

# MURDER, THE MODEL CODE, AND THE MULTIPLE AGENDAS OF REFORM

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Over half a century ago, the American Law Institute, after President Roosevelt suggested that it turn its attention to "the field of the substantive criminal law," approved the recommendation of an advisory committee to undertake the preparation of a Model Penal Code. At the time, two contemporary observers remarked that the task might "prove to be impossible of performance on any comprehensive scale, under contemporary social and economic conditions."<sup>1</sup>

Indeed, the task might prove very difficult to perform satisfactorily under any imaginable social and economic conditions. This must have soon become apparent, if it was not so already, to those who undertook the task at that time. Some of the major problems involved in penal code revision are precisely epitomized in the issues that arise in relation to Model Penal Code section 210.2 dealing with murder, with which we are here concerned.<sup>2</sup>

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1. Wechsler & Michael, *A Rationale of the Law of Homicide: I*, 37 COLUM. L. REV. 701 n.1 (1937).

2. MODEL PENAL CODE § 210.2, which provides in full:

(1) Except as provided in 210.3(1)(b), criminal homicide constitutes murder when:

(a) it is committed purposely or knowingly; or

(b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged in or is 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, kidnapping or felonious escape.

(2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in section 210.6].

Anyone setting out to formulate practicable proposals for the reform of the law of murder is confronted with the need to meet at least three inescapable requirements, which we will call "doctrinal correctness," "political acceptability," and "systematic coordination." Sometimes these three goals all point in the same direction and there will be no conflict among them. But there will inevitably be matters that give rise to apparently irreconcilable cross-purposes. What trade-offs are made, what compromises are achieved, and with what results, are the essence of law reform. These questions are the focus of attention as we move from a celebration of the adoption of the Code by the Institute to a retrospective appraisal of the Code.

This paper is divided into four short segments. The first section gives examples of efforts in the Code's treatment of murder to meet the doctrinal, political, and coordinating goals of reform. Section II illustrates examples of the tension between goals that emerged in the reform of the law of murder. Section III discusses the impact of the choices made in the Code's murder provision as they were presented in 1962. Section IV addresses the tension between the Code's provisions on the substantive law of murder and sentencing structures that have become popular during the last decade.

## I. REFORMING THE LAW OF MURDER

Section 210.2 of Article 210 of the Model Penal Code provides an illuminating case study in criminal law reform. The primary mission of those who were later described as "the finest artists of criminal law doctrine"<sup>3</sup> was to achieve doctrinal correctness, coherence, and precision in relation to some of the most intractable problems involved in deciding how the criminal law can and should operate. They had proposed a major restructuring of the law of homicide, which included a redefinition of murder that represented a significant departure from the traditional rules.

### A. Doctrinal Change

Section 210.2 contains three major doctrinal changes. First, the common law definition of murder as the unlawful killing of another human being with "malice aforethought" is abandoned. Instead, murder is defined to include cases where a criminal homicide is committed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life.<sup>4</sup> This definition was proposed in order to

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3. Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 313.

4. See *supra* note 2.

provide a more satisfactory means of describing the culpability required for murder than did the older language of "malice aforethought," which, as Wechsler and Michael noted, had been reduced to "a term of art signifying neither 'malice' nor 'forethought' in the popular sense."<sup>5</sup>

The second major innovation was the abandonment of the division of murder into degrees, which had been initiated by the Pennsylvania legislature at the end of the eighteenth century and was followed by the vast majority of American jurisdictions.<sup>6</sup> The primary purpose of the degree structure for murder was to isolate those cases for which the death penalty might be appropriate by dividing murder into two degrees with the death penalty reserved for the first degree.<sup>7</sup> The Model Penal Code drafters thought this function would be better performed by dealing with capital punishment in a separate provision (section 210.6) apart from the basic definition of the offense.

The third innovation of section 210.2 lies in its departure from the felony-murder rule (which assigns strict liability for homicide committed during the commission of a felony) by abandoning the strict liability aspect of the traditional rule.<sup>8</sup> Put in its place is section 210.2(1)(b), which recognizes the probative significance of the concurrence of homicide and a violent felony by establishing a presumption that the requisite recklessness and indifference to the value of human life exist when a homicide is committed during the course of certain enumerated felonies.<sup>9</sup>

### *B. Political Acceptability*

By any account, the two most prominent examples of explicit pursuit of political accommodation in the Code are the death penalty and felony-murder.

Although the American Law Institute Advisory Committee strongly opposed the death penalty, the Council of the Institute was divided on the issue and decided that the Institute should have no position on whether the

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5. Wechsler & Michael, *supra* note 1, at 707.

6. MODEL PENAL CODE § 210.2 commentary at 16 (1980). *See also* 1794 PA. LAWS, c. 257, §§ 1, 2 which provided:

[A]ll murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate or premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery or burglary shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree.

7. MODEL PENAL CODE § 210.2 commentary at 16 (1980).

8. *Id.* commentary at 29-30.

9. *Id.* at 29.

death penalty should be retained or abolished.<sup>10</sup> Nevertheless, the Code's drafters believed that capital punishment for murder would be continued, in at least some jurisdictions,<sup>11</sup> and so expressed a view on the crimes for which it would be used and the procedures that should govern its imposition.<sup>12</sup>

The fact that ninety percent of the Advisory Committee opposed the death penalty<sup>13</sup> is evidence that section 210.6, which deals with the sentence of death for murder, represents an attempt to limit the use of the capital sanction as much as possible. Indeed, the death penalty is expressly limited to murder and excluded for all other offenses;<sup>14</sup> and even in murder cases a noncapital sentence is required if certain conditions are present.<sup>15</sup> The use of the capital sanction is premised on the presence of one or more aggravating factors *and* the absence of specified mitigating factors.<sup>16</sup>

"For those jurisdictions that wish to retain capital punishment," the Model Code offers a system that has as its main features:

- (i) the exclusion from the capital class of certain murders where a clear ground of mitigation is established; (ii) a specification of aggravating circumstances, at least one of which must be established before a capital sentence becomes possible; (iii) a final discretionary determination by the court, or alternatively by the jury, based upon a balancing of all the aggravating and mitigating circumstances that appear; and (iv) a supplementary proceeding, after conviction of murder, during which the existence or non-existence of these factors is determined and a decision

10. MODEL PENAL CODE § 210.6 commentary at 111 (1980).

11. *Id.*

12. *Id.*

13. *Id.* The Advisory Committee voted 18-2 to recommend that the American Law Institute favor abolition of the death penalty. *Id.*

14. *Id.* commentary at 117.

15. MODEL PENAL CODE § 210.6(1). Subsection (1) of this section provides:

(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:

(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 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 regarding the defendant's guilt.

16. *Id.* § 210.6(2).

concerning imposition of the capital sanction will be made.<sup>17</sup>

The system is endorsed in such unenthusiastic terms that the Comment reads like a disavowal:

This plan reflects the imposing difficulty felt by every agency that has reviewed the law of homicide in formulating a workable rule to differentiate the cases where capital punishment should and should not be employed. The solution to the difficulty, insofar as it can be solved, inheres in acknowledging the multiplicity of factors that bear on the issue. This is, in any case, the theory of the Model Code.<sup>18</sup>

The felony-murder doctrine, under which one is guilty of murder if a death results from the commission or attempted commission of any felony, is subjected to a cogent, thirteen-page critique in the Commentary to the Code.<sup>19</sup> The Commentary condemns the doctrine for “its essential illogic,”<sup>20</sup> described as involving “gratuitous” punishment,<sup>21</sup> and said to be “indefensible in principle.”<sup>22</sup> Principled argument for the doctrine is said to be “hard to find”<sup>23</sup> and the only such argument cited — the rationale given by Holmes in *The Common Law* — is summarily rejected.<sup>24</sup>

“[T]he submission of the Model Code that the felony-murder doctrine should be abandoned as an independent basis for establishing the criminality of homicide”<sup>25</sup> seems to follow inexorably from the critical analysis of the doctrine. Yet having discredited the doctrine, section 210.2(1)(b), in what is significantly described as “a concession to the facilitation of proof,”<sup>26</sup> establishes “a presumption” that rests on no more secure a basis than the discarded rule.<sup>27</sup>

The presumption is that the “recklessness and indifference” required for criminal homicide to constitute murder “are presumed if the actor is engaged, or is an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape, or deviant sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.”<sup>28</sup>

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17. MODEL PENAL CODE § 210.1 commentary at 8-9 (1980).

18. *Id.* at 9.

19. MODEL PENAL CODE § 210.2 commentary at 29-42 (1980).

20. *Id.* at 36.

21. *Id.*

22. *Id.* at 38-39.

23. *Id.* at 37.

24. *Id.* at 37-39 (quoting O. HOLMES, *THE COMMON LAW* 49 (1881)).

25. MODEL PENAL CODE § 210.2 commentary at 30 (1980).

26. *Id.* (emphasis added).

27. *Id.* at 29-30.

28. MODEL PENAL CODE § 210.2(1)(b).

The rationale underlying this is stated in the Commentary as follows:

[I]t remains indefensible in principle to use the sanctions that the law employs to deal with murder unless there is at least a finding that the actor's conduct manifested an extreme indifference to the value of human life. The fact that the actor was engaged in a crime of the kind that is included in the usual first-degree felony-murder enumeration or was an accomplice in such crime, as has been observed, will frequently justify such a finding. Indeed, the probability that such a finding will be justified seems high enough to warrant the presumption of extreme indifference that Subsection (1)(b) creates. But liability depends, as plainly as it should, upon the crucial finding. The result may not differ often under such a formulation from that which would be reached under some form of the felony-murder rule. But what is more important is that a conviction on this basis rests solidly upon principle.<sup>29</sup>

Thus, although the strict liability involved in the felony-murder rule was abandoned, it was replaced by what might seem a presumption of guilt. In fact, the Code's presumption only relieves the prosecution of proving reckless disregard for human life if the defendant does not put the matter at issue. Once recklessness is denied, the burden rests on the state.

But the Commentary, in explaining the "manner" in which "the presumption operates,"<sup>30</sup> is far from clear. On the one hand, it states that the jury may "regard the facts giving rise to the presumption as sufficient evidence of the required culpability. . . . The presumption may, of course, be rebutted by the defendant . . . [but] if the presumption is not rebutted . . . then the appropriate conviction is murder."<sup>31</sup> On the other hand, it states "the presumption has the effect of leaving on the prosecution the burden of persuasion beyond a reasonable doubt. . . ."<sup>32</sup> In either instance, the political motivation of the presumption is obvious.

### C. *Systematic Coordination*

In undertaking a redefinition of the law of murder, two major requirements had to be met. First, the penal treatment of murderers had to be correlated with the provisions regarding application of penalties to those whose homicidal behavior was criminal although it did not amount to murder. Second, penal treatment of murder had to be coordinated with the sentencing of non-homicidal crimes.

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29. *Id.* commentary at 38-39 (1980).

30. *Id.* at 30.

31. *Id.*

32. *Id.*

Regarding the first of these requirements, the Model Penal Code groups all criminal homicides into three basic categories: murder, manslaughter, and negligent homicide.<sup>33</sup> The distinctions among these categories are drawn in terms of concepts of culpability. Thus, murder is defined as criminal homicide committed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life.<sup>34</sup> The offense of manslaughter is defined to include both reckless homicide and homicide that would otherwise be murder but for the presence of "extreme emotional disturbance for which there is a reasonable explanation or excuse."<sup>35</sup> Negligent homicide is defined as criminal homicide "when it is committed negligently."<sup>36</sup> In accordance with these distinctions, murder is classified as a felony of the first degree;<sup>37</sup> manslaughter as a felony of the second degree;<sup>38</sup> and negligent homicide as a felony of the third degree.<sup>39</sup>

The three grades of homicide each have a separate niche in the three-part sentencing scheme. The three degrees of felony provided the basis for differentiation among the major crimes for sentencing purposes and introduced some discipline into the legislative use of penal sanctions.<sup>40</sup> Under the Code, the maximum sanctions implied by the degrees of felony are:<sup>41</sup> first degree — life imprisonment (although a person convicted of murder might be sentenced to death); second degree — ten years; and third degree — five years.<sup>42</sup>

The Code also prescribes that if a prison sentence is imposed upon conviction of a felony then it must be for a minimum of one year.<sup>43</sup> Courts are authorized to impose longer minima varying with the degrees of felony: first degree — up to ten years; second degree — up to three years; third degree — up to two years. On the other hand, under the Code, courts would not be authorized to control the maxima of prison terms. This would be fixed by statute at the levels indicated.<sup>44</sup> However, courts could control the minimum.

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33. MODEL PENAL CODE § 210.1(2).

34. *Id.* § 210.2.

35. *Id.* § 210.3.

36. *Id.* § 210.4.

37. *Id.* § 210.2(2).

38. *Id.* § 210.3(2).

39. *Id.* § 210.4(2).

40. Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109. U. PA. L. REV. 465, 474-75 (1961).

41. *Id.* at 475.

42. *Id.*

43. *Id.*

44. *Id.*

The significance of these sentencing provisions is considerably qualified by the Code provision dealing with release upon parole, which according to Herbert Wechsler meant that the prison terms stated in the Code "have their meaning only in establishing the earliest and latest time when the prisoner will have his first release upon parole."<sup>46</sup> The Code here struck what Paul Tappan, the principal architect of the Code's sentencing provision, once described as the compromise "between the ideals of the thoroughly egalitarian treatment of offenders, on the one hand, and a complete individualization of correctional efforts, on the other."<sup>46</sup> Between the extremes of a *definite* sentencing system (with inflexible penalties) and an *indeterminate* system (with neither maximum nor minimum limits), the system adopted in the Code is an *indefinite* system (with fixed maxima and minima).

For a murder conviction not resulting in capital punishment, the offender could be sentenced to probation or a minimum prison term of anywhere between one year and ten years at the judge's discretion. The offender would be released any time between that minimum term and life, depending on the judgment of the parole board. However, the Code contains a presumption of release by the board at first eligibility. The parole criteria were "designed to express the policy that first releases should take place when men are eligible, unless a substantial reason for postponing the release appears."<sup>47</sup>

Herbert Wechsler's rationale for authorizing the court to impose a minimum sentence within statutory limits but not to control the maximum is as follows: "The point on which the court can make the best and most decisive judgment at the time of sentence is [that] which calls for an appraisal of the impact of the disposition on the general community, whose values and security have been disturbed."<sup>48</sup> The court should therefore "be empowered to prescribe a minimum duration of the term."<sup>49</sup>

On the other hand, Wechsler stated that "the court is poorly equipped at the time of sentence to make solid and decisive judgments on the period required for the process of correction to realize its optimum potentiality or for the risk of further criminality to reach a level where the release of the offender appears reasonably safe."<sup>50</sup> He felt that "the organs of correction . . . [were] best equipped to make decisions of this order and to make them

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45. *Id.* at 485.

46. P. TAPPAN, CRIME, JUSTICE AND CORRECTION 431 (1960).

47. Wechsler, *supra* note 40, at 487.

48. *Id.* at 476.

49. *Id.*

50. *Id.*



later on in time, in light of observation and experience within the institution. . . . Whether and how long the prisoner should be held beyond the minimum, if any, fixed by the court should therefore, be remitted to . . . the Board of Parole — within statutory limits varying with the degree of the offense.”<sup>51</sup> These general theories of sentence setting and penal treatment were well suited to a single grade of murder as defined in the Code.

## II. RESOLVING CONFLICTING OBJECTIVES

The previous section identified ways in which the Code’s drafters simultaneously pursued the multiple objectives of reform. This section focuses on three topics where the consensus views of the Code’s drafters on proper substantive principles clashed with the political sentiments of the time. The three areas of conflict — mandatory minimum sentences, felony-murder, and capital punishment — are not the only conflicts between principle and politics evident in this section of the Code, but they would be on any list of the most significant of such conflicts.

These three topics also show a contrast in the degree of accommodation accorded to political sentiments. This section identifies the conflicts and provides our view of their solution. In the next section we will examine some of the consequences in principle and in policy that flow from the balances struck in these Code sections.

### A. *Minimum Punishments for Murder: Principle Over Sentiment*

The distinction between eligibility for capital punishment and non-capital punishment may have been the historical origin of second-degree murder,<sup>52</sup> but that was not the only function served by the division of murder into two degrees. First-degree murder almost everywhere is an offense that carries an extremely high minimum penalty, typically life imprisonment. Second-degree murder, at the time the Code was being formulated, was usually an offense with no or low minimum sentence and substantial judicial and parole discretion as to the time actually served.

H.L.A. Hart noted as one of the “major contrasts” between the treatment of murder and its punishment in England and the United States was that English law had never admitted the notion of different degrees of murder. He noted also that whereas “the average sentence served in English prisons among those who have been sentenced to death but

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51. *Id.*

52. Wechsler & Michael, *supra* note 1, at 703.

rerieved is about ten years. By contrast, in some states in America sentences of twenty-eight years are not uncommonly served for first-degree murder and seventeen years for second-degree murder."<sup>53</sup>

The Code's drafters resolved the tension between public sentiment in favor of mandatory minimum sanctions and their own view of appropriate penalty ranges in favor of sentencing flexibility and lower punishment ranges. With the exception of the capital punishment option for first-degree murder, the offenses of first- and second-degree murder were merged into a single substantive murder crime. This offense did not carry any mandatory minimum but did provide for a judicial setting at either probation or a prison sentence. A prison sentence for what would have been first-degree murder prior to the Code could be at a minimum as low as one year in the discretion of the judge and in no event could exceed ten years under the ordinary sentencing provisions for first-degree felony.<sup>54</sup>

The Commentary to Tentative Draft No. 9 of Article 201 of the Code states: "Under Subsection (2), murder is a felony of the first degree. . . . The sentence of imprisonment for a felony of the first degree permissible under the Code is comparable to that under existing second-degree murder statutes,"<sup>55</sup> thus suggesting that the two offenses were roughly analogous. The Commentary failed to mention that the whole penal regime associated with first-degree murder had been abolished by the Code's provisions on murder and on sentencing for first-degree felonies. Other than in the case of the special provision for the sentencing of "dangerous offenders" and the capital punishment issues discussed presently, the push toward mandatory minimum penalties for murder was rejected rather than accommodated.

### *B. Felony-Murder: Symbolic Compromise*

Few provisions of the criminal law are as widely criticized and as immune to reform as the special penal provisions relating to felony-murder. The common law doctrine deriving malice from the intention to commit a felony was roundly disapproved by academic commentators including those who drafted the Code. Yet the political popularity of the felony-murder rule led the drafters to propose what looked to be a compromise. All doctrines of constructive malice were disapproved because the minimum *mens rea* needed to sustain a murder conviction was a homicide "committed recklessly under circumstances manifesting ex-

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53. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U. L. REV. 433, 436-37, 440 (1957) (footnotes omitted).

54. MODEL PENAL CODE § 6.06.

55. MODEL PENAL CODE § 201.2, commentary at 39 (Tent. Draft No. 9, 1959).

treme indifference to the value of human life." But such recklessness and indifference would be *presumed* if the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, one of a number of enumerated offenses.<sup>56</sup>

Two things should be noted about this apparent compromise. First, it does not appear to be a substantial step toward the sort of rule that made felony-murder popular with prosecutors. Second, it could not represent an important step toward constructive liability and still maintain the integrity of the Code's general approach to *mens rea*. The presumption had the effect of leaving the burden of persuasion on the prosecution in the individual case. What then was the function of the presumption? It would be said that, unlike the felony-murder rule, the rebuttable presumption gave the jury a role to play in the determination of guilt. "The jury may . . . regard the facts giving rise to the presumption as sufficient evidence of the required culpability. . . . The presumption may, of course . . . simply not be followed by the jury."<sup>57</sup>

Any real compromise with the logic of constructive malice would not only be inconsistent with the Code's treatment of murder, but would also conflict with the unified and coordinated doctrine of *mens rea* that was among the Model Penal Code's major substantive contributions. The felony-murder issue is an example of the way in which the demands of consistency with the general provision of the Code produced a clash between principle and political sentiment; and exerted pressure against any major compromise.

It is unlikely that any prosecutor enamored with the doctrine of constructive malice would extract much comfort from the Model Penal Code's "presumption." From a prosecutorial perspective, the great attraction of the felony-murder doctrine is the imposition of liability for murder based on the culpability required for the underlying felony without proving any culpability with regard to the death. Once liability for the underlying felony was established, the murder became a strict liability offense. Thus, the very feature that makes the felony-murder rule attractive to prosecutors is what makes it acutely inconsistent with the Code's theory of culpable mental states.

### C. *Capital Punishment: The Accommodation of Popular Sentiment*

We have discussed the development of standards for the death penalty

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56. MODEL PENAL CODE § 210.2 (1962).

57. *Id.* commentary at 30.

in the Model Penal Code elsewhere.<sup>58</sup> As a primary instance of accommodation to political and popular sentiment, the following features bear brief recapitulation. To begin, not only did the Code's Reporters favor abolition of the capital sanction, but by a vote of eighteen to two the Advisory Committee also recommended that the Institute express itself upon the issue.<sup>59</sup> The Council, however, was divided on the issue of retention or abolition and was "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. . . ."<sup>60</sup>

In the Commentary, it is noted that "capital punishment continues to command substantial political support within the American system [and] . . . that many jurisdictions will continue to authorize the death penalty for at least some offenders for a considerable time to come."<sup>61</sup> In these circumstances, it was decided that the Model Code should address the problem of providing standards for "a fair and rational system of administration" of the death penalty.<sup>62</sup>

The drafters proceeded to devise a set of standards governing the selection of cases for capital punishment and for the procedure to determine whether the death sentence should be imposed. They did this without deciding whether capital punishment was ever an appropriate penalty for murder. They did so as an exercise in contingent reform on the assumption that if a fair and rational system were enforced, the whole process would be less objectionable than it had been in the past. This is, to our knowledge, the only such contingent reform proposal undertaken by the Code's drafters. It proved to be a task at least as intricate and time-consuming as the rest of the provisions for murder in the Code.

### III. SOME CONSEQUENCES OF GOAL CONFLICT

When the goals of reform clash, the resolution of the conflict between different and competing objectives inevitably entails the sacrifice of some values. The costless compromise is unattainable. This section identifies three types of cost involved in constructing the murder provisions: internal inconsistency, political vulnerability, and limited viability. When political considerations prevail over doctrinal needs, internal inconsistencies in the Code provisions may result. When doctrinal positions are adopted that will

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58. F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 77-92 (1986).

59. MODEL PENAL CODE § 210.6 commentary at 111 (1980) (footnote omitted).

60. *Id.*

61. *Id.* at 116 (footnote omitted).

62. *Id.* at 116-17.

be unpopular, political vulnerability is the consequence. And when the drafters seek hybrid solutions, as with felony-murder, both inconsistency and vulnerability can result.

*A. Internal Inconsistency*

One of the most striking features of the murder provisions of the Model Penal Code is the contrast between the elegant economy of the definitions of murder and the extraordinary complexity of the provisions on capital punishment in section 210.6, which try to subdivide murder into penological categories relevant to the choice between life and death.<sup>63</sup>

Although opposed to the death penalty, the authors of the Code were faced with the political necessity of attempting “to try to design legal formulas for the morally complex question whether to sentence a criminal to death.”<sup>64</sup> They tried to bring order into the “multiplicity of factors that bear on the issue” and in the Commentary they refer to Michael and Wechsler’s attempt “to enumerate the relevant considerations and to state the theories of their relevancy.”<sup>65</sup> This was the model they followed in their enumeration of the various aggravating and extenuating factors to be taken into account in determining “whether sentence of death should be imposed.”<sup>66</sup>

Although the enumeration of factors may carry some of the comfort that mathematical modes of presentation provide, the appearance of logic and precision is quite illusory. The essential problem was well stated by Michael and Wechsler:

It is impossible in the present state of knowledge to determine with any precision what weight should be given the various aggravating and extenuating circumstances, either absolutely or relatively. Some of them are significant for more than one reason, and they may be entitled to greater weight than those which are significant for a single reason. Again, the various factors, aggravating and extenuating, can be combined in so many different ways that it is impossible to anticipate how they will be combined in particular cases. And yet the weight to be given any factor may depend upon how it is associated with other factors; what is needed is no mere addition and subtraction of factors but the determination of the import of various combinations of circumstances. Consequently, in order that even the greatest wisdom may achieve even an approximately satisfactory

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63. MODEL PENAL CODE § 210.6.

64. Weisberg, *supra* note 3, at 393.

65. MODEL PENAL CODE § 210.1 commentary at 9 n.14 (1980); Michael & Wechsler, *supra* note 1, at 1261.

66. MODEL PENAL CODE § 210.6 (2) (alternative formulation) (1980).

result, judgments must be based upon a complete analysis of the particular case, an analysis that will take into account the presence or absence of each relevant factor.<sup>67</sup>

The reference to "the present state of knowledge" in this passage might suggest that half a century later we could be in a better position to devise a formula "to determine whether the sentence of death is appropriate," which the British Royal Commission on Capital Punishment declared impossible to achieve.<sup>68</sup> But it seems that the authors were under no illusion that it would some day be possible to construct a calculus to determine eligibility for death.

The Code initially provides a formal model that appears to lend decorum to, and possibly does facilitate psychic distancing from, the decision to take human life. It provides the illusion of legal rule and of an algebraic formula for decisionmaking. "The solution to the difficulty, insofar as it can be solved. . ." <sup>69</sup> was really no solution at all.

Another apparent inconsistency relates to the question of the penalties for murder when both the standard felony in the first degree and capital punishment standards are used. The Code drafters held that "were it not for the accident of history that prisons emerged as a humane substitute for death or transportation, which had previously been the normal fate of criminals," the sense that imprisonment was "somehow the right penal sanction rather than the grave exception" would never have attained the influence it had.<sup>70</sup> Accordingly, in the light of "the inevitable negative results" of a commitment to prison, although they provided that upon a felony conviction the duration of suspension or probation should be five years, the drafters espoused a policy of "according a priority to dispositions which forego an institutional commitment."<sup>71</sup>

Section 6.02 of the Code defines the sanctions that the court may use in sentencing, ranging from suspension of sentence and probation through to imprisonment.<sup>72</sup> It states that suspension or probation may be used for all offenses with the possible exception of murder. On the question of the preclusion of a sentence of probation or a fine in murder cases, the Institute took no position; but the Commentary states that there was much support for the view "that it is unsound in general for the legislature to exclude an

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67. Michael & Wechsler, *supra* note 1, at 1301.

68. ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, 1953, CMND 8932.

69. MODEL PENAL CODE § 210.1 commentary at 9 (1980).

70. Wechsler, *supra* note 40, at 472.

71. *Id.* at 471.

72. MODEL PENAL CODE § 6.02.

entire class of offenders from a particular sentencing alternative.”<sup>73</sup> Moreover, section 7.01 provided that a court *shall* deal with a convicted person without passing a prison sentence unless “having regard to the nature and circumstances of the crime and the history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for protection of the public” on one or more of the following grounds:

- (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
- (b) the defendant is in need of correctional treatment that can be provided more effectively by his commitment to an institution; or
- (c) a lesser sentence will depreciate the seriousness of the defendant’s crime.<sup>74</sup>

The practical implication of this policy was that the basic murder offense carried no mandatory minimum other than five years suspension or probation. There is no doubt that in at least some cases of murder the grounds justifying commitment to prison would not be present. The distinction between capital and non-capital murder in the Code carries even more disparate consequences than in jurisdictions that subdivide murder into degrees. Yet there is nothing in the nature of the distinctions drawn between those “[i]nstances of murder to which the death penalty should be confined, if its use in any circumstances is admitted”<sup>75</sup> and those in which it is excluded, to justify the enormity of the difference in possible punishment.

There is one other indication of inconsistency between the capital punishment standards and the general approach of the murder statute worth mentioning. Once the discredited doctrine of premeditation was eliminated, either a new basis for distinguishing between first- and second-degree murder could have been proposed or the separate degrees could have been abolished. The approach taken by the capital punishment standards could have been the basis for distinguishing between first- and second-degree murder in a system that did not have a death penalty. But this was not considered an attractive reform even by those who drafted section 210.6 for the death penalty contingency.<sup>76</sup>

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73. MODEL PENAL CODE § 210.2 commentary at 47 (1980).

74. *Id.* § 7.01(1).

75. *Id.* § 210.6 commentary at 132.

76. *Id.* commentary at 123-29.

### B. Political Vulnerability

"No branch of penal legislation," according to Herbert Wechsler, is "more unprincipled or more anarchical than that which deals with prison terms that may or sometimes must be imposed on conviction of specific crimes."<sup>77</sup> The remedy offered by the Code was to establish three degrees of felony and to distribute all the major crimes among those degrees,<sup>78</sup> with maximum penalties fixed by statute in relation to each degree.<sup>79</sup> The Code also deliberately created broad single offenses where the common law made multiple distinctions for many different crimes. Thus, theft, formerly a huge collection of separate offenses based on fine distinctions, was consolidated into an omnibus offense.<sup>80</sup>

These efforts at consolidation meshed nicely with the individualized discretion and presumption against institutional commitment in the Code sentencing provision. But even if legislative endorsement were obtained for precisely the same gradation of offenses and penalty limits as set out in the Code, they would be immensely vulnerable to the winds of political change. Wechsler acknowledged that "what dictates legislation is the simple point of politics that reelection demands voting against sin."<sup>81</sup> When legislators start amending sentencing ranges, they are voting against sin. They are not concerned about penological principles or theoretical consistency. Armed with emotion, intuition, and pencil and paper, they seek penalty provisions that will function as symbolic denunciations of the crimes to which they apply. The delicate and interrelated schemes of law reformers can be rapidly reduced to anarchic disorder by elected officials.

An interesting example can be derived from a comparison of the *Final Report of the National Commission on Reforms of Federal Criminal Laws* with Senate Bill 1, 94th Congress, 1st Session (1975).<sup>82</sup> The latter was the first version of what was to become the federal criminal code nine years later. The proposed federal criminal code sentencing provisions were based on the Model Penal Code, with three degrees of felony and a presumption against imprisonment. Among other things, the Senate Bill changed a presumption in favor of probation to a presumption against probation, increased the number of felonies in the proposed Code, and

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77. Wechsler, *supra* note 40, at 472-73.

78. MODEL PENAL CODE § 6.01 commentary at 38-40.

79. *Id.* § 6.06.

80. MODEL PENAL CODE § 223.1.

81. Wechsler, *supra* note 40, at 472-73.

82. This example is found in Schwartz, *The Proposed Federal Criminal Code*, 17 CRIM. L. REP. 3203, 3211-12 (1975).



increased the length of authorized sentences by a substantial margin.<sup>83</sup>

The vulnerability of sentencing schemes to penal inflation by the legislative process is inevitable and thus unavoidable. Such things as a presumption against institutional commitment are likely to receive short shrift when the call to arms in the war on crime next echoes through the halls of the legislature.

Still, the form in which crime definitions and sentencing proposals are presented may have an influence on how much distortion is introduced by the political process. Providing only one degree of murder rather than two can raise the stakes if legislative changes will attach high mandatory punishments to that offense. The second-degree murder provision enables judges and prosecutors to avoid harsh penal consequences when legislation has created one grade of murder with very high mandatory penalties but a lesser grade with greater sentencing flexibility.

### C. *Lack of Viability*

Those who seek compromise solutions to problems have to rely on the willingness of both parties to make concessions or accept modifications. The adjustment of opposing principles, modifying some aspects of each yet at the same time making acceptable to the subscribers to both, is rarely an easy matter. Indeed, it is often unachievable.

The rebuttable presumption formulation of the Model Penal Code<sup>84</sup> that was designed to replace the felony-murder rule seems to have had little appeal for either supporters or opponents of the rule. Supporters of the rule saw nothing attractive in an innovation which, although it was described as "a concession to the facilitation of proof"<sup>85</sup> was clearly intended to make proof more difficult than the rule itself. Prosecutors would have no incentive to support such a plan unless the risk of political defeat of any felony-murder rule was substantial.

Only New Hampshire adopted the rebuttable presumption formulation of the Model Penal Code,<sup>86</sup> although a proposal in West Virginia "adopted the Code approach to the question."<sup>87</sup> Other states, such as Hawaii<sup>88</sup> and Kentucky<sup>89</sup> have abolished the felony-murder rule com-

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83. *Id.*

84. MODEL PENAL CODE § 210.2 commentary at 29 (1980).

85. *Id.* at 30.

86. N.H. REV. STAT. ANN. § 630:1-b (1986).

87. MODEL PENAL CODE § 210.2 commentary at 41 (1980); W. VA. CODE § 61-2-1 (Supp. 1987).

88. HAW. REV. STAT. §§ 701-706 (1985).

89. KY. REV. STAT. ANN. § 507.020 (Baldwin 1986).

pletely, whereas others have qualified it in various ways.<sup>90</sup> But the Code formulation found no real constituency in state or federal criminal code revision. An outright rejection of the rule might have had the same degree of limited success in legislation without the compromise in principle.

#### IV. SUBSEQUENT EVENTS

We do not propose here to write a comprehensive report reviewing the twenty-five years since the Model Penal Code was adopted by the Institute. Instead, we focus on two aspects of section 210 where there have been significant developments in the career of the Code recommendations. First, the constitutional challenges to capital punishment that resulted in the Supreme Court decisions in *Furman v. Georgia*<sup>91</sup> and the five cases decided in July 1976 (the *Gregg* quintet)<sup>92</sup> created a demand for state legislation that followed the form but not the substance of the Model Penal Code capital punishment standards.<sup>93</sup> So, after a relatively uneventful first decade, some version of those standards now appears in the laws of thirty-five of the thirty-six states that have capital punishment.<sup>94</sup>

Second, movements away from the delegation of discretion to correctional authorities and toward determinate sentencing and prison sentence schedules set forth in legislation or by a sentencing commission have put pressure on the allocation of sentencing authority that fits the unified grading of murder in the Code sentencing scheme.<sup>95</sup> Neither development — the demands of the capital punishment opinions or the decline in the popularity of parole — was visible on the horizon in 1962. But the interaction of the Code provisions with subsequent events provides instructive case studies in the outcome of law reform initiatives.

##### A. Capital Punishment and the Constitution

During the first decade after the adoption of the Model Penal Code, the proposed standards for capital punishment did not generate a ground-

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90. MODEL PENAL CODE § 210.2 commentary at 41 (1980): “[T]he great majority [of states] limit felony murder to certain specified felonies. The offenses most often included are arson, burglary, rape, robbery, and kidnapping.”

91. 408 U.S. 238 (1972).

92. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

93. See, e.g., ARIZ. REV. STAT. ANN. § 13-902 (1978); CAL. PENAL CODE § 190-190.5 (West Supp. 1987); N.H. REV. STAT. ANN. § 630:5 (1986).

94. *Gregg v. Georgia*, 428 U.S. at 179 n.23.

95. MODEL PENAL CODE § 210.2 commentary at 20 (1980).

swell of legislative activity in those thirty-odd states that had retained capital punishment on their statute books. Even among those states that undertook penal code revision inspired by the Model Penal Code, such as New York and Illinois, the listing of aggravating and mitigating circumstances and the calculus of balance provided in the Code were less popular than the delegation of discretion to juries unconstrained by standards.<sup>96</sup> However, unfettered jury discretion to impose capital punishment was found violative of the eighth amendment injunction against “cruel and unusual punishment” in *Furman* in 1972.<sup>97</sup> This decision provoked an impressive upsurge of legislative activity that resulted in a large number of states adopting lists of aggravating and mitigating circumstances based on those in the Code to guide jury discretion; as well as a number of states making specific subcategories of murder the subject of mandatory death sentences.

In 1976 the United States Supreme Court all but mandated the use of guides to jury discretion with lists of aggravating and mitigating circumstances as the only device which would allow state regimes of capital punishment for murder to survive constitutional scrutiny. In two out of the *Gregg* quintet decisions, *Roberts*<sup>98</sup> and *Woodson*,<sup>99</sup> the Court struck down death penalty statutes that it categorized as mandatory. In two other cases, *Proffitt*<sup>100</sup> and *Gregg*,<sup>101</sup> the Court upheld systems that used criteria based on the Model Penal Code although the systems differed from each other and from the Code recommendations.

In the fifth case, *Jurek*,<sup>102</sup> the Court upheld a Texas system in which the aggravating conditions and the criteria to guide jury discretion are *not* based on the Model Penal Code. As a result, only Texas uses a set of criteria independent of the Code but defended from constitutional attack by the Supreme Court’s approval in *Jurek*.<sup>103</sup> Every other state uses some variation of the Code criteria not because of the attractiveness of those specific criteria — they had no legislative appeal in the decade prior to *Furman* — but because of their demonstrated capacity to survive assault in the federal courts.

In the state systems, the aggravating and mitigating circumstances adopted differed substantially from each other and also from those listed in

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96. *E.g.*, ILL. ANN. STAT. ch. 38, para. 9-1 (Smith-Hurd 1987).

97. 408 U.S. 238.

98. 428 U.S. 325.

99. 428 U.S. 280.

100. 428 U.S. 242.

101. 428 U.S. 153.

102. 428 U.S. 262.

103. *Id.*

the Model Penal Code. The presumption against the death penalty in cases where there was substantial mitigation was nowhere adopted. Florida permits a judge to overrule a jury recommendation against the death penalty<sup>104</sup> — a possibility which would have horrified the Code's drafters. The use of the lists of criteria in most of the states show the kind of conceptual strains one would expect when legislatures are coerced into adoption of criteria by the prospect of constitutional assault on the death penalty. The ceremonies that led to the adoption of Code criteria in state legislation were, in almost all cases, shotgun weddings. Whether the Code criteria as adopted in the states represent an improvement over alternative formulations is difficult to judge.

The only possible comparison is between the Texas system and the Code standards as adopted or adapted by the states. In regard to this, three things can be said. First, the Texas statute contains some ludicrous provisions that all the Model Penal Code jurisdictions avoid. For example, jurors in Texas are told to opt for execution rather than a life sentence if the jury finds "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."<sup>105</sup>

Second, the aggravating and mitigating circumstances of the Code are adapted in many states in ways that clearly pervert the intentions of the drafters. The Florida scheme which permits judicial override of jury recommendations against death is probably more in conflict with the intentions of the drafters than either the Texas system or the system of unguided discretion struck down in *Furman*. The Code Commentary places more value on the jury's discretion than on the factors the jury weighed in reaching their decision: "[T]he jury . . . shall take into account the aggravating and mitigating circumstances enumerated . . . and any other facts it deems relevant."<sup>106</sup>

Third, it does not appear that the specific balance of aggravating and mitigating factors has had much to do with the proportion of defendants receiving death sentences or those who are subsequently executed. The irrelevance of statutory provisions to death penalty decisions can be demonstrated by comparing the records of different states that have adopted variations of the Model Penal Code provision. If sentencing procedures determined the imposition of the death penalty, one would expect similar patterns in states with similar death sentencing laws. Table I presents some relevant comparative data for Georgia, Florida, and

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104. FLA. STAT. ANN. § 921.141 (West 1985).

105. TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon Supp. 1988).

106. MODEL PENAL CODE § 210.6 commentary at 108 (1980).

Pennsylvania, three states with similar lists of aggravating and mitigating factors based on section 210.6.

TABLE I. HOMICIDES, DEATH ROW POPULATIONS, AND EXECUTIONS IN GEORGIA, FLORIDA, AND PENNSYLVANIA

	State Population*	Number of Homicides**	Death Row Populations+	Number of Executions Since 1977++
Georgia	5,463,105	713	102	7
Florida	9,746,324	1,409	193	16
Pennsylvania	11,863,895	678	33	0

\* From U.S. Department of Commerce, Bureau of Census, *County and City Data Book*, at 2, Table A (1983).

\*\* In 1982, from U.S. Dep't of Justice, FBI, *Uniform Crime Reports; Crime in the U.S. 1982*, at 44, Table 3.

+ Through 1983, from Bureau of Justice Statistics, U.S. Department of Justice, *Capital Punishment 1983*, at 3, Figure 4 (1984).

++ From NAACP Legal Defense and Education Fund, Inc., *Death Row, U.S.A.* 3 (Aug. 1, 1986).

The striking contrast between Pennsylvania and the other two states reveals that the Model Penal Code provisions and their legislative progeny have limited influence on the actual administration of the death penalty. Only the restriction of death eligibility cases in the list of aggravating factors appears to have a direct influence on the frequency of death sentences. Apart from that, the determinants of execution in the United States in the 1980s do not appear to be strongly related to the standards that are supposed to guide jury discretion in murder cases.

The determination of costs and benefits in this particular subchapter of the career of the Model Penal Code is a task we do not attempt. Clearly, the Code has had a substantial influence on state legislation. Whether this influence has been beneficial is another question.

### B. Sentencing and the Substantive Law of Murder

For the first decade following the Institute's adoption of the Model Penal Code, there were no major reforms in the law of criminal sentencing passed by the states or proposed by the President's Commission on Law Enforcement and Administration of Justice,<sup>107</sup> or by the National Advi-

107. See Silver, *Introduction and Afterword* to the President's Commission on Law

sory Commission on Criminal Justice Standards and Goals.<sup>108</sup>

In 1971 when the National Commission on Reforms of Federal Criminal Laws published its Final Report, the recommendations on sentencing paralleled those of the Model Penal Code and were considered both mainstream in derivation and relatively uncontroversial.<sup>109</sup> However, by the time the proposed federal Criminal Code was enacted into law in 1984, the major sentence setting authority was an agency called a Sentencing Commission, which was charged with the issuance of sentencing guidelines that would set the punishment ranges for particular offenses and offenders under a law that narrowed judicial discretion and abolished parole.<sup>110</sup> When the National Commission reported in 1971, phrases like "Sentencing Commission" and "Sentencing Guidelines" had not yet been coined.

Sentencing reform initiatives were the substantive criminal law surprise of the 1970s, generated in the aftermath of prison riots by concern about sentence disparity and wide discretion. Academic discussion of fixed price and guideline sentencing was rapidly reflected in major changes in state law; including the introduction of determinate sentencing in California,<sup>111</sup> Indiana,<sup>112</sup> and Maine,<sup>113</sup> of a mixed system in Illinois,<sup>114</sup> and Sentencing Commission experiments in Minnesota<sup>115</sup> and Pennsylvania.<sup>116</sup> The goal of all these reforms was to reduce sentence disparity, to fix the period of time an offender would serve at the time of the initial sentence, and to base the sentence to be served largely on the "just deserts" culpability of the particular offender.

When these proposals arrived, the earth moved under the structure of substantive crimes that had been established by the Model Penal Code in areas such as murder and theft. There is no inconsistency in having a broad definition of a single offense like murder and leaving the determination of individual sentences to other agencies. That is in fact what the Model Penal

Enforcement and Administration of Justice, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1968).

108. U.S. DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *A NATIONAL STRATEGY TO REDUCE CRIME* (1973).

109. *See* NATIONAL COMMISSION ON REFORMS OF FEDERAL CRIMINAL LAWS, *FINAL REPORT* (1971).

110. 28 U.S.C. § 991 (Supp. III 1985).

111. CAL. PENAL CODE §§ 18-19 (West Supp. 1987).

112. IND. CODE ANN. §§ 35-50-2-3, 30-50-3-4 (Burns 1985).

113. ME. REV. STAT. ANN. tit. 17A, §§ 1251-1256 (1983).

114. ILL. ANN. STAT. ch. 38, para. 1005-8-1 to -3 (Smith-Hurd 1982).

115. MINN. STAT. ANN. § 244.09 (West Supp. 1988).

116. 42 PA. CONS. STAT. ANN. §§ 2151-2156 (Purdon 1981 & Supp. 1987).

Code did by delegating the selection of minimum terms to judges and the determination of the period of time to be actually served to the Parole Board.<sup>117</sup> The justification for this type of delegation was the need to individualize punishment and to make judgments about rehabilitation govern release dates.<sup>118</sup>

When a Sentencing Commission issues its guidelines on the duration of prison sentences based on fine gradations in the culpability of the offender, it is the sentencing guidelines rather than the Code definitions that become a real criminal code for the purpose of grading homicide offenses; and such guidelines mesh with Code definitions in the manner of oil and water. The broad general definitions of the Model Penal Code were based on the assumption that detailed definitions could not lead to coherent gradations of blameworthiness and were not of significant penological relevance.<sup>119</sup> The so-called "just deserts" sentencing guidelines assumed capacities for definition and gradation that the Code drafters thought were beyond human ability to achieve.

Our own review of the attempt to operationalize the "just deserts" philosophy and to create a schedule of tariffs or a price list of criminal penalties has led us to the conclusion that those who drafted the Model Penal Code have much the better of the argument. It may well be that what appears now as a groundswell in favor of price list punishment will eventually abate. The pendulum is no less active in criminal law reform than in any other legislative area.

But rather than offer some arbitratative suggestions, we think it is important to recognize the inconsistency between the Model Penal Code approach and current fashions in penal law. The Code drafters and modern sentencing reformers take very different views of our capacity to fine-tune multiple moral distinctions in penal legislation. It is precisely in relation to matters of this nature that the political independence and juristic expertise of the Model Penal Code exercise are of value in the process of law reform.

#### CONCLUSION

The multiple goals of law reform are inherent features of the environment in which model codes are discussed and written. Frequently, solutions that seem right from the standpoint of doctrinal correctness or systematic coherence and consistency will be in conflict with political sentiment. When this happens it would clearly be wrong to allow concern

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117. *See generally* MODEL PENAL CODE §§ 1.01, 402.1.

118. *Id.* § 305.1.

119. *Id.* § 1.13.

with *realpolitik* to dominate the code building process. But it is possible to take account of political reality in other ways. Those who draft model codes can, without compromising substantive principles, draft alternative formulations clearly indicating which is the preferred form.

The rebuttable presumption formulation in Article 210 may be an example of a compromise initiative that was neither principled nor politically realistic. It was as though the Code drafters were engaged in a sort of silent auction with legislative bodies in which some compromise with basic principles was offered in the hope that an accommodation could be reached that would avoid dramatic conflict. The argument for including the rebuttable presumption in the Code may have been that the drafters should use their skill to produce a new formulation which would limit the amount of damage that politicians could do to the Code. But if this was the object of the exercise, it might have been better achieved, without compromise, by offering alternative formulations, one including and the other excluding the felony-murder rule and registering endorsement of the latter.<sup>120</sup>

In regard to the death penalty, where the Institute and the Council had resolved not to take a position on whether the sentence of death should be retained, the use of this device was clearly not possible. Even so, it would have been possible to organize the attempt to reduce the chaos in capital sentencing in ways less likely to be interpreted as an endorsement of the penalty. It is true that the Commentary states explicitly that section 210.6 "does not signal Institute endorsement of capital punishment."<sup>121</sup> At the same time, the concluding commendation of that section as having provided "the constitutional model for capital sentencing statutes" and "a paradigm of constitutional permissibility"<sup>122</sup> strikes a note which seems both incongruous and inappropriately complacent.

We think that doctrinal preferences and political accommodations can be more clearly labeled in the law reform process. Yet, it is a significant tribute to the drafters of the Model Penal Code that our concluding recommendation for change in the style of law reform is a matter of near clerical detail.

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120. The device of offering alternative formulations and endorsing one of them was in fact used in the Code in relation to the proceedings to determine the sentence in murder cases. See MODEL PENAL CODE § 210.6 commentary at 107-09, 142-44 (1980).

121. *Id.* at 111.

122. *Id.* at 171.