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AN ETHICAL FAIRY TALE

*Gerald F. Uelman**

Let's put ourselves in Claire Hopewell's shoes, and let's plant those shoes in Los Angeles, California, in 1996. Over four hundred vicious murderers are awaiting execution on California's death row. We've only delivered four executions since the death penalty was restored eighteen years ago, and voters are furious. Their fury was visited on the state supreme court ten years ago, voting three justices who were "soft" on the death penalty out of office, yet it hasn't seemed to speed up the pace of executions. More death penalty sentences have been affirmed, but the eagerly anticipated parade to the death chamber is still stalled.

The culprits holding up the parade are criminal defense lawyers who are seizing on legal technicalities to obstruct and delay the execution of their clients. The Attorney General publicly denounced lawyers who reached into their own pockets to provide a death row inmate with a pair of tennis shoes to bribe him into delaying his execution by allowing them to file a federal habeas corpus petition asserting his constitutional rights. Unethical defense lawyers, he suggested, will stop at nothing to prevent an execution.

It is Tuesday morning, and at one minute after midnight next Friday, we're finally going to deliver on the promise we made to the voters. A vicious cop-killer will die. The crowds have already started gathering outside the gates of the San Quentin penitentiary. The television screens are filled with images of the brave officer who was shot point-blank in the face while trying to capture a fleeing bank robber. His grieving widow and children appear in their vigil, waiting for justice to finally be delivered. The media also serves up generous doses of the life history of Frank Smith, a lowlife whose conviction for the murder of the police officer capped a long history of substance abuse, theft, and violence. It has been ten long years of appeals and petitions filed by his exhausted lawyers. His conviction has been

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reviewed and approved by forty judges at every level of the judicial hierarchy, all the way to the U.S. Supreme Court, twice.

At this point, a young public defender three years out of law school contemplates calling Frank Smith's lawyers and saying, "I have new evidence that Frank Smith is innocent." Before she makes the call, she consults her mentor, Jane Sitwell, a battle-scarred veteran of the death penalty wars. As a senior deputy public defender, Sitwell has represented half a dozen death row inmates.

Jane says, "Before you do anything, we need to make damn sure that Ben Jones is telling the truth. No judge will stop the execution just on your assertion that another con is ready to step up and say, 'I did it.' They'll say we cooked the whole thing up to stall the execution."

Claire responds, "There's no time to investigate. The execution is two days away. And we'll never find corroborating evidence without the cooperation of Ben Jones. He's the only one who can give us the kind of proof the courts and the prosecutors will demand."

Jane stops and looks thoughtful. "Do you realize that you're switching roles? All of a sudden, you're a prosecutor, looking for evidence that will convict your own client of a murder. Who do you represent, Ben Jones, or Frank Smith?"

"Right now," replies Claire, "I wish I didn't represent anyone. I want to do what's right. The execution of an innocent person is wrong. I couldn't live with myself if I could have prevented it and I didn't."

"What I'm suggesting," says Jane, "is that as a practical matter you can't prevent it, unless you can convince your client that it is in his best interest to step forward and admit the murder."

"Get serious," says Claire. "Ben Jones is a streetwise sociopath. It's not in his self-interest to put his neck on the line to save someone else's life. I would be conning him if I told him it was, and he would know it."

"Where will you be," asks Jane, "if you take this story to Frank Smith's lawyers, they file an immediate application for a stay, and then Ben Jones waltzes in and swears he never admitted the crime to you?"

Claire pauses, then answers, "It's almost as though, by giving me this information, Ben set me up. I now have a conflict that should keep me from even continuing to represent him. I want him to incriminate himself, which may not be in his best interests, in order to appease my own conscience."

Jane wisely murmurs, "Perhaps you're assuming too much. How can you be sure that Ben would not respond to your persuasive skills? And why do you assume that facing up to his responsibility for someone else's life is not in his best interests? It may be the best thing that ever happened to him."

Claire looks quizzical. "You're saying, 'confession is good for the soul?' When I started this job three years ago, you told me the first job of any defense lawyer is to make sure her client says nothing to anyone except his lawyer. Is this a new exception to the rule?"

Jane replies, "Every rule has exceptions."

The following morning, Claire Hopewell sits across her desk from her client, Ben Jones, and begins to speak. She has rehearsed her words dozens of times throughout a sleepless night. As she speaks, however, she discovers the words she delivers aren't precisely the "speech" she prepared. She is baring her soul.

"Ben, if I were just speaking as your lawyer, I would have to say forget everything you told me yesterday. The D.A. is not going to let up on your case because you were the hero who saved Frank Smith from execution. The last thing the public wants to see is that we came within hours of executing an innocent man. You're crazy if you think confessing to the murder of a cop will get you a good deal on a drug charge. If they can't execute Frank Smith, they'll look for every possible way on earth to strap you to the gurney in his place.

"As you well know, I'm bound to keep your secret. What you told me is privileged. By telling it to me, you may have turned the rest of my life into hell, knowing I had information that might have saved an innocent man from execution and chose not to reveal it. But you probably wouldn't have told it to me if it were not privileged. If I break the promise of that privilege to you, I've still got to live in hell. I could then be responsible for *your* execution. Like it or not, my primary duty is to you. You are my client.

"But let me speak to you as a fellow member of the human race. I have a very strong feeling that the real reason you told me what you told me yesterday was not to get a deal for yourself but to find some peace. You told me 'it's not right' for Frank Smith to die for something he didn't do. You've been there. You've suffered in lots of ways that were 'not right' in your own life. Now, you have the chance to keep it from happening to someone else. You're the only person who can keep Frank Smith alive after midnight tomorrow. That makes you a very powerful person.

“There are two kinds of power in the world. There’s the power we exercise to make ourselves look good or feel good. That power never lasts. Then there’s the power to *do* good. It’s called the power of love. That power lasts, because it changes people. If I didn’t believe that, I’d go nuts doing what I’m doing. You’ve got to believe that too.

“I’ve decided I can’t step into your shoes. I can’t hold myself responsible for what you are doing to Frank Smith if you remain silent, and I can’t take the credit if you save his life. By becoming your lawyer, I don’t become your scapegoat, so all of the bad things you’ve done are hanging from my neck. And I don’t become the hero if you do what’s right, either. If I reveal what you told me without your consent, I’m taking your power away from you without your permission. I can’t do that, even when your power holds the key to someone else’s life.

“If you want to keep your secret, I’ll simply withdraw as your lawyer, and I won’t say anything that could hurt you. I’ll probably hate you for making my life hell, but I can’t betray you just because you’ve disappointed me. If you want to exercise your power to save Frank Smith, I’ll do everything in my power to protect you. I don’t want you to do it with the thought that it will help you in your case, though. It probably won’t. Do it because it will make this rotten world better. Do it because it will change you. Do it because it will change Frank Smith. Do it because it will change me.”

Ben pauses for a long time.

It was the first time in his life that another human being had been completely honest with him.

He hadn’t thought lawyers were capable of complete honesty.

He smiles and says, “I’ll do it.”

Within minutes, Claire is on the telephone to Frank Smith’s lawyers. A frenzy of activity follows, preparing affidavits and filing a last-minute application for a stay twenty-four hours before the scheduled execution of Frank Smith. The Attorney General holds a press conference, furiously denouncing Claire as a “well-known opponent of the death penalty who high-pressured her own client to lie in order to delay this execution.” He releases a dossier with Ben Jones’s rap sheet, claiming he had no more credibility than Pinocchio.

Ben's prior convictions for drug dealing, pimping, and armed robbery do not add to his luster. Smith's lawyers argue that ballistics testing is underway which can link the shooting of the police officer to a weapon in Ben Jones's possession. The Attorney General responds that he has evidence that Ben Jones and Frank Smith were previously acquainted in the underworld and suggests that Jones may have gotten the gun from Smith. A courageous Ninth Circuit judge stays the execution in the face of furious editorializing about soft-headed judges once more delaying the inevitable. He is denounced by the Republican candidate for president, and the President himself calls for his resignation. A closely divided U.S. Supreme Court, highly suspicious of Ninth Circuit judges who are soft on the death penalty, denies the Attorney General's last minute appeal to dissolve the stay.

Ben Jones quickly discovers the disadvantages of making himself a high-profile defendant. The D.A. employs both barrels of the "Three Strikes" law in his pending drug case, and he is convicted and sentenced to life imprisonment. He finally becomes disgusted with the "rewards" for his burst of idealism and tells Claire he plans to renounce the declarations he has signed and refuses to testify unless the prosecutor grants him immunity for the murder and a break on his "Three Strikes" sentence. Frank Smith's lawyers are left with a recanted affidavit, a gun that doesn't conclusively disprove their client's involvement, and no other way to prove their client's innocence.

Five years later, Frank Smith was executed. He was number forty in California's parade of executions, instead of number five. Claire Hopewell left the practice of law and entered the ministry.

A fairy tale?

In 1986, Brian Dugan told his Illinois defense counsel, representing him in another murder case, that he alone had kidnapped and murdered a ten-year-old suburban Chicago girl. Rolando Cruz, convicted of that crime, was then on death row awaiting execution for the murder. At his attorney's urging, Dugan told his story to state police investigators. They disbelieved it and set out to discredit it. They succeeded. Rolando Cruz remained on death row for nine more years, while a phalanx of lawyers sought to prove his innocence. They finally succeeded; improved DNA tests ruled out Cruz as the perpetrator and matched the genetic type of Brian Dugan. Dugan, serving two life terms for other murders, had refused to testify unless

granted immunity from the death penalty. Immunity was never granted. Now, he can be convicted and take Rolando Cruz's place on death row.¹

The Moral (Select One):

- (1) Virtue is its own reward.
- (2) The death penalty shows our system of justice at its worst.
- (3) Who lives and dies among those on death row is determined by random selection.
- (4) All of the above.

1. Gera-Lind Kolarik, *DNA, Changed Testimony Gain Acquittal*, A.B.A. J., Jan. 1996, at 34-35.