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# Should the ALI Take a Position on Capital Punishment?



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Several years ago, the American Law Institute started the process of revising the sentencing provisions of the MPC. One of the early questions that project participants struggled with was whether to take a stand on the legitimacy of the death penalty as a sentencing option. In their preliminary draft, the reporter and advisers decided against addressing that highly charged issue.

The Supreme Court's decisions in *Blakely* and its progeny temporarily halted the ALI's sentencing project. Only recently have the reporter and advisers regained their bearings and developed at least a preliminary plan to accommodate the requirements of that decision. With the ALI's sentencing project restarting its engines, this may be the last opportunity to reconsider whether the ALI should take a stand on the death penalty. This essay argues that it should.

The argument in favor of taking a position on capital punishment is straightforward. The Model Penal Code analyzes and makes recommendations on all aspects of state-sanctioned punishment, and no one would deny that the death penalty falls in that category. The refusal to take a position on the death penalty thus represents an ad hoc exception to the general approach of the Model Penal Code, and the burden of proof always lies with those who favor ad hoc exceptions.

There are four main arguments in opposition. The first is based on principle—that the matter whether to execute murderers is at bottom a moral or political question and not a legal one, which makes it an inappropriate subject for the ALI. The second argument is based on precedent. The original MPC carefully avoided taking any position on capital punishment, and (according to this argument) the burden of persuasion therefore rests upon those who would part from that well-considered decision. The third argument is that the ALI should not come out against the death penalty because it will have effectively excluded itself from any future debates about capital sentencing procedures. The final argument bows in the direction of political reality. According to this argument, whatever valuable suggestions the Sentencing Project might contain will be trampled in the stampede to praise or condemn the Project's position on the death penalty.

Let us first consider the question of whether the moral issues raised by the capital punishment debate make it an inappropriate topic for the ALI. To be sure, the MPC is heavy with technical propositions, such as what physical conduct suffices as a "substantial step" for attempt liability, or whether a purpose to aid is required for accomplice liability, to take just two examples. But the Code also takes plenty of positions on questions that obviously rest on moral assumptions. The Code took the position that an insanity defense should be available based not only on impairment of cognitive ability but also on impairment of volitional capacity. To be sure, the scientists of the time were optimistic (falsely so, it turns out) that the legal system would be able to measure volitional impairment with some precision, and to that degree the inclusion of volitional impairment as a basis for the defense was premised on empirical assumptions. That view, however, ignored the fact that empirical assumptions alone were never enough to support the Institute's decision to make volitional impairment a basis for the insanity defense. That decision required another premise, namely, that those who truly cannot control their physical actions are not morally culpable.

Another prominent example of an MPC proposition based on moral considerations is the Institute's decision to make what is now known as "acquaintance rape" a generally less serious offense than "stranger rape." Professor Louis B. Schwartz, who was responsible for the drafting of this provision, stated in the comment that this differential treatment was justified by the lower level of social outrage and apprehension occasioned by forcible sex between former sexual partners or voluntary social companions. This is nominally an empirical question—how do most people feel about stranger rape versus acquaintance rape?—but thinly veils a moral one: Is stranger rape really "worse" than acquaintance rape? My many conversations with Professor Schwartz, who was my colleague and criminal law mentor in his last decade of academic service, made it obvious to me that he truly believed stranger rape was a greater moral transgression. Surely the drafters of the MPC would not have moved forward with this provision if they had only their individual moral views to go on, but neither would they have moved forward relying entirely

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upon their empirical assumptions about levels of social outrage.

Capital punishment does not differ in kind from these examples. The debate over the death penalty involves empirical disagreements—over deterrence, over recidivism rates for prisoners serving life without possibility of parole, over the degree of racial discrimination involved in capital sentencing, and, most recently, over error rates. It would be disingenuous to deny that the debate over the death penalty does not also include a debate over the morality of state-sanctioned killing in the absence of exigent circumstances. Indeed, it is my intuition that this moral question is the single most important factor in the capital punishment equation. This does not, however, make the issue of capital punishment different in kind from insanity or the grading of rape. Nor does it differentiate the issue of capital punishment from the issue of whether to permit strict liability for killings during crime (aka “the felony-murder” rule), which the MPC rejects.

The argument from precedent cannot be taken too seriously. The ALI is, after all, not a court. It is a policy-recommending body, something between a legislature and a think tank. Neither legislatures nor think tanks ordinarily consider themselves “bound” by their past substantive decisions. (Legislators sometimes cite past practice with respect to legislative procedures, but that is a different matter.) It is generally thought that the doctrine of *stare decisis* serves two important functions—first, to ensure equal treatment of litigants across time; and second, to protect justifiable reliance interests. Obviously neither of these interests is implicated here. The ALI has not “treated” anyone in any manner, and no one has relied on the ALI’s refusal to take a position on the death penalty. It might be argued that the ALI’s neutrality on the death penalty has served the Institute well, helping it steer clear of political entanglements that would bog the Institute down in the pursuit of its greater mission. But that is not a *stare decisis* argument so much as an argument about consequences.

The third argument against taking a position on capital punishment is that, if the Institute condemns it, the Institute will be prevented from having any future input on capital sentencing procedures. The premise is that, once the Institute has called for the abolition of capital punishment, it cannot then insist upon having a say in how capital sentencing procedures are structured. This would be a particular shame, considering that the Institute’s historic neutrality on the death penalty allowed it to have so much influence on the fashioning of post-*Furman v. Georgia* capital sentencing procedures around the nation. But the premise is mistaken. There is no logical reason why the Institute cannot condemn the death penalty and still offer suggestions as to what capital sentencing ought to look like. Lawyers and courts often make arguments in the alternative; nothing prevents the ALI from doing the same. For the Institute to offer a model capital sentencing procedure *at the same time* it condemns the death penalty

may undermine the seriousness of the condemnation, but the Institute is always free to offer such suggestions later, after acknowledging that the prospects of abolition have become remote.

The only argument against taking a position on the death penalty that survives serious scrutiny is the last one: There is a very real danger that whatever position the ALI takes on capital punishment will largely overshadow any other insights the Sentencing Project might contain. Certainly a position on the death penalty would be the only “newsworthy” story in the Project. Endorsing the death penalty would make it considerably harder for the Institute to persuade liberals and academics that the rest of the Project was worth considering, just as rejecting the death penalty would make it difficult to get conservatives and law enforcement organizations to approach the balance of the Project with an open mind. It is not just that the death penalty polarizes like no other subject in the criminal law, but that it has a tendency to stop rational discourse in its tracks.

Could anything be done to ameliorate the practical effects of taking a position on the death penalty? The Institute might include a severability clause stating that, even if a state legislature disagrees with the Institute’s position on the death penalty, the rest of the Project should nonetheless be adopted. This idea has promise. It would permit the Institute to take the principled course—making recommendations on every matter central to criminal sentencing—without seeming to put state legislatures in the position of adopting all or nothing. Admittedly, there would be some complications. Suppose the Institute rejected the death penalty and adopted a severability clause of the sort I have suggested. Presumably some changes to the Project’s recommendations would have to be made in a state that wishes to retain the death penalty. Should the Institute go on to make an alternative set of recommendations for such states? This would make for some extra work on the part of the Institute, but the added burden would hardly be crushing.

The more pointed question is whether a severability clause would really be effective. It is one thing for a court to enforce the valid portions of a statute or contract because of the presence of a severability clause; it is quite another to expect politicians and the public to respect such a clause in a legislative recommendation. Those who wish to engage in demagoguery will surely convict the remainder of the Project on a guilt-by-association theory. Despite these doubts, I believe a severability clause could work. Proponents of adopting the Project would be able to point to the clause and say that the drafters foresaw this precise situation. And, if the Institute were to adopt an alternative set of recommendations, those same proponents could trumpet the alternative recommendations as a custom fit. In this way, even if the ALI taking a position on the death penalty were to make a big immediate splash, the unintended ripple effects could be minimized.

There is one other alternative. The Institute could defer taking a position on the death penalty until such time as it

is able to undertake a project on "Principles Governing the Use of State-Sponsored Lethal Force," or the like. This would purport to cover lethal force on the battlefield, preventative killings by domestic police, assassinations of terrorist leaders, and the death penalty at home. The death penalty is a form of punishment and is therefore appropriately covered in a document purporting to cover all aspects of punishment, such as the MPC. But the death penalty is also an application of state-sponsored lethal force, and it would hardly be a stretch to say that the death penalty should, at a minimum, hew to a few general principles that govern all uses of such force. So taking a position on the death penalty in the MPC Sentencing Project or in some future "lethal force" project would be equally princi-

pled. This is not the place to make a full-fledged project proposal; suffice it to say that the Institute should not defer taking a position on the death penalty if its leadership does not sincerely intend to pursue something like a "lethal force" project.

I have come down on the side of upholding principle and against political expediency. This is not because expediency never trumps principle but rather because I believe there are at least two acceptable measures the Institute can take to render the principled course less costly. The line between bravery and foolishness may be fine, but the line between prudence and cowardice can be equally so. The ALI should say what it thinks about the death penalty.