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ice: Let's leave well enough alone

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On March 9, Gov. [Patrick J. Quinn](#) signed into law legislation repealing the death penalty in Illinois. So ends an ignominious, 34-year period that cost taxpayers untold millions of dollars. The final score? Almost twice the number of death row exonerations as opposed to death row executions (20 to 12, to be exact).

Predictably, nine days later on March 18, the Chicago Tribune published an op-ed article from an Illinois state legislator advocating a new death penalty law. But this time — Scout's honor — it will only be for the "worst of the worst" murders.

If you still think a new, improved law could change things, take a look at this first-person account of the death penalty in action:

"Here is something that happened in my time. Certain men are condemned to death for a murder. ... At this point the judges are informed by the officers of [another jurisdiction] that they have some prisoners who confessed outright to this murder ... [The judges are troubled by] the precedent it would set in suspending the execution of the sentences; that the sentence has been passed according to law and

that the judges have no right to change their minds. In short, these poor devils are sacrificed to the forms of justice."

So where and when do you think this occurred? Texas in the 1970s? Mississippi in the 1940s? Alabama in the 1920s?

Try France in the 1560s — that's 4½ centuries ago. This incident is related by the great French essayist Michel de Montaigne, who worked in the courts for over a decade. ("Of Experience" from Michel de Montaigne, "The Complete Works" (Everyman's Library, 2003). And it reminds us that, in a very fundamental way, nothing ever changes. The death penalty always puts a bizarre spin on any case it touches. The finality of the death penalty means that it should be the easiest of cases for those involved to stop and to admit to a mistake. Yet, perversely, it is just the opposite. No one ever wants to admit that he has made a mistake in a "life and death" situation; the consequences are simply too terrifying. So, in the face of doubt, a person ironically "digs in" and becomes even more adamant. (Anyone who still questions this should review the Jeanine Nicarico case in DuPage County.)

Nothing ever changes. The March 18 Tribune op-ed piece made the same promise that is made for every new death penalty scheme: Death will only be the punishment for the "worst of the worst" murders.

But because we are human beings, it never will be.

Here's why. The death penalty statute that went into effect in Illinois in 1977 had only seven eligibility factors. But the version of the statute that was just repealed had triple the number of eligibility factors — 21. That means that the legislature added a new death eligibility factor about every 2½ years the statute was in effect.

And how could they not? I cannot imagine what it must be like to be a prosecutor who has to explain to grieving family members why the murder of their loved one is not death-eligible. How do you tell any family touched by murder that their loss was not one of the "worst of the worst"?

So you go to the legislature and the death-eligible factors gradually increase from seven to 11 to 14 to 17 to 19 to 21. And you reach the point where, as the "Report of the Governor's Commission on Capital Punishment" stated in 2002, nearly every first-degree murder in Illinois could be eligible for the death penalty under one theory or another. And murders that were never meant to be death-eligible in 1977 suddenly become death-eligible. And prosecutors start asking for death in cases where the

evidence is a bit weaker. And somehow you end up with many innocent men on death row.

If your state legislator starts to float ideas about re-instituting the death penalty, send him a copy of David Garland's "Peculiar Institution: America's Death Penalty in an Age of Abolition" (Harvard, 2010). It will first remind him of the enormous financial burden the death penalty places on state taxpayers. For example, since the death penalty was reinstated in 1976, Maryland has spent \$187 million on capital cases. This averages out to \$37.2 million for each of its five executions. Compare this to New York: \$170 million on capital prosecutions between 1995 and 2005. The result? Not a single execution.

Garland goes on to show that a large part of America has historically been more ambivalent about the death penalty than you might suppose. Michigan, for example, abolished its death penalty in 1846; in fact, 25 states have at one time or another abolished capital punishment. Only the South has been consistently in favor of the death penalty. Only once has a former member of the Confederacy ever abolished the death penalty for murder: Tennessee, and that was only for one year (1915-1916).

Garland expands on what he calls the "Southernness" of the death penalty. Since 1976, Southern states have carried out about 83 percent of all American executions. Texas alone has performed more than one-third of them. And Garland contends that it is impossible to separate this Southern enthusiasm for executions from the issue of race. In antebellum times, every Southern state specified a certain number of felonies as punishable by death only if committed by a slave. This was continued de facto by many Southern states after the Civil War when they made rape a capital offense, but actually imposed death only when a black man was convicted of raping a white woman. And this also cannot be separated from the more than 3,000 lynchings of blacks that occurred between 1880 and 1930 in the South.

So why did so many Northern states — including Illinois — re-institute the death penalty after the U.S. Supreme Court had struck it down — at least temporarily — in 1972 in *Furman v. Georgia*? Garland argues that for many people outside the South the death penalty is no longer about actually executing people. Rather, it has become an "expressive punishment." As Garland writes, "The system of capital punishment that exists in America today is primarily a communication system. ... It is about mounting campaigns, taking polls, passing laws, bringing charges, bargaining pleas, imposing sentences and rehearing cases. It is about threats rather than deeds, anticipated deaths rather than actual executions." Which explains why immediately

after Gov. Quinn signed the repeal, some people began lobbying for a new death penalty statute.

Quinn's signature has concluded a sad period of Illinois criminal justice.

Let's leave well enough alone.

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