

Special Feature

No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code

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"From this day forward, I no longer shall tinker with the machinery of death."¹

I. Introduction

Justice Harry Blackmun was new to the Supreme Court in 1972 when the Court declared prevailing capital punishment statutes unconstitutional in the landmark case of *Furman v. Georgia*.² He dissented from that decision, along with the three other Justices recently appointed by President Richard Nixon. Justice Blackmun wrote separately to explain that he believed that the death penalty was an issue for the legislative and executive spheres: "The authority [to abolish capital punishment] should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue."³ After the Court reauthorized the death penalty by upholding a new generation of capital statutes in 1976, Justice Blackmun worked for most of the next two decades with the center of the Court to apply the Court's increasingly convoluted capital jurisprudence—neither dissenting from the left (as Justices Brennan and Marshall did, voting against every execution that came before the Court⁴) nor from the right (as Justices Scalia and Thomas now do in rejecting the Court's constitutional requirement of individualized capital sentencing⁵). Near the end of his career on the bench, however, Justice

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1. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

2. 408 U.S. 238 (1972).

3. *Id.* at 410 (Blackmun, J., dissenting).

4. *See, e.g., Boggs v. Muncy*, 497 U.S. 1043, 1043 (1990) (Brennan & Marshall, JJ., dissenting from denial of application for stay of execution) ("Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, . . . we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case." (citation omitted)).

5. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 373 (1993) (Scalia, J., concurring) ("In my view the *Lockett-Eddings* principle that the sentencer must be allowed to consider 'all relevant mitigating evidence' is quite incompatible with the *Furman* principle that the sentencer's discretion must be channeled."); *id.* at 374 (Thomas, J., concurring) ("Although *Penry v. Lynaugh*, 492 U.S. 302

Blackmun abandoned the enterprise of attempting to regulate the practice of capital punishment under the Constitution. After cataloging the incoherence and inefficacy of the Court's death penalty doctrine since 1976, Blackmun declared that "the death penalty experiment has failed"⁶ and announced his refusal to further engage in it: "From this day forward, I no longer shall tinker with the machinery of death."⁷

The decision of the American Law Institute (ALI) in October of 2009 to withdraw the death penalty provisions (§ 210.6) of the venerable Model Penal Code (MPC) "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment"⁸ represents a similar recognition of the futility of further regulatory efforts. Although the ALI voted neither to endorse nor oppose the abolition of capital punishment as a general matter, its withdrawal of MPC § 210.6 was accompanied not only by a statement recognizing the "intractable" problems in the capital justice process but also by a deliberate refusal to undertake any further attempts at law reform in the area of capital punishment "either to revise or replace § 210.6 or to draft a separate model statutory provision."⁹ Thus, it is clear that the ALI's decision to forgo further reform efforts was based not on its own resource constraints or other pragmatic concerns, but rather, like Justice Blackmun's renunciation of constitutional regulation, on the impossible—"intractable"—nature of the task.

Justice Blackmun's repudiation of the Court's death penalty jurisprudence and the ALI's withdrawal of the MPC's death penalty provisions are linked by more than their joint acknowledgement of the intractability of the problems in the capital justice process. Rather, the MPC's death penalty provisions provided the template for the modern death penalty statutes that the Supreme Court approved in 1976, and the failures of the Supreme Court's regulatory role in the post-1976 era provided the foundation for the ALI's withdrawal of the MPC's death penalty provisions. In the remainder of this introduction (Part I), we describe the origins of the MPC's death penalty provisions, the role they played in the Supreme Court's death penalty jurisprudence, the events leading up to the ALI's withdrawal of MPC § 210.6, and the potential implications of the ALI's decision. Part II consists of the paper commissioned from us by the ALI, which, while not adopted by the ALI as its own publication, informed the ALI's decision to withdraw

(1989), 'remains the law,' . . . in the sense that it has not been expressly overruled, I adhere to my view that it was wrongly decided." (citations omitted).

6. *Callins*, 510 U.S. at 1145 (Blackmun, J., dissenting from denial of certiorari).

7. *Id.*

8. Message from Lance Liebman, Dir., Am. Law Inst. (Oct. 23, 2009), <http://www.ali.org/news/10232009.htm>.

9. AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 4 (2009), available at http://www.ali.org/doc/Capital%20Punishment_web.pdf.

§ 210.6.¹⁰ This paper highlights “the major concerns regarding the state of the death-penalty systems in the United States today”¹¹ and thus should be of interest not only to those seeking to understand the decision of the ALI but also to those interested in the fairness and efficacy of the capital justice process more generally.

The ALI’s Model Penal Code project arose from the ALI’s general mission as an independent, nonprofit, nonpartisan, expert organization to “produc[e] scholarly work to clarify, modernize, and otherwise improve the law.”¹² The ALI is perhaps best known for its “Restatement” projects, in which the ALI has sought to address uncertainty in the law through restatements of basic legal subjects that serve as authoritative sources for judges and lawyers.¹³ When the ALI turned its hand to a project on American criminal law, however, “it judged the existing law too chaotic and irrational to merit ‘restatement.’”¹⁴ Instead, the ALI decided to draft a model penal code that could serve as a template for state legislative reform. The ALI’s enormously influential Model Penal Code project—“far and away the most successful attempt to codify American criminal law”¹⁵—was launched in 1951, and the MPC was finally adopted by the ALI in 1962. While the MPC was under preparation, the Advisory Committee to the MPC Project, which was headed by Professor Herbert Wechsler of Columbia Law School as Chief Reporter, voted 18 to 2 to recommend the abolition of capital punishment.¹⁶ But the ALI’s Council held the view “that the Institute could not be influential” on the issue of abolition or retention of the death penalty and thus should not take a position either way.¹⁷ The body of the Institute agreed with the Council, and thus the MPC took no position on the issue but rather promulgated model procedures for administering capital punishment for adoption by states that retained the death penalty.¹⁸

The death penalty procedures promulgated by MPC § 210.6 differed from prevailing capital statutes in several key provisions. First, the MPC allowed the death penalty only for the crime of murder, not for crimes such as kidnapping, treason, and rape (among others) as many state statutes permitted.¹⁹ Second, the MPC categorically exempted juveniles from the

10. *Id.* at 1.

11. *Id.*

12. *ALI Overview*, AM. LAW INST., <http://www.ali.org/index.cfm?fuseaction=about.overview>.

13. *Id.*

14. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 323 (2007).

15. *Id.* at 320.

16. MODEL PENAL CODE § 210.6 cmt. at 111 (1980) (repealed 2009).

17. *Id.*

18. *Id.*

19. *See id.* at 117 (“Although the Model Code neither endorses nor rejects capital punishment for murder, it does disallow the death penalty for all other offenses.”); *THE DEATH PENALTY IN AMERICA* 36–38 (Hugo Adam Bedau ed., 1997) (listing the different crimes eligible for capital punishment in thirty-six states).

death penalty and gave the trial judge discretion to exempt defendants if "the defendant's physical or mental condition calls for leniency."²⁰ Moreover, the MPC precluded a sentence of death in cases in which "the evidence suffices to sustain the verdict, [but] does not foreclose all doubt respecting the defendant's guilt."²¹ As for which murders should be punished with death, the MPC did not confine capital punishment to "first-degree" murder (generally defined by state statutes as either premeditated and deliberate murder or felony murder); rather, the MPC made eligibility for the death penalty for any murder turn on the finding, in a separate penalty phase, of one of eight "aggravating circumstances" that ranged from the more objective and clear-cut ("The murder was committed by a convict under sentence of imprisonment."²²) to the more subjective and qualitative ("The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."²³). The MPC's innovation was not only the list of aggravating circumstances but also the requirement of a bifurcated procedure in which the determination of guilt and the determination of the appropriate penalty were to be considered in two separate proceedings. The MPC required the finding of at least one aggravating circumstance at the penalty phase for a defendant to be eligible for the death penalty but also required the consideration of "mitigating circumstances" and authorized the death penalty only when "there are no mitigating circumstances sufficiently substantial to call for leniency."²⁴ Mitigation consisted of eight statutorily defined mitigating circumstances (such as "[t]he defendant has no significant history of prior criminal activity"²⁵ and "[t]he youth of the defendant at the time of the crime"²⁶), but the sentencer was also instructed to consider other evidence "including but not limited to the nature and circumstances of the crime [and] the defendant's character, background, history, mental and physical condition."²⁷ The MPC's structuring of the penalty phase, with its lists of aggravating and mitigating circumstances, was a significant departure from prevailing practice, which gave sentencing juries essentially unfettered

20. MODEL PENAL CODE § 210.6(1)(e); *see also id.* § 210.6 cmt. at 134 (rationalizing the "leniency" language as cognizant of the possibility that in some unusual instances, such as a defendant with a terminal illness, "it may be thought that fate's judgment on the defendant is punishment enough"); THE DEATH PENALTY, *supra* note 19, at 41 (listing the "Minimum Age Authorized for Capital Punishment, by Jurisdiction" in 1994).

21. MODEL PENAL CODE § 210.6(1)(f); *see also id.* § 210.6 cmt. at 134 (describing the provision as "an accommodation to the irrevocability of the capital sanction" that preserves the possibility of new exculpatory evidence at a later time); Alan Berlow, *The Wrong Man*, ATLANTIC ONLINE, Nov. 1999, <http://www.theatlantic.com/past/docs/issues/99nov/9911wrongman.htm> (decrying the fact that "[t]o date no state has adopted this 'residual doubt' provision").

22. MODEL PENAL CODE § 210.6(3)(a).

23. *Id.* § 210.6(3)(h).

24. *Id.* § 210.6(2).

25. *Id.* § 210.6(4)(a).

26. *Id.* § 210.6(4)(h).

27. *Id.* § 210.6(2).

discretion in capital trials to impose life or death (and for a much wider range of crimes than simply murder) without any statutory standards or guidance.²⁸

For a decade after their adoption, the MPC death penalty provisions had virtually no impact on state procedures.²⁹ But after the Supreme Court constitutionally invalidated prevailing death penalty statutes in 1972 in *Furman*, a large majority of states sought to draft new capital statutes that would meet the *Furman* Court's apparent concern with standardless sentencing discretion. Although a significant number of states sought to address the problem of standardless discretion through the enactment of mandatory capital statutes,³⁰ a substantial number of states modeled their new statutory endeavors on the Model Penal Code.³¹ In 1976, the Supreme Court struck down mandatory capital statutes as unconstitutional under the Eighth Amendment,³² but upheld the "guided discretion" statutes enacted by Georgia, Florida, and Texas.³³ In doing so, the Court made a point of referencing the ALI's efforts to guide capital sentencing discretion through the Model Penal Code and the similarity, either textual or functional, of each of the state statutes before it to the MPC's death penalty provisions.³⁴

Two years after the 1976 cases reinstating the death penalty, the Supreme Court invalidated a conviction obtained under Ohio's capital statute on the ground that the statute's narrowly drawn list of mitigating circumstances unconstitutionally constrained the sentencer's consideration of mitigating evidence that might call for a sentence less than death.³⁵ In doing so, the Court adopted as a constitutional requirement an approach virtually identical to the MPC provision that capital sentencers must consider "the nature and circumstances of the crime [and] the defendant's character,

28. See *id.* § 210.6 cmt. at 129-32 (discussing the history of capital sentencing and contrasting it with the procedures expounded in the Model Penal Code).

29. While "[p]rior to 1972, no American jurisdiction had followed the Model Code in adopting statutory criteria for the discretionary imposition of the death penalty . . . the only discernible effect of the Model Code proposal was introduction of a bifurcated capital trial procedure in six states." *Id.* at 167-68 (citing Comment, *Jury Discretion and the Unitary Trial Procedure in Capital Cases*, 26 ARK. L. REV. 33, 39 n.9 (1972) (listing states)).

30. See *id.* at 168 ("Following *Furman* the legislative response was diverse, with the majority of retentionist jurisdictions enacting mandatory capital punishment for certain offenses.").

31. See *id.* at 169 ("Each of the 19 new statutes examined when this comment was prepared resembles the Model Code provision and provides for bifurcation and consideration of specified aggravating circumstances.").

32. See *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

33. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

34. See *Gregg*, 428 U.S. at 193 (citing the Model Penal Code to reject the claim that standards to guide a capital jury's sentencing deliberations are impossible to formulate); *Proffitt*, 428 U.S. at 247-48 (noting that the Florida statute in question was patterned after the Model Penal Code); *Jurek*, 428 U.S. at 270 (recognizing that Texas's action in statutorily narrowing the categories of murder for which the death penalty may be imposed serves essentially the same purpose as the list of aggravating circumstances expounded by the Model Penal Code).

35. *Lockett v. Ohio*, 438 U.S. 586, 608 (1978).

background, history, mental and physical condition.”³⁶ As the ALI itself recognized, the Court’s cases from 1976 to 1978 outlining the constitutional preconditions for a valid capital punishment scheme “confirm what the 1976 plurality several times implied—that Section 210.6 of the Model Code is a model for constitutional adjudication as well as for state legislation.”³⁷

Shortly after the new generation of MPC-inspired, guided-discretion statutes were approved by the Court in 1976, executions resumed in the United States after a decade-long hiatus. Over the next quarter century, the national execution rate soared, reaching levels that the country had not seen since the early 1950s (though the execution rate has declined substantially in the first decade of the new century).³⁸ Many observers, us among them, lamented that the new generation of capital statutes failed to fulfill their promise of rationalizing the administration of capital punishment and ameliorating the problems that the ALI and the Supreme Court had sought to address.³⁹ Observers within the ALI were especially concerned about the shortcomings of the new capital statutes in light of the role that the ALI’s reform efforts and institutional prestige had played in the constitutional reinstatement of capital punishment. Thus, when the ALI approved the undertaking of a law reform project that would reconsider the provisions of the MPC relating to criminal sentencing in general, internal critics of the administration of capital punishment viewed the new project as an opportunity to reconsider the ALI’s contribution to the new status quo. In particular, law professor Frank Zimring, an Adviser to the new ALI Sentencing Project, called upon the Project to address (and call for the abolition of) capital punishment.⁴⁰ When the ALI set aside the question of capital punishment as beyond the scope of the Project, Professor Zimring resigned in protest as an Adviser and later published an article criticizing the ALI’s failure to address capital punishment.⁴¹

Zimring’s call for abolition within the ALI was taken up by members Roger Clark and Ellen Podgor, both law professors as well, who moved at the ALI’s annual meeting in 2007: “That the Institute is opposed to capital

36. MODEL PENAL CODE § 210.6(2); see also *Lockett*, 438 U.S. at 604 (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”).

37. MODEL PENAL CODE § 210.6 cmt. at 167.

38. See DEATH PENALTY INFO. CTR., EXECUTIONS IN THE U.S. 1608–2002: THE ESPY FILE (2010), <http://www.deathpenaltyinfo.org/documents/ESPYyear.pdf> (listing executions in the United States from 1608–2002); DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2010), <http://deathpenaltyinfo.org/documents/FactSheet.pdf> (tallying executions yearly from 1976–2010).

39. See generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (analyzing the Supreme Court’s doctrinal approach to capital punishment regulation).

40. AM. LAW INST., *supra* note 9, at 15 annex C.

41. *Id.* at 15 n.6 (citing Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code*, 105 COLUM. L. REV. 1396 (2005)).

punishment.”⁴² The President of the ALI responded by assigning the Institute’s Program Committee the task of deciding whether the ALI should study and make recommendations about the death penalty.⁴³ The President also appointed an Ad Hoc Committee on the Death Penalty “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.”⁴⁴ The Director of the ALI, Lance Liebman, engaged us, Carol Steiker and Jordan Steiker, to write a paper in which we would,

[R]eview 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?⁴⁵

Part II of this Article is the paper that we eventually submitted to the ALI, after detailed discussions of an earlier draft with an advisory committee assembled by the ALI consisting of prosecutors, defense lawyers, judges, and academics. The paper reviewed the history and current state of the administration of capital punishment in the United States and recommended that the ALI withdraw § 210.6 with the following statement: “[I]n 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.”⁴⁶

The Council of the ALI, its chief governing board, submitted a report to the body in advance of the ALI’s annual meeting in 2009. The Council recommended that the Institute withdraw the death penalty provisions of the MPC and not undertake any further project to revise or replace those provisions.⁴⁷ Although the Council’s report acknowledged “reasons for concern about whether death-penalty systems in the United States can be made fair,”⁴⁸ it did not endorse the statement that we proposed in the paper and instead recommended that the body take no position to either endorse or oppose the abolition of capital punishment.⁴⁹ At the ALI’s 2009 annual meeting, the body voted as the Council had recommended on the withdrawal of the MPC’s death penalty provisions and the decision not to undertake further reform efforts regarding capital punishment, but it also added, after several hours of vigorous discussion, the following statement: “For reasons

42. *Id.* at 11 annex 3.

43. *Id.*

44. *Id.*

45. *Id.* at 46.

46. *See infra* at ____.

47. AM. LAW INST., *supra* note 9, at 1.

48. *Id.* at 5 (capitalization omitted).

49. *Id.* at 6.

stated in Part V of the Council's report to the membership, the Institute withdraws Section 210.6 of the Model Penal Code in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment."⁵⁰

In essence, the body split the baby in half: it adopted the Council's report and thus rejected an explicit call for the abolition of capital punishment, but it also adopted the language from our report recognizing "current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." As Adam Liptak, who reported the ALI's decision for the *New York Times*, translated, "What the [I]nstitute was saying is that the capital justice system in the United States is irretrievably broken."⁵¹ The body's resolution went back to the Council, which must approve any action of the body before it becomes official policy of the ALI. In October 2009, the Council approved of the body's vote and statement, and the ALI's withdrawal of the death penalty provisions, and its reasons for that withdrawal, became official.⁵²

The ALI decision comes at a time of significant uncertainty for the American death penalty. Fifteen years ago, capital punishment in this country seemed firmly entrenched both politically and legally. Death sentencing (both in absolute numbers and as a function of homicides) peaked in the mid-1990s (averaging about 325 per year nationwide)⁵³ and executions climbed to their modern-era highs by the late 1990s (averaging close to 100 per year nationwide).⁵⁴ Reversal rates in capital cases dipped dramatically by the end of the 1990s as state and federal courts finished sorting through the bulk of challenges to the new state statutes adopted in the wake of *Furman*.⁵⁵ Moreover, in the late 1980s, the U.S. Supreme Court had rejected several prominent attacks on the administration of the death penalty, signaling a greater degree of deference toward state policies. In 1989, the Court declined to impose an Eighth Amendment bar against the execution of juveniles or persons with mental retardation.⁵⁶ And, perhaps more importantly, the

50. Message from Lance Liebman, *supra* note 8.

51. Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 5, 2010, at A11.

52. Message from Lance Liebman, *supra* note 8.

53. *Death Sentences by Year: 1977-2008*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-year-1977-2008> (tallying death sentences yearly from 1977-2008).

54. *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (tallying executions yearly from 1977-2010).

55. See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II 60 fig.3A (2000) (showing a regular decrease in post-conviction reversals from the early 1990s to 2000).

56. See *Stanford v. Kentucky*, 492 U.S. 361, 372-73 (1989) (rejecting the claim that an emerging national consensus precluded the imposition of the death penalty for offenders who were sixteen or seventeen years old at the time of the offense); *Penry v. Lynaugh*, 492 U.S. 302, 333-35 (1989) (rejecting the claim that an emerging national consensus precluded the imposition of the death penalty for offenders with mental retardation).

Court rejected in 1987 what appeared to be the last potentially comprehensive challenge to capital punishment—the claim that significant racial disparities in the imposition of the death penalty require judicial intervention (and perhaps abolition).⁵⁷ In the early 1990s, the Court also expressed skepticism that the Constitution affords any special protection against the execution of the innocent, emphasizing that collateral review of state criminal convictions has traditionally focused on constitutional rather than merely factual error.⁵⁸ On the legislative side, three states reenacted death penalty statutes in the 1990s (New Hampshire, New York, and Kansas),⁵⁹ and most of the state legislative efforts during this period were designed to expand rather than contract the availability of the punishment. At the federal level, the bombing of the federal courthouse in Oklahoma City culminated in the most significant comprehensive reform of federal habeas corpus law in the twentieth century, with Congress imposing unprecedented limits on the availability of federal habeas review of state capital convictions.⁶⁰

After this period of expansion during the 1990s, however, the most recent decade has witnessed a sea change in the political and legal status of the death penalty. The discovery of numerous wrongfully convicted and death-sentenced inmates (many of whom were exonerated via emerging sophisticated techniques for evaluating DNA evidence) appears to have weakened public support for capital punishment (especially in light of the nearly universal embrace of life-without-possibility-of-parole as the sentencing alternative to the death penalty). In addition, the economic crisis of 2008 has amplified growing concerns about the financial cost of capital punishment. Whereas twenty-five years ago many people attributed their *support* of the death penalty to the perceived financial savings relative to lifetime imprisonment,⁶¹ over the past decade it has become clear that the death penalty imposes substantial financial costs above and beyond ordinary imprisonment.⁶² Indeed, a new framework for calculating capital costs focuses on the cost of a capital prosecution actually culminating in an execution. In states where executions remain very rare events (and the costs of death-row incarceration are quite high), the results are staggering. In California, for example, estimates suggest that the cost of each execution obtained in the modern era (dividing total capital costs incurred during this

57. *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

58. *See Herrera v. Collins*, 506 U.S. 390, 400–02 (1993) (holding in a plurality opinion that “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation”).

59. *See, e.g.*, Act of Jan. 4, 1995, ch. 1, 1995 N.Y. Laws 1; Act of Apr. 22, 1994, ch. 252, 1994 Kan. Sess. Laws 1069; Act of Apr. 27, 1990, ch. 199, 1990 N.H. Laws 304.

60. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (codified as amended in scattered sections of 28 U.S.C.).

61. THE GALLUP REPORT, NOS. 232, 233, THE DEATH PENALTY: SUPPORT FOR DEATH PENALTY HIGHEST IN HALF-CENTURY 3 (1985).

62. *See infra* at ____.

period by the thirteen executions carried out) is about a quarter of a billion dollars.⁶³

Innocence and cost concerns have contributed to the remarkable decline in capital sentencing over the past decade. The past four years have produced about 115 death sentences per year, a greater than sixty percent decline from the highs of the mid-1990s;⁶⁴ each of the last four years produced fewer death sentences nationwide than any other year since reinstatement in 1976.⁶⁵ Executions have also dropped significantly, to an average of about forty-four per year over the past three years (compared to an average of about seventy per year over the preceding decade).⁶⁶ Some of this decline is attributable to concerns about whether the prevailing protocol for administering lethal injection sufficiently protects against unnecessary pain; such concerns led to the first judicially imposed moratorium on executions (lasting about seven months) in the post-*Furman* era.⁶⁷

Politically, the direction of the last decade has decisively favored reform and restriction. New Jersey (2007) and New Mexico (2009) repealed their death penalty laws, and New York chose not to reinstate the death penalty after its capital statute was found to violate state law.⁶⁸ Maryland flirted with abolition and instead chose to drastically limit the cases in which death could be imposed.⁶⁹ Several other states, including Kansas, Montana, New Hampshire, and Colorado, have seen repeal bills advance in the legislature without ultimate success.⁷⁰ North Carolina enacted a broad provision safeguarding against the racially discriminatory imposition of the death

63. Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. (forthcoming 2010).

64. *Death Sentences by Year*, *supra* note 53.

65. *Id.*

66. *Executions by Year*, *supra* note 54.

67. See Adam Liptak, *Challenges Remain for Lethal Injection*, N.Y. TIMES, Apr. 17, 2008, <http://www.nytimes.com/2008/04/17/washington/17lethal.html> (analyzing how state lethal injection protocols might be affected after the Supreme Court's decision in *Baze* effectively ended "the informal moratorium of the last seven months").

68. See Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3 (describing the repeal of New Jersey's death penalty); *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16 (reporting the repeal of New Mexico's death penalty); Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment*, WASH. POST, Apr. 13, 2005, at A3 (chronicling the committee vote not to reinstate the death penalty in New York).

69. See John Wagner, *Md. Likely to Pass Death Penalty Bill*, WASH. POST, Mar. 26, 2009, at B1 (explaining the limits placed on the use of the death penalty in Maryland).

70. See Kirk Johnson, *Death Penalty Repeal Fails in Colorado*, N.Y. TIMES, May 5, 2009, at A16; Raja Mishra, *N.H. Bill to Repeal Death Penalty Fails: Officer's Slaying Fuels Debate*, BOSTON GLOBE, Mar. 28, 2007, available at 2007 WLNR 5870704; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3 (noting that the Montana state legislature had debated repeal of the death penalty but did not adopt any repeal); Scott Rothschild, *Bill to Abolish the Death Penalty Fails in Kansas Senate*, LJWORLD (Feb. 19, 2010), http://www2.ljworld.com/news/2010/feb/19/death-penalty-ban-debate-kansas-senate-today/?city_local.

penalty,⁷¹ and many other states have established commissions to study various aspects of the administration of the death penalty within their jurisdictions.⁷²

On the legal side, the U.S. Supreme Court has increasingly imposed constitutional restraints on state capital practices. A trio of decisions in the early 2000s marked the first Supreme Court cases finding ineffective assistance of counsel in the capital context;⁷³ they appear to call for more searching review of counsel performance in capital litigation. The Court also embraced significant proportionality restrictions on the imposition of the death penalty, reversing its 1989 rulings permitting the execution of juveniles⁷⁴ and persons with mental retardation,⁷⁵ and invalidating an emerging effort to punish child rape with the death penalty.⁷⁶ Apart from the practical significance of these decisions in narrowing death eligibility, the Court's opinions provided a more solicitous methodological framework for challenging state capital practices as violative of "evolving standards of decency."⁷⁷ Whereas previous decisions privileged the raw count of state laws permitting or prohibiting the challenged practice, the Court's decisions invalidated the death penalty for juveniles and persons with mental retardation despite the fact that a majority of death penalty states authorized these practices.⁷⁸ The Court emphasized the role of nonlegislative indicia in gauging evolving standards, including expert opinion, international opinion, and polling data.⁷⁹ Moreover, in its decision invalidating the death penalty for child rape, the Court went beyond the facts of the case to proscribe the imposition of the death penalty for any nonhomicidal, ordinary crime on the grounds that prevailing death penalty law already invited an excessive risk of

71. North Carolina Racial Justice Act, ch. 464, 2009 N.C. Sess. Laws, available at <http://www.ncga.state.nc.us/Sessions/2009/Bills/Senate/PDF/S461v7.pdf>.

72. See, e.g., Act of July 29, 2009, ch. 284, 2009 N.H. Laws 544 (establishing a commission to study the death penalty in New Hampshire); Act of Jan. 12, 2006, ch. 321, 2005 N.J. Laws 2165 (establishing the New Jersey Death Penalty Study Commission).

73. See *Rompilla v. Beard*, 545 U.S. 374, 389 (2005) (holding that sentencing-phase investigation was inadequate in light of the norms for capital representation); *Wiggins v. Smith*, 539 U.S. 510, 533–34 (2003) (holding that investigation supporting counsel's decision not to introduce mitigating evidence was itself unreasonable); *Williams v. Taylor*, 529 U.S. 362, 398–99 (2000) (determining that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision).

74. *Roper v. Simmons*, 543 U.S. 551, 574 (2005).

75. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

76. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646 (2008).

77. See, e.g., *Atkins*, 536 U.S. at 321.

78. See Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 180–83 (2008) (discussing the transition in the Court's proportionality methodology).

79. See, e.g., *Atkins*, 536 U.S. at 316 n.21 (listing factors that support the finding of a national consensus against executing offenders with mental retardation).

arbitrary decision making.⁸⁰ Along these same lines, the last decade has seen an increased willingness of members of the Court to echo Justice Blackmun's reservations about the American capital system. In an obscure Kansas case adjudicating a technical flaw in the Kansas statute, four dissenting Justices insisted that the risk of error in capital cases called for a new capital jurisprudence informed by the lessons of wrongful convictions.⁸¹ In his concurring opinion in the lethal injection case, Justice Stevens expressed his view that the death penalty no longer serves societal purposes sufficient to justify its imposition, essentially joining Justice Blackmun in his unwillingness to continue the post-*Furman* experiment with capital punishment, though agreeing to abide by the Court's precedents as a matter of *stare decisis*.⁸²

In what ways might the ALI decision interact with these legal and political developments? Given the Supreme Court's invocation of the MPC in its foundational death penalty decisions, the Court has already accorded some significance to the ALI's views regarding the administration of capital punishment. The ALI's withdrawal of the MPC provisions—and its accompanying language recognizing “intractable” problems—straightforwardly undercuts the Court's reliance on the MPC—and the expertise reflected in the ALI's endorsement of a model approach to capital sentencing. In addition, the Court's newly crafted proportionality analysis (developed in its decisions invalidating the death penalty for juveniles and persons with mental retardation) enhances the constitutional significance of the ALI's action. Given the increased role of “expert” opinion in gauging evolving standards of decency, the ALI's doubts about the prevailing administration of the American death penalty are relevant to the Court's own determination whether current deficiencies are constitutionally tolerable. Equally important, the ALI's action will likely inform political debate about whether and how to reform the death penalty. As political actors increasingly ask whether the administration of the death penalty in their jurisdictions is sufficiently reliable and fair, the ALI's own assessment along these dimensions might well affect legislative outcomes.

The ALI's decision is also likely to be significant because it dovetails with the particular nature of contemporary concerns about capital punishment. The increased fragility of the American death penalty, both politically and legally, is rooted less in abstract moral dissatisfaction with the punishment than in pragmatic concerns about its administration. There does not appear to be markedly greater concern within the courts, legislatures, or the public at large about whether the death penalty denies human dignity or

80. *Kennedy*, 128 S. Ct. at 2661 (“[T]he resulting imprecision and the tension between evaluating the individual circumstances and consistency of treatment have been tolerated where the victim dies. It should not be introduced into our justice system, though, where death has not occurred.”).

81. *Kansas v. Marsh*, 548 U.S. 163, 207–10 (2006) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

82. *Baze v. Rees*, 128 S. Ct. 1520 (2008) (Stevens, J., concurring).

creates an inappropriate relation between state and citizen. Rather, the momentum toward restriction and restraint has been propelled by perceptions about the inability of states to implement the death penalty in an accurate, nonarbitrary, and efficacious manner. In this respect, the ALI decision proceeds along the same path. As our report indicates, the ALI did not endeavor to address the broad moral question of whether the death penalty is a just practice. Our report assumed, for the sake of argument, that states might have compelling reasons in the abstract for choosing to impose such a severe punishment, and we then turned to the question more suited to the expertise of the ALI—whether the system that the MPC capital provisions have helped to produce and sustain has successfully redressed the flaws in American capital practice that inspired states to turn to the MPC in the wake of *Furman*.

The ALI's decision to withdraw the MPC capital provisions—and to decline to investigate further reform—reflects skepticism about the capacity of sentencing instructions to ensure accurate, evenhanded capital decision making. The past ten years have seen similar expressions of skepticism from lawmakers and judges confronted with concrete evidence about the administration of the American death penalty. But even though the skepticism is not new, it likely carries distinctive weight when voiced by the very body that invested its labor and prestige in the effort to craft such instructions.

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