The Death Penalty Is Applied Unfairly to the Poor. Nick DiSpoldo.


The Death Penalty Is Applied Unfairly to the Poor

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In 1972, in the case of Furman v. Georgia, the Supreme Court ruled that the death penalty was unconstitutional if it was applied in an arbitrary or discriminatory manner. In the following viewpoint, Nick DiSpoldo argues that the justice system, and particularly the system of capital punishment, discriminates against the poor. He contends that despite judicially guaranteed rights to effective legal defense counsel and adequate legal resources, indigent prisoners do not get the same quality of defense that wealthy defendants receive. DiSpoldo is a freelance writer in Yermo, California.

As you read, consider the following questions:

1. In DiSpoldo's view, what will a rich defendant do when charged with a capital crime that a poor defendant cannot do?
2. According to the author, what Supreme Court ruling established that defendants in capital trials were entitled to free counsel?
3. What Supreme Court ruling established that prisons must maintain law libraries, according to the author?

As an inmate and law clerk in the prisons of California and Nevada, I often assisted death row prisoners with legal problems and have studied more death transcripts than I care to recall. I am often asked why I helped people avoid execution who were convicted of horrible crimes. But I'm a paralegal, not a priest or moral philosopher, and am more concerned with due process and equal protection as guaranteed by the Fourteenth Amendment.

Unequal Justice

The decision of the Los Angeles County District Attorney not to seek the death penalty in the O.J. Simpson case has renewed debate about how fairly the death penalty is applied. In Griffin v. Illinois, the late Justice Hugo L. Black wrote: "There can be no equal justice when the kind of trial a man gets depends on how much money he has in his pocket." It is interesting to note that Mr. Simpson is being tried in the same courthouse in which the State of California tried Caryl Chessman. Chessman, a defendant with "no money in his pocket," was convicted of multiple counts of rape and kidnapping and drew the death penalty in 1949. Chessman did not kill anyone but was convicted under the Little Lindberg Law. [Until the 1968 case of United States v. Jackson overturned it, this federal law permitted juries to impose death sentences on kidnappers who harmed their victims.] He was executed on May 2, 1960. A poor defendant without friends or family, Chessman chose to defend himself rather than proceed to trial with a public defender who
could not, in his opinion, adequately answer legal questions.

I do not, of course, begrudge Mr. Simpson his financial resources; he earned them. But it is nearly impossible, even upon conviction, to execute any individual of wealth, one who is represented by nine attorneys and no one knows how many investigators who assist them. The newest defense addition is a costly team of juror consultants.

I oppose capital punishment because we do not have the capacity to make capital punishment fair, as the Supreme Court believed it could be made fair in Furman v. Georgia. "Capacity" is the operable word here. If two suspects, one wealthy, one poor, are charged with separate capital crimes, the quality of justice immediately changes. The rich defendant may usually post bail, retain attorneys of choice, hire investigators and employ experts who will provide psychiatric testimony for the defense. The trial is often delayed for the benefit of the defense by legal maneuvers and multiple motions. The Simpson defense team moved for a speedy trial in accordance with their client's own wishes. However, they could have delayed this trial had it suited their purposes. By way of contrast, the indigent defendant, unable to post bond, will remain in jail and will proceed to trial with a court-appointed attorney or, as is likely, a public defender who is generally either inexperienced or burdened with a staggering caseload.

In researching a book-in-progress about the 300-year history of the death penalty in the United States I have discovered only six cases in which those executed were individuals of influence or affluence. It is primarily the poor and underprivileged whom the state is determined to kill.

We have a death penalty in this country because the Supreme Court has thus far declared it to be constitutional. The Court may again take up the issue and could conceivably declare the death penalty unconstitutional by a mere five-to-four vote—that is how precarious the political and legal life of capital punishment is. The Court has long wrestled with the question of capital punishment. In the 19th century, it decided that execution by firing squad was not "cruel and unusual punishment" (Wilkerson v. Utah). In 1890 William Kemmler, the first person to be executed by electrocution, appealed his case and the Court ruled that "punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of the Constitution."

However, death by electrocution may very well involve "torture" or "a lingering death." On May 3, 1946, Willie Francis was placed in the electric chair in Louisiana's Angola Prison and given the first official and authorized voltage of electricity. The affidavit of Warden Harold Resweber declares: "The electrocutioner turned on the switch.... Francis' lips puffed out and he groaned and jumped so that the chair jumped off the floor. The switch was turned on again and the condemned man yelled, 'Take it off! Let me breathe!'" Francis was re-electrocuted, and this time the state accomplished its macabre mission. It is worth noting that as of October 1994 U.S. District Court Judge Marilyn Hall Patel has declared California's gas chamber to be an inhumane method of execution and has halted any further executions in California by this means.

Lewis E. Lawes, former warden of New York's Sing Sing Prison, wrote in Life and Death in Sing Sing (1928): "Not only does capital punishment fail in its justifications, but no punishment could be invented with so many defects. It is an unequal punishment in the way it is applied to the rich and the poor. The defendant of wealth or power never goes to the electric chair or gallows." In a book of his own, Crime in America (1970), former Attorney General Ramsey Clark observed: "It is the poor, the sick, the ignorant, the powerless and the hated who are executed...."

Changing Standards on the Supreme Court
The Supreme Court itself may change from decade to decade to such a marked degree that life-and-death issues like capital punishment become a sort of judicial game. For example, between 1930 and 1968, 455 persons were executed for rape in the United States; 405 blacks, 48 whites, 2 Asians. But in 1977 the Court decided in *Coker v. Georgia* that the death penalty for the rape of an adult female was unconstitutional. Fine. But what do we do about the 455 persons who have already been "constitutionally" executed for the crime of rape? There is an old adage in law: At any given time, the Constitution means what the Supreme Court says it means.

I have found that most people are amazed—if not appalled—to learn that prior to 1932 indigent defendants in capital cases were not provided with state-paid counsel. In other words, before 1932 many were executed without having had a lawyer to defend them. In that year the Court ruled (*Powell v. Alabama*) that in capital cases free counsel must be provided for defendants who could not afford to pay. Later, in the 1963 case *Gideon v. Wainwright*, the Court held that all persons charged with felonies in state trials must be furnished free counsel if necessary.

There is no more stunning and startling example of the Court's judicial ambivalence than the case of Frank Palko. In 1935 Frank Palko was convicted of killing a police officer. A Connecticut jury found Palko guilty of second-degree murder and sentenced him to life in prison. The prosecution, dissatisfied with the sentence, appealed the verdict to the Connecticut Court of Errors, citing errors prejudicial to the prosecution. The prosecution was granted the right to retry Palko. Palko objected, citing the Fifth Amendment's prohibition against double jeopardy. Palko had a point. The Fifth Amendment is unequivocal and clear: "... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...." Yet Palko was retried and this time he was sentenced to death.

Palko appealed to the Supreme Court, which ruled that the Fifth Amendment did not apply to the states. In 1937, Justice Benjamin Cardozo, writer of the Palko decision, accordingly stated: "The Fifth Amendment is not directed to the states, but solely to the Federal Government." So Frank Palko was executed. Thirty-two years later, however, the Warren Court held: "The double jeopardy clause is fundamental to the American scheme of justice and should apply to the states ... [and] as it is inconsistent with this holding, *Palko v. Connecticut* is hereby overruled." Frank Palko will certainly be happy to hear that.

**Resources for Indigent Defendants**

While a prisoner in the Arizona State prison at Florence, I was the administrative clerk of Warden Harold J. Cardwell. I had the run of the prison, and the warden would let me go anywhere except home. I visited the men on death row nearly every other day, and it was my function as law clerk to bring them law books from the prison library, writing materials, copies of advanced court opinions; to make photocopies and to explain how to use the books or read citations. In *Bounds v. Smith* the Court ordered that all prisons must maintain law libraries or provide inmates with "adequate appeal representation and legal instruction." Prison officials opted for the former as being less costly.

These are the limited resources and opportunities available to the indigent in prison. Providing law books, of course, is not necessarily a panacea. Most condemned inmates are poorly educated. Law books can be very difficult, if not impossible, for people who have not read a single book in their lives—about law or anything else.

The grounds for appeal of most death sentences relate to what is called ineffective assistance of counsel. When the Supreme Court demanded that counsel be provided for indigent defendants in *Gideon*, it stressed that assistance means effective assistance of counsel. In examining trial
transcripts, I often discovered instances where the defense attorney was ineffective: failure to file a timely motion to suppress evidence; failure to challenge defective warrants; inept questioning of prospective jurors, etc. I have read trial records indicating that the entire jury was seated in three hours! When one considers the large pool of prospective jurors and the seventy-five pages of questions they were required to fill out in the Simpson trial, one can be sure that no indigent defendant will ever receive this sort of lengthy pre-trial preparedness.

Capital punishment is a manifestly unfair form of punishment, and for this reason I am convinced that it will eventually be removed from our justice system. We cannot invest society with a respect for human life by taking human life.

**FURTHER READINGS**

**Books**


**Periodicals**


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