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“Victims’ Rights: The Fallacy of the Zero-Sum Solution”

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"A great empire and little minds go ill together."
-Edmund Burke

The State of Florida executed Pedro Medina in March 1997. The execution itself hardly marked a watershed; neither did the flames that erupted from Medina's head as the voltage surged through his body. The same thing happened in 1991 during Jessie Tafero's execution, and the responses to the unanticipated horror were identical. Again calls came from various public and private organizations to abolish if not capital punishment per se, then surely the electric chair itself as an antiquated method of both psychological and physical torture. At the other end of the philosophical spectrum were those who insisted on the chair's efficacy and even heralded its use as an extra measure of deterrence to would-be killers planning forays into the Sunshine State. One legislator, commenting on whether lethal injection should supplant electrocution, objected because lethal injection was too easy: it was like going to sleep.

The most startling result of Medina's execution, however, was not the accompanying argument concerning the method of putting people to death. The public's mandate seems sufficiently clear to permit the states to choose whatever vehicle suits their particular populations' tastes in death machinery. Instead, another, older argument raised its head: the question of the rights of the condemned versus those of their victims, and by extension, the perceived discordant rights of predator, prey, and society in general.

Shortly after Medina's execution, Court TV broadcast an installment of its popular "Cochran and Grace" show, featuring Johnnie Cochran and Nancy Grace. Cochran, of course, represented O. J. Simpson and served as the program's liberal commentator. Nancy Grace was a former prosecutor from Georgia and Cochran's

conservative foil. On this particular program, Grace echoed Florida's attorney general, Bob Butterworth, by advancing the argument that irrespective of the nature of Medina's death, including whether he suffered before dying, right-thinking men and women would be better advised to put their concern for Medina's victim's rights before his.

That is, quite simply, impossible because, as I will argue, the rights of both criminals and their victims (including the families of the primary victim) are identical and cannot be differentiated, either philosophically or existentially, as long as the country is governed by the Constitution.

I do not quarrel with the jury's verdict in Medina's case. I accept his guilt for statistical reasons alone: there are far more guilty than innocent people in prison. Neither will I argue Medina's mental competency at the time of his execution. I wish, rather, to address a more fundamental problem with attempting to establish a tripartite separation of rights, the same rights that are rooted firmly in the political and philosophical underpinnings of the Republic. This tactic always produces a zero-sum solution with perpetual losers.

Grace and the majority of conservative commentators insist on one group of rights for criminals (here defined as anyone convicted or even suspected of committing a crime), one for victims of crimes, and yet a third for the majority (shrinking as I write) who have had no contact with the criminal-justice system on either side. Grace et. al. complain that the criminal enjoys a distinct set of rights that not only infringes those of her/his victim and the public in general but is even more sacrosanct. Thus, there is a need to redress this grossly unfair (and impolitic) imbalance with a new declaration of rights for America's version of the *sans culottes*. What neither Ms. Grace nor anyone else can find, however, is any distinct set of rights for criminals anywhere outside the Eighth Amendment to the Constitution, which prohibits cruel and unusual punishments. These "rights" are a fabrication, the club used to beat the socially undesirable elements of society once they come under the control of the criminal-justice monolith.

Under the law, the technical definition of a criminal (notwithstanding Grace's inclusion of anyone arrested) is someone who has been

convicted of a crime. No matter how high the mountain of evidence, how heinous the offense, how obvious the guilt, until a defendant is convicted by a jury or pleads to the charges, he or she enjoys the same protection that the law and the Constitution extend to every citizen of this country. We can hate Timothy McVeigh before his conviction if we believe him guilty of the carnage in Oklahoma City, but he did not stop being a citizen of the United States, with all the rights and privileges that status confers, until the jury rendered its verdict.

In the Declaration of Independence, Thomas Jefferson asserted that "all men are created equal [and] endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." Mr. Jefferson naturally understood "men" to mean white males, but his point is that citizens of the United States all possess civil rights that originate from their Creator. Leaving aside the religious implications and Jefferson's racism and sexism, the greatest single mind in the country articulated a philosophy under which a government was instituted to secure those basic rights of its citizens. So fundamental were those rights that Jefferson acknowledged the duty of the citizens to overthrow any government that failed to protect them.

The Constitution became the vehicle by which those rights were secured, specifically in the Bill of Rights, something of a radical document that requires closer examination for the purpose of this essay. So subversive are these first 10 amendments that Ed Meese, a former Attorney General of the United States publicly labeled the American Civil Liberties Union a "criminals' lobby" for the organization's unqualified support of the universal application of the Bill of Rights. What provokes this kind of response and how does it bear on the current separation of rights?

Only four of the amendments arouse the ire of the proponents of victims' rights vis-a-vis those of criminals, with the Fourth being the perennial whipping boy. This amendment deals with search warrants and probable cause. The Supreme Court has steadily eroded the peoples' dignity to the point where the "right of the people to be secure in their persons, houses, papers, and effects" is problematic, all because of the perceived miscarriage of justice caused by the so-called exclusionary rule that prohibits the

admission at trial of illegally obtained evidence. But the Fourth Amendment is designed to protect all citizens, not just those accused of crimes, against over-zealous and sometimes criminal-minded police.

The Fifth and Sixth Amendments articulate injunctions against double jeopardy and self-incrimination and mandate due process of law, a speedy trial, and assistance of counsel. Here is where the much maligned *Miranda* decision first took form. Although these two amendments pertain to criminal and civil proceedings, it hardly seems unreasonable to prevent unrestricted trials, unguided by rules of law, coerced confessions, and denial of counsel to laymen ignorant of the law and their own rights. At the risk of becoming laborious, I repeat: these rights apply to everyone, guilty or innocent. If you are asleep in your home, the police cannot enter your house, coerce a confession, and hold you incommunicado while the prosecutor prepares a case against you. At least, not yet. These are not "criminal" rights but basic rights that protect each citizen.

The Eighth Amendment, as previously noted, prohibits cruel and unusual punishments, but it - or at least its interpretation - has been vilified by politicians as infringing on a state's rights to inflict appropriate punishment on its prisoners. Perhaps some obscurantists would return us to the rack and wheel, but this amendment is necessary for a civilized society to govern the treatment of those it convicts and sentences to either imprisonment or death. If there is a criminals' right, this is it, but few would argue that the state should officially sanction cruelty at any level.

As with any section of the Constitution, these provisions are subject to interpretation by the Supreme Court, but the protections remain logical extensions of the political thought that founded the Republic and are as viable today as they were in 1789. The public would no more consider rescinding any of these civil rights than they would revoking either the abolition of slavery or the extension of the franchise to women and blacks. All are fundamental civil rights, not criminals' rights.

Why, then, the insistence that the two are distinguishable? H. L. Mencken once observed: "The trouble about fighting for human freedom is that you have to spend so much of your life

defending sons of bitches; for oppressive laws are always aimed at them originally" (Quoted in Stubbs and Barnet, 1989). That describes the basis of the argument about rights today. Nancy Grace's gratuitous advice to spend more time focusing on the victims' rights than on those of the criminal's ignores Mencken's cogent analysis; namely that the rights are identical. It is the inclusion of a criminalized element beneath the umbrella of civil rights that appears to scandalize many citizens and their representatives, who think that such an inclusion is tantamount to a preferential treatment of those who ignore the laws the rest of society follows. Or, as Ed Koch, the former mayor of New York City, observed in an article for the *New Republic*, "When we protect guilty lives, we give up innocent lives in exchange" (Koch, 1985).

This is not to say that specific conflicts do not arise, especially where economic inequities dictate tough choices. Certainly a society should direct its resources to helping victims of crime, including compensation and restitution where possible from the guilty party. If a conflict exists between extending aid to a victim or his/her predator, then of course priority should be given to the victim's needs, even if that means fewer amenities for the convicted felon. But that is a long way from an endorsement of the proposition that the rights of both are any different or that one's rights should supersede the other's, at least not until the Fourteenth Amendment guaranteeing equal protection under the law is repealed.

Victims of crimes do have rights, just as any other citizen of the country. They have not been abridged by any special treatment of the men and women who harmed them. All that is necessary is for them to exercise those rights, whether in a courtroom or other public forum. Indeed, they must avail themselves of the opportunity, if for no other reason than to dispel the myth that criminals' rights have miraculously contravened their own. Unfortunately, victims and society in general tend to see the extension of any civil right to those arrested, incarcerated, or merely suspected of committing a crime as a miscarriage of justice and an affront to decent people everywhere. This ignorance of the law and avenues for redress creates a climate of fear and loathing that amplifies a specious class division, the result of which is an iatrogenic disaster.

Consider what happens when civil rights are redefined and relegated to criminals' rights.

Surveys have consistently shown that when asked if they would voluntarily submit to a search of their persons while walking down the street, most people respond affirmatively, explaining that they have nothing to hide and therefore see no inherent objection to such a search. These same individuals would consent to wiretaps on their phones and warrantless searches of their homes, all because they are not breaking the law and have nothing to hide. After all, it's only the bad guys who would object to a search. These well-intentioned citizens ignore the purposes behind the formal articulation of those rights, willing, as Dr. Franklin put it, to surrender a little liberty for a little security, a proposition that usually gains neither.

And it gets worse. Recently, the Supreme Court ruled that during a routine traffic stop, police can force everyone in the vehicle to get out. This is deemed a reasonable intrusion to protect the lives of the police making the stop. No matter what the weather or how infirm a passenger might be, forget probable cause, driver and passengers must leave the vehicle when ordered or face arrest.

Every such tactic contradicts both the spirit and the meaning of the Fourth Amendment. Yet, they are acceptable to the majority, the same majority who think that only criminals get searched or have their phones tapped, because of an erroneous distinction between civil and criminal rights. It is impossible, however, to attack one without attacking the other because both arise from the same safeguards written into the Constitution.

This insistence on two (and often three) sets of rights and the consequent reaction against the concern for the criminalized and disenfranchised is hardly new. In his *Discourses*, (1950) Niccoló Machiavelli described the phenomenon. "[F]or seeing a man injure his benefactor arouses at once two sentiments in every heart, hatred against the ingrate and love for the benefactor." Citizens naturally see the state as their benefactor and equate themselves as part of it. At the very least, they commiserate with any victim of crime, because, as the same Machiavelli states in *The Prince*, (1950a) "lawless acts injure the whole community." Since the rights of a victim are always grafted onto the rights of society at large,

the citizen "feels that he himself in turn might be subject to a like wrong and to prevent similar evils, sets to work to make laws."

And well she/he might, but the laws, to be effective and fair, must apply to everyone. Anger at antisocial behaviour is both natural and acceptable but not at the expense of the laws that bind a people together.

It is precisely this emotional response that is most pernicious and divisive. John Locke thought that men's emotions must be restrained by the intellect. Indeed, it is the capacity to reason and control instinctive responses to prevent a greater harm that sets man apart from the beasts. The current insistence on condoning, or at least acquiescing to brutal executions because the public should pay more attention to victims' rights is a graphic example of what Locke feared. It is not whether Timothy McVeigh should be executed but rather at what costs to the national psyche and in terms of damage to civil rights?

All victims of crime have been denied their fundamental human rights by whatever predator attacked them, but society must do better than responding emotionally and creating a class of victims' rights that by its very nature subjugates other human and civil rights. We do not have the luxury of picking which laws we want to obey, at least not without penalty. Nor can we opt for certain constitutional protections for ourselves while excluding others, a tactic both illegal and immoral. It is as easy to point to interpretations embodied in, say, *Miranda* and criticize them as it was to argue against *Brown v. Board of Education* that ended segregation in the public schools. As unpopular as both decisions were, they each set forth civil rights that are the province of all citizens of the Republic, those arrested and those from, those in school and those out. The rights enumerated by the Constitution remain in force for every citizen, no matter what scurrilous arguments attempt to compromise or subvert them.

In 1782, Hector St. Jean de Crève-Cour published his *Letters from an American Farmer*. In that volume, he described what it meant to be an American. "We have no princes, for whom we toil, starve and bleed: we are the most perfect society now existing in the world. Here man is free as he ought to be; nor is this pleasing quality so transitory as others are" (Quoted in Lunsford,

1994). This idyllic description sounds terribly trite today, but the foundations upon which Crève-Cour's analysis rested remain as valid as they were over 200 years ago because, precisely because, the same protections this French émigré enjoyed are the same ones guarding every citizen of this country. They are not "technicalities" that free guilty felons; neither can they be subdivided into distinct classes. They are constitutional rights that must be extended in the face of inept investigations and even apparent guilt, because if those rights become preferentially enforced, then no one's rights are secure.

Should victims be compensated for their losses where possible? By all means, including fines and assessments against the perpetrators of the crimes. Should they be allowed to enter testimony at penalty phases regarding their loss and anguish? Should they be permitted to witness the execution of the individual responsible for killing their loved ones? Again, I would argue in favour of such measures, but this does not require a finding of a new set of rights. By applying existing law, or by availing themselves of possible remedies, victims can sue felons for compensation and damages, and virtually every jurisdiction permits victim-impact statements. These are fundamental civil rights, not victims' or criminals' rights.

In the last years of the 20th century, it should never have been necessary to codify separate guarantees for the protection of the rights of women, gays, and ethnic minorities. Yet it is. Victims of crimes, however, have not experienced systematic discrimination except at the hands of the most insensitive public officials. As difficult as their lives have been made by criminal activity, they have never abrogated their rights or had them denied as a matter of law. To rectify any slight, all that is necessary is to be aware of those rights and exercise them.

Oklahomans, for example, obviously feel that the verdict in Terry Nichols's trial was unfair, at least in the penalty phase. The attorney general has therefore vowed to bring Nichols back to Oklahoma, try him for the other homicides, and sentence him to death. Timothy McVeigh will likely precede him. Citizens have no right to enhance Nichols' Punishment, but current law does permit them to try him separately for state and federal crimes arising out of the same incident. This is a perfectly lawful exercise of their rights that concomitantly

protects the rights of the accused and is vastly superior to the unseemly lynch-mob mentality that initially heaped scorn on the same jury system that had convicted McVeigh.

No equitable way exists to create a system that protects the rights of one class and dispenses of them at will for another. The tendentious claims of politicians and advocates with personal axes to grind ignore the underlying need for nonbiased application of the laws, one that ensures equality for everyone. As Thomas Jefferson described to Colonel Carrington in 1788, universal rights are "so much the interest of all to have, that I conceive [they] must be yielded" (Koch and Peden, 1993).

The specious separation of rights into criminal, victim, and civil disparages Jefferson's and Madison's original intent to protect every citizen and plays to the natural sentiment described by Machiavelli. It subverts the Constitution by creating class divisions within society and encouraging discrimination for personal agendas. Moreover, it reduces the Republic to a three-legged stool, each leg being a separate set of rights. When one leg becomes shorter than its fellows, the stool tilts and ultimately topples over. Legs equal in length and equidistant from each other provide the strongest support. This is the underlying strength of the Republic.

There is one law that applies to all, and until something else comes along, commentators and politicians would better serve the people by following that law instead of playing to the fears, desperation, and tragedy endured by the victims of crime. Victims, like society itself, deserve the right to see justice done, to be safe from harm, and to reach some sort of closure. Finally, is that not what punishment, whether restitution, incarceration, or death is all about?

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