Capital Punishment: Law & Policy
Death Penalty Seminar
Columbus School of Law – Catholic University
Syllabus: 2009
Course No. 560 - 3 credits


Thursday evenings, 6:20-9:10 PM, Room 252

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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 23, 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. 19, and a draft of approximately 15 pages or longer must be submitted by March 19. 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.

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](http://www.deathpenaltyinfo.org/getcat.php?cid=5).

Thursday, January 8
I. Historical and Constitutional Framework
   A. History of the death penalty in the U.S.
      1. Á Short History of the American Death Penalty, pp.20-27 (required readings in bold)
      2. Stroud v. West Virginia, 100 U.S. 303 (1880) (exclusion of blacks from capital jury) (optional readings or resources in plain text)
         - See also D. Carter, Scottsboro: A Tragedy of the American South (1979)
   B. XIV Amendment considerations (due process)
      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)
      4. Baze v. Rees, 128 S. Ct. 1520 (2008), discussion; see [http://www.lethalinjection.org](http://www.lethalinjection.org) for all decisions regarding constitutionality of lethal injection procedures
   D. Video: A&E TV-- historical overview (Chessman case) -- discussion
   E. Assignment of opinions for **oral presentations** in next class

Thursday, January 15
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.
3. Listen to the oral argument in Furman: http://www.oyez.org/oyez/resource/case/131/audioresources

B. Response to Furman
1. Model Penal Code, pp.845-47
2. Sample statute: Texas, pp.868-71

Thursday, January 22
III. A Constitutionally Acceptable Death Penalty
B. Parallel decisions
C. The first executions
1. M. Gilmore, Shot in the Heart (1994) (Gary Gilmore)
D. Video: historical impact of Gregg

Thursday, January 29
IV. The Sentencing Process
A. Aggravating Circumstances
1. Godfrey v. Georgia, pp.149-55 (vague and overbroad)
B. Mitigating Circumstances
1. Lockett v. Ohio, pp.169-76
2. Eddings v. Oklahoma, 455 U.S. 104 (1982), pp.177-82 (mitigating evidence must be considered)
3. Johnson v. Texas (youth as mitigation in Texas)
C. Victim Impact Statements
2. Payne v. Tennessee, pp.536-47
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?

Thursday, February 5
V. Special Issues and Challenges: Race
   D. Video: The Walter McMillian Story - 60 Minutes, CBS News

Thursday, February 12
VI. When is the Death Penalty Disproportionate in light of the Offense?
   A. Non-homicide offenses
   B. Felony murder and indirect involvement
   C. Outlines due next class

Thursday, February 19 (Outlines due)
VII. Disproportionality in light of the Offender
   A. Mental Retardation
      3. Video: Earl Washington story, CNBC - mental retardation
   B. Juveniles
   C. Mental Health Issues - Insanity
2. See note 1, p. 779, "Curing" the defendant for execution
3. Panetti v. Quarterman, No. 06-6407 (2007) (excerpt distributed); video of Panetti history

D. Use of Psychiatric Experts

E. Current cases and controversies
2. Volunteers
   a. Whitmore v. Arkansas, pp.362-68
   c. Volunteers and defense attorneys: Note 3, Problem 8-1, pp.359-60
4. ABA Resolution on Exempting the Mentally Ill (distributed)

Thursday, February 26
VIII. The Capital Jury
A. Jury selection - penalty phase
2. Wainwright v. Witt, pp.325-36
5. Brian Nichols case in Georgia – proposal for non-unanimous juries

B. Jury selection - guilt phase implications
1. Lockhart v. McCree, pp.339-48

C. Jury Instructions
1. Simmons v. South Carolina, pp.578-85 (life without parole)


E. Assignments for mock hearing
Thursday, March 5 – no class – spring break

Thursday, March 12
IX. Death Penalty Appeals
   B. State Post-conviction: Murray v. Giarratano, pp.630-38 (representation)
   C. Pulley v. Harris, pp.137-41 (proportionality review not required)
      1. Walker v. Georgia, No. 08-5385 (Oct. 20, 2008) (Stevens, J., concurring)
   D. Federal Habeas Corpus Review and AEDPA: Overview, pp.643-53
      1. Coleman v. Thompson, pp.712-23 (procedural limits)
         a. Subsequent DNA testing
      2. Excerpts from the Federal Habeas Corpus Statute, text pp.883 & 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 19 ((drafts of papers due)
X. Innocence
      1. Video affidavits
   B. House v. Bell, U.S.(2006); excerpts from decision distributed
   C. Kansas v. Marsh, U.S. (2006); excerpts from decision distributed
   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)
   E. The "problem" of innocence
      2. False confessions
      3. Jailhouse snitches
      4. Eyewitness testimony; see Troy Davis case (pending in 11th Cir.)
   F. Clemency
      1. Ohio Adult Parole Authority v. Woodard, pp.780-88
      2. Clemencies in Illinois, clearing death row
   G. Possible Guest Speaker

Thursday, March 26
XI. The Lawyer’s Role
   A. Effective Assistance of Counsel
      3. Williams (Terry) v. Taylor, pp.403-04, note 1 (AEDPA issues)
6. Video: Alliance for Justice (George McFarland)
7. The ABA Guidelines, pp.416-19

B. The Prosecutor’s Role
4. K. Armstrong & M. Possley, The Verdict: Dishonor, Chicago Tribune Jan. 8, 1999 (Brady and other obligations)
5. Video: Jack McMahon - prosecutorial standards; ethics

Thursday, April 2

XII. Federal Death Penalty and International Comparisons
A. Post-Furman Application
2. Federal Death Penalty statute, pp.871-82
3. United States v. Fell (distributed)
4. Video: CBS 60 Minutes - Chandler
5. First federal executions: Timothy McVeigh, Juan Garza, Louis Jones

C. Death penalty under military jurisdiction and military commissions

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.794-807 (extradition)
4. International Treaties and the Death Penalty, pp.808-12 (time on death row, juveniles, race, foreign nationals)
7. International perspectives on terrorism cases

Thursday, April 9, NO CLASS - Holy Thursday

Thursday, April 16

XIII. Current Issues
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

C. Student Presentations

Thursday, April 23 (Last class - all papers due)

XIV. Final Thoughts
   A. Problem of Arbitrariness Revisited
      2. D. Von Drehle, Among the Lowest of the Dead (1995)
         a. The Frequency of Error in Capital Sentencing, pp. 840-42
   B. Public policy considerations
      1. Arguments for and against the death penalty, pp.7-18
      2. State legislative reviews of the death penalty
   C. Student presentations
   D. All papers due