

Important Administrative Information Concerning Course Schedule and Requirements

-Read with Care-

You are responsible for the information contained in this document and that contained in the Syllabus. For your convenience Part I hereof appears in both places.

I. Projected Coverage Schedule

Subject to external contingencies and the vagaries of coverage, I intend to proceed roughly as follows:

Week of January 12 – Unit I (to be read before first class). Begin Unit II.

Week of January 19¹ - Unit II, cont'd. For class of January 20 bring in a brief description of what crimes you think are so bad you would impose death for them. For the class of January 21 revise your description in light of the prior class discussion. (I won't grade any of these. I just want to get you thinking). The second hour of class on January 21 will be devoted to brainstorming what factors should tend to make a potentially capital crime more culpable (aggravating factors).

Week of January 26 - Completion of Unit II. The first hour should be devoted to brainstorming what factors should tend to make a potentially capital crime less culpable. Then we will turn to a discussion of how these factors should be utilized by the judge and/or jury in making the ultimate sentencing decision. Please bring to class a brief description of your proposal in this regard.

Week of February 2 - Unit III.

Week of February 9 – Completion of Unit III in the form of a video presentation on February 9. Start Unit IV. People writing papers need to submit outlines to me by the end of class on February 11 and see Joyce to set up times to see me for discussion of outlines.

Week of February 16- complete Unit IV on February 16. No class on February 18; individual meetings to discuss paper topics.

Week of February 23 - Unit V.

Week of March 2- Unit VI.

¹Holiday schedule in effect. No school Monday. We meet on Tuesday, January 20, a legislative Monday.

Week of March 9 –Unit VII

Week of March 16 - Unit VIII. – Paper drafts due at end of class of March 18. Set up meetings with Joyce to discuss paper drafts.

Week of March 23 – No class meetings; individual meetings to discuss paper drafts.

Week of March 30 - Unit IX.

[Spring vacation week of April 6]

Week of April 13 –Unit X.

Week of April 20 – Unit XI.

Week of April 27 – There is one hour scheduled for this week, which I am holding for contingencies. We will determine what use to make of it as the time approaches.

Course papers are due to Joyce, electronically or physically, by 4:00 p.m. on April 30, the day before exams begin.

II. Schedule of Deadlines Concerning Exams and Papers

a. For Students Exercising the Exam Option

With respect to the examination the schedule and procedures will be the following:

1. The examination will be take-home. You may pick it up from Joyce during business hours on any day during the first week of the examination period, starting Monday, May 4 and ending Friday, May 8. Your pick-up time will be recorded. You will have three full days (72 hours) to work on the examination. Thus, if you pick the exam up at 9:30 a.m. on Tuesday, May 5 it must be returned by 9:30 a.m. on Friday, May 8. Though you must pick up the test by coming to my assistant's office, it is ok to submit your answers by e-mail provided that you do so by your deadline. You will receive a confirmation on receipt.

2. In substance you will be asked to answer one or more essay questions calling upon you to synthesize the readings and class discussions. There will be a 20-page limit. Outside research, although permitted, will be discouraged. You will not be permitted to discuss the examination or any of the actual or potential subjects of answers to it with any other person (including me) for the duration of the examination period.

3. During the weeks when there are no classes because I am meeting with paper-writers you need to be developing an expertise on no less than three death penalty topics so as to be able to discuss them in some depth on the take-home exam.

b. For Students Exercising the Paper Option

This course qualifies for Writing Credit I.² Many of you are beneficiaries of my having been responsive to student demand in permitting a larger enrollment than is usual for a paper course; the obverse is that you should not count on my being flexible with respect to deadlines.

I will be freely available throughout the semester to discuss your writing project with you, but you must comply at minimum with the following:

By the end of class on February 11 you must turn in an outline of your paper topic. This need not be more than a page or two but must explain the substance of the argument to be made and the key sources that will be relied upon. The purpose is to explain to me what new insight your paper will contain. Experience advises me to repeat that last sentence for emphasis: there is every chance that I will ask you explicitly, "What does this paper add to human knowledge"?

The failure to turn in an outline by the prescribed deadline is ipso facto an election to exercise the exam option.

Class will not meet on February 18. You need to see me that day to review your paper topic (having previously made an appointment for this purpose through Joyce).

A draft of your paper must be turned in by the end of class on March 18. We will have individual meetings during the week of March 23 (when class will not meet), which you must also have scheduled in advance. My objective will be to make suggestions that will assist your work (and your grade) but you, not I, are responsible for the ultimate product; a paper may have five weaknesses of various significance and I may comment on the two major ones. That doesn't mean there are no other improvements to be made.

In any event since attending such meetings is a Law School prerequisite to the award of writing credit (and since I can't hold a meeting without having read your paper in advance) any failure on your part to abide by the deadlines in this handout may result in the denial of writing credit.

The final paper is due to Joyce, electronically or physically, at 4 pm on Thursday, April 30, the day before the start of exam period..

III. Substantive Criteria for Papers

Whatever you choose to write about, I expect you to do so in accordance with the highest standards of scholarship. You should state and support a non-trivial proposition, and be full, fair, and accurate in your presentation, rigorously in separating fact from opinion. I will expect you to

² By special arrangement I can make it qualify for Writing Credit II for a few of you. If you are interested in this, see me soon.

rely on primary sources to the greatest extent appropriate (including personal interviews as useful) and to document your work in a way that would permit a future scholar to recreate and build on it.

The ultimate point is to make a new contribution to human knowledge. It need not be an enormous contribution but it needs to be one. I am familiar with most of what has been written in this field and if you do not add to it, no matter how fully you cite your sources, you cannot expect to do well gradewise.

Valuable guidance on the matters covered in the previous two paragraphs, and much else of relevance, is to be found in VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES AND SEMINAR PAPERS* (KF250 .V6 2003) and I most strongly recommend that you spend a few hours with it as your very first step on your paper. You should certainly do so before formulating a topic.

Although I am not going to be fanatical on the subject I would expect to see a document of at least 30 pages if submitted for Writing Credit I, double-spaced (except for footnotes and indented quotations), using standard 1" margins and a reasonable font size.

Possible Topics

The following list is merely illustrative. It is intended to suggest the range of possibilities you might choose to pursue.

1. The litigation campaign against the death penalty suffers to a unique degree from an ethical/strategic problem which often appears when social reform is sought through the courts. Almost any lawyer who takes on an individual case is faced with conflicts between the needs of his or her client, and those of the movement as a whole. In practice, the needs of clients have invariably prevailed -- often to the distinct detriment of the movement as a whole. Is there a defensible position that lawyers should be more flexible in this area? Does it make a difference whether the lawyers in question are employed by public interest organizations which are able to assist only a small fraction of those seeking help?

2. Those of you with an interest in looking more deeply into the pre-Furman campaign against the death penalty might want to begin by browsing through Greenberg, Judicial Process and Social Change 421-96 (1977) (on reserve). This exercise might (a) inspire you with a desire to write a more comprehensive history than has yet been done, or (b) to pick one or more of the key arguments against the death penalty and trace their evolution. This latter project might be of particular present practical importance, since much of the pre-Furman history of these arguments is as unknown to present-day judges as it is to present-day lawyers.

3. Could you make a cogent case for overruling any of the cases in the syllabus? Having done so, what is your substitute rule going to be?

4. The federal habeas corpus statute was significantly re-written in June, 1996. Have the changes met the objectives of the drafters? Is the system now faster? fairer? Is further

legislative reform warranted and if so what? Some thoughts on this subject are contained in David R. Dow and Eric M. Freedman, "The Effects of AEDPA on Justice," in *THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* (North Carolina Academic Press, 2009) (on reserve); <https://www.themarshallproject.org/2014/11/15/death-by-deadline-part-one> and <https://www.themarshallproject.org/2014/11/16/death-by-deadline-part-two>

5. If you thought that the death penalty was being imposed in a racially disproportionate way and wished to correct the situation by statute what would your statute say?

6. In the period of a single month in late 2009 the Supreme Court issued three decisions relating to ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, which were published along with a number of academic commentaries on them in Volume 31, No. 4 of the Hofstra Law Review (2003) which is available at <http://www.hofstralawreview.org/tag/volume-36-issue-3/>. The cases are Bobby v. Van Hook, 130 S.Ct. 13 (2009), Wong v. Belmontes, 130 S.Ct. 383 (2009), and Porter v. McCollum, 130 S.Ct. 447 (2009), and they were summarized in an article in the U.S. Law Week of 78 U.S.L.W. 1338 (December 8, 2009). What might we learn from this activity? A good deal of additional information about these guidelines is to be found at <http://www.abanet.org/deathpenalty/resources/home.shtml> which may be worth browsing for both inspiration and research purposes. In the fall of 2013 Hofstra hosted a symposium on the tenth anniversary of the Guidelines and the Hofstra Law Review has been publishing a number of the articles. You might want to take a look to see if they spark any thoughts for projects.

7. Following up on the original ABA project a number of organizations subsequently collaborated to flesh out those portions of the guidelines relating to mitigation. The resulting Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases appear along with scholarly commentary in Volume 36, No. 3 of the Hofstra Law Review available at www.law.hofstra.edu/DeathPenalty. Because this material dates only from the spring of 2008 there has been relatively little written on it so far, which might provide you with an opportunity.

8. As you may see on the TWEN site, the American Bar Association, the American Psychological Association, and the American Psychiatric Association have issued a joint statement describing how the principles of Roper v. Simmons, 543 U.S. 551 (2005) (exempting persons under 18 from execution) and Atkins v. Virginia, 536 U.S. 304 (2002) (exempting mentally retarded persons from execution) should be extended to cover the mentally ill. Although this has gotten a fair amount of attention in the law reviews it has not been extensively analyzed in the courts. You might want to weigh in on the appropriateness of such an exemption and how one might be defined if recognized. In this regard you may wish to consider what the effects may be of the adoption by the American Psychiatric Association at the end of 2012 of a revision of its diagnostic manual in the so-called DSM-5.

9. For a variety of reasons, including but not limited to Harbison v. Bell, 129 S.Ct. 1481 (2009) and Ohio Adult Parole Authority v. Woodard, 523 U.S. 272 (1998), there has been an

upsurge of interest in clemency, with a view towards strengthening it both substantively and procedurally as a tool for increasing the fairness of the capital punishment system in individual cases and overall. You might consider how or whether, this could or should be done.

10. As the overall architect of the litigation/legislative/ political struggle against or in favor of the death penalty over the next five years what is your strategy and its rationale? If that seems like too big a topic you might want to confine your discussion to some specific jurisdiction. You might want to take a look at the 2014 annual report of the Death Penalty Information Center on the TWEN site. Is there anything you could learn from experience in England, Canada, and/or South Africa?

11. Browsing through CB Chapter 13 might lead you to want to consider whether all or some of the United States' practices with respect to the death penalty violate international law, and what remedies in domestic or international tribunals might or might not be available.

12. There is an ongoing debate, which you might wish to join, as to whether the Eighth Amendment entitles a prisoner to relief from his death sentence because the state has taken too long to carry it out. If such a claim were recognized, what would its contours be? See Johnson v. Bredsen, 130 S.Ct. 541 (2009); Thompson v. McNeil, 129 S.Ct. 1580 (2009); Knight v. Florida, 102 S.Ct. 459 (1999); Lackey v. Texas, 514 U.S. 1045 (1995).

13. As you know there has been a lot of attention given in recent years to the issues surrounding capital prisoners who could potentially be exonerated through DNA testing. Various federal and state statutes have been introduced to address this problem. You might wish to analyze these, or come up with preferable legislative or judicial solutions.

14. The death penalty has been repealed in six states in the last six years and more are on the horizon. (For the current status see <http://www.deathpenaltyinfo.org/>). A number of those states have had to grapple with transitional issues because the repeal was prospective only. What is/should be the legal situation of (a) people already under sentence of death on the date of repeal and (b) people who committed their crimes before repeal but have not yet been tried?

15. There is a good deal of information on a number of the foregoing subjects as well as others at <http://www.deathpenaltyinfo.org/> and it might be worth a look as you consider a topic. I also remind you of the note in the Syllabus regarding AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT (Acker et al. eds. 3d ed. 2014) (on reserve). This is an anthology of essays on many of the themes that we will touch on in class, and that you may want to explore further in papers. Almost every author is a leading authority on his or her subject, and the pieces are documented in a way that should give you good leads to start your research. Accordingly, I would recommend that you browse the table of contents at an early point. A somewhat more advanced resource for the same purpose is THE FUTURE OF AMERICA'S DEATH PENALTY (Lanier et al. eds. 2009) (on reserve).

16. The official diagnostic manual of the American Psychiatric Association, known as the DSM, was released in a new edition, the DSM 5 in the spring of 2013. It was extremely

controversial throughout its development and has remained so, see <https://www.nytimes.com/2013/05/02/books/greenbergs-book-of-woe-and-frances-saving-normal.html?ref=books&r=0>.

What are the implications of the revision for capital defendants?

17. I suggested in *Enforcing the ABA Guidelines in Capital State Post-Conviction Proceedings After Martinez and Pinholster*, 41 Hofstra. L.R. 591 (2013) (on the TWEN site) that Martinez v. Ryan, 132 S. Ct. 1309 (2012) could appropriately be expanded in a number of directions. Judicial reaction has so far been tepid. You might wish to contribute to this discussion.

E.M.F.