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BOOK REVIEW

THE DEATH PENALTY DEBATE: A PROSECUTOR'S VIEW

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SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* (FARRAR, STRAUS AND GIROUX 2003).

Walter Berns relates the following story in his book on capital punishment:

In the dark of a wild night a ship strikes a rock and sinks, but one of its sailors clings desperately to a piece of wreckage and is eventually cast up exhausted on an unknown and deserted beach. In the morning he struggles to his feet and, rubbing his salt-encrusted eyes, looks around to learn where he is. The only human thing he sees is a gallows. "Thank God," he exclaims, "civilization."¹

Many of us are naturally troubled by the image of a gallows representing so-called progress. Isn't this the 21st century? Aren't we better than that? Then we recall John Wayne Gacy, Henry Brisbon and Timothy McVeigh and wonder, how far have we really come? Human nature is still human nature. No matter how far we have advanced technologically, there are still evil people among us, and the community has a right—and a duty—to protect its members from the worst of us. At some point we all must face the question of how we do that, and whether we will, as a community, use the ultimate punishment against a fellow human.

As a prosecutor who must deal with life and death decisions on a regular basis, I welcome Scott Turow's book, *Ultimate Punishment: A*

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¹ WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 3 (1979).

Lawyer's Reflections on Dealing with the Death Penalty. It should be read by anyone interested in this long-debated subject.

Turow has established himself as an author whose books make the best seller lists on a regular basis and who is widely respected for his writing talents and intelligence. His latest work outlines his personal thoughts on the death penalty, one of the most serious issues facing the nation's legal system.

The death penalty has long been among the most controversial issues in criminal justice, and for good reason. It is the ultimate punishment. The crimes for which it can be used are the most vicious and vile in our experience. Gacy murdered over thirty people. McVeigh killed 168 human beings in Oklahoma City. Brisbon told an engaged couple to kiss their last kiss before slaying them in the early 1970s, and then continued to kill while in prison for those crimes. Society rightly demands accountability for these terrible acts, and in many states the offender forfeits the right to live among us if convicted.

For much of this country's history the death penalty was regularly used as a punishment for murder and other serious crimes. But there were also times when the punishment fell out of favor, and in 1972, in *Furman v. Georgia*,² it was declared unconstitutional by the U.S. Supreme Court.³ In 1976 the Supreme Court upheld a state death penalty statute,⁴ which led to the reintroduction of capital punishment in many of our states.⁵

Since then hundreds of defendants have been sentenced to death, and a number of them have been executed. But the debate over the death penalty has never ended. Some people are morally opposed to it; others see it as a corrupting part of our criminal justice system. On the other side are those who argue with fervor that the death penalty is a vital part of any community, a mechanism for people living together to protect innocent life.

The debate is often heated on both sides, with much of the rhetoric aimed simply at stirring the passions of those who already share the speaker's views. For various reasons Illinois has in many ways become the center of the debate. In recent years several high-profile capital cases were thrown out, including some where DNA testing led to the release of those convicted and sent to death row.

Despite these controversies, the people of the State of Illinois, through their elected representatives, have retained the death penalty as an

² 408 U.S. 15 (1972).

³ SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 22 (2003).

⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁵ TUROW, *supra* note 3, at 23.

appropriate punishment for certain crimes. Nevertheless, ever since former Governor George Ryan imposed a moratorium upon executions⁶ and then, in the waning days of his administration, ordered the release or reduction of sentence for every death row inmate in Illinois,⁷ the public has rightfully wondered whether we really do have the death penalty. This uncertainty has left the issue in an unhealthy state of limbo.

In his book, Turow describes his transition from a “death penalty agnostic”⁸ to a reluctant opponent of capital punishment, who wishes that it could be limited to situations involving “crimes of unimaginable dimension like [John Wayne] Gacy’s or that would fully eliminate the marginal risks that incorrigible monsters like [Henry] Brisbon might ever again satisfy their vampire appetites.”⁹ He concludes that we are incapable of creating a justice system that reaches “only the rare, right cases, without also occasionally condemning the innocent or the undeserving.”¹⁰

He attributes his change in views to his representation of two former death row inmates, Alejandro Hernandez and Chris Thomas, and his participation in Governor Ryan’s Commission on Capital Punishment. Turow states that the Governor directed the Commission to identify “[w]hat reforms, if any, would make application of the death penalty in Illinois fair, just and accurate,”¹¹ and then describes how he and the rest of the Commission responded to that directive by issuing a report two years later making more than eighty recommendations for improving the administration of capital punishment in Illinois, including increased DNA testing,¹² videotaping of interrogations and confessions¹³ and reducing the number of statutory eligibility factors from twenty to only five.¹⁴ Many, although not all, of those recommendations, have since been adopted by our legislature.¹⁵

When the Commission’s report came out in April 2002, I was serving as the head of the Illinois State’s Attorneys Association. We publicly

⁶ Ken Armstrong & Steve Mills, *Ryan: 'Until I Can Be Sure'; Illinois Is First State to Suspend Death Penalty*, CHI. TRIB., Feb. 1, 2000, at 1.

⁷ Maurice Possley & Steve Mills, *Clemency for All*, CHI. TRIB., Jan. 12, 2003, at 1.

⁸ TUROW, *supra* note 3, at 9.

⁹ *Id.* at 114.

¹⁰ *Id.*

¹¹ *Id.* at 27-28.

¹² See FORMER GOVERNOR RYAN’S COMM’N ON CAPITAL PUNISHMENT, FINAL REPORT (2002) 51-64, available at <http://www.idoc.state.il.us/ccp/reports/index.html> [hereinafter COMMISSION REPORT].

¹³ See *id.* at 24-30.

¹⁴ See *id.* at 66-75.

¹⁵ TUROW, *supra* note 3, at 100-01.

supported the vast majority of its recommendations and thanked the Commission for its hard work.¹⁶ However, because I considered some of the proposals misguided or even unconstitutional, I offered my own suggestions. In particular, I too called for a reduction of the eligibility factors, eliminating more than ten but retaining some rejected by the Commission. I specifically supported the proposal to videotape all interrogations in homicide cases. Subsequently, I supported legislation to make such videotaping the law in Illinois beginning this year.¹⁷ At our suggestion, the state has provided funding for pilot programs so that practical procedures can be worked out before videotaping is mandated throughout the state.¹⁸

I was not alone in these efforts, as the other elected State's Attorneys in Illinois also worked for reform through the Illinois State's Attorneys Association. Moreover, such actions were not in any way unusual, as state's attorneys had been involved in improving the criminal justice system in our state for years, working with both the legislature and the Illinois Supreme Court to bring about positive changes that affected both capital and non-capital cases.

In fact, when the Governor's Commission was established, the Illinois Supreme Court had just completed its own review of the death penalty process and announced new requirements for capital cases, including the creation of a Capital Litigation Trial Bar,¹⁹ which many elected prosecutors, including myself, supported. Similarly, in 1997, my office worked with other prosecutors in drafting the first statute in the country authorizing post-conviction DNA testing,²⁰ and in 1999, we implemented a policy calling for the videotaping of confessions in murder cases.

Unfortunately, the overall impression left by Turow's book is that the participants in the criminal justice system have little interest in improving things on their own. He states that the response to the release of the Commission's report by "[a] number of prosecutors" was "outrage."²¹ Throughout the book Turow emphasizes the failings of the criminal justice system. He does so, I suspect, to show that the system is open to mistakes

¹⁶ Written Response of Illinois State's Attorneys Association to Governor's Commission on Capital Punishment (May 16, 2002) (on file with author); Press Release, Cook County State's Attorney's Office, Devine Embraces Majority of Death Penalty Commission Recommendations; Urges Lawmakers to Fund Expanded DNA Testing (May 16, 2002) (on file with author).

¹⁷ 725 ILL. COMP. STAT. 5/103-2.1 (2004).

¹⁸ 20 ILL. COMP. STAT. 3930/7.2 (2004).

¹⁹ ILL. SUP. CT. R. 714.

²⁰ 725 ILL. COMP. STAT. 5/116-3.

²¹ TUROW, *supra* note 3, at 99.

or abuse from many quarters. That is a fair statement, but there should also be a recognition that most people in law enforcement work hard in difficult circumstances to see that justice is done. Police and prosecutors take great pains to ensure that the right person is charged and that the proceedings are fair. History further demonstrates that judges and juries regularly sort out difficult issues and arrive at fair and just verdicts. Admittedly, all of this good work is done by human beings, so no one can claim that it reaches perfection. It is also true that in any large group, there will be some individuals who do not live up to the standards of their profession.

The so-called human element is one of the basic issues that Turov and the rest of us grapple with in analyzing the merits of the death penalty. Those of us who work in the justice system would be foolish to say that we can guarantee there will never be a mistake made in the thousands and thousands of cases that go to trial. At the same time, we can say that, with the various post-conviction and appellate reviews available to defendants, there are numerous checks to insure that the evidence establishes beyond any real doubt that the person convicted was responsible for the crime charged. Especially in capital cases, trial and appellate court judges examine the issues very carefully to avoid error. Most of the troubling cases we read about today are from years ago, before the advent of DNA technology and the introduction of other improvements such as the Capital Case Litigation Fund.²² As a result of these improvements, today we can cite cases where the proof of guilt is overwhelming and seemingly irrefutable.

But after all the arguments and debates, we are always left with the reality that the human element exists, and perfection cannot be guaranteed.

The underlying theme in much of the current death penalty debate is that any human system is by definition subject to mistake. As a result, no one can guarantee that, with all the reviews and cross checks that man can devise, we will never execute an innocent person.

The supposition is that if we eliminate the death penalty, we can guarantee that innocent lives will not be lost. This ignores the other side of the equation. In the first place, an innocent life has already been lost or we wouldn't be discussing the death penalty in the first place. Secondly, if abolition does take place, it is at least possible that a prison guard or inmate will be killed by a lifer who has no additional punishment to fear. Thirdly, a career criminal facing life in prison if convicted has no additional sanction

²² 30 ILL. COMP. STAT. 105/5.518 (West Supp. 2004). The Fund was created by the Illinois General Assembly in 2000 for the purpose of supporting the work of both defense attorneys and prosecutors in death penalty cases. It provides financial support for defense attorneys, investigators and experts in the areas of DNA and mental competence.

to be concerned with if he murders a store clerk in an armed robbery or a rape victim to prevent them from being witnesses against him. In fact, he has a positive motivation to take life. The issue is more complex than many reformers would have us believe. Whichever way we go, innocent lives can be affected.

At least on the surface, it was concern about the human element in the justice system that led Governor Ryan to grant blanket clemency to those on death row in Illinois. Unfortunately, the Governor and his staff were content to deal in the broadest generalities in making the decision to grant clemency to everyone convicted of capital murder, which included the most brutal criminals in our community. Despite promises to anguished families of victims,²³ there was no analysis of individual cases, perhaps because any such review would have established that in the overwhelming majority there was no doubt whatsoever about guilt.

In the Governor's hands, the notion of "perfection" became a handy rationale to ignore the challenge of dealing with the evidence in each case and an excuse for making the grand gesture.

Governor Ryan's clemency decision is one of the issues Turow struggled with in developing his views on the death penalty. His book reflects his internal debate and is, therefore, limited to what the author knows about a particular subject. That is unfortunate, in that Turow attracts a wide audience and is rightfully regarded as a thoughtful, reasonable man. Because of the limited scope of his book, however, he has not brought his talents to bear on all aspects of the issues he raises.

The effect of the book's limitations can be seen in its section on the clemency process. As Turow sees it, the Governor was forced to deal with the clemency issue as he did because no one, including prosecutors, offered any assistance on the issue.²⁴

While I am confident that the author was stating his honest belief based on the personal knowledge he had, it is far from the full story. First of all, the Governor and his staff had all sorts of help from defense lawyers, with whom they conferred regularly.²⁵ In addition, prosecutors made direct written appeals to the Governor to decide each of the cases on its own merit and not on a blanket basis.²⁶ We prepared full responses to each of the

²³ See Christi Parsons, *Families Wonder if Ryan Listened; Governor Meets With Loved Ones of Murder Victims*, CHI. TRIB., Dec. 7, 2002, at 1.

²⁴ TUROW, *supra* note 3, at 93.

²⁵ Steve Mills & Maurice Possley, *Decision Day for 156 Inmates; Ryan Poised to Make History After 3 Years of Debate on Death Penalty*, CHI. TRIB., Jan. 12, 2003, at 1.

²⁶ See, e.g., Letter from Richard A. Devine, Cook County State's Attorney, to George Ryan, Governor of Illinois (Oct. 14, 2002) (on file with author).

clemency requests and appeared and argued at every hearing by the Prisoner Review Board. We were prepared to provide any information requested by the Governor and to meet with him or his staff at any time. We were never asked to do so. One elected prosecutor called the Governor personally to request such meetings and was told to mind his own business.²⁷

The Governor and his staff did not want our input on these cases of brutal murder because they had no intention of deciding the merits of individual convictions. The Governor was committed to blanket clemency, a high-profile, headline-grabbing approach. Like Turow, I will not speculate on the Governor's motivation, but I certainly will say that the families of the victims deserved better and had been promised better by the Governor.²⁸

Even if the Governor felt compelled to deal with all the cases on death row, he had a clear alternative to blanket clemency. He could have done his job and analyzed each case thoroughly. The Prisoner Review Board held hearings on all the petitions and made recommendations to the Governor on every one of them.²⁹ If he had granted clemency or pardons individually, after a full review of each case, there would no doubt have been disagreement with some of his decisions, but at least he would have demonstrated some respect for the victims' families and the work of the criminal justice system. As the author noted, Governor Ryan's blanket clemency had the potential to undermine "the reliability of the law as an institution" by bringing into question "the work of many years by police, prosecutors, judges and juries—as well as the implied promise to victims' families . . . because of the beliefs of a single individual."³⁰

To his credit, Turow opposed blanket clemency and was rightly concerned about its impact on the criminal justice system,³¹ but his book fails to tell a large part of that important story.

Some who agree that Governor Ryan can fairly be criticized for his handling of the clemency process nonetheless support his ultimate decisions. They believe that unless we can guarantee a uniformly fair and

²⁷ Conversation with Joseph Birkett, Du Page County, Illinois, State's Attorney (Oct. 2002).

²⁸ See Parsons, *supra* note 23; see also John Keilman, *Relatives of Victims Feel 'Cheated'*, CHI. TRIB., Jan. 12, 2003, at 1.

²⁹ 730 ILL. COMP. STAT. 5/3-3-2(a)(6) (2004). These recommendations remain secret to this day despite my request that the Governor make them public.

³⁰ TUROW, *supra* note 3, at 95-96.

³¹ *Id.*

mistake-free process in capital cases, we should abandon the death penalty. Because death is final, there is no going back after punishment is imposed.

Turow's thinking on the issue is more complex and nuanced, but he concludes (with mixed emotions) that he would prefer to allow Gacy and Brisbon to live out their days in prison, even though it is "infuriating,"³² than leave our justice system open to the "moral hodgepodge" of trying to fairly decide who lives and who dies.³³ In his view, there will always be inconsistencies because there are so many decision-makers. In Illinois alone there are over 100 elected State's Attorneys who have the power to decide whether to seek death, a few of whom, in Turow's view, might be influenced by public opinion in a high pressure case.³⁴

Some of my fellow State's Attorneys regard Turow's book as anti-prosecutor. I do not share that view, perhaps because I have known him for years and have always found him to be a fair and reasonable person. In his book he has raised some fundamental issues that we should all consider. Having said that, I believe his work could have been more balanced—and thus more helpful to our debate—in a number of ways.

For example, Turow notes that the review of reversed Illinois cases called into question "the gold standard" in evidence: eyewitness testimony.³⁵ But if eyewitness testimony is an evidentiary gold standard, it is also true that it is routinely impeached. Eyewitness identifications are among the most contested issues in state criminal trials. There are many cases where juries and judges have rejected eyewitness testimony, and others where eyewitnesses have expressed doubt or even withdrawn identifications. The issue is a legitimate one, but it does not advance the discussion to suggest that the issues relating to eyewitness testimony have only recently been identified and are not regularly raised and resolved by the criminal justice system.

Consider also the Commission's recommendation that lineup procedures be videotaped, including the witness.³⁶ An argument can be made for doing so, but there are also downsides to the proposal. In many cases, particularly those involving gangs, witnesses are already reluctant to cooperate with the police because they fear retaliation.³⁷ Videotaping them would guarantee their refusal to participate in any line-up procedure.

³² *Id.* at 114.

³³ *Id.* at 115.

³⁴ *Id.* at 43.

³⁵ *Id.* at 31.

³⁶ COMMISSION REPORT, *supra* note 12, at 39-40.

³⁷ *Id.* (citing Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 600, 640-41 (1998)).

This, like many of the Commission's proposals, is designed to prevent mistakes from ever happening. That is all well and good, but the only way to guarantee a mistake will not be made is for law enforcement to do nothing. That is not an option when it comes to violent crime.

Turow notes that the work of the Commission impeached a "fixed star" in the justice system that "nobody voluntarily confesses to a crime he or she didn't commit."³⁸ Turow then describes four examples of people "voluntarily" giving false confessions.³⁹ While the author's examples strike me as either involuntary statements or non-confessions, his point is nonetheless valid.

For example, our office took a close look at the issues raised by the infamous Lori Roscetti case,⁴⁰ tried over fifteen years ago in Illinois. In that case, three defendants were found guilty of the brutal rape and murder of Lori Roscetti, a young medical student in Chicago.⁴¹ They all received sentences of natural life.⁴² A fourth defendant had confessed to participating in the crime, pleaded guilty and testified against a co-defendant.⁴³ He was sentenced to twelve years in prison.⁴⁴ The convictions occurred prior to the advent of DNA as an accepted method of identification.⁴⁵ In 2001, after DNA testing linked two other individuals to the murder, we dismissed the cases against the four original defendants.⁴⁶ Because the DNA evidence contradicted two confessions, including one by a person who pled guilty, we began a serious review of "voluntary" confessions. We concluded that there are people who, when placed in the position of being a suspect in a serious criminal case, will try to work out the best deal possible with law enforcement, regardless of guilt.

To deal with the problem, we put together a seminar for our felony prosecutors, reviewed the cases with them and pointed out steps we, as prosecutors, must take to avoid such confessions in the future. The main lesson was that police and prosecutors must always corroborate a confession by cross-checking the statement against other information that

³⁸ TUROW, *supra* note 3, at 28.

³⁹ *Id.* at 28-31.

⁴⁰ *People v. Ollins*, No. 87 CR 4752 (Ill. Cook County Cir. Ct. 1987); *People v. Ollins*, No. 02 CR 5378 (Ill. Cook County Cir. Ct. 2002).

⁴¹ Maurice Possley & Steve Mills, *New Evidence Stirs Doubt Over Murder Convictions*, CHI. TRIB., May 2, 2001, at 1.

⁴² *Id.*

⁴³ Matt O'Connor, *Sentencing Closes 'Book of Horrors'*, CHI. TRIB., July 29, 1988, § 2, at 1.

⁴⁴ Possley & Mills, *supra* note 41.

⁴⁵ *Id.*

⁴⁶ Steve Mills et al., *3 Roscetti Inmates Walk Free*, CHI. TRIB., Dec. 6, 2001, at 1.

only people involved in the crime would know. To be able to do that, interrogators must avoid spoon-feeding information to a suspect that can later be regurgitated as a confession.

The “false voluntary confession” is an example of an issue that law enforcement can identify and take steps to address. In the work of the Commission and in Turow’s book, it is one of many issues, along with eyewitness identification, lineups and jail house informants that are cited ostensibly to show what must be done to make the capital process work. Many prosecutors suspect that the underlying motivation of many Commissioners was to show that, with all these problems, our community should never again utilize a penalty that once imposed, could not be rescinded.

If my sense of this is correct, it would have been better for the Commission to have said so, rather than to have pretended we should strengthen a death penalty system which a majority of the Commission apparently concluded should not exist at all.⁴⁷ Given the beliefs of the majority of the Commissioners about the death penalty itself, we can rightly be concerned that the proposals might not all be designed to make our capital system work better.

We must always strive for a justice system that protects individual rights but also one that allows law enforcement to do its job of finding the right people and holding them accountable for their crimes. The question is whether we can do that in the context of the death penalty. That issue brings us back to the bottom-line of whether the death penalty, with all the issues surrounding it and its impact on other parts of our legal system, should be retained.

It is time to make that decision, and I must part company with the author on where we go from here. Turow believes that the political will is lacking for our elected officials to make a decision on the death penalty.⁴⁸ As a consequence, he expects that abolition will eventually come from the United States Supreme Court.⁴⁹ In the meantime, the moratorium has continued under our current Governor, and Illinoisans are “content to see the death chamber continue to gather dust.”⁵⁰

It all sounds so nice. Let’s let this issue just sit there. No one seems to mind, so let it be. Well, I am sorry to disrupt such pleasant, peaceful thoughts, but there are a lot of people who mind. There are a number of families of murder victims who expect the law to have some credibility.

⁴⁷ TUROW, *supra* note 3, at 123.

⁴⁸ *Id.* at 113.

⁴⁹ *Id.*

⁵⁰ *Id.* at 102.

They ask prosecutors whether a death sentence, if imposed, will be carried out. We can only tell them that we continue to seek the death penalty in appropriate cases, but we have no idea whether it will ever be a reality.

Think of that. One of the most important laws in our state—perhaps the most important—and no one can say whether it will ever again be anything more than some writing in a book. That is wrong, and not just for the families of victims or the police officers, prosecutors, judges and jurors who spend countless hours on capital cases because of their theoretical importance. It is more than that. It is wrong for all of us to have a legal system in which one of our most significant laws exists in theory but is ignored in practice.

It is not enough, as Turow implies, to say that our elected leaders will not deal with this issue, so we must wait for the courts. Those of us who believe it is decision-time have an obligation to speak out and demand that our General Assembly and Governor deal with the issue. Not surprisingly, they don't want to. The moratorium provides our elected officials a very comfortable safe harbor: they can say they are in favor of the death penalty, so as not to offend the public which supports the sanction, and yet not offend abolitionists either, because the penalty will never be used until countless unnamed reforms are adopted. Death penalty opponents are content with the moratorium because they have achieved their objective for the time being and might lose if the issue were put to a vote.

Representative Art Turner introduced a bill in the Illinois House a year or two ago that sought to abolish the death penalty in Illinois.⁵¹ At the time, I called for a full debate on the issue in the legislature. I prepared a position paper on the death penalty that I submitted to each member of the General Assembly and the Governor's office.⁵² My actions were met with a resounding silence.

Since 1976, the people of Illinois have said that death is an appropriate punishment for the most heinous crimes and criminals. Today, the death penalty exists but is not applied. We have a multitude of proposals for reform, but many of them have no purpose except to make imposition of the death penalty a practical impossibility. Rather than undermine our criminal justice system by retaining on the books a law which we have no intention of using, it would be more honest to consider abolition. Our current course threatens to turn capital litigation into a process devoted primarily to providing lifetime employment for attorneys. We must confront the issue

⁵¹ See Kate McCann & Christi Parsons, *Death Penalty Debate Gets Forum in House*, CHI. TRIB., Mar. 7, 2003, at 1.

⁵² Position Paper of Richard A. Devine, Cook County State's Attorney, Statement on the Death Penalty in Illinois (Apr. 30, 2003) (on file with author).

of whether we should repeal the death penalty or implement it. We should do one or the other.

Scott Turow's book has framed a number of the issues that should be part of that debate. I hope he will add his voice to the few of us who see this as too important an issue to be left as is, as pleasant as that may be for our decision-makers.