

CAPITAL PUNISHMENT: ARGUMENTS IN FAVOR

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The Translators to the Reader:

The following is a translation of an oral presentation originally done in Spanish. Unfortunately, the nuances of language do not allow for much coherence or rhythm in the process of transferring an extemporaneous presentation to written form. Spoken language, as opposed to written communication, allows for expression and innuendo to interact and enhance the delivery of ideas. Those factors, while flavorful and enhancing to speech, do not have the same effect in written communication. Not to mention if the presentation was done in a language other than that in which it is being presented. It is in this endeavor where the true essence of language dichotomy can be experienced and appreciated. It is in this effort to precisely convey the speakers message that translators pride themselves. We, the translators, have gone to great lengths in this endeavor to preserve every subtlety and emphasis of the original works. Syntax and grammar, however, have been adjusted for the sake and convenience of those who will read the English versions.

In this discourse Professor Zepeda Coll acquaints us with the policy of a State sanctioned death penalty. He lays down a foundation for his arguments by making reference to some of the major thinkers of our Christian era and how they have influenced that aspect of our Judeo-Christian culture. He ably interweaves their rather variegated arguments regarding capital punishment with the concept of punishment itself and its ostensible purposes and rationalizations in our contemporaneous societies. In defense of such an emotional issue Professor Coll develops a logical and cogent argument that attempts a denouement of the distillation of those ideas as they relate to society's responsibilities in the dispensation of justice and the sovereignty of the rule of law.

In rebuttal to Professor Coll, Professor Jaime Náquira Riveros presents a series arguments against Capital Punishment. Professor Riveros defensive approach is reliant on a base of humanistic and impassioned emotional logic. The statistics presented to buttress his position are linked to emotional and cultural values and ultimately rest on his description and interpretation of the nature of man. He carefully addresses the concept and varying values of the nature of punishment. Nevertheless he recognizes that criminal behavior is ultimately an intrinsic part of human nature. He stresses, however, that in the process of the dispensation of justice there must be a continuous effort to achieve

"objectivity, serenity and prudence" by those entrusted with this awesome task. In effect, he postulates a very liberal "punishment-should-fit-the-crime" ideal that is somewhat revolutionary, if not evolutionary.

Transcription of Oral presentation: Professor Coll⁵

I must defend the thesis of society's right to administer capital punishment. I cannot say that I am openly in favor of capital punishment, but sometimes it is necessary to support one thesis or another because it is academically indicated to do so. Besides, it is not an immoral attitude to support one or another position in this matter. I will try to do like the English colonel of "The Bridge On The River Kwai," who conscientiously and in an efficient and solid manner built the bridge that his enemies demanded of him.

Unfortunately, the problem of capital punishment has unleashed centuries old arguments. It is indeed likely that in the beginning of the civilized era the right of society to carry out death sentences was not discussed. By the fourth century there already existed various thesis against capital punishment (as deduced from some writings by Christian thinkers such as Origenes and Tertulian).

The most important philosopher was Saint Augustine.⁶ However, on this issue he holds a somewhat ambiguous position. In a letter to a distinguished magistrate Saint Augustine declares himself totally against capital punishment. But in his magnum opus,⁷ THE CITY OF GOD, he allowed some cracks to appear through which it can be interpreted that he, as a matter of doctrine, did not really reject capital punishment.

In fact, St Augustine's position is very similar to that of the Catholic Church and, for that matter, Christianity in general. The principal Protestant opponents, such as Luther⁸ and Calvin,⁹ were openly and unreservedly in favor of capital punishment. Most of the opposition appears to arise in the Catholic sector of Christianity. The Catholic Church has never, until recently, argued against the right of lay authorities to apply capital punishment in extreme cases. The Catholic Church has always considered lay authorities to have been delegated by God to decide on all those matters that concern the common welfare. Included among those matters is the right to punish, including capital punishment. It can be found in the latest ecclesiastical documents, those of Vatican Council II and the Catechism of the Catholic Church, that capital punishment is permissible in exceptional cases. The church, however, makes the exception that if other remedies or means can substitute capital punishment then those should be applied. Furthermore, the right to award clemency should never be excluded.

For purposes of argument, St Augustine, the inspiration for many of the moral theologians of the church, shall not be called on yet. Let us, instead, consider the perhaps most important moral theologian of the Catholic Church in the twentieth century, Bernard Haring. Father Haring proposes that the progress of humanity, the maturity of man and his sensibility do not advise capital punishment, but, instead, advise the use of

alternatives or substitutes. Nevertheless, he reiterates – as all Catholic theologians do – that lay authorities do have the right to employ capital punishment in extreme cases. This remains the official position of the Catholic Church.

In all instances, arguments about capital punishment swing from one extreme to the other. Whenever doctrinaire arguments are presented there are also emotional appeals; theoretical principles are appealed to and then practical reasons are presented. There is also the ever present problem of social convenience and depictions of historical development. There are those who, in theory, do not reject the existence of capital punishment, but who, nevertheless, totally reject it in reality as being useless. Herein lies the problem because the bulk of this discussion in the last 200 years has arisen from the rejection of the ideas of the two greatest philosophers of the Western World, Kant and Hegel. Both were shapers of cultural thinking that favored capital punishment. Kant outspokenly even favored the Hammurabian maxim, "an eye for an eye; a tooth for a tooth." Hegel, however, upon proposing that freedom is the basis for law, confirms his famous "damage" doctrine, i.e., a delinquent action, grave or serious enough to damage the structure of society, has the right to survive and repair the damage by eliminating the source of its origin, the criminal.

Later, especially in Italy, there were serious discussions regarding capital punishment. The famous Beccaria,¹⁰ who is without a doubt the first who systematically proposed that capital punishment should not exist, admits, however, that it is acceptable in only two situations: war and self-defense. Other Italian essayists followed his logic but he is credited with its inception. Of course, there are some exceptions such as those of the Positivists,¹¹ who approved capital punishment for reasons that are somewhat dangerous inasmuch as they maintain that criminal behavior is "innate or genetic." Pursuant to that line of thinking, the delinquent is, therefore, not responsible for his actions, as he must be considered diseased, and who, for sanitary reasons, must be eliminated from society. This is the most dangerous reasoning proposed by those in favor of capital punishment.

Among penalists today we find an overwhelming majority in favor of the abolition of capital punishment. Among the remaining students of jurisprudence, opinions are divided. In regard to the people something very special has occurred, and here, in Chile, there has been an evolution. Up to thirty years ago each time someone was condemned to die the people would exhibit a change in position. When a crime was committed the death sentence was asked for, and then, later, a pardon was requested for the condemned. This sort of jurisprudential plebiscite has been changing more or less since 1992 as a result of a pardon that was granted to the two Peruvians that murdered two young men in Arica and currently the case of Cupertino Andaur.¹²

It seems to me that the problem lies mainly in the concept of punishment itself. Punishment has several purposes: retribution, deterrence, and rehabilitation. The abolitionist doctrine places more emphasis on the rehabilitative aspect of punishment and excludes the retributory and deterrent effects. There are those who consider the retributory nature of punishment as a sort of social vengeance, and, in order to pre-empt any logical contradictions of the effect of retribution state that the idea of any absolute

retribution is unlikely and put forth the notion that retribution is only relative, analogical, and moral.

Now then, when the rehabilitative becomes the main purpose or objective of the punishment there will occur a logical contradiction that must be overcome. For example, if capital punishment is negated, then its opposite, a life sentence, is affirmed. If the main objective of punishment is of a rehabilitative nature, or, in other words, to achieve the reinstatement of the convict into society, then a life sentence becomes unjust. If the convict has been rehabilitated then why is he still behind bars? Those in favor of abolishing capital punishment then must favor the eventual attainment of freedom for the convict after a few years in prison if his rehabilitation is proven. In fact, Senator Pinera, who has just presented a bill to confirm life sentences, has said, ". . .of course, if after 30 years. . ." a person is rehabilitated he may then be set free. That is, imprisonment would consist of 20 to 30 years of incarceration. But, at any rate, the possibility would always be present that the rehabilitative process would preclude the life sentence. Thus, once capital punishment is abolished so will life sentences in all its practical reality. It is natural that it be so if the main purpose of the punishment is to rehabilitate the convict and reinstate him into society.

Now arises the problem of retribution, which is, after all, the classic purpose of a conviction. If such a conviction is indeed a social vengeance, i.e., prison terms, the same moral order being retributive in nature would be no more than a vengeance. Then, retribution cannot be accepted in regard to capital punishment, but it can be regarding imprisonment.

Now, if we accept the thesis that all punishment is retributive and we apply a strict logic to such a conclusion we have another outcome. If punishment is to be a rehabilitative process then all punishments must be indefinite in time, or, until such a moment at which a convict may be returned to society according to the standards set by it. Again, society must assume the right to determine when the convict has been rehabilitated. Accordingly, mere promise or remorse would not suffice. That is why, if the punishment is to have a rehabilitative effect, it must be indefinite.

The problem with the abolition of capital punishment also creates a distortion of punishments. In effect, it becomes difficult to evaluate the kinds of punishments to be adjudged for the particular crimes committed against society. In the case of Cupertino Andaur his death sentence was commuted for a life sentence; the same punishment received by his accomplices. As we all know complicity is a lesser degree of participation than actually performing the murder. It is common sense to realize that if the same punishment is going to be experienced for having participated in different degrees of the same act then it creates a conceptual distortion. Some of the accomplices of Andaur must have thought, "well, I did not dare rape, perhaps I should have done it."

I will mention some specific cases in our legislation regarding punishments. Don Feliciano Palma, a gentleman who committed numerous frauds is looking at approximately 35 to 40 years in prison. Due to the idiosyncrasies of the judicial system

he will not be eligible for parole until having served a minimum of 15 to 20 years of his sentence. On the other hand, the Peruvian men who wretchedly murdered the two young men in Arica, theoretically, would be eligible for parole in 10 years because they have no previous record. That is, Don Feliciano Palma is being more severely punished than they are, and there exists no comparison in the crimes. What does this problem of distortion of punishments have us do? We would have to change the whole penal system, beginning with pardons. I believe that the just thing would have been for the President of the Republic to commute the sentence of Mr. Andaur's accomplices.

Now, what happens? Let us look at the dissuasive or deterrent character of the punishment assigned. The abolitionists consider that capital punishment has no dissuasive value, that he who is determined to commit murder will do it anyway, with or without capital punishment as a deterrent. Unfortunately, there is no empirical way that this contention can be confirmed. Stuart Mill, the father of liberalism, said in the English House of Commons in 1858, that the deterrent effect of punishment "is impossible to determine because no one can plumb the depths of a man's conscience." It is said that capital punishment does not dissuade but what if it were the opposite? The only poll that I've read was an article the other day in a newspaper by an ex-director of the Horwitz Psychiatric Hospital of Santiago, referring to whether capital punishment is or is not dissuasive; he maintains that it is. This piece was presented to the House of Representatives of the United States and it dealt with the years 1960-69. During that time capital punishment was abolished in some states of the United States of America. In the United States, 1960, while capital punishment was in effect, there were about 8,400 homicides committed nation wide. Nine years later the number of homicides had climbed to 14,700, or almost double. According to these numbers it seems that the absence of the possibility of a capital punishment apparently influenced the increase in homicides. Furthermore, a distinguished feminine jurist, one of the first Chilean feminists, declared herself against capital punishment; now she has changed her mind. I have also been informed that Dr. Otto Dorr, who has even written a book against capital punishment, has also exhibited a change towards the opposite position. We shall examine the reasons for these changes.

Garofalo was the one who said that capital punishment couldn't be properly called punishment. Many thinkers argue that we are in reality supporting a position for social defense or protection, a sort of analogy between personal and social defense and protection. St. Thomas seems to support this thesis. He approves of tyrannicide,¹³ and capital punishment is analogically applicable for the reasons that tyrannicide is justified – the protection of the social unit when it is threatened by the arbitrarily delinquent actions of a tyrant. In my estimation the most valuable argument is that we all recognize the legitimacy of self-defense. Considering the manner and scope in which the application of capital punishment is restricted (as in Chile, while not abolished it is severely restricted, almost absolutely so inasmuch as the President of the Republic has declared himself against it) its no mystery why laws are passed presumably to broaden the legitimate right of self defense. When capital punishment was employed in Chile a series of specific elements strictly relating only to capital crimes must be present in order for the adjudication to be jurisprudentially viable or permissible. For example, in cases of

nocturnal assaults in a home it is very difficult to prove the specific elements of the capital crime and justify a self-defense argument. As of three years ago laws have been passed in this country whereas these requirements have become presumptive. This broadening through increased presumptions for a legitimate self defense argument, have been brought about because the citizenry is increasingly insecure. Such insecurity is always dangerous for the survival of a lawful, democratic state. General insecurity is often times the incubating broth for the forfeiture of the greatest gifts given to man which, as Don Quixote¹⁴ used to say is: freedom.

While society does not have the right to kill, the individual sees his right to self defense reinforced by the broadening presumptive legal arguments. As a result, we are privatizing the right to kill. Furthermore, I can assure you that very soon there will be new laws making gun ownership easier, contracting of bodyguards easier, etc. Could any of us criticize Dr. Zamorano, who feels highly threatened by the growing crime, if he tomorrow installs a high voltage cable at the entrance to his house, and, consequently, a person who trespassed to steal cherries, or a child looking for his ball, is electrocuted? Evidently, we would understand the situation. It has happened. It happened in the case of an elderly person who was attacked on his property. The attackers were set free within a short period of time. He was attacked a second time. The third time, believing that he was being attacked again by the same men, he fired his gun and accidentally shot an eleven year old boy.

Now let us do a philosophical analysis for a moment. Let us use John Locke¹⁵ who is the indisputably most well known father of liberalism and empiricism. Locke posits that man has three basic natural rights: property rights, the duty of the government to protect these rights, and the rule of the majority. Indeed, one of the purposes of organized society is to guarantee those rights. In other words, the right of life, the right of liberty, and the right of estate. No punishment, even for the most horrible crime, may cause the confiscation of estate. Let us not confuse the confiscation of estate with indemnification, which are two different things. There cannot be a confiscation of estate since that would go against the natural rights of man. It is as respected as the right to wealth, or the right to own property, as these are rights derivative of people and survive beyond the life of the landowner. After all, the protection of an estate was the first victory for those who struggled for the moderation of sentences, i.e., the suppression of confiscation of estate.

We present now the absolute moral right to life. I must point out that in all international pronouncements, beginning with that by the United Nations in 1948, the reforms to that charter in 1957, and the resolutions by the Inter-American Commission of Jurists in 1969, it is reiterated that no one may unjustly be deprived of his life. That is the catholic ethic more or less repeated. In the conference of 1957 and 1969 Colombia and Uruguay asked for the total abolition of capital punishment – it was denied. The big powers, United States, the Soviet Union, and the United Kingdom were opposed. Although France had capital punishment it kept silent. However, much is said in favor of life, but it is not excluded, no one may be unjustly deprived of his life. Moreover, in the conference of 1969 it was agreed that those countries that have abolished capital punishment should not reestablish it and those that still apply it should not extend it to other offenses.

Society does not have the right to deprive anyone of life because life is an absolute value. Neither justly nor unjustly, both the innocent nor guilty man may take life, and the state must protect life and prevent that it is taken. Let us accept this argument: absolutely no one can be deprived of life. How about liberty? Isn't liberty a supreme value as well? Because those of us that are so obsessed with liberty often say that we must sacrifice life in defense of liberty, we cannot mortgage liberty just to stay alive. If liberty were such an absolute value then any punishment that deprives us of it would be unfair and unjust. We would now have to posit that all punishments must be options. What I am saying is not a utopic rambling. These theories we've explored are being talked about in Europe today. They propose that life sentences be abolished as such punishments may be considered inhumane. The arguments are very similar to those for the suppression of capital punishment. Perhaps tomorrow it will also be asked that ALL sentences and punishments be optional?

However, something else very important is happening that demands attention. The state acknowledges that it cannot deprive anyone of his life, justly or unjustly, nor can it allow anyone to take life. Nevertheless, there is discussion and even some laws that permit euthanasia. It is further discussed that the medical practitioner, if asked for a mercy killing, may or may not object as a matter of conscience. There are some that think a medical practitioner should facilitate euthanasia if requested. I realize that this is a legislative matter and it is still in an incipient stage, but there are precedents for it. Could not the same thinking be applied to suicide, or abortion?

It is, then, that capital punishment is nothing more than a subrogation by the authority of society and the state to punish those who unjustly take the life of another weaker human being who was unable to protect himself. We often times place a higher value on a basic reaction, such as self defense, than on the rational resolution of the death penalty by the authorities.

Since everyone has a right that his life be respected and if that is taken unjustly, there can then be an exemplary punishment. If retributive in nature then it should be relative to the gravity of the event. After all, we live in a social environment and have an equal part in the social order.

In any case, the discussion of this matter will continue always. Now Professor Naquira will debate some of these viewpoints. Obviously this is an argument that will continue since it is a very emotional issue.

Finally, I believe, that, for the security of society, for the definitive sovereignty of the rule of law, just as we have to guarantee the freedom of the citizenry against the whims of power, we have to unrestrictedly protect those that are unable to protect themselves against unjust aggressions.

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⁵ This transcription is one of a series of oral presentations by reknown Chilean Law Professors during the 1996 Symposium: Right to Life, held in Serena, Chile.

⁶ Augustine, Saint (354-430), greatest of the Latin Fathers and one of the most eminent Western Doctors of the Church. Augustine was born in Tagaste, Numidia (now Souk-Ahras, Algeria). Augustine's best-known work is his autobiographical Confessions (about 400). In his great Christian apologia The City of God (413-426), Augustine formulated a theological philosophy of history.

⁷ Magnum Opus, Latin for a persons greatest work, a masterpiece. Advanced Dictionary, Thorndike Barnhart (1993).

⁸ Luther, Martin (1483-1546), German theologian and religious reformer, who initiated the Protestant Reformation.

⁹ Calvin, John (1509-64), French theologian, church reformer, humanist, and pastor, whom Protestant denominations in the Reformed tradition regard as a major formulator of their beliefs.

¹⁰ Cesare Beccaria (1738-1794) Birthplace: Milan, Italy. Publications: An Essay on Crimes and Punishments (1764, 1963); 2. Elementi di Economia Publica (1804). His early text on criminal law was an enormous international success and influenced the penal policies of many countries. His starting point was the utilitarian principle of the greatest happiness of the greatest number, according to which the test of the seriousness of a crime, and hence the nature of the punishment, is always social injury and not private intention. Beccaria was more interested in reforming criminal law than in reforming the criminal. He believed that crime, like other behavior, was the result of hedonism, free will and rationality (the latter idea was from Enlightenment philosophy, e.g. the philosophes): all humans are equal under the law because of their rationality. For more information on Beccaria see: C. Phillipson, Three Criminal Law Reformers: Beccaria, Bentham, Romilly (Dent, 1923); M. P. Mack, 'Beccaria', International Encyclopedia of the Social Sciences, D. L. Sills (ed.) (Macmillan and Free Press, 1968), vol. 2; P. Groenewegen, 'Turgot, Beccaria and Smith', in Alto Polo, Italian Economics, Past and Present, ed. P. Groenewegen and J. Halevi (Univ. of Sydney, 1983).

¹¹ Positivism, system of philosophy based on experience and empirical knowledge of natural phenomena, in which metaphysics and theology are regarded as inadequate and imperfect systems of knowledge. The doctrine was first called positivism by 19th-century French mathematician and philosopher Auguste Comte, who was interested in a reorganization of social life through scientific knowledge. Many of Comte's doctrines were later adapted and developed by British social philosophers John Stuart Mill and Herbert Spencer and by Austrian philosopher and physicist Ernst Mach.

¹² In May 1997, Cupertino Andaur Contreras was sentenced to death by the Chilean Appeals Court in Santiago. He had been found guilty of raping and killing a nine-year-old boy in December 1992. In August, the Second Chamber of the Supreme Court confirmed the death sentence. The death sentence was later

commuted to life imprisonment by presidential pardon. This report is an extract from the Amnesty International Report, Chile, 1997.

¹³ Tyrannicide: The act of killing a tyrant, or person who kills a tyrant. Advanced Dictionary, Thorndike Barnhart (1993)

¹⁴ Don Quixote by Cervantes Saavedra, Miguel de (1547-1616), Spanish writer, whose novel is regarded as one of the masterpieces of world literature. Don Quixote describes the adventures of a Spanish nobleman who, as a result of reading many tales of chivalry, comes to believe that he is a knight who must combat the world's injustices. He travels in search of adventure with his squire, Sancho Panza, a practical peasant. Quixote's imagination often runs away with him, and he sees windmills as giants and country inns as castles. The novel was intended as a satire on medieval tales of chivalry, but it presents a rich picture of Spanish life and contains many insights. Encyclopedia, Microsoft BookShelf 98.

¹⁵ Locke, John (1632-1704), English philosopher, who founded the school of empiricism. Locke's empiricism emphasizes the importance of the experience of the senses in pursuit of knowledge rather than intuitive speculation or deduction.