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DEATH PENALTY INFORMATION CENTER

Death Penalty Information Center Podcast, *Discussions With DPIC*: Denver District Attorney Beth McCann on Colorado's Death-Penalty Repeal

In the April 2020 episode of *Discussions with DPIC*, Denver District Attorney Beth McCann (pictured) speaks with Death Penalty Information Center Executive Director Robert Dunham about Colorado's repeal of capital punishment.

McCann was elected DA in 2016, as part of a nationwide wave of reform-oriented prosecutors. Both as prosecutor and in her eight years in the Colorado legislature, McCann has advocated for broad criminal justice reforms, including the abolition of the death penalty. In her discussion with Dunham, she describes the major societal shift away from capital punishment, Colorado's efforts at abolition, and the role of prosecutors in shaping change.

This Q & A has been lightly edited for clarity.

You can listen to the podcast at: https://deathpenaltyinfo.org/resources/podcasts/discussions-with-dpic/denver-district-attorney-beth-mccann-on-colorados-death-penalty-repeal

Discussions With DPIC: Denver District Attorney Beth McCann

Robert Dunham 0:02
Hello, and welcome to Discussions with DPIC. I'm Robert Dunham, the executive director of the Death Penalty Information Center. In this episode, I'll be speaking with Beth McCann, the district attorney of Denver, Colorado, about her views of capital punishment and Colorado's recent repeal of the death penalty.

Before taking office as Denver's D.A., Ms. McCann served four terms in the Colorado House of Representatives and work both as a prosecutor and as a lawyer in private practice. In her 2016 campaign for district attorney, she ran on a platform broad criminal justice reform that included support for ending the death penalty. D.A. Beth McCann, thank you for joining us.

Beth McCann 0:40
Thank you for having me. It's a pleasure.

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Robert Dunham 0:42
Well, it's our pleasure to have you.

When you ran for district attorney in 2016, you were part of a new wave of prosecutorial candidates who emphasized a justice reform agenda over being tough on crime. And you advocated using the power local prosecutors have as a means of addressing mass incarceration and racial and economic inequities in the criminal justice system. Favoring reform doesn't automatically mean abolishing the death penalty, but you and many others who were running as reformers openly called for reducing or ending the use of capital punishment. That was a stark change from prior generations of prosecutors who were often strong supporters of capital punishment.

What happened that caused this shift?

Beth McCann 1:24
Well, I think a number of things have been going on in the criminal justice system over the last several years, and we've made great strides in promoting criminal justice reform that recognizes that the tough on crime, incarceration-driven practices really haven't resulted in a safer or healthier community. I think over the past decade, there's been an increasing recognition that mass incarceration is unjust at certain times and it can actually be harmful to communities — particularly communities of color.

I think that we've seen some bipartisan efforts to roll back the excesses of mass imprisonment. And I think the public has begun to understand and support this effort. In fact, even if we look at a recent small drop in the national incarceration rate, it really doesn't address the magnitude of our history of mass incarceration. Data is now sparking people to really think about what are we doing in the criminal justice system and how can we make it work better, and how can we be proactive and do prevention in criminal justice?

I think that the public's attitude about capital punishment has mirrored this sort of thinking and has evolved. People have recognized that racism, systemic poverty, and wrongful convictions sometimes happen in our imperfect criminal justice system. Now, close to half, or maybe more than half of all Americans believe that the death penalty is sometimes imposed arbitrarily and unfairly.

I think it's been a confluence of attitudes and thoughts about what is an appropriate punishment for crime, and what is the role of the government in making sure we have safe communities. So, I think it's really been a lot of things, but there are now a number of prosecutors who do not support the death penalty across the country.

Robert Dunham 3:53
One of the things that we've seen, as new prosecutors have come in and — we've done a study of this — we've seen that in one third of the 35 counties with the most people on death row, prosecutors have changed just since 2015. But many reformed prosecutors, once they come in,

have faced a backlash from police unions, from crime reporters, even from other district attorneys and governors, saying that the death penalty is the law and as district attorney, you've got an obligation to enforce it.

I remember a news story, the day you were sworn in. A local television reporter asked you whether Denver was done with the death penalty. You said, and I'm quoting here "we are under my administration. I don't think that the state should be in the business of killing people." I'm curious whether you have faced any of the type of backlash that we've seen in St. Louis County, in Philadelphia, in Florida? And if you haven't, what is it that makes Denver different from the places where we've seen that backlash?

Beth McCann 5:04
Well, I'll tell you as I talk to district attorneys around the country, I appreciate how special Denver really is. For example, I have a very supportive relationship with the police department, the police chief here, and with the mayor and the city council members, as well as generally criminal justice reform groups. Everybody is working collaboratively in Denver, to look at making the system better and being more open to reform. I think we're interested in looking at new ways because we're recognizing that the old ways haven't always served as well. But I do see how my colleagues across the country struggle with this. Denver itself, we did some polling and the voting voters in Denver do support the repeal of the death penalty by over sixty percent.

So, I think in Denver, this is something that the community supports. They want to see the death penalty repealed. And so, I have not had backlash on this issue in Denver.

Now, some of my colleagues in the DA community and other jurisdictions in Colorado do not agree with me, and in fact testified in support of the death penalty. And there has been some back and forth in the local newspaper about the repeal that just occurred. It's a very emotional and personal issue for people. And I very much understand that, and I respect the people who have a different viewpoint, because I think it's heartfelt and it is comes from a deep personal belief. But for me, I believe this is the right way to go that we should no longer use the death penalty in our country.

Robert Dunham 6:58
You were mentioning a moment ago, other prosecutors had testified differently on the issue. And we've heard a number of prosecutors arguing against the abolition of capital punishment because they say the death penalty is a valuable bargaining chip for obtaining guilty pleas. But states that have never had the death penalty don't seem to have a problem negotiating pleas, and prosecutors in states that have recently abolished the death penalty don't seem to be deluged with new capital trials.

I know that when you testified, you opposed using the death penalty as a bargaining tool and you said up front that in your office, you would not be seeking the death penalty at all. Do you think that not having that bargaining chip made it more difficult for your office to resolve

murder cases? And do you think the end of Colorado's death penalty is going to make it more difficult for other prosecutors to obtain guilty pleas?

Beth McCann 7:54
I don't think so.

Personally, I don't think that we should file first-degree murder cases, unless we believe that a jury would convict and that we can prove the case beyond a reasonable doubt. That's the standard that we exercise whenever we file a case. And if we believe that we have a first degree murder case and that the jury would find someone guilty, we are in a position to either require that the case go to trial or that the person plead guilty to first degree murder. We've had cases where people do enter pleas to first degree murder. There's no question that if the death penalty is part of the case, that it would be easier to get a plea of first degree murder because given the choice, a defendant is naturally going to choose a plea that will allow him or her to stay alive.

So, you're in a position with a defendant where they really have no choice if the offer is either the death penalty or plea to first degree murder. I think that we shouldn't be filing cases unless we can prove them. And we shouldn't be using the threat of killing someone or having someone lose their life in order to get a plea to first-degree murder.

And I don't think that it really works as a deterrent. I mean, that's another argument that we hear, but it has not deterred people in Colorado. For example, we have the Aurora theater shooter, and it clearly did not deter him, because the death penalty was sought against him. And since I was elected since I've been the DA, we haven't seen a big spike in horrific murders in Denver, because people know that I'm not going to bring the death penalty.

Most offenders who commit extreme acts of violence, assume they're not going to get caught and they don't think about the consequences. So, I think that It really doesn't act as a deterrent and I also think that that it really should not be used as a way to force someone into a plea. It just doesn't seem to me that that's the appropriate role.

Just for example, we don't file a higher charge, say, in a robbery case. We're not going to file aggravated robbery in order to get a plea to robbery when we know we can't prove aggravated robbery. We're only going to file things that we think we can prove. So I don't agree with the idea that this will make us less able to get first degree murder convictions.

Robert Dunham 10:41
Just this week, the National Registry of Exonerations came out with their 2019 report on exonerations, and each year DPIC takes a look at that to see if there are any implications for the death penalty. And I think one of the things you just said is really interesting in light of the report.

I went through the 76 murder exonerations, just in the last year, to look at whether there was an impact for capital punishment. And it turns out that there were 18 cases in which the death penalty was part of the reason there was a wrongful conviction, including a number of cases in which witnesses were threatened with the death penalty if they didn't cooperate. And so, they testified falsely against innocent defendants, and some innocent defendants pled guilty to avoid facing the death penalty.

Beth McCann 11:36
Well, the stakes are so high when you're talking about death, that I think it's it skews things because, again, if your choice is pleading to a charge or you face the potential of death, a defendant really has no choice. I mean granted, if they go forward, the prosecution has to prove the death piece of the sentence. But the risk that you would have to take as a defendant facing death is so disproportionate to the risk that a defendant in another kind of case would face that I think it just it, it puts so much pressure on the defendant that you wouldn't see in another kind of case.

Seeking the death penalty, it's the most difficult and gut wrenching decision that a prosecutor makes. And for someone to be facing the death penalty, it just changes the nature of the options.

Robert Dunham 12:48
Before you became a district attorney, you were state legislator for eight years. So you've seen this issue from two pretty important perspectives. I'd like to ask you a bit about the process by which abolition happened in Colorado, because during the time from when you first became a legislator to, now, your time as district attorney, Colorado made several unsuccessful attempts to abolish the death penalty. Why do you think abolition succeeded this time when it hadn't in the past?

Beth McCann 13:24
Well, as I mentioned, I think that the public view of the death penalty has evolved over the years and I think that more people in Colorado are recognizing that using the death penalty is not an appropriate way to go in these horrific cases. I also think that we had this case, in Colorado, with the Aurora theater shooter, and in that case, the jury was unable to return a verdict of death. I think that that helped change people's minds as well, because if you would think of any case where this might be successfully argued that was that was the case, one of the cases. And also, in Denver, my predecessor brought a case that was just a horrific, brutal murder of five people — you can't imagine any more horrific crime scene. And, in that case, the jury also declined to impose death.

So, I think we've had some of this kind of experience. I think that there was better work done to prepare this year. Last year when it was introduced, it was introduced in a way that some felt was not fair and appropriate. So this year, more groundwork was done, and there was an assurance from the governor that he would sign this bill if it came to him. We also have a situation in Colorado now where we have a Democratic house, a Democratic senate, and a

Democratic governor, although this issue doesn't necessarily break down just on partisan lines. But we certainly have more legislators who were willing to cast this difficult vote.

Robert Dunham 15:25
Having looked at this both as a legislator and as a district attorney, one of the things legislators look at is cost effectiveness. And what we've noticed ,as repeal legislation has gone through various different states, is that the legislators once they are convinced that the death penalty doesn't contribute to public safety, that it isn't a deterrence, they then talk about the policy issue and drain on resources.

One of the issues you talked about in your testimony was the enormous drain on prosecutorial resources when a death penalty is pursued. Could you tell our listeners what kind of impact it has on the workings of a prosecutorial office when a death penalty case is underway? And also, have you noticed effects on prosecutors. Individually — personal effects on people working on the cases and on others working around them?

Beth McCann 16:27
What I can tell you is when I was a young Deputy D.A. here in Denver, there were death penalty cases that were brought in our office. It takes an enormous toll on the office as a whole really, emotionally, as well as resource-wise.

In a death penalty case, understandably and as they should, the defendant's attorneys are going to file every conceivable motion that they can think of, and it's often hundreds of motions. So the amount of resources that are put in to prosecute a capital case are enormous. It draws away resources from other cases that are going on in the office. Investigators, clerical staff, victim advocate work, and attorney work, it impacts everything that we do.

In addition, there's an emotional toll because, if you're dealing with a death penalty case, these are the worst of the worst crimes. They are unimaginable crimes and they are gut wrenching and heart wrenching. And dealing with victims' families and friends and going through that process is incredibly challenging emotionally. And it kind of pervades the whole office, like everyone is aware that there is a death penalty case and everybody knows the stage of it. They know what's going on, they are aware of it. It just kind of has a pervasive influence.

I've also talked to other attorneys, in other offices, about the huge impact that it has, both for victims' families, victim advocates, Deputy D.A.s. You know, these are the worst of the worst cases. That would be true to some extent, of course, even if you didn't have the death penalty: dealing with a case of this nature has a huge emotional toll and resource toll. But when the death penalty is introduced, it just ups the game exponentially.

Robert Dunham 18:48
In Colorado, and actually it's been the case in a couple of states, there are state legislators who are family members of homicide victims. And in the case of Colorado, there's both a representative whose son was one of the people shot in the Aurora movie theater case, and a

senator who lost a child and a daughter-in-law [sic] in one of the murders that ended up putting two people on death row. So when it came to the legislative debates, the victim impact issue of capital punishment was really, I think, raw.

What was your sense of the way that was handled? And apart from the folks who, I think — it's unimaginable the anguish that that they've gone through — but apart from their reactions, do you have a sense of, of how victims today, whose cases have not resulted in death sentences yet or may not have resulted in death sentences after trial, thought about the repeal?

Beth McCann 20:06
Well, let me start by saying Senator Rhonda Fields — whose son was murdered along with his fiancé because he was a witness in another murder case — she is a very good friend of mine. We were actually office mates in the legislature. We are still very good friends. We have agreed to disagree on this issue. But my heart just goes out to her and her daughter Maisha because of the pain of losing her talented son in such a brutal way. She feels very strongly that death is an appropriate punishment. And I respect, absolutely respect, her position. You know, I can't imagine, I mean I can imagine, but I can't feel that kind of pain that she has been through.

And the same with Representative Sullivan, who lost his son in the Aurora shooting. And I know that other victims' families who've lost children or husbands or wives in these brutal, awful ways, some of them think death is the appropriate penalty. Others do not. I think it's a very personal issue. And I think it was very hard for the legislature to talk about and vote on this bill, because everyone respects Senator Fields and Representative Solomon.

That said, I think that, in my opinion, capital punishment is not the right way to go. I don't think the state should be in the business of killing people. And I've said that. I think life without the possibility of parole is a horrific way to spend the rest of your life and it certainly takes a person out of circulation so that they're not out in the community. But I very much respect the viewpoint of others that disagree with me. And I'm sure that those who may be facing cases that are still pending are very unhappy with the passage of this bill, and the commuted sentences of the three men who were on death row. So, I'm sure that they have a different viewpoint than do I.

Robert Dunham 22:35
Watching the debate in Colorado, on the heels of last year's repeal in New Hampshire, I thought the victim's issues were really interesting. The leader of the abolition movement in New Hampshire was a State Representative named Renny Cushing. Representative Cushing is himself a surviving family member of two separate and unrelated murders. And yet, he said that as as family member of a homicide victim, he thought that — he was opposed to the death penalty before the murder — seeking death penalty in his case would mean that he had lost not just his father, but he would have lost his moral compass as well.

Did you see any of the homicide victim's family members in Colorado speaking out against capital punishment and in favor of the repeal?

Beth McCann 23:38
Yes, there were some victims families who actually testified in the legislature and have publicly expressed support for repealing the death penalty. In fact, in the Aurora theater shooting, there were differing views among the victims' families about whether the death penalty should have been sought in that case. And we had a murder of a correctional officer where the prosecutor wanted to seek the death penalty and the family asked that it not be sought. So again, people have very personal, deeply held views about this — and they differ.

Robert Dunham 24:19
I want to go back to your time as a legislator: when issues like this came up, capital punishment issues, other kinds of issues about what the criminal law should be, what kinds of things did you find, as a legislator, most influenced your fellow legislators' decisions? There's been a lot of talk over the years about how district attorneys and law enforcement have a significant impact on legislative judgments and I was wondering if that was the case — if those are the folks that you were listening to, the legislature was listening to, while you were a state representative?

Beth McCann 25:01
I think that legislators listen to both sides of issues. But certainly, local prosecutors, local sheriffs, local police chiefs have a lot of influence in the legislature, because they are influential in their communities. And so legislators want to be responsive to their constituents. And they want to also listen to people who are in the system, so that they get perspective on how do these things really work? I mean, reality is most legislators have no experience in the criminal justice field. That's just not something that they have ever been involved in. So, when they're looking at laws that change how we do things, it's helpful to get input from people who are actually in the trenches.

But we also have representation from the ACLU, from defense groups, the defense bar, so there are always representatives of different points of view. And I guess it depends on the individual legislator, how much he or she is influenced by which points of view and also based on their constituents and how their constituents view things.

Robert Dunham 26:18
Do you think that with more reform prosecutors being elected at the county level, that that is going to affect legislation: having a voice from the law enforcement side that that no longer touts the tough-on-crime line?

Beth McCann 26:35
Oh, absolutely. Yes, I think that's very much the case. And I think we are in a position as prosecutors to influence and help shape legislation and I think that's very important.

Now, in my case, in our legislature, we have a number of legislators who are very much reform minded and very aggressive about. So, I actually work with them sometimes to help shape legislation so that it's a little more palatable to the prosecution side with a Democratically-

controlled legislature and governor. Many of the prosecutors in Colorado feel that the legislature is pushing forward way too aggressively on criminal justice reform.

We work together to try to help them understand the unintended consequences of some of the work that they do. And I, because I was in the legislature, I have good relationships with many of the current legislators, so we can talk about these things in a non-threatening and helpful way. In fact, I just got a call today from one of our senators about the speedy trial issues that are going on right now with the Coronavirus issue and should we have legislation about that. So, I think it's important for prosecutors to be involved in the legislative process and be able to help make good decisions.

Robert Dunham 28:07
Both as a legislator and district attorney, you've had a record of, I guess the best way I would describe it is a consistent commitment to fairly applying the law. If you were shaping the law as a legislator, what was it that made you decide to leave your legislative position, where you get to write the law, and then instead run for D.A.?

Beth McCann 28:32
There were a number of things.

You know, I believe in the work that we do as prosecutors, and I felt that I could have more of an influence to actually impact people's daily lives as the elected prosecutor. Every decision that we make, here in my office, impacts individuals, their families — both victims and their families, the defendants and their families. So these are really important decisions. And it's important that we have someone who is trying to improve the system, the criminal justice system.

It's hard: these are huge systems and they're all interconnected. We can make progress and we can, you know, look at how we do things, how we could do things a little bit better.

For example, the legislature, last year, was proposing to reduce felony drug possession of small amounts of drugs from felony to misdemeanor. And I supported that, but I asked that they give us more time to implement and so we negotiate that. I didn't get as long as I wanted, but I got an extra three or four months. And then we negotiate where we needed more resources — if we're going to set up programs and alternatives for drug addicted people, we need funds. So that was part of the negotiation as well. And we ended up with a bill that I think accomplished a lot of those goals because we were able to work together.

I loved being in the legislature. But I also felt like, you know, in the legislature, you're working with 100 other people or 400 other people, whatever your group is, to get things passed. So there's a lot of compromise, which is not a bad thing. But when you're in charge of an office, you have more ability, I think, to actually make those individual differences. Also, as a matter of fact, we have term limits in power. I could have run for Senate — I was term-limited in the

House — but I chose to run for D.A. because I feel like this is a better position for me to actually accomplish some change.

Robert Dunham 30:58
As we're talking, there are a couple of cases pending in Colorado — even after the abolition of the death penalty — murder cases that are raising a fair amount of controversy. The abolition bill that was adopted applies prospectively: that is, to future crimes. And in the way it was written, it applies to when crimes are *charged* as opposed to when crimes actually occurred. So prosecutors can still choose to capitally prosecute a crime, so long as they charge it before July 1.

Just the other day, there were two capital cases that were still pending. The one in Adams County involving a sheriff's deputy, the DA just earlier in the week said that they were going to withdraw the death penalty. But there still is a case that's pending in El Paso County, which is Colorado Springs. Why do you think that these cases are still being pursued as capital? What do you think the likely outcome would be if a death penalty was imposed?

Beth McCann 32:15
You know, I'm reluctant to talk about cases that are outside of my jurisdiction. Each elected district attorney has his own thought on the death penalty, and also their own constituents to whom they are accountable. So, I don't know what's going to happen in the case in El Paso County. I think we, as elected prosecutors have to make difficult decisions about what is an appropriate penalty. And they involve not just the facts of the case, but they really do involve political and emotional concerns.

As you mentioned, the DA in Adams County has decided not to pursue the death penalty. And he was quite critical of the governor in his comments about why he's not pursuing the death penalty. He did not agree with the passage of the bill and he did not agree with the governor signing the bill and commuting the sentences. But he felt like, according to the article, I've not spoken him personally about it, but he felt like it was not worth the resources to go through with the death penalty, understanding that the governor might choose to commute the death penalty sentence anyway. So that was his conclusion.

I don't know what the district attorney in El Paso County will do. He's got to weigh, does he think it's worth going through the process and spending all the resources and emotional drain to go through the death penalty phase? Given that the death penalty is no longer going to be used in Colorado and the governor will always have the ability to commute the sentence, I think he's just got to make that personal decision. That's really his right to do and we will see what he decides.

Robert Dunham 34:22
Going forward, Colorado doesn't have a death penalty. How do you think the state's abolition of the death penalty will affect your job as a prosecutor in Denver and that of the other Colorado prosecutors?

Beth McCann 34:38
Well, I have an election coming up in November. So far, I don't have an opponent. So that's very helpful. But I will see, you know, if, if the voters of Denver, do not agree with me and feel strongly enough, just on that one issue, versus all the other things that we're doing in Denver, they certainly have the right to, to vote me out, someone could run against me still and make an issue of the death penalty. As far as the other prosecutors, you know, I think, honestly, the death penalty was used so infrequently in Colorado, I don't think it's going to have much of an impact.

The only places that it's been used recently are along the Front Range: you mentioned in Adams County, Denver, and Arapahoe county, and El Paso County. It really doesn't get used in the more rural counties. So, I don't think it's really going to make much of a difference. And it's not going to make a difference in my office because I haven't —I said in the beginning that we wouldn't seek it. So, really I think we'll just be business as usual here.

Robert Dunham 35:54
One last question before we let you go. There's been a lot of talk — and I mentioned this at the very beginning — about the death penalty and criminal justice reform. While you don't have to oppose the death penalty to support criminal justice reform, most of the reform district attorneys have also opposed capital punishment. Why do you think that is?

Beth McCann 36:23
Most of the reform-oriented prosecutors have more of a view that we should look at the criminal justice system through a broader lens. And how do we really prevent crime? And how do we keep people from getting involved in the system? And if they do, are there alternatives to incarceration or mass incarceration? And so, repeal of the death penalty is kind of along those same lines: just looking at criminal justice in a way that's a little more enlightened, if you will, like looking at other things besides just imprisonment.

You know, can we deal with someone's underlying drug addiction? Can we deal with someone's underlying mental health issue? That was an issue in the Aurora theater shooting. Can we do a better job as a society in looking at these causes of criminal justice? Instead, what we've done in the past is, we've just relied on the criminal justice system to sort of solve people's individual ills, if you will.

I would rather see us have more resources directed toward earlier intervention, mental health, education, elimination of poverty. These are the things that will really change the system, that we need as a community, as a society, to be looking at, in my opinion. And so I think it's part of the thinking of people who are more oriented toward criminal justice reform that they would not see the death penalty as an appropriate punishment.

Robert Dunham 38:10
Denver District Attorney, Beth McCann, thank you for joining us on discussions with DPIC.

Beth McCann 38:15
Thank you. It's been my pleasure.

Robert Dunham 38:16
To learn more about the Denver District Attorney's Office and district attorney Beth McCann, visit denverda.org. For more information about the death penalty, visit the Death Penalty Information Center website at www.deathpenaltyinfo.org. And to make sure you never miss an episode of this podcast, subscribe to *Discussions with DPIC* with your podcast app of choice.