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Poverty and the Death Penalty

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Disparities of wealth are inevitable within capitalism. Perhaps nowhere are these disparities more disturbing and deadly than in our system of justice and, in particular, in the way in which the death penalty is meted out in the United States. Our thesis is a simple one: Capital punishment in the United States is administered in an economically discriminatory way. The wealth disparity between those murderers who live and those who die constitutes a serious constitutional challenge to the permissibility of the death penalty. Our argument is not that we should somehow pity the vicious first degree murderer because of his economic misfortune, or in any way excuse or mitigate the moral and legal gravity of his offense, but rather that the most severe and solemn form of criminal punishment must be administered in a more economically evenhanded way in order for any of us to take comfort in believing that justice was served by the murderer's death at the hands of the state. Our failure as a society to ensure some semblance of economic equality in our harshest criminal punishment constitutes a kind of procedural cruelty that is inconsistent with the Eighth Amendment to our Constitution. Unfortunately, our Supreme Court has demonstrated an almost pathological reticence to consider issues of class and wealth (see *San Antonio v. Rodriguez*).

We employ a strategy that might be called an "argument from contingent realities." We grant that moral, legal, or constitutional rules might sanction some practice in a more perfect (just, fair, equitable, etc.) world, but argue that given the contingent realities of the actual world, the practice in question is not to be permitted. That is, in the abstract capital punishment may not be unconstitutional, but in fact the way in

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which it is dispensed, we believe, puts it at odds with the Eighth Amendment and the Equal Protection Clause.

Our Supreme Court seemed to have employed something like the contingent realities strategy in its very famous and controversial 1972 decision in *Furman v. Georgia*. They were concerned that there seemed to be no rational link between the most serious murders and the death sentences imposed in individual trials. One could easily find cases in which equally brutal murders resulted in a death sentence in one trial and in a prison sentence in another. Indeed, it was relatively easy to find cases in which a much more atrocious murder resulted in prison when compared with another murder that resulted in a death sentence. Justice Stewart used the helpful analogy of being struck by lightning to illustrate the contingent reality of rape and murder trials in the 1960s.

Since the Court saw the arbitrariness and capriciousness of capital punishment to be a direct function of unfettered jury discretion, the state of Georgia, in what became a model for the other states, set about to correct the problem. They first more narrowly defined the crime of aggravated first-degree murder. In addition they mandated a scheme of bifurcated trials—the first phase in which the jury determines factual guilt or innocence, and the second phase devoted to the jury’s consideration of “aggravating” and “mitigating” circumstances that bear on the appropriateness of death. And finally they instituted automatic appellate review of all death sentences. In its pivotal 1976 decision in *Gregg v. Georgia* our Supreme Court ruled that “the statutory system under which Gregg was sentenced to death does not violate the Constitution.”

We believe that a quarter century’s experience with the post-Furman death penalty procedures is an embarrassing constitutional failure. The apparent caprice and unfairness in our application of state-sponsored death is every bit as prevalent as it was before 1972. There are at least two independent reasons for this.

The first is jurisprudential. In a series of decisions in the 1970s the Court mandated the following two constitutional directives:

1. “[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed” (*Furman v. Georgia*).
2. “[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty” (*Woodson v. North Carolina*).

Principle 1 tells juries that they may not capriciously exercise their discretion in inflicting death as they see fit. Principle 2, however, may well force them to do precisely this. How can they possibly consider “the character and record of the individual offender,” or the “the circumstances of the particular offense,” without exercising unlimited discretion to administer death on a case-by-case basis?

A second, far greater source of caprice exists within the power of local prosecutors to determine which murders to prosecute as capital cases in the first place. Different moral and criminological philosophies, reelection concerns, media attention, and a

host of other variables virtually guarantee that considerations beyond simple calculations of desert and seriousness will enter into a prosecutor's decision to seek the death penalty or not.

It is morally and constitutionally problematic to suppose that judges, juries, and prosecutors wield discretion over life and death in such a capricious manner. It is even more troublesome, however, if what appears to be arbitrary administration is really disguised bias and discrimination. We believe that capital punishment is not "freakish," but insidious. We would oppose the death penalty, were it simply a crap shoot, but this game is played with clearly loaded dice. Our criminal justice system, like every other institution in American society, is infected by prejudice and discrimination.

Since blacks are three times as likely to be poor as whites, it seems reasonable that race could serve to measure the impact of poverty on criminal charges, convictions, and sentencing.

In 1978, 53 percent of black jail inmates had pre-arrest incomes below \$3,000, compared with 44 percent of whites. In 1983, the median pre-arrest income of black jail inmates was \$4,067 and that of white jail inmates was \$6,312. About half of blacks in jail were unemployed before arrest and 44 percent of whites were. (Katz, 24)

For our purposes, evidence of racism will be treated as evidence of class bias.

In the area of arrests and charges, there is ample evidence of both racism and economic bias. Maynard L. Erikson argued that poor individuals from juveniles to adults are more likely to be arrested and charged than middle and upper-income individuals (41–52). Terence P. Thornberry found that juveniles from lower class families were more likely to be sent to juvenile court and less likely to receive probation than those from affluent homes (90–8).

Theodore Chiricos et al. argued that the poor person is more likely to be found guilty of similar crimes than is the wealthier defendant. In part this is explained by fact that the poor are less likely to make bail and more likely to be represented by a public defender (553–572). The effect of being unable to post bail may bias the verdict toward guilty because the defendant is unable to substantially assist in his own defense. The effects of being represented by a public defender are more varied and complex. Since public defenders typically have large case loads and are salaried employees, there is less economic incentive to devote extensive time to research and pretrial motions, activities which would clearly increase the chances that the charges would be dismissed.

The final phase of the criminal justice system is sentencing and here, just as in the other phases, there is evidence that the harshest penalties are reserved for blacks and the poor. J. Petersilia found

that blacks and Hispanics are less likely to be given probation, more likely to receive prison sentences, more likely to receive longer sentences, and more likely to serve a greater portion of their original time. (28)

As with conviction rates, this may in part be due to blacks and the poor being more likely to be represented by public defenders.

A court-appointed defense lawyer's only reference to his client during the penalty phase of a Georgia capital case was: "You have got a little ole nigger man over there that doesn't weigh over 135 pounds. He is poor and he is broke. He's got an appointed lawyer. . . . He is ignorant. I will venture to say he has an IQ of not over 80." The defendant was sentenced to death. (Bright 292)

We all understand how historic and contemporary attitudes of racial prejudice could affect capital sentencing. It is less clear how a person's socioeconomic class could bias the outcome of a death penalty case to such a degree that it would implicate both the Equal Protection Clause and the Eighth Amendment. We want to suggest two interrelated ways in which a defendant's poverty could work to his—and in rare instances, her—disadvantage in the context of a capital sentence. In addition, we will speculate on a third factor involving the socioeconomic class, not of the defendant, but of the victim.

We vacillate in our commitment to neoclassical economic theory, but we concede the wisdom in the economic homily "you get what you pay for." The most obvious way that the current system works to the disadvantage of poor people is in the amount of professional compensation provided for indigent defense in capital cases. In the 1980s, Alabama put a limit of \$1,000 on out-of-court compensation; attorneys in rural Texas received as little as \$800 for a capital case; and Kentucky imposed an upper bound of \$2,500 (Bright 292). We assume that the amazing comment to the jury quoted above is only partially a result of incompetence and racism, but also the fact, as he went out of the way to tell the jury, that he was appointed by the court to represent the defendant. We have no record of how much he was compensated, but we can guess that it varied from the attorney's fees in the O. J. Simpson case by orders of magnitude.

Stephen Bright aptly titled a recent article in *The Yale Law Journal* "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer." He chronicled, not with the nice statistical data that we wish we had but with anecdote after anecdote stories of drunken court-appointed attorneys, ones with no experience, grievous strategic errors, and gross ignorance of relevant law. The pattern here is so pervasive that these injustices should be addressed, not on the appeal of individual death sentences but in terms of the overall equality of the institution of capital punishment.

Resource equity is also an issue with the other prevalent system for providing indigent defense. Public defenders' offices are not staffed by drunks, racists, or professionally incompetent attorneys. Indeed, they are usually bright, energetic, and highly dedicated professionals. The problem here is not salary or compensation, though being a public defender is certainly not a ticket to wealth and luxury, but one of excessive case loads. Again the story is most effectively told anecdotally, but perhaps a Louisiana Supreme Court ruling can serve as a summary. In *State v. Peart* the court ruled that excessive case loads and under-funding of such necessary ingredients of an adequate criminal defense as investigative support and expert witnesses amounted to a failure on Louisiana's part to "provide . . . the effective assistance of counsel the constitution requires" (*State v. Peart*).

There are two other ways poverty influences the death penalty—they occur long before cases are prosecuted in the criminal courts. Both have to do with decisions on the part of the state as to how to prosecute the defendant. Capital cases are incredibly high stakes occurrences, not just for the defendant but also for the state. Issues of prestige and credibility are raised, in the abstract for the state and in very personal terms for the district attorney. In addition, they are much more expensive to litigate. Consequently, the state chooses its capital cases very carefully. Huge factors are the odds of winning, the relative cost of the prosecution, and the degree of community pressure. Indigent defendants are relatively good bets for district attorneys considering the possibility of asking for the death penalty.

The second way that socioeconomic status is implicated in the death penalty can most easily be appreciated if we again use race as a proxy for wealth. Several studies have demonstrated that the race of the murder victim causally influences the decision whether to seek the death penalty (Baldus et al. 1990; GAO 1990). We take it to be obvious that the wealth of the victim is equally relevant. We are convinced that murder victims who are poor, regardless of their race, are afforded an unequal, second-class status.

If the preceding analysis is at all persuasive, fairly dramatic changes in our criminal justice system seem morally and constitutionally required. We would recommend that capital punishment be abandoned, at least until the contingent realities of this society are significantly altered and in its place federal and state statutes mandate a punishment of life imprisonment without the possibility of parole for the crime of aggravated murder. Many of our students seem to feel that such a punishment would be mere rhetoric and that these evil and dangerous individuals would soon be on the streets. In point of fact, however, the sentence is just what it says, and it has withstood court challenges.

The threat of spending the rest of one's life in a maximum security prison acts as a very strong negative incentive to aggravated murder. Whether this threat would be as effective as death in deterring these horrible crimes is still a matter of some controversy among social scientists—economists tend to insist that theory mandates that capital punishment must be a more effective deterrent, while criminologists despair

any reliable data to support such an hypothesis. All parties would agree, however, that any differentials are extremely slight and, by implication, that life imprisonment is an effective deterrent.

Most candidates for capital punishment are extremely violent and dangerous individuals who should not be at large in society. Life imprisonment without parole guarantees that we need not fear that they will repeat their crimes. Skeptics will argue, of course, that there remain dangers of escape or of murders committed while in prison. Such occurrences are possible. But life without parole forecloses the possibility of aggravated murderers being intentionally released, and this, after all, is the major public safety concern.

Part of our moral and political justification for criminal punishment is retributive. Most of us believe that criminals have unfairly taken advantage of the rest of us and that abstract standards of justice demand that they “pay back” society for their crimes when they are legally convicted. The most serious crimes “deserve” the most serious punishment. Life without parole would be society’s harshest criminal punishment. It would be reserved for those truly horrible crimes for which justice demands the “ultimate” penalty.

One argument against capital punishment that seems to resonate with everyday citizens is that there is a risk of executing individuals who are innocent of the crimes for which they were convicted. We believe that the danger is real and that the preceding analysis explains a big part of it. When capital defendants are represented by inexperienced, underpaid, and in some cases incompetent, attorneys, it should come as no surprise that legal and strategic mistakes are common. We can only feel confident that the truly guilty are the ones being executed when everyone is afforded the same quality (and quantity) of criminal defense. Since we all know that the contingent realities of this world preclude such equal advocacy, and since most of us acknowledge that risk of executing the innocent is profound, life without parole eliminates the risk, though sadly does not address the issue of wrongful convictions that result in prison sentences.

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