

Capital Punishment Curriculum

For Law Schools

Death Penalty Focus

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[1]

Course Description

Capital punishment generates enormous controversy. Some, including a number of religious and human rights groups, argue that use of the death penalty is inherently wrong. Other opponents might be willing to support the use of the death penalty in certain circumstances.

This course is intended to introduce a comparative study of the death penalty in abolitionist versus retentionist countries, based on the prohibition of this punishment in International conventions. It is designed primarily for use in US law schools, with emphasis on US law, but should prove instructive in other locations.

The main question presented is this: "Does the death penalty constitute cruel and unusual punishment, and if so, is this punishment inherently cruel and unusual, or just disproportionate, and unnecessary to society?"

The primary goal of this course to demonstrate that the Universal Declaration of Human Rights and every standard of international human rights law is contradicted by:

- the harshness in the law of capital punishment per se,
- the inflexibility of punishment (applying unvarying death penalty regardless of any sense of the individual deserts of offenders) and
- the unfair use of the death penalty based on factors other than factors related to the nature and characteristics of the crime.

The second goal is to use a comparative historical approach by illustrating the similarities and differences in the practice of capital punishment over time and place. We will review the current practice of capital punishment in both religious states and secular countries.

The course is designed as a full semester, but with the flexibility to be offered in segments as stand-alone lectures or seminars of 1 to 4 weeks' duration.



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Overview and Course Goals

It is expected that students will read the cases and other materials related to the death penalty, rather than relying on a single textbook.

The curriculum will benefit from the participation of guest speakers at some of the seminar sessions. For the development of legal and academic skills, the curriculum will:

- [1] provide information about the application of the death penalty in the U.S. and Internationally;
- [2] assist in developing an informed position on capital punishment;
- [3] enhance critical thinking, writing, and other communication skills;
- [4] facilitate critical consumption of published research;
- [5] stimulate intellectual curiosity not only about crime and criminals, but also about the criminal justice system and its significance in human rights;
- [6] produce a better understanding of capital punishment in society



[3]

Course Content

[Week 1] History of U.S. Death Penalty

Capital punishment through history; U.S. Supreme Court decisions and contemporary problems with the application of the death penalty.

[Week 2] Cruel & Unusual Analysis

Description and analysis of a recent U.S. Supreme Court case, including the cases leading up to it, the actual opinions in the case, the impact on future cases, application in pending litigation, precedential significance. (This segment would be recommended to teach as a segment of a Constitutional Law course for law schools interested in presenting death penalty course material for less than a full semester).

[Week 3] Methods of Execution

Constitutionality of means of execution (electrocution, gas, lethal injection, other methods)

[Week 4] Death Penalty & Proportionality Doctrine

When a death sentence is disproportionate or grossly disproportionate to the crime committed. Examples include death penalty for aggravated rape, rape of a child, treason, non-homicidal terrorist acts or drug crimes; or when a death sentence may be inappropriate to the specific defendant, including juveniles, the mentally retarded or the mentally ill.

[Week 5] Regional Patterns in Different Countries: Abolitionists & Retentionists

Comparison of the US death penalty with that in another retentionist country (e.g., China, Iran, Iraq, Congo) and description and analysis of recent developments in capital punishment law in the different states of the USA. Comparison of historical forces in abolitionist vs. retentionist Western nations. (This segment would be recommended to teach as a segment of Comparative Criminal Justice course for law schools interested in presenting death penalty course material in less than a full semester).

[Week 6] General Deterrence & the Death Penalty

Whether or not executions prevent people other than the person executed from committing capital crimes.

[Week 7] Retribution, Religion & the Death Penalty

The effects of the death penalty on the families of murder victims, death row inmates and of the executed. Attitudes of world religions about the death penalty and revenge.

[Week 8] Economic Costs of Capital Punishment

Comparing the economic costs of capital punishment with the economic costs of alternative punishments.

[Week 9] Wrongful Conviction
in Capital Cases

Analysis of inaccuracies in capital sentencing under which innocent persons have been sentenced to death, such as those found in Illinois, and the means by which they can be corrected. (This segment would be recommended to teach as a segment of a Wrongful Conviction & Innocence or Criminal Law course for law schools interested in presenting death penalty course material in less than a full semester).

[Week 10] Public Opinion & Death Penalty

The importance of American public opinion on the death penalty through the history and into the future. Changes in public opinion and factors are effecting that change.

[Week 11] Public Executions

Public executions. What is, or would be, the impact of having executions in public? TV as the new Town Square.

[Week 12] Alternatives to the Death Penalty

Comparing different possible alternatives: lengthy prison sentence with opportunity for parole or Permanent Imprisonment (Life Without the Possibility of Parole).

[Week 13] International Aspects

International law, treaties, conventions and agreements covering the death penalty and their impact on the US. (This segment would be recommended to teach as a segment of Human Rights course for law schools interested in presenting death penalty course material of less than a full semester).

[Week 14] The Future of Death Penalty

What factors, in abolitionist states or internationally, have led to abolition of the death penalty or to moratorium. What evidentiary, procedural, moral, practical and fiscal barriers exist to imposition of the death penalty.



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Course Objectives

The primary objective of this course is to learn critical thinking skills in a criminological context. Here you will be exposed to different issues involving capital punishment.

This course is a survey of issues involving the death penalty. It seeks to:

- [1] provide information about the application of the death penalty in the U.S. and International level;
- [2] assist in developing an informed position on capital punishment;
- [3] enhance critical thinking, writing, and other communication skills;
- [4] facilitate critical consumption of published research;
- [5] stimulate intellectual curiosity not only about crime, criminals, and the criminal justice system,
- [6] produce a better understanding of capital punishment in society.



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Suggested Course Materials

[1] A brief history; the death penalty debate; "outer limits?"

Roger Lane, *Capital Punishment: In Violence in America*, vol 1, ed. Ronald Gottesman, Charles Scribner's Sons, New York, U.S. (1999).

Victoria Schneider, and John Ortiz Smykla, *A summary analysis of executions in the United States*, Anderson Publishing, Cincinnati, U.S. (1991).

Steven A. Hatfield, *Criminal Punishment in America: From the Colonial to the Modern Era*, 1 USAFA J. Leg. Stud. 139 (1990).

Franklin Zimring, *The Contradiction of American Capital Punishment*, Oxford University press, NY, U.S. (2003).

Question:

What general lessons can be learned from the history of the death penalty in the United States?

[2] Challenges to the Death Penalty

Furman v. Georgia, 408 U.S. 238 (1972)

Gregg v. Georgia , 428 U.S. 153 (1976)

Woodson v. North Carolina , 428 U.S. 280 (1976)

Sigler, Mary; *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 Am. Crim. L. Rev. 1151, 1155 (2003)

Question:

Why is the United States the only western industrialized nation to routinely employ capital punishment?

[3] Methods of execution

Baze v. Rees , 128 S.Ct. 1520 (2008)

Code of Medical Ethics, Sec E 206 (Amer. Med. Assn, 2000)

Sech, Robert J. *A Proposal for Thoroughly Evaluating The Constitutionality Of Execution Methods*, 30 Val. U. L. Rev. 381 (1995).

Questions:

What arguments can be found in *Baze* to challenge future lethal injection executions in other states?

What will be the future of the death penalty if lethal injection is ultimately found to violate the 8th Amendment? Is such a result politically feasible?

[4] Bars to Death Penalty Culpability

Enmund v. Florida , 458 U.S. 782 (1982)

Tison v. Arizona , 481 U.S. 137 (1989)

Categorical bars

Atkins v. Virginia, 536 U.S. 304 (2002)

Roper v. Simmons , 543 U.S. 551 (2005)

Kennedy v. Louisiana , USSC No.07-343, 6/25/08, 554 U.S.____ (2008)

Wernick, Steven J. *Constitutional Law: Elimination of the Juvenile Death Penalty Substituting Moral Judgment for a True National Consensus*, Florida Law Review April (2006).

Ozimek, Mark Alan; Note, *The Case for a More Workable Standard in Death Penalty Jurisprudence: Atkins v. Virginia and Categorical Exemptions under the Imprudent "Evolving Standards of Decency" Doctrine*, 34 U. Tol. L. Rev. 651, 684 (2003).

Matura, Jeffrey C. *Campaign Finance Reform Symposium: Note: When Will It Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. Legis. 249 (1998).

Questions:

What other categorical bars can be pursued?

Can you make an argument that the decision in Kennedy voids all non-homicide death penalty statutes? If not all, which ones?



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Suggested Course Materials

[5] Comparative Perspective

Whiteman, James; *Harsh Justice: Criminal Punishment and the Widening divide between America and Europe*, New York: Oxford University Press (2003).

Schreiber, Ariane M. *States that Kill: Discretion and the Death Penalty– a Worldwide Perspective*, 29 Cornell Int'l L.J. 263 (1996).

Questions:

What social and political traditions and history have shaped nations or regions that have abandoned or reduced the use of capital punishment; why have other, retentionist nations or regions rejected those forces and arguments?

[6] Deterrence & Capital Punishment

Bailey, William; *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, Criminology 36:711-733 (1998).

Question:

Is the death penalty a greater general deterrent to capital crime than an alternative non-capital punishment such as permanent incarceration (life imprisonment without possibility of parole)?

[7] Retribution, Religion & the Death Penalty

Gale, M.E., *Retribution, Punishment, and Death*; University of California Davis Law Review, 18:973-1035 (1985).

Questions:

Is retribution an acceptable basis for supporting the death penalty?
In a secular society, what role should religious opinion play?

[8] Economic costs & death penalty

Costly Death Penalty Takes Toll on State Budgets, www.deathpenaltyinfo.org/article.php?scid=7&did=851.

The Hidden Death Tax: The Secret Costs of Seeking Execution in California, a report by the American Civil Liberties Union of Northern California at

and the March 2009 update at

REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY IN CALIFORNIA, June 2008, by the California Commission on the Fair Administration of Justice, a bi-partisan body created by the state legislature: <http://ccfaj.org/rr-dp-official.html>

Question:

Which costs more: capital punishment or LWOP? How much more? Why? What is the political importance of the financial cost?

[9] Innocence and death penalty

House v. Bell, *supra*
Herrera v. Collins, 506 U.S. 390 (1993)
Mishna Sanhedrin 6 :1
Schlup v. Delo , 513 U.S. 298 (1995)
28 U.S.C. § 2244(b)(2)(ii)
United States v. Quinones, 295 F.Supp 2d 256 (S.D.N.Y. 2002)

see, generally,
<http://www.deathpenaltyinfo.org/innocence-and-death-penalty>; <http://innocenceproject.org/>

Questions:

Is it constitutional to execute a factually innocent person? Should "finality" trump factual innocence? The tension between the criminal justice system's need for finality and the fear of executing an innocent person. How much process is enough?



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Suggested Course Materials

[10] Public opinion & death penalty

Bohm, Robert; *Toward an understanding of Death Penalty Opinion Change in the United States*, *Humanity and society* 16:524-542 (1992).
<http://deathpenaltyinfo.org/news/past/30/2008>

Question:

Does the American public support the death penalty?
What factors impact public opinion? Does the public's opinion about the death penalty matter?

[11] Public execution

Blum, Steven A. *Public Executions: Understanding Cruel and Unusual Punishments Clause*, 19 *Hastings Const. L.Q.* 413 (Winter 1992).

Bessler, John D. *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 *Fed. Comm. L.J.* 355, 441 n.53 (1993)

Question:

Should the public be allowed to view executions?
Should executions be televised?

[12] Alternatives to the death penalty

A matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment, *Harvard Law Review*, 119:1838-1854 (2006).

Question:

Would you support the death penalty if the alternative were life imprisonment with absolutely no possibility of parole?

[13] International and Foreign Law and the Death Penalty

United States v Bin Laden, 126 F. Supp 2d 256 (S.D.N.Y. 2000)
Llamas v Oregon, 126 S.Ct 2669 (2006)
Medellin v Texas, USSC no. 06-984 ,3/25/08, 552 U.S.____ (2008)
Readings (required)-
Koh, 98 Am. J. Int'l L 43 (2004)
Alford, 98 Am. J. Int'l L 57 (2004)

Schabas, William A. *The International Sourcebook on Capital Punishment*, Northwestern University press (1997).

Rosen, Sonia & Journey, Stephen; *Abolition of the Death Penalty: An Emerging Norm of International Law*, 14 *Hamline J. Pub. L. & Policy* 163, 164 (1993).

Questions:

What aspects or issues of current death penalty jurisprudence can be challenged from International law or treaty law and/or by reference to foreign law sources?
Is the death penalty a human rights issue in the US?
Does that matter?



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Suggested Course Materials

[14] Future Issues

Callins v. Collins, 510 U.S. 1141 (1994) (Blackmun J dissenting from denial of Certiorari)

Questions:

What conditions, developments or factors do you think may ultimately lead to abolition of the death penalty? Consider the recent New Jersey, New York and New Mexico experiences; economic climate and political factors.

Do you think the United States Supreme Court will, at some point, find the death penalty unconstitutional? If so, on what grounds? (8th Amendment, due process, equal protection?)

What opportunities for reform of the capital punishment system are presented by the election of Barack Obama?

[15] Additional Resources

Death Penalty Information Center
<http://deathpenaltyinfo.org/>

Death Penalty Focus
<http://deathpenalty.org/>

The American Civil Liberties Union (ACLU)
<http://www.aclu.org/capital/index.html>

ACLU of Northern California

http://aclunc.org/issues/criminal_justice/death_penalty/index.shtml

Amnesty International
<http://www.amnesty.org/en/death-penalty>