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The American Law Institute
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THE AMERICAN LAW INSTITUTE

Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty

(April 15, 2009)

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Report of the Council to the Membership of The American Law Institute
On the Matter of the Death Penalty
(April 15, 2009)

I. Introduction and Proposed Motion

On Tuesday afternoon, May 19, the ALI members attending the 2009 Annual Meeting will be asked to consider and approve the following motion with regard to the death penalty:

MOTION: That the Institute withdraws § 210.6 of the Model Penal Code.

The motion will be presented on behalf of the Council, which approved the same motion at its December 2008 meeting. In order to be the position of the Institute, the approval of a majority of the ALI members present when it is put to a vote at the Annual Meeting is required.

The Council makes one further recommendation: If a motion to endorse or oppose the abolition of capital punishment is presented for a vote at the 2009 Annual Meeting, the Council recommends that the members present vote against the motion.

To assist the members in preparing for the consideration of this matter at the 2009 Annual Meeting, the following report is being distributed in advance to the entire membership. The report provides important background information, including the history of the 1962 Model Penal Code's approach to the death penalty, a recitation of why the matter is before us in 2009, and a review of the process in which the Institute has been engaged over the past two years to arrive at this point. In Section V, we discuss some of the considerations and reasons for the Council's recommendations and decisions, including its decision not to undertake a project to revise or replace § 210.6. Section VI outlines the major concerns regarding the state of the death-penalty systems in the United States today, as set forth more fully in a paper prepared by Professor Carol Steiker and Professor Jordan Steiker at the request of ALI Director Lance Liebman. The paper is summarized in and also annexed to this report for information and not for approval.

II. The Current Model Penal Code

The Model Penal Code, recommended by the American Law Institute in 1962, expresses no view on whether capital punishment should be an available sentencing option. Despite the views of the Code's Chief Reporter (and later ALI Director) Herbert Wechsler, the other Reporters, and most of the Advisers, who favored excluding the death penalty as a sanction available in the United States, the minutes of the March 1959 Council meeting report this conclusion: "that it is undesirable for the Institute to take a position on … the abolition of capital punishment on the ground that this was a political question on which the opinion of either the Council or the Institute could be of little help in settlement of the matter."

In presenting the Proposed Official Draft of the MPC at the 1962 Annual Meeting, one of the Reporters, Professor Louis Schwartz of the University of Pennsylvania, said:

> The Institute went through a great struggle over whether to approve or disapprove the death penalty. We finally took the course of providing the most reasonable standards and procedures for application of the death penalty for use by those jurisdictions which chose to retain it. Therefore we have bracketed the references to the death penalty, to show the contingent character of the Institute's approval of the capital punishment provisions.

The main provision of the Model Penal Code concerning capital punishment, § 210.6 (reproduced in full in Annex A), defines cases appropriate for capital punishment as follows: only murder, then only if there are "aggravating circumstances," and even then, not if "substantial mitigating circumstances call for leniency" or if the evidence at trial "does not foreclose all doubt respecting … guilt." The section also proscribes the death sentence for those under age 18 at the time of the murder and for those whose "physical or mental condition calls for leniency." Section 210.6 then mandates a special sentencing procedure in capital cases and allocates sentencing authority between judge and jury. Specifically, the section lays out two formulations from which states adopting the MPC would choose. The one preferred by the Institute is for use of a jury in contested cases but with the judge retaining discretion to reject a jury verdict of death. But the section also sets forth an alternative procedure whereby the judge acts without the aid of a jury. Thus, under either procedure, final discretion to sentence a defendant to death lies with the judge. Additionally, the section requires the judge, and when aided by a jury also the jury, to consider the aggravating circumstances and mitigating circumstances delineated in the final subsections of the section.

III. Why the Subject Is Before Us

In 2001, the Institute began work on some of the criminal sentencing provisions of the MPC, with Professor Kevin Reitz as Reporter. At an early stage, the Director, Council, and Reporter concluded, with substantial support from the project's Advisers, that the sentencing project should not address the issue of the death penalty, at least in the first stages of the effort.[1] That decision still stands.

A Tentative Draft of the Sentencing project was before the membership for action at the 2007 Annual Meeting. In advance of the meeting two ALI members, Professors Roger Clark and Ellen Podgor, submitted a motion they intended to present that would have the Institute call for the abolition of the death penalty. With the proponents' consent, then-President Michael Traynor informed the ALI membership that, although the agenda for the 2007 Annual Meeting would permit some discussion of the subject, the motion would not be presented for a vote at that meeting; the Program Committee and Council would subsequently consider "whether the ALI should study and make recommendations about the death penalty"; and a report would be made at the 2008 Annual Meeting. (The written

[1] One Adviser, Professor Franklin Zimring, disagreed, presented his arguments in a strong way, and resigned as an Adviser when his recommendation was not accepted.

Status Report on Capital Punishment distributed to the ALI members before the 2008 meeting is reproduced in its entirety as Annex C.)

President Traynor then appointed an ad hoc committee of Council members led by Professor Daniel Meltzer to advise the Program Committee in the matter. In concluding his committee's written report (within Annex C at pp. 11-24), Professor Meltzer identified three possible courses of action the Institute could follow: (a) call for abolition of the death penalty; (b) withdraw § 210.6 from the Model Penal Code; and/or (c) undertake a project to revise § 210.6.

Thereafter, the Institute sponsored an online forum to further solicit the views of ALI members. After considering the members' comments at the 2007 Annual Meeting and those submitted on the forum or otherwise (summary of comments within Annex C at pp. 29-43), in December 2007 the Program Committee recommended and the Council agreed that a more extensive paper should be commissioned (within Annex C at pp. 45-46). Director Liebman then engaged Carol Steiker and Jordan Steiker to prepare that paper, a draft of which was discussed by a diverse group of experts, including judges and lawyers in addition to academics, at an invitational conference sponsored by ALI in New Orleans in September 2008. Different views were expressed at the meeting. The paper, as revised after the conference by the Steikers, is Annex B.[2]

The Program Committee met in November 2008 and agreed upon a set of recommendations. At the December Council meeting, those recommendations were discussed at some length and accepted by the Council.

IV. Decisions and Recommendations of the Council

The Council voted in December to take the three positions described below. Under the ALI's governance structure, approval by both the Council and the membership is required for the Institute to make a recommendation about law. The decision to undertake a project is within the discretion of the Council, which makes such decisions after receiving the recommendation and advice of the Director and the Program Committee. Of course, comments on all of the Council's decisions regarding capital punishment will be welcome at the Annual Meeting discussion on May 19 or at any other time.

A. The Institute, without need for further study or a full project, should withdraw § 210.6 from the Model Penal Code.[3]

B. The Institute should not (as it did not in 1962) take a position on whether capital punishment is ever an appropriate punishment and thus should not endorse capi-

[2] The paper is very much what the ALI leadership had wanted and has helped the Program Committee's and the Council's deliberations enormously. It was prepared as background and is being distributed to the ALI membership for information and not for endorsement.

[3] It should be noted that the Model Penal Code was addressed to state crimes and did not address the federal crimes of treason or seriously damaging espionage. Thus, withdrawal of § 210.6 does not address the question of the federal death penalty for these crimes.

tal punishment or call for its abolition. (ALI therefore should not approve the motion made by Professors Clark and Podgor in 2007 or any similar motion that may be presented at this year's Annual Meeting.)

C. The Institute should not engage in a project on capital punishment, either to revise or replace § 210.6 or to draft a separate model statutory provision.

V. Reasons for the Council's Decisions and Recommendations

The Program Committee's and Council's review and consultation, informed by the papers produced by the Meltzer Committee and by the Steikers and by the New Orleans conference, as well as by other sources, provide ALI with a sufficient basis to proceed with the withdrawal of § 210.6 without undertaking a traditional ALI project and to recommend that the Institute neither endorse nor oppose the abolition of capital punishment. Among the reasons that motivated many members of the Council are these:

A. Section 210.6 was an untested innovation in 1962. We now have decades of experience with death-penalty systems modeled on it. The section played an influential role in the evolution of American capital-punishment systems and capital-punishment law over the last half century. However, since the provision was approved by ALI, U.S. Supreme Court decisions have reshaped the constitutional landscape with respect to sentencing generally and the death penalty specifically, raising questions about some aspects of § 210.6. Even though other aspects of the section—in particular, the categorical exclusion of capital punishment as a punishment for juveniles and for crimes other than murder and its doubts about it as a punishment for the mentally ill—proved to be prescient as confirmed in later constitutional jurisprudence, on the whole the section has not withstood the tests of time and experience.

B. Many on the Council have concerns, convincingly described in the Steikers' paper and other sources, about the administration of the law of capital punishment in the United States, including the administration of death-penalty laws derived from § 210.6. A number of these concerns are outlined in Section VI, infra. 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.

C. American constitutional law today permits capital punishment.[4] The punishment has substantial support among U.S. citizens at least for certain crimes. Federal law as well as the law of a majority of states provides for the availabili-

[4] Among developed countries, the U.S. is in a minority that have capital punishment regimes. The European Union does not permit the death penalty in member states, although in a number of EU countries polls show that significant majorities favor the penalty. While the relevance of foreign legal practice to American policy is a controversial question, at a minimum the international evolution away from the death penalty provides an additional reason for the conclusion that, in major respects, § 210.6, adopted in 1962, does not supply a model for state statutory law that the ALI should be endorsing today.

ty of the death penalty as a sanction for prescribed crimes. The basic question posed by the Clark-Podgor motion raises profound moral, political, and social issues, with the views of individuals often being based on deep personal convictions. Unlike other controversial questions that the Institute has not been reticent to address, careful study and reasoned debate by thoughtful persons—the hallmarks of the Institute's process often resulting in influential contributions to law reform—would probably not contribute to the political debate on capital punishment or influence the views of legal policymakers. Within the Institute, substantial consensus is unlikely. For these reasons, the Council does not believe that ALI should further study and then speak to this fundamental question.

D. Some Council members believe that since the death penalty will continue to be imposed in some jurisdictions in the United States, the ALI could play a useful role in recommending procedures that are consistent with current constitutional requirements. Other members, supported by the arguments in the Steikers' paper, believe that real-world constraints make it impossible for the death penalty to be administered in ways that satisfy norms of fairness and process. As ALI's current Sentencing project progresses, Director Liebman will evaluate and may recommend new projects in the area of criminal law. At this time, the Director, the Program Committee, and a large majority of the Council are not convinced that an ALI effort to offer contemporary procedures for administering a death-penalty regime would succeed intellectually, institutionally within what would surely be a divided membership, and politically in terms of influence outside the Institute. Thus ALI will not undertake a project concerning the death penalty.

VI. Reasons for Concern about Whether Death-Penalty Systems in the United States Can Be Made Fair

The paper prepared at the Director's request by Carol Steiker and Jordan Steiker sets forth in detail, with supporting documentation, the major reasons why many thoughtful and knowledgeable individuals doubt whether the capital-punishment regimes in place in three-fourths of the states, or in any form likely to be implemented in the near future, meet or are likely ever to meet basic concerns of fairness in process and outcome. These include (a) the tension between clear statutory identification of which murders should command the death penalty and the constitutional requirement of individualized determination; (b) the difficulty of limiting the list of aggravating factors so that they do not cover (as they do in a number of state statutes now) a large percentage of murderers; (c) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system that has resulted in statistical disparity in death sentences based on the race of the victim; (d) the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate; (e) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced; and (f) the politicization of judicial elections, where—even though nearly all state judges perform their tasks conscientiously—candidate statements of personal views on the death penalty and incumbent judges' actions in death-penalty cases become campaign issues.

VII. Summary

A. The Council recommends to the ALI membership that the Institute withdraw § 210.6 of the Model Penal Code. When a motion to that effect is presented at the 2009 Annual Meeting, the Council recommends that those present vote in favor.

B. The Council further recommends that if a motion that the Institute endorse or oppose the abolition of capital punishment is presented for a vote at the 2009 Annual Meeting, the members present vote against that motion.

C. The Council reports that there are no plans to begin an ALI project to draft language that would revise or replace § 210.6 or otherwise address the subject of capital punishment.

We welcome your thoughts before or during the consideration of this matter, which is scheduled to be taken up at 2:00 p.m. on Tuesday, May 19, 2009, in Washington, D.C.

ANNEXES

§ 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(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

(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.

(2) Determination by Court or by Court and Jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empaneled for the purpose.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous

verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

Alternative formulation of Subsection (2):

(2) Determination by Court. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. In the proceeding, the Court, in accordance with Section 7.07, shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of such examination. In addition, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

(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 kidnaping.

(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.

(4) Mitigating Circumstances.

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

Annex B

Report to the ALI Concerning Capital Punishment

Prepared at the Request of ALI Director Lance Liebman by
Professors Carol S. Steiker (of Harvard Law School) &
Jordan M. Steiker (of University of Texas School of Law)
November 2008

INTRODUCTION AND OVERVIEW

We have been asked by Director Lance Liebman to write a paper for the Institute to help it assess the appropriate course of action with regard to Model Penal Code § 210.6 (adopted in 1962 to prescribe procedures for the imposition of capital punishment). This request stems from two recent developments. First, the Institute has already undertaken a project revisiting the MPC sentencing provisions, but that project has not included any consideration of capital punishment. Second, at the Institute's Annual Meeting in May of 2007, Roger Clark and Ellen Podgor moved "That the Institute is opposed to capital punishment." In response to the motion, an Ad Hoc Committee on the Death Penalty was convened, and in light of that committee's deliberations, Director Liebman gave us the following charge: "to review the literature, the case law, and reliable data concerning the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty and, if retained, what limitations should be placed on its use and what procedures should be required before that sentence is imposed. Another way of asking the question is this: Is fair administration of a system of capital punishment possible?" (Program Committee Recommendation Regarding the Death Penalty, Dec. 3, 2007).

The possible approaches that the Institute might take with regard to § 210.6 at the present time were identified in Dan Meltzer's memorandum on behalf of the Ad Hoc Committee on the Death Penalty (Report on ALI Consideration of Issues Relating to the Death Penalty, Oct. 2, 2007): 1) revise § 210.6, 2) call for abolition, or 3) withdraw § 210.6. Although each of these options obviously allows for various permutations, we agree that these three options mark the Institute's primary choices of action. In light of the difficulties, elaborated below, that would be raised by either the Institute's attempt to revise § 210.6 or the Institute's embrace of an unadorned call for abolition, we believe that the soundest course of action for the Institute would be withdrawal of § 210.6 with an accompanying statement to the effect that, in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option.

This choice comes at a time of widespread reflection about American capital punishment. On the one hand, popular political support for the death penalty appears to remain relatively high, with opinion polls reporting stable majorities (about 70%) embracing the death penalty on a question that asks "Are you in favor of the death penalty for a person convicted of murder?" Thirty-six states presently authorize the death

penalty (as well as the federal government), twenty-four of those states have at least ten inmates on death row, and nineteen of those states have conducted at least ten executions over the past forty years. At the same time, however, use of the death penalty (in terms of executions and especially death sentences) has declined significantly in recent years. Nationwide executions reached a modern-era (post-1976) high of 98 in 1998; the past three years have seen significantly lower totals – 53 (2006), 42 (2007), and 34 (2008 – as of Nov. 20). Nationwide death sentences have dropped even more precipitously, from modern-era highs of around 300 in the mid-1990s (315 (1994), 326 (1995), 323 (1996)), to modern-era lows in each of the past four years (140 (2004), 138 (2005), 115 (2006), 110 (2007)). In addition, executions during the modern era have been heavily concentrated in a small number of states, with five states (Texas (422), Virginia (102), Oklahoma (88), Florida (66) and Missouri (66)) accounting for about two-thirds of the executions nationwide (744/1133). Several states, including California and Pennsylvania, have large death-row populations (CA = 667, PA = 228) but very few executions in the modern era (CA = 13, PA = 3). This snapshot captures both the continuing political support for the death penalty as an available punishment but also significant ambivalence about its use in practice. Although different in its particulars, this snapshot shares some similarities to the state of the American death penalty almost a half century ago when the Institute last addressed capital punishment.

The Institute's initial involvement in American capital punishment resulted in its promulgation of § 210.6 of the Model Penal Code in 1962. As the Meltzer memorandum recounts, the drafters of the MPC considered the problems plaguing the then-prevailing death penalty practices. The provision sought to ameliorate concerns about the arbitrary administration of the punishment and the absence of meaningful guidance in state capital statutes. The MPC provision was essentially ignored until the Supreme Court invalidated all existing capital statutes in *Furman v. Georgia*[1] 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.[2] Those

[1] 408 U.S. 238 (1972).

[2] Gregg v. Georgia, 428 U.S. 153, 193 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded 'that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case.'") (emphasis in original) (quoting ALI, Model Penal Code § 201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959)) (footnote omitted) (the citation to "§ 2.01.6" rather than to "§ 2.10.6" reflects the change in numbering from the 1959 draft to the 1962 Code); Proffitt v. Florida, 428 U.S. 242,

statutes, and the decisions upholding them, provided the blueprint for the modern American death penalty.

The stance that the Court took in 1976 was provisional; it then adopted a role of continuing constitutional oversight of the administration of capital punishment. Each year the Court has granted review in a substantial number of capital cases, and the Court has continually adjusted its regulatory approach to prevailing capital practices. It is clear that the Court's attempt 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 below, reveals the continuing influence of arbitrary factors (such as geography and quality of representation) 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. Moreover, such a difficult task is compounded by deeply rooted institutional and structural obstacles to an adequate capital justice process. Such obstacles include the intense politicization of the capital justice process, the inadequacy of resources for capital defense services, and the lack of meaningful independent federal review of capital convictions.

In many legal contexts, the identification of problems in the administration of justice and obstacles to reform would counsel in favor of the Institute's undertaking a reform project in order to promote needed improvement. The administration of capital punishment, however, presents a context highly unfavorable for a successful law reform project, for several related reasons.

First, numerous other organizations have already undertaken to study the administration of capital punishment, both at the state and the national level. These studies have generated an enormous amount of raw data and a large body of proposed reforms (about which there is a substantial degree of agreement from a variety of sources). A large number of diverse states have undertaken systematic self-studies of the administration of their systems of capital punishment in the recent past. For example, in 2001, Governor George Ryan of Illinois appointed a blue-ribbon, bi-partisan commission to conduct a comprehensive study his state's administration of capital punishment after

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247-48 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (describing Florida statute as "patterned in large part on the Model Penal Code"); Jurek v. Texas, 428 U.S. 262, 270 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (citing Model Penal Code to support its conclusion that the narrowing of capital murder in the Texas statute serves much the same purpose as the use of aggravating factors in Florida and Georgia).

13 exonerations from Illinois' death row.[3] In 2004, a task force of the New Mexico State Bar undertook a comprehensive study of capital punishment in that state.[4] The legislatures of a number of other states have also undertaken systematic studies of their death penalty systems, including Connecticut in 2001,[5] North Carolina in 2005,[6] New Jersey in 2006,[7] Tennessee in 2007,[8] and Maryland in 2008.[9] In addition to these comprehensive studies, virtually every death penalty state has undertaken one or more smaller investigations into various aspects of their capital justice system (such as cost, racial disparities, forensic evidence processing, etc.). The most wide-ranging studies to date are those conducted by the American Bar Association in conjunction with its call for a nationwide moratorium on capital punishment in 1997. In the wake of the adoption of its moratorium resolution, the ABA developed a publication entitled *Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States*, which was intended to serve as "Protocols" for jurisdictions undertaking reviews of death penalty-related laws and processes. The ABA, as part of its Death Penalty Moratorium Implementation Project, has recently completed a three-year study of eight states to determine the extent to which their capital punishment systems achieve fairness and provide due process.[10] A review of the ABA's research and the state self-studies together strongly suggests that the death penalty is not an area in which the Institute can measurably contribute by conducting new research or compiling or explicating existing research.

Second, there is also reason to be skeptical that the Institute will be able to promote needed death penalty reform by adding its voice, with the expertise and prestige that is associated with it, to influence political actors. Capital punishment has remained an issue strongly resistant to reform through the political process in most jurisdictions. Consider first the reforms contained in § 210.6 itself. Although adopted by the Institute in 1962, § 210.6 was ignored in the political realm for a decade, until the Supreme Court constitutionally invalidated capital punishment in 1972, at which point § 210.6 was

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[3] *See* http://www.idoc.state.il.us/ccp/index.html for a copy of the Executive Order, a list of Commission Members, and the Commission's final report. Two years later, Governor Mitt Romney of Massachusetts (an abolitionist state) took a similar step in appointing a blue-ribbon commission; the Massachusetts Commission was charged with determining how to create a "fool proof" death penalty statute that would avoid the erroneous conviction and execution of murderers. *See* http://www.cjpc.org/dp_govs_commission.htm.

[4] *See* http://www.nmbar.org/Attorneys/lawpubs/TskfrcDthPnltyrpt.pdf for a copy of the Task Force's final report.

[5] *See* http://www.ct.gov/…/commission_on_the_death_penalty_final_report_2003.pdf for a copy of the Connecticut Commission's final report.

[6] *See* http://www.deathpenaltyinfo.org/node/1557 (20 members of the North Carolina House of Representatives appointed to undertake study the administration of the death penalty).

[7] *See* http://www.njleg.state.nj.us/committees/njdeath_penalty.asp. New Jersey abolished the death penalty in 2007.

[8] *See* http://www.thejusticeproject.org/press/tn-death-penalty-study-bill-passed/ (16 member expert committee appointed in Tennessee).

[9] *See* http://www.deathpenaltyinfo.org/node/2336 (commission appointed to study racial, socio-economic, and geographical disparities, the execution of the innocent, and cost issues relating to the death penalty in Maryland).

[10] *See* http://www.abanet.org/moratorium/ for the full reports of the ABA Moratorium Implementation Project.

pressed into service by state legislatures in order to revive the moribund penalty. The ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, have likewise failed to succeed in the political realm; indeed, the ABA's Death Penalty Moratorium Implementation Project found in 2007 that not a single one of the eight states that it studied were fully in compliance with any aspect of the ABA *Guidelines* studied. (See discussion in section on "Inadequacy of Resources, *infra*.) Perhaps most telling is the view of Professor Joseph Hoffman, someone who has devoted enormous time and energy to death penalty reform, spearheading death penalty reform efforts in both Illinois and Indiana and serving as Co-Chair and Reporter for the Massachusetts Governor's Council on Capital Punishment. Hoffman served as a member of an advisory group to discuss an earlier draft of this paper, and he strongly expressed the view that seeking reform of capital punishment in the political realm is futile. This is a striking position to take by one who is not morally opposed to the death penalty and who has worked on numerous reform projects. But Hoffman cited as grounds for his change of heart the example of Illinois, in which there were confirmed wrongful convictions in capital cases, a sympathetic Governor, and a bi-partisan reform commission, but still strong resistance in the state legislature to reforms specifically targeted at capital punishment. In short, serious concerns about efficacy in the political realm militate against the undertaking of a new reform effort by the Institute.

Moreover, some of the structural problems in the administration of capital punishment are not the sort of problems that the Institute can address with its legal expertise. While standards for defense counsel, for example, might be considered within the purview of the Institute's expertise, the problem of the intense politicization of the capital process – arising from the decentralization of criminal justice authority within states, the political accountability of many of the key actors in the capital justice system, and the sensationalism of death cases in the media – is a problem largely beyond the reach of legal reform.

Finally, were the Institute to take on a death penalty reform project despite the likelihood of ineffectiveness in the political realm and the fact that some of the underlying problems are not amenable to legal reform, it would run the risk not merely of failing to improve the death penalty, but also of helping to entrench or legitimate it. The undertaking of a reform project, despite its impetus in the flaws of current practice, might be understood as an indication that "the fundamentals" of the capital justice process are sound, or at least remediable. If the Institute upon reflection concludes, as this report suggests, that the administration of capital punishment is beset by problems that cannot be remedied by even an ambitious reform project, the Institute should say so, rather than invest its own time and resources and the hopes of reformers, in a project that will not succeed but may delay the recognition of failure.

We also recommend against the Institute's adoption of the Clark-Podgor motion declaring "[t]hat the Institute is opposed to capital punishment." As this report reflects, our study of capital punishment focuses on its contemporary administration in the United States and the prevailing obstacles to institutional reform. We did not understand our

charge from the Institute to encompass review of moral and political arguments supporting or opposing the death penalty as a legitimate form of punishment. Obviously there is deep disagreement along these dimensions regarding the basic justice of the death penalty. Some supporters view the death penalty as retributively justified (or indeed required). Other supporters maintain that the death penalty deters violent offenses and should be embraced on utilitarian grounds, especially in light of some recent empirical work purporting to establish its deterrent value.[11] Opponents generally reject the retributive argument and insist that capital punishment violates human dignity or vests an intolerable power in the State over the individual. Some opponents reject the empirical claims of deterrence and advance contrary claims of a "brutalization effect" in which executions actually reduce inhibitions toward violent crime.

Resolution of these competing claims falls outside the expertise of the Institute. The Institute is well-positioned to evaluate the contemporary administration and legal regulation of the death penalty. Moreover, the Institute is well-suited to evaluate the success, or lack thereof, of the MPC death penalty provisions in light of their subsequent adoption (in whole or part) by many jurisdictions. If, in its review of the prevailing system and of the prospects for securing a minimally adequate capital process, the Institute were to conclude that the death penalty should not be a penal option, the Institute should frame its conclusion to reflect the basis for its judgment. Endorsement of the Clark-Podgor motion might well be understood to reflect a moral or philosophical judgment rather than a judgment about the inadequacy of prevailing or prospective institutional arrangements to satisfy basic requirements of fairness and accuracy. That perception of the Institute's position would be inconsistent with the focus of this report (and the questions propounded by the Program Committee Recommendation Regarding the Death Penalty) and could possibly undermine the authority of the Institute's voice on this issue.

The remaining question for the Institute is whether to withdraw § 210.6, and if so, whether to include an accompanying statement regarding the withdrawal. The case for withdrawal is compelling and reflects a consensus among the Institute's members who have spoken to the issue thus far. At the outset, it should be noted that several provisions in § 210.6 have been rendered unconstitutional by rulings of the U.S. Supreme Court in the years since 1962. For example, section 210.6's failure to require a jury determination of death eligibility conflicts with the Supreme Court's recognition of a Sixth Amendment right to such a determination;[12] one of § 210.6's aggravating factors ("the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity") has been deemed to be impermissibly vague;[13] and section 210.6's failure to identify mental retardation as a basis for exemption from capital punishment violates the Court's recent Eighth Amendment proportionality jurisprudence.[14] These specific defects could be

[11] *See generally* Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 Ann. Rev. L. & Soc. Sci. 151 (2005) (reviewing recent empirical studies and their critics).
[12] Ring v. Arizona, 536 U.S. 584 (2002).
[13] Godfrey v. Georgia, 446 U.S. 420 (1980).
[14] Atkins v. Virginia, 536 U.S. 304 (2002).

corrected, but more fundamentally § 210.6 is simply inadequate to address the endemic flaws of the current system. Section 210.6, which in many respects provided the template for contemporary state capital schemes, represents a failed attempt to rationalize the administration of the death penalty and, for the reasons we discuss in greater detail below, its adoption rested on the false assumption that carefully-worded guidance to capital sentencers would meaningfully limit arbitrariness and discrimination in the administration of the American death penalty.

Given the prevailing problems in the administration of the death penalty and the discouraging prospects for successful reform, we recommend that the Institute issue a statement accompanying the withdrawal of § 210.6 calling for the rejection of capital punishment as a penal option under current circumstances ("In light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment, the Institute calls for the rejection of capital punishment as a penal option."). Such a statement would reflect the view that the death penalty should not be imposed unless its administration can satisfy a reasonable threshold of fairness and reliability.

Mere withdrawal of § 210.6, without such an accompanying statement, would pose two problems. First, the absence of any explanation might suggest that the Institute is simply acknowledging specific defects in the section, or that the Institute believes that the problems afflicting the administration of the death penalty are discrete and amenable to adequate amelioration. Second, and more importantly, the Institute's role is to speak directly and forthrightly on policy questions within its expertise. If the Institute is persuaded that the death penalty cannot be fairly and reliably administered in the current structural and institutional setting, it should say so.

Of course, many of the problems in the capital justice system exist to some degree in the broader criminal justice system as well. Why should these problems call for the rejection of the death penalty as a penal option if such problems could not justify elimination of criminal punishment altogether? Four considerations suggest the distinctiveness of the capital context. First, unlike incarceration, capital punishment is not an essential part of a functioning criminal justice system (as reflected by its absence in many localities, states and, indeed, many countries). While many of the same problems that afflict the prevailing capital system are also present in the non-capital system, the deficiencies of the non-capital system must be tolerated because the social purposes served by incarceration cannot otherwise be achieved. Second, many of the problems undermining the fair and accurate administration of criminal punishment are more pronounced in capital cases. For example, the distorting pressures of politicization exist in both capital and non-capital cases, but the high visibility and symbolic salience of the death penalty heightens these pressures in capital litigation. The inadequacy of resources and the absence of meaningful supervision of counsel are also prevalent throughout the criminal justice system, but these problems appear with greater regularity and severity on the capital side as a consequence the special training, experience, and funding necessary to ensure even minimally competent capital representation. Third, the irrevocability of the death penalty counsels against accepting a system with a

demonstrably significant rate of error. Evidence suggests a higher rate of erroneous convictions in capital versus non-capital cases, and there is little reason to believe that the problem of wrongful convictions and executions will be solved in the foreseeable future. Fourth, deficiencies within the capital system impose significant and disproportionate costs on the broader legitimacy of the criminal justice system. In light of the high visibility and high political salience of capital cases, the arbitrary or inaccurate imposition of the death penalty undermines public confidence in our institutions and generates a distinctive and more damaging type of disrepute than similar problems in non-capital cases.

What follows below is a more thorough account of the existing problems in capital practice, the various efforts to address those problems, and the prospects for meaningful reform. Part I evaluates the course of constitutional regulation over the past three decades. The remaining sections examine the underlying problems and structural barriers that have undermined regulatory efforts (Part II: The Politicization of Capital Punishment; Part III: Race Discrimination; Part IV: Juror Confusion; Part V: The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases; Part VI: Erroneous Conviction of the Innocent; Part VII: Inadequate Enforcement of Federal Rights; Part VIII: The Death Penalty's Effect on the Administration of Criminal Justice). Of course, it is possible to improve discrete aspects of the capital justice process through incremental reform. But achieving the degree of improvement that would be necessary to secure a minimally adequate system for administering capital punishment in the United States today faces insurmountable institutional and structural obstacles. Those obstacles counsel against the Institute's undertaking a reform project and in favor of the Institute's recognition of the inappropriateness of retaining capital punishment as a penal option.

I. The Inadequacies of Constitutional Regulation

The Supreme Court's constitutional regulation of capital punishment, which commenced in earnest with the Court's temporary invalidation of capital punishment in *Furman v. Georgia* in 1972[15] and its reauthorization of capital punishment in *Gregg v. Georgia* in 1976,[16] has produced some significant advances, both substantively and procedurally, in the administration of the death penalty. Indeed, most of these advances track the requirements of § 210.6, which served as a template for many states in reforming their capital schemes to avoid constitutional invalidation. For example, like the MPC, most states try to guide capital sentencing discretion through consideration of "aggravating" and "mitigating" factors in response to the *Furman* Court's rejection of "standardless" capital sentencing discretion and the *Gregg* Court's approval of "guided discretion." Such guidance seeks to avoid the arbitrariness that was guaranteed by the pre-*Furman* practice of instructing juries merely that the sentencing decision was to be made according to their conscience, or in their sole discretion, without any further

[15] 408 U.S. 238.
[16] 428 U.S. 153. *See also Gregg*'s four accompanying cases: *Proffitt*, 428 U.S. 242; *Jurek*, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976).

elaboration. By invalidating the death penalty for rape in 1977[17] and extending that invalidation to the crime of child rape this past Term,[18] the Supreme Court, again like the MPC, has limited capital punishment to the crime of murder,[19] in comparison to the pre-*Furman* world in which death sentences for rape, armed robbery, burglary and kidnapping were authorized and more than occasionally imposed. The Court recently has categorically excluded juveniles and offenders with mental retardation from the ambit of the death penalty.[20] Although the Court has never held that bifurcated proceedings (separate guilt and sentencing phases) are constitutionally required,[21] post-*Furman* statutes have made bifurcation the norm, and it would likely be held to be a constitutional essential today, should the issue ever arise.

Despite these genuine improvements to the administration of capital punishment, constitutional regulation has proven inadequate to address the concerns about arbitrariness, discrimination, and error in the capital justice process that led to the Court's intervention in the first place. At its worst, constitutional regulation is part of the problem. When the Court requires irreconcilable procedures, its own conflicting doctrines doom its efforts to failure. Such conflicts have led several Justices to reject the Court's regulatory efforts as unsustainable. In many more instances, the Court's doctrine, though it may recognize serious threats to fairness in the process or recognize important rights, fails to provide adequate mechanisms to address the threats or vindicate the rights. Some of these inadequacies have led additional Justices to defect in various ways from the Court's death penalty doctrine. Finally, the existence of an extensive web of constitutional regulation with minimal regulatory effect stands in the way of *non*-constitutional legislative reform of the administration of capital punishment – not only because such reform is generally extremely unpopular politically, but also because political actors and the general public assume that constitutional oversight by the federal courts is the proper locus for ensuring the fairness in capital sentencing and that the lengthy appeals process in capital cases demonstrates that the courts are doing their job (indeed, maybe even *over*-doing their job, considering how long cases take to get through the entire review process). What follows is a discussion of the four most serious inadequacies in the constitutional regulation of capital punishment and their implications for reform efforts.

1. The central tension between guided discretion and individualized sentencing. The two central pillars of the Court's Eighth Amendment regulation of capital punishment are the twin requirements that capital sentencers be afforded sufficient guidance in the exercise of their discretion and that sentencers at the same time not be restricted in any way in their consideration of potentially mitigating evidence. The first

[17] Coker v. Georgia, 433 U.S. 584 (1977).
[18] Kennedy v. Louisiana, 128 S. Ct. 2651 (2008).
[19] The Court limited its holding to crimes against persons, and put to one side crimes against the state such as treason or terrorism. *See id.* at 2659.
[20] Atkins v. Virginia, 536 U.S. 304 (2002) (offenders with mental retardation); Roper v. Simmons, 543 U.S. 551 (2005) (juvenile offenders). The MPC categorically excludes juvenile offenders, and addresses mental retardation by requiring a life sentence when the court is satisfied that "the defendant's physical or mental condition calls for leniency." § 211.6(1)(e).
[21] McGautha v. California, 402 U.S. 183 (1971). The MPC requires bifurcated proceedings. § 210.6(2).

requirement led the Court to reject aggravating factors that rendered capital defendants death eligible but failed to furnish sufficient guidance to sentencers – most notably, factors similar to MPC § 210.6(3)(h): "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." The Court rejected such vague factors as insufficient either to narrow the class of those eligible for capital punishment or to channel the exercise of sentencing discretion.[22] The second requirement led the Court to reject statutory schemes that limited sentencers' consideration of any potentially mitigating evidence, either by restricting mitigating circumstances to a statutory list,[23] or by excluding full consideration of some potentially relevant mitigating evidence.[24]

From the start, the tension between the demands of consistency and individualization were apparent. As early as a year prior to *Furman*, the lawyers who litigated *Furman* and *Gregg* argued that unregulated mercy was essentially equivalent to unregulated selection: "'Kill him if you want' and 'Kill him, but you may spare him if you want' mean the same thing in any man's language."[25] After more than a decade of attempting to administer both requirements, several members of the Court with widely divergent perspectives came to see the incoherence of the foundations of their Eighth Amendment doctrine. In 1990, Justice Scalia argued that the second doctrine – or "counterdoctrine" – of individualized sentencing "exploded whatever coherence the notion of 'guided discretion' once had."[26] Justice Scalia rejected the view that the two doctrines were merely in tension rather than flatly contradictory: "To acknowledge that 'there perhaps is an inherent tension' [between the two doctrines] is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II. And to refer to the two lines as pursuing 'twin objectives' is rather like referring to the twin objectives of good and evil. They cannot be reconciled."[27] As a result, Justice Scalia (later joined by Justice Thomas), has chosen between the two commands and rejected the requirement of individualized sentencing as without constitutional pedigree: "Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted."[28]

Four years later, Justice Blackmun came to same recognition of the essential conflict between the doctrines, but reached a different conclusion. Justice Blackmun found himself at a loss to imagine any sort of reform that could mediate between the two conflicting commands: "Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient

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[22] *See, e.g.,* Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988).
[23] *See* Lockett v. Ohio, 438 U.S. 586 (1978).
[24] *See* Penry v. Lynaugh, 492 U.S. 303 (1989).
[25] *See* Brief Amici Curiae of the NAACP Legal Defense and Education Fund, Inc., and the National Office for the Rights of the Indigent at 69, McGautha v. California, 402 U.S. 183 (1971) (No. 71-203).
[26] Walton v. Arizona, 497 U.S. 639, 661 (1990) (Scalia, J., concurring)
[27] *Id.* at 664 (citations omitted).
[28] *Id.* at 673.

discretion to consider fully and act upon the unique circumstances of each defendant would 'thro[w] open the back door to arbitrary and irrational sentencing.'"[29] Unlike Justices Scalia and Thomas, however, Justice Blackmun did not resolve to jettison either constitutional command – not merely because of the demands of *stare decisis*, but "because there is a heightened need for both in the administration of death."[30] Consequently, Justice Blackmun concluded that "the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution."[31]

One Justice's response to the conflict between the need for guidance and the need for individualization was to call for limiting eligibility for capital punishment to a very small group of the worst of the worst – "the tip of the pyramid" of all murderers, in the words of Justice Stevens.[32] If unguided mercy reprieves some from this group, there will still be arbitrariness in choosing among the death eligible, but it will operate on a much smaller scale, and with greater assurance that those who make it to the "tip" belong in the group of the death eligible. However, even if it were agreed that limiting arbitrariness to a smaller arena is sufficient to mediate the conflict between guidance and discretion, this solution is neither constitutionally prescribed nor politically feasible. The Court's "narrowing" requirement is formal rather than quantitative; there is no requirement that any state restrict the ambit of the death penalty to a group of any particular size or with any particular aggravating attributes. And in the absence of a constitutional command, the scope of most capital statutes remains extraordinarily broad. One study, for example, of the Georgia statute upheld in *Gregg* as a model of guided discretion, found that 86% of all persons convicted of murder in Georgia over a five-year period after the adoption of Georgia's new statute were death-eligible under that scheme,[33] and that over 90% of persons sentenced to death before *Furman* would also be deemed death-eligible under the post-*Furman* Georgia statute.[34] The widespread authorization of the death penalty for felony murder, murder for pecuniary gain, and murders that could be described as "cold-blooded," "pitiless," and the like[35] have ensured a wide scope of death eligibility, and capital statutes have tended to grow rather than shrink over time, for reasons that we discuss in greater detail below. (See section on "Politicization.")

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[29] Callins v. Collins, 510 U.S. 1141, 1155 (1994) (Blackmun, J., dissenting from denial of certiorari) (citation omitted).
[30] *Id.*
[31] *Id.* at 1157.
[32] *See Walton*, 497 U.S. at 716-18 (Stevens, J., dissenting).
[33] David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 268 n.31(1990).
[34] *Id.* at 102.
[35] Although the Court initially invalidated vague aggravators like "heinous, atrocious or cruel," it later permitted judicially imposed "narrowing constructions" of such aggravators to save them from unconstitutionality. For example, in Arave v. Creech, 507 U.S. 463 (1993), the Court upheld Idaho's aggravator of "utter disregard for human life" by a narrowing construction that asked sentencers whether the defendant acted as a "cold-blooded, pitiless slayer."

The conflict between guidance and individualization thus has been resolved by the Court not by Justice Stevens' suggestion of strict narrowing, but rather by reducing the requirement of guidance to a mere formality. States must craft statutes that narrow the class of the death eligible to some subset – however large and however defined – of the entire class of those convicted of the crime of murder. In contrast, the Court has enforced the requirement of individualization with greater zeal and demandingness. Consequently, the structure of capital sentencing today is surprisingly similar to the pre-*Furman* structure (bifurcation aside). The sentencer must determine whether the defendant is death eligible – today not merely by conviction of a capital offense by also by the additional finding of an aggravating factor. These factors can be numerous, broad in scope, and still quite vague; indeed, the Court has held that the aggravator can duplicate an element of the offense of capital murder (in which case the aggravator adds nothing to the conviction).[36] After this fairly undemanding finding, the inquiry opens up into pre-*Furman* sentencing according to conscience: the sentencer is asked whether any mitigating circumstances of any type, statutory or non-statutory, call for a sentence less than death. This sentencing structure, which dominates the post-*Furman* world, is not accidental, nor is it the product of deliberate undermining of constitutional norms by states; rather, it is the *product* of constitutional regulation and thus fairly impervious to all but constitutional reform.

We share Justice Blackmun's skepticism about the possibility of adequate constitutional mediation of the needs for heightened guidance and individualization in the capital context. As for Justice Steven's suggestion of the possibility of sharply narrowing the scope of capital punishment, Justice Harlan said it best in 1971, in explaining the Court's rejection of challenges to standardless capital sentencing under the Due Process clause:

> 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. . . . For a court to attempt to catalog the appropriate factors in this exclusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.[37]

As for Justice Scalia's suggestion of abandoning the individualization requirement as a constitutional essential, we think the 1976 *Woodson* plurality explanation for why individualization is required remains compelling:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular

[36] *See* Lowenfield v. Phelps, 484 U.S. 231 (1988).
[37] *McGautha*, 402 U.S. at 204, 208.

> offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[38]

In the absence of a constitutional solution, states (and Congress) will continue to operate capital sentencing schemes that fail to adequately address the concerns about arbitrariness and discrimination that led to constitutional intervention in the first instance.

2. Racial disparities and constitutional remedies. The failure of constitutionally mandated guided discretion to offer much in the way of guidance might be less worrisome if there were other constitutional avenues to address discriminatory outcomes. After all, the challenge to standardless capital sentencing that led to the constitutional requirement of guided discretion was premised in large part on the concern that the absence of guidance gave too much play to racial discrimination. The NAACP Legal Defense Fund, the organization that spearheaded the constitutional litigation challenging the death penalty that culminated in *Furman* and *Gregg*, was also involved in litigation under the Equal Protection clause directly challenging racial disparities in the distribution of death sentences. For the first few decades of constitutional regulation of capital punishment, however, the Court avoided this issue, deciding cases that raised it on entirely non-racial grounds.[39] Finally, in 1987, the Court took up the issue directly in *McCleskey v. Kemp*.[40]

McCleskey involved a constitutional challenge to the imposition of the death penalty based on an empirical study conducted by Professor David Baldus and his associates (the Baldus study) using multiple regression statistical analysis to study the effect of the race of defendants and the race of victims in capital sentencing proceedings in Georgia. The study examined over 2,000 murder cases that occurred in Georgia during the 1970's. The researchers used a number of different models that took account of numerous variables that could have explained the apparent racial disparities on nonracial grounds. The study found a very strong race-of-the-victim effect and a weaker race-of-the-defendant effect: after controlling for the nonracial variables, the study concluded that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence as defendants charged with killing blacks, and that black defendants who killed white victims had the greatest likelihood of receiving the death penalty.

The Court rejected McCleskey's challenge to his death sentence on both Equal Protection and Eighth Amendment grounds. The Court assumed for the sake of argument the validity of the Baldus study's statistical findings, but held that proof of racial disparities in the distribution of capital sentencing outcomes in a geographic area in the past was insufficient to prove racial discrimination in a later case. Proof of

[38] 428 U.S., 304 (plurality opinion of Stewart, Stevens, and Powell, JJ.).
[39] *See, e.g.,* Coker v. Georgia, 433 U.S. 584 (1977); Maxwell v. Bishop, 398 U.S. 362 (1970).
[40] 481 U.S. 279 (1987).

unconstitutional discrimination, held the Court, requires proof of discriminatory *purpose* on the part of the decisionmakers in a particular case. Moreover, in light of the importance of discretion in the administration of criminal justice, proof of such purpose must be "exceptionally clear."[41] In light of this heavy burden, the Court found the Baldus study's results "clearly insufficient" to prove discriminatory purpose under the Equal Protection clause.[42] As for the Eighth Amendment challenge, the Court held that the "discrepancy indicated by the Baldus study is a far cry from the major systemic defects identified in *Furman*."[43] The Court concluded that the "risk of racial bias" demonstrated by the Baldus study was not "constitutionally significant."[44]

In part, the Court's rejection of McCleskey's claim was informed by its concern that there might be no plausible constitutional remedy short of abolition: "McCleskey's claim . . . would extend to all capital cases in Georgia, at least where the victim was white and the defendant is black."[45] (We discuss further the difficult problem of remedies for racial discrimination below in the section on "Race Discrimination.") But the Court's requirement of exceptionally clear proof of discriminatory purpose on the part of a particular sentencer makes constitutional challenges to intentional discrimination essentially impossible to mount. Not surprisingly, there have been no successful constitutional challenges to racial disparities in capital sentencing in the more than two decades since *McCleskey*, despite continued findings by many researchers in many different jurisdictions of strong racial effects. By rendering racial disparities in sentencing outcomes constitutionally irrelevant in the absence of more direct proof of discrimination, the Court has dispatched the problem of racial discrimination in capital sentencing from the constitutional sphere to the legislative one, where it has not fared well. (See "Race Discrimination," below.) Notably, Justice Powell, the author of the 5-4 majority opinion in *McCleskey*, repudiated his own vote only a few years later, when a biographer asked him upon his retirement if there were any votes that he would change, and he replied, "Yes, *McCleskey v. Kemp*."[46]

In rejecting McCleskey's Eighth Amendment claim that the Baldus study demonstrated an unacceptable "risk" of discrimination, the Court relied in part on other "safeguards designed to minimize racial bias in the process."[47] Primary among these safeguards is the Court's *Batson* doctrine. In *Batson v. Kentucky*[48] – decided just one year prior to *McCleskey* – the Court eased the requirement for proving intentional discrimination in the exercise of peremptory strikes by shifting the burden to the prosecution to provide race neutral explanations for strikes when the nature or pattern of strikes in an individual case gave rise to a *prima facie* inference of discriminatory intent.

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[41] *Id.* at 297.
[42] *Id.*
[43] *Id.* at 313.
[44] *Id.*
[45] *Id.* at 293.
[46] David Von Drehle, *Retired Justice Changes Stand on Death Penalty: Powell Is Said to Favor Ending Executions*, Wash. Post, June 10, 1994 (based on interview with John C. Jeffries, Jr., Justice Powell's official biographer).
[47] *McCleskey*, 481 U.S. at 313.
[48] 476 U.S. 79 (1986).

Batson did in fact permit the litigation of many more claims of discrimination in the use of peremptory strikes than the earlier, more demanding *Swain* doctrine,[49] and the Court has been more vigorous in overseeing the enforcement of the *Batson* right in capital cases in recent years.[50]

But the Court's reliance on *Batson* as a means of preventing racial discrimination in capital jury selection is profoundly misplaced. Studies of the effectiveness of *Batson* in reducing the race-based used of peremptory strikes have demonstrated only an extremely modest effect.[51] This is not surprising in light of the incentives that exist to base peremptory strikes at least in part upon the race of prospective jurors and the ease with which "race neutral" explanations for strikes can be offered.

If the race-based use of peremptory strikes depended on racial hatred or the belief in the intrinsic inferiority of minority jurors, then there would undoubtedly be much less race-based use of peremptories than is evident today. However, there is clearly a great deal of what economists call "rational discrimination" in jury selection. Counsel on both sides make decisions about the desirability of jurors from particular demographic groups based on generalizations about attitudes that the group as a whole tends to hold. There is good reason, based on polling data, to believe that blacks as a group are more sympathetic to criminal defendants and less trusting of law enforcement than whites, and that blacks as a group are less supportive of capital punishment than whites. Moreover, in cases involving black defendants, there is reason to believe that black jurors may be more personally sympathetic to the defendant than white jurors and more likely to perceive "remorse" on the part of the defendant, a perception crucial to obtaining life verdicts in capital sentencings.[52] Under such circumstances, capital prosecutors who harbor no personal racial animosity may well see strong reasons to use race as a proxy for viewpoint in using peremptory challenges, especially when they often have little other information to go on.

In implementing *Batson*, the Court has held that a prosecutor's race neutral explanation need not be "persuasive, or even plausible" – it must simply be sincerely non-racial.[53] It can be perilous for a prosecutor to offer as an explanation some aspect of a struck minority juror that is also true of white jurors whom the prosecutor failed to strike.[54] But one sort of explanation remains a virtually guaranteed race neutral explanation – an objection to a prospective juror's demeanor (e.g., the juror appeared hostile, nervous, bored, made poor eye contact, made too much eye contact, smiled or

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[49] *See* Swain v. Alabama, 380 U.S. 202 (1965).
[50] *See* Snyder v. Louisiana, 128 S. Ct. 1203 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 534 U.S. 1122 (2002).
[51] *See, e.g.,* William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171 (2001).
[52] *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Colum. L. Rev. 1538 (1998).
[53] Purkett v. Elem, 514 U.S. 765, 768 (1995) (accepting the prosecutor's professed objection to the struck jurors' hairstyle and facial hair as an acceptable non-racial reason).
[54] These sorts of comparisons formed the basis for the reversals in *Miller-El v. Dretke* and *Snyder*, *supra* note 50.

laughed inappropriately, frowned). Because no lawyer or judge can simultaneously monitor all of the prospective jurors' demeanors throughout all of voir dire, and because perceptions about the meaning of demeanor can vary, there is no way to disprove a prosecutor's claim that a particular juror appeared more "hostile" to him than the others. To reject such an explanation, a trial judge would have to make a credibility determination against a prosecutor – something judges are not prone to do lightly and in the absence of any hard evidence. Moreover, prosecutors may offer such explanations not only from a calculated attempt to preserve a dubious strike, but also in some cases from an honest perception built on the foundations of "rational discrimination." Starting from a belief that black jurors are more hostile to law enforcement or less supportive of the death penalty, a prosecutor in a capital case may genuinely believe that he or she is perceiving hostility from prospective minority jurors.

In short, there is little reason to put much faith in *Batson* as a strong protection against the racial skewing of capital juries. This skewing should concern us not merely because it inevitably affects perceptions about the fairness of the capital justice system, but because there is strong reason to believe that the race of capital jurors affects the outcomes of capital trials (just as there is reason to believe that the race of victims and defendants does).[55]

3. Innocence. Just as *McCleskey* effectively precludes challenges to racial discrimination in capital sentencing (at least challenges based on patterns of outcomes over time), the Court's doctrine also makes virtually no place for constitutional consideration of claims of innocence. In *Herrera v. Collins*,[56] the Court rejected petitioner's claim of actual innocence as a cognizable constitutional claim in federal habeas review. The Court held that while claims of actual innocence may in some circumstances open federal habeas review to other constitutional claims that would otherwise be barred from consideration, the innocence claims themselves are not generally cognizable on habeas. The Court assumed – without deciding – that a "truly persuasive" showing of innocence would constitute a constitutional claim and warrant habeas relief *if* no state forum were available to process such a claim.[57] But, the Court found that Herrera's claim failed to meet this standard. More recently, the Court has suggested just how high a threshold its (still hypothetical) requirement of a "truly persuasive" showing of innocence would prove to be. In *House v. Bell*,[58] the petitioner sought federal review with substantial new evidence challenging the accuracy of his murder conviction, including DNA evidence conclusively establishing that semen recovered from the victim's body that had been portrayed at trial as "consistent" with the defendant actually came from the victim's husband, as well as evidence of a confession to the murder by the husband and evidence of a history of spousal abuse. The Court held that this strong showing of actual innocence was the rare case sufficient to obtain federal habeas review for petitioner's *other* constitutional claims that would otherwise have been barred, because no reasonable juror viewing the record as a whole would lack reasonable

[55] *See* Bowers, et al., *Death Sentencing in Black and White*, *supra* note 51.
[56] 506 U.S. 390 (1993).
[57] *Id.* at 417.
[58] 547 U.S. 518 (2006).

doubt. But even this high showing was inadequate, concluded the Court, to meet the "extraordinarily high" standard of proof hypothetically posited in *Herrera*.[59]

This daunting standard of proof suggests that even if the Court does eventually hold that some innocence claims may be cognizable on habeas, such review will be extraordinarily rare. Thus, the problem of dealing with the possibility of wrongful convictions in the capital context (like the problem of dealing with patterns of racial disparity) has been placed in the legislative rather than the constitutional arena. The reliance on the political realm to deal with the issue of wrongful convictions is less troubling than such reliance on the issue of racial disparities, because there is far more public outcry about the former rather than the latter issue. But the problem of wrongful convictions in the capital context has proven to be larger and more intractable than might have been predicted. The large numbers of exonerations in capital cases may be due in part to the fact that many of the systemic failures that lead to wrongful convictions are likely to be more common in capital than other cases. Moreover, courts have been resistant both to providing convicted defendants with plausible claims of innocence the resources (including access to DNA evidence) necessary to make out their innocence claims, and to granting relief even when strong cases have been made. Finally, larger-scale reforms that might eliminate or ameliorate the problem of wrongful convictions are often politically unpopular, expensive, or of uncertain efficacy. (See section on "Erroneous Conviction of the Innocent," below.)

4. Counsel. Unlike innocence, the problem of inadequate counsel has been squarely held to undermine the constitutional validity of a conviction. Despite the fact that "effective assistance of counsel" is a recognized constitutional right, the scope of the right and the nature of the remedy have precluded the courts from being able to ensure the adequacy of representation in capital cases. Perhaps in response to repeated accounts of extraordinarily poor lawyering in capital cases,[60] the Court recently has granted review and ordered relief in a series of capital cases raising ineffectiveness of counsel claims regarding defense attorneys' failure to investigate and present mitigating evidence with sufficient thoroughness[61] – a development that might be viewed as raising the constitutional bar for attorney performance, at least in the sentencing phase of capital trials.[62] Nonetheless, constitutional review and reversal remain an inadequate means of ensuring adequate representation, both because the constitutional standard for ineffectiveness remains too difficult to establish in most cases, and because the remedy of reversal is too limited to induce the systemic changes that are necessary to raise the level of defense services.

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[59] *Id.* at 555 (quoting *Herrera*).

[60] *See, e.g.,* James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, 2103-10 (2000); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835 (1994); Marcia Coyle, et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, Nat'l L. J., June 11, 1990, at 30.

[61] *See* Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005).

[62] Compare the outcomes and analysis in *Williams*, *Wiggins*, and *Rompilla* to the Court's earlier rejections of claims of ineffective representation in capital sentencing proceedings in Strickland v. Washington, 466 U.S. 668 (1984), and Burger v. Kemp, 483 U.S. 776 (1987).

One of the hurdles to regulating attorney competence through constitutional review is the legal standard for ineffective assistance of counsel. In crafting the governing standard in *Strickland v. Washington*,[63] the Court maintained that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system."[64] In light of the Sixth Amendment's more modest goal of ensuring that the outcome of a particular legal proceeding crosses the constitutional threshold of reliability, the Court established a strong presumption in favor of finding attorney conduct reasonable under the Sixth Amendment, in order to prevent a flood of frivolous litigation, to protect against the distorting effects of hindsight, and to preserve the defense bar's creativity and autonomy. This general deference was amplified for "strategic choices," which the *Strickland* Court described as "virtually unchallengeable."[65] Moreover, the Court declined to enumerate in any but the most general way the duties of defense counsel, instead deferring to general professional norms. Finally, the requirement that a defendant also prove "prejudice" from attorney error (a reasonable probability that the outcome of the trial would be different) necessarily immunizes many incompetent legal performances from reversal, if the guilt of the defendant is sufficiently clear.

The difficulty of meeting the legal standard, even in cases of manifestly incompetent counsel, is amplified by the procedural context in which such claims are made. Although there is often no legal bar to raising claims of ineffective assistance on direct appeal (when indigent defendants still have a constitutional right to appointed counsel), appellate review is appropriate only for record claims, where the basis for asserting ineffective assistance is a trial error evident from the transcript (such as failure to object to the introduction of prejudicial evidence by the state). Claims of ineffective assistance, however, routinely involve the presentation of factual evidence beyond the record – e.g., evidence about information that the defense attorney failed to discover or to introduce, evidence about the likely answers to questions that the defense attorney failed to pursue at trial, or evidence about the defense attorney's interaction with the defendant. Such evidence must be developed in collateral proceedings, where the constitutional right to counsel runs out.[66] Although almost all states formally provide for counsel for indigent defendants in capital post-conviction proceedings,[67] there is virtually no monitoring of the performance of such counsel.[68] Moreover, should post-conviction

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[63] 466 U.S. 668.
[64] *Id.* at 689.
[65] *Id.* at 690. Note that often the primary source of information in ineffective assistance litigation is trial counsel him- or herself, who will often have obvious reasons to resist the implication of ineffectiveness and testify accordingly. Hence, the enormous deference to "strategic choices" allows attorneys who wish to justify their decisions at a later date an obvious means to do so, though the Court did qualify its deference by noting that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91.
[66] *See* Murray v. Giarratano, 492 U.S. 1 (1989) (rejecting constitutional right to representation for indigent prisoners seeking postconviction relief in capital cases).
[67] Alabama is a notable exception.
[68] *See* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wis. L. Rev. 31, 66 (although

counsel fail to perform adequately, *their* ineffectiveness does not preserve the claims that they are seeking to raise from state procedural bars, because there is no constitutional right to counsel in such proceedings.[69] The inadequacy of postconviction representation is compounded by the deferential review of state court decisions under the 1996 habeas statute (AEDPA), which seeks to ensure that state post-conviction proceedings are the primary venue for the litigation of non-record claims. The decline in the number of federal habeas grants of relief in the post-AEDPA era demonstrates the impact that AEDPA has had – an impact necessarily greatest on claims, like those of ineffective counsel, that will rarely see direct review.[70]

The constitutional review and reversal of individual capital convictions is by its nature an inadequate tool for achieving the institutional changes that are necessary in the provision of indigent defense services in capital cases. On the same day that the Court announced the constitutional standard in *Strickland*, it decided a companion case, *United States v. Cronic*,[71] which rejected a claim of ineffectiveness based on the circumstances faced by the defense attorney in litigating the case (lack of time to prepare, inexperience, seriousness of the charges, etc.). The Court insisted that a defendant must identify particular prejudicial errors made by counsel, rather than merely identify circumstances that suggest that errors would likely be made. *Cronic* has widely been held by courts to preclude Sixth Amendment challenges to the institutional arrangements (fee structures, caseloads, availability of investigative or expert services, lack of training and experience, etc.) that lead to incompetent representation, except in the most extraordinary of circumstances.[72] Without any ability to directly control fees, caseloads, resources, or training, courts conducting Sixth Amendment review of convictions can only reverse individual convictions based on individual errors. And even an extended period of substantial numbers of reversals on ineffectiveness grounds has failed to produce substantial reform in the provision of capital defense services. Despite the fact that "egregiously incompetent defense lawyering" was the most common reversible error in capital cases (39%) in a more than two-decade period (1973-1995) with an overall reversible error rate of 68%,[73] there is no reason to believe that these reversals promoted systemic reform. Indeed, the absence of systemic assurance of adequate counsel in

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some states have informal means of monitoring the performance of postconviction counsel, only Florida requires such monitoring).

[69] In Coleman v. Thompson, 501 U.S. 722 (1991), post-conviction counsel's failure to file a timely appeal from the denial of post-conviction relief barred federal habeas review of petitioner's claim regarding the ineffectiveness of his trial counsel. The Court did, however, note without deciding the question whether "there must be an exception [to *Giarratano*] in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.* at 755. The Court avoided the question by noting that the default in Coleman's case happened on appeal from a merits denial of post-conviction relief, and thus he had been afforded a forum for litigating his ineffectiveness claim.

[70] *Compare* James Liebman, et al., *A Broken System: Error Rates in Capital Cases, 1973-95* (2000), available at http://www2.law.columbia.edu/instructionalservices/liebman/ (40% federal habeas reversal rate in capital cases during pre-AEDPA period), with Nancy King, et al., *Habeas Litigation in U.S. District Courts* (2007) (12.5% federal habeas reversal rate in capital cases during post-AEDPA period).

[71] 466 U.S. 648 (1984).

[72] *See* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 Md. L. Rev. 1433 (1999).

[73] Liebman, et al., *A Broken System*, *supra* note 70.

capital cases formed a cornerstone of the American Bar Association's call for a moratorium on executions in 1997, two years after the end of the studied period.[74]

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The best evidence of the inadequacies of constitutional regulation of capital punishment 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."[75] 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 reinstituted the death penalty in the 1976 cases, this past Term has concluded that the death penalty should be ruled unconstitutional, though he has committed himself to *stare decisis* in applying the Court's precedents.[76] 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."[77] Justices Scalia and Thomas have repudiated the Court's Eighth Amendment jurisprudence as hopelessly contradictory and unable to promote guided discretion. Justices Kennedy, Souter, and Breyer each have authored opinions raising a variety of serious concerns about the administration of capital punishment and the ability of constitutional regulation to prevent injustice.[78] Finally, Justices Sandra Day O'Connor and Ruth Bader Ginsburg have both given speeches questioning the soundness of the capital justice process on the ground of inadequate provision of capital defense services.[79] We can think of no other

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[74] The text of the ABA moratorium and a copy of the supporting report are available at http://www.abanet.org/moratorium/resolution.html.

[75] *Callins*, 510 U.S, at 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

[76] *See* Baze v. Rees, 128 S. Ct. 1520, 1552 (2008) (Stevens, J., concurring).

[77] *Id.* at 1550.

[78] *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2661 (2008) (emphasizing "the imprecision [in the definition of capital murder] and the tension between evaluating the individual circumstances and consistency of treatment" that plague the administration of the death penalty as a reason for not extending the penalty to cases in which the victim does not die) (majority opinion joined by Stevens, Souter, Ginsburg, and Breyer); Kansas v. Marsh, 548 U.S. 163, 207-11 (2006) (emphasizing the risk of erroneous conviction in the current capital justice process as a reason to reject a capital scheme that required a death sentence when aggravating and mitigating evidence were in equipoise) (Souter dissent, joined by Stevens, Ginsburg, and Breyer); Ring v. Arizona, 536 U.S 584, 616 (2002) (emphasizing the continued division of opinion as to whether capital punishment is in all circumstances "cruel and unusual punishment" as currently administered as grounds for requiring jury sentencing in all capital cases) (Breyer concurrence for himself alone).

[79] In 2001, Justice O'Connor criticized the administration of capital punishment on the grounds of wrongful conviction and inadequate provision of defense services. *See* Associated Press, *O'Connor Questions Death Penalty*, N.Y. Times, July 4, 2001. The same year, Justice Ginsburg told a public audience that she

constitutional doctrine that has been so seriously questioned both by its initial supporters and later generations of Justices who have tried in good faith to implement it. Such reservations strongly suggest that the constitutional regulation of capital punishment has not succeeded on its own terms.

The question remains whether the Institute should undertake a new law reform project to ameliorate the consequences of the Supreme Court's unsuccessful regime of constitutional regulation of capital punishment, given that the Institute's prior law reform project in this area (MPC § 210.6) played a role in initiating and shaping the Court's current approach. Militating against such a course of action is the fact that the problems currently afflicting the capital justice process are not addressable in the absence of larger scale political or institutional changes that are either impossible or beyond the scope of an ALI-style law reform project. The scope of these problems – which we survey below – demonstrates that a more appropriate response by the Institute would be the withdrawal of § 210.6 with a statement calling for the rejection of capital punishment as a penal option.

II. The Politicization of Capital Punishment

Perhaps the most important feature of the landscape of capital punishment administration that imperils the success of any discrete law reform project is the intense politicization of the death penalty. Capital punishment (like the rest of criminal justice in the United States) 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 we review below – e.g., 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.

The vast majority of death penalty jurisdictions within the United States have elected rather than appointed prosecutors, and these prosecutors are usually autonomous decisionmakers in their own small locales (counties). Rarely is there any state or regional review of local decisionmaking or coordination of capital prosecutions. These simple facts of institutional organization generate enormous geographic disparities within most death penalty jurisdictions. In Texas, for example, Dallas County (Dallas) and Harris County (Houston), two counties with similar demographics and crime rates, have had

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supported a state moratorium on the death penalty, noting that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well-represented at trial." Associated Press, *Ginsburg Backs Ending Death Penalty*, Apr. 9, 2001, available at http://www.truthinjustice.org/ginsburg.htm.

very different death sentencing rates, with Dallas County returning 11 death verdicts per thousand homicides, while Harris County returns 19. One sees an even greater disjunction in Pennsylvania between Allegheny County (Pittsburgh) and Philadelphia County (Philadelphia), which have death verdict rates of 12 and 27 per thousand homicides, respectively. In Georgia, another significant death penalty state, the death sentencing rate ranges from 4 death verdicts per thousand homicides in Fulton County (Atlanta) to 33 in rural Muscogee County – a difference of more than 700%. Large geographic variations exist within many other states that are similarly uncorrelated with differences in homicide rates.[80] These geographic disparities are troubling in themselves because they suggest that state death penalty legislation is unable to standardize the considerations that are brought to bear in capital prosecutions so as to limit major fluctuations in its application across the state. But these geographic disparities are also troubling because they may be one of the sources of the persistent racial disparities in the administration of capital punishment in many states. (See section on "Race Discrimination" below.)

In addition, the symbolic politics of capital punishment is very much at play in the election of local prosecutors. Candidates for local district attorney and state attorney general in a wide variety of jurisdictions have run campaigns touting their capital conviction records, even going so far as listing individual defendants sentenced to death.[81] As a practical matter, an elected prosecutor's capital conviction record should be a relatively small part of any prosecutor's portfolio, given the limited number of capital cases that any prosecutorial office will handle – a small fraction of all homicide cases, and an even smaller fraction of all serious crimes. (Remember that even Harris County, Texas, has a death verdict rate of only 1.9% of all homicides). Clearly, many prosecutorial candidates perceive that the voting public has a special interest in capital cases, both because of the fear generated by the underlying crimes that give rise to capital prosecution and because a prosecutor's support for capital punishment represents in powerful shorthand a prosecutor's "toughness" on crime. These general incentives are troubling in themselves, because they suggest that political incentives may exist to bring capital charges and to win death verdicts, quite apart from the underlying merits of the cases.[82] Even more troubling is the incentives that may exist to favor those in a position to provide campaign contributions or votes. The racial disparities in capital charging

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[80] *See generally* James S. Liebman, et al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), available at http://www2.law.columbia.edu/brokensystem2/index2.html.

[81] *See* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465, 474-75 (1999); Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 Geo. J. Legal Ethics 941 (1994).

[82] The federal system presents a different picture with regard to the problem of political pressures on prosecutors, because federal prosecutors are appointed rather than elected. Moreover, unlike most local district attorneys, federal prosecutors must subject their decisions to seek the death penalty to centralized review by Main Justice. While federal cases may be different in important respects from state cases (in degree of politicization, among other things), the MPC was designed as a state penal code. Thus, any such differences are not relevant to the question of how the Institute should address the capacity of § 210.6 to address the problems common to most state death penalty systems.

decisions favoring cases with white victims mirror the racial disparities in political influence in the vast majority of communities.[83]

Judges as well as prosecutors must face the intense politicization that surrounds the administration of capital punishment. Almost 90% of state judges face some kind of popular election.[84] Politicization of capital punishment in judicial elections has famously ousted Chief Justice Rose Bird and colleagues Cruz Reynoso and Joseph Grodin from the California Supreme Court,[85] as well as Justice Penny White from the Tennessee Supreme Court.[86] These high-profile examples are only the tip of the iceberg of political pressure, as no judge facing election could be unaware of the high salience of capital punishment in the minds of voters, especially in times of rising crime rates or especially high-profile murders. The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, after an official visit to the United States, reported that many of those with whom he spoke in Alabama and Texas, which both have partisan judicial elections, suggested that "judges in both states consider themselves to be under popular pressure to impose and uphold death sentences whenever possible and that decisions to the contrary would lead to electoral defeat."[87]

Of course, there is every hope and reason to expect that most judges will conscientiously endeavor to resist such pressures and decide cases without regard to political influences. Despite the fact that there is good reason to have confidence in the personal integrity of the individual men and women who comprise the elected judiciary, several statistical studies suggest that, in the aggregate, judicial behavior in criminal cases

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[83] The Baldus study on racial disparities in capital sentencing, see *supra* note 33, also found evidence that charging decisions were strongly correlated with the race of murder victims. These statistical findings parallel anecdotal evidence from lawyers in the field. Stephen Bright, Director of the Southern Center for Human Rights in Atlanta, Georgia, describes an incident in a Georgia county: "In a case involving the murder of the daughter of a prominent white contractor, the prosecutor contacted the contractor and asked him if he wanted to seek the death penalty. When the contractor replied in the affirmative, the prosecutor said that was all he needed to know. He obtained the death penalty at trial. He was rewarded with a contribution of $5,000 from the contractor when he successfully ran for judge in the next election. The contribution was the largest received by the District Attorney." Stephen B. Bright, *Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 Santa Clara L. Rev. 433, 453-54 (1995). This case was part of a larger pattern of prosecutors meeting the families of white murder victims to discuss the bringing of capital charges, but not with the families of black murder victims. *See id.*

[84] Matthew Streb, *Running for Judge: The Rising Political, Financial and Legal Stakes of Judicial Elections* 7 (2007).

[85] *See* Joseph R. Grodin, *Judicial Elections: The California Experience*, 70 Judicature 365, 367 (1987) (describing television spot that encouraged voters to vote "three times for the death penalty; vote no on Bird, Reynoso, Grodin").

[86] Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?* 72 N.Y.U. L. Rev. 308, 314 (1997) (describing opposing party's political add "Vote for Capital Punishment by Voting NO on August 1 for Supreme Court Justice Penny White").

[87] Press Statement, Professor Philip Alston, United Nations Human Rights Council Special Rapporteur on extrajudicial, summary or arbitrary executions, June 30, 2008. A recent political advertisement by a Texas trial court judge reflects the influence of public pressure to return death verdicts. Judge Elizabeth Coker's advertisement offers as the first reason to re-elect her the fact that she "cleared the way for the jury to issue a death sentence" in John Paul Penry's capital murder trial after it had been reversed by the U.S. Supreme Court for a second time. (A copy of the advertisement is on file with the authors.)

generally and capital cases in particular appears to be influenced by election cycles.[88] Moreover, in many jurisdictions, judges not only preside over and review capital trials, they also appoint lawyers, approve legal fees, and approve funding for mitigation and other expert services. These decisions, which are crucial to the capital justice process, are less visible but no less likely to be subject to political pressures.[89] Finally, in a few capital jurisdictions, elected judges actually impose sentences in capital cases through their power to override jury verdicts, and a comparison among these states strongly suggests that the degree of electoral accountability influences the direction of such overrides.[90] One potential avenue for mitigating the effect of political pressure on elected judges was foreclosed when the Supreme Court struck down, on First Amendment grounds, a state law barring a judicial candidate from announcing his or her views on disputed legal or political issues.[91] The Court's decision invalidated laws in nine states, and it has been interpreted broadly by lower courts, who have struck down other limitations on judicial candidates, including those on both fundraising and campaign promises, that were part of the law in many more states.[92]

Governors, too, are influenced by the intense politicization of capital punishment. Like prosecutors and judges, Governors have often campaigned on their support for the death penalty, emphasizing their willingness to sign death warrants.[93] While Governors

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[88] *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?* 48 Am. J. Pol. Sci. 247 (2004) (finding that trial judges standing for re-election tend to impose harsher sentences as elections approach); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. Pol. 427 (1992) (finding that district-based elections influence justices in state supreme courts to join conservative majorities in death penalty cases in Texas, North Carolina, Louisiana, and Kentucky); Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 Am. J. Pol. Sci. 360 (2008) (finding that judicial behavior in affirming death sentences is correlated with public opinion about the death penalty only in states where judges face election and not in states where judges are appointed); *but cf.* John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. Cal. L. Rev. 465 (1999) (finding no system-wide evidence of the effect of state judicial election methods on capital case outcomes, but finding other evidence confirming the politically charged character of the death penalty in state courts).

[89] For example, defense lawyers in the pool of those seeking appointments to capital cases contributed money to the election and re-election campaigns of judges in Harris County, Texas – the county responsible for the largest number of executions in the United States. *See* Amnesty International, *One County, 100 Executions: Harris County and Texas – A Lethal Combination* 10 (2007), available at http://www.amnesty.org/en/library/info/AMR51/125/2007.

[90] Elected judges in Alabama and Florida have been far more likely to use their power to override jury verdicts to impose death when the jury has sentenced the convicted person to life in prison than to replace a jury verdict of death with one of life. In contrast, judges in Delaware, who do not stand for election, are far less likely to override in favor of death than to override in favor of life. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759, 793-94 (1995). Moreover, in Alabama, overrides in favor of death have appeared to be more frequent in election years. *See* Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 Fordham Urb. L. J. 239, 255-56 (1994).

[91] Republican Party of Minnesota v. White, 536 U.S. 765 (2002).

[92] *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 Geo. L. J. 1077, 1095-96 (2007).

[93] *See* Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* 71 (2005) (noting examples of John K. Van de Kamp in California, Jim Mattox in Texas, and Bob Martinez in Florida).

are less implicated in the day-to-day workings of the capital justice process than prosecutors and judges, they play a crucial role in the exercise of clemency powers, which the Supreme Court has recognized as an important defense against conviction and execution of the innocent.[94] Some Governors, like George Ryan of Illinois, have not been afraid to use the clemency power to respond to concerns about wrongful conviction. However, the trend in the use of the clemency power in capital cases has been sharply downward in the decades since the reinstatement of capital punishment in 1976, at the same time that the trend in death sentencing and executions has been sharply upward.[95] The persistent high political salience of capital punishment, as reflected by its prominence at all levels of political discourse,[96] has no doubt affected the willingness of Governors to set aside death sentences.[97]

Finally, the politicization of the issue of capital punishment in the legislative sphere limits the capacity of legislatures to promote and maintain statutory reform. The kind of statutory reform that many regard as the most promising for ameliorating arbitrariness and discrimination in the application of the death penalty is strict narrowing of the category of those eligible for capital crimes. Justice Stevens argued that unfettered discretion to grant mercy based on open-ended consideration of mitigating evidence (which is commanded by the constitution) is not fundamentally inconsistent with guided discretion (which is also commanded by the constitution), provided that the category of the death eligible is truly limited to the "tip of the pyramid."[98] And the Baldus study reported that racial disparities were not evident in the distribution of death sentences for the category of the most aggravated murders, because death sentences were so common in this category.[99] A few states, like New York, have managed to maintain a relatively narrow death penalty.[100] However, most states have been unwilling to restrict the scope of the death penalty, and the continued inclusion of broad aggravators like felony murder, pecuniary gain, future dangerousness, and heinousness (or its equivalent) preclude the strict narrowing approach in most jurisdictions.

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[94] See the discussion of Herrera v. Collins, 506 U.S. 390 (1993), in the "Constitutional Regulation" section, *supra* notes 55-59 and accompanying text.

[95] *See* Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from* Gregg *to* Atkins, 33 N.M. L. Rev. 349 (2003).

[96] Even presidential politics is profoundly marked by capital punishment, though the federal government in general, and the President in particular, plays a very small role in the administration of capital punishment, other than through the appointment of Justices to the Supreme Court.

[97] One dramatic example of the political costs of clemency is the 1994 Pennsylvania gubernatorial race between Republican Tom Ridge and Democrat Mark Singel. Singel had been chairman of the state's Board of Pardons, which had released an inmate who was arrested on murder charges a month before the election. Overnight, Singel went from leading Ridge by 4 points to trailing him by 12: Singel's commutation recommendation lost him the election. *See* Tina Rosenberg, *The Deadliest D.A.*, N.Y. Times, July 16, 1995.

[98] See the discussion of Stevens' opinion in Walton v. Arizona, 497 U.S. 639 (1990), in the "Constitutional Regulation" section, *supra* notes 32-36 and accompanying text.

[99] See the discussion of the Baldus study in the section on "Race Discrimination," *infra* at 27-28.

[100] Indeed, New York even refused to re-authorize the penalty after its highest court invalidated the state's death penalty statute on easily remediable state constitutional grounds. But states like New York and New Jersey (the only state to legislatively abolish capital punishment since its reinstatement in 1976) are outliers. They did not participate significantly in the practice of capital punishment in the modern era even while formally retaining the death penalty.

Moreover, even if a jurisdiction were able to pass a truly narrow death penalty (something more likely in an abolitionist jurisdiction reinstating the death penalty than in a retentionist jurisdiction sharply curtailing a current statute), the political pressure to expand the ambit of the death penalty over time will likely prove politically irresistible. The tendency of existing statutes, even already broad ones, to expand over time through the addition of new aggravating factors has been well documented.[101] When former Governor Mitt Romney introduced legislation drafted by a blue-ribbon commission to reinstitute capital punishment in Massachusetts, supporters of the draft emphasized the very narrow ambit of proposed statute. However, a symposium of experts organized to discuss the proposed statute noted the problem of what one of them called "aggravator creep" (an analogy to "mission creep" referred to in military contexts), in which "[a] statute is passed with a list of aggravating factors, and then structural impulses often push that list to become longer and longer as new aggravators are added."[102] The most eloquent case for the inevitability of "aggravator creep" has been made by lawyer and novelist Scott Turow. Turow, a former federal prosecutor who supported the death penalty for most of his life, wrote a (nonfiction) book describing how his later pro bono work on the capital appeal of a wrongfully convicted man and his service on the Illinois Governor's Commission to reform the death penalty convinced him to vote as a Commission member for abolition rather than reform. As a moral matter, Turow remains persuaded that a narrow death penalty is both morally permissible and desirable. But he has come to see that expansion is inevitable, with the arbitrariness and potential for error that expansive capital statutes necessarily entail:

> The furious heat of grief and rage the worst cases inspire will inevitably short-circuit our judgment and always be a snare for the innocent. And the fundamental equality of each survivor's loss, and the manner in which the wayward imaginations of criminals continue to surprise us, will inevitably cause the categories for death eligibility to expand, a slippery slope of what-about-hims.[103]

The foregoing suggests that politicization of the death penalty, both within the capital justice process and more broadly in the realm of public policy and discourse, threatens both the integrity of individual cases and the prospects for reform. This politicization is the most far-reaching, important, and intractable reason to be dubious of the prospects for success of an ALI reform project in this area.

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[101] Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in Austin Sarat, ed., *The Killing State: Capital Punishment in Law, Politics, and Culture* (1999); Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 Pepperdine L. Rev. 1 (2006).

[102] *See Symposium: Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report. Panel One – The Capital Crime*, 80 Ind. L. J. 35, 35 (2005) (statement of Edwin Colfax).

[103] Scott Turow, *Ultimate Punishment: A Lawyer's Reflections on Dealing with the Death Penalty* 114 (2003).

III. Race Discrimination

Race discrimination has cast a long shadow over the history of the American death penalty. During the antebellum period, race discrimination was not merely a matter of practice but a matter of law, as many Southern jurisdictions made the availability of the death penalty turn on the race of the defendant or victim.[104] After the Civil War, the discriminatory Black Codes were largely abandoned, but discrimination in the administration of capital punishment persisted. Discrimination permeated both the selection of those to die as well as the selection of those who could participate in the criminal justice process. African Americans were more frequently executed for non-homicidal crimes, were more likely to be executed without appeals, and were more likely to be executed at young ages.[105] Discrimination was most pronounced in Southern jurisdictions. The most obvious discrimination occurred in capital rape prosecutions, as such prosecutions almost uniformly targeted minority offenders alleged to have assaulted white victims, and the numerous executions for rape post-1930 (455) were entirely confined to Southern jurisdictions, border states, and the District of Columbia.[106] Until the early 1960s, the differential treatment of both African-American offenders and African-American victims was attributable in part to the exclusion of African-Americans from jury service, again largely (although not exclusively) concentrated in Southern and border-state jurisdictions.

When the Supreme Court first signaled its interest in constitutionally regulating capital punishment in the early 1960s, several Justices issued a dissent from denial of certiorari indicating their willingness to address whether the death penalty is disproportionate for the crime of rape.[107] Although these Justices did not mention race in their brief statement, they were undoubtedly aware of the racially-skewed use of the death penalty to punish rape. The NAACP Legal Defense Fund thereafter sought to document empirically race discrimination in capital race prosecutions with an eye toward challenging such discrimination in particular cases. The first significant study, produced by Professor Marvin Wolfgang and others at the University of Pennsylvania, found both race-of-the-defendant and race-of-the-victim discrimination in the administration of the death penalty for rape (after controlling for non-racial variables); African-American defendants convicted of raping white females faced a greater than one-third chance of receiving a death sentence whereas all other racial combinations yielded death sentences in about two percent of cases.[108]

The Wolfgang study did not ultimately lead to success in litigation, and the Eighth Circuit's rejection of the study as a basis for constitutional relief, authored by then-Judge Blackmun – foreshadowed the Supreme Court's subsequent denial of relief in *McCleskey*,

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[104] Stuart Banner, *The Death Penalty: An American History* (2002).
[105] William J. Bowers, *Legal Homicide: Death as Punishment in America, 1864-1982*, 67-87 (1984).
[106] Marvin E. Wolfgang, *Race Discrimination in the Death Sentence for Rape*, in William J. Bowers, *Executions in America* 113 (1974).
[107] Rudolph v. Alabama, 375 U.S. 889, 889-91 (1963) (Goldberg, J., joined by Douglas and Brennan, JJ., dissenting from denial of certiorari).
[108] Wolfgang, *supra* note 106, at 117 (Table 4-2).

discussed above.[109] In particular, the judicial response to the statistical demonstration of discrimination was to insist on a showing by the defendant of improper racial motivation in *his* case, a requirement that insulates widespread discriminatory practices from meaningful judicial intervention. But the Wolfgang study did contribute to the accurate perception that the prevailing administration of the death penalty was both arbitrary and discriminatory, and thus contributed to *Furman*'s invalidation of existing statutes and the "unguided" discretion they entailed.

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 reflected in the Wolfgang study. 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. The more difficult question is whether the persistent role of race in capital decisionmaking can be significantly reduced or eradicated, whether through statutory efforts to narrow the reach of the death penalty or other means.

The Baldus study, described above, found that defendants charged in white-victim cases, on average, faced odds of receiving a death sentence that were 4.3 times higher than the odds faced by similarly situated defendants in black-victim cases.[110] Other studies have similarly pointed to a robust relationship between the race of the victim and the decision to seek death and to obtain death sentences (also controlling for non-racial variables). Leigh Bienen produced a study of the New Jersey death penalty that reflected greater prosecutorial willingness to seek death in white victim cases.[111] Baldus, et al, studied capital sentences in Philadelphia and found both race-of-the-victim and race-of-the-defendant discrimination.[112] Given the remarkably different histories and demographics of Philadelphia and Georgia, it is surprising that the Philadelphia study found a magnitude of race-of-the-victim effects quite similar to the magnitude found in the Georgia study addressed in *McCleskey*. A federal report issued in 1990, which summarized the then-available empirical work on the effects of race in capital sentencing (28 studies), likewise found consistent race-of-the-victim effects (in 82% of the studies reviewed), particularly in prosecutorial charging decisions.[113]

Apart from these statistical studies, a broad scholarly literature often highlights American racial discord as an important explanatory variable of American exceptionalism with respect to capital punishment – the fact that the United States is alone among Western democracies in retaining and actively implementing the death

[109] Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968).
[110] *See* Part I, *supra*, at p. 13-14.
[111] Leigh Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 Rutgers L. Rev. 27 (1988).
[112] David Baldus, et al., *Race Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview, with Recent Finding from Philadelphia*, 83 Cornell L. Rev. 1638 (1998).
[113] U.S. General Accounting Office, Death Penalty Sentencing (Feb. 1990).

penalty.[114] Such works point to the fact that executions are overwhelmingly confined to the South (and states bordering the South), the very same jurisdictions that were last to abandon slavery and segregation, and that were most resistant to the federal enforcement of civil rights norms.

Professor Frank Zimring, in his recent broad assessment of the American death penalty, argued that the regional persistence of "vigilante values" strongly contributes to American retention of capital punishment.[115] Many scholars have speculated that contemporary state-imposed executions might serve a role similar to extralegal executions of a previous era, and Zimring observes that "the substantive core of the support for death as a penalty seems to be an ideology of capital punishment as community justice that appears most intensely today in these areas where extreme forms of vigilante justice thrived in earlier times."[116] A recent article in the American Sociological Review presents empirical data supporting the claim that current death sentences might be linked to such vigilante values.[117] The authors report a positive relationship between death sentences, "current racial threat" (reflected in the size of a jurisdiction's African-American population), and "past vigilantism" (reflected in past lynching activity). The authors conclude that: "our repeated findings that this relationship is present support claims that a prior tradition of lethal vigilantism enhances recent attempts to use the death penalty as long as the threat posed by current black populations is sufficient to trigger this legal but lethal control mechanism."[118]

Supporters of the death penalty would certainly resist the claim that the death penalty remains in place *because of* underlying conscious or unconscious racial prejudice. Moreover, the high level of executions in Southern jurisdictions correlates not only with racial factors (such as past race discrimination and contemporary racial tensions) but also with other potential explanatory factors such as high rates of violent crime and the prevalence of fundamentalist religious beliefs. Some empirical literature, though, modestly supports the claim that racially discriminatory attitudes may account for some of the contemporary support for the death penalty.[119]

The most significant efforts to reduce the effect of race in capital proceedings have focused on narrowing the class of death eligible offenses and guiding sentencer

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[114] Carol S. Steiker, *Capital Punishment and American Exceptionalism*, in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (2005).
[115] Franklin E. Zimring, *The Contradictions of American Capital Punishment* (2003).
[116] *Id.* at 136.
[117] David Jacobs, et al., *Vigilantism, Current Racial Threat, and Death Sentences,* 70 Amer. Soc. Rev. 656 (2005).
[118] *Id.* at 672
[119] Several empirical studies have explored the subtle role of race discrimination in death penalty attitudes. *See, e.g.,* Steven E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. of Research in Crime & Delinquency 202 (1994) (reporting empirical study in which two indexes of racial prejudice were significantly linked to greater support for the death penalty among whites, even after controlling for relevant demographic and attitudinal variables); Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, 54 Social Psychology Quarterly 67 (1991) (empirical analysis finding that racial prejudice significantly predicts both support for the death penalty and tougher crime control policies).

discretion at the punishment phase of capital trials. The first solution – restricting the death penalty to the most aggravated cases – appears promising, because the Baldus study found that race effects essentially disappear in such cases given the very high frequency of death sentences in that range (in the eighth category of cases within the study, with the most aggravation, jurors imposed the death penalty 88% of the time[120]). Indeed, the MPC death sentencing provision could be viewed as one such effort to narrow the death penalty because it requires a finding of an aggravated factor (beyond conviction for murder) to support the imposition of death.

The problem, though, played out over the past thirty years, is that no state has successfully confined the death penalty to a narrow band of the most aggravated cases. Death eligibility in prevailing statutes remains breathtakingly broad, as aggravating factors or their functional equivalent often cover the spectrum of many if not most murders. The MPC provision is representative in this regard, allowing the imposition of death based on any of eight aggravating factors, including murders in the course of several enumerated felonies,[121] and any murder deemed "especially heinous, atrocious or cruel, manifesting exceptional depravity."[122] One reading of the MPC provision is that it excludes only those murders of "ordinary" heinousness, atrociousness, cruelty, or depravity, and prosecutors and especially jurors might be reluctant to deem any intentional deprivation of human life as "ordinary" along those dimensions.

The failure to achieve genuine narrowing is partly a matter of political will in light of the constant political pressure to expand rather than restrict death eligibility in response to high-profile offenses (consider the expansion of the death penalty for the crime of the rape of a child). But the failure also stems from the deeper problem identified by Justice Harlan (discussed above), that it remains an elusive task to specify the "worst of the worst" murders in advance. Any rule-like approach to narrowing death eligibility will require jettisoning factors such as MPC's "especially heinous" provision; but those factors often capture prevailing moral commitments – some offenses are appropriately regarded as among the very worst by virtue of their atrociousness, cruelty, or exceptional depravity. At the same time, many objective factors taken in isolation seem appropriately narrow (such as MPC §210.6(3)(c), the commission of an additional murder at the time of the offense), but collectively these factors establish a broad net of death eligibility. The breadth of death eligibility in turn invites and requires substantial discretion, particularly in prosecutorial charging decisions, which permits racial considerations to infect the process.

The prospect of a meaningful legislative remedy to address race discrimination seems quite remote. After *McCleskey*, legislative energies were directed toward fashioning a response to the discrimination reflected in the Baldus study. At the federal level, the Racial Justice Act, which would have permitted courts to consider statistical data as evidence in support of a claim of race discrimination within a particular jurisdiction, repeatedly failed to find support in the U.S. Senate. Many state legislatures

[120] *McCleskey*, 481 U.S. at 325 n.2 (Brennan, J., dissenting).
[121] §210.6(3)(e).
[122] §210.6(3)(h).

have considered similar legislation (including Georgia, Illinois, and North Carolina), but to date only Kentucky has enacted such a provision. The Kentucky provision, like the failed federal bill, allows a defendant to use statistical data to establish racial bias in the decision to seek death, though the question remains whether racial bias likely contributed to the decision to seek death *in the defendant's case*.[123] To date, no death-sentenced inmate in Kentucky or elsewhere has had his death sentence reversed on such grounds.

Apart from its lack of political appeal, racial justice legislation seems inadequately suited to address the problems reflected in the empirical data. On a practical level, the numerous variables involved in particular cases make it difficult to demonstrate racial motivation or bias at the individual level, even if such discrimination is evident in the jurisdiction as a whole. Introducing evidence of system-wide bias might cause a court to look more closely at the facts surrounding a particular prosecution (especially with a burden-shifting provision), but the sheer "thickness" of the facts in a particular prosecution will likely permit courts to find inadequate proof of bias in case after case. Indeed, racial justice legislation risks legitimating capital systems that are demonstrably discriminatory by ostensibly providing a remedy when in fact none is forthcoming. More broadly, the litigation focus of racial justice acts fails to address the underlying problems. Many of the most troublesome cases in which race influenced prosecutorial or jury decisionmaking are those in which no death sentence was sought or obtained because of the minority status of the victim. Courts are (appropriately) powerless to compel decisionmakers to produce death sentences in such cases, and the troubling differential treatment is irremediable. Notwithstanding their increased political participation generally, minorities remain significantly underrepresented in the two roles that might make a difference: as capital jurors[124] and as elected district attorneys.[125] The combined influences of discretion, underrepresentation, historical practice, and conscious or unconscious bias, make it extraordinarily difficult to disentangle race from the administration of the American death penalty.

IV. Jury Confusion

Another significant post-*Furman* effort to solve the problem of arbitrariness and discrimination has been to impose structure and order on the ultimate life-death decision. The universal adoption of bifurcated proceedings – with a punishment phase focused

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[123] The Kentucky provision states: "No person shall be subject to or given a sentence of death that was sought on the basis of race. . . . A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought." Ky. Rev. Stat. Ann. § 252.3 (2001).

[124] Empirical research has found a strong association between life verdicts and the presence of at least one African-American male on the jury in capital cases involving African-American defendants and white victims. William J. Bowers, et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 192 Table 1 (2001) (asserting "black male presence effects").

[125] *See* Jeffrey Pokorak, *Probing the Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors,* 83 Cornell L. Rev. 1811 (1998) (discussing significance of underrepresentation of racial minorities as District Attorneys).

solely on whether the defendant deserves to die – was embraced in hopes of producing reasoned moral decisions rather than impulsive, arbitrary, or discriminatory ones. In this respect, the post-*Furman* experiment has been focused on rationalizing the death sentencing process through a combination of statutory precision and focused jury instructions. Such provisions would precisely enumerate relevant aggravating and mitigating factors and carefully explain burdens of proof, the role of mitigation, inappropriate bases for decision (e.g., "mere sympathy"), and the process for reaching a final decision.

As noted above, the *constitutional* requirements respecting states' efforts to channel sentencer discretion are quite minimal. Indeed, once states have ostensibly "narrowed" the class of death-eligible defendants via aggravating circumstances, states need not provide any additional guidance to sentencers as they make their life-or-death decision.[126] The central question as a matter of policy and practice is whether the post-*Furman* experiment with guided discretion has resulted in improved and more principled decisionmaking. The available empirical evidence – largely developed by the Capital Jury Project (CJP) – is discouraging along these lines.

Over the past eighteen years, the CJP has collected data from over a thousand jurors who served in capital cases with the goal of understanding the decision-making process in capital cases. CJP interviewers spent hours with individual jurors exploring the factors contributing to their decisions and their comprehension of the capital instructions in their cases. The CJP designed its questions to determine whether the intricate state capital schemes adopted post-*Furman* actually reduce arbitrariness in capital sentencing by controlling sentence discretion. Dozens of scholarly articles have been published based on the CJP data, and much of the research has documented the failure of jurors to understand the guidance embodied in the sentencing instructions and verdict forms they receive.[127] By collecting data from numerous jurisdictions (fourteen states), the CJP project has been able to identify not only idiosyncratic defects in particular state statutes but endemic flaws in jury decisionmaking, such as the propensity of jurors to decide punishment during the guilt-innocence phase of the trial,[128] their frequent misapprehension of the standards governing their consideration of mitigating evidence,[129] and their general moral disengagement from the death penalty decision.[130]

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[126] *See, e.g.,* Zant v. Stephens, 462 U.S. 862 (1983).

[127] *See, e.g.,* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 Brooklyn L. Rev. 1011 (2001); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); William J. Bowers, Marla Sandys, & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

[128] *See, e.g.,* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043, 1089-90 (1995).

[129] *See, e.g.,* Bentele & Bowers, *supra* note 127, at 1041 (suggesting that mitigating evidence plays a "disturbingly minor role" in jurors' deliberations in capital cases across jurisdictions).

[130] *See, e.g.,* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 Stan. L. Rev. 1447 (1997) (describing how prevailing capital sentencing

Jurors tend to misunderstand the consequences of a life-without-possibility-of-parole verdict, and, in jurisdictions that permit the alternative of a life-with-parole verdict, jurors consistently underestimate the length of time a defendant will remain in prison if not sentenced to death.[131] A significant number of jurors serve in capital cases notwithstanding their unwillingness to consider a life verdict,[132] and many jurors who have served on capital trials simply are unable to grasp the concept of mitigating evidence.[133] Other findings of the CJP point to the skewing of capital juries through death-qualification,[134] the significance of the racial composition of the jury in capital decisionmaking,[135] and the particular problems posed in jurisdictions (such as Florida and Alabama) where juries and judges share responsibility for capital verdicts.[136]

The empirical findings of the CJP are disheartening because they reflect widespread, fundamental misunderstanding on the part of capital jurors. Perhaps some of the findings can be discounted by the fact that the jurors' explanations of their role and the governing law were offered well after their actual jury service (and perhaps the jurors' understanding of their sentencing instructions at the time of interviews did not correspond perfectly to their understanding of the instructions at the time of their deliberations). But even a superficial review of instructions given in capital cases today reveals the unnecessary technical complexity of prevailing practice.[137] Jurors are told about the role of aggravating factors, their ability (in many jurisdictions) to consider non-statutory aggravators, the role of mitigation, and so on. They are then asked to weigh or balance aggravation against mitigation or to decide whether mitigating factors are sufficiently substantial to call for a sentence less than death.

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practices assist jurors in overcoming their resistance to imposing the death penalty in part by diminishing their sense of responsibility for their verdict).

[131] John H. Blume, et al., *Lessons from the Capital Jury Project*, in *Beyond Repair? America's Death Penalty* 167 (Stephen Garvey, ed. 2003); *see also* Theodore Eisenberg, et al., *The Deadly Paradox of Capital Jurors*, 74 S. Cal. L. Rev. 371 (2001) (discussing jurors' misperceptions about the meaning of life sentences).

[132] Blume, et al*., supra* note 131, at 174.

[133] Craig Haney, *Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223, 1229 (1995) (reporting that "less than one-half of our subjects could provide even a partially correct definition of the term 'mitigation,' almost one-third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in 10 was still so mystified by the concept that he or she was unable to venture a guess about its meaning") (citing Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 Law & Hum. Behav. 411, 420-21 (1994)).

[134] *See, e.g.*, Marla Sandys and Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *America's Experiment with Capital Punishment***,** James Acker, et al., ed.(2nd ed. 2003).

[135] Bowers, et al., *supra* note 124.

[136] Wanda D. Foglia and William J. Bowers, *Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making*, 42 Crim. L. Bulletin 663 (2006).

[137] In Alabama, for example, the allocation of burden regarding proof of mitigating circumstances is explained as follows: "[w]hen the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence." Ala. Code § 13A-5-45(g).

These sorts of efforts to tame the death penalty decision do not necessarily ensure more principled or less arbitrary decisionmaking. Casting the decision in terms of "aggravation" and "mitigation" and requiring jurors to "balance" or "weigh" these considerations might falsely convey to the jurors that their decision is a mechanical or mathematical one, rather than one requiring moral judgment. As one commentator lamented, "giv[ing] a 'little' guidance to a death penalty jury" poses the risk that "jurors [will] mistakenly conclude[] that they are getting a 'lot' of guidance" thus diminishing "their personal moral responsibility for the sentencing decision."[138]

More fundamentally, the problem identified by Justice Harlan in *McGautha* casts a shadow over any effort to rationalize the decision whether to impose death. In many jurisdictions, jurors are permitted to consider both statutory and non-statutory aggravating factors (including victim impact evidence), making the grounds for their ultimate decision virtually limitless. At the same time, every jurisdiction – responding to the Supreme Court's direction – currently permits unbridled consideration of mitigating factors, which likewise undercuts any effort to structure the death penalty decision. In the thirty-five or so years of constitutional regulation since *Furman*, states have reproduced the open-ended discretion of the pre-*Furman* era, but have packaged it in the guise of structure and guidance. In the absence of *substantive* limits on sentencer discretion, the complicated and confusing *procedural* means of implementing that discretion cannot reduce arbitrary or discriminatory decisionmaking. It can only obscure the jury's current responsibility for deciding, essentially on any criteria, whether a defendant should live or die. In this respect, reform of contemporary capital statutes should focus on reducing complexity and communicating clearly the sentencer's awesome obligation to make an irreducible moral judgment about the defendant's fate. The states' failure to make such reforms is largely attributable to their misguided belief that the complicated overlay of instructions is somehow constitutionally compelled. It is also partly attributable to the fact that such reform efforts – and the return to the pre-*Furman* world that they would represent – would amount to a concession that Justice Harlan was right: that statutory efforts (like the MPC death-sentencing provision) are likely unable to reduce the arbitrary imposition of the death penalty.

V. The Inadequacy of Resources, Especially Defense Counsel Services, in Capital Cases

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.[139] What emerges from these studies is a consensus that capital

[138] Joseph L. Hoffman, *Where's the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1159 (1995).

[139] *See, e.g.*, 2008 study of "The Cost of the Death Penalty in Maryland" by the Urban Institute; 2008 study of "The Hidden Death Tax: The Secret Costs of Seeking Execution in California," by the ACLU of Northern California; 2006 study by the Death Penalty Subcommittee of the Committee on Public Defense of the Washington State Bar Association (no title); 2004 study of "Tennessee's Death Penalty: Costs and Consequences," by Comptroller of the Treasury; 2003 Study of "Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections" by the Legislative Division of Post Audit, State of

prosecutions generate 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 imprisonment (or other lengthy prison terms), even when the costs of incarceration are included. Although the data are often incomplete or difficult to disaggregate, it appears that the lion's share of additional expenses occur during the trial phase of capital litigation, as a result of a longer pre-trial period, a longer and more intensive voir dire process, longer trials, more time spent by more attorneys preparing cases, more investigative and expert services, and an expensive penalty phase trial that does not occur at all in non-death penalty cases. Appellate and especially post-conviction costs are also considerably greater than in non-capital cases, though they tend to make up a smaller share of the total expense of capital litigation.

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 ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, originally adopted in 1989 and revised in 2003, offer specific guidance on such matters as the number and qualifications of counsel necessary in capital cases, the nature of investigative and mitigation services necessary to the defense team, and the performance standards to which the defense team should be held. The *Guidelines* also instruct about the need for a "responsible agency" (such as a Public Defender organization or its equivalent) to recruit, certify, train and monitor capital defense counsel. In addition, there are separate Guidelines regarding the appropriate training for capital counsel, the need to control capital defense caseloads, and the need to ensure compensation at a level "commensurate with the provision of high quality legal representation."[140] 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.[141]

Nonetheless, it is obvious that the vast majority of states do not comply with the ABA *Guidelines*, and many do not come even close. In response to concerns about the lack of fairness and accuracy in the capital justice process, the ABA called in 1997 for a nationwide moratorium on executions until serious flaws in the system are identified and eliminated. In 2001, the ABA created the Death Penalty Moratorium Implementation Project, which in 2003 decided to examine several states' death penalty systems to determine the extent to which they achieve fairness and provide due process. Among

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Kansas; 2003 "Study of the Imposition of the Death Penalty in Connecticut" by the Connecticut Commission on the Death Penalty; 2002 study of "The Application of Indiana's Capital Sentencing Law," by the Indiana Criminal Law Study Commission; 2001 "Case Study on State and County Costs Associated with Capital Adjudication in Arizona" by the Williams Institute.

[140] Guideline 9.1B

[141] *See Williams*, 529 U.S. at 396 (citing ABA Standards for Criminal Justice); *Wiggins*, 539 U.S. 510 (citing 1989 ABA death penalty Guidelines); *Rompilla*, 545 U.S. 374 (citing 1989 and 2003 death penalty Guidelines).

other things, the Project specifically investigated the extent to which the states were in compliance with the ABA *Guidelines* for capital defense counsel services. The first set of assessments were published near the end of 2007, and the record of compliance with the ABA *Guidelines* was extremely low: of the 8 states studied,[142] not a single state was found to be fully "in compliance" with any aspect of the ABA *Guidelines* studied. For the 5 guidelines that were studied over the 8 states, there were 15 findings of complete noncompliance and 23 findings of only partial compliance (in 2 cases, there was insufficient information to make an assessment).

For example, the assessment described Alabama's indigent defense system as "failing" due to the lack of a statewide indigent defense commission, the minimal qualifications and lack of training of capital defense counsel, the failure to ensure the staffing required by the Guidelines (2 lawyers, an investigator, and a mitigation specialist), the failure to provide death-sentenced inmates with appointed counsel in state post-conviction proceedings, and the very low caps on compensation for defense services.[143] While Alabama had the worst record of compliance among the states studied, Indiana had the best record. Nonetheless, the Project founded that Indiana, too, "falls far short of the requirements set out in the ABA *Guidelines*." In particular, the report pointed to inadequate attorney qualification and monitoring procedures, unacceptable workloads, insufficient case staffing, and lack of an independent appointing authority (such as a Public Defender office). Indiana is not alone in this latter failing, as fewer than 1/3 of the 36 states that currently retain the death penalty have statewide capital defense systems as called for by the ABA.[144]

The 2003 revisions to the ABA *Guidelines* insist that the Guidelines are not "aspirational" but rather are the minimum necessary conditions for the operation of the capital justice process in a fashion that adequately guarantees fairness and due process. Unfortunately, the record of compliance with the Guidelines even among the states most committed to providing adequate defense services remains poor. New York, which provided for generous levels of capital defense funding when it reinstated capital punishment in 1995, slashed that allocation by almost a third three years later, and then maintained funding at the reduced rate until its capital statute was judicially invalidated in 2004.[145] When the New York State Assembly held hearings that year on whether to again reinstate the death penalty, experts warned that the invalidated statute failed to comply with the ABA *Guidelines* for the appointment of counsel in postconviction proceedings.[146] The record of state compliance with the *Guidelines* overall suggests that the states agree with the ABA that the *Guidelines* are not aspirational – not because the

[142] The 8 states assessed by the ABA Moratorium Implementation Project were Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. The reports are available at http://www.abanet.org/moratorium/.
[143] The caps for capital defense services in Alabama are $2,000 for direct appeal, and $1,000 for state post-conviction proceedings.
[144] *See* Shaila Dewan, *Executions Resume, as Do Questions of Fairness*, N.Y. Times, May 7, 2008.
[145] James R. Acker, *Be Careful What You Ask For: Lessons from New York's Recent Experience with Capital Punishment*, 32 Vermont L. Rev. 683, 752 (2008).
[146] *Id.*

states believe that they are required, but rather because they simply do not aspire to meet them.

Failure to meet (or even to aspire to meet) the ABA *Guidelines* should not necessarily be written off as simple intransigence. The costs involved in providing the resources necessary for a minimally fair capital justice process can be staggering. Instructive in this regard is the Brian Nichols prosecution in Atlanta. Nichols was charged in a 54-count indictment for an infamous courthouse shooting and escape that killed a judge, a court reporter, a sheriff's deputy, and a federal agent. In the investigative stage of the case, Nichols' appointed counsel quickly generated costs totaling $1.2 million, wiping out Georgia's entire indigent defense budget and requiring the postponement of the trial.[147] Note that this price tag covered only the early investigative costs and did not include the costs of Nichols' trial or the years of appellate and post-conviction costs that will follow if a death sentence is imposed (note: Nichols has been convicted and the sentencing phase is ongoing as of this writing, Nov. 20, 2008). The provision of the resources necessary for fair capital trials and appeals may simply not be possible, or at least not possible without substantial diversion of public funds from other sources – something state legislatures have shown themselves again and again unwilling to do in the context of providing indigent defense services. Moreover, when excellent defense services are provided to capital defendants at every stage of the criminal process, the process may become endlessly protracted. As Frank Zimring has most aptly observed, "A nation can have full and fair criminal procedures, or it can have [a] regularly functioning process of executing prisoners; but the evidence suggests it cannot have both."[148]

The ABA's Moratorium Implementation Project should sound two significant cautionary notes for the ALI. First, the ABA has already done the important work of promulgating norms and standards for the capital justice process. After a great deal of study, reflection, and consultation with experts, the ABA has made comprehensive and sensible recommendations for the reform of capital sentencing proceedings, and there seems little that an ALI study could usefully add. Second, even if the ALI came up with different or additional reform proposals, the lack of resources or the political will to generate the necessary resources stands in the way of any substantial reform of the capital justice process. The widespread failures to adequately fund defense counsel services, which are foundational for the implementation of most other reforms, should make the ALI dubious of the prospects for success of a large-scale law reform project in this area.

VI. Erroneous Conviction of 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

[147] *See* Shaila Dewan & Brenda Goodman, *Capital Cases Stalling as Costs Grow Daunting*, N.Y. Times, Nov. 4, 2007.
[148] Franklin E. Zimring, *Postscript: The Peculiar Present of American Capital Punishment*, in Stephen P. Garvey, ed., *Beyond Repair? America's Death Penalty* 228 (2003).

the number of people who have been released from death row with evidence of their innocence. The Death Penalty Information Center, an anti-death penalty organization, keeps a list of exonerated capital defendants that now totals 129 for the years since 1973.[149] While it is difficult to extrapolate from the number of known exonerations to the "real" rate of wrongful convictions in capital cases (for the same reason that it is difficult to extrapolate from the number of professional athletes who test positive for steroids to the rate of steroid use among athletes), reasonable estimates range from 2.3% to 5%.[150]

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.[151] Professor Samuel Gross of Michigan has studied wrongful convictions in both capital and non-capital cases, and he has made a convincing case that erroneous convictions occur disproportionately in capital cases because of special circumstances that affect the investigation and prosecution of capital murder. These circumstances include pressure on the police to clear homicides, the absence of live witnesses in homicide cases, greater incentives for the real killers and others to offer perjured testimony, greater use of coercive or manipulative interrogation techniques, greater publicity and public outrage around capital trials, the "death qualification" of capital juries which makes such juries more likely to convict, greater willingness by defense counsel to compromise the guilt phase to avoid death during the sentencing phase, and the lessening of the perceived burden of proof because of the heinousness of the offense.[152]

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. First, it did not prove easy for those who were eventually exonerated by DNA to get access to DNA evidence or to get relief even *after* the DNA evidence excluded them as the perpetrators of the crimes for which they were convicted. A recent study of

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[149] For inclusion on DPIC's innocence list, a defendant must have been convicted and sentenced to death, and subsequently either: a) their conviction was overturned AND i) they were acquitted at retrial or ii) all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence. *See* http://deathpenaltyinfo.org/node/70.

[150] *See* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases* (forthcoming 2008 J. Empirical Legal Stud.); Samuel R. Gross, *Convicting the Innocent* (forthcoming 2008 Ann. Rev. L. & Soc. Sci.); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate* 97 J. Crim. L. & Criminology 761 (2007).

[151] The Innocence Project at Cardozo Law School tracks the causes of wrongful conviction in cases of DNA exonerations. *See* http://www.innocenceproject.org/understand/.

[152] *See* Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 Buff. L. Rev. 469 (1996).

the first 200 people exonerated by post-conviction DNA testing revealed that approximately half of them were refused access to DNA testing by law enforcement, often necessitating a court order. After being exonerated by DNA evidence, 41 of the 200 required a pardon, usually because they lacked any judicial forum for relief, and at least 12 who made it into a judicial forum were denied relief from the courts despite their favorable DNA evidence.[153]

Second, these early difficulties cannot be written off as preliminary kinks that have been worked out of the system. While the vast majority of states have now passed legislation requiring greater preservation of and access to DNA evidence, the ABA Moratorium Implementation Project's recent assessment of 8 death penalty states included an assessment of how well these states were complying with the ABA's recommendations regarding preservation of and access to biological evidence, and the provision of written procedures, training and disciplinary procedures for investigative personnel. As in the context of the provision of defense counsel services, findings of complete non-compliance or only partial compliance with the ABA's recommendations were commonplace, while full compliance was rare. Similar resistance can be found to implementing reforms aimed at preventing some of the most common causes of wrongful conviction, such as videotaping police interrogations to prevent false confessions, changing photo identification procedures to avoid misidentification, subjecting jailhouse snitch testimony to greater pretrial scrutiny, and performing external independent audits of crime labs. Resistance to providing adequate funding for capital defense services has already been documented above,[154] and the failure of defense lawyers to challenge misidentifications, false confessions, and unreliable scientific evidence has been an important element in the generation of wrongful convictions.

This resistance has a variety of causes. Some law enforcement groups resist changes in investigative procedures with which they have been comfortable, such as interrogations and identification procedures. Moreover, they may oppose proposals for greater monitoring and disciplining of investigative personnel because they fear that misunderstandings may lead to misuse of such procedures. Some reforms are expensive, such as investing in the infrastructure for reliable preservation of biological material, while others promise to be too open-ended in the resources that they might require, such as improving defense counsel services.

Once again, as in the provision of adequate defense counsel services, there is not very much question about the general types of improvements that would be helpful in reducing wrongful convictions; rather, there appears to be an absence of political will to implement them (or to do so in an expeditious fashion). Moreover, a number of the factors catalogued by Samuel Gross that render capital prosecutions more prone to error are simply inherent in the nature of capital crimes and not obviously subject to amelioration by changing the capital justice process. These circumstances militate against the undertaking of a reform project by the ALI and support the suggestion that the ALI instead call for the rejection of capital punishment as a penal option.

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[153] *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55 (2008).
[154] See discussion in "Resources" section, *supra* at 34-37.

VII. Inadequate Enforcement of Federal Rights

The preceding sections discuss the limits of constitutional regulation of the death penalty to counter many of the institutional and structural challenges of the American death penalty. Some of the challenges are simply beyond the reach of courts and "law," such as the difficulties described above in guiding sentencer discretion and combating the influence of race in discretionary decisionmaking; other institutional problems, such as the inadequate level of resources at capital trials and the failure to safeguard against wrongful convictions, require the involvement and leadership of political branches. The constitutional edifice that remains secures only limited benefits, and, regrettably, those limited benefits are frequently undermined by inadequate enforcement mechanisms, particularly the stringent limitations on the availability of federal habeas review of state capital convictions.

Over the past three decades, coinciding with the Court's inauguration of constitutional regulation of the death penalty, the availability of federal habeas review has been sharply curtailed. The initial limitations were Court-crafted, but they were followed by the most significant statutory revision of federal habeas in American history, the adoption of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The net effect of these judicial and statutory refinements has been to dilute the limited constitutional protections that the Court has developed.

The case for strong federal habeas review of state criminal convictions is rooted in experience. During the early part of the 20th century, state trial courts, especially in the South, often made little pretense of ensuring basic fairness, and state appellate courts appeared more than willing to ratify those truncated proceedings. After the infamous denial of habeas relief to Leo Frank,[155] whose mob-dominated murder trial led to his death sentence despite his likely innocence, the Court granted habeas relief to five African Americans who had been convicted of murder and sentenced to death following a race riot in Arkansas.[156] The Arkansas case illustrated the potential for state hostility to federal rights: the five defendants were represented by a single lawyer who never consulted with them, and the forty-five minute trial before an all-white jury, in front of an angry white mob, included no defense motions, witnesses, or defendant testimony.[157] As the Court extended most of the constitutional criminal protections in the Bill of Rights to state criminal defendants in the 1950s and 1960s, the Court adjusted the scope of federal habeas as well. Perceived state court hostility to federal constitutional protections, especially those rights newly-recognized and extended to state proceedings, led the Court to expand the federal habeas forum and to relax procedural barriers to federal review of federal claims.

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[155] Frank v. Mangum, 237 U.S. 309 (1915).
[156] Moore v. Dempsey, 261 U.S. 86 (1923).
[157] Larry W. Yackle, *Capital Punishment, Federal Courts, and the Writ of Habeas Corpus,* in *Beyond Repair? America's Death Penalty* 65 (Stephen Garvey, ed. 2003).

Beginning in the1970s, though, the availability of federal habeas review was significantly limited. Most importantly, the Court tightened the federal enforcement of defaults imposed in state court, so that the failure of state inmates to preserve federal claims within state court forecloses later consideration of those claims in federal court as well – with extremely narrow exceptions.[158] Strict enforcement of state procedural default rules has significantly limited the effectiveness of the federal forum. Indeed, some courts have even applied stringent default rules against fundamental claims of excessive punishment – including the prohibition against executing persons with mental retardation.[159] The enforcement of procedural defaults in this context means, as a practical matter, that the execution of all persons with mental retardation is not constitutionally prohibited; the prohibition extends only to those persons with mental retardation who have successfully navigated state procedural rules and preserved their claim for state or federal review. In this respect, limitations on the availability of federal habeas review promote misconceptions about prevailing capital practices; the public is likely to believe that the Court's decisions announcing absolute prohibitions – such as the *Atkins* exemption – effectively end the challenged executions, whereas the reality is more qualified and complicated.

The near blanket prohibition against litigating claims defaulted in state proceedings encourages state courts to resolve claims on procedural grounds, and state courts have occasionally imposed defaults opportunistically to deny enforcement of the federal right. Moreover, strict enforcement of defaults in federal courts is particularly troublesome in cases involving claims defaulted on state postconviction review (typically claims alleging ineffective assistance of counsel at trial or prosecutorial misconduct). As noted above, because state inmates have no constitutional right to counsel on state habeas, they have no right to *effective* assistance of counsel in that forum. Ordinarily, in cases involving attorney error at trial, the one avenue for reviving a procedural defaulted claim is for the inmate to demonstrate that he had been denied constitutionally adequate representation; but if the attorney error occurs on state habeas, the inmate is held to his attorney's mistakes and cannot seek relief under the Sixth Amendment. Given the inadequate resources and monitoring of state postconviction counsel, it is not uncommon for death-sentenced inmates to forfeit substantial claims on state habeas, and the current regime of federal habeas review permanently forecloses consideration of such claims. The strict enforcement of procedural defaults ensures that many death-sentenced inmates will be executed notwithstanding constitutional error in their cases.

The Court has also crafted limitations on the ability of inmates to benefit from "new" law on federal habeas. The Court's nonretroactivity doctrine, set forth in *Teague v. Lane*,[160] is ostensibly designed to prevent excessive dislocation whenever the Court identifies a new constitutional rule; its roots are traceable to the Warren Court era, when the Court's vast expansion of constitutional criminal procedure threatened to throw open the jailhouse doors. But in its more recent incarnation, the nonretroactivity doctrine has

[158] *See* Murray v. Carrier, 477 U.S. 478 (1986); Wainwright v. Sykes, 433 U.S. 72 (1977).
[159] *See, e.g.*, Hedrick v. True, 443 F.3d 342 (4th Cir. 2006) (defaulting defendant's claim of ineligibility for the death penalty based on mental retardation).
[160] 489 U.S. 288 (1989).

blocked retroactive application of many decisions far less dramatic or path-breaking than the Warren Court rulings which had given rise to the doctrine. The Supreme Court, as well as lower federal courts, have rejected as impermissibly "novel" claims that are barely distinguishable from previously decided cases.[161] Apart from generating extraordinary time-consuming and complex litigation, *Teague* has thwarted the development and evolution of constitutional principles surrounding the administration of capital punishment. Federal habeas courts are discouraged from modestly extending or refining established precedents, so all constitutional realignment must come from the Supreme Court itself (on direct review of state criminal convictions). This institutional arrangement is a built-in headwind against adaptation to changing circumstances, and given the Eighth Amendment's focus on "evolving standards of decency," the *Teague* doctrine is at cross-purposes with the underlying substantive law of the death penalty.

The most significant reform of federal habeas is embodied in AEDPA's unprecedented limitations on the availability and scope of federal review. AEDPA imposes a strict statute of limitations for filing in federal court,[162] stringent limitations on successive petitions,[163] and restrictions on the availability of evidentiary hearings to develop facts relating to an inmate's underlying claims.[164] These procedural barriers have proven formidable, and many inmates have lost their opportunity for federal review of their federal claims on these grounds. The most far-reaching of AEDPA's provisions, though, has been the elimination of de novo review for federal claims addressed on their merits in state court. In its place, AEDPA requires, as a condition for relief, that the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[165] This statutory revision essentially requires federal courts to defer to wrong but "reasonable" decisions by state courts. It insulates from review all decisions but those that demonstrably flout established rules. In many areas of constitutional doctrine, this "reasonableness" standard of review amounts to "double deference" on federal habeas. Numerous constitutional doctrines, including the Court's standards for reviewing the effectiveness of counsel or a prosecutor's alleged discriminatory use of peremptory challenges, already require deferential review of the underlying conduct; state courts are not expected to grant relief unless trial counsel's performance wildly departed from established norms or a prosecutor's race-neutral explanation defies belief. When these cases get to federal habeas, AEDPA imposes an *additional* level of deference. For Sixth Amendment claims concerning the right to effective counsel, the question is not whether trial counsel's performance was unreasonably deficient – it is whether the state court's determination of reasonableness was *itself* unreasonable. This relaxation of federal review of state decisionmaking essentially insulates all but the most egregious denials of rights in state court.

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[161] *See, e.g.*, Butler v. McKellar, 494 U.S. 407 (1990) (holding that the rule prohibiting police-initiated interrogation concerning a separate offense in the absence of counsel, Arizona v. Roberson, 486 U.S. 675 (1988), was novel notwithstanding an earlier decision that had addressed a virtually identical Fifth Amendment violation, Edwards v. Arizona, 451 U.S. 477 (1981)).
[162] 28 U.S.C. §2244(d)(1).
[163] 28 U.S.C. §2244(b).
[164] 28 U.S.C. §2254(e)(2).
[165] 28 U.S.C. §2254(d)(1).

AEDPA's significance in curtailing federal enforcement of federal rights is reflected in the substantial decline in habeas relief since AEDPA's enactment.[166] It is also reflected in numerous federal habeas decisions that explicitly recognize that relief might be required under de novo review. For example, the Fifth Circuit Court of Appeals recently reversed a District Court grant of relief on a claim of impermissible judicial bias.[167] The state court judge, at petitioner's capital trial, had indicated in open court that he was "doing God's work to see that [Petitioner] gets executed;" the judge also taped a postcard to the bench depicting the infamous "hanging judge" Roy Bean, altering it to include his own name and self-bestowed moniker, "The Law West of the Pedernales;" and the judge engaged in extensive ex parte contacts with the prosecution, threatened to remove petitioner's attorneys, and laughed out loud during the defense presentation of mitigating evidence at the punishment phase. The panel opinion recognized that such conduct might require relief under de novo review, but reversed the District Court because it could not find the state court's rejection of the bias claim unreasonable.[168] AEDPA's mandated deference, which ratifies unconstitutionally obtained death-sentences absent gross negligence on the part of the state court, removes the strongest incentive for state courts to toe the constitutional mark and allows executions to go forward despite acknowledged constitutional error.

Unlike several of the institutional and structural obstacles to the fair and accurate implementation of the death penalty described above, the scope of federal habeas is subject to legislative and judicial revision. But it seems unlikely that meaningful reform or restoration of federal habeas will be forthcoming. The politicization of criminal justice issues makes it extraordinarily difficult to expand review, and all of the pressures run in the other direction. In the absence of reform, though, the Court's minimalist constitutional regulation becomes virtually irrelevant; though enormous resources are expended in federal habeas, and the litigation results in delayed executions, most of the energies are directed toward overcoming procedural barriers rather than enforcing the underlying substantive rights of death-sentenced inmates.[169] Despite the articulation of many constitutional protections, the enforcement is relegated to state courts, and at least some of those courts, particularly in active executing states, are notably unsympathetic to the Court's regulatory efforts. Indeed, in a Texas case recently twice reversed by the Court, Texas judges repeatedly voiced their prerogative to disagree with the Court's constitutional conclusion.[170]

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[166] *See supra*, note 70.

[167] Buntion v. Quarterman, 524 F.3d 664 (5th Cir. 2008).

[168] *Id.* at 67 ("Although we might decide this case differently if considering it on direct appeal, given our limited scope of review under AEDPA, we are limited to determining whether the state court's decision was objectively unreasonable.").

[169] Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. Chi. L. Forum 315.

[170] Ex parte Smith, 132 S.W.3d 407, 427 (Tex. Crim. App. 2004) (Hervey, J., concurring) ("[H]aving decided that no federal constitutional error occurred in this case, we may disagree with the United States Supreme Court that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case.") (summarily reversed in Smith v. Texas, 543 U.S. 37 (2004)); Ex parte Smith, 185 S.W.3d 455, 474 (Tex. Crim. App. 2006) (Hervey, J., concurring) ("[W]e are not bound by the view expressed in *Penry II* that Texas jurors are

The inadequacy of federal habeas review to enforce federal rights is lamentable in itself; but it also generates the same legitimation problem described above. Despite the Court's seeming regulation of the American death penalty via its declaration of substantive rights, the procedural mechanisms currently in place under-enforce those protections. Casual observers of the death penalty will likely regard the death sentences and executions that emerge from the current process to be the product of careful, extensive review by many courts. The reality, though, is much different. States have essentially the first and last opportunity to focus on the constitutional merits of inmates' claims. After that review, the many years of legal wrangling is primarily spent navigating the procedural maze and deferential forum that federal habeas has become. Thus, even if increased constitutional regulation of the death penalty could solve many of the deficiencies of the prevailing system, which appears unlikely, the inadequate mechanisms for enforcing that regulation would in any case undermine the effort.

VIII. The Death Penalty's Effect on the Administration of Criminal Justice

The preceding sections highlight the constitutional, institutional, and structural obstacles to the fair and accurate administration of the death penalty. But the problems with the American death penalty are not confined to the capital system. The current battles over the scope of the death penalty may have consequences for the broader American criminal justice scheme. In particular, the presence of the death penalty may tend to normalize and stabilize the extremely punitive sanctions prevailing on the non-capital side; the constitutional regulation of the death penalty – with its explicit death-is-different caveat – has further insulated non-capital practices from significant scrutiny; concerns about inefficiencies in the capital system – particularly delays between trial and sentence – have led to significant restrictions on the habeas rights of non-capital inmates; and the demands of the capital system drain resources from the non-capital defense system and the state and federal judiciaries more generally. A decision about the Institute's stance on capital punishment must take account of these spillover costs imposed by the current capital regime.

Capital punishment constitutes only a tiny part of the criminal justice system. Fewer than 50 people were executed and slightly over 100 people were sentenced to death nationwide in 2007, while considerably over two million people remain incarcerated in the non-capital criminal justice system. The death penalty does not even constitute a substantial part of our system for punishing *homicide*. In a country that has experienced between 15,000 and 20,000 homicides per year nationwide over the past decade, the number of capital sentences and executions last year looks particularly trivial. The relative paucity of death sentences and executions does not disappear if we focus on the high-water marks for death-sentencing and executions in the modern era, with highs for death sentences in the 300s (per year, nationwide) and executions hovering close to 100 (per year, nationwide).

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incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case.") (on remand from summary reversal) (reversed in Smith v. Texas, 127 S. Ct. 1686 (2007)).

At the same time, the non-capital system has experienced extraordinary growth. Over the past three decades, the country has embarked on an unprecedented experiment with mass incarceration. The jail and prison population of the United States has grown eight-fold over the past 35 years. In addition to imprisoning the most inmates in absolute terms worldwide, the United States also has an incarceration rate that is five to eight times higher than other Western industrialized nations; the United States has recently achieved the dubious distinction of imprisoning more than one out of every hundred of its adults. Much of the expansion of the prison population is attributable to more punitive sentencing regimes, especially for non-violent offenders. National spending on incarceration has reached unprecedented levels, with estimates that states and the federal government spend over $65 billion annually to house the more than 2.3 million inmates held nationwide. Moreover, the rate of incarceration in minority populations is particularly high, with one in nine black males between the ages of 20 and 34 behind bars.

Despite the enormous social and political costs of our mass incarceration policies, reform efforts have been unable to reverse the remarkable trends. The presence of the death penalty, especially the recent focus on the possibility of executing innocents, might well undermine the prospects for non-capital reform. First, the very existence of the death penalty blunts arguments about the excessive punitiveness of non-capital sanctions. Indeed, death penalty opponents approvingly argue in *favor* of harsh incarceration sanctions (including life without parole) as a way of undermining support for the death penalty. In this respect, the death penalty deflects arguments about the ways in which lengthy incarceration (and the absence of alternative sanctions) imposes substantial costs and undermines human dignity: lengthy incarceration is viewed as a "lesser" evil instead of as an evil in itself. Second, the innocence focus wrought by the death penalty and projected on to the rest of the criminal justice system tends to emphasize the *selection* of those to be incarcerated rather than on the normative underpinnings of our incarceration policy. Tinkering with the investigation and prosecution of crime will leave untouched the prevailing punitive framework. The one important link between wrongful convictions and excessive punitiveness is frequently missed in public and professional debate: the presence of extremely harsh sanctions encourages plea-bargaining, and when the plea-bargain discount is sufficiently high, excessive punishments encourage false confessions. But few advocates of reform have sought to attack the problem of wrongful convictions by reducing the harshness of our current sanctions. The focus on innocence in contemporary death penalty discourse also tends to legitimate and entrench the justice of harshly punishing the guilty. The more precariously-held values of fairness, non-discrimination, adequate representation, and procedural regularity are endangered by equating injustice with inaccuracy.

The death penalty's deflection of policy-based criticisms of our extraordinarily punitive non-capital system is exacerbated by the Court's highly-visible constitutional regulation of the death penalty. Over the past decade, the Court has issued three landmark decisions limiting the reach of the death penalty. Two of the decisions, *Atkins*

v. Virginia[171] and *Roper v. Simmons*,[172] held that the death penalty was disproportionate as applied to particular offenders – juveniles and persons with mental retardation. The third decision, *Kennedy v Louisiana*,[173] held that the death penalty was constitutionally disproportionate as applied to a particular offense – the rape of a child – though the Court's reasoning was considerably broader, indicating that the death penalty is disproportionate as applied to any non-homicidal ordinary crime (distinguishing offenses against the State such as espionage and treason). Together, these decisions reflect a considerable broadening of the criteria available to discern evolving standards of decency, including evidence of elite, professional, and world opinion. Two of the cases – *Atkins* and *Simmons* – overruled relatively recent decisions, and, along with *Kennedy*, the decisions signal an unprecedented willingness of the Court to rein in capital practices deemed excessive.

But at the same time the Court has demonstrated a willingness to protect against disproportionate punishment on the capital side, it has wholly deferred to states in their imposition of harsh terms of incarceration. In between its pronouncements in *Atkins* and *Simmons*, the Court upheld the operation of California's "three-strikes-you're-out" law that resulted in a 25-years-to-life sentence for a repeat offender convicted of attempting to steal three golf clubs from a golf course pro shop.[174] In a choice of quotation that reveals just how difficult the non-capital proportionality test is meant to be, the Court reached back to repeat its observation from an earlier case that the proportionality principle might "come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment."[175]

There may be strong institutional and practical reasons for providing robust proportionality review in capital cases while deferring to extremely punitive and rare non-capital sentences. But the death-is-different principle might contribute to a false sense of judicial oversight, especially in light of the enormous visibility and salience of the death penalty both within the United States as a symbol of crime policy and in the broader world as a symbol of American punitiveness. In this respect, the Court's capital jurisprudence offers a means to legitimate American penal policy by ameliorating some of its harshest aspects and portraying the Court as a counter-majoritarian scrutinizer of state penal policy, while leaving the fundamental pillars of America's true penal exceptionalism intact. The United States' status as the world's leading incarcerator remains untouched by the constitutional regulation of capital punishment, yet such regulation gets a disproportionate degree of attention because of the power of the death penalty as a symbol in numerous different arenas. As a result, constitutional regulation of capital punishment both obscures and normalizes the excesses of American penal policy. The problems of mass incarceration, racial disparities in punishment, and the endless war on drugs are obscured because they inevitably fall into the shadows when the spotlight of

[171] 536 U.S. 304 (2002).
[172] 543 U.S. 551 (2005).
[173] 128 S. Ct. 2641 (2008).
[174] Ewing v. California, 538 U.S. 11 (2003).
[175] *Id.* at 21 (internal quotation marks omitted) (quoting Rummel v. Estelle, 445 U.S. 263 (1980) (upholding a life sentence with possibility of parole for a repeat offender convicted of obtaining $120.75 by false pretences)).

national and world attention are focused by the Court on highly dramatic issues regarding American death penalty practices. Moreover, extremely lengthy sentences are normalized by capital litigation: successful capital litigants, after all, are almost always "rewarded" with sentences of life without possibility of parole. Even the lengthiest sentences lose their horror when they are so avidly sought and so victoriously celebrated by the (rarely) successful capital litigant. In these ways, the narrow successes of capital litigants under the Eighth Amendment offer little comfort to and indeed likely limit the chances of successful challenges by the vastly larger group of non-capital litigants. Of course, a proponent of our severe non-capital policies would not find worrisome any reinforcement of such policies. But the many critics of our current trend toward mass incarceration should pay attention to the ways in which the retention of capital punishment may entrench and legitimate that trend.

As noted above, concerns about the administration of the death penalty – particularly the length of time between the imposition of death sentences and executions – led to stringent procedural and substantive limits on the availability of federal habeas for state prisoners. Although the title of the legislation – the Antiterrorism and Effective Death Penalty Act – suggests a purpose unrelated to the status of non-capital inmates, the restrictions were made to apply globally. In addition, many of the restrictions imposed by AEDPA – its one-year statute of limitations, its absolute ban on same-claim successive petitions, its higher bar for filing new-claim successive petitions, its onerous exhaustion provisions, and its restrictions on the availability of federal evidentiary hearings – actually impose special hardships on non-capital inmates; unlike those sentenced to death, indigent non-capital inmates have no statutory right to counsel in state or federal habeas proceedings. As difficult as it is for death-sentenced inmates to navigate AEDPA's procedural maze, the burdens on non-capital inmates are virtually insurmountable. The already low-rate of relief for non-capital inmates pre-AEDPA (1 in 100) has apparently dropped considerably post-AEDPA (1 in 341) according to a recent study.[176] Thus, concerns about the skewed incentives on the capital side – in which inmates have every reason to delay seeking relief in federal court – have generated restrictions for the vastly larger group of non-capital inmates whose incentives are quite different. More generally, this example illustrates the risk of capital litigation driving broader criminal justice policy, and the peculiar dynamic of a small subset of American prisoners framing the debate over the appropriate operation of larger institutional frameworks.

Although death penalty inmates are a small fraction of the overall prison population, the death penalty extracts a disproportionately large share of resources at every stage of the proceedings. As discussed above, capital trials are enormously more expensive than their non-capital counterparts, and the decision to pursue a capital sentence often has significant financial consequences for the local jurisdiction. Indigent defense is notoriously underfunded in both capital and non-capital cases, and the resources devoted to the capital side often come directly at the expense of the rest of the

[176] *See* Nancy J. King, Fred L. Cheesman II, & Brian J. Ostrom, *Habeas Litigation in U.S. District Courts: An empirical study of habeas corpus cases filed by state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996*, National Center for State Courts, Aug. 21, 2007, at p. 9.

indigent defense budget. In this respect, death penalty prosecutions threaten to compromise an already over-burdened and under-funded indigent defense bar, in addition to imposing daunting costs on local prosecutors and their county budgets. The political pressures and high emotions in capital cases can sometimes overwhelm sober assessments. The famous Texas litigation involving John Paul Penry reflects this dynamic, as his three capital trials generated millions in county expenses before he pled to a life sentence (after three reversals of his death sentences). Following the Supreme Court's invalidation of his first sentence, the local District Attorney declared to the press, "if I have to bankrupt this county, we're going to bow up and see that justice is served."[177] More recently, the Chair of the Florida Assessment Team for the ABA Death Penalty Moratorium Implementation Project reported that "all members of the Assessment Team, including those representing the state, were deeply worried that the expenditure of resources on capital cases significantly detracts from Florida's ability to render justice in *non*-capital cases."[178]

In addition to these financial costs, the death penalty places enormous burdens on state and federal judicial resources. In some states, such as California, the burdens imposed by capital cases on appellate courts compromise the ability of those courts to manage their competing commitments on the civil and non-capital side. The burdens imposed are not merely a function of the sheer time required for capital litigation; the frenetic, last-minute litigation in active executing states exacts its own toll on judges and court personnel and likely negatively affects the courts' fulfillment of their non-capital obligations. The possibility of even greater disruption along these lines looms with the increased likelihood that AEDPA's "opt-in" provisions[179] will become operative. Those provisions give fast-track status to death-sentenced inmates from states that create a system for the appointment and compensation of competent counsel in state postconviction. Under the opt-in provisions, once a state has satisfied the opt-in requirements, the state receives the benefit of a shorter statute of limitations for death-sentenced inmates filing in federal habeas (six months instead of one year) and the federal courts are under strict deadlines for ruling on claims, including the congressionally-imposed requirement that capital cases take priority over the rest of the federal docket. A literal reading of the opt-in provisions would require federal courts to halt on-going proceedings (trials, hearings, etc.) until capital habeas petitions are resolved ("The adjudication of any application under section 2254 that is subject to this chapter, and the adjudication of any motion under section 2255 by a person under sentence of death, shall be given priority by the district court and by the court of appeals over all noncapital matters."[180]). In this respect, the death penalty makes extraordinary demands on the American courts and threatens the quality of justice for all litigants, including those outside the capital process.

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[177] Steve Brewer, *Penry likely to face retrial, officials say*, The Huntsville Item, Jul. 1, 1989, p.3A.
[178] Christopher Slobogin, *The Death Penalty in Florida*, Vanderbilt University Law School Public Law and Legal Theory Working Paper 08-51 (November, 2008).
[179] 28 U.S.C. § 2261.
[180] 28 U.S.C. §2266(a).

CONCLUSION

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.

Status Report on Capital Punishment

April 2008

Prior to the 2007 Annual Meeting's consideration of the Model Penal Code Sentencing Project, Professors Roger S. Clark of Rutgers School of Law, Camden, and Ellen S. Podgor of Stetson University College of Law submitted a motion (Annex 1) to have the Institute declare its opposition to capital punishment. After consultation with them, President Michael Traynor advised the membership (Annex 2) that their motion would not be presented for a vote in 2007, that consideration of whether the ALI should study and make recommendations about the death penalty would be assigned to the Program Committee and Council, and that an electronic forum would be established on which members could address the question.

Michael Traynor then appointed a special committee, chaired by ALI Council member Daniel Meltzer of Harvard Law School, to advise the Program Committee. The Meltzer Committee's report (Annex 3) discusses the ALI's consideration of the death penalty while the Model Penal Code was being drafted half a century ago, the background to inclusion of § 210.6 on capital punishment in the MPC, the history of the influence of that Section on American law, and the constitutional status of the death penalty today. The report also lays out arguments for and against the Institute's engaging in work on the death penalty as well as possible structures if the ALI were to set out on such work. Specifically, the report discusses three options: an ALI call for abolition of the death penalty in the United States, withdrawal by the ALI of § 210.6, or revision of § 210.6.

An online forum, moderated by Washington University School of Law Professor and ALI Secretary Susan Frelich Appleton, and was made available to ALI members for about a month last fall. The posted materials included the Meltzer Committee's report and a transcript (Annex 4) of the discussion of this matter at last year's Annual Meeting. The comments submitted by ALI members on the forum or otherwise last fall were provided verbatim to the Program Committee and to the Council, along with a summary (Annex 5) prepared by Deputy Director Elena A. Cappella.

The Program Committee then recommended to the Council (Annex 6), and the Council by resolution (Annex 7) agreed, that the Institute take further steps to consider American law regarding the death penalty and its operation in practice. Director Lance Liebman was asked to identify one or more individuals to write a paper that would review the literature, the case law, and reliable data concerning important death-penalty issues. He has now engaged Professors Carol S. Steiker of Harvard Law School and Jordan M. Steiker of the University of Texas Law School to undertake this work. (This may well be the first time the Institute has appointed siblings on a single venture.) The Director will soon name a small group of experts to advise and guide the Steikers and to review their drafts. The paper is expected to be presented to the Council in December and to be on the agenda of the 2009 Annual Meeting.

Lance Liebman and Michael Traynor will present an oral status report on this matter during the opening session of the 2008 Annual Meeting on May 19, after which the floor will be opened for brief comments on the process and on the issues that the Steikers' paper might address.

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Annex 1

2 April 2007

MODEL PENAL CODE: SENTENCING

Motion on Capital Punishment

Proposed by Roger S. Clark, Camden, New Jersey and Ellen S. Podgor,
Gulfport, Florida

We wish to move the following at this year's Annual Meeting: "That the Institute is opposed to capital punishment."

Statement in Support

General comments

The Discussion draft on sentencing circulated for discussion at the 2006 meeting comments that "The sentencing Articles of the Model Penal Code drafted in the 1950s and early 1960s, have not been influential in the bulk of sentencing-code revisions undertaken since the mid-1970s." Regrettably, this is not true of the capital punishment provisions in the Code, included against the better judgment of the Reporters and the Advisory Committee. They have become, in a memorable phrase from the 1980 Commentaries on the Code, "a paradigm of constitutional permissibility," a lifeline for the retention of capital punishment against constitutional attack. We believe that the time has come to disavow them. A Model Code of Sentencing for the twenty-first century should specifically exclude the death penalty.

The rest of the civilized world has abandoned capital punishment. Among the many arguments that found favor in Europe, Australia, Canada, New Zealand and the Americas are: that it is fundamentally wrong, and inconsistent with modern views on human dignity; that its mistakes are irreparable; that it is inevitably imposed in an arbitrary fashion; that it degrades all those involved in its imposition; that it serves no utilitarian purpose; that it soaks up vast resources for prosecution, defense and courts that might be better spent, and so on. In preparing for the Model Penal Code, the Institute commissioned a study by Professor Thorsten Sellin which became the classic utilitarian study of the application of the penalty. Sellin concluded, in the words of the Institutes's magisterial MODEL PENAL CODE AND COMMENTARIES (OFFICIAL DRAFT AND REVISED COMMENTS) (1980), 112, that "a sentence of death is executed in a trivial fraction of the cases in which it might legally be imposed and that there is no quantitative evidence that either its availability or its imposition has noticeable influence upon the frequency of murder." Some subsequent econometric studies claimed different results, but it is hard to disagree with the recent findings of the New Jersey Death Penalty Study Commission that the

"published studies on whether the death penalty functions as a deterrent to other murders are conflicting and inconclusive" and that "There is no compelling evidence that the ... death penalty rationally serves a legitimate penological intent."

Some history of the Institute and the issue

A brief review of the Institute's somewhat convoluted involvement with the issue is in order. As the 1980 COMMENTARIES note, at 111:

> ... the Reporters favored abolition of the capital sanction. The Advisory Committee recommended by a vote of 17-3 that the Institute express itself on the issue, whatever its opinion proved to be. By a vote of 18-2, the Advisory Committee also recommended that the Institute favor abolition. The Council was divided on the issue of retention or abolition but substantially united in the view that the Institute could not be influential in its resolution and therefore should not take a position either way. The Institute agreed with the Council[1], and the Model Code therefore does not take a position on whether the sentence of death should be retained or abolished.

It was nevertheless "regarded as essential that the Model Code address itself to the problem presented in [retentionist] jurisdictions." Hence the Institute adopted the bracketed Section 210.6 of the Code which contains a melange of aggravating and mitigating circumstances that are to be considered in order to justify a sentence of capital punishment in a particular case.

The 1980 COMMENTARIES add, at 171:

> ... the reforms in capital sentencing achieved since 1972 appear dramatic. While many forces contributed to this transformation, by far the most significant was the Supreme Court and particularly its changing perception of the death penalty provision based upon the Model Code. Speaking for the Court in *McGautha v. California*, Justice Harlan discussed Section 210.6 at length and concluded that it was a futile effort to solve

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[1] The Commentaries cite here to "ALI Proceedings 217-19 (1959)". The Proceedings do not exactly support the proposition in the text. On the pages in question, a bold member described in the text as as "Mr Hardy" [probably Covington Hardee of New York] asked "aren't we going to deal with the major issue we have been skirting around for the past 24 hours...?" Judge Breitel used the words "kind of abdication" to characterize the position being taken on capital punishment. He suggested that the Institute should canvass the opinion of the membership and "in the light of that opinion, indicate where we stand." He then moved "that the Institute be polled with regard to its position on capital punishment on two questions: one, what the individual view of the voter is, and second, whether the Institute should express its view in the Model Penal Code." The Proceedings record that the motion was put to a vote and carried. The Chair commented: "That was almost unanimous." Our researches have not revealed the result of the poll which does not appear to have been shared with the membership.

> the "intractable" problem of standards in capital sentencing, which demonstrated that the Court should not undertake "to pronounce at large that standards in this realm are constitutionally required." [402 U.S. 183, 207 (1971)] The subsequent reexamination and ultimate rejection of this conclusion by the Court has left the Model Code provision as the constitutional model for capital sentencing statutes and in the future may transform Section 210.6 into a paradigm of constitutional permissibility.

The case-law since the Commentary was published would indicate that, while the exact details of Section 210.6 have not carried the day, the basic paradigm has been achieved. A failure to "take a position," in short, resulted in supporting what we believe to be the wrong position, namely retention of the death penalty.

The spirit of Norval Morris

> The 2006 Discussion Draft (p. 4) lists as the first of its "most important proposals":
>
> A new statement of sentencing purposes, borrowing from the theories of Norval Morris, that overlays limits of proportionality upon the pursuit of utilitarian goals, and makes the purposes applicable to decisionmakers throughout the sentencing system.

Invoking the distinguished departed is always a risky business, but we venture to suggest that Norval would have been disappointed that his views on capital punishment did not find a little corner somewhere. He was lifelong abolitionist, as a child in New Zealand, during his time in Australia, as Chair of the Ceylon Commission on Capital Punishment, while he was with the UN affiliated Crime Prevention unit in Tokyo and in his writing in Chicago. We understand his "limits of proportionality" in this respect to be diametrically opposed to the imposition of death. His eloquent chapter entitled *Hans Mattick and the Death Penalty: Sentimental Notes on Two Topics*, in THE PURSUIT OF JUSTICE: ESSAYS FROM THE CHICAGO CENTER 65 (Gordon Hawkins & Franklin E. Zimring eds., 1984) ends with a discussion of the Supreme Court's efforts based on the Model Code. It concludes: "In brief, on the known facts, we lack the purity of heart for a just, fair and appropriate invocation of the death penalty." Reading again his title parable in THE BROTHEL BOY AND OTHER PARABLES OF THE LAW (1992) we suspect that, in a nutshell, he would find the application of capital punishment to be fundamentally incompatible with basic humanity. Human beings are simply not capable of making the decisions required for a just application of the ultimate penalty.

The final words we leave with you are Justice Blackmun's, dissenting from the denial of review in Callins v. Collins, 510 U.S. 1141 (1994) at 1145-46:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved...I feel

> morally and intellectually obligated to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations can ever save the death penalty from its inherent constitutional deficiencies....The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent and reliable sentences of death required by the Constitution.

We would appreciate the circulation of this Motion to the membership in advance of the San Francisco meeting.

Annex 2

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Michael Traynor
President, ALI

May 10, 2007

To: Members of the Institute

Re: Motion on Capital Punishment

The Institute has worked very little on criminal law issues since the achievements of the Model Penal Code and the Model Code of Pre-arraignment Procedure, completed in 1962 and 1975, respectively. In 1999, we began a project on Model Penal Code: Sentencing, an important subject on which recent developments, including changes in state systems, justified substantial revision to the original MPC treatment. Professor Kevin Reitz undertook the work, and his materials for the 2007 Annual Meeting fully justify our confidence in him and in the importance of our providing guidance about sentencing systems to states reconsidering their current laws.

From the beginning of this work, some ALI members have urged that the project include consideration of capital punishment. (The original MPC recommended procedures for administering a capital punishment regime but at that time the Institute took no position on whether a state or the federal government should include capital punishment in its criminal justice system.) Professor Reitz, Director Lance Liebman, and many of the Advisers to the current project believed, on the other hand, that taking up capital punishment in this project would raise issues different from those being addressed and would decrease the likelihood that our work would receive serious attention in states considering reform of their sentencing laws and procedures.

Approaching this year's Annual Meeting, two members, Professor Roger Clark of Rutgers Camden Law School and Professor Ellen Podgor of Stetson Law School, submitted a motion calling for the Institute to state that "the Institute is opposed to capital punishment." It did not seem to me or to my fellow officers that discussion of this subject should begin and conclude at the San Francisco meeting. Our agenda is full. The work done on our Sentencing project (and on the six other projects on the Annual Meeting agenda) is important and needs all the time scheduled for it.

The Institute could take a position on capital punishment only with approval of both the membership at an Annual Meeting and of the Council, which also has not considered the matter for almost half a century. The ALI's processes, which prepare a subject for Council and Annual Meeting discussion, have proved themselves over time. Therefore I communicated with the proponents of the motion and asked them not to press their motion at this annual meeting and in-

stead to defer consideration of the questions until they can be considered by our Program Committee and Council for report at next year's annual meeting. Professors Clark and Podgor have graciously agreed. They will be accorded the opportunity to speak briefly on Wednesday morning in San Francisco and the Director, the Sentencing Reporter, and perhaps others will also speak briefly. We are allocating up to one half hour for this introductory conversation before we take up the Sentencing draft itself.

The consideration of whether we should study and make recommendations about the death penalty will then be assigned to the Institute's Program Committee. The matter will be properly prepared for a report and fuller discussion, perhaps with a Program Committee and a Council recommendation, at the 2008 Annual Meeting in Washington. Over the year between the 2007 and 2008 Annual Meetings, all members of the Institute will be invited to communicate with the Program Committee about their views, including through a special online forum that we will establish for this purpose.

I appreciate the willingness of the proponents of the motion to participate in this process, true to the Institute's traditions and structure, and welcome the participation of other members in our discussion of these important questions in the months ahead.

Sincerely,

Annex 3

MEMORANDUM

TO: Program Committee, American Law Institute

CC: Michael Traynor, Roberta Ramo, Lance Liebman, Elena Cappella

FROM: Ad Hoc Committee on Death Penalty (Christine Durham, Kay Knapp, Gerard Lynch, Myles Lynk, Daniel Meltzer (Chair), William Webster)

DATE: October 2, 2007

RE: Report on ALI Consideration of Issues Relating to the Death Penalty

During consideration of the Model Penal Code Sentencing Project, suggestions have been made that the Project should address the issue of capital punishment. Most recently, at the Annual Meeting in May of 2007, Roger Clark and Ellen Podgor moved: "That the Institute is opposed to capital punishment." President Traynor had been informed ahead of time that this motion would be made, and in a letter of May 10, 2007, sent in advance of the Annual Meeting, he advised the membership that consideration of whether the ALI should study and make recommendations about the death penalty would be assigned to the Institute's Program Committee and that an electronic forum would be established for ALI members to express their views on the matter. He suggested that a recommendation of the Program Committee and a Council Recommendation could be presented at the 2008 Annual Meeting.

This Ad Hoc Committee was appointed by President Traynor to advise the Program Committee, the Council, and the Director about alternative ways in which the Institute might respond to the concerns underlying the motion.

I. Background on the Model Penal Code and Capital Punishment

A. Consideration of Capital Punishment during Preparation of the Model Penal Code.

The Model Penal Code (MPC), promulgated in 1962, takes no view on whether a state should administer capital punishment. When the MPC was under preparation, the Institute obtained a report on the death penalty by University of Pennsylvania criminologist Thorsten Sellin.[1] That report surveyed the law and focused on broad policy issues such as deterrence, the risk of mistake, and the actual incidence of punishment. The Advisers to the MPC Project, by a vote of 18-2, recommended the abolition of capital punishment. But the Council charted a different course, recommending that the Institute take no position on the question, and

[1]Thorsten Sellin, The Death Penalty (1959).

expressing the view that "the Institute could not be influential in its resolution and therefore should not take a position either way." The membership of the Institute agreed.[2]

Harry Kyriakodis of the ALI's staff has looked through the ALI's archives for 1959-60. At the 1959 Annual Meeting, when Tentative Draft #9 of the MPC was under discussion, Judge Breitel moved that the membership be polled on the question of what position the MPC should take on capital punishment. Director Goodrich is recorded as remarking, after that motion carried: "That was almost unanimous."

The matter of how to undertake the poll was then referred by the Council to the Executive Committee, referred back to the Council, referred to a subcommittee of the Council, and finally back to the Council. There were apparently differences of view about the desirability of the survey, its content, and its consistency with the ALI's bylaws. President Tweed told the Executive Committee that the poll would ascertain the membership's views on capital punishment "without going into the question of their views on whether or not the Institute should adopt a preferred recommendation, a question fraught with the difficulties raised in the discussion of the Executive Committee in its last meeting."

The ballot ultimately distributed to the membership, which at that time numbered about 1480, had two alternatives: one for abolition and one for retention but only in cases of aggravated murder after a separate trial on sentence. In a memorandum of February 5, 1960 to the membership, President Tweed said, "The poll is being taken for the information of the Council of the Institute so that it may consider the vote in determining whether or not it is desirable for the Institute officially to express a preference in the Final Draft of the Model Penal Code as between alternatives I and II. The results of this poll will not be published without a further authorization to do so from the membership of the Institute." The only evidence of the results of the poll that has been found is a note from Director Goodrich to President Tweed, dated February 11, 1960, only 6 days after the date of President Tweed's memorandum. It suggested there were 603 responses, with 203 for abolition, 359 against, and 31 indecisive.[3]

B. The Model Penal Code Provision

As finally approved, the Model Penal Code includes, in its provisions on homicide, Section 210.6 on capital punishment, which is quoted in full in an appendix to this memorandum. Section 210.6 was placed in brackets "to reflect the fact that the Institute took no position on the desirability of the death penalty."[4] The Commentary states the view that "many jurisdictions would retain the sentence of death for many years . . . It was therefore regarded as essential that the Model Code address itself to the problem presented in such jurisdictions."

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[2]ALI, MODEL PENAL CODE AND COMMENTARIES, Part II, § 210.6, p. 111 (1980).

[3]Note that adding the responses totals 593, not 603.

[4]Commentaries, *supra* note 2, at 107 n*.

Section 210.6 had two principal purposes. The first was to define in what cases capital punishment should be imposed, and the second was to prescribe the allocation of sentencing authority between judge and jury.

On the first point, the Code proscribes capital punishment for crimes other than murder. With regard to murder, the Code sought an alternative approach to the traditional discretionary systems found in American jurisdictions, which can be described in general as having authorized capital punishment for first degree murder, as a matter in the unbridled discretion of the sentencer (ordinarily the jury), without specific standards governing how that discretion should be exercised. Section 210.6 sought to provide a more definite structure.

In setting forth substantive criteria for determining when capital punishment should be imposed, section 210.6 begins with a number of categorical exclusions of the death penalty: when there are no aggravating circumstances, when substantial mitigating circumstances call for leniency, when the defendant pleaded guilty to murder as a felony of the first degree, when the defendant was a juvenile, when the defendant's physical or mental condition calls for leniency, and when the evidence sustaining the verdict "does not foreclose all doubt respecting the defendant's guilt."

For cases of murder for which the death penalty is not categorically excluded, the MPC proposes a structure, novel at the time, to try to guide the exercise of discretion by (1) specifying a set of aggravating factors, (2) precluding capital punishment unless at least one aggravating circumstance has been established, and (3) requiring, in addition, a finding that there is no mitigating evidence calling for leniency.

On the second question that section 210.6 addresses, the allocation of sentencing responsibility, the MPC provides alternative formulations. Under one, the judge alone has sentencing discretion. Under the other, a death sentence may be imposed only with the concurrence of the judge and of a sentencing jury. 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.

Subsequent experience with the administration of capital punishment under statutes based on the MPC has revealed shortcomings in section 210.6. Nonetheless, it represented a considerable advance for its time--notably, in its significant categorical exclusions (both of crimes other than murder and of some murders) from eligibility for capital punishment, in its effort to provide guidance in what had theretofore been an entirely discretionary determination, and in its requirement of a separate sentencing hearing focused specifically on the question of the appropriateness of the death penalty, with full opportunity for the defendant to present evidence in mitigation.

C. Constitutional Developments and the Influence of Section 210.6

Ten years after the MPC was promulgated, the Supreme Court, in *Furman v. Georgia*

(1972) (5-4), effectively invalidated traditional, discretionary systems for the imposition of capital punishment. Each of the nine Justices wrote an opinion. Two Justices thought capital punishment was per se unconstitutional. The other three Justices in the majority found the death penalty unconstitutional because of the lack of standards for determining how, among the many persons convicted of murder, the decision was made to sentence only a few to death; the resulting system, in the view of these three Justices, led to the arbitrary and/or discriminatory imposition of the death penalty.

By 1976, 35 states and the Congress had enacted new capital punishment laws that attempted to address the concerns expressed by the three decisive Justices in *Furman*. About half the states opted for mandatory death penalties--an approach that the Supreme Court held to be unconstitutional in 1976 in *Woodson v. North Carolina* and *Roberts v. Louisiana*, which reasoned that contemporary standards of decency require individualized consideration of the appropriateness of a sentence of death in the particular case. The other states enacted schemes seeking to confine discretion, typically by prescribing aggravating and mitigating factors, and the majority of those states patterned their efforts, more or less closely, on MPC § 210.6. In 1976, the Supreme Court upheld statutes from Florida, Georgia, and Texas, in each case by a vote of 7-2. See *Proffitt* v. *Florida*; *Gregg v Georgia*; *Jurek v. Texas*. The Florida and Georgia statutes were patterned, more or less closely, on the MPC; Texas's statute took a quite different form, limiting capital murder to five categories of murder and putting three yes/no questions to the jury that, in the Court's judgment, adequately narrowed the reach of capital punishment while permitting consideration of mitigating evidence.

The Commentaries to section 210.6, published in 1982, stated that the Supreme Court's decisional law "amounts to a broad endorsement of the general policy reflected in the Model Code provisions."[5] And as a generalization, the legislative response to the 1976 decisions did tend to follow the general approach of the MPC. Today, 38 states and the federal government authorize the death penalty, and most have looked for guidance in some way to section 210.6.

Concern about the MPC's influential role in the reinstatement of the death penalty has been an important motivation for those ALI members who have urged the ALI revisit the issue of capital punishment. For members opposed to the death penalty, the view that section 210.6 was influential in the eventual reinstatement of capital punishment after the *Furman* decision is a source of deep concern. Thus, at the 2007 annual meeting, Roger Clark described the MPC as having given "a patina of constitutional legitimacy to an otherwise irrational process." That view, while certainly understandable, may overstate the influence of the MPC on the development of the death penalty after *Furman.* The counterfactual scenario--what would have happened in the 1970s had section 210.6 not existed--is of course very difficult to establish, but it seems quite possible that the Supreme Court was unlikely to stand in the way of the strong political movement, following *Furman*, to reinstate capital punishment, and that drafters of post-*Furman* statutes, even if they lacked the benefit of section 210.6, would have found approaches

[5]Commentaries, *supra* note 2, at 167.

(whether similar to that in section 210.6, similar to that in Texas, or in some other form) to satisfy the concerns expressed in *Furman* about arbitrariness and discrimination.

D. The Current Sentencing Project

In 1999, the Institute began the current project to revisit the Model Penal Code's provisions on sentencing. Before the motion proposed in May, 2007 by Professors Clark and Podgor, some Advisers to the Sentencing Project had urged that the project address (and called for the abolition of) capital punishment. A notable proponent of that view was Professor Frank Zimring. That question has in the past received attention from the Advisers, the Reporter, the Director, and the Program Committee, all of whom concluded that it would not be desirable to include consideration of capital punishment (whatever position on capital punishment might emerge from such consideration) in the Sentencing Project, whose focus has been on non-capital sentencing.[6] The scope of the Sentencing Project as it has proceeded to date has, accordingly, been made clear to the Council and the membership. However, the question whether the Institute might launch a distinct project addressing capital punishment has not previously received focused attention from the Program Committee or the Council.

II. Options for the Program Committee and the Council

In trying to identify options that the Program Committee might consider for recommendation to the Council, our committee has proceeded on the premise that the Institute traditionally has not, and should not, take positions on issues of legal policy apart from study of those issues in the context of an existing project. The ongoing Sentencing Project has not studied capital punishment. In our judgment, the issue of capital punishment is sufficiently complex, and sufficiently distinct from the questions that form the core of the work undertaken to date by the Sentencing Project, that it would be a mistake for the Institute to take a position for or against capital punishment absent more focused attention on the death penalty. More broadly, we believe that the ALI's credibility comes from the fact that its recommendations, whether or not all would agree with them, have detailed consideration behind them, and preservation of that credibility counsels strongly against simply voting yea or nay on the issue of capital punishment.

The question then arises whether a study of the death penalty, either as part of the Sentencing Project or as a separate project, would be useful and appropriate work for the Institute. We begin by summarizing the considerations that have been put forward for undertaking a project. We then try to describe in a general way what a project might seek to accomplish. We then discuss the concerns that have been raised about undertaking such a project.

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[6]Professor Zimring resigned from the Advisers in protest and later published an article criticizing the Institute's failure to address capital punishment. See Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396 (2005).

A. The Possibility of Undertaking a Project

1. Changes in Circumstance Since 1962

There has been a wealth of experience in the administration of capital punishment since section 210.6 was promulgated in 1962, as well as many changes in the legal terrain in those 45 years. A list of significant changes would include the following:

(a) Many of the statutes now in effect draw more or less closely on MPC section 210.6, permitting evaluation of how that provision has operated in practice and whether the section has fulfilled the objectives of those who drafted it.

(b) The Supreme Court had developed an elaborate jurisprudence under the Cruel and Unusual Punishment Clause, which both reshapes the legal terrain and also calls into question the validity of some aspects of section 210.6.[7]

(c) Experience suggests that the aggravating factors specified in the Model Penal Code may be overly broad and accordingly fail adequately to prescribe appropriate criteria to ensure that discretion is exercised in a morally appropriate and evenhanded fashion.[8] Among the very broad factors are that the murder was "especially heinous, atrocious or cruel";[9] that it was committed by someone with a prior conviction for a felony involving violence or threat thereof to the person; that the murder was committed in the course of committing or attempting to commit, robbery, burglary, arson, kidnapping, or sexual assault; that the murder was committed to avoid arrest; and that the murder was committed for pecuniary gain. One study found that 86% of all persons convicted of murder in Georgia, whose aggravating factors are similar to those in the MPC, were death eligible (that is, had at least one aggravating factor) and that 90% of those convicted of murder in Georgia prior to *Furman* would have been death eligible under the post-*Furman* Georgia statute.[10]

(d) The tide of opinion in developed countries has turned against capital punishment,

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[7]For example, absent a narrowing construction, the MPC's "especially heinous, atrocious or cruel" aggravating factor has been held to be unconstitutionally vague. See Maynard v. Cartwright, 486 U.S. 356 (1988).

[8]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.").

[9]On the constitutionality of that factor, see footnote 7, *supra.*

[10]See, *e.g.*, DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 102, 268 n. 31 (1990).

and the United States, in retaining capital punishment, is an outlier among developed nations. The question of the lawfulness or appropriateness of the death penalty is now viewed by many as being as much a question of international human rights as of penal policy, and evolving conceptions of human dignity have caused many countries that formerly maintained capital punishment, and many individuals who previously supported capital punishment, to shift their views. In the past 35 years, as the majority of American states were re-instituting the death penalty in the wake of *Furman*, European countries (now including Eastern Europe) one by one were abolishing it, as have our neighbors Canada and Mexico. Among developed countries, only Japan, Taiwan, and South Korea retain the death penalty for ordinary crimes.[11] While 69 nations, primarily in Africa, the Middle East, and Asia, retain the death penalty, these retentionist nations are not ones that most Americans would view as models for our criminal justice system.

(e) Investigation of capital convictions, often but not invariably assisted by the use of DNA evidence, has revealed well over a hundred cases of wrongful conviction of persons on death row, with some exonerations coming only days or hours before scheduled executions.[12] Among the recurrent themes in such cases is the frailty of testimonial evidence provided by eyewitnesses, by accomplices, and by jailhouse informants.

(f) Concerns that the administration of capital punishment is infected by racial discrimination have been supported by empirical studies, the most elaborate of which found discrimination to be most pronounced with respect to the race of the victim (with killers of white victims four times more likely than killers of black victims to be sentenced to death).[13]

(g) The Supreme Court's decisions on the constitutionally-required role of the jury in sentencing--beginning with *Apprendi v. New Jersey* (2000), and culminating in *United States v. Booker* (2005)--have implications for capital-sentencing schemes. The Court held in *Ring v. Arizona* (2002) that it was unconstitutional to assign to the trial judge alone the responsibility for finding aggravating factors that, under state law, must be found to permit imposition of a death sentence. (*Ring* thus suggests that subsection 210.6(2) of the MPC does not pass constitutional muster.)

(h) A complex body of legal rules, some established by Supreme Court decision and some by Congress in 1996, seeks to restrict post-conviction review and appears to be premised on the view that such review has improperly delayed and impeded the carrying out of capital

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[11]A list of countries that have abolished and that have retained capital punishment is found at http://www.deathpenaltyinfo.org/article.php?scid=30&did=140 (accessed August 13, 2007).

[12]The Death Penalty Information Center, an anti-death penalty group, reports that since 1973 there have been 124 exonerations of persons on death row. http://www.deathpenaltyinfo.org/FactSheet.pdf (accessed July 2, 2007).

[13]See BALDUS, WOODWORTH & PULASKI, *supra* note 10.

sentences.

Thus, the administration of capital punishment today looks quite different than it did when the MPC was adopted in 1962. Some have suggested that whether one is a proponent or opponent of capital punishment, it is hard to approve of the way that capital punishment is currently administered. On this view, for proponents of the death penalty, legal proceedings are expensive, complex, and extended; capital sentences are relatively rare (only 128 were imposed in 2005) and, despite a death row population exceeding 3000, executions are rarer still (only 53 executions were carried out in 2006); the delays and difficulties involved in carrying out capital sentences means that the benefits that proponents would associate with the penalty are highly attenuated and the costs to the criminal justice system, in energy and resources, is considerable.

For opponents, the constitutional and statutory standards are viewed as overbroad and toothless, leaving in place a system in which prosecutorial discretion is unregulated; sentencing decisions are made primarily by one-time actors under general standards that fail adequately to confine discretion or eliminate arbitrariness; the poor quality of defense representation contributes to a continuing lack of evenhandedness; concerns about racial discrimination persist; disturbing evidence of wrongful convictions has emerged; and the legal structure overall provides a patina of legitimacy for a process that remains arbitrary.

2. Opportunities Presented for the Institute

In these circumstances, the Institute could seek to study the experience in recent decades and to determine, based upon that study, how to address the issue of capital punishment today. In the course of our deliberations, it has been a point of consensus that the existing administration of capital punishment is in a sorry state. An ALI project would provide an occasion, in a less politicized environment than that surrounding state death penalty legislation, and relying on the capacity of the Institute to engage in thorough and comprehensive review, to craft an approach to the death penalty that is consistent with the broad aspirations of the Model Penal Code. Indeed, some have remarked that if the ALI does not seek to provide a framework for the administration of capital punishment that is preferable to existing practice, it is not clear who else can and will.

We canvass below a number of concerns about undertaking a project on the death penalty. But we note that there would also be perils were the Institute to decide not to do so. One such concern is resistance by those who believe strongly that the ALI has a moral responsibility to study this issue, especially in light of what they view as the baneful influence of section 210.6. More generally, we suspect, without being sure, that a large number of members are at least uneasy about the death penalty as administered today.

B. The Scope of a Possible Project

A project might begin by revisiting the terrain covered by section 210.6, analyzing experience under it, and then seeking to ascertain whether it remains a sensible prescription for the administration of capital punishment today. A project that begins down this path might end

up at a variety of destinations. We assume that if a project were to be seriously considered, the Institute would, as is customary, obtain a prospectus from a leading scholar seeking to highlight more specifically the opportunities, pitfalls, and scope of a possible project. This memorandum is not meant to be a substitute for such a prospectus. Nonetheless, we believe it would be helpful to outline what seem to us possible outcomes, not to recommend one or the other, but simply to help identify what a project might accomplish and what problems might be anticipated.

1. Call for Abolition. One possible outcome would be a revision of the MPC that calls for the elimination of capital punishment as a penal option. Such an outcome might be based on objections that are general and abstract (for example, moral objections to capital punishment). It might, alternatively, be based upon objections about the way that the penalty is administered (for example, concerns about arbitrariness, discrimination, cost) and/or on distinct concerns (the effect of capital punishment on American standing in the developed world).

2. Withdraw Section 210.6. A second possible outcome would be for the ALI to state that it no longer regards the framework established by the MPC to be a workable or justifiable basis for the imposition of capital punishment, without either trying to develop a substitute framework, on the one hand, or calling for its abolition, on the other.[14]

3. Revise Section 210.6. A third approach would start from the view that capital punishment will not disappear from state systems of criminal justice, and that a project that revised the Institute's recommendations concerning capital punishment in light of the experience noted above could, if adopted by states, significantly improve the operation of a system that few believe is operating well today. On this view, experience has suggested that the procedures recommended in 210.6, although they represented an improvement over the unguided discretionary judgments that prevailed when the MPC was approved, have important flaws and that further refinement is possible and desirable if the death penalty is to be maintained. A set of revised recommendations could, though it need not, be coupled with an expression of concerns about the continuation of capital punishment, which might be worded in a variety of ways. It might recognize that there are divisions within the Institute, as within the public, about whether the death penalty is ever justified, and that there is skepticism within the Institute that our fact-finding procedures and legal institutions are adequate to the task of imposing the ultimate punishment in any but the narrowest of circumstances.

A project of revision might address some or all of the following set of issues:

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[14]Were that the approach, one would have to attend to whether to seek in some fashion to preserve section 210.6's specification of categorical exclusions of some murders from death-eligibility. Some of those exclusions now overlap with requirements imposed by federal constitutional law, although the relevant decisions were sufficiently recent and divided that one cannot consider them to be settled law immune from re-examination. See *Atkins v. Virginia* (2002) (6-3) (barring execution of mentally retarded offenders); *Roper v. Simmons* (2005) (5-4) (barring execution of juvenile offenders).

a. What set of substantive and procedural provisions could increase the likelihood that decisions whether to impose death or imprisonment are morally significant and non-arbitrary? This would include the terrain covered by section 210.6--the specification of substantive standards for the imposition of the death penalty, as well as the allocation of responsibility between judge and jury. The project might also examine procedures designed to address concerns about racial discrimination.

b. What kinds of additional procedural provisions should be employed in cases involving the possibility of capital punishment? Such procedures could be of many different types. They might require that defense counsel in capital cases possess special qualifications. They might limit or regulate the use of kinds of evidence (confessions that are not videotaped or statements by jailhouse informants) thought to pose particular risks of mistaken conviction. They might require that particular kinds of evidence (DNA or other scientific evidence) linking the defendant to the crime be introduced, and might deal more broadly with questions relating to access to DNA samples. They might address questions about how a sentencing jury should be instructed.

c. What procedures and standards should be in place to regulate decisions made other than at trial, to ensure the evenhanded and appropriate exercise of discretion? Consideration might be given to standards or procedures to regulate the exercise of discretion by local prosecutors, the review of sentences by a centralized appellate body, and the exercise of powers of clemency by the Executive Branch.

It has been suggested that many individuals involved in the design and operation of state capital punishment systems are struggling with issues like these. Guidance from the ALI could be of considerable assistance to such persons.

Some have suggested that if the Institute were to take up the issue of capital punishment, there are many empirical questions about the death penalty that could usefully be studied, such as efforts to resolve ongoing debates about whether capital punishment has deterrent value, consideration of the financial cost of capital punishment as compared to alternative penalties, or examination of the problem of conviction of the innocent. The Committee is doubtful that engaging in primary research on any of these topics is a worthwhile project for the Institute. To begin with, doing so does not play to the strength of the Institute. Moreover, each of those questions has been widely studied and each is quite complex; where disagreements persist (for example, on the deterrent effect of capital punishment), an Institute project is unlikely to be able to resolve them in a fashion that would command general acceptance. However, if a project on capital punishment were to be commenced, assembling various studies that have been undertaken and summarizing what they have found and what questions they leave open would be an important part of the study.

C. Concerns about Undertaking a Project

Although the Committee believes that there is an opportunity for productive work on capital punishment by the Institute, there are significant arguments on the other side. A number

of these rest on the likely reaction of our membership or of various constituencies outside of the ALI to one or another possible outcome of any project, and as such they necessarily depend on uncertain predictions. These concerns include the following:

1. Considerable work has been done on many of the issues noted above by scholars and by state commissions.[15] An ALI project would not necessarily add greatly to the storehouse of knowledge or to the range of possible recommendations concerning the death penalty.

2. It is uncertain that an ALI project, whatever its outcome, would have influence with respect to so politicized an issue as the death penalty. Our legislative projects generally have had mixed success. At least excluding those projects (like the UCC) undertaken jointly with NCCUSL, the MPC may itself be the ALI project that has had the most influence on state legislation. However, it may be unlikely that an ALI project on the death penalty would have a similar kind of influence. Beyond the fact that the politics of criminal justice are very different today than they were decades ago, section 210.6 had little influence on state criminal codes, even in states that had reformed their criminal codes based on the MPC, until the 1976 Supreme Court required states to modify their statutes governing capital punishment in order to satisfy constitutional requirements. That history may lend support to a more general suggestion that there is no real constituency for reform in death penalty states unless reform is necessary to avoid constitutional problems.

At the same time, we recognize that it is not easy to characterize the political environment, for growing concerns about the death penalty may provide an opportunity for attention to the kind of thoughtful analysis that an ALI project would provide. The politics in any individual state can be hard to predict and somewhat accidental. Some years ago, Massachusetts came close to reinstating the death penalty in the wake of a particularly gruesome child abduction and murder. In this area, as elsewhere, legislation by anecdote is a real possibility. Needless to say, the anecdotes can generate political momentum in multiple directions; evidence that an innocent person had recently been executed could stimulate legislative interest in reform.

Legislative projects always create some risk that an ALI recommendation will not gain much traction in state legislatures. Those risks, however, seem to us higher with respect to criminal law projects in today's political environment, and especially high with respect to the death penalty.

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[15]There have been thoughtful projects in Illinois and Massachusetts. Governor's Comm'n on Capital Punishment, Report 3 (Apr. 15, 2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf; Governor's Council on Capital Punishment, Final Report 4-5, 6-12 (May 3, 2004), available at http://www.mass.gov/Agov2/docs/5-3-04% 20MassDPReportFinal.pdf. A New Jersey Commission recently studied the death penalty and concluded by recommending its abolition.

3. Kevin Reitz, Reporter for the Sentencing Project, and others have expressed concern about the possible impact on the current project if the ALI were to take up capital punishment. The particular concern, which necessarily must be based on informed speculation, is that a difficult part of the process of securing support in the states for sentencing reform and sentencing commissions involves bringing prosecutors and other "law and order" representatives on board. On this view, if the ALI takes a position on the death penalty that is disfavored by those constituencies, that fact could undercut the credibility of the ALI's non-capital sentencing recommendations with the same constituencies. Reinforcing this concern is the view held by some that the problem of non-capital sentencing, with more than two million persons incarcerated under sentencing practices that many view as draconian and unfair, is a larger, though less visible, source of injustice than is the injustice associated with capital punishment.

4. In the end, for many persons inside and outside of the ALI, the appropriateness of capital punishment is likely to turn on moral concerns. For example, some will argue that capital punishment is inappropriate whether or not it deters, while others will take the view that capital punishment is morally appropriate even on the assumption that it does not deter. While an ALI study of capital punishment that assembles studies of the operation of the system along multiple dimensions surely can influence the judgment of some individuals, many proponents or opponents are not likely to be swayed by anything that such a project would say.

5. However a project were defined at the outset, it might arrive at a destination quite different from what was initially expected. On the one hand, it might eventuate that the Institute would recommend abolition. Although such an outcome would be reached only after a full study by the ALI, a significant number of members might conclude that a project recommending abolition (a) is substantively mistaken, (b) discards an important opportunity to improve the administration of capital punishment in states where it will persist, or (c) involves a considerable investment of Institute resources and energy without adding greatly to the storehouse of knowledge.

On the other hand, a project to revise and improve state death penalty laws would likely be opposed by a significant number of members of abolitionist sentiment, who might characterize such a project as having the ALI "tinker with the machinery of death"[16] and thereby help to legitimate, once again, a practice that, on this view, should be abolished--either because capital punishment is inherently wrong or because, as Justice Blackmun opined, "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."[17] Indeed, such members might be concerned, not implausibly, that an "improved" system for the death penalty could lead more states to retain or even reinstate capital punishment.

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[16]Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from the denial of certiorari).

[17]*Id.*

The intermediate suggestion that the ALI simply withdraw section 210.6 and indicate that the Institute no longer has confidence that a just death penalty can be administered under that framework has the virtues and vices of a compromise. On the one hand, such an outcome would eliminate or at least diminish many of the objections to undertaking a project; on the other hand, it would forgo the opportunity to improve the law in those jurisdictions in which capital punishment is likely to persist, while perhaps not going far enough to satisfy abolitionists. Moreover, although the ALI has often revised provisions (for example, in moving from a Restatement 1st to a Restatement 2d), we do not know of precedent for the ALI's withdrawing rather than revising a provision of a project that earlier had been approved by the Institute's processes. To say that this has not been done is not to say that it should not be done. However, at least two questions would deserve careful thought. First, section 210.6 is not the only provision of the MPC that was once viewed as sensible and appropriate but may no longer be so viewed. The same, no doubt, is true of provisions of other ALI projects or Restatements. There is a question whether the Institute should start down the path of withdrawing provisions now viewed as misguided. Second, one would have to specify the degree of study (by a Reporter, Advisers, and the Council) before a recommendation to withdraw an extant provision should be made.

6. Academic opinion concerning capital punishment is quite polarized, and it could be difficult to locate a Reporter who was interested in the Project and who would not be viewed as solidly on one side or another of this contentious issue.

We have elaborated these concerns at length because we think they deserve careful consideration by the Program Committee and the Council. Some members of the Committee think that, in light of these concerns, the option of simply not addressing capital punishment at all, either as part of the existing Sentencing Project or as a separate project, is a serious possibility that the Program Committee and the Council should consider. Others, who deem the arguments in favor of addressing capital punishment to be sufficiently powerful to outweigh these concerns, suggest that the option of not undertaking a project should not be seriously considered.

D. Relationship to the Ongoing Sentencing Project

If the Institute were to undertake a project addressing the death penalty, all Members of this Committee believe that it should be separate from rather than a part of the ongoing Sentencing Project. That project is well along, having commenced in 1999. If the Institute were to undertake a study of the death penalty, it would presumably be launched only after consideration by the Council and, most likely, commission of a prospectus. Thus, it would not even begin until the sentencing project was moving into its ninth year. And once commenced, any consideration of capital punishment promises to be complex and controversial, making it unlikely that it would progress rapidly through the ALI's deliberative processes. It would be unfortunate, in our view, to delay completion of the excellent work on non-capital sentencing that already is far along in order to permit completion of study of the death penalty.

In addition, the concern noted above about the possibly deleterious impact on the non-

capital Sentencing Project of the ALI's taking on the issue of capital punishment would be muted if the existing project proceeds on a separate track and is concluded in advance of any project on capital punishment.

Separation of the projects is not without costs. There are undoubtedly some connections between the two projects. (One that has been mentioned is the appropriateness of a sentence of life without parole.) But our guess is that such connections are not that significant and can be solved by coordination between the Reporters and by the Director, and that the costs of separation are far outweighed by the benefits.

Appendix

[§ 210.6. Sentence of Death for Murder; Further Proceedings to Determine Sentence.

(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

(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.

(2) Determination by Court or by Court and Jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empaneled for the purpose.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence of death.

Alternative formulation of Subsection (2):

(2) Determination by Court. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. In the proceeding, the Court, in accordance with Section 7.07, shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of such examination. In addition, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the Court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

(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 kidnaping.

(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.

(4) Mitigating Circumstances.

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the

requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.]

Excerpt from the Transcript of the 2007 Annual Meeting
Wednesday, May 16, 2007

President Traynor: We will take a break and resume. Please be back in your seats promptly at 11:00 for our discussion of capital punishment and then Sentencing.

(*At 10:48 a.m., a recess was taken until 11:00 a.m. the same day, May 16, 2007.*)

President Traynor: Let us begin this morning what will have to be necessarily a very brief and introductory conversation on the issue of capital punishment.

You have before you the Institute's project on Sentencing, a draft, including introductory pages, of almost 400 pages dealing with sentencing guidelines and commissions to which we need to devote our main attention. At the same time, there has been interest, since the beginning of the project, when is The American Law Institute and is it going to attend to the issue of capital punishment, and that is reflected most recently in the motion by Roger Clark and Ellen Podgor that the Institute should take a position to abolish capital punishment. They have very graciously agreed to defer that. We will send that subject to the Program Committee, including the important related questions whether the Institute should take any position at all on the subject and, if so, what it should be and not necessarily whether it should abolish or keep the death penalty. A lesser alternative might be to say, in those states that have chosen to have it, here are some considerations that might be relevant.

The various questions that we will begin the conversation on very briefly this morning will continue, we hope, through correspondence, and then we plan to set up an e-mail discussion group, we will get a protocol out on how that will be done. It yet has to be developed, and that will be done after the Annual Meeting. But we urge you to consider very carefully what is best for The American Law Institute and to separate that—I know in some cases it may not be easy—but to separate that from your personal view or moral view or policy view about how you feel about the death penalty because a number of moral and policy issues are implicated there that may or may not be within the scope of what we can do as The American Law Institute and the credibility of our work not only on our Sentencing project but as an institution.

We will begin the conversation, as we have arranged through the courteous cooperation of the proponents of the motion, that they will be able to speak for up to five minutes each. There won't be a rebuttal time. I will then ask our Director if he has any comments and ask our Reporter, and we will open the floor then for very brief discussion. We will see how many want to talk, but we may have to, unfortunately, limit comments to a minute or two. But we will see how it goes, and we will begin with Roger Clark. Roger.

Professor Roger S. Clark (N.J.): Thank you, Mike. I was very proud yesterday to find myself admitted to the ranks of life members of this great Institute, and I rise today, as I have risen each of these past several years, to raise a subject that I believe is a glaring omission from an otherwise splendid draft on the topic of sentencing. I refer, of course, to what at least since the time of Blackstone in the English language has been known as the sentence of death.

I would submit that the omission of that topic from this draft goes, in the delightful phrase that the Reporter uses in other contexts, to the moral legitimacy of the project, and indeed in those elegant words, moral legitimacy, it goes to the moral legitimacy of our great Institute.

I shall be brief, because I know there are others here who have approached me and said they wished to speak this morning and contribute to the debate. Professor Risinger, for example, a few moments ago, shared with me some striking statistics on error in capital sentencing, and I know there are others, and of course I want to hear from the coauthor with me of this motion.

I want to make four points really. One is to make the point that we make in our memorandum about the history of this issue and the Institute. If you read our memo, I think you will appreciate that, following procedures that would not pass muster in terms of our current approach to transparency, the Institute in 1962 deluded itself into thinking it could take no position on this issue. At the same time as taking no position, it devised a set of aggravating and mitigating circumstances and a procedure to go with them, a procedure that an older and wiser Harry Blackmun described as "the machinery of death." [Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).] Frankly, that position was a disaster that succeeded only in giving a patina of constitutional legitimacy to an otherwise irrational process.

I would submit that this organization, having set in motion that particular machinery, has a unique obligation to withdraw it, to withdraw its defective product.

The second point has to do with the philosophy of Norval Morris, which is pervasive in this draft on sentencing. I am very proud to say that Norval Morris was, like me, born in New Zealand, although he fairly quickly left and became a major player on the world stage. Norval, in addition to developing his principles for limiting penalties, which you find in this draft, was a lifelong opponent of capital punishment. Norval without abolition is like Hamlet without the prince.

Is this appropriate for the Institute to deal with? I was at the Meeting on Monday—

President Traynor: Excuse me, Roger, we're coming to a close, so if you could get to your point.

Professor Clark: I'm coming to my close, thank you. I was at the Meeting on Monday, when we adopted our rejuvenated Bylaws, and I read them carefully. One of the objects of the Institute is "better adaptation" of law "to social needs." Another is "to secure the better administration of justice." Taking the position we advocate on capital punishment is designed to do precisely those two things. Thank you.

President Traynor: Thank you.

Professor Ellen S. Podgor (Fla.): Let me first say to Kevin Reitz, this is an extraordinary draft. It is truly remarkable, and I would make three points. The first point is that

what we are stating here is not to undermine this project. I am also going to state as a second point why our motion fits here, and third, why the Institute needs to deal with this issue.

First, let me state, with regard to why it does not undermine the project. As my coauthor Roger Clark has already stated, it is important for the Institute to look to the localized nature of what we are doing here as an Institute to progress the law.

Many people said that when the Council of Europe was formed and they said there would be no death penalty, that it would never happen. But Protocol No. 6 of the European Convention on Human Rights abolished the death penalty in response. To date, there are 47 member states, and yes, even Russia observes a moratorium on the death penalty.

We are not mandating this for states, we are advising this for states. We are giving them suggestions, a model, something to look toward and something to model their codes after, and to be progressive in that nature we should be like other civilized nations in the world. Moratoriums exist in the United States: Illinois, and just recently New Jersey. The Institute needs to be on the forefront of this issue.

It fits here. We tell our students, as an academic I say this, that we always look to the title in making a determination in our interpretive process of what we are dealing with. And the title here is "Sentencing." To omit, therefore, any consideration or any mention of the most important aspect in the United States today of sentencing, that being the death penalty, cannot be seen as a *casus omissus*. It is too obvious and therefore it must be wrong.

The title here is Sentencing, and it does have, although there is no mention whatsoever of specific numbers within what has been in the draft here, there are mentions, for example, on page 26 [§ 1.02(2), Reporter's Note to Comment *b(1)*], of things like reentry. We have no reentry if there is death. We, therefore, must have language within this draft to contend with what is the reality.

There are two ways to approach this. One could say that this draft is process oriented or structurally oriented. If it is process oriented, then the mention of death needs to be there if the mention of reentry is there. If it is structurally oriented, then if one looks at things like pages 154 and 155 [§ 6B.01], and one deals with presumptive sentences, then we are not recognizing what the Supreme Court has so aptly recognized, and that is that death is different, and, if death is different, then we must recognize it.

My final point is this is not a Restatement, this is a model, and this is a model that states are going to look to. The states may not adopt every provision, as they have not in the past. They may adopt some and they may not adopt others, but if we are not at the forefront of this issue and giving them guidance on the most important issue in civilized society today, then we are not doing our job. Thank you.

President Traynor: Thank you. The Chair wishes to thank the proponents of the motion for their courtesy in accommodating this introductory conversation and for beginning it here this morning.

I will now ask our Director, Lance Liebman, if he has any comments, and then our Reporter on Sentencing, Kevin Reitz, and then we will open the discussion for the few minutes more remaining. Lance.

Director Liebman: I will just make several short points. One is I think Roger and Ellen put the points very clearly and very well and very convincingly.

From the start of this project, it seemed to us and to those who were working on it and to Professor Reitz that the particular structure of this project, which was about sentencing commissions and ways for states to decide what their sentences should be, did not include the question of specific sentences, including the death-penalty question, and that was a decision we made at the beginning.

About two years ago, with some people saying we should move in this direction, we substantially considered the question at a very serious and extended meeting of the Program Committee of the Institute, and the decision at that point was to continue in the direction that the project has been going.

As Mike has said, over the next academic year we will reconsider that and be back here and be in touch with you about what the Program Committee thinks and what the Council thinks, and then we will be coming back here.

The only other thing I would mention is the very hard question from the point of view of the job I hold with the Institute, which is what exactly we have to contribute on the matter, what research or other work we would have to do. We are a process organization and not one that takes a position on some controversial global policy question. So the question is not only one of whether one is in favor of or against the death penalty, but as well what is it exactly that The American Law Institute can contribute, and how the Institute can go about it, if it sought to contribute on this question.

President Traynor: Thank you, Lance. Kevin.

Professor Kevin R. Reitz (Minn.): Thanks, Mike. I find this a difficult issue. I have found it a difficult issue from the outset of this project. I have revisited it many times. I continue to revisit it. To date, every journey has taken me back to the same place, at least in my best judgment.

My concern sounds to some degree in what Lance just mentioned. I ask myself, what can the Institute do well? How can the Institute make the greatest possible contribution to the present landscape of American sentencing?

It seems to me that, at least I hope, a draft like the current draft before the membership today makes the kind of contribution that the Institute can offer. It results from a sustained examination of the rather technical, difficult, complicated issues of sentencing structure that have been unfolding nationwide. It presents information in a compendium form available to states that

otherwise would not have access to the kind of national study we have done here. It is, I hope, exactly the kind of work the Institute should be doing. Moreover, there is an appetite in state government for this kind of information.

On the subject of the death penalty, I am not so sure that the Institute is positioned to add informational value. The Institute could choose to assert a political position or a moral position, but it is not a resource, an informational or research resource, that we are purporting to advance in taking a position on the death penalty.

Now my second concern, and this is really the greater concern, is that an assertion of a moral or a political position on the death penalty would, in my judgment, undermine the effectiveness of the draft on issues of subcapital sentencing in many regions of the nation. Today, even before adoption by the membership, early drafting in the Model Penal Code project has been influential in sentencing-reform legislation in Alabama. It was a partial model for legislation that has been passed just in the last two or three weeks in Colorado and now sits on the Governor's desk, where it will be signed. It has been an influential model in ongoing sentencing reform in the state of California, even as simply a Reporter's draft not adopted by the Institute to date. All three of those states are death-penalty states.

The political standing of the Institute's product would be at least somewhat, perhaps very, very different in those states if the single most famous aspect of the new Model Penal Code were its position on the death penalty. It would be much more difficult to gain the support of prosecutors in states, even states relatively moderate in some of their sentencing practices and so on. So my concern, as everyone has said, does not relate to my position on the death penalty, but it does relate to my sense of where the Institute could make the greatest contribution to the American law of sentencing.

We have over two million incarcerated inmates on any given day in American prisons and jails—that is a huge subject matter—and another five million on probation or parole. We have fewer, I think, by latest count, or roughly 3500, on death rows nationwide, and something on the order of 50 or 60 of those individuals are executed per year.

The death penalty is an enormously important moral-political problem in the United States. I grant its importance. But, to me, the much larger numbers of subcapital sentencing are the real societal crisis that we face today, and I pull back when I think of the Institute squandering its potential influence in order to make what would, I admit, to me be a very satisfying moral statement on the death penalty. But I think we would squander our potential to make the greatest possible contribution to the landscape of American penality. Thank you.

President Traynor: We have several speakers. I would appreciate it if you could take two minutes. The first one up was at microphone 2.

Professor D. Michael Risinger (N.J.): I support the ultimate consideration of the motion by the Institute, but I want to make it clear that I do not personally oppose the death penalty based on a moral absolutist stance but because of process issues, the risks the death penalty imposes on the factually innocent or wrongfully convicted, and also because of distortions in the

criminal process of postconviction relief that are driven by the desire to carry out the death penalty efficiently but that work to the detriment of the factually innocent in all types of criminal convictions.

In this regard, it is necessary to be clear on the magnitude of the problem. In his concurrence in Kansas v. Marsh, 548 U.S. ___, 126 S. Ct. 2516, 2538 (2006), Justice Scalia took the position that factually wrongful convictions occur in only about 27 out of every hundred thousand cases. Unfortunately, he is wrong.

In an article now in press in the *Journal of Criminal Law and Criminology* [D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (forthcoming 2007)], I have used the DNA exonerations in capital cases and an empirically proper associated set of cases as a denominator to derive what the minimum actual innocence rate in capital cases actually is. It is 3.3 percent, more than 120 times Justice Scalia's claimed rate. This also strongly suggests that in the thousand-plus executions since the resurrection of the death penalty there have been three dozen or so factually innocent—that is to say, they weren't there, they didn't do it—factually innocent persons executed in the United States.

Whatever your position on the death penalty, it is important for both sides of the death-penalty debate to deal with the best available information on the magnitude of the problem, and if you wish to check the procedures and process by which this derivation was made you can Google my name, Risinger, and then "wrongful conviction." You'll see a preliminary draft of the article, and the final article will be out within about six weeks.

President Traynor: Thank you. We will only be able to accommodate the speakers presently standing for about a minute and a half each and no more. I am sorry, but this is just the beginning of the conversation that will ensue throughout the year through e-mail and correspondence.

Professor Eric M. Freedman (N.Y.): In response to the motion, the leadership has said two things, one of which I don't think needs to detain us very long, which is, gee, should the ALI get into this? As Roger said, the ALI got into this some decades ago and its work was used to support the constitutionality of capital punishment. We lost our virginity on this a long time ago, and, even if that were not true, it is a critical legal issue and we have the expertise and we should do it.

Now, on the process issues of how to do it and what we have to contribute, to me it makes rational sense to be in the Model Penal Code, because if you were to propose a statutory provision, which a state could adopt or could not adopt, as with many other revisions that you already have, that said, "The penalty of death shall not exist in this state," then the supporting rationale would be, one, its intention with the purposes of this sentencing project, which we're going to discuss this afternoon; two, the huge amount of resources, fully documented and fully able to be put forth, and expense of the death penalty diverts resources from more productive uses; and three, also fully documented, it ratchets up all the noncriminal sentences in a way that

is totally at odds with what we are trying to achieve, and therefore we recommend that, if you are going to implement our vision of a just sentencing system, you don't have the death penalty.

Now it is perfectly true that a state may pick that item off our menu or may not pick that item off our menu and thereby reduce the effectiveness of our proposed structure, but that is no different than anything else that we are doing. Therefore, I certainly hope that, next year when we are here, the leadership, if it doesn't like the idea of putting it in this project, will at least come with some work plan for how this critical issue, critical to every judge and lawyer, is going to be addressed within the Institute's framework so that we do discharge our debt to history about this.

President Traynor: Thank you.

Mr. Peter F. Langrock (Vt.): I am opposed to the death penalty, but a cost-benefit analysis of this situation—I am worried about the two million or three million or ten million people who are going to be sentenced in the future. If I thought we could abolish the death penalty here by action, I would take a different position.

The one point I wanted to make, to respond to you, Mike, the one thing we do not want to become is enablers. We do not want to set up a system that sets up a process for administering the death penalty. I can live without a mention of it, I can live with a statement that says we are against it, but for us to try and deal with procedures that would enable the limitation, the constitutional limitation of the death penalty, would be a mistake.

President Traynor: Thank you.

Professor Beverly McQueary Smith (N.Y.): I am Beverly McQueary Smith, Professor of Law at Touro Law Center, formerly of Huntington, New York, now of Central Islip, New York. In the interest of full disclosure, I will state that I am the past President of the National Bar Association, and, as one of the few minority members of this body, I have to tell you that in 1999 I asked for the abolition of the death penalty in a written article. [See Beverly McQueary Smith, *Don't Go Gentle into That Night*, 13 NBA NAT'L B.A. MAG. 3 (1999).] I also wrote an article dealing with the imposition of the death penalty in the U.S. to determine whether or not it comported with international norms. [See Beverly McQueary Smith, *The Imposition of the Death Penalty in the United States of America: Does It Comply with International Norms?*, 15 TOURO L. REV. 529 (1999).] I determined in that article that we did not comport with international norms that were consistent with human rights.

You have citations throughout your draft, on pages 38 and 39 and 74 [§ 1.02(2), Reporter's Note to Comment *j*; § 6A.02, Comment *g*], which talk about the disparate impact of the criminal-justice system on black people and other people of color in the U.S. of A. We cannot basically hide our heads in the sand like ostriches and pretend that we cannot address this issue and pretend it is going to go away. We already know that there is a disproportionate impact on blacks and browns in our criminal-justice system, and we have to deal with it as a body of intellectuals who can actually make a difference and change the outcome so that we can regain our moral suasion in the U.S. and throughout the world. Thank you very much.

President Traynor: Thank you. It is an important point and we hope you will participate in the conversation that is going on in the next year. Thank you.

Professor Smith: Absolutely.

Professor Roger J. Goebel (N.Y.): In view of the fact that the European Union makes the abolition of the death penalty a prerequisite for any country to join the European Union and that the European Convention on Human Rights requires all signatories at least to declare a moratorium and hopefully to eliminate it altogether, there is, I think, a substantial reason why a civilized country like the United States and a body like the ALI should consider this question.

Unlike the prior speaker, I do not believe that customary international law has evolved to the point where it can be said that the death penalty is inconsonant with customary international law, but, like the majority opinion in *Lawrence* [Lawrence v. Texas, 539 U.S. 558 (2003)], it is certainly appropriate to consider what other civilized countries are doing.

Now as to the impact on the Institute and its efficiency, that is obviously a grave matter, but if, at the very least, this body should have an educated debate, the members of the body, who are certainly not without influence in their own states, will be better capable of dealing with the issue in their own states. Furthermore, even if, as I suspect, the body would ultimately decide not to take a vote on the matter or to take an adverse vote for considerations of efficiency, that would not eliminate the possibility of having the current draft consider, in § 7.07A and § 7.07B or elsewhere, heightened standards of evidence and proof to be used in those states that do adopt capital punishment, because it is, I think, without controversy today that innocent people are condemned to death and that far too many defendants have been sentenced to death despite serious questions of fact concerning their guilt.

President Traynor: Thank you.

Mr. George Paterson Barton (New Zealand): My name is Barton from Wellington, New Zealand, a country that has been without capital punishment for over 40 years. For the reasons given by the mover and seconder of the motion, I consider that the basics of the whole project are seriously undermined if the motion is not accepted by the membership. I entirely approve.

President Traynor: Thank you.

Professor Evan Tsen Lee (Cal.): I would like to quote very briefly from the beginning of the Reporter's Introductory Memorandum. It says [on page xxvii]: "Within American criminal law, it would be difficult to find a subject of greater social importance than the sentencing of offenders. It would likewise be difficult to identify an area of greater policy flux."

Those statements are unquestionably true, but they are not really specific enough. In fact, within American criminal law it would be difficult to find a subject of greater social importance than capital punishment. It would likewise be difficult to identify an area of greater policy flux

than capital punishment, and yet the draft, as it is currently constituted, proposes to say nothing about it.

Now I understand and am sympathetic to the concern that taking a position on capital punishment might influence or hurt adoptions in states where capital punishment is particularly popular, but I actually think a lot can be done to limit such backlash. I mean, I think, as the Reporter pointed out, that the states where these sentencing commissions exist, including North Carolina and Ohio, are very, very ardent capital-punishment states. So the question really of what position to take or whether to take a position on capital punishment, as opposed to the adoption and structure of sentencing commissions, those are completely logically severable questions, and I think that could be made very clear in the draft.

If I could just say one more thing, which is we do have something to add to this unquestionably, and it is not to take a moral position. The empirical research on capital punishment, on the costs and benefits of capital punishment, is all over the place. It goes both ways, and largely it depends on who funds the research. What the ALI can add is a neutral and dispassionate and trusted voice in giving an assessment of what the empirical data really says.

President Traynor: Thank you. Our last speaker at microphone 1.

Mr. Ronald Frederick Waterman (Mont.): I litigate in this area. I have been present during an execution. It is time for this institution, I believe, as it is time for every responsible institution in the United States, to take positions on this subject. I know what my opinion would be, but I think that we forget that part of what we are is a voice, a voice of reason that leads to just results, that points the way sometimes when the law is confused. And I will submit that the counterbalance to the concern about the adoption of this Model Penal Code is more than offset by the fact that, by taking a position that is fundamentally correct, we enhance the standing and stature that we have had during the entirety of The American Law Institute.

President Traynor: We thank the proponents of the motion and the speakers on the floor this morning not only for making a contribution to this introductory conversation but also for the highly professional tone with which the debate was conducted. We appreciate your attention on it. We will now get to the project on Sentencing, and Roberta Ramo, President Designate, will be chairing the remainder of that discussion. Thank you very much.

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Summary of Members' Comments on the Capital Punishment Electronic Forum
(listed in order in which they were posted)
(November 26, 2007)

1. Mark Arnold (Husch & Eppenberger, LLC, Saint Louis, MO): abandon the death penalty on pragmatic grounds, namely that the costs (to victims, the system, et al.) outweigh the benefits.

2. Michael Vitiello (University of the Pacific, McGeorge School of Law, Sacramento, CA): agrees with Arnold.

3. David Bagwell (sole practitioner, Fairhope, AL): ALI should not opine on whether a state should or should not have the death penalty. Abolition of the death penalty is a political issue, not a legal one.

4. Martin Cowan (retired Professor, Florida State University School of Law): a resolution on the motion will be divisive for the Institute. Even if a large majority of ALI members is against capital punishment, it would be valuable to retain some version of section 210.6. Personally concerned about the execution of the innocent, and the use of unreliable evidence such as unsupported confessions and eyewitness identification testimony. Recommends that ALI bring section 210.6 up to date on those issues.

5. Elizabeth Hillman (Rutgers-Camden, State University of New Jersey School of Law): supports the Clark-Podgor motion.

6. Dennis Braithwaite (Rutgers-Camden, State University of New Jersey School of Law): supports the Clark-Podgor motion.

7. Gilbert Merritt (U.S. Court of Appeals, 6th Circuit Judge, TN): favors a study by ALI to produce a "full, accurate description" of the present law, especially constitutional law. The result will probably be a conclusion that there is no way to make death penalty law "rational and humane."

8. Kathryn Kase (Texas Defender Service, Houston, TX): ALI should do a study – and ultimately should oppose the death penalty.

9. Carolyn King (U.S. Court of Appeals, Fifth Circuit, TX): ALI should not take a position for or against the death penalty. It is a moral and political issue on which ALI has no special competence. But ALI should undertake a project to restate existing death penalty law and make suggestions to improve the law.

10. David McCord (Drake University Law School, Des Moines, IA): ALI should not advocate the abolition of the death penalty because it is not within ALI's core competence and mission. Also, ALI should not re-examine MPC section 210.6 for a number of reasons (which he elaborates). Rather, that section should "lie as an artifact of an earlier age."

11. Evan Lee (University of California, Hastings College of the Law): ALI did not shy away from other political or moral issues in the Model Penal Code. It did shy away from the

death penalty not because the subject was outside its competence or mission, but as a prudential matter so as not to endanger the whole project. He favors a separate ALI project that would be a "hard-headed analysis" of the empirical scholarship and an estimate of the impact of the death penalty on the courts.

12. Mark Stichel (Gohn, Hankey & Stichel, LLP, Baltimore, MD): opposes the motion. ALI has no superior moral authority or lobbying muscle than others who have unsuccessfully lobbied for years for abolition of the death penalty. He supports an ALI project to propose "a restatement or recodification of the law of capital punishment," which would include formulating rules and guidelines for the administration of capital punishment. Such a study by ALI would be authoritative and vetted in the typical ALI process.

13. John Beckerman (Rutgers-Camden, State University of New Jersey School of Law): supports the motion; opposes ALI's undertaking a new study or project on the death penalty -- because it won't tell us anything new.

14. Steven Friedell (Rutgers-Camden, State University of New Jersey School of Law): supports the motion; the death penalty question can be viewed as a moral question, and as a policy question; also as a social, historical, even theological question. However, it is fundamentally also a legal question and thus falls squarely within the province of ALI.

15. Mary Coombs (University of Miami School of Law): supports the motion. The facts underlying reasons for or against capital punishment are both empirical and legal and thus the motion raises an issue on which ALI has special knowledge.

16. Vincent Del Buono (former Prog Mgr, Security, Justice & Growth Program, British Council/UK DFID in Abuja, Nigeria): the Council should poll the entire ALI membership asking whether the member is for abolition or retention of the death penalty (and not whether ALI should take a position on the matter). The results of the poll could help the Council and ALI leadership in charting a course for ALI.

17. Joseph Dellapenna (Villanova University School of Law, PA): personally opposes the death penalty but does not support an up-or-down vote on the motion. He would support a serious study by ALI (not an empirical study) of the evidence and arguments relative to capital punishment, which study should recommend a position on the question within a stipulated time, perhaps two to three years. Such a study would carry greater weight than a vote on the motion.

18. Diane Amann (University of California-Davis, School of Law): ALI is ready to adopt the motion now. But if it refrains, then it should undertake a prompt and thorough study of capital punishment.

19. Joan Heminway (University of Tennessee College of Law): "The disrespect that capital punishment shows for human life and dignity is too high a price to pay for the limited retributive, deterrent, and incapacitative functions it may serve. The ALI has the knowledge and capacity to stand up against capital punishment without further study. It--we--should do so."

20. Eric Freedman (Hofstra University School of Law): Even if the major structural flaws in the operation of the death penalty system could be redressed with adequate resources, it is far better to devote those resources to improving the entire criminal justice system. Some

states are already moving in this direction. He favors a study and not an up-or-down vote on the motion. "Because our unique strength as an organization comes from the well-reasoned and well-documented back-up for our policy positions, I would disagree with those who have suggested that we should simply pass the Clark-Podgor motion without further ado. I would urge that instead we commit to the production of a study whose entire content will endure as a proud model of the Institute's finest work." And "by the time the ALI issued its study there would be states whose political processes could be influenced by our work."

21. Cynthia Lee (George Washington University Law School): supports the Clark-Podgor motion, quoting Justice Blackmun in Callin v. Collins: "The problem is that the inevitability of factual, moral, and legal error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution."

Summary of Members' Comments Submitted to ALI separately from the Online Forum
(listed in order in which they were received)
(November 26, 2007)

1. Stephen Presser (Northwestern Law School, Chicago): Recommends staying out of this area. Reasonable people can differ over retention or abolition of the death penalty but not over its constitutionality. ALI should clarify law & not engage in policy debates. Even projects like Corporate Governance, which have a prescriptive element, are undertaken in the belief that there are objectively correct solutions to the problems addressed. ALI would lose some of its legitimacy, which comes from objectively illuminating the law, if it takes a position on subjects like capital punishment, abortion, affirmative action and others on which, as an organization, it has no special expertise to offer.

2. Thomas Walsh (Bryan Cave, LLP, St. Louis): ALI should not serve as a platform for policy reformers. Debate on the motion will be divisive and fallout from its adoption may well be devastating, both financially and reputationally, for the Institute.

3. Thad Long (Bradley, Arant, Rose & White, LLP, Birmingham, AL): advises against ALI's taking a position on capital punishment for 3 reasons: (1) ALI has been effective in getting its views accepted because it is perceived "as a scholarly, objective analytical body" and not "as an activist organization." (2) Not everyone sees capital punishment as a moral issue whose resolution is so clear that ALI should advocate its abolition. ALI's entry into this political thicket will tarnish its reputation for objective reliability and set a precedent for deeper advocacy into the political thicket in the future. (3) Individual members can advocate on political or moral issues, but shouldn't be able (by majority vote or poll or other means) to convert ALI into an advocacy institution, which would do ALI more harm than good.

4. Arnold Mytelka (Kraemer Burns, Mytelka et al.; Springfield NJ): sent in an opinion column he wrote for the NJ Law Journal (published in the 11/5/07 issue) urging the NJ legislature to abolish the death penalty and substitute life without parole as recommended (with only one dissent) by the NJ Death Penalty Study Commission.

5. Patricia Wald (retired U.S appeals judge, D.C. Circuit): Does "not have an absolutist view of the death penalty as morally wrong" but is troubled by the callous way in which it is administered, which makes uniform standards almost impossible to implement. Realizes problems for ALI's image if it goes either way but ALI should have the courage to confront the question of capital punishment. It is a paramount question in Europe; if ALI comes out in favor of its use, that could affect some of our international projects but we must face the choice of condemning or accepting it in stringent circumstances or decide there simply are no standards or circumstances or restrictions that will work. The U.S. Supreme Court has embarked on a second round of parsing procedures for using capital punishment. ALI may be able to contribute to what, if any, procedures, standards or circumstances could make it justifiable, or if that is majority sentiment whether it should never be used.

Concluding note:

Professors Ellen Podgor and Roger Clark, the makers of the motion last May, sent in the following message, here quoted in its entirety:

"We would like to thank the Institute for hosting this forum and the Meltzer Committee for carefully exposing the issues. We are very grateful to the many people who wrote thoughtful comments, especially those who may have found the forum technologically intimidating. The ALI is engaged in a re-examination of sentencing law and policy and is proposing solutions that would enhance the existing structure and process. We continue to believe that this organization, if it is to be true to itself, should deal with the most extreme of sentences -- death. It is apparent that there are strong views for proceeding to a vote on our motion, or at least for further consideration to be given to the death penalty in the sentencing project or in another ALI project pertaining specifically to the sentence of death. We are hopeful that these voices will be heard and that the Institute will take the appropriate steps to offer its expertise."

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Annex 6

To: ALI Council

From: Paul L. Friedman, Program Chair
Lance Liebman, Director

Date: December 3, 2007

Re: Program Committee Recommendation Regarding the Death Penalty

On Friday, November 30, the Program Committee[*] met by telephone and unanimously agreed to recommend to the Council the following next steps concerning death penalty jurisprudence. The Committee's consideration benefited from the excellent memorandum prepared by the ad hoc committee chaired by Dan Meltzer, another copy of which is attached. The Committee also learned from the successful online forum open to all ALI members, and appreciates the work of Susan Appleton as its moderator. Elena Cappella's 4-page summary of the members' submissions is attached (along with a 20-page document containing the full text of the submissions).

The Committee believes that the Institute should take further steps to consider the American law regarding the death penalty and its operation in practice. One reason is that we are currently engaged in work on criminal sentencing. Another is that the Model Penal Code, an important ALI achievement, includes in §210.6 a set of propositions for administering a death penalty system. That earlier ALI work influenced state law. It contains (for jurisdictions deciding to have a death penalty) some recommendations that most of us regard as sound, but overall the section cannot be regarded as satisfactory jurisprudence today. A third and related reason is that the system developed by the Model Penal Code was novel and untested in 1962; we now have several decades worth of experience against which one can assess whether the death penalty provisions of the MPC have worked as anticipated and whether they have succeeded in creating a reasonably fair system for the administration of capital punishment in those states that have chosen to impose the death penalty. A fourth reason is that some ALI members seek to have the Institute recommend the abolition of the death penalty, and the Institute should give this matter more serious attention than a mere vote on a motion to endorse abolition would provide.

The Program Committee recommends that the Council and the Institute's membership not act on this subject without further study and process. Specifically, this would rule out simply withdrawing §210.6 of the Model Penal Code without further analysis and discussion. Process – which includes written work, evaluation, and measured reflection – is our greatest strength and the only way we can make a credible contribution to public consideration of this important legal subject.

[*] The following Committee members joined in the teleconference: Kenneth Abraham, Paul Friedman, Margaret Marshall, Daniel Meltzer, Ellen Peters, Jane Stapleton, Larry Stewart, and Michael Traynor. (Members Harold Koh, Carolyn Lamm, and Lee Rosenthal were unable to participate, though all have been involved in the discussion of this matter.) Also on the call were Susan Appleton, Roswell Perkins, Roberta Ramo, Lance Liebman, and Elena Cappella.

The Committee recommends that the Director identify an individual to write a 25-50 page paper that would initially be received and discussed by a small advisory group. The paper would not be based on original research. It would draw upon the Meltzer Committee's summary of the ALI's treatment of the death penalty in the past and the legitimate concerns about the relationship of our still-extant words to current issues. It would review the literature, the case law, and reliable data concerning the most important contemporary issues posed by the ultimate question of retention or abolition of the death penalty and, if retained, what limitations should be placed on its use and what procedures should be required before that sentence is imposed. Another way of asking the question is this: Is fair administration of a system of capital punishment possible? Relevant issues include jury selection, the allocation of responsibility between judge and jury, the use of aggravating and mitigating factors, the deterrence question, the availability of competent counsel and other resources for the defense of capital cases, whether discrimination and unfettered prosecutorial discretion can be effectively addressed, as well as issues of cost and innocence. Many of the issues bear on the actual operation and actual effects of administering capital punishment under state statutes, including those modeled on §210.6. The paper would summarize the most recent Supreme Court jurisprudence, including the pending lethal-injection case which is expected to be decided in the current Term. It would also place U.S. death penalty practice and jurisprudence in an international context, summarizing the practices of other developed countries and, to the extent the information is available, assess the impact of the death penalty on perceptions of United States law abroad.

Without prejudging the paper, it is clear to us that it would show that much has changed since MPC §210.6 was endorsed by the Institute and would evaluate whether §210.6 remains an appropriate recommendation of the ALI in view of all that is known today. Thoughtful statements were made by a number of ALI members on the floor of the last Annual Meeting and again this fall through the electronic media. We heard differing views in that discussion, and in the Program Committee's deliberations, about whether and if so how the Institute should address capital punishment. Some who support our engaging in work on the subject have suggested that a paper of this sort should propose (or discuss alternatives concerning) procedures legally necessary or appropriate for jurisdictions that choose to retain the death penalty. Others disagree, arguing that our proposing better procedures would be construed as an endorsement of capital punishment or as neutrality on the question of retention or abolition but with the effect of enabling states to retain capital punishment. Of course, after canvassing the jurisprudence both here and abroad and the available data regarding actual practices and costs and effects of capital punishment, the paper's author might conclude that a fair, just, and sufficiently reliable death penalty system cannot be devised. For the moment, however, the Program Committee makes no recommendation about whether the paper's author, guided by an advisory group, should include recommendations for improving death penalty systems or should propose that ALI take a position with regard to retention or abolition of the death penalty and what that position should be.

The process that the Committee recommends the Council endorse anticipates presentation of the paper to the Council next fall and to the 2009 Annual Meeting. The recommendation assumes the possibility that the Council and Annual Meeting might approve the paper as a statement of the Institute's current views regarding the death penalty, thus replacing incompatible or outdated provisions in the Model Penal Code. Even if the paper takes no position concerning support of or opposition to the death penalty, the process we propose would create the opportunity for a Council member or other ALI member to move that the Institute take such a position.

We will discuss this subject at Thursday morning's Council meeting in Philadelphia.

Excerpt of Minutes of Council Meeting on December 6-7, 2007
(minutes still subject to Council approval in May 2008)

After extensive discussion of the Committee's recommendations, upon motion duly made and seconded, the following resolution was adopted:

> **Resolution No. 07-17:** The Council approves in substance the recommendations of the Program Committee as described in the December 3, 2007, memorandum by Program Committee Chair Paul Friedman and Director Lance Liebman with the following qualifications and understandings:
>
> (1) That the timetable set forth in the memorandum is likely to be ambitious given the nature and extent of the proposed study.
>
> (2) That consideration be given to the appointment of more than one author for the study.
>
> (3) That the advisers include individuals with death penalty experience from various professional backgrounds and roles.
>
> (4) That the President consult with the Executive Committee about presenting this matter to the Institute's membership.