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Life or Death Decision

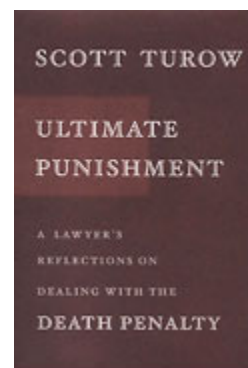
In his latest book, Scott Turow talks about how he came to believe that the country's experiment with capital punishment has "failed miserably"

DECEMBER 2003 ISSUE | U.S.

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Scott Turow has long juggled two careers—that of a novelist and that of a lawyer. He wrote much of his first and best known legal thriller, *Presumed Innocent*, on the commuter train to and from work during the eight years he spent as an Assistant United States Attorney in Chicago, and he has churned out another blockbuster every third year since joining the firm of Sonnenschein Nath and Rosenthal in 1986. But in his most recent book he has switched to a different genre: nonfiction.



[Ultimate Punishment](#)

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by Scott Turow
Farrar, Straus and
Giroux

Ultimate Punishment: A Lawyer's Reflections on

Dealing With the Death Penalty is Turow's highly personal examination of capital punishment, a subject he has had close experience with in both his careers. It is his first nonfiction work in twenty-six years (his only other, *One L*, is a still-in-print account of his first year at Harvard Law School, which he entered in 1975 after several years of studying and teaching creative writing at Stanford). Turow's most recent novel, last year's *Reversible Errors*, revolved around a bogus death sentencing. But he consciously avoided making his novel an anti-death-penalty polemic.

He did, however, feel that there was much he needed to say on the topic. For two years, beginning in March 2000, Turow served as one of the fourteen members of Illinois Governor George Ryan's special commission on the death penalty. The commission was charged with reexamining the state's death-penalty statutes after thirteen death sentences had been overturned on appeal and the governor had declared a moratorium on executions. Ryan would later, as he was leaving office in January 2003, commute the death sentences of all 167 prisoners on the state's death row.

Turow brought more than his name to the commission. His pro bono work at Sonnenschein had included getting two death sentences set aside, most notably in the high-profile Nicarico case in Chicago's western suburbs. In that case, Turow's client, Alejandro Hernandez, and another man, Rolando Cruz, were sentenced to death for the kidnapping, rape, and murder of a ten-year-old named Jeanine Nicarico. When another man later confessed to the killing, DuPage county prosecutors for years stubbornly refused to accept the man's statement, even after DNA evidence began pointing to him as the killer and excluding both Cruz and Hernandez. Both Hernandez and Cruz were eventually exonerated, and

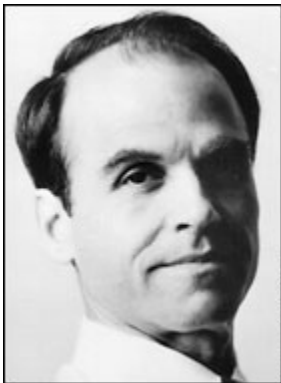
several former prosecutors and DuPage County police officers were indicted on a number of charges, including conspiracy to obstruct justice.

But despite such in-depth exposure to the issue, Turow still thought of himself as a "death penalty agnostic" when he joined Governor Ryan's commission. "Every time I thought I was prepared to stake out a position," he explains in *Ultimate Punishment*, "something would drive me back in the other direction." But by the time the commission reported its conclusions in April 2002, Turow had finally reached a personal verdict on the death penalty.

"I appear to have finally come to rest on the issue," Turow writes in the concluding lines of *Ultimate Punishment*. "Today, I would still do as I did when [former Illinois Senator] Paul Simon asked whether Illinois should retain capital punishment. I voted no."

I spoke with Turow by phone on November 18.

—Bill Beuttler



Scott Turow

Your new book, *Ultimate Punishment*, recounts your involvement with the two-year commission on capital punishment formed by Illinois governor George Ryan. Ryan, of course, is the governor who made national headlines in 2000 by declaring a moratorium on executions in Illinois, and later by commuting the death sentences of all 167 prisoners on Illinois' death row as he was leaving office in January of this year. Could you talk about Ryan's motivations for these actions? Why was he doing all this?

First, just in the interest of complete disclosure, let me explain something before I answer your question, which is that since the time that *Ultimate Punishment* was written, Governor Ryan's personal lawyer has joined our firm. So Ryan is, in theory, my client. But he has waived any restrictions on my remarks that would result from our relationship, and I don't have any role in representing him.

That said, I thought very highly of the way the governor conducted himself on this particular issue. I think his motive was simply to do the right thing. My sense is that he was deeply troubled by the death penalty, and by the fact that he was consistently unable to rationalize anything in the system. As soon as he thought that there was a particular principle that was supposed to be guiding the application of the death penalty, he would find that it was observed in the breach. He did sign one death warrant, and I think for him it was just a very troubling experience. He was inclined after that to try to see if the system could be improved. But in the absence of any legislative action, he just felt that he needed to clear death row and let the state start again—hopefully with a better capital system. Indeed, that was what the people of Illinois wanted. But I never really saw any evidence that he was playing politics with this. I know—and I know this personally—that he was advised that if there were any political considerations with regard to the commutations that they all ran against his doing this. And he did it anyway, because, as he told his staff, he would not be in the position of playing God.

I would add one other factor I'm aware of that received virtually no public attention, which is that he spent a lot of time with his minister. He really doesn't believe that his private religious beliefs ought to be a matter of public discussion, nor does he try to justify his public decisions on the basis of private beliefs. But I'm sure that that had a role there as well.

Could he have risked the commutations if he weren't already planning on leaving office?

Well, you know, I think virtually everything he did on the death penalty hastened the day that he was going to leave office. But I don't want to pretend that this was his principal problem. It wasn't. His principal problem was a long-running corruption investigation stemming back to his days in the secretary of state's office. But his actions on the death penalty—along with a couple of other issues—cost him the support of the right wing of his party. He's a Republican. Obviously, conservative Republicans didn't agree with what he did.

David Protess and his Northwestern University journalism students helped prove the innocence of several of the thirteen prisoners whose death sentences were overturned early on, leading Ryan to put together his commission on capital punishment. Why did it take a bunch of j-school students to demonstrate that this was such a widespread problem?

I do not want to take anything away from David Protess and his students, who did a magnificent job, a courageous job, and a diligent job. They were of course aided by a very experienced private investigator named Paul Ciolino, and Paul did a lot of the heavy lifting. Furthermore, when I went back in the course of writing *Ultimate Punishment* to review the record in the Anthony Porter case, where the Northwestern journalism students were of particular effect, I found that Porter's lawyers had been suggesting for years that this other man, Alstory Simon, was guilty. What the journalism students did was take that lead, as it were, and actually nail it down. At the end of the day, it was Ciolino who got Alstory Simon on tape admitting that he had committed these murders. I do think the role of the students and of Paul Ciolino is instructive. Clearly they were able to do

something that the lawyers just didn't have the time to do, which was to literally track down Alstory Simon.

Among the commission's recommendations to the state was to streamline the number of factual circumstances warranting a death sentence from twenty or twenty-one to five. What were some of the existing circumstances that the commission recommended discarding, and why?

Let me talk about this in general and then talk about specifics. One of the real difficulties about having a death penalty is deciding exactly what circumstances ought to qualify for death. It turns out that when you get down to the short strokes on this, a lot of people have different hot-button issues. Some people think that the murder and especially the sexual abuse of children ought to be of particular concern. There's a wide array of things that people think are the very worst—murdering law enforcement officers, murdering in penal institutions, multiple murders, contract murders. And then more complicated incidents come up that anger the public or just scare the bejesus out of them, and our legislature has been very quick to add them to the death-penalty statute. Eventually, of course, you turn the statute into a moral mishmash. Far and away the most open to abuse of all of the eligibility circumstances is the one that allows people who have potentially committed felony murder to be sentenced to death. Felony murder is a murder that occurs in the course of committing another forcible felony—for example, a robbery or a kidnapping.

Now, this one bothers me a lot because it ends up turning a lot of crimes where quite clearly the defendant didn't set out to murder anybody into capital offenses. I'm not trying to give anybody a gold star here; they're horrible crimes. But as compared to somebody like John Wayne Gacy, who

lured thirty-three young men to his house and tortured them to death, they obviously are in a different moral echelon.

A lot of those cases have been turned into capital cases at the discretion of individual prosecutors. So for that reason we recommended narrowing the criteria. But that has proven to be a political impossibility. Even though a really good reform bill finally passed the Illinois legislature last week, one of the things that all of the political leaders were candid about—many of them in public—was that it would have created an enormous political liability for anybody who voted to curtail this list of eligibility factors.

You were involved in getting two death-penalty sentences overturned through your pro bono work. In one of them, the convicted man, Alex Hernandez, was declared innocent, and yet prosecutors had gone out of their way—even to the point of apparently suppressing evidence of his innocence—to keep him on death row. You were a prosecutor yourself at one point. Did the actions of these prosecutors surprise you? How widespread are the sorts of things that happened to Hernandez?

Well, the actions of a number of the prosecutors involved in the Hernandez and Rolando Cruz prosecutions didn't merely surprise me—they appalled me. I really didn't think some of the things they did could be done to Americans. I didn't think people would knowingly try to convict a man with prints from a woman's shoe. I just didn't think things like that happened in our courtrooms. But they did. I was inclined in the initial years that I was involved in that case to see it as a particularly egregious example of prosecutorial misbehavior, because I did not want to believe—and I *do* not believe—that most prosecutors behave that way. They don't. But as the years have gone on I've had to accept the fact that

what happened in that case is less isolated than I wanted to think it was originally.

Again, having been in that dog pit, I understand a lot of this. It is certainly the case that prosecutors often regard themselves as having to fight with one hand tied behind their back. And that becomes the justification for overreaching. A prosecutor may feel, "The guy's guilty. I'll be goddamned if I'm going to turn that piece of exculpatory evidence over to the defense lawyer because the guy's not really innocent and it'll make it look like he is."

That's very dangerous thinking. But again, having been a prosecutor, I know that those thoughts went through my mind. I can remember going down to the offices of colleagues who were not involved in cases and saying, "I've got this evidence and I don't want to turn it over. What do you think?", and having them look at me. I remember my boss, Jim Streicker, telling me, "If you think it could hurt you, you'd better turn it over."

Again, I think most prosecutors do what they should. But let's suppose that there are 102 state's attorneys in Illinois, and 100 of them behave admirably in their administration of capital cases. If there are two out there who use capital cases as political stepping stones and condone suppressing evidence, how does that fit? Do Americans really want a capital system where that power is in the hands of the government, knowing that in one case out of fifty it's going to be abused that way? That's the question I would ask.

The other death-penalty case you were involved in highlighted how unequally the death penalty is applied. The condemned, Christopher Thomas, had confessed to fatally shooting a man during a holdup,

the sort of killing that would usually lead to a prison term.

Christopher Thomas felt wronged at being put on trial for his life and recanted his multiple confessions, and it seemed like the judge was exasperated and sentenced him to death almost out of pique. Wasn't the main reason that the Supreme Court ruled against the death penalty in 1972 that there was so little logic involved in determining who did or didn't get sentenced to death?

Well, yes. And when they reauthorized capital punishment they did it on the specific premise that they would create reforms and require each state to apply the death penalty in a way that would be far more rational. But the reality is that there are so many haphazard factors—as Chris Thomas's case illustrates graphically—that we're not going to achieve that goal. Who the lawyers are, whether the prosecutors are pursuing a death sentence for personal reasons or political gain, whether the defendant is willing to plead guilty, whether he happens to irritate the sentencer—those are just random factors. I'm familiar with one case where the prosecutor wanted to go for the death penalty because he'd never tried such a case before, and he wanted the experience. We have had a twenty-five-year experiment in reducing the arbitrariness with which the death penalty is imposed, and it's failed. It's failed miserably.

I thought it was interesting that in the book you were referring to the defendant as "Chris" through most of your account rather than by his last name. You must have developed some degree of sympathy for him as you were defending him. I'm curious whether developing that sort of relationship with the defendant shapes a lawyer's wider view of the death penalty.

Well, it would be impossible not to have sympathy of some kind with somebody like Chris once you understand the background that produced him. Among other things, there was not a male in Chris's extended family who had not been to the penitentiary, at least none that I encountered. And the abuse he suffered was extraordinary. He had a horrible experience as a boy. But of course he committed a horrible crime, no matter what his background was. There's still enough of the prosecutor left in me that I believe that when you murder another human being you have to pay an enormous price. But one of the things that was most upsetting to me was that I think the prosecutors really missed the moral measure of this young man. This was somebody who didn't just confess when he was caught, but who expressed genuine remorse. And they trampled that good part of Chris for years. Once he was allowed, really by lifting the death sentence, to be truer to himself, he rose to the occasion and expressed remorse again, in a way that I think probably did a lot more—and this is my judgment, not theirs—for the victim's family than having seen him sentenced to death did. They saw a young man who was weeping and contrite and apologetic.

Several states besides Illinois have been reviewing their death-penalty cases. Here in Massachusetts, the governor, Mitt Romney, has been making headlines by taking the opposite approach—he's trying to get the death penalty reinstated. But he's also formed a commission to write legislation that would supposedly rule out the possibility of innocents being executed. It would, for example, stipulate that confessions or scientific evidence be required in order to condemn a criminal to death. Is it possible to write law so that no innocent person can be executed?

Well, if the governor actually means what he says, I would suggest it's going to be very unsatisfying to the public. I read the press release announcing the creation of this commission, and I read the governor's comments, and if he wants to limit the death penalty to those cases where there is scientific certainty—and that seems to me to be what he has said—then at the beginning he's going to have to accept the fact that he would not have been able to execute Timothy McVeigh, who was convicted on the basis of accomplice testimony and an overwhelming circumstantial case. I think Romney's plan is just one more species of arbitrariness that will be introduced into the system. And remember there have been instances, like the one involving Joyce Gilchrist, a city-police chemist in Oklahoma City, where scientific evidence was fabricated or exaggerated. So you're never going to be able to take bad faith out of the system. And if you can't do that, you're never going to be able to create a system that will be absolutely certain of not executing the innocent.

In the case of Alex Hernandez, he was conned into confessing to murder, which is how he ended up on death row.

Well, there was a statement put into evidence, but there's a great deal of question about whether what was reported actually took place. But even assuming the statement occurred, this was a situation in which Alex—whose IQ is around 75—was told that he should extract a statement from a childhood friend who was in custody. He was told that the friend was a suspect in another murder. And so the police said, "You can get a \$10,000 reward if you can solve these two murder cases. And so you, Alex, tell him things about the Nicarico case, and he'll tell you things about the other case." Nobody, of course, told Alex, "You should only say things that are true." They took a shoebox full of money—full of dollar bills, knowing how limited and gullible this man was—and put it in the room with him and said, "This is the reward money, now you go get it." As

one of the cops who was there described it years later, it was all bullshit. You could stand there and hear what was going on, and it was one whopper from one guy and another one from the other. They were both making it up as they went. Most of the cops who'd been present that night regarded it as ridiculous. But of course the cold words were on the page, and when there wasn't other evidence, suddenly it was treated as serious and used to convict Alex.

In regard to Hernandez's low IQ, the Supreme Court last year ruled that executing the mentally retarded is cruel and unusual punishment. Do you agree with that ruling?

Certainly that was one of the things our commission recommended. As I recount in *Ultimate Punishment*, I spent a couple of years trying to figure out what the death penalty was about. You know, if we're using the death penalty because we're trying to eradicate particularly dangerous people, it wouldn't matter if the defendant is retarded or not. It's only if you accept the fact that the principal purpose of the death penalty is to send a moral message that the intellectual capacity of the defendant ought to matter.

The past two Presidents have both, when they were governors, presided over the executions of mentally retarded criminals. Clinton signed the death warrant of Rickey Ray Rector, who, as he was about to be put to death, asked that the slice of pecan pie he was served at his last meal be saved "for later." Among the 152 people who were put to death by Texas while Bush was governor was a thirty-three-year-old man named Terry Washington, who had the communication skills of a seven-year-old. When it comes to getting elected to national office, how important is it to be seen as tough on crime, even to the point of executing mentally retarded criminals?

I think the fact is that neither political party is interested in taking a position against the death penalty. There are conservatives in the Republican Party who say that the death penalty is just one more government program that's failed. There are certainly liberals in the Democratic Party who regard the death penalty as unequal, inhuman, and barbaric. But they don't constitute a majority in either party, and it's regarded as a no sale issue. So basically capital punishment has fallen off the radar screen as a national political issue.

You noted in your book that during the third debate of the 2000 presidential campaign Bush and Gore both agreed that the death penalty is a deterrent. You then demonstrate that it isn't, or at least that you don't think it is. Why is that?

The first reason is that it just doesn't make sense. The young people whom I've represented over the years who've committed or been accused of committing violent crimes have very little sense of the future. Indeed, the most striking thing to me has always been the degree to which these kids live in the present. They don't know what's going to happen to them next week. So to tell them that years and years from now you might be put to death if you do this, as opposed to being confined for the rest of your life—they're not thinking about either consequence. If they could think about consequences of their behavior, they wouldn't be in all the trouble that they're in to start with.

The second reason is that the common sense sort of statistical evidence just doesn't support it. Illinois and Michigan are comparable states in almost every statistically significant regard: their income level, racial makeup, dispersion of population between urban and rural areas. Except that Michigan—which hasn't executed anybody since the 1840s—has the lower murder rate. Texas has executed a third of everybody we've

executed since 1977, when the death penalty was reconstitutionalized, and Texas still has a murder rate higher than the national average. So there's not a lot of good empirical evidence that the death penalty functions as a deterrent where it's practiced. And indeed that turns out to be the prevailing opinion among scholars. It's not exclusive, but when you ask criminologists, about 80 percent of them—and even 65 percent of police chiefs—say the death penalty doesn't keep other people from becoming murderers.

Bush and his Administration are very pro death penalty. As I mentioned, Bush signed off on the 152 executions when he was governor of Texas, and his attorney general, John Ashcroft, has repeatedly overruled U.S. attorneys when they didn't seek the death penalty. White House counsel Alberto R. Gonzales was shown, actually by this magazine, to have given only cursory briefings to then-governor Bush as his legal counsel in Texas, and to have sometimes omitted "crucial issues in the cases at hand: ineffective counsel, conflict of interest, mitigating evidence, even actual evidence of innocence." Gonzales is now considered a leading candidate to be appointed by Bush to the Supreme Court. How much of an effect can the Bush Administration have on death-penalty cases nationally, given that most death-penalty cases occur at the state level?

Well, there is a federal death penalty, which, as you point out, the Bush-Ashcroft Administration has sought with greater frequency. They seem undeterred by the fact that, by the last count I saw, in fifteen of the sixteen instances in which they've sought death and gotten convictions, juries have not agreed with them and have thought that *not* the appropriate punishment. I don't know why they don't step back with that kind of

batting average. So certainly they have a direct effect. And obviously if the President were to appoint to the Supreme Court somebody who is ardently pro death penalty and who believes that the procedure is too slow and has too many procedural safeguards, that would have a great impact across the country, although it would depend on which particular justice was being replaced.

Getting on to the Democratic candidates: You noted earlier that Howard Dean now supports the death penalty for heinous crimes but used to oppose it altogether. John Kerry is opposed to it, except when terrorism is involved, and even tried to make the point that life imprisonment is in some ways a worse punishment than being put to death. Dick Gephardt favors the death penalty, but has co-sponsored legislation that would make DNA testing more available in capital cases. And Wesley Clark wants more study. Are these positions soft enough that it may cause these candidates problems if any of them runs against Bush in 2004?

Obviously for Kerry it's going to be a political problem, but I admire him for staying where he's at. He obviously comes from a state where there is no death penalty. I don't know what Howard Dean means by "heinous crimes"

He was talking mostly about cases involving police officers or children, from what I've read.

Well, as I've said, you can challenge that by saying, "What about murders in penal institutions, don't we have to have some punishment available for those people? Are you including parents who kill their children?" All of these categories end up collapsing when you try to make categories. But I think the death penalty is a red-meat issue in the South. Where religious

fundamentalism has a greater hold there's a lot of eye-for-an-eye thinking that goes with it, and so there's a really strong current in favor of capital punishment. Politically, it's like guns: it's one of those issues that people, especially white men, show up to vote against Democratic candidates because of.

Probably the most pro death penalty candidate up front among the Democrats is Joe Lieberman. He says his main rationale is that it provides justice for the victim's family. Your book really questions the wisdom of that. Could you explain a little about why?

I share Senator Lieberman's sympathies for these families. And certainly, as the former attorney general of Connecticut, he's probably had a great deal of exposure to their anguish. It's a horrible loss, and to think that it's been brought about by the conscious will of another person is particularly upsetting. But the problem with this argument that the "victims deserve it" is that it's an argument we trot out only when we've reached a consensus based on other factors that death is the appropriate sentence. Forty-nine times out of fifty, on a national average, we don't impose death in the instance of first-degree murder convictions. In other words, forty-nine times out of fifty we say the victim *doesn't* deserve it, even if the victim's family wants it. And so it's really a fig leaf as an argument. And besides that, even if you give heed to that argument, it greatly increases the arbitrariness of the system. What rationale is there, what kind of justice is it, when for identical crimes one person lives and one person dies because of the nature of the victim families?

You note that throughout most of Europe the death penalty has already been abolished. Do you think that should affect the way we view the death penalty here? You mention something in the book about the different circumstances here and there, but with increased

international trade and with combating terrorism in tandem, aren't we becoming more intertwined? Should that affect our approach to the death penalty?

I think it will. This is one of many instances in which Americans are regarded as ludicrous cowboys. The fact that we're regarded as barbarians because of this is bound to have an effect over time. I do question, however, whether Europeans really are in a position to give us this kind of advice. First of all, their murder rate is nowhere near ours. And the other thing, and this is something that the Europeans don't acknowledge, is that the death penalties were abolished throughout Western Europe *against* the will of political majorities in those countries. The reason that they were abolished was because of the sad lessons of history. Those countries had seen democratically elected governments put people to death in the name of the law, for political reasons, and they did not want the state equipped with that power any longer—which, by the way, I regard as a particularly imposing argument. But because American experience has not included that nightmare—of having a national government elect the likes of Hitler—that argument has much less sway here than it does in Europe.

You write that you came to the commission as a "death penalty agnostic," having evolved from considering the death penalty barbaric when you came out of college and graduate school to deciding as a federal prosecutor that there are cases in which it should be sought. For instance, you write that you could yourself have flipped the switch to kill John Wayne Gacy. When your work on the commission began, you note, "I still hung in a sort of ethical equilibrium, afraid to come down on either side of the question of whether capital punishment was actually right or wise." By the end of the experience, though, you had reached a verdict: that the death

penalty should be outlawed. What finally tipped you in that direction?

I basically decided that I'd been asking myself the wrong question. I'd spent years deciding, or trying to decide, whether it was right or just to execute the likes of Gacy, and I think that's the wrong question to be asking. The question is, can we construct a legal system that will reach those rare right cases without also sweeping in the wrong cases—the cases of the innocent or, far more often, those who on any sort of comparable basis just don't deserve the death penalty? And I think it asks too much of the legal system to have it respond with that kind of precision, the kind of precision that's demanded if we want to use the death penalty as a basis to send this moral message. We can do pragmatic things with the legal system—we can decide commercial disputes, we can use it to incarcerate criminals—because there's some tangible benefit that we get when we do those things. But if you're asking the justice system to be a symbol and only a symbol, which is what we are in fact asking with the death penalty, it will never operate perfectly. And we have to accept that.

You went into the commission work without knowing what you were going to conclude. Did anything else that came out of the commission surprise you?

Well, you know, there are moments when you sit there and you go, "God almighty, what are we wasting all of this time for?" Even if it's twelve cases a year in Illinois, that's just twelve cases. And because it remains a consuming national issue, it's constantly being debated, always coming up in political campaigns. Sometimes I feel like, "God, why don't we just get done with this and move on?"

One last question. Your most recent novel, *Reversible Errors*, revolved around a death-penalty case, and now *Ultimate Punishment* has been in the book stores for a few weeks as well. Have you gotten much feedback from readers regarding how the two books have affected their views on the death penalty?

I've had a lot of people who've read *Ultimate Punishment* and said it's nudged them more toward viewing the death penalty as a mistake. One reason I wrote *Ultimate Punishment* was because I really did not want *Reversible Errors* to be read as a tract. It certainly was inspired by the sort of emotional swamp that one gets into in capital litigation, but I wasn't trying to promote a particular agenda. It wasn't intended to be the *Uncle Tom's Cabin* of capital punishment. And so for that reason, I really wanted to speak far more openly about my own conclusions, and anguish, on this subject.