

A DATE WITH DESTINY  
By Michael A. Schuler  
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CONFRONTING CAPITAL PUNISHMENT - TWO TESTIMONIALS

From Scott Turow (Turow is an attorney and a best selling novelist)

I was forced to confront my own feelings about the death penalty as one of 14 members of a commission appointed by Governor George Ryan of Illinois to recommend reforms in that state's capital-punishment system. In the past 25 years, thirteen men who spent time on death row in Illinois have been exonerated, three of them in 1999. Governor Ryan declared a moratorium on executions in January 2000, and five weeks later announced the formation of our commission.

We were a diverse group: two sitting prosecutors; two sitting public defenders; a former Chief Judge of the Federal District Court; a former U.S. Senator; three women; four members of racial minorities; prominent Democrats and Republicans. Twelve of us were lawyers, nine with experience as defense attorneys and eleven with prosecutorial backgrounds...

Governor Ryan gave us only one instruction. We were to determine what reforms, if any, would make application of the death penalty in Illinois fair, just and accurate. In March, 2000, during the press conference in which members of the Commission were introduced, we were asked who among us opposed capital punishment. Four of the fourteen raised their hands. I was not among them...

Governor Ryan's Commission didn't spend much time on philosophical debates, but those who favored capital punishment tended to make one argument again and again: sometimes a crime is so horrible that killing its perpetrator is the only just response. I've always thought death-penalty proponents have a point when they say that it denigrates the profound indignity of murder to punish it in the same fashion as other crimes...The issue is not so much revenge or retribution as "moral order." When everything is said and done, I suspect that this notion of "moral proportion" - ultimate punishment for ultimate evil - is the reason most Americans continue to support Capital Punishment. This places an enormous burden of precision on the justice system, however. For if we execute the

innocent or the undeserving, then we have undermined, not reinforced, our sense of moral proportion....

Then too, in looking over the hundreds of opinions in the roughly 270 capital appeals in Illinois, I was struck again and again by the wide variation in the seriousness of the crimes. There were many monstrous offenses, but also a number of garden-variety murders. (a man who had impulsively shot a robbery victim was on death row, but...a man who had knocked a friend unconscious and placed him on the tracks of an oncoming train, for instance...had escaped it).

Geography also matters in Illinois. You are five times as likely to get the death penalty for first degree murder in a rural area as you are in Cook County... Gender seems to count, too. Capital punishment for slaying a woman is imposed at three and a half times the rate for murdering a man...The results reflect anything but a clearly proportional morality...

The members of the Commission knew that capital punishment would not be abolished in Illinois anytime soon. Accordingly, our formal recommendations, many of which were made unanimously, ran to matters of reform... Yet our proposals sidestepped the ultimate question. One fall day, Paul Simon, former U.S. Senator and one of the Commission's chairs...forced us to vote on whether Illinois should have the death penalty at all. The vote was an expression of sentiment, not a recommendation. But now, by a narrow majority, we agreed that capital punishment should not be an option...

Like many others, I have wrestled with this issue, I have changed my mind often, driven back and forth by the errors each position seems to invite. Yet after two years of deliberation, I seem to have finally come to rest. When Paul Simon asked whether Illinois should have a death penalty, I voted no.

From Sean O'Brien (O'Brien is a professor at the University of Missouri-Kansas City School of Law and director of its Death Penalty Representation Clinic)

"Doyle Williams is on line 2." I debated whether to pick up the phone.

It was 3 p.m., April 9, 1996. Doyle was scheduled to be executed at midnight. Doyle was not my client; he was represented by Charles German, who was doing a heroic job of trying to stop Doyle's execution.

I met Doyle in 1990, when I became director of the

Missouri Capital Punishment Resource Center. He was Missouri's finest jailhouse lawyer, a person who helped prisoners with pro se pleadings and other legal troubles. Doyle had landed on death row after he and another man kidnapped and murdered a witness. Doyle's co-defendant was given immunity to turn state's evidence, and he walked free as Doyle was sent to death row.

Doyle never talked to me about his own case; he was worried about his fellow prisoners. Some were mentally retarded. Joe Amrine and Larry Griffin were innocent. "I mean for-real innocent, not convict-innocent," Doyle explained. (Today, Amrine is free, but Griffin is dead.) We talked about life on death row. He called me "counselor" in a way that simultaneously conveyed respect and affection.

Doyle often called to alert me to emergencies. Once he sent me a habeas corpus petition filed by a lawyer appointed to represent Steve Parkus. It was a nine-page cut-and-paste job devoid of facts or issues. I mean literally cut-and-paste; you could see the edges of the Scotch tape on the photocopy. The lawyer had simply rearranged this mentally retarded prisoner's pro se filing and taped it to a preprinted form.

In February 1996, Doyle had called me about Amrine, whose attorney had missed the deadline for filing a notice of appeal. I was working on Amrine's case when Doyle called on April 9.

I am ashamed to say what went through my mind as I debated whether to pick up the phone. I was already not going to make it home for dinner with my family. I ran the risk of losing critical time on the pressing cases of Amrine and others.

What if he wants me to help with a desperate last-minute appeal? Then again, what if he just wants to say goodbye? With some hesitation, I picked up the phone.

"Hello, counselor!"

"Hey, Doyle. How are you holding up?" Then, with some trepidation, I asked, "Is there anything I can do?"

Doyle replied, "Well, as a matter of fact, there is."

Uh-oh, I thought--here it comes.

"Zein Isa needs your help."

Zein was a feeble, elderly prisoner who would not survive long enough to be executed. He was too ill to leave his cell. Zein would live out the rest of his days in virtually solitary confinement.

"Do you think Warden Delo would let us have a wheelchair for Zein so someone could roll him to the dining

room to eat with the rest of the guys?"

I promised to look into it. We said our goodbyes, and that was the last time I talked to my friend Doyle. I found out later that Doyle spent his last day calling people with requests on behalf of other prisoners. I had wasted three full minutes of his precious time absorbed in my own selfish concerns.

As I hung up the phone, I experienced a profound awareness that no matter what each of us had previously done in our lives, at that moment Doyle Williams was a better human being than I. If a death row inmate can find redemption, maybe a lawyer can, too.

\*\* REFLECTIONS \*\*

Chapter 103, a statute abolishing the death penalty, was signed into law by Wisconsin governor Farwell on July 10, 1853. By that time, two years had passed since the hanging in Kenosha of **John McCaffary** for the murder of his wife. That, by the way, was the last state-sanctioned execution that took place in Wisconsin. For 155 years, We have lived without capital punishment. No state, province or nation in the world can match this long, unblemished record of freedom from the ultimate, irrevocable form of punishment.

It took Wisconsinites a while to get used to the death penalty's absence. On three occasions in the years that followed abolition, citizens took matters into their own hands and lynched accused murderers. But the principle gradually gained acceptance, and despite attempts at repeal before and after the Civil War, in the 1930's, 40' and 50's and most recently in 1993, that tradition of forbearance was maintained.

The individual most responsible for establishing that new "kinder, gentler" rule was **Marvin Bovee**, a Wisconsin State Senator of Quaker and Unitarian descent. **Bovee** remembered that, as a child, he had been taught to "hate nothing but injustice and cruelty," and he firmly believed that capital punishment was cruel, excessive and capricious. It is, he wrote,

...a dark spot resting on us as Christians. A life once taken can never be restored, but liberty can be given and restoration made to an unfortunate being who has been unjustly imprisoned.

Following a brief political career, **Bovee** continued to work for prison reform and abolition of the death penalty

in other states. In 1870 he published a collection of essays by prominent Americans entitled Christ and the Gallows: Reasons for the Abolition of Capital Punishment. Contributors included religious liberals and free thinkers like Horace Greeley, Elizabeth Cady Stanton, Oliver Wendell Holmes, Henry Wadsworth Longfellow and Charles Sumner.

Others preceded **Marvin Bovee** in expressing repugnance for capital punishment. Early in our nation's history the Universalist physician and Founding Father, **Benjamin Rush**, identified the death penalty with "monarchical governments" and insisted that a government of the people had no need for it. "An execution in a republic," he wrote, "is like a human sacrifice in religion." **Thomas Jefferson** was of much the same opinion, and sought to reduce the number of crimes punishable by death in Virginia to a bare minimum.

Some of the arguments marshaled against capital punishment by its early opponents still sound fresh today. To the claim that the Bible endorses the penalty abolitionists responded that Scripture is inconsistent on this issue, and that in ancient times the punishment didn't always fit the crime. **Cain** killed **Abel**, yet God did not demand his life. Just the opposite, **Yahweh** forbade that **Cain** be physically harmed. On the other hand, the Bible identifies many seemingly minor transgressions as capital offenses. The Good Book, then, is hardly a reliable handbook of jurisprudence.

Early abolitionists were also concerned about the negative effect capital punishment has on the overall culture. Legal philosopher **Cesare Beccaria** worried that the death penalty "stimulated barbarity by teaching murder and violence to the people." In the 18<sup>th</sup> century, when **Beccaria** wrote, public hangings and beheadings were crowd-pleasers and offered as entertainment for the sullen masses. The 1853 **McCaffary** hanging drew a crowd of 3,000 to Kenosha and I suspect that more than a few Wisconsinites rued the loss of this gruesome public spectacle.

The effect of capital punishment on our cultural climate is still something we ought to be concerned about. It may be no coincidence that states where the death penalty is more frequently employed almost invariably report higher rates of violent crime and murder than those where executions rarely if ever take place. The homicide rate in **Texas** is more than twice that of **Wisconsin**. Moreover, **Sister Helen Prejean** reports that after the state of Louisiana executed eight men in the space of eight weeks, the murder rate in New Orleans almost immediately rose by 16%.

Recent studies have also shown that the number of capital crimes is greater in states with the death penalty than in adjacent states that eschew capital punishment. Thus, South Dakota's murder rate is higher than North Dakota's; Connecticut's is higher than Massachusetts; Virginia's higher than West Virginia's. **Scott Turow** notes that in 2003 Michigan, with no death penalty, had a lower rate of murder than pro-death penalty Illinois, even though the urban-rural distribution, income levels, racial makeup of those two states was comparable.

Whether or not a criminal offender deserves to be killed, the effect capital punishment has on our public sensibilities needs to be taken into consideration. After the dissolution of apartheid, the new **South African** government did away with the death penalty for precisely that reason. It was felt that this "brutal and inhumane" form of punishment would only perpetuate a legacy from which South Africans wished to be free. Today, seventy-seven nations have reached a similar conclusion, one that found articulate expression in **Justice William Brennan's** dissenting opinion in the 1976 Supreme Court case, **Gregg v. Georgia**:

The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhuman, as objects to be toyed with and discarded... Justice of this kind is obviously no less shocking than the crime itself, and new 'official' murder, far from offering redress from the offense committed against society, adds instead a second defilement to the first.

From the foregoing, it should be fairly obvious that capital punishment serves neither as a deterrent to crime nor does it produce a less violent, better-ordered society. Indeed, the opposite appears to be the case. Since **Canada** banned capital punishment in 1975, its homicide rate has actually declined by 40%.

Proponents of the death penalty offer other rationales however. Execution may not deter others from committing crimes, they say, but it most definitely deters the person being executed. With capital punishment, we can be absolutely certain that a killer will not take another life.

This argument fails to pass muster when actual recidivism statistics are examined. After the Supreme Court abolished the death penalty in 1972, thus commuting

the sentences of 558 inmates, only seven repeated the offense - six while still in prison and only one while out on parole. A Michigan study reports that of four hundred murderers paroled between 1938 and 1972, none had murdered again. Although examples can be cited in which a convicted murderer did kill again, they are exceptionally rare. The vast majority of capital offenders do, like **Doyle Williams**, somehow manage to find a measure of redemption; they prove to be more than the worst thing they have ever done.

And...in those rare instances where the perpetrator is an incorrigible sadist or psychopath - a **Hannibal Lector**, a **John Wayne Gacy** or a **Jeffrey Dahmer** - life in a highly secure prison without the prospect of parole is always a sentencing option. When he served on the Illinois death penalty commission, **Scott Turow** took time to visit that state's Supermax facility and asked the warden, **George Wellborn**, whether it offered surefire security against repeat offenses. **Wellborn** pondered the question for a moment before answering, "Yes." In other words, deterrence does not require the death penalty.

"But," its proponents will object, "to keep someone in prison for life is prohibitively expensive. Why should society be burdened with that expense; why should it provide sustenance and security to someone who, as one Georgia prosecutor put it, "is a cancer on the body of society?"

To be sure, incarceration is expensive. But studies have shown it to be no more expensive than litigating a death penalty case, which typically takes more than a decade. In order to insure that no miscarriages of justice take place, all possible avenues of appeal must be explored and exhausted. Hundreds of thousands of dollars may be spent to safeguard the innocent and insure due process. Despite these elaborate precautionary measures, people still end up on death row who don't deserve to be there. Keeping capital offenders in prison for life would be no more costly and would prevent irrevocable mistakes.

Furthermore, one has to ask what it says about a civilization when human life becomes subject to economic calculation? Regrettably, people die all the time because society has decided that it is just too expensive to keep them alive. How much are we willing to spend to save the life of a critically ill indigent, a baby born with severe birth defects, or malnourished East African child? But only in the death penalty debate is the issue raised so brazenly, the economic argument made so pitilessly. I find that a little chilling

I would like to believe that as Americans we can rise to a higher level of morality. To treat the death of a fellow human being as a source of monetary savings demeans those who propose it. Last summer, I was asked to deliver an oral response to a speech given by **William F. Schulz**, former president of the UUA and recently retired Executive Director of Amnesty international. Bill and I spoke before an audience of 700 UU ministers, and with respect to the death penalty, this is what he said:

I oppose the death penalty not because I believe that every (person on death row) possesses inherent worth...but because the use of executions by the state diminishes my own dignity and that of every other citizen in whose name it is enforced... I do not want the state to indulge me in my worst (and most selfish) impulses. Part of the role of government is to save us from our basest passions in order to extract some semblance of worth and dignity out of the muck and meanness that infects our hearts.

Perhaps the most compelling point to be made in favor of capital punishment is that simple justice demands it. According to former Solicitor General of the United States **Robert Bork**, "it "serves a vital social function as an expression of moral outrage...over the violation of society's most important rules." It was this argument that initially moved **Scott Turow**. "The issue is not retribution or revenge, exactly," **Turow** wrote, "so much as moral order."

When all is said and done, this notion of moral proportion - ultimate punishment for ultimate evil - is the reason most Americans continue to support capital punishment.

The notion here is that without recourse to the death penalty, neither society nor the victim's loved ones will be able to reach "closure" on the issue. There will always be a nagging feeling that someone literally "got away with murder" and wasn't held fully accountable for their action. That prosecutor quoted earlier put it this way:

The truth of the matter is, members of the jury are not taking the defendant's life... If the switch is pulled and he's put to death, he himself pulled that switch the morning he dispatched his victim...

There is, in other words, a universal law of proportional justice that every community is obliged to uphold. By failing to acknowledge that principle, we weaken the moral order and strengthen the forces of anarchy.

The problem with this thesis is that it doesn't work in the real world. Overall, the death penalty has created more disorder than moral order. "The strongest argument against the death penalty, former President **Jimmy Carter** argues, "is the extreme inequity in its employment." As has been repeatedly pointed out by its detractors, the death penalty falls disproportionately on citizens who are poor, on those whose victims were white or female or who had the misfortune to be tried in rural areas or in a Southern state. How can we possibly state that justice is well served when repentant, rehabilitated offenders like **Doyle Williams**, or **Carla Faye Tucker** are executed, while the killers of Martin Luther King, Medgar Evers and of three little black girls sitting in a Birmingham church are spared? As an abstract principle "proportional justice" is morally and intellectually appealing, but it has proven to be an unrealizable ideal.

Given the wide variation in community standards, the unequal distribution of legal resources, and a persistent climate of racism, the American justice system will never be more than approximately fair. And this suggests that a punishment as extreme and irreversible as capital punishment is morally unacceptable.

The advisory referendum that will appear on the Wisconsin ballot in November seeks to allay doubts about the death penalty by reserving it for first degree, intentional homicide - for heartless killers and the most heinous crimes. It also will require proof-positive evidence of guilt through DNA testing. But this measure does nothing to correct the fundamental inequality and capriciousness of our criminal justice system. Justice and fairness demand more than forensic certitude - which even DNA testing doesn't always guarantee.

The real question is: does Wisconsin need the death penalty? According to one recent poll, a healthy majority of voters think it does. Men in our state favor capital punishment almost two-to-one. But when all is said and done, what purpose would be served by ending Wisconsin's 155 year old abolitionist tradition? It won't make us one whit safer, places us in a position that the United Nations, Amnesty International, The Catholic Church and most mainline protestant churches have thoroughly

repudiated and will further coarsen of a culture that is already far too petulant and fraught with violence.

The November referendum is only advisory. But that hardly makes it less significant. How many state legislators will be courageous enough to ignore a clear popular mandate? How many will take the risk of voting their conscience, as they have in the past? I'm sure that with the shocking slaying of Weston high school's principle on Friday, the ballot measure will be given fresh impetus, but I would argue that the problem and its solution lie elsewhere. What kind of culture have we created where a fifteen year-old can walk heavily armed into a school with such an incredible chip on his shoulder?

The record of capital punishment in this country has not been a particularly admirable one. It has not made our society better or more just in the past. Why do we imagine it would do so in the future?