

WHY DEATH IS DIFFERENT: MINNESOTA'S EXPERIMENT WITH CAPITAL PUNISHMENT

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Legacy of Violence: Lynch Mobs and Executions in Minnesota. By John D. Bessler, Esq. *University of Minnesota Press*, 2003. 307 pages. \$29.95

I. INTRODUCTION

At no time during our modern experience with the death penalty have the questions surrounding the wisdom of capital punishment been starker or more troubling.¹ To be sure, the perennial moral and psychological issues surrounding capital punishment continue to this day: Is it ever permissible, no matter how heinous the crime, for the state to take a human life? Does the death penalty effectively deter the commission of capital offenses? Or, is the death penalty little more than a primitive blood-letting exercise that debases any society that administers it?

To these enduring questions have now been added others, courtesy of remarkable advances in forensic science and DNA testing that have exposed the troubling inability of prosecutors and courts to separate consistently the guilty from the actually innocent. Indeed, we now witness what has become nearly commonplace: the exoneration by DNA testing of an inmate sentenced to death or life imprisonment years ago for a capital offense that he did not

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1. Beginning in the late 1970s, a number of states enacted new death penalty statutes in an effort to comply with the standards that the Supreme Court in *Furman v. Georgia*, 408 U.S. 238, 270-80 (1972), had found lacking in most existing death penalty regimes. See Bryan Stevenson, *Two Views on the Impact of Ring v. Arizona on Capital Sentencing: The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1091 (Summer 2003) (citing MARC MAUER, RACE TO INCARCERATE 42-55 (1999)).

commit.² Science challenges the public's assumptions regarding the ability of the judicial system to convict and execute only those who are in fact guilty. We now know, if we did not before, that such powerfully incriminating evidence as eyewitness testimony and the suspect's own confession may be not merely questionable, but in fact, demonstrably false.

The courts are now confronting (and the public is gradually awakening to) the reality that no fact-finding system, however enhanced it may purport to be with protections for the accused, can prevent the wrongful conviction of innocent persons, particularly when, as with capital punishment, the universe of defendants consists almost exclusively of the poor and poorly represented.³ In short, science has now weighed in on the moral

2. The Innocence Project at the Cardozo Law School reports that, as of February 2004, some 142 convicts have been exonerated as a result of DNA testing since 1989, with seventy-nine of the exonerations occurring since 2000. See Innocence Project, *DNA*, at <http://www.innocenceproject.org/causes/dna.php> (last visited Mar. 3, 2004). In the first 138 of these exoneration cases, more than two-thirds of the wrongful convictions, at least in part, involved what proved to be mistaken eyewitness identifications at trial. See Innocence Project, *Case Profiles*, at <http://www.innocenceproject.org/case/index.php> (last visited Mar. 3, 2004). Of the first 123 post-conviction exoneration cases studied, false confessions were involved in thirty-three of them. *Id.* The "Central Park Jogger" case itself involved five defendants, each of whom had falsely confessed to the crimes. False confessions also led, in part, to suspension of the death penalty in Illinois. *Id.* See also *Report of the Governor's Commission on Capital Punishment*, State of Illinois (April 2002) available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf (last visited Mar. 3, 2004). Long questioned by psychologists, but rarely by courts, the high incidence of false confessions is attributable to the length and stress of the interrogation, established police interrogation techniques that are designed to break down the suspect, the suspect's low intelligence and/or mental impairment, and the suspect's desire to terminate a stressful encounter with interrogators, often accompanied by the mistaken belief that his innocence will be subsequently proven. See Innocence Project, *False Confessions*, at <http://www.innocenceproject.org/causes/falseconfessions.php> (last visited Mar. 3, 2004). Minnesota is one of the few states that require electronic recording of all police interrogations. *State v. Scales*, 518 N.W.2d 587 (Minn. 1994). In contrast, a confession in the vast majority of other states can be rehearsed by interrogators with the suspect before being written or recorded, with no record of the hours of interrogation that likely preceded it. See Innocence Project, *False Confessions*, at <http://www.innocenceproject.org/causes/falseconfessions.php> (last visited Mar. 3, 2004).

3. In recent years, the issue of what constitutes the minimally acceptable assistance of counsel under the Sixth Amendment of the United States Constitution has occupied the courts. While initially the adequacy standard was absurdly low, there is some evidence that the Supreme Court may now be willing to elevate it in an effort to reduce the incidence of wrongful convictions. Compare *Strickland v. Washington*, 466 U.S. 668 (1984) with *Wiggins v. Smith*, ___ U.S. ___,

dilemma of capital punishment with a question of its own: Given the finality of an execution, can we accept any system that will inevitably give rise to the judicial system's worst nightmare—the conviction and execution of a person who is factually innocent?

As one of twelve states that currently do not have a capital punishment system, Minnesota has, for the past ninety years, spared itself the moral challenges and practical costs of administering the death penalty. Nonetheless, some Minnesota officials, including Governor Tim Pawlenty, now advocate for the re-institution of the death penalty.⁴ In the wake of these calls for enacting a capital punishment system, Minnesota's legislators and citizens would be wise, however, to consider not only the experience of other states that have practiced capital punishment for the past twenty-five to thirty years, but also the lessons that Minnesota learned from its own experiment with the death penalty between 1849 and 1911.

In *Legacy of Violence: Lynch Mobs and Executions in Minnesota*,⁵ Minneapolis lawyer John D. Bessler sets forth with remarkable scholarship, clarity, and objectivity the history of Minnesota's failed attempt to make peace with capital punishment. In his exhaustively researched story of state-sponsored hangings (and of privately administered lynchings as well),⁶ Bessler crystallizes the

123 S. Ct. 2527 (2003).

4. The governor's initial call for adopting the death penalty came within hours of the arrest of a Level Three sex offender in connection with the abduction (and presumed murder) of a college student in December 2003. The governor's later proposal contains provisions intended to protect against the conviction of the innocent, including the prerequisite that DNA evidence "link" the accused to the crime and that the trial judge must concur with the jury's imposition of the death penalty. See Press Release from Governor Pawlenty, Governor Pawlenty Outlines Principles for Death Penalty Legislation (Jan. 27, 2004), at http://www.governor.state.mn.us/Tpaw_View_Article.asp?artid=775 (last visited Mar. 3, 2004). In his January 27, 2004 press release, Governor Pawlenty stated that he supports the death penalty because "the punishment needs to fit the crime The death penalty option will . . . provide closure for families and communities." *Id.*

5. JOHN D. BESSLER, *LEGACY OF VIOLENCE: LYNCH MOBS AND EXECUTIONS IN MINNESOTA* (University of Minnesota Press 2003) [hereinafter *LEGACY OF VIOLENCE*].

6. Bessler has unmasked the racial hatred in 1920 Duluth that led to the shocking lynching of three African-American circus workers falsely accused of raping a white teenage woman. The lynchings, taking place nearly a decade after the abolition of capital punishment in Minnesota, underscore perhaps the most grimly ironic of all purported justifications for the death penalty—if the state does not hang the accused, a lynch mob may do it anyway. Because lynchings are, mercifully, a part of Minnesota's past, while the death penalty may become part of its future, this review centers upon that portion of *Legacy of Violence* that addresses

state's six-decade-long experience with the death penalty and its struggle, with varying degrees of short-term success, to minimize the most counter-productive and destructive effects of capital punishment.

Together with the lessons that can be drawn from the modern experiences of states currently practicing capital punishment, *Legacy of Violence* points us to the fundamental truth underlying the death penalty—that a punishment, which society first perceives as necessary to deter crime and vindicate the rule of law, must ultimately be rejected as counterproductive, costly, and irreducibly inhumane. In sum, *Legacy of Violence* and the history of capital punishment in other states establish that the death penalty itself carries the seeds of its own demise. That same collective history also demonstrates, however, that the abolition of the death penalty is often only a precursor to a later call for its reinstatement as the lessons learned from prior experience fade and become forgotten. For these reasons, *Legacy of Violence* is not only timeless, but also uniquely relevant in present-day Minnesota as the Legislature weighs the call for enactment of a sanction that has been absent from the state's criminal justice system for more than nine decades.

II. MINNESOTA'S LEGACY OF VIOLENCE

John Bessler's approach in *Legacy of Violence* is to tell the story of Minnesota's experience with the death penalty (and lynchings) and to allow his readers to draw their own conclusions regarding what lessons that history teaches. In doing so, he avoids engaging in any polemic or tirades, despite the clarity of his own belief that capital punishment is a self-defeating and misbegotten venture best left to our less-civilized past. Among the most telling episodes in Minnesota's capital punishment history are the following, which Bessler describes with a trial lawyer's eye for detail and storytelling skill.

A. *The Dakota Indian Executions*

Minnesota's 1849 territorial charter incorporated mandatory death sentences for any person convicted of a capital offense.⁷ By 1854, Minnesota authorities had publicly hanged the Territory's

the state's experience with state-sanctioned executions.

7. LEGACY OF VIOLENCE, *supra* note 5, at 1.

first condemned man, a Dakota Indian, before a large mob in St. Paul that called for the sheriff to “crucify him.”⁸ As described in the *Daily Minnesotian*, “[l]iquor was openly passed through the crowd, and the last moments of the poor Indian were disturbed by bacchanalian yells and cries.”⁹ A father held his daughter in his arms so that she could see all, while “giddy, senseless girls and women chattered gaily with their attendants, and old women were seen competing with drunken ruffians for a place near the gallows.”¹⁰ According to the account, “the crowd reportedly left the scene ‘satisfied and in high glee.’”¹¹

After eventually achieving statehood, Minnesota’s support for capital punishment was most evident in 1862 during the Dakota Conflict, commonly known as the “Sioux Uprising.”¹² In hastily arranged and perfunctorily performed “trials” unimpeded by rules of evidence, defense lawyers, or any definable standard of guilt, a military commission sentenced more than 300 Dakota Indians to death.¹³ A war-weary President Lincoln, who by then had seen more than enough Civil War bloodshed, had little tolerance for the carnage that Governor Ramsey then sought to exact.¹⁴ Nonetheless, Lincoln reluctantly recognized the political need to appease the calls from Minnesota for revenge and retribution. The compromise that he crafted between his own sensibilities and those of the Minnesotans was to commute all but thirty-eight of the death sentences—a decision that enraged the locals for its leniency. Even as so “limited,” the hanging of these thirty-eight men in Mankato still remains the largest mass hanging in U.S. history,¹⁵ an event that spectators at the event hailed with a ‘prolonged cheer.’¹⁶

B. The Execution of a White Woman and the Aborted Effort at Abolition

While the mass execution of thirty-eight Dakota Indians caused

8. *Id.* at 3.

9. *Id.* at 4.

10. *Id.*

11. *Id.*

12. *Id.* at ch. 2.

13. *Id.* at 44-46.

14. *Id.* at 47.

15. Even the president could not prevent the Minnesota territorial authorities from inadvertently hanging an innocent Indian whom they confused with one whose execution Lincoln had authorized. LEGACY OF VIOLENCE, *supra* note 5, at 62.

16. *Id.* at 59-62.

little revulsion in the state, the 1860 hanging of Ann Bilansky, the only woman executed in Minnesota, caused no shortage of it. The prosecution alleged that she had poisoned her husband while she was allegedly engaged in one or more illicit affairs, including one with her purported “nephew.” To prove its circumstantial case, the state proffered what, by today’s standards, was absurdly comical “scientific” evidence designed to prove that the cause of death was indeed arsenic poisoning. Though the state’s fact witnesses were hardly more convincing than its “experts” and the evidence that the deceased had actually taken his own life was at least as strong as the evidence pointing to his alleged murder, the prosecution nonetheless obtained a first-degree murder conviction, which the Minnesota Supreme Court upheld. Despite this affirmance, however, the evidence of guilt was so dubious that the prosecutor himself later publicly acknowledged his own “grave and serious doubts as to whether the defendant has had a fair trial.”¹⁷

Although Mrs. Bilansky was a truly unlikable character, the prospect of executing any woman caused considerable angst, leading the Minnesota legislature to debate, while Bilansky awaited her execution, whether capital punishment should be abolished. In the end, the proponents of the death penalty carried the day, with the House of Representatives Judiciary Committee setting forth in its report the following reasons why capital punishment remained necessary:¹⁸

1. Premeditated murder is distinguishable from all other crimes and requires a distinctive punishment.
2. The “universal feeling of mankind” is that anyone who has taken the life of another has forfeited his own.
3. The death penalty is sanctioned by “divine authority.”
4. Abolishing capital punishment would lead to an increase in crimes of murder.
5. The penal code “almost precludes the possibility of an innocent person suffering the death penalty.”
6. The abolition of the death penalty would lead to lynchings (a rather damning justification for capital punishment, to be sure).

With Mrs. Bilansky’s impending execution thus unimpeded, the sheriff ordered the construction of a large fence around the

17. *Id.* at 88.

18. *Id.* at 82-83.

gallows in the St. Paul courthouse square in an effort to inject a tasteful measure of “privacy” into the proceedings. Nonetheless, many onlookers secured vantage points from where they could witness the hanging, and a crowd estimated at between 1500 and 2000 people gathered outside the fenced enclosure. Following her hanging, a few attendees claimed pieces of the hangman’s rope as mementos or “a remedy for diseases.”¹⁹

C. Jury Resistance and Defense Strategies

As initially enacted, Minnesota’s first-degree murder law automatically required the imposition of the death penalty in the event of a conviction. Knowing that death would be the necessary punishment following conviction, jurors faced the dilemma posed by a defendant who they believed was guilty, but whom they did not perceive as meriting execution. Sensing the reluctance of jurors to convict in such cases, the legislature in 1868 amended the law to make a life sentence the presumptive sentence for a first-degree murder conviction, with a death sentence to be imposed only if the jury affirmatively voted for it.²⁰

Because Minnesota law accorded only a jury the right to impose the death penalty, some defendants found good reason to enter guilty pleas to avoid the impaneling of a jury. When, however, members of the notorious James and Younger gangs used that tactic to avoid likely death sentences following their infamous crime sprees in Minnesota, the legislature in 1883 amended the first-degree murder law in order to grant the trial judge not only the power to impose capital punishment but the obligation to do so absent “exceptional circumstances.”²¹

D. Protecting the Public From the Gruesome—Smith’s Law

Executions by hanging continued to be openly public affairs limited only by the individual good taste of the local sheriff called upon to administer the execution. In such cases, the sheriff might invite a selected group of guests to serve as onlookers or “assistants” while attempting to limit the size of the crowd in an effort to minimize the “brutalizing effect” of the hanging upon the public.²²

19. *Id.* at 90.

20. *Id.* at 97.

21. *Id.* at 104.

22. LEGACY OF VIOLENCE, *supra* note 5, at 113.

By 1889, however, the concern over the unavoidably depressing impact of the death penalty upon the citizenry gave rise to the “reforms” incorporated in what became known as “Smith’s Law.” This statutory effort to protect the public’s psyche from the negative effects of executions included the following restrictions:

1. All hangings would take place before sunrise while most people slept.
2. The execution would take place within the walls of the jail or within an enclosure higher than the gallows.
3. The only persons who could attend the execution were the sheriff and his “assistants,” the clergy or a priest, a physician, three persons designated by the condemned prisoner, and six others designated by the sheriff.
4. The press was forbidden from attending executions and could not report publicly anything more detailed than the fact that on a particular date the prisoner was executed.²³

Of course, these press restrictions angered newspapers, which argued that if the purpose of the death penalty was to deter crime, the hanging should be a publicly reported affair. In any event, Smith’s Law’s press restrictions, carrying as they did only a nominal fine for their violation, did little to deter the press. Consequently, while hangings continued to be administered with some frequency, albeit less publicly, an inquisitive citizen could still learn the most minute details of the hanging simply by reading the account in any newspaper inclined to disregard the statute.

E. The Abolition Movement Takes Hold—The Hanging of William Williams

Both public sentiment and Smith’s Law effectively suppressed large-scale concerns surrounding capital punishment as the state executed ten more men between 1896 and 1905. Public tolerance for the death penalty, however, receded following the seminal event leading to the ultimate abolition of capital punishment—the unspeakably crude and cruel hanging of William Williams in 1906. Apparently lacking the requisite mathematical ability to determine the length of rope appropriate for suspending the condemned man from the gallows, the sheriff’s crew affixed a length around his neck that enabled him to land on the floor beneath the scaffolding.

23. *Id.* at 118.

Rather than begin the hanging anew, however, three deputies pulled on the rope, thereby suspending Williams above the ground for some fifteen minutes before he was pronounced dead from strangulation.

News accounts, published in flat violation of the press restrictions in Smith's Law, caused widespread revulsion within a public that had already begun to express its misgivings regarding capital punishment. Those same news accounts, however, also resulted in the state prosecuting three St. Paul newspapers for violating those restrictions. Arguing that the law beneficially precluded the publication of execution details that would appeal to morbid tastes and lowered public morals, the state convinced the Minnesota Supreme Court that the restraint on the press was necessary and constitutional.

Ultimately, however, the press reporting of the Williams hanging coalesced abolitionist forces that viewed the death penalty as not only immoral and dehumanizing but also as counterproductive to its avowed purpose of deterring crime.²⁴ By 1911, proponents of abolishing the death penalty gathered a majority in the legislature to end the practice, convinced that (a) capital punishment was not a deterrent, (b) juror reluctance to impose the death penalty had likely led to the acquittal of defendants who would have been otherwise convicted, (c) the death penalty ran counter to the purpose of reforming and correcting prisoners, (d) it brutalized society, and (e) it foreclosed the subsequent exoneration of anyone who might later be proven innocent.²⁵ In place of a presumptive death penalty, Minnesota's first-degree murder statute was reformed to provide a mandatory life sentence in all cases. Realizing the limitations of the eye-for-an-eye philosophy underlying the death penalty, Minnesota joined the movement in the early twentieth century toward a less violent, demoralizing, error-prone, and costly way of punishing its worst offenders.

III. THE MODERN DEATH PENALTY

While many other states that had previously abolished the death penalty later re-established it after World War II, Minnesota has refrained, along with eleven other states, from returning to a

24. *Id.* at 173-79.

25. *Id.* at 173-179.

capital punishment system that it found so troubling. Since 1911, Minnesota has consistently rejected the death penalty while at the same time it has also retained one of the lowest murder rates in the nation, a characteristic common to most of the states that also currently abstain from capital punishment.²⁶

In the past three decades following the Supreme Court's decision in *Furman v. Georgia*,²⁷ the modern practice of capital punishment in the thirty-eight states that embrace it has spawned increasing litigation and public controversy over the manner in which capital punishment is administered.²⁸ At present, there are some 3500 inmates on death row in the United States,²⁹ nearly all of whom were unable to retain their own private counsel at trial and who were frequently represented, often inadequately, by an overworked and underfunded public defender or by an unskilled and underfunded court-appointed private lawyer.³⁰

Even as they contest their death sentences in post-conviction proceedings, many of the condemned remain unrepresented. Many of those who are forced to represent themselves are impaired either intellectually or psychologically.³¹ Were it not for the enormous pro bono commitment of time and money expended by members of the private bar, many of whom practice in non-death penalty states including Minnesota,³² the number of death row inmates without legal representation would be markedly higher.

In recent years, along with scientific proof that courts and juries frequently err in administering capital punishment, the sheer

26. *Id.* at XVII.

27. 408 U.S. 273 (1972).

28. *Facts About the Death Penalty*, Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/FactSheet.pdf> (last visited Mar. 3, 2004) (showing statistics for states and increasing public concern).

29. *Id.*

30. See *Death Penalty Representation*, Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/article.php?did=896&scid=68> (last visited Mar. 3, 2004); Amanda Paulson & Abraham McLaughlin, *Despite Reprieves, 3,500 Still on Death Row in the U.S.*, CHRISTIAN SCIENCE MONITOR, Sept. 4, 2003, available at <http://www.christiansciencemonitor.com/2003/0904/p04s01-usju.htm> (last visited Mar. 4, 2004).

31. See *Mental Illness and the Death Penalty*, Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/article.php?did=78&scid=66> (last visited Mar. 3, 2004); *Mental Retardation and the Death Penalty*, Death Penalty Information Center, available at <http://www.deathpenaltyinfo.org/article.php?scid=28&did=176> (last visited Mar. 3, 2004).

32. At present, at least ten death row inmates in other states currently have Minnesota private practitioners representing them in post-conviction relief proceedings.

volume of executions and death penalty sentences has forced the courts and the public at large to re-examine the wisdom of attempting to administer any system of capital punishment. No doubt, the advancements in forensic and DNA testing have heightened the courts' awareness that, given its finality and severity, "death is qualitatively different"³³ and requires a heightened concern for how the condemned have actually arrived on death row. In terms of jurisprudence, the courts have unavoidably confronted the glaring shortcomings in the system including not only those resulting from breathtakingly inept representation at trial and the denial of such basic constitutional protections as the right to indictment by a grand jury³⁴ and to trial by jury³⁵ but also from the insistence of several states upon executing the mentally retarded³⁶ and juveniles.³⁷

The call in Minnesota for re-establishment of capital punishment ironically comes, therefore, at a time when doubts regarding the wisdom of accepting the costs, burdens, and imperfections of capital punishment have never been greater and courts have been forced to scrutinize the legitimacy and reliability of death penalty convictions. The issue now for Minnesota is whether any system that it might adopt could be administered in a manner consistent with its own moral sense and best interests.³⁸

As John Bessler has shown us, Minnesota, once an unrelenting practitioner of capital punishment, has already answered that

33. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

34. *See, e.g., United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), *vacated by* 535 U.S. 953, *remanded*, 357 F.3d 745 (8th Cir. 2004); *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999).

35. *See, e.g., Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), *cert. granted in part*, ___ U.S. ___, 124 S. Ct. 833 (2003).

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

37. *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *cert. granted*, ___ U.S. ___, 124 S. Ct. 1171 (2004).

38. For example, would trial judges and jurors in Minnesota be sufficiently open to imposition of a death sentence in capital cases such that the system could function in the majority of courtrooms in the state? Would the public defenders' offices in Minnesota have the time and resources necessary to defend not only the guilt phase, but also the penalty phase of a capital case, as well as the numerous direct and post-conviction appeals that follow in the event of a conviction and imposition of the death penalty in a given case? How will the standards for determining what types of crimes and the manner of their commission be expressed and applied so that the death penalty would be imposed with a semblance of consistency and rationality?

question with a profound “no.” As the state considers whether any modernized and “improved” system of capital punishment could satisfy Minnesota’s standards of morality and justice, its leaders would do well not only to study John Bessler’s work in depth but also to heed the words with which he prefaces it:

The ultimate weakness of violence is that it is a descending spiral, begetting the very thing that it seeks to destroy Returning violence for violence multiplies violence, adding deeper darkness to a night already devoid of stars.

—Martin Luther King, Jr.³⁹

39. MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE? CHAOS OR COMMUNITY 62 (Beacon Press paperback ed. 1967).