

IN MEMORY OF MICHAEL MELLO[‡]

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Before coming to VLS to share my thoughts at the memorial on January 30, 2009, I knew I would not have enough time to even get through the roadmap, as they like to say in the classroom setting. I had to think about what it was about Michael Mello that I really needed to make sure was shared with the rest of the attendees. It had to be something that went beyond the usual and the predictable, something that was true Mello and without which the tribute would not have been full. I did not have to think long; the help came from Michael's writings. It is his personal and professional ethics that have always fascinated me the most.

As an author Michael has had one of the biggest impacts on my development as an individual. When I started law school I was a big proponent of capital punishment. No surprise, having come from an Orwellian society of the late U.S.S.R., I was confused, clueless even. I was convinced, even after having studied the history of the death penalty in this country, that it acted as a deterrent, and a mighty one, and that the concept of retribution, barbaric as it might be, was only unacceptable to academia, and that real life demanded it. I could not have been more wrong.

While at Vermont Law School I came across an essay written by then yet unknown to me Professor Michael Mello called *Another Attorney for Life*.¹ The essay, although mostly set in the death-penalty jurisprudential and political realm, invites larger conclusions and provokes bigger thoughts about the role of an attorney within the justice system and beyond it.

In the essay Mello made it clear to me why the death penalty was wrong: it was wrong because the system made mistakes and innocent people were executed. Evolving standards of decency aside, that was a good enough reason to reject capital punishment.

Still, what struck me even more was Mello's own internal struggle as an advocate (*advocate* is the term he used) of which he talked in the essay. Of course he felt frustrated with the "machinery of death" as a system with its laughably low thresholds for effectiveness of counsel, "old sparkies" of all sorts, and judges who liked to play God. But mostly he felt frustrated and angry at himself, believe it or not, as a part of the system, an integral

[‡] This article is based on the presentation given by the author at the celebration of the life and work of Michael Mello held at Vermont Law School on January 30, 2009.

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* My wife Katherine R. Ready, J.D. 2007, Vermont Law School, an alumna of two of Michael's classes, has significantly contributed to the content of my reflections.

1. Michael Mello, *Another Attorney for Life*, in *FACING THE DEATH PENALTY, ESSAYS ON A CRUEL AND UNUSUAL PUNISHMENT* 81 (Michael L. Radelet ed., 1989).

and necessary part, but still a part of the system of legal homicide. That is why he ultimately quit deathwork. He did not want to help to provide “sanitized,” as he put it, executions. As an attorney, he did a great job representing and defending his clients, and met every professional standard above and beyond; it was himself as a human being that he set different, higher ethical standards for. As a human being, he refused to support “the aura of legalism” and “appearance of fairness.” That was quintessential Mello.

Thus, even a bigger revelation to me was this: being on the right side of the law does not always equal being on the right side. Sometimes personal ethics override (should override) an otherwise legitimate and necessary, even integral *and* lawful position. For me, an aspiring lawyer, who just recently came from a country whose entire body of law a few years ago was written in Newspeak, that revelation was significant, to say the least; the best system in the world—the adversary system—does not always work, even when it runs like a well-oiled machine. Hence, to me the double meaning of the name of the essay—another attorney against the death penalty or another attorney for the rest of one’s life—carries the utmost significance.

Mello used the word *attorney* in the original sense of the word—*advocate*, which in turn carried a sense of a higher purpose: being of help to someone less advantaged, and not in today’s MPRE sense of what one can get away with. Thus for Mello, the role of an attorney implied, absolutely and necessarily it did, higher ethical standards of an advocate.

In *Dead Wrong, A Death Row Lawyer Speaks Out Against Capital Punishment*,² Michael tells about his days as a law clerk to Judge Robert Vance of the United States Court of Appeals for the Eleventh Circuit. To describe Judge Vance as a person and as a jurist, Mello uses Aristotle’s notion of practical wisdom, which he describes in such terms as pragmatism and common sense. He talks about practical wisdom as good judgment, the exercise of which requires experience and reflection and which is comprised of qualities of character and experience, and methods of deliberation. Such practical wisdom is also what described Michael himself.

Common sense, humility, openness, appropriateness (read professionalism), empathy, politeness—all of those were parts of Michael’s practical wisdom. Judge Vance, himself against the death penalty, was assassinated by a mail bomb sent to his home a few days before Christmas in 1989. Alabama state prosecutors tried to go for the death penalty; Mello continued to fight the system in the courtroom and in the classroom.

2. MICHAEL A. MELLO, *DEAD WRONG: A DEATH ROW LAWYER SPEAKS OUT AGAINST CAPITAL PUNISHMENT* (1997).

In the classroom Michael always treated us students with respect and dignity, no matter how baseless our statements could be (e.g., when we would use Fifth and Sixth Amendment right to counsel interchangeably). He did not assume anything about us, never raised his voice, always had time for us, and was always considerate of our personal circumstances. He always listened, and was always honest with us, as he was at all times extremely professional, and again, first and foremost, respectful. He never imposed his views on us; he was accepting, tolerant, and open to differing viewpoints; he never intimidated, and never tried to make us feel uncomfortable.

Many educators today see it as a must to get through a study plan, cover all the bases, and hit all major points, oftentimes at the expense of the quality of the learning process. They don't bother to take a step back and have a conversation about the reasons behind the rules. The truth is that a computer program can teach a class based on a bullet-points approach; a commercial outline and a bunch of CDs do the job just fine. The Model Penal Code can be programmed in one's brain by repetition. One does not need to go to law school to study law for the bar and to pass it.

But computer programs, fancy outlines, and mindless drills would never be able to teach how to assess a larger picture; to see a forest, not just a bunch of tree trunks; to recognize a conflict; and to seek out solutions from a larger, real-life perspective. Not every professor, regardless of how bright and accomplished, can do that. Mello could. In fact, he did it so well that learning the black-letter law came naturally and easily after underlying principles were dissected.

After I left VLS in late 2006, I wrote Professor Mello a note thanking him for the learning experience I had in his classroom. A few days later I received a reply, which, in part, said:

Thank you for your lovely note of Jan. 3 and your kind words. I simply loved having you and Katie in my classes. You added more than you can possibly realize. Please do keep in touch. Let me know if I can ever be of assistance to you. I'll miss your voice, background, and viewpoint at VLS.

Mello died on my birthday, but as always, considerate as he was, I did not learn the news until the next morning.

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