

Capital Punishment: Law & Policy
Death Penalty Seminar
Columbus School of Law – Catholic University

Syllabus: 2010
Course No. 560 - 3 credits

Text: *Cases and Materials on the Death Penalty* by Nina Rivkind & Steven Shatz (West Group, Third Edition 2009). Additional materials will be distributed.

Thursday evenings, 6:20-9:10 PM, Room 312 D

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Consultation: Students may call for consultation or to make an appointment during normal business hours or in person before or after class. Questions may be submitted by e-mail at any time.

Grading: Grading will be based on one paper (75%) and class participation (25%). The paper will be due on the last class day, April 22, and should be at least 25 pages in length. The paper may fulfill one of the writing projects as required by the law school. A proposed topic and outline must be submitted for approval by Feb. 18, and a draft of approximately 15 pages or longer must be submitted by March 18. The quality of the outline and draft will contribute towards the paper's 75% share of the final grade. The paper should preferably delve more deeply into any of the topics covered in class. The first section of the paper should discuss the underlying constitutional and legal principles related to the paper's topic and should demonstrate the student's command of the subject matter as discussed in class.

Class participation will be evaluated through a variety of activities. Since this is a seminar, each student should expect to be called upon in each class. In the second class, students will take the role of one of the 9 Supreme Court Justices and represent that Justice's opinion in *Furman v. Georgia*. During the ninth class, students will be asked to assume the role of one of the participants in a contemporary death penalty case. During the last two classes of the semester, the final portion of class will be devoted to ten-minute presentations by the students regarding the subject of their paper and their tentative conclusions or conjectures, followed by class discussion.

Attendance: Class attendance should follow the Law School's academic rule, which states: *Regular and punctual attendance at class meetings or equivalent exercises is a condition of receiving credit in all courses. If a student misses more than two hours of course work for each credit hour assigned to the course the instructor may direct the dean's office to exclude the student from the course.* Since this is a three-credit course, students may miss six hours (two classes) without penalty. Any further potential absences must be discussed with the professor beforehand.

There are no restrictions on the use of laptop computers in class.

Overview and Outline: This course will examine the key court decisions regarding the death penalty over the past 40 years. It will analyze the basic structure of existing death penalty law: the decision to pursue a capital case, trial, sentencing, and appeal. It will also explore public policy issues related to death penalty law and the ethical issues facing attorneys handling capital cases. The outline below provides the readings anticipated for the course. Some of these are included in the assigned text, others will be provided as supplementary materials. Required readings are in **bold; page numbers are from the assigned text**, unless otherwise indicated. Optional readings are for further study and may be helpful in preparing the course paper. A list of additional books and law review articles can be found at:
<http://www.deathpenaltyinfo.org/getcat.php?cid=5>.

Thursday, January 7

I. Historical and Constitutional Framework

A. History of the death penalty in the U.S.

1. **A Short History of the American Death Penalty, pp.20-28 (required readings in bold)**

2. *Strauder v. West Virginia*, 100 U.S. 303 (1880) (exclusion of blacks from capital jury) (optional readings or resources in plain text)

3. ***Powell v. Alabama*, 287 U.S. 56 (1932) (right to representation in capital case), pp.28-35**

-See also D. Carter, *Scottsboro: A Tragedy of the American South* (1979)

4. H. Bedau (edit.), *The Death Penalty in America: Current Controversies* (1997)

5. S. Banner, *The Death Penalty: An American History* (Harvard Press, 2002)

B. XIV Amendment considerations (due process)

1. ***McGautha v. California*, 402 U.S. 183 (1971), pp.36-45** (jury's discretion)

2. *In re Kemmler*, 136 U.S. 436 (1890) (electrocution upheld)

C. VIII Amendment considerations (cruel and unusual punishment)

1. *Wilkerson v. Utah*, 99 U.S. 130 (1879) (firing squad upheld)

2. *Glass v. Louisiana*, 471 U.S. 1080 (1985) (electrocution)

3. *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001) (electrocution in Ga. unconstitl.)

4. *Baze v. Rees*, 128 S. Ct. 1520 (2008), discussion; see

<http://www.lethalinjection.org> for all decisions regarding constitutionality of lethal injection procedures

5. Can an inmate be subjected to repeated attempts at execution? See case of Romell Broom in Ohio (2009).

D. Video: A&E TV-- historical overview (Chessman case) -- discussion

E. Assignment of opinions for **oral presentations** in next class

Thursday, January 14 (a substitute time may be selected)

II. Unconstitutional as Applied

A. ***Furman v. Georgia*, 408 U.S. 238 (1972), pp.46-75** (everyone should read excerpt in textbook; in addition, read the complete opinion of the Justice assigned to you)

1. Each student should be prepared to present one of the 9 concurring or dissenting opinions and to advocate for that position in a roundtable discussion.

2. J. Marquart & J. Sorenson, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 *Loyola of Los Angeles L. Rev.* 5 (1989) (distributed)

3. Listen to the oral argument in *Furman*:

<http://www.oyez.org/oyez/resource/case/131/audioresources>

B. Response to *Furman*

1. **Sample statute: Georgia, pp.913-15**

2. **Sample statute: Texas, pp.916-19**

3. C. Steiker & J. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *Harv. L. Rev.* 355 (1995)

4. See American Law Institute's Model Penal Code (1962)

Thursday, January 21

III. A Constitutionally Acceptable Death Penalty

A. **Gregg v. Georgia, 428 U.S. 153 (1976), pp.76-92** (guided discretion)

B. Parallel decisions

1. **Note pp.92-93**, *Proffitt v. Florida*, 428 U.S. 242 (1976) (weighing statute; jury recommendation); cf. *Ring v. Arizona*, 536 U.S. 584 (2002)

2. **Jurek v. Texas, 428 U.S. 262 (1976) (future dangerousness), pp.103-108**; cf. *Penry v. Lynaugh*, 492 U.S. 302 (1989)

3. **Woodson v. North Carolina, 428 U.S. 280 (1976), pp.93-102**; see also *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) (mandatory statutes)

C. The first executions

1. M. Gilmore, *Shot in the Heart* (1994) (Gary Gilmore)

2. D. Von Drehle, *Among the Lowest of the Dead* (1995) (John Spenselink)

D. Video: historical impact of *Gregg*

Thursday, January 28

IV. The Sentencing Process

A. Aggravating Circumstances

1. **Godfrey v. Georgia, pp.146-51** (vague and overbroad)

2. **Arave v. Creech, pp.152-63** (limiting instruction by state court)

B. Mitigating Circumstances

1. **Lockett v. Ohio, pp.199-207**

2. **Eddings v. Oklahoma, 455 U.S. 104 (1982), pp.207-12** (mitigating evidence must be considered)

3. *Johnson v. Texas* (youth as mitigation in Texas)

4. *Mills v. Maryland*, 486 U.S. 367 (1988) (no unanimity on mitigators)

5. *Oregon v. Guzek*, 546 U.S. 517 (2006) (innocence at sentencing phase)

C. Victim Impact Statements

1. *Booth v. Maryland*, 482 U.S. 496 (1987)

2. **Payne v. Tennessee, pp.586-98**

3. Symposium: "Victims and the Death Penalty: Inside and Outside the Courtroom," 88 *Cornell L. Rev.* 257 (2003)

4. See *Kelly v. California*, No. 07-11073, Nov. 10, 2008, dissents from denial of cert. by JJ. Breyer and Stevens with **videos of VIS**.

D. Who Decides?

1. *Ring v. Arizona*, 536 U.S. 584 (2002)

Thursday, February 4

V. Special Issues and Challenges: Race

- A. *Turner v. Murray*, 476 U.S. 28 (1986) (jury instruction and race)

B. **McCleskey v. Kemp**, 481 U.S. 279 (1987), pp.180-95

1. D. Baldus, et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998)

2. **D. Baldus, et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, (distributed)**

3. The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides - <http://www.deathpenaltyinfo.org/article.php?scid=45&did=539>

4. **Racial Justice Act, p. 197, note 4**

5. Maryland Race Study, see

<http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf>

C. **Miller-El v. Dretke**, 541 U.S. 231 (2005), pp.366-81 (race bias in jury selection); see also *Snyder v. Louisiana*, 552 U.S. ____ (2008).

- D. Video: The Walter McMillian Story - *60 Minutes*, CBS News

Thursday, February 11

VI. When is the Death Penalty Disproportionate in light of the Offense?

A. Non-homicide offenses

1. **Coker v. Georgia**, 433 U.S. 584 (1977), pp.241-45 (death penalty for rape)

2. **Kennedy v. Louisiana**, 128 S. Ct. 2641 (2008) (rape of child) pp.291-313

B. Felony murder and indirect involvement

1. **Enmund v. Florida**, 458 U.S. 782 (1982) (excerpt distributed)

2. **Tison v. Arizona**, 481 U.S. 137 (1987), pp.246-57

3. *Jacobs v. Scott*, 130 L.Ed. 2d 618 (1995) (Stevens, J., dissenting)

C. **Outlines due next class**

Thursday, February 18 (Outlines due)

VII. Disproportionality in light of the Offender

A. Mental Retardation

1. *Penry v. Lynaugh*, 492 U.S. 302 (1989); see also *Penry v. Johnson*, 532 U.S. 782 (2001) (after re-trial)

2. **Atkins v. Virginia**, 536 U.S. 304 (2002), pp.258-74

3. Video: Earl Washington story, CNBC - mental retardation

B. Juveniles

1. *Thompson v. Oklahoma*, 487 U.S. 815 (1988)

2. *Stanford v. Kentucky*, 492 U.S. 361 (1989)

3. **Roper v. Simmons**, 543 U.S. 551 (2005), pp.276-91

4. See *Graham v. Florida* and *Sullivan v. Florida* (argued in Supreme Court on Nov. 9, 2009; life without parole for juvenile offenders)
- C. Mental Health Issues - Insanity
 1. **Ford v. Wainwright**, 477 U.S. 399 (1986), pp.806-20
 2. See note 1, p. 831-32, "Curing" the defendant for execution
 3. **Panetti v. Quarterman**, 551 U.S. 930 (2007) (Part 2), pp.820-31; video of **Panetti history**
- D. Use of Psychiatric Experts
 1. **Barefoot v. Estelle**, pp.547-60 (predicting future dangerousness)
 2. *Ake v. Oklahoma*, 470 U.S. 68 (1985) (access to experts)
 3. Predicting future dangerousness: R. Rosenbaum, *Travels With Dr. Death*, Vanity Fair (1990), textbook pp.564-86
- E. Current cases and controversies
 1. Curing insanity for execution: K. Miller & M. Radelet, *Executing the Mentally Ill* (1993)
 2. Volunteers
 - a. *Whitmore v. Arkansas*, pp.362-68
 - b. Ethical Issues: Note, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 Georgetown J. of Legal Ethics 799 (1990)
 - c. **Volunteers and defense attorneys: Note 4, Problem 7-1, pp.394-96**
 3. Defining a class of mentally ill defendants for exclusion from the death penalty—see 54 Catholic University Law Review 1113, "Symposium: The Death Penalty and Mental Illness" (2005)
 4. **ABA Resolution on Exempting the Mentally Ill (distributed)**

Thursday, February 25

VIII. The Capital Jury

- A. Jury selection - penalty phase
 1. **Witherspoon v. Illinois**, pp.329-33
 2. *Morgan v. Illinois*, p.348 (excluding jurors who automatically vote for death)
 3. **Uttecht v. Brown**, 551 U.S. 1 (2007), pp.333-38
 4. Brian Nichols case in Georgia – proposal for non-unanimous juries
 5. See New Mexico rule for two juries: (subpart D)
http://www.nmcompcomm.us/nmrules/NMRules/5-704_11-30-2009.pdf
- B. Jury selection - guilt phase implications
 1. **Lockhart v. McCree**, pp.348-58
 2. W. Bowers, et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998)
- C. Jury Instructions
 1. *Simmons v. South Carolina* (1994), pp.631-38 (life without parole)
 - a. *Shafer v. South Carolina*, 532 U.S. 36 (2001)
 - b. *Kelly v. South Carolina*, 534 U.S. 246 (2002)
 2. *Weeks v. Angelone*, 528 U.S. 225 (2000), pp. 640-51 (clarity of instruction)
- D. **Ring v. Arizona**, 536 U.S. 584 (2002), pp.526-38
 1. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

2. See *Schriro v. Summerlin*, 542 U.S. 348 (2004), p.539, Note 3 (*Ring* not retroactive)

E. Assignments for mock hearing

Thursday, March 4

IX. Death Penalty Appeals

A. Direct Appeal - *Douglas v. California*, 372 U.S. 353 (1963)

B. **State Post-conviction: *Murray v. Giarratano*, pp.457-66** (representation)

C. *Pulley v. Harris*, pp.176-80 (proportionality review not required)

1. *Walker v. Georgia*, No. 08-5385 (Oct. 20, 2008) (Stevens, J., concurring) (commenting on lack of proportionality review)

D. **Federal Habeas Corpus Review and AEDPA: Overview, pp.673-83**

1. ***Coleman v. Thompson*, pp.732-43** (procedural limits)

a. Subsequent DNA testing

2. Excerpts from the Federal Habeas Corpus Statute, text pp.931 & ff.

3. L. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 *Buffalo L. Rev.* 381 (1996)

4. Patriot Act revisions – “opt-in” changes

E. Mock hearing

F. Drafts of papers due next class

Thursday, March 11– no class – spring break

Thursday, March 18 ((drafts of papers due)

X. Innocence

A. ***Herrera v. Collins*, 506 U.S. 390 (1993), pp.692-707**

1. Video affidavits

B. ***House v. Bell*, 547 U.S. 518 (2006), pp.745-63**

C. ***Kansas v. Marsh*, 548 U.S. 163 (2006), pp.220-29**

D. Resources on innocence

1. B. Scheck, et al., *Actual Innocence* (Doubleday 2000)

2. M. Radelet, et al., *In Spite of Innocence* (Northeastern Univ. Press 1992)

3. The Innocence Protection Act (part of H.R. 5107; passed 2004)

4. *United States v. Quinones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002)

E. The "problem" of innocence

1. Video: National Conference on Wrongful Convictions and the Death Penalty (1998)

2. False confessions

3. Jailhouse snitches

4. Eyewitness testimony; see Troy Davis case

F. Clemency

1. *Ohio Adult Parole Authority v. Woodard*, pp.780-88

2. Clemencies in Illinois, clearing death row

3. M. Radelet & B. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 *U. Richmond L. Rev.* 289 (1993)

G. Possible Guest Speaker

Thursday, March 25

XI. The Lawyer's Role

A. Effective Assistance of Counsel

1. **Strickland v. Washington**, 466 U.S. 668 (1984), pp.396-407 (2-prong test)
 2. **Wiggins v. Smith**, 539 U.S. 510 (2003), pp.408-22; cf. *Bobby v. Van Hook*, No. 09-144, cert. granted and decided Nov. 9, 2009 (per curiam)
 3. *Porter v. McCollum*, U.S. (2009) (post-traumatic stress for veterans)
 4. *Rompilla v. Beard*, U.S. (2005) (ineffectiveness at sentencing phase)
 5. S. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835 (1994)
 6. **Video**: Alliance for Justice (George McFarland)
 7. The ABA Guidelines, pp.469-71
- B. The Prosecutor's Role
1. **Kyles v. Whitley**, 514 U.S. 419 (1995), pp.473-88
 2. **Jacobs v. Scott**, pp.501-03
 3. *Banks v. Dretke*, 124 S. Ct. 1256 (2004)
 4. K. Armstrong & M. Possley, *The Verdict: Dishonor*, Chicago Tribune Jan. 8, 1999 (*Brady* and other obligations)
 5. **Video**: Jack McMahan - prosecutorial standards; ethics

Thursday, April 1, NO CLASS - Holy Thursday

Thursday, April 8 (may move date of class)

XII. Federal Death Penalty and International Comparisons

A. Post-*Furman* Application

1. Reviving older statutes: *U.S. v. Harper*, 729 F.2d 1216 (9th Cir. 1984)
2. **Federal Death Penalty statute, pp.919-30 (read for background)**
3. *United States v. Fell*, U.S. Dist. Ct., Dist. of Vt. (2002) (constitutionality of federal death penalty)
4. Video: CBS 60 Minutes - Chandler
5. First federal executions: Timothy McVeigh, Juan Garza, Louis Jones
6. *Jones v. United States*, 527 U.S. 373 (1999)
7. R. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 Fordham Urban L.J. 347 (1999)

B. THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000) (U.S. Dept. of Justice 2000)

C. Death penalty under military jurisdiction and military tribunals

D. International Law Developments

1. U.N. Universal Declaration of Human Rights
2. International Covenant on Civil and Political Rights
3. **Minister of Justice v. Burns, Sup. Ct. of Canada, pp.867-74** (extradition)
4. **International Treaties and the Death Penalty, pp.875-79 (time on death row, juveniles, race, foreign nationals)**
5. *Breard v. Greene*, 523 U.S. 321 (1998) (Vienna Conv.)
6. *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (Vienna Convention)
7. International perspectives on terrorism cases

Thursday, April 15

XIII. Current Issues

A. **Baze v. Rees, 128 S. Ct. 1520 (2008), pp.841-63 (lethal injection procedures)**

1. Ohio's use of a single-drug protocol

B. Decline in death sentences and executions

1. When does a punishment become unusual?
 2. See *Roper v. Simmons*; *Atkins v. Virginia*, above; compare *Gregg v. Georgia*
 3. Report from the California Commission on the Fair Administration of Justice (2008) – Death Penalty section, pp. 112-57, at <http://www.ccfaj.org/documents/CCFAJFinalReport.pdf>
 4. Time on death row; see, e.g., *Johnson v. Bredesen*, No. 09-7837 (U.S. Dec. 2, 2009)
- C. Student Presentations

Thursday, April 22 (Last class - all papers due)

XIV. Final Thoughts

- A. Problem of Arbitrariness Revisited
 1. **Callins v. Collins, (Blackmun, J., dissenting), pp.880-91**
 2. D. Von Drehle, *Among the Lowest of the Dead* (1995)
 3. J. Liebman, "A Broken System: Error Rates in Capital Cases, 1973-1995", read **The Frequency of Error in Capital Sentencing, pp. 891-93**
- B. Public policy considerations
 1. ALI withdrawal of death penalty provisions from Model Penal Code
 2. State legislative reviews of the death penalty
- C. Student presentations
- D. **All papers due**