two decades following the promulgation of the Model Penal Code continued the long-term decline in executions, culminating in a ten year period of no executions.42 During this time, the Supreme Court of the United States tiptoed to the edge of ending capital punishment in Furman v. Georgia, which struck down laws that delegated the life or death choice to juries with no written standards,43 then backed away from judicial abolition in Gregg v. Georgia, de-

42. See Zimring & Hawkins, American Agenda, supra note 17, at 27 fig.2.1.
decided in 1976, which approved statutes that guided discretion with examples of aggravating and mitigating circumstances. Because the Supreme Court required little more than the formality of written standards, there was soon little substantive difference between the disapproved system in Furman and the minimum permissible death penalty allowed under Gregg and its progeny.

The Supreme Court’s embrace of written “aggravating” and “mitigating” circumstances produced statutes that imitated the structure of section 210.6 of the Model Penal Code. None of these statutes attempted to create the same allocation of authority between judge and jury as section 210.6(2) or the safeguards against death sentences in close cases found in subsection 210.6(1). The embrace of the Model Penal Code was, therefore, much more a matter of form than substance.

The past twenty-five years of death penalty practice have produced a double-barreled crisis that has generated hostility and contempt from all sides of the political spectrum. In many Northern states that have death penalty statutes, good defense lawyers and conscientious judges have fought the system to a draw with long delays and very low rates of actual execution. In some Southern states, by contrast, inadequate defense and appellate lawyers and judges willing to use procedural defaults to nullify substantive legal claims have created much higher rates. For example, Virginia’s, Texas’s, and Missouri’s rates of execution are more than thirty times those of Ohio, Pennsylvania, and California. The two great crusades of the 1990s were the attempt to speed up executions through procedural defaults and “effective death penalty” laws and the effort to find and free the scores of persons under death sentence who were not guilty of the crimes that had led to their stays on death row. Unfortunately, every effort to speed up executions magnified the risk of executing the innocent, while every credible effort to find the innocent slowed down the rush to execution.

The present cumbersome, time-consuming, inefficient, and arbitrary system of capital punishment in the United States has few defenders. The epidemic of death row inmates found innocent is one reason that public ambivalence about capital punishment is uncomfortably chronic. In 2001, while sixty-three percent of the public supported capital punish-

45. For a critical survey of these cases and the substantive outcome, see Robert Weisberg, Deregulating Death, 1983 Sup. Ct. Rev. 305.
47. See Zimring, supra note 41, at 144, 147-49 (noting that Southern states account for three quarters of all executions, and procedural bars combined with less-skilled lawyers result in higher execution rates).
48. See id. at 73 fig.4.2.
49. See id. at 144.
50. Id. at 174-77.
ment, a smaller majority of the population also supported "a nationwide moratorium on the death penalty while a commission studies whether it's been administered fairly." While the American Law Institute might have been avant-garde had it called for an end to capital punishment in 1959, deep concern about American executions is now widespread among mainstream institutions. The American Bar Association went on record in support of a moratorium on the death penalty in 1997, four years before the beginning of the ALI project to reform the Model Penal Code in Sentencing.  

One final dimension of the current crisis in capital punishment policy deserves special mention: the problematic pronouncements of law that have been generated by the Supreme Court's efforts to free itself from last-minute litigation in the shadow of the death chamber. One example is Coleman v. Thompson, a decision in which the Supreme Court upheld Virginia's refusal to hear a defendant's substantive arguments because his lawyers had been three days late in filing his appeal. Mr. Coleman died for his lawyer's sins. A second case, Herrera v. Collins, provoked a phrasing from Chief Justice Rehnquist that is a further indication that all is not well: "We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional ...."  

Genuine concern with due process, then, all but shuts down the machinery of capital punishment, as good lawyers manipulate the system to create delay. Any effort to speed up executions works best when it provides bad lawyers to capital defendants and then uses procedural defaults to defeat any meaningful substantive inquiries. Anyone who is not worried about this dilemma is no friend of American law.  

IV. THE REIGN OF THE HEADLESS HORSEMAN  

While the reform agenda of the new Model Penal Code effort is limited to sentencing and corrections, the broad view of sentencing the new project endorses makes this restatement quite ambitious. The new project will start with the deep structure of criminal punishment, considering the various potential purposes of punishment and the priority given to each relative to the others: the extent to which desert should be a de-
fining principle of sentences under the Model Penal Code; the appropriate interplay between desert and deterrence; the extent to which the wishes of crime victims or their families should play a role; the extent to which the range of punishment for similar offenses should be permitted to differ; the appropriate relationship between the maximum punishments for attempted and completed crime; and whether a life sentence without possibility of parole should be a permitted outcome in Model Penal Code sentencing.

This new effort must coordinate the purposes, institutions, and limits of criminal punishment. It is no small job under any circumstance. But it is an impossible task if the Code has no control over the purposes of a death penalty, the circumstances in which it is permitted, and the alternative sanctions to death for particular death-eligible crimes.

The new project's inability to coordinate principled sentencing without confronting capital punishment seems destined to promote irrationality. For example, the "life without parole" sanction is inconsistent with many principles of rational sentencing. But a death penalty without it as an alternative may tempt jurors who do not trust authorities to choose death rather than risk release with any other sanction. Further, it may not be possible to choose the punishments for lesser grades of willful killing without reference to the scope of death-eligible offenses. There is also the issue of whether the new edition of the Model Penal Code will be eternally at the mercy of the unprincipled felony murder provisions of subsection 210.6(3)(e).56

The odd and ironic consequence of having to design an entire sentencing structure and penalty scheme without knowing whether and under what circumstances death will be a punishment is that there can be no principled framework for punishment in the law of murder. Withdrawing from discussions about the death penalty would also not indicate deference to the 1962 Model Penal Code because no state adopted its substantive rules for death. It would instead indicate deference to the same political process that the institutions of sentencing reform were created to avoid on all issues but the death penalty. Perhaps the idea is to throw raw meat to the legislature with an unprincipled death penalty and hope they will leave the rest of the punishment process to rational coordination. But that is arguably creating, at best, a sentencing system as a headless horseman, with order and reason to apply only as long as the stakes do not get too high.

The irony of having principled sentencing for every crime but murder is easy to discover in the origins of the Model Penal Code. The substantive prelude to the Model Penal Code, the first great engagement of the young Herbert Wechsler with the substantive criminal law, was his epic collaboration with Jerome Michael, the two-part Rationale of the Law...
Wechsler had an instinct that reform of the penal law should start at the top; it should take more than political concern to persuade his successors to begin rethinking the law of punishment by doing the opposite.

V. What's To Be Done?

The American Law Institute’s engagement with capital punishment as a sentencing question is necessary, but it will not be easy. The politics of American capital punishment are well worth wanting to avoid: A combination of high popular support for the general idea of a death penalty and ambivalence and distrust about its operating system has produced a system rife with inefficiency, inconsistency, and injustice. The operational crisis and contradictory impulses of capital punishment are chronic conditions in American life. What should an ALI reexamination of sentencing provide to the states as guidance on the thorny question of the death penalty?

First, the ALI should finish the job begun by its report on capital punishment and by the Model Penal Code’s Advisory Board in 1959. A clear statement that execution should not be a penal option in a modern state might have been avant-garde in 1959, but it represents a firm consensus throughout other Western democracies early in the 21st century. Even the American Bar Association has been on record since 1997 in support of an end to executions, a “moratorium” proposal that historically has been the politically expedient path to abolition on the installment plan. My guess is that, in 2005, the internal political processes of the ALI would not be a major impediment to endorsing abolition.

But a quiet and firm rejection of capital punishment by the revisors of the Code would be subject to two potential problems: political futility and insufficiency. A rejection of capital punishment might seem to be futile because it will not change many minds in those states that firmly support the death penalty. The argument for the insufficiency of a “just say no” approach involves the failure to address the current conditions in the United States. If the death penalty continues, merely opposing it will not address the gross unfairness in current practices that often claim to be based on Model Penal Code blessed procedures. Each of these arguments deserves unpacking.

The political impact of an ALI pronouncement on capital punishment will be minimal in the state legislatures of those Southern states where executions are concentrated. Stalin was reputed to have responded to news that the Vatican opposed his policies by asking: “How


58. See Harris, supra note 52.
many divisions has the Pope?" The American Law Institute has even fewer troops in Texas, Oklahoma, and Alabama. One might assert that the unpopular position of the Institute simply hurts the prospects of the Code's other worthy sentencing reforms without contributing anything to abolition of the death penalty in the United States.

I think such an argument both overstates the costs of a principled stand on capital punishment and vastly underestimates its potential benefits. The effect of a death penalty position on the probability that states will adopt other proposed sentencing systems is close to zero. Many political leaders respect principle, and all of them are capable of selecting attractive reforms from a larger list of proposals. Indeed, were the ALI prompt in starting its consideration of capital punishment, its statement on that subject could appear and be digested years before the main sentencing proposals of the project are ready for display. The real prospect for longstanding guilt by association with opposition to the death penalty seems remote. There is no high political cost to doing the right thing.

One might doubt whether there is any political gain to be had from another Northern elite group opposing executions. But quite a bit of gain can come as part of the collective pressure elite opinion exerts on institutions like the federal courts, which exercise enormous power on death penalty policy. Foreign and domestic elites influence American opinion leaders (including judges) more than such opinion leaders like to acknowledge. The considered opinion of any select body of law reformers would be influential on any question of importance. In addition, a reexamination by the ALI might also undo associations of the 1962 Code with capital punishment. A new look at the death penalty by the reform agency that has played so important a part in the modern history of capital punishment could be an influential part of a sequence of changes that will operate outside the political process but that, over the long term, may determine its outcome.

Rejection of the death penalty by the ALI will therefore be a non-trivial contribution toward the only law reform of substance that is viable for the long term—the end of death as a punishment. But we should be concerned about the sufficiency of a focus on the long-term solution when current substantive standards for death and the procedures for trial and appeal are so badly in need of repair. Indeed, the ALI is also under an obligation to provide some operational help to a system in crisis right now, particularly when the risk of execution is greatest precisely in those states with the lowest current standards.

The argument for revisiting the substantive and procedural standards for death cases is a strong one, but the career of the 1962 standards also teaches a good deal about precautions necessary to avoid implicit

59. See, e.g., Lawrence v. Texas, 559 U.S. 558, 567–68, 572–73 (2003) (using opinions from academia and international community as support for holding that laws criminalizing sodomy were unconstitutional); Zimring, supra note 41, at 180–83.
approval of death as a punishment. The first precaution is, of course, an explicit rejection of executions as part of a law reform agenda. That was one missing link in 1962. A second precaution is to avoid identifying any proposed standards as comprehensive solutions to the problems that bedevil capital punishment. The Illinois Blue Ribbon Commission on Capital Punishment has already shown how to fashion and advocate partial solutions to particular problems without providing an audience any reason to conclude that the Commission would endorse a system that adopted safeguards. The Massachusetts Commission report of 2004, by contrast, probably does generate an impression of approval for a death penalty it explicitly announced it would neither endorse nor oppose. Why the difference?

An outline of specific minimum standards for capital crimes and procedures can be generated without great risk of cooption. However, publishing detailed statutory language carries a much greater risk of implicitly embracing the death penalty. An outline of important minimum standards can also isolate a few priority reforms. That kind of damage control is easy to distinguish from the attempt to design an exemplary death penalty.

But what if the Council of the ALI actually wanted to embrace the death penalty in 2005 by drafting an exemplary death penalty statute, a new improved version of section 210.6? Might this happen? I doubt it. Even in 1959, when no serious effort to oppose the death penalty had yet been launched, the Council of the Institute had merely requested that the ALI not take a position. While there might be reluctance now to embrace any public position on capital punishment, few, if any, mainstream American leadership groups have an affirmative vision of the death penalty as part of the American future. In my view, the career of Attorney General John Ashcroft is the exception to this pattern that proves the general rule.60

What makes elite groups of leaders nervous about capital punishment is not any enthusiasm they have for the practice of execution. I suspect that it is, instead, a desire to avoid the costs that might result because nonelite constituencies might be offended. Among opinion leaders, the only real division of view is between those who wish to tolerate execution as a political necessity and others who would stand on principle against execution. In my view, diversity has some friends in the ALI in 2005. Lethal injection does not.

CONCLUSION

A basic review of the current status and likely prospects of the death penalty in the United States will not consume an inordinate amount of
time or other resources of the ALI. The most likely substantive outcome of that review will be to place the project on the side of abolishing the death penalty as unnecessary, dangerous, and unduly burdensome on the institutions of justice. Among the principal victims of the death penalty in the United States are the institutions of justice forced to bear the impossible burden of capital punishment.

There are also strong arguments that the Institute might wish to endorse a set of minimum standards for operating systems that refuse to end capital litigation. There is no room in the Model Penal Code for a "Model Code of Death," but some of the more obvious biases and perverse incentives of the current system can be addressed without cooptation.

None of this needs to consume the major energies of the sentencing reform effort. The institutions and principles that determine the kind and amount of nonlethal punishments in the United States should demand most of the Institute's energy. The current needs and future importance of principles for modern punishments is great. The prison and its alternatives will be with us long after execution has disappeared as an instrument of civilized criminal justice. But until the executioner has been banished from American soil, the question of capital punishment must remain a necessary topic of criminal sentencing reform.