

# What's Wrong With Capital Punishment?

By Don Herzog

Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption*. New York: Spiegel and Grau, 2014

In the circles of public interest law, Bryan Stevenson is – take your pick – a legend or a saint. He won a vaunted MacArthur Foundation Fellowship in 1995. He founded the Equal Justice Initiative, based in Alabama. The organization litigates on behalf of those imprisoned as children: Stevenson prevailed before the Supreme Court in *Miller v. Alabama*, which ruled it unconstitutional to give a minor a mandatory sentence of life without parole. States and circuit courts have split on whether the ruling is retroactive. This term the Supreme Court will decide *Toca v. Louisiana* to resolve that question. Stevenson's on that case, too.

EJI also does journeyman work representing those on death row. Over the years they've done a lot of extended political journalism, most recently a suitably wrenching report on lynching in America. Their online history of racial injustice is impeccably done. They lobby for legal and political change, too: the website just happily noted the resignation of Kim

Thomas, head of Alabama's Department of Corrections. ("During his four-year tenure, EJI issued reports documenting serious sexual and physical abuse by prison guards and dangerous conditions that have led to extraordinarily high rates of violence in Alabama's prisons. For the past six months, EJI repeatedly has called for new leadership at the ADOC.")

*Just Mercy* takes the reader back a few decades. Stevenson's a young lawyer, EJI a vision rich only in aspirations: "The office was cold in the winter" – mind you, that's winter in Montgomery, Alabama – "it was almost impossible to keep squirrels out of the attic, and there wasn't enough electricity to run the copier and a coffeepot at the same time without blowing a fuse." Lawyers don't take these jobs for the money or the splendid offices or the lavish expense accounts.

If you like being kicked in the gut by a guy who knows how to write, *Just Mercy* is a great read. But as a brief against capital punishment, it's terse, even baffling. And I say that as someone emphatically on Stevenson's side of our vexing debates.

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The centerpiece of Stevenson's book is the legal saga of Walter McMillian, or "Johnny D" to his friends. McMillian grew up in southern Alabama in the 1950s. He got a couple of years of education in a "colored school" and then started working. By the time he was an adult, he had his

own pulpwood business in southern Alabama. Easygoing, popular, married, in 1986 Walter started having an affair with Karen Kelly, who was white. Shortly after, 18-year-old Ronda Morrison, also white, was found dead with three shots in her back. Kelly started taking drugs and took up with Ralph Myers, a white man with a hefty criminal record.

The authorities were getting nowhere tracking down Morrison's murderer – until they got Myers to spin a yarn. Walter, explained Myers, had forced him at gunpoint into Walter's truck. Why? Walter's arm was sore and he needed a lift to the cleaners. There Myers waited, went and got cigarettes, and returned ten minutes later. Walter got back in the truck, told Myers he'd killed someone, and had Myers drive him back to town. Before long, Myers had seized on the police's suggestion that McMillian had sodomized him to boot.

You wouldn't have to be all that skeptical to shelve this in the fantasy section – or, better, in the reject pile on the fantasy editor's desk. But the state was off and running, booking McMillian and pressing homicide charges. No matter that when the investigators staged a meeting between Myers and McMillian, Myers needed someone to tell him which of a few black men McMillian was. No matter that Myers kept changing his story as the months went on. (At the trial, Myers testified that he'd witnessed the murder himself and that an older white man had instructed McMillian to

kill Myers, too – but McMillian was out of bullets.) Someone had to be convicted of Morrison’s murder: why not McMillian?

It’s hard to resist the inference that he was being punished for daring to sleep with a white woman. Stevenson went to interview Karen Kelly, by then in jail for murdering another woman. “Sheriff Tate only had one thing on his mind,” she told him. “He just kept saying, ‘Why you want to sleep with niggers? Why you want to sleep with niggers?’ It was awful, and he’s awful.”

I’m skipping more perjured testimony, evidence illegally withheld from the defense, an ironclad alibi attested to by many witnesses, and more. It took the jury – the prosecutor had used peremptory challenges against all African Americans but one, and despite *Batson’s* ban on the use of such challenges on racial grounds the judge dismissed objections – less than three hours to convict McMillian. They sentenced him to life in prison. The judge – this eyebrow-raiser remains a charming procedural possibility in Alabama, and not just a possibility, because their judges do it all the time – raised the sentence to death. McMillian spent six years on death row before Stevenson finally got him out. Every witness for the prosecution recanted. I’m skipping, too, the meeting at which state investigators, already convinced of McMillian’s innocence, said the prosecutor wanted to “maintain the status quo” – keep him in jail – for a few months more.

Nature was as unkind to McMillian as was Alabama. He broke his neck and ended up in an assisted care facility, delusionally fearing he was back on death row.

Interspersed with McMillian's saga are briefer tales of others caught up in our criminal justice system. To read these tales is to learn – to be forever doomed – to lend an ironic tinge to the pronunciation of *justice* in that familiar phrase. We meet neglected and abused children who made terrible choices and suffered the consequences. We meet a mentally retarded man, finally executed after the state botched an attempt. We meet more like them. Stevenson writes limpid prose and doesn't bother polemically underlining how ghastly his tales are.

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But what's the moral of these stories? Logicians worry about cherry picking: presenting only the evidence that serves one's case. "I thought about how certain it was that hundreds, maybe thousands of other people were just as innocent as Walter," muses Stevenson. If I had to guess, I'd choose thousands or tens of thousands. That guess wouldn't be a stab in the dark: the ongoing parade of false convictions, even ones demonstrated without DNA evidence – in yet another of Stevenson's tales, the state conveniently has destroyed the DNA evidence he seeks to exculpate a client – suggest we have a systemic problem. But is it "certain"? Not,

surely, on the basis of the stories presented here. They can't carry that kind of weight.

Stevenson has a few different suggestions on why we should get rid of capital punishment. First come some remarks following on his title, *Just Mercy*. At a benefit dinner celebrating the release of yet another wrongfully imprisoned woman, Stevenson tells the audience, "We need more mercy. We need more justice." In this mood, too, Stevenson sounds like Clarence Darrow, reminding us sorrowfully, even indignantly, of what deprived and depraved childhoods some of our criminals endured. "Mercy is just," he also offers, "when it is rooted in hopefulness and freely given."

The problem is that we usually think of mercy and justice as rival ideals. Sometimes, we think, we should be merciful and not comply with the inexorable dictates of justice. Mercy, we think, lies in *not* giving people what they deserve, which of course is one of our oldest views about justice. I'm not sure what Stevenson has in mind in provocatively imagining a kind of mercy that is itself just. Nor am I sure how that would lead not to forgiving some offenders or mitigating their punishments, but to abolishing capital punishment itself.

Stevenson also takes a swipe at other time-honored sentiments about justice: "In debates about the death penalty, I had started arguing that we would never think it humane to pay someone to rape people convicted of

rape or assault and abuse someone guilty of assault or abuse.” But you needn’t cling to that hidebound a picture of “eye for an eye” to discard this instantly. You can coherently think that murderers, or anyway the most depraved murderers, deserve to be put to death without committing yourself to the view Stevenson mocks here.

Late in the book, in a couple of understated but unmistakable passages, he invites us to think of capital punishment as a violation of Christianity. I’m an easy enough sell here. But of course plenty of devout Christians aren’t – and plenty of us old-fashioned liberals worry about basing state policy on religious views.

Most promising, but cryptic, is this: “Walter’s case had taught me that the death penalty is not about whether people deserve to die for the crimes they commit. The real question of capital punishment in this country is, *Do we deserve to kill?*” What might that mean?

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If my subject isn’t already dyspeptic enough for you, let’s revisit the September 7, 2011 GOP presidential primary debate. Brian Williams (no cheap jokes, please) solemnly addresses Rick Perry. “Your state has executed 234 death row inmates, more than any other governor in modern times.” Williams is already being interrupted by a wave of applause. The applause, shall we say, is not for him. Doggedly, he continues. “Have you

struggled to sleep at night with the idea that any one of those might have been innocent?"

Here's Perry's response:

No, sir. I've never struggled with that at all. The state of Texas has a very thoughtful, a very clear process in place of which – when someone commits the most heinous of crimes against our citizens, they get a fair hearing, they go through an appellate process, they go up to the Supreme Court of the United States, if that's required.

But in the state of Texas, if you come into our state and you kill one of our children, you kill a police officer, you're involved with another crime and you kill one of our citizens, you will face the ultimate justice in the state of Texas, and that is, you will be executed.

More uproarious applause. Williams asks Perry what he makes of the applause. Maybe he intended that follow-up as a reproach, or an invitation to the TV audience to realize they've just tuned into the lunatic asylum, but Perry takes it as a generous softball and slams it out of the park: "I think Americans understand justice. I think Americans are clearly, in the vast majority of cases, supportive of capital punishment."

I wish Perry could sit down with some veterans of Texan prisons. With Clarence Brandley, sentenced to death in 1981, exonerated in 1990. With Ricardo Aldape Guerra, sentenced to death in 1982, exonerated in 1997. With Muneer Deeb, sentenced to death in 1985, exonerated in 1993. With Michael Blair, sentenced to death in 1994, exonerated in 2008. This takes me up only to the letter D on the University of Michigan Law School's website on exoneration, but you get the idea. Yes, they were exonerated before they were executed. But somehow I doubt that Governor Perry and the GOP audience applauding him are big fans of the frozen-molasses pace of our legal machinery of death. (Stevenson gives us Chief Justice William Rehnquist denouncing the endless appeals and delays in 1988. "Let's get on with it," declared the Chief.)

So maybe Stevenson's "do we deserve to kill?" is a reminder that the system is fallible. It would be fallible even if it weren't staffed by the corrupt goons willing to railroad Walter McMillian to death row. Recall the familiar maxim, "better that  $x$  guilty men go free than that one innocent man be punished." As is widely and correctly noted, set  $x$  high enough and you can't have a criminal justice system at all. As is also widely and correctly noted, there's something especially horrifying about executing an innocent man. You can

release an innocent man you've held in jail, and I suppose you can pay him millions of dollars in compensation. But the only thing you can do for the innocent man you kill is clear his name.

It's tempting, though, to construe Stevenson's language differently. Let's concede, if only for argument's sake, that God would be within His rights in smiting murderers, or the worst murderers. We're not God. More precisely, neither are the officials manning the criminal justice system, not in Alabama and not in any other state.

They're not omniscient, but that points us back to the tragic cost of error. But they're not all that righteous, either. We are all broken, urges Stevenson. Here he unobtrusively taps another Christian sentiment: there but for the grace of God.... But you might think that the justification of capital punishment requires more than the thought that the criminal deserves to die. You might think it requires the thought that we, or our representatives, are morally entitled to kill.

You're morally permitted to kill someone if your life or limb is threatened. But a civilian has no right to kill a criminal after he's arrested. Not even if the civilian knows for sure the criminal is guilty. When we prosecute Jack Ruby for killing Lee Harvey Oswald, it's not because we wonder whether Oswald was really guilty. Nor, for those

of us believing in capital punishment, is it because we wonder whether Oswald deserved to die. It's that Ruby wasn't in the right role to kill him.

When Stevenson demands, "Do we deserve to kill?" he might be suggesting that even at its most august and impersonal, even without the sadly usual brigade of corrupt goons, the modern state isn't finally any better positioned, morally speaking, than Jack Ruby was. He might mean that there are some moral accounts we cannot properly settle. He might mean that even the most heinous murderers, those who do deserve death, don't and can't deserve it at our hands.

On that, I might well be with him.

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