

CAPITAL PUNISHMENT: ARGUMENTS AGAINST

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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 speaker's 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 his 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 Náquira Riveros presents a series of 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 hinged 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 Riveros⁵

The truth of the matter is that the subject of Capital Punishment is a subject matter that has been, is, and will always be argued and arguable. Arguments for and against have been presented, but I believe that today, with such an audience as we have here, a serious and intelligently well thought out argument has been presented. I will address the opposite side: a discourse against capital punishment.

Unfortunately, this matter cannot be truly pondered and appreciated when it is presented through the popular media because it cannot be part of a "show" between songs and commercials, with a drink or an hors d'œuvre on hand. I believe that the subject of capital punishment is a very serious matter, very delicate and transcendental and can only be dealt with in an environment such as we have here today. Otherwise it would be disrespectful to the subject, to those present, and to those eventually affected by it. Therefore, I agree with my predecessor, Professor Coll, in the manner in which he has presented his argument inasmuch as his words may have yielded many arguments against the death penalty. I do not have the slightest doubt that he is NOT in favor of capital punishment, a cause with which I am identified.

It will save me great many words by accepting many of the thoughts and arguments that he very intelligently presented. They, in fact, will therefore serve to further strengthen my position. Consequently, it will make my arguments easier and I will proceed to present complementary arguments, or, in other instances, challenge some of the arguments that I believe to be debatable.

To start with I believe that the problem of capital punishment can be analyzed from several perspectives because it is, indeed, polyfacetic. In all human problems it is inevitable that we isolate its biological, psychological, social, political-criminal, criminological, juridical and penal, anthropological and religious or spiritual dimensions. All these variables, whether we like it or not, are inclusive. Thus, we listen to many arguments and suddenly they all seem to cross because each can be viewed from a different position. The main thing is to clarify and identify the position from whence we are analyzing the matter.

For example, what meaning does capital punishment have for me? I believe that the death penalty has an undoubtedly clear and unequivocal meaning. In our country it permits the channeling or directing, with the formal support of penal law, feelings of hate, resentment and vengeance. For that matter, it should be clear that here (Chile) a judicial order contemplating a death penalty sentence is a legal remedy, not to be confused with fairness. Nevertheless, a remedy that gives the victim's family the power to claim or demand a form of compensation for their hate, resentment, or vengeance. Indeed, feelings that we would find understandable. I will be the first one to understand the feelings of an affected family for it is only human that they should feel so. However, one thing is that I

understand those feelings and another that I justify them. To explain something means to see the causes; to justify means something entirely different, and to justify things presupposes contrasting the fact with certain values, and it is this conflict that makes me not agree with capital punishment.

As a consequence, it's very clear that the death penalty is favored because it allows the survivors or family to feed the negative feelings associated with retribution. It has also been said that it is an effective means of ridding society of a dysfunctional member, a member whose actions have shown he has no useful purpose in society. In return, society would not have the obligation of caring for him into the future. In fact, his continued existence implies a potential danger for the rest of society's future.

There is something of great importance here and I say that all penal sanctions must respect certain fundamental concepts. One of the concepts that have already been mentioned is that of the dignity of the human being. If someone were to propose that upon a person having committed a crime he loses his dignity, I would not subscribe to that opinion for I do not believe that a human being loses his dignity for having committed a crime, no matter how awful that crime may be. In fact, I've yet to encounter anyone that can provide me with ontological⁶ or jurisprudential evidence on the delinquent's loss of dignity as a consequence of the commission of a crime. Perhaps the reason I've neither heard nor seen such a nexus between criminal behavior and the loss of dignity is because one does not exist; or, no one has been brave enough to postulate one. Therefore, in this regard, it is strictly in the use of the word dignity with which I reach agreement with Professor Coll. Contemporary law and international declarations make it very clear and simple that dignity is a respected interest.

I believe we all agree that the dignity of the human being is very important, and, if this is so, then I imagine that one way of respecting the dignity of a human being is by respecting his/her life. What dignity do we speak of if we can deprive the owner or carrier of such of his/her life? If we employ logic dignity then implies life, and dignity is not lost because someone has committed a crime; no matter how bad that crime may be. It is that precise logic that, on one hand, is vital to me.

Secondly, as was mentioned by Professor Coll, what is the purpose, role, function, objective, end, or whatever we want to name it, of a punishment? What is expected to come from it? However one may theorize, and I say theorize, because one thing is theory another is practice, an adjudicatory sentence implies a form of retribution. Some reject retribution as the finality of the sentence. Even those who postulate retribution as an end consider certain relativity between the deed and the punishment. I believe that a penal sentence, seen under that light, indeed, implies retribution. Let's be frank, all sentences presuppose a punishment, something bad, a suffering, and, I cannot, by a play on word, disguise such a reality. Thus, undoubtedly, a penal sentence is a punishment, and, consequently, some retribution based on a fact of the commission of a crime. A punishment is for something that has occurred, not for something that I, we, believe would occur, for that is not only philosophically reprehensible, but, above all, illegal.

It is said that punishment also has a preventive or dissuasive function, and herein lies the problem. Penal doctrines generally refer to a preventive purpose, be it intimidatory, dissuasive, negative, and adverse. How true is this from the point of view of criminology? In other words, when the legislature creates a sanction for a given crime and when the tribunal judges the perpetrator and a sentence is imposed or implemented; is there a truly real intimidating effect on would be criminals?

The truth of the matter appears to be that investigations in the field of criminology, and in other countries where such studies have been done, reveal certain truisms. For instance, a person that is not inclined or predisposed to commit a crime will not do so, regardless of known penalties for known crimes. Will knowledge of known penalties stop me from committing a crime? Why don't I commit murder, or aggravated assault, or fraud? Why? Does the existence of a penal code that specifies such a punishment for any of those offenses stop me from committing those crimes? I do not act in a criminal manner because my upbringing, which begins in the home, is reinforced at school, and other socializing agents, have crystallized certain values and principles. Therefore, if the penal doctrine were in fact true, would it then be reasonable to conclude that I, and those of you present here, do not commit crimes solely because there exists a penal code that sanctions such behavior? Certainly not. There is a segment of the population, however, that will have no restraints regardless of a penal code, or of this or that punishment. It is the result of the formative process that instills our principles and values and what ultimately serves to restrain us; in other words, our conscience.

We have a segment of our population that makes crime their profession, their trade, their main, and driving purpose in life. Those of us that have had the opportunity of talking with some of those professional criminals have generally arrived at the same conclusion. The judiciary process and law enforcement authorities are nothing more than an occupational hazard to them. They consider the penal code equal to that risk assumed by ordinary citizens when they board public transportation; wherein the absolute certainty that we will arrive safely at our desired destination is absent. In fact, those that make crime their livelihood expressly assert that civil authorities are merely a risk or hazard. Such a statement seems to be sustained by criminological studies if we consider that in this city alone there are committed 30 homicides, 100 robberies, 100 rapes each month. Do the total number of felonies committed result in a trial, a conviction and a sentence? The total number of crimes committed is far above those that result in convictions and sentences. Therefore, those citizens that make crimes their trade say, "[f]or me these are occupational risks because I do these things, but I have a house, a family, I pay good schools for my children, of course, if I am caught in the end, and things were balanced out, I have still come out ahead."

Where am I going with this argument? My point is that the much-talked about intimidatory nature of the punishments with the ostensible factor of deterrence does not make a difference to these citizens. It does not make a difference because it is their business and that business happens to come with inherent risks. Just as the penalties for crimes make no difference to us either. It makes no difference to me if tomorrow a legislator decides that such and such a felony calls for the death penalty. I would not

consider it pertinent because I would continue to lead my life according to my principles and values. Therefore, we have sectors of the population to whom law enforcement penalties do not make a difference one way or another. Who, then, is affected by this intimidatory nature of preventive punishment? Truly, I do not know. Perhaps it is effective on senior citizens, to those of grandparent age whom, although righteous men and women may be easier to intimidate. From the point of view of criminology I really doubt whether a prevention of crime due to the intimidatory nature of a penal system really exists.

On the other hand, there is much talk about a "special prevention" in that penal sanctions may be utilized for the reintegration, reeducation, or rehabilitation of the individual. Well, then, a death penalty certainly precludes that argument. Obviously this task of special prevention must be framed within certain relative measures. The rehabilitative process for someone who has been convicted of stealing a chicken, for example, may take 15 years, depending on his personality. That, obviously, does not seem reasonable in view of the offense – the punishment does not fit the crime. There cannot be predetermined sentences; there must be a relation or proportion between the unjust act, the negativity of the deed, its purported evil and the time for rehabilitation and respective sanctions to which the criminal will be subject. If rehabilitation cannot be accomplished, so be it, but the punishment must end at some point.

Therefore, as seen under the light of criminology or penal policies the concept of prevention is quite debatable. There is, however, a cultural-historical argument that is very simple. There was mention of criminological studies, not in Chile where there have been none, but in other countries like in the United States, Great Britain, Germany, France, in the Low Countries, and Canada. In England, for example, the death penalty has been imposed for a period of time and a statistical record kept of criminal activity. The results showed that in some instances the incidence of capital crimes were reduced when the death penalty was invoked. Conversely, when lighter sentences were imposed the incidence of those crimes increased and in other occasions they decreased. No clear and definitive pattern was discerned, but there is indeed a cultural-historical indication that is quite clear. In ancient cultures, and in some modern ones, the death penalty was and is dispensed with great generosity. Can anyone say that on this world of ours, where the death penalty has been generously applied, there has disappeared patricide, theft, rape, fraud or dishonest abuses? No, in fact, in some of these cultures where a thief will have his hand cut off, thefts continue. What does this indicate? It shows that these punishments have no dissuasive effects. It simply does not work. My interpretation is that cultural-historical record reveals that in no country where the death penalty is generously applied there has disappeared patricide or homicides. For me it is a weighty argument and it speaks for itself; indeed, it illustrates the uselessness of capital punishment.

I have also heard arguments from a religious perspective. That it is a convenience for the "condemned" to have advance notice of his/her demise so as to allow him/her to prepare spiritually to meet the lord. In regards to that argument I respond in the following. It so happens in this world that not all are believers, there are those who are and those who are clearly not. For those human beings that are not believers, at the time they are executed,

they are most definitely dead. For the believer, however, it is an opportunity to pass on to a better life. Then, in the religious sense, the question to be posed is, "does the State have the authority to dispose of life." I would answer that the State does not have the right to take life. For that matter, I have always believed that when an individual is condemned to die and is executed, society is merely repeating a delinquent act.

I believe that society and its penal authorities do not project a good example when a convict is executed; on the contrary, the act of execution itself falls into the same category of crime it is trying to repress. By society repeating a delinquent act, that is to say, repeating an execution, or, in other words, the State sanctioned tacit destruction of life – life, in my view is sacred – does not seem a reasonable thing for society to do.

Nor do I believe the imposition of a death penalty is a form of self-defense. It cannot be a self-defense situation as there are other alternatives. Life sentences can be imposed and the convicted criminal will be segregated from society and effectively neutralized. Another option can be to segregate the dangerous individual from society for only the time it is necessary to do so. It is in this regard, in favor of perpetual imprisonment, why I agree completely with the gentleman who preceded me in that the doctrines of Comparative Penal Law have overruled capital punishment. There is much legislation that does not even consider capital punishment; also, there exists a strong movement towards considering that life sentences should not be for life as they might themselves be considered inhumane. Maximum 20 and 30 year sentence limits have been proposed instead. Therefore, punishments based on depriving someone of their liberty would not be allowed to exceed those limits. Although capital punishment still exists in Chile the emerging trend in Comparative Penal Law is drawing us away from the use of that type of punishment.

It is in fact said, "[l]ook, this person will not, in the next 10, 20, 30 or 40 years of life left in him, recover his liberty." This, I believe, is absurd. If one of the functions of imprisonment is to rehabilitate, reeducate, or whatever you wish to call this process, and a convict demonstrates his rehabilitation after a period of time it does not make any sense to leave him in there. As a matter of fact there is a wonderful film by Burt Lancaster, who having been condemned to a life sentence, dedicated his time to study birds and eventually became a famous ornithologist and recovered his freedom. In such a case I must ask that if a person obtains outstanding achievements in a field as the product of his study or work, while serving a prison term, and demonstrates to society that they need no longer fear him, does it make any sense to keep him incarcerated? I don't believe so; for that matter, I also do not subscribe to the current popular opinion regarding Cupertino Andaur⁷, that postulates that he be "incarcerated with the clear, express and written provision, that under no circumstances or authority, is he to ever be let out of prison."

Perhaps if Mr. Andaur does nothing while in prison he should then remain there; however, what if he, like the ornithologist in the Burt Lancaster film, rehabilitates and does something to contribute to society, what then? How, then, would we justify the unequivocal prohibition of reintegrating him into society?

It was pointed out also that one reason that motivates the citizenry to ask for, demand the death penalty is social insecurity. If it is true, we must then be aware of the function of the media on this matter. A media that is, of course, effective and desirable in the services it renders, can also do great harm. Naturally, the media, whenever possible will seek out and exploit the bizarre and morbid aspects of crimes in the ever-present quest for ratings. As a result, the public reacts with horror and fear; in turn, they demand from their legislators, or even the judiciary in some instances, that drastic actions in the application of the severest punishment be imposed on the offenders. I can certainly understand and explain such a reaction, I cannot, however, justify it.

I do believe that the media should exercise some form of self-censorship. They should think through very well what it is they are doing. If the media exploits only those terribly negative aspects of the news, such as where every news item is dripping with bloody sensationalism, well, then, of course, it's natural that we would all feel terrorized. These seem to be the inherent evils of media in every society. Nevertheless, I do believe the media has an important role in presenting the social realities. This not to say they should hide or cover up the negative realities, instead, they should just not exaggerate so much because it creates insecurity in the citizenry.

As I have indicated, I do not believe that capital punishment achieves what it is purported to achieve. First, it is a violation of a person's dignity. Second, from the point of view of criminology, and the ostensible functions it derives, capital punishment does not appear to accomplish anything. Third, when the authorities execute an individual they are merely repeating the crime that allegedly led that individual to be convicted in the first place. The clearest evidence comes from the historical-cultural facts, and criminological demonstrable facts, that illustrate how liberally dispensed executions have not made crime disappear. Consequently, there can be no legitimate defense for capital punishment. It then leads me to the conclusion that capital punishment has no logical reason, except, and I wish to be very clear and frank on this, that, "[i]t is the only way that a relative of the victim, or his representative, may feel assuaged and satisfy the desire for vengeance, resentment or hate." Additionally, I have heard from a magistrate an argument that states, "[t]hose that do not agree with capital punishment would probably change their thinking if it were their son or daughter, or wife, or loved one who was the victim." In my view, such an argument has no value. Certainly, If I were the father of the child Cupertino Andaur murdered, and I met him face to face, I would perhaps become violent and try to kill him. I can't say definitively, perhaps yes, perhaps not, but it is something subjective that all of you would rationalize and understand. What I cannot understand is how judicial authorities, entrusted with administering justice, would "administer" such with the necessary objectivity if it too dons a mantle of hate, of vengeance and feelings. It is easy to understand, insofar as my potential for violence is concerned, but that an objective tribunal is possessed of a desire for vengeance, fueled by hatred and resentment, stands my hair on end!

I conclude then that its objectivity, serenity, and prudence must characterize the dispensation of justice. Think about when we have had to make decisions and they have been the products of impulse, do we not end up 90% of the time regretting such

decisions? Without a doubt, emotions, impulse, and passion are never good advisors. It has come out in the media that some judge has expressed his feelings about the emotional justification of that argument, I don't care one way or the other, because, although I may become violent with Andaur, in the hypothetical case described above, the judge that is weighing the case cannot identify himself with passions and revenge and sentiments of that kind; on the contrary, the judge must remain objective.

¹ The Law Review of the The Catholic University of the North, Sede Coquimbo, Chile, is a one issue annual publication. This article is a reprint from the 1997 issue.

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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 Ontology The branch of metaphysics that deals with the nature of being.

⁷ In May, 1997, Cupertino Andaur Contreras was sentenced to death by the Santiago Appeals Court. He had been found guilty of raping and killing a nine-year-old boy in December 1992. August 19, 1997, the Second Chamber of the Supreme Court confirmed the death sentence. The death sentence was later commuted to life imprisonment by presidential pardon on August 29, 1997. Amnesty International Report, Chile, 1997.