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THE DEATH PENALTY: A DIALOGUE ON MORALITY AND THE LAW: REMARKS BY JEANNE BISHOP

BY JEANNE BISHOP¹

Thank you so much, Mark.² Thank you, Bridget Welter, for bringing me here and the Journal of Law and Public Policy. I love coming to St. Thomas. Before I came here this time, I looked up on your website what you say your mission is, and that is that you are dedicated to integrating faith and reason in the search for truth through a focus on morality and social justice.³ I get to teach, work and speak at a lot of different law schools, but I think St. Thomas is just unsurpassed in living up to its mission and living up to the truth of those words – and this is part of it. I am incredibly grateful that you are turning that search for truth to this topic of the death penalty, because it is important.

The majority of U.S. states still have a death penalty, and every jurisdiction has a federal death penalty, even in the states that do not have a death penalty under state law, like Massachusetts.⁴ Prosecutors still sought the death penalty for the marathon bomber.⁵ So, it exists in a sense in every state, including this one. I have been working on this issue for a long time, about since I was your age and in school, and this is before the tragedy in my family. I opposed the death penalty for all these what I call “rational” reasons: that it is more expensive than housing someone for life;⁶ that it risks killing an innocent person; that it

¹ Jeanne Bishop, a public defender from Cook County, provided remarks after her sister’s murderer received the death penalty. These remarks were given at the Fall 2018 symposium “THE DEATH PENALTY: A Dialogue on Morality and The Law” at the St. Thomas Sch. of Law (Nov. 9, 2018).

² Professor Mark Osler is a professor at the University of St. Thomas School of Law in Minneapolis, Minnesota. Professor Osler served as moderator of the University of St. Thomas Journal of Law and Public Policy’s fall 2018 symposium, “THE DEATH PENALTY: A Dialogue on Morality and the Law.”

³ *St. Thomas School of Law Mission Statement*, <https://www.stthomas.edu/law/about/> (last visited Jan. 26, 2019).

⁴ Bradley Campbell, *Massachusetts Isn’t Ok With The Death Penalty, But Dzhokhar Tsarnaev’s Jurors Had To Be*, PRI’s The World (May 15, 2015), <https://www.pri.org/stories/2015-01-05/massachusetts-isnt-ok-death-penalty-dzhokhar-tsarnaevs-jurors-have-be>.

⁵ *Id.*

⁶ *What Costs More the Death Penalty or Life in Prison?* NBC (Sep. 21, 2011), https://www.nbcrightnow.com/news/what-costs-more-the-death-penalty-or-life-in-prison/article_2d18f8a1-d1ce-5382-8bd6-15471a1b4194.html.

is racist in its application; that you are more likely to get the death penalty for killing a white person than for killing an African-American person.⁷ You go on and on with all these rational reasons, and you get in debates with people. Then at the end of the debate, they would say, “You know what? You would feel differently if that was your family member.” Along the lines of what Professor Osler described to you, Alberto Gonzalez said that if it happened to you and your family, then you would want the death penalty; you would want that person dead.⁸ That is the conversation stopper, because you have no idea how you would feel if a tragedy like that struck. And then it did.

It happened to my family in 1990 – April 7, 1990. I was out to dinner with my younger sister, Nancy. She was twenty-five years old, and her husband, Richard, was twenty-nine. We were with my parents, and we were at this Italian restaurant on Clark Street in Chicago celebrating really happy news. Nancy was pregnant. They were going to have what would have been their first child. The last thing we expected is that they would go home that night and find this intruder waiting for them. He had broken into their townhouse, had a .357 Magnum revolver, took them down to the basement, shot Richard in the head once execution-style, and shot Nancy twice in her pregnant side and abdomen. That shattering event led to a six-month murder investigation. No one could figure out who had done it, and it turned out to be a teenage boy, a sixteen-year-old who lived only a few blocks away from them.

Back then, Illinois did not have a death penalty for juveniles.⁹ This was in 1990, when other states did.¹⁰ This was before the case of *Roper v. Simmons*, the U.S. Supreme Court case that overruled the death penalty for juveniles, saying that it is unconstitutional.¹¹ In places like Texas, Florida, and Missouri, you could get the death penalty for juveniles, but not in Illinois.¹² So, when instead the killer of my family members got a life sentence without the possibility of parole, the press was all waiting there after his sentencing to say, “Aren't you disappointed that he could not get the death penalty?” That was the first opportunity that I had to say, “No, the death penalty would contradict everything that Nancy stood for. She was this warm, generous, open-hearted, loving person; she loved life. She was carrying life in her body when she died. Really, the last thing she would want would be for her memorial to be the death of another person.” I also felt that the death penalty was wrong because

⁷ *The Case Against the Death Penalty*, ACLU (Aug. 2012), <https://www.aclu.org/other/case-against-death-penalty>.

⁸ Osler, Mark. “The Death Penalty.” Lecture, St. Thomas Journal of Law and Public Policy, Minneapolis, MN, November 9, 2018.

⁹ Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes* (Oct. 7, 2005), <https://deathpenaltyinfo.org/documents/StreibJuvDP2005.pdf>.

¹⁰ *Id.*

¹¹ See *Roper v. Simmons*, 543 U.S. 551, 577 (2005).

¹² Streib, *supra* note 8.

it would take me away from who Nancy was and closer to who the killer was, because when an execution is carried out, it is not done in the name of the prosecutor or the governor. It is done in the name of the people of the state of Illinois or the state of Minnesota. Unless you stand up and say, "I do not want that," you are complicit in that. That is when I started first speaking against the death penalty.

We are here to talk about truth and the death penalty. One of the biggest untruths that was floated – at this time back in 1990, when I started advocating against it – was that all victims want the death penalty. They want the harshest possible punishment, and they need that for this thing called "closure." Closure is supposed to be where, once the person who killed your loved one is executed, all of your psychological turmoil and grief and everything will be resolved by that act. I just did not believe in that because, I thought, "I love Nancy, and I will miss her forever. That grief will live in me as long as that love does. Every May fourteenth, on her birthday, I am going to mourn her. Every time I see a baptism in my church, I think of that baby that she would have had. I do not want to close that. I want it to live in me and motivate me to work hard against the kind of violence that took her life, against gun violence, against hatred, against all these things that we see all around us, in Thousand Oaks, California and Pennsylvania and Florida, and on and on."

So, I got started working against it back then. It was a really different landscape because the opponents of the death penalty – the outspoken opponents – were mostly people who were in the defense bar, people who were advocates for prisoners facing the death penalty, and the religious community. What would happen is we would say, we should abolish the death penalty. Then, they would trot out the angriest victims to say, "How dare you? These people should fry! They should burn in hell, and we want them dead." That would be the end of it, and we would get nowhere. So, we started gathering victims' family members, like me, who oppose the death penalty into organizations that could have more of a voice. Some of the murder victims' family members believed in the death penalty in principle, but they did not want the death penalty because it would just take years and years, and there would be no end to appeal after appeal. They just wanted to have the immediate justice of a sentence of a term of years or a life sentence. Gradually these voices started to emerge.

I remember going to a conference overseas on the death penalty. It was a former prosecutor speaking, and he said that no movement to try to abolish the death penalty is going to succeed unless it is not only joined but led by two groups: prosecutors and victims' family members. We started seeing prosecutors speaking out against the death penalty. One of those is Robert Morgenthau, the former district attorney in New York, who said, "Look, this is just a waste of money. I have a limited budget. I can spend millions of dollars on this one case to kill this one

person, or I can use the rest of it for investigations, for law enforcement, for services for victims, things like that.”¹³ Another really important prosecutorial voice against the death penalty is your professor, Mark Osler, who has always spoken out against the death penalty from the perspective of his Christian faith and his ideals that led him to become a prosecutor in the first place. If you have not read his groundbreaking book, *Jesus on Death Row*, comparing the trial and execution of Jesus with our modern death penalty, you should read it.¹⁴ It is a great book – an incredible resource.

So, what happened in the State of Illinois? We had a death penalty. I was working against it, and a third group joined these voices of victims’ family members and prosecutors, and those were the wrongfully convicted. In the state of Illinois, we had exoneration after exoneration of people who were innocent and were sometimes within days of execution. We had a guy named Anthony Porter, who had actually given away all his belongings, had bought the suit for him to be buried in, and had been measured for his casket.¹⁵ He had always denied the crime and said he was innocent.¹⁶ A group of journalism students from Northwestern University went out to the scene – which the defense lawyer had not done – and realized that the witness could not possibly have seen what he said he saw when he implicated Mr. Porter.¹⁷ The witness recanted, the real killer confessed, and he was released.¹⁸ We exonerated twenty people from Illinois’s death row.¹⁹ That was half of our death row.

The governor at the time was a Republican governor, George Ryan. He said, “Look, if the State of Illinois had a fleet of airplanes, and one out of every two planes was dropping out of the sky and crashing, we would ground all the planes, and we would figure out what was wrong with these airplanes and why they keep crashing.” He put together a bipartisan commission, half Republicans, half Democrats, chaired by former U.S. Attorney, Tom Sullivan, a partner at Jenner and Block, a highly respected lawyer, and they studied it for two years.²⁰ They heard testimony from all sides, and they came up with a report with more than

¹³ Robert M. Morgenthau, *What Prosecutors Won’t Tell You*, N.Y. TIMES (Feb. 7, 1995), <https://www.nytimes.com/1995/02/07/opinion/what-prosecutors-won-t-tell-you.html>.

¹⁴ MARK W. OSLER, *JESUS ON DEATH ROW: THE TRIAL OF JESUS AND AMERICAN CAPITAL PUNISHMENT* (2009).

¹⁵ ROBERT J. NORRIS, *EXONERATED: A HISTORY OF THE INNOCENCE MOVEMENT* 78 (2017); *Fatal Flaws of Capital Punishment*, CHICAGO TRIBUNE, Feb. 12, 1999, available at <https://www.chicagotribune.com/news/ct-xpm-1999-02-12-9902120166-story.html>.

¹⁶ THE CASE OF ANTHONY PORTER, <https://capitalpunishmentincontext.org/cases/porter> (last visited Jan. 27, 2019).

¹⁷ Jon Jeter, *A New Ending to an Old Story*, WASHINGTON POST (Feb. 17, 1999), https://www.washingtonpost.com/archive/lifestyle/1999/02/17/a-new-ending-to-an-old-story/63e38bb9-f485-4a77-8fdf-6664adfa57e1/?utm_term=.b8e1bb2d7cce.

¹⁸ *Id.*

¹⁹ Christina McMahon, *Illinois Abolishes the Death Penalty*, 16 PUBLILREP 83, 84 (2011).

²⁰ STATE OF IL. REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT (2002).

eighty separate recommendations of how you could try to ensure that no innocent person was ever executed.²¹ At the end of the report, they still concluded that even if you enacted all of these recommendations, you still could not guarantee that you would not kill an innocent person.²² That risk still existed. The moratorium that Governor Ryan declared on the death penalty stayed in place as the legislature worked through, “How do you know how many of these things can we enact?”²³ In the end, they only enacted fourteen of the recommendations. One of them, by the way, was spearheaded by a state senator from Illinois named Barack Obama, and that was this idea that all confessions in murder cases should be videotaped.²⁴ Everybody agreed with that. It was a point of complete agreement for Republicans and Democrats, conservatives and liberals, because the conservatives thought, “Well, if somebody is guilty and they say they are, that is very powerful evidence to play a video for a jury with a guy saying, ‘I did that.’” For the people who advocated for defendants, it was powerful because there were so many cases where people had been tortured, beaten, electric shocked, and threatened into confessing to crimes they had not committed. That was a big step forward, but still we had this problem of innocent people still being executed.

Finally, the legislature in Illinois passed a death penalty abolition bill. Now we had a new governor – we had Governor Pat Quinn, a Democrat and a deeply faithful Catholic. But he was getting a ton of pressure from the prosecutorial community in Illinois, and some of the angry victims [wanted him] to not sign the bill [and] to keep the death penalty in place.²⁵ By now there were fifteen more people on Illinois's death row.²⁶ So, Governor Quinn had this decision to make, and again, this is where your professor Mark Osler showed up. One of the things the Governor needed was to have the sense that there is a valid prosecutorial position against the death penalty. He came to a meeting that we had with all the members of Governor Quinn's legal staff, where Professor Osler said, “Look at the states around you, around the state of Illinois. They do not have a death penalty. They do not want it, they do not need it, and here is why.” It was incredibly effective at that eleventh hour.

At the end of the day, Governor Quinn did sign the bill, and he invited a small group of people to a very somber ceremony. It was not a big hoopla with applause and cheering and everything. He came out to a

²¹ *Id.*

²² *Id.*

²³ Dan Kening, *New Bill Would Repeal Death Penalty in Illinois*, CHICAGO TRIBUNE (Feb. 26, 2001), <https://www.chicagotribune.com/news/ct-xpm-2001-02-26-0107120371-story.html>.

²⁴ Andrew Stern & Mary Wisniewski, *Illinois Governor Signs Death Penalty Ban*, REUTERS (Mar. 9, 2011), <https://www.reuters.com/article/us-illinois-death-penalty/illinois-governor-signs-death-penalty-ban-idUSTRE72875120110309>.

²⁵ Samuel G. Freedman, *Faith Was on the Governor's Shoulder*, N.Y. TIMES (March 25, 2011), <https://www.nytimes.com/2011/03/26/us/26religion.html>.

²⁶ Stern & Wisniewski, *supra* note 24.

podium, and he brought four books with him. One was Sister Helen Prejean's *Dead Man Walking* — the Catholic nun who wrote the book about visiting people on death row and also visiting the victims.²⁷ One of them was by Joseph Cardinal Bernardine against the death penalty, because he is the former Cardinal in Chicago. He believes in this thing called a seamless web of life, where you are against abortion but you are also against weapons that can kill people, and you are against the death penalty.²⁸ He stated his reasons of conscience and faith, and it was the most amazing moment to be there and see this scourge of killing removed from the state. One of the people who was there was my friend, Andrea Lyon. She is nicknamed the Angel of Death Row because, as a defense attorney in my office in Chicago, she took nineteen cases to verdict on the death penalty and never lost one — not one client sentenced to death. She had the worst of the worst, because she was the best. She talked about what it was like to know that she would never again have to be in a courtroom, begging for the life of her client. It was deeply moving.

What happened next? After we abolished the death penalty, the sky did not fall; the crime rate did not skyrocket. We had all this money that was being spent on this capital litigation fund that we needed to help counties afford to bring death penalty cases and to pay for expert witnesses for indigent defendants. All that money now is getting plowed into victim services and law enforcement — where it belongs.²⁹ The Republican governor in Illinois — who just got voted out of office the other day — briefly, in a desperate attempt to get re-elected, floated the idea of bringing back the death penalty.³⁰ He was roundly jeered, not just by people like me, but even by people in the Republican Party just saying, “We are not going back there — we have been through all of this debate and we are not going back there.”

What do I hope you will take away from what I have said today? That when you get into a discussion with people about the death penalty, and people say, “Oh, the victims want it or they need it,” say to them, “Not true. Not all victims’ families want the death penalty, not all of them need it. There is a better way for many to honor our loved ones.”

I will just end with a story. There was a terrible murder in Chicago, a senseless murder in a Brown's Chicken restaurant.³¹ Two guys (one of

²⁷ HELEN PREJEAN, *DEAD MAN WALKING: THE EYEWITNESS ACCOUNT OF THE DEATH PENALTY THAT SPARKED A NATIONAL DEBATE* (1994).

²⁸ JOSEPH L. BERNANDIN, *THE GIFT OF PEACE: PERSONAL REFLECTIONS BY CARDINAL JOSEPH BERNANDIN* (1998).

²⁹ 725 ILL. COMP. STAT. 5/119-1 (2011). *See also* P.A. 096-1543 § 10.

³⁰ Kim Geiger, Monique Garcia, Dan Hinkel, *Rauner Proposes Reinstating Death Penalty in Illinois, Which Outlawed It Earlier This Decade*, CHICAGO TRIBUNE. (May 14, 2018), <https://www.chicagotribune.com/news/local/politics/ct-met-bruce-rauner-guns-bill-20180514-story.html>.

³¹ Carlos Sadovi & Azam Ahmed, *Luna's Words Hit Home*, CHICAGO TRIBUNE. (April 26, 2017), <https://www.chicagotribune.com/news/ct-xpm-2007-04-26-0704250948-story.html>.

them named Juan Luna) broke in and stole a negligible amount of money, did not need to kill anyone, herded them all into the back, and shot seven people in cold blood.³² When Mr. Luna stood trial, they were seeking the death penalty. It was kind of widely felt that if you are going to have a death penalty, this is the guy who deserves it. Many of the relatives of the victims did not believe in the death penalty, and they had a press conference on the front steps of 26th and California, the criminal courts building in Chicago.³³ One of them looked right into the TV camera—she spoke into the camera as if she were speaking to Mr. Luna—and she said, “You killed my mother. You showed her no mercy, but we will show you mercy, because that is who she was; that is what she believed in; that is what she stood for.”³⁴

That is why I do the advocacy that I do in memory of my sister Nancy. I believe, like Sister Helen, that people are more than the worst thing that they have ever done, that every human being is precious and valuable and capable of redemption. Thank you.

Mark Osler:

Before anyone else has a question, Ms. Bishop just signed a contract with HarperCollins for her next book. Her first book is *Change of Heart*, which some of you have read.³⁵ If you could talk a little bit about that.

Jeanne Bishop:

I grew up in Oklahoma City, and I used to have an accent, but it got beat out of me when I went to college—these people were making fun of me.

When the Oklahoma City bombing happened in April 1995, it impacted my community that I loved and people that I knew. One of the people that I met in my death penalty advocacy is a guy who owns gas stations there. His name is Bud Welch, and his only daughter, Julie, died in that bombing. She was almost Nancy's age. She was twenty-three years old, and she was a genius at languages. She was a translator for the Social Security Administration on the first floor. When Bud saw on the news the cratered out building from Timothy McVeigh's truck bomb, he did not need to even wait for her body to be found; he knew that Julie was dead. He was filled with hate and rage, and he wanted the death penalty for whoever had done it. When Timothy McVeigh was caught—you

³² *Id.*

³³ *Families of “Brown’s Chicken Massacre” Victims Speak About the Death Penalty*. Murder Victim’s Families for Human Rights. (2008). http://www.mvfh.org/sites/default/files/pdf/MVFHR8-07_0.pdf.

³⁴ *See Id.*

³⁵ JEANNE BISHOP, *CHANGE OF HEART: JUSTICE MERCY, AND MAKING PEACE WITH MY SISTER’S KILLER* (2015).

guys are probably all too young to even remember this—there is this scene where he is brought out in his orange jumpsuit. Bud was watching this on the news, hoping that some sniper would just take him out at that moment. The death penalty was not even soon enough for him, but he started realizing that he was consumed by rage and hatred and that was not healing him. So, he changed his mind about the death penalty when he looked into why Timothy McVeigh set off that bomb. He did it out of revenge and retaliation, because he was a kind of a white supremacist, off-the-grid kind of guy. He was all upset about the thing that happened to the Branch Davidians in Waco, Texas.³⁶

There was this compound led by this cultish guy named David Koresh. The ATF and FBI raided it, it caught fire, and it killed seventy-five people, including women and children. On the second anniversary of that conflagration, when Tim McVeigh set off that bomb.³⁷ He got the death penalty when he was caught. Bud spoke out against it. He tried to meet Tim McVeigh. He wanted to forgive him face-to-face. He was not able to do that; but, before Tim was executed, he reached out instead to Timothy McVeigh's father, Bill McVeigh. He went to see him, and they found that they had all these things in common. They both grew up on farms, big Irish-Catholic families; three kids each. They were born within months of each other. Both working men, never went to college. Bud at the gas station, Bill at this overnight General Motors plant for thirty-seven years. They became friends, and they had this moment of forgiveness and reconciliation. So, the book is about them and about this understanding and love being a better way to respond to tragedy than just taking the life of this one man.

Question from the audience:

Does your work take you to any other states?

Jeanne Bishop:

As Professor Osler said, we did this death penalty project where we purposely went to death penalty states like Tennessee, Virginia, Oklahoma, California, [and] Colorado. I am also going around to other places that have the death penalty. I was just in Iowa, because they are talking about bringing back the death penalty there, and you know it is a convenient political tool right before elections. I am not only going to places with the death penalty, I am going to places where they are talking about reinstating it.

Question from the audience:

³⁶ John P. Jenkins, *Oklahoma City Bombing*, Encyclopedia Britannica, <https://www.britannica.com/event/Oklahoma-City-bombing> (last visited: Feb. 2, 2019).

³⁷ *Id.*

When you mentioned that it is cheaper to incarcerate someone for life than to execute them, did you mean that financially or in the broader picture?

Jeanne Bishop:

That is a great question. It is actually cheaper. Financially, it costs way less money to incarcerate someone.³⁸ That seems odd, because whenever you hear someone advocating for the death penalty, they say, “Why should I pay to feed and clothe this guy? Let’s just wipe them off the face of the earth.”

It starts with the trial. When Bruce Rauner, our former governor in Illinois, wanted to reinstate the death penalty, they said, “When you are reinstating the death penalty, you are reinstating all of these apparatuses that cost a ton of money. You are reinstating a death row. You are reinstating specially trained guards. You are reinstating automatic appeals, whether a prisoner wants it or not. If you get death, you automatically have an appeal where we are ordering now the transcript of this whole trial. You are reinstating the capital litigation trust fund that had millions and millions of dollars of taxpayer money that paid for it.” Let’s say you want to have an expert to examine your guy to see if there is some sort of brain development thing or something or you need an expert witness about cross-racial identification or things like that. It is enormously expensive just at the trial level because, of course, it is two trials. It is the guilt and innocence phase, but then there is the whole aggravation/mitigation phase — the penalty phase, which is usually much longer and more time-consuming and expensive. Then you have the appeals, and on and on. In Illinois, they did a study, and they found that it would be maybe about six hundred thousand dollars to eight hundred thousand dollars to house someone for life and about two million dollars per case on the death penalty.³⁹

Mark Osler:

We are here in a Catholic school, so I can ask this question. You have been a public defender for twenty-seven years. Twenty-seven years of being mired in tragedy day after day after day, of racial disparities, of the problems of poverty and violence, and then your hobby is working on the death penalty. How does faith sustain you? There are not many people who do what you do for as long as you have. How has your faith let you do this?

³⁸ Death Penalty Information Center, *Facts about the Death Penalty* (Jan. 30, 2018), <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

³⁹ Leigh B. Bienen et al., *Sixth and Final Report*, ILL. CAPITAL PUNISHMENT REFORM STUDY COMM (October 28, 2010), <http://illinoismurderindictments.law.northwestern.edu/docs/CPRSC-Sixth-and-Final-Report.pdf>.

Jeanne Bishop:

Wow, that is such a lovely question. No one has ever asked me that question before. I really think it is out of a sense of profound gratitude. I mean, when Nancy was killed at age twenty-five, I was only a few years older than her, and I was not a public defender then. I was an associate in the corporate department of Mayer Brown, which is one of those big global law firms. They were paying me a lot of money. I was doing a terrible job and really cheating my employer, because I was not giving my whole heart to it. I did not love corporate law. I did not believe in it deeply, and I am not here to dissuade anyone from doing that. That is a great, honorable path, that way, too, but it was not for me; it did not mean anything deeply meaningful to me.

When Nancy lost her life at age twenty-five, she was happy. She was married to a man she loved, she was about to have a baby, and she had this job that she loved. I thought, “Oh my gosh, I have been wasting this life that God has given me.” Every breath I draw from now on is a gift that I do not deserve, and to honor Nancy's memory and to honor this God who gave me this life, it cannot be about me. It cannot be about making money or working for the big fancy firm. It has to be about doing something meaningful for other people, which is the only reason to do anything, I think—not for yourself but for the greater good of the world. That is the truth of what Jesus said about when you lose your life – that is when you find it, right?

The pastor at my church, John Buchanan, if you could sum up twenty-six years of his preaching that I listened to from him, it is this: give your life away; give it away. Thank you so much.