



# The University of Montana

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June 4, 2007

Rep. Diane Rice  
Chair, House Judiciary Committee  
Capitol Station  
Helena, Montana 59620

Re: SB 306, A Bill to Abolish the Death Penalty

Dear Representative Rice:

My name is Jeffrey Renz. I teach criminal law litigation and civil rights litigation at The University of Montana School of Law. My students who decide to practice criminal law upon graduation have become prosecutors and defense attorneys in about equal measure.

I have represented defendants in two death penalty cases. My former client, David Dawson, was executed in September 2006.

I am currently drafting two essays entitled, "Redemption and Punishment" and "Redemption and Capital Punishment." In March, I will participate in a panel entitled, "The Death Penalty: History, Philosophy, and Practice," at Georgetown University. What follows is a condensation of "Redemption and Capital Punishment," my Georgetown presentation, and the results of my research.

**HISTORY OF THE DEATH PENALTY AND THE CHRISTIAN CHURCH:  
DURING THE YEARS CLOSEST TO THE LIFE AND TIMES OF JESUS  
CHRISTIANS WERE OPPOSED TO THE TAKING OF HUMAN LIFE**

The history of the Christian attitude towards the death penalty falls into four eras of roughly 500 years each.

For the first 500 years of the Christian church, Christians were non-violent. They abjured all homicide, whether as soldiers or in self defense. That is, they did not serve in the army and did not act as executioners, judges who imposed death, or officials who exercised similar powers.

In 337, however, Emperor Constantine legalized the Christian church and laid the way for Christianity to become the official religion of the Roman Empire. As to this circumstance,

Christian Brugger, Capital Punishment and the Roman Catholic Moral Tradition (Notre Dame 2003), concluded,

“Once Christianity had become the state religion, the imperial values articulated in Roman law tended to overwhelm gospel values. ‘Citizenship and membership in the state religion were inseparable. The emperor deemed it his duty as the repository of religious authority to regulate the church, and this seemed entirely natural to contemporaries.’ [Russell, Jeffrey B., *Dissent and Order in the Middle Ages* 10 (Twayne Publishers 1992).] As a result, the legacy of Constantinian-Theodosian Christianity to subsequent ages was highly ambiguous on the ethics of killing, whether in the case of war or capital punishment. Less and less attention was paid to that most troublesome of the teachings of Christ: the prohibition of taking revenge.”

Given an opportunity for power and its beneficial uses, the Christian leadership gradually drifted away from the non-violent position. One may see how this happened—the Emperor Constantine encourages his legions to convert to Christianity. But they cannot fight under the pre-Constantinian Christian doctrine. Constantine himself, and his successors want to fight, but would be forbidden under Christian doctrine.

What was the Christian leadership to do? They faced a choice between bringing more souls to Christ or adhering to Christ’s prohibition on violence to their fellow man. The Christian leadership took the pragmatic course and stepped towards earthly power.

Nevertheless, for the next 500 years, homicide was still considered sufficiently sinful that William the Conqueror and his knights had to do penance for killing and injuring King Alfred’s soldiers after the Battle of Hastings in 1066—the culmination of a “just war.” Although the laity could shed blood, clergy were still seen as being barred from participation in homicide or bloodshed of any kind. This soon changed.

During the third period, the view that even lawful homicide was sinful changed as a result of several circumstances: the advent of warrior clergy, the Crusades, and the problem of heretics. The call for the Crusades rendered it a Christian duty to kill the infidel and regain the Holy Land. Lawful homicide became much more than sin-free; killing of Muslims was seen as an act earning God’s grace. The warrior popes and the Knights Templar, on the other hand, were a natural outgrowth of the fact that the church hierarchy tended to be dominated by second and third sons of the nobility who were trained in arms and state-craft. Powerful warrior clergy eventually established Papal states that engaged in warfare with their neighbors under the Pope’s banner and occasionally, under the Pope’s active command in battle. At the highest levels of Christian leadership the shedding of infidel blood and, soon, of Christian blood, became an acceptable norm.

The relaxation of the ban against the clergy’s participation in bloodshed and the concept of killing as doing God’s work laid the foundation for the hunting and execution of heretics. The

most important aspect of the war against heretics was that it reached its bloody peak during the time of Thomas Aquinas. Aquinas, against this backdrop, penned justifications for capital punishment that form the arguments for, and sometimes against, capital punishment today.

But the history does not end with Aquinas. At the advent of the fourth 500 years, the execution of heretics justified the execution of religious dissenters and, by the Fifteenth and Sixteenth Centuries, justified Protestant executions of Catholics and Catholic executions of Protestants. In Seventeenth Century England, Protestant turned against Protestant, and dissenters from the official Protestant church, Puritans and Baptists among them, were soon persecuted, tortured, and executed. Keep in mind that their acts were crimes against the government, as well as against the established Church.

Throughout these periods, the justification for the execution of heretics, religious dissenters, and Protestants served as the justification for the execution of those who had committed other crimes against the Crown. That justification survives today in the form of Montana's death penalty.

So, we must ask, which is the "Christian" view? Is it the view that prevailed in the years closest to the life and times of Jesus? Or is it the view that developed as Christianity allied itself ever more closely with politics and governmental power?

#### THE AQUINAS JUSTIFICATION FOR CAPITAL PUNISHMENT IS A JUSTIFICATION FOR ABORTION AND EUTHANASIA

Today's justification for the killing of criminals rests primarily, if not solely, on Thomas Aquinas's argument in *Summa Theologica*, II-II, Q 64, Art. 2:

"Now every part is directed to the whole, as imperfect to perfect, wherefore every part is naturally for the sake of the whole. For this reason we observe that if the health of the whole body demands the excision of a member, through its being decayed or infectious to the other members, it will be both praiseworthy and advantageous to have it cut away. Now every individual person is compared to the whole community, as part to whole. Therefore if a man be dangerous and infectious to the community, on account of some sin, it is praiseworthy and advantageous that he be killed in order to safeguard the common good, since 'a little leaven corrupteth the whole lump.'"

Aquinas argues that it is permissible for a community to kill one of its members for the safeguard of the common good in the same way it is permissible to amputate a gangrenous limb for the safeguard of the rest of the body. The problem with this analogy is multi-fold.

First, the principle elevates society's interests above the individual's existence. This is the euthanasia argument. That is, the principle that says we may kill another for society's benefit—for the common good—reaches beyond the killing of criminals. This principle supports

the taking of other lives when it may be justified for the common good.

The principle is also a pro-abortion argument. Applying this principle—that one may kill an individual to preserve the greater whole—the mother may rationalize that she may kill her unborn child for her benefit. The argument that the child is innocent has no bearing here, because this mother rationalizes, “My safety or my way of life is threatened by this unborn child.” Indeed, this very argument underlies China’s abhorrent “one couple, one child” policy. China’s “one couple, one child” policy compels women, pregnant with their second child, to obtain an abortion. We can see how easy it is to compare an unborn child to a gangrenous limb. It is done by declaring it, not a human being, but a mere piece of tissue. We have seen how often this has been done. Abortion and capital punishment have the same principle in common.

Finally, we should see how Aquinas’s analogy is inapt. The limb has no existence apart from the body and no purpose other than as part of the body. The body may exist without the limb but the limb may not exist without the body.

Analogizing the body to the community raises the community above the individual in the same way the individual is raised above his limb. The analogy reduces the individual to a limb that has no purpose and no existence other than as a part of the community.

The analogy is contrary to Christian thought and to Western morality. The individual, guilty of crime or otherwise, is nevertheless a human being. Like the mother’s unborn child, he has a soul and because he has a soul, he has intrinsic worth to God.

That brings us to the third argument, the argument so well put by Justice Sheehy.

#### THE DEATH PENALTY DENIES AN OFFENDER THE OPPORTUNITY FOR REPENTANCE AND REDEMPTION

We all understand repentance. By repentance I mean contrition and absolution. By redemption, I mean those of the offender’s actions and obligations that follow repentance and that are necessary to expiate—to provide satisfaction to God for—one’s sin.<sup>1</sup>

The Gospels are filled with messages of repentance and redemption. We are told, for example, that “there will be more joy in heaven over one sinner who repents than over ninety-

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<sup>1</sup>“By this a man is entirely freed from the guilt of punishment when he pays the penalty which is owed; further the weakness of the natural good is cured when a man abstains from bad things and accustoms himself to good ones: by subjecting his spirit to God in prayer, or by taming his flesh by fasting to make it subject to the spirit, and in external things by uniting himself by giving alms to the neighbors from whom his fault had separated him.” Thomas Aquinas, *Summa Contra Gentiles*, Book Four, Ch. 72:14.

nine righteous persons who need no repentance.”<sup>2</sup> The death penalty, however, ends the possibility for the offender’s repentance and redemption. The death penalty is thus anti-redemptive.

Even though the offender has the opportunity to repent prior to his execution, the death penalty remains anti-redemptive.<sup>3</sup> There is no time limit on repentance and redemption. We are told that we are to forgive, not seven but seventy-seven times.<sup>4</sup> Peter explains that God does not wish “that any should perish but that all should come to repentance.”<sup>5</sup> He also makes clear that the “deadline” for repentance is not to be set by man, but by God, “who will come like a thief.”

I remind you that at the time of the New Testament, the civil (and therefore moral) authority to kill a prisoner came from pagan kings and emperors, who either claimed that authority from their gods or who claimed that they themselves were divine. The divinity of kings, and its derivative, the divine right of kings, was terminated in this country by the American Revolution.

Therefore, I ask, “If the Lord never gives up on a sinner, then who has the moral authority to frustrate His plan, to take the criminal’s life, and to end the offender’s opportunity for repentance and redemption?” Give this some thought. If you can answer, “I do!” then vote against this bill.

Sincerely,

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Associate Professor

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<sup>2</sup>Luke 15:7 (all references are to the New American Bible); see Luke 15:8-10; Matt. 21:28, where Jesus notes that “the tax collectors and harlots” [who have repented] will enter heaven before the Pharisees, who have not repented. For an Old Testament example, see Ezekial 33:1-20.

<sup>3</sup>The Catholic Church of the 15th Century was so conscious of this fact that it created an entire religious order, the Archconfraternity of St. John the Beheaded. The members of this order were to stay with the condemned in their last hours to aid them in repentance and in making their peace with God and with the Church before they were executed. The brothers of St. John the Beheaded continued their work for four centuries. Montana’s death penalty scheme does not address repentance.

<sup>4</sup>Matt. 18:21-22.

<sup>5</sup>2 Peter 3:9-10.