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COUNTER-POINT

GACY v. DAHMER: AN INFORMED RESPONSE

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The topic of Mr. MacArthur's address, "The Death Penalty and the Decline of Liberalism," and the majority of his remarks dealt with his disappointment with the recent levels of commitment by liberals to the anti-death penalty campaign in America.

I have often appeared in various public and private forums to discuss or explain Illinois capital punishment law and practice, or to train prosecutors in capital punishment states how to prepare to prosecute capital cases without error. Until I left government employment in late 1985, I never publicly discussed my personal views or the moral or philosophical basis for capital punishment, and have done so only rarely since. I have never campaigned for passage of the death penalty in Illinois or elsewhere, and have never raised or donated a dime, much less a fortune, to any pro-death penalty campaign.

As an Illinois prosecutor, I was oath- and duty-bound to uphold and enforce *all* the laws of Illinois, including the death penalty statute.[1] As a private citizen, I continue to believe in the appropriateness of capital punishment for certain crimes and criminals, and I am willing to state my personal reasons for that belief, as I did at the *Death Penalty Symposium*.[2]

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1. 720 ILCS 5/9-1 (West 1993).

2. Mr. Kunkle spoke at the *Death Penalty Symposium* at The John Mar-

While I am a defender of the death penalty, as adopted by the Illinois legislature in 1977, I am not, and never have been a proselytizer or campaigner for it. Therefore, had Mr. MacArthur stuck to his theme, as the title of his remarks and his article stated, I would have felt no need to attempt to rebut any of his remarks.

That a wealthy, non-lawyer/publisher is passionately opposed to the death penalty and can recite the defense arguments from various capital cases and social science "studies" is neither unexpected nor inappropriate. Everyone is entitled to his own opinion.

However, when he chooses to criticize the members of the Chicago Police Department and the Cook County State's Attorney's Office "in their handling of John Gacy"[3] and to suggest that Wisconsin is somehow more enlightened than Illinois because they sentenced him to life without parole as opposed to death,[4] I beg to differ.

With respect to the "star witness" Mr. MacArthur believes I treated badly because he had become "a political liability and thus severely lacking in credibility,"[5] I would point out several misapprehensions in Mr. MacArthur's remarks and in Mr. Royko's column[6] to which Mr. MacArthur cites at footnote eighteen.

When this witness came forward to Detective Janus and complained of sexual battery at the hands of John Gacy, he unfortunately did not provide many, if not most, of the details of his torture which made his trial testimony so chilling, and indeed, so important to us. Mr. MacArthur might want to compare the police reports which Detective Janus wrote at the time of his investigation with Janus' statements in the Royko column[7] and with the witness' trial testimony.[8]

When the felony review assistant interviewed the witness and John Gacy, and made the decision not to approve felony charges, Detective Janus' hands were not "tied." He could have approved misdemeanor battery charges without any approval from the Assistant State's Attorney. He did not. This leads me to believe that Detective Janus was not nearly so antagonistic to the Assistant's decision as he appears in the Royko column.[9]

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shall Law School on October 17, 1996. This Article is a response to the speech which Mr. John R. MacArthur gave at the *Symposium*, an adaptation of which is published *supra*.

3. John R. MacArthur, *The Death Penalty and the Decline of Liberalism*, 30 J. MARSHALL L. REV. 321, 325 (1997).

4. Rebecca Carr & Maureen O'Donnell, *Clash of Emotions for Dahmer Victims' Families* and *Dahmer Chronology*, CHI. SUN TIMES, Nov. 29, 1994, at

5. MacArthur, *supra* note 3, at 325.

6. Mike Royko, *A Word for Justice*, CHI. SUN-TIMES, Nov. 2, 1980, at 2.

7. *Id.*

8. *See* United States *ex rel.* Gacy v. Welborn, No. 89C6392, 1992 WL 211018, at *8-10 (N.D. Ill. 1992).

9. Royko, *supra* note 8, at 2.

That the Royko column is dated November 2, 1980, is no accident of fate. Days before the election of November 1980, which pitted Royko and Sun-Times backed Democrat Richard Daley against incumbent Republican Bernard Carey, Royko wrote a series of three columns trashing Carey or his office.[10]

I believe that history has shown both Mr. Daley and Mr. Carey to have been excellent State's Attorneys. The prosecution of John Gacy, unlike those of many highly publicized serial murderers, was carried out without error. Unlike the case of Charles Manson,[11] Juan Corona,[12] and others, no state or federal court ever reversed Gacy's conviction.[13]

Contrary to Mr. MacArthur's assertion, I never criticized this victim's credibility. In fact, we relied upon his testimony in both our appellate briefs and in my argument before the Illinois Supreme Court.[14] Royko states in his agenda-driven and politically timed column that "one of [the felony review assistant's] superiors said that the decision was made because it was 'one person's word against another's.'"[15]

Royko opined, "AND THAT'S THE PART, of the story I find the most incredible—one person's word against another's."[16] They took the word of a convicted sodomist rather than of a victim who had a clean, straight background.

The problem with this simple analysis is that there are mistakes of fact on both sides of the equation. On the Gacy side, neither Detective Janus nor the Assistant State's Attorney knew that John Gacy was "a convicted sodomist." Even later, on December

10. *See* Mike Royko, *Can't Carey it off*, CHI. SUN-TIMES, Oct. 28, 1990, at 2; Mike Royko, *Carey blind spot?*, CHI. SUN-TIMES, Oct. 30, 1980, at 2; Mike Royko, *A real bangdup job*, CHI. SUN-TIMES, OCT. 31, 1980.

11. California v. Manson, 132 Cal. Rptr. 265 (Cal. Dist. Ct. App. 1976) (reversing the conviction of Manson's co-conspirator Leslie Van Houten.) The State of California tried Manson and his "family" for murder and conspiracy to commit murder relating to seven grisly slayings on two occasions in 1969. *Id.* at 274-77. Van Houten was later retried twice: the first resulted in a mistrial, and the second resulted in Van Houten's conviction for murder and conspiracy, affirmed at *California v. Van Houten*, 170 Cal. Rptr. 189 (Cal. Dist. Ct. App. 1981).

12. A California Superior Court convicted Juan Corona of murder, but that conviction was reversed due to a series of grievous errors made during the prosecution. California v. Corona, 145 Cal. Rptr. 894 (Cal. Dist. Ct. App. 1978). Corona gained infamy when it was discovered that he had brutally slaughtered 25 migratory farm workers in California. *Id.* at 897-99. Eventually, the California appellate court granted the State's petition for mandamus, 170 Cal. Rptr. 667 (Cal. Ct. App. 1980), and Corona's case was finally tried to conviction and affirmed. California v. Corona, 259 Cal. Rptr. 524 (Cal. Ct. App. 1981)

13. See *infra* notes 24-26 for a discussion of Gacy's appeals and petitions.

14. Illinois v. Gacy, 530 N.E.2d 1340 (Ill. 1988).

15. Royko, *supra* note 8, at 2.

16. *Id.*

11 and 12, 1978, when Gacy's final victim, Robert Piest, disappeared, the Des Plaines Police Department was checking the background of "the contractor guy," that Piest left his workplace to talk to about a job, Gacy's "Chicago B of I sheet,"[17] did not contain the entry of his Iowa conviction for sodomy and his prison sentence.[18] Only by later obtaining an FBI criminal history record were they able to discover the Iowa conviction.[19]

On the victim's side of the equation, he did not have "a clean straight background,"[20] as Royko puts it. Even Royko's column admits that the victim had "a teenage marijuana violation."[21] He failed to mention the recency of that conviction, other drug-related arrests, and the fact that the victim had recently been receiving psychiatric treatment.[22]

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17. "B of I sheet" refers to the Bureau of Information report sheets that many law-enforcement agencies maintain on criminals, informants and suspects.

18. *See, e.g.*, United States *ex rel.* Gacy v. Welborn, No. 89C6392, 1992 WL 211018, at *1 (N.D. Ill. 1992) (quoting the Illinois Supreme Court opinion referring to Gacy's Iowa conviction); Scott Fornek, *John Gacy's Last Hours*, CHI. SUN TIMES, May 8, 1994, at 18 (discussing the discovery of Gacy's prior conviction and imprisonment in Iowa).

19. Three of Gacy's murder victims had been employees of his construction business. In all three cases, police officers interviewed Gacy. Sadly, no connection was made until the remains were uncovered at 8213 Summerdale. Because one investigation was carried out by the Park Ridge Police Department, one by Chicago Area 5 Youth Division and one by Chicago Area 6 Youth Division, there was simply no means of cross-communicating about those open "missing-youth" cases. The lack of computerized data exchange was simply not in place in 1975-77 then those murders took place. While the fact of Gacy's status as employer might not have triggered a cross-match, his status as "last person in company of victim" might well have. Had this connection been made, it is much more likely that Gacy's killing spree could have been ended much earlier than it was, than if Gacy had simply been charged in a sexual battery case. It is doubtful, however, whether such technology was even possible in 1975-77, or whether is should have been in place. In either event, even in hindsight, I do not believe that these sad circumstances are a fair criticism of the Chicago Police Department or other Police Departments at that time.

That suburban or out-of-state criminal history information usually did not show up on Chicago B of I sheets or even State B of I sheets in 1975-78 was an endemic problem. Changes in tertiary dissemination rules and policies, changes in legislation on criminal information procedures and responsibilities, changes in equipment, manpower, funding and even in "attitudes" were all necessary to correct one of the reasons John Gacy remained undetected by law enforcement for so long. Those problems have been addressed and, hopefully, corrected.

20. Royko, *supra* note 8, at 2.

21. *Id.*

22. I am reluctant to use the victim's name or provide too much detail here as I have no desire to resurrect these tragedies for a very nice young man who, despite the physical and psychological abuse inflicted on him by John Gacy and the difficult circumstances in his personal life at that time, has put it behind him and has made a good life for himself. We have been in periodic

In addition to objecting to Mr. MacArthur's version of the facts regarding this witness, I also question the relevance of his point to the topic he was supposed to address. I have the same problems with respect to the rhetorical question, "Why, as a matter of principle, should Gacy have been executed by the government when Jeffrey Dahmer, another high-volume sex killer was not?" In footnote twenty he correctly answers his own question: Wisconsin did not have a death penalty statute.

His following analysis, lauding Wisconsin's enlightenment and castigating Illinois' barbarism, seems to suggest that Illinois voters approved the death penalty in the 1970 referendum, over a year before Gacy's first murder, out of the same political motivation and reverse discrimination that he concludes resulted in Gacy's execution. Gacy was executed because, while legally sane and responsible for his actions, he killed twelve innocent victims in a state with a constitutional death penalty statute.[23] His convictions and sentences were affirmed not only by Illinois,[24] but federal courts of review,[25] including the Supreme Court of the United States,[26] which I doubt cared much about whether Gacy was a Democratic precinct captain or not.

Despite the fact that Illinois has the death penalty and Wisconsin does not, on a layman's level, and assuming that there might be degrees of insanity, I do not find it hard to accept that a jury might distinguish between Dahmer and Gacy. Gacy was an otherwise industrious, capable businessman, who carefully prepared in advance to commit numerous murders in secrecy, successfully hiding the bodies and his crimes for years. On the other hand, Dahmer was a maladjusted weirdo who drilled holes in the heads of his living victims for his own scientific purposes, killed a man after police responded to his apartment building and confronted him and his naked and bleeding victim, kept body parts in his closet and refrigerator for extended periods of time, and cannibalized his victims.

It would appear that Mr. MacArthur's real point was, as he stated, Illinois has the death penalty and Wisconsin does not. The

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contact over the years, and I very much doubt he has any ill feelings for those of us that handled the Gacy prosecution.

23. 720 ILCS 5/9-1 (West 1993).

24. Illinois v. Gacy, 468 N.E.2d 1171 (1984) (*aff'g* circuit court conviction), and Illinois v. Gacy, 530 N.E.2d 1340 (1988) (*aff'g* circuit court dismissal of petition for postconviction relief).

25. Gacy v. Welborn, 994 F.2d 305 (7th Cir. 1993) (*aff'g* district court's denial of petition for *habeas corpus*), and Gacy v. Page 24 F.3d 887 (7th Cir. 1994) (denying request for issuance of stay of execution).

26. Gacy v. Illinois, 470 U.S. 1410 (denying petition for *habeas corpus*), *reh'g denied*, 471 U.S. 1062 (1985), and *cert. denied*, 490 U.S. 1085 (1989); Gacy v. Welborn, 510 U.S. 899 (1993)(denying rehearing and certiorari); Gacy v. Page, 114 S. Ct. 1667 (1993)(denying request for issuance of stay of execution).

Constitution of the United States of America, and the Supreme Court of the United States, permit individual states to determine their own penalties for criminal offenses. If Mr. MacArthur simply wanted to say that he disagrees with that constitutional premise, he could have done so without wandering into the factually inaccurate and questionably relevant criticisms of prosecutors, police departments and Illinois voters.