

SYLLABUS -- Part 1

Communications

My office is in room 212, ext. 35167, Eric.M.Freedman@Hofstra.edu. My assistant, Joyce Cox, Joyce.A.Cox@Hofstra.edu, x36339, sits at the far back of Room 216. You will find her helpful on all administrative matters relating to the course and are encouraged to contact her in the first instance regarding them. I sometimes hand out course materials and announcements during class session; she will be able to provide extra copies if you need them. She is also closely aware of my schedule, including the best way to contact me at any particular time, so you should make appointments through her.

You may generally expect to find me in my office on Wednesdays 9:10 AM – 10:00 AM, the hour immediately before our Wednesday class.

I have created a page for this course on the TWEN service. Please register for it as promptly as possible. Go to Lawschool.Westlaw.com, click on TWEN, choose Drop/Add Course, and pick this course. Once you have registered, you will have access to syllabi, course materials, and announcements, as well as the ability to have discussions with other class members. (I will monitor these as a matter of interest, but not feel any strong obligation to intervene).

You are responsible for the contents of notifications distributed by any of the foregoing methods, as well as the information contained in this and subsequent parts of the course syllabus.

Attendance Policy

I will provide sign-in sheets for each regularly-scheduled class hour, which will be the dispositive evidence of your attendance. Each student is responsible for being present at the time class begins and for signing in. Any attempt to subvert the accurate recording of student attendance during each class hour, by falsification of the sign-in sheets or otherwise, is a violation of the Code of Academic Conduct.

You may miss no more than six class hours this semester.

Accommodations may be made for students who must be absent for religious reasons and in cases of truly compelling hardship. In the event that you believe yourself to be in such circumstances, you should communicate with Joyce. I will do nothing respecting these issues until late in the semester. At that point I will review the file of anyone with more than the prescribed number of absences and determine whether to grant any excuses that may have been sought or instead to forward the file to the Office of Student Affairs with a view to denying you credit for the course.

Grading

Detailed information about course policies concerning papers and the examination option is being distributed separately in a handout entitled "Important Administrative Information Concerning Course Schedules and Requirements." In substance, the process for paper-writing will involve the submission of an outline, consultation with me, submission of a rough draft, and further consultation with me. The exam will be take-home, and require you to write a substantial essay showing your mastery of several of the topic areas covered by the course.

Papers submitted in this course are eligible for Writing Requirement I.¹ I place substantial weight on diligent preparation and participation in class discussion, and reserve the right to reflect this policy in grading.

Course Readings

The casebook is Rivkind & Shatz, Cases and Materials on the Death Penalty (3d ed., 2009). But if you only read what is in the casebook, you are not doing enough.

Almost all the assigned cases as edited by me are posted on TWEN and should be your primary resource; in a few cases they are not there and you need to go to the reporter. The versions in the casebook almost invariably preserve less of the original than I want you to know. (In class I will switch freely back and forth between the casebook and TWEN versions). Of course, you need to use the TWEN versions for cases that are not in the casebook, and I certainly have no objection to your reading the full reports. In addition, you may find it instructive to look into the complete case record in the library at [U.S. Supreme Court Records and Briefs, 1832-1978](#), at the briefs on Westlaw for more recent cases, at the cases mentioned in my notes, or additional sources.

¹ 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.

My notes in the syllabus below are designed to help you by guiding your thinking; pause over them -- in many cases they raise deeper questions than they seem to at first.

The cross-references noted are for your benefit; defense lawyers like to view problems in this field holistically, while prosecutors prefer looking at them atomistically. You should be able to do both, and understand what difference it makes.

As a resource, you should use 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. Another, somewhat more advanced, resource for the same purpose is THE FUTURE OF AMERICA'S DEATH PENALTY (Lanier et al. eds. 2009) (on reserve).

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 19² - 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.

²Holiday schedule in effect. No school Monday. We meet on Tuesday, January 20, a legislative Monday.

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.

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.

Assignments

I. The Bad Old Days -- Or Were They?

Note: The readings in the first two units are the most important in the course, since all of modern death penalty law derives from these two groups of cases. Our principal concern during this period will be defining what was wrong with the death penalty system prior to Furman and suggesting ways to fix it.

All readings are available on TWEN unless otherwise noted. Be sure to check the two folders entitled Assigned Cases, as well as the main course materials page.

A.

Powell v. Alabama, 287 U.S. 45 (1932) (Course Book 28)
 Freedman, Earl Washington's Ordeal, 29 Hofstra L. Rev. 1089 (2001)

Notes: The threads that connect these cases constitute a number of persisting themes in the course. See how many you can identify before class.

The Scottsboro case (which underlies Powell) was a major event in American history, and has been the subject of a good deal of work, including Goodman, *STORIES OF SCOTTSBORO* (1994) (on reserve) and *Scottsboro: An American Tragedy* (PBS Video 2001)(on reserve). The Washington case is also the subject of MARGARET EDDS, *AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON, JR.* (2003, with an updated paperback edition) (on reserve)

B.

Furman v. Georgia, 408 U.S. 238 (1972) (Course Book 46)
Pizza Pie Chart (posted on TWEN)

II. Modernizing (and Improving?) the System

Note: On the basis of the cases listed below, we will spend our time in class attempting to fix legislatively the problems we identified last week.

Gregg v. Georgia, 428 U.S. 153 (1976) (Course Book 76)
Proffitt v. Florida, 428 U.S. 242 (1976) (Course Book 92)
Woodson v. North Carolina, 428 U.S. 280 (1976) (Course Book 93)
Roberts v. Louisiana, 428 U.S. 325 (1976)(Course Book 102)
Jurek v. Texas, 428 U.S. 262 (1976) (Course Book 103)
2013stats.pdf article on TWEN

Notes: Of the cases in this assignment, Jurek has proven to be the most vexing to the courts. Why? Jurek himself, by the way is very much alive. See Jurek v. Estelle 623 F.2d 929 (5th Cir. 1980).

Obviously, you should be asking yourself what you know now that you didn't know before with respect to the elements of a constitutionally acceptable death penalty statute. Beyond that, you should try your hand at predicting the problem areas that will arise out of this set of cases. More practically, since a large number of the cases we will be reading in the rest of the course come out of these states it would be helpful to you to have some idea of the structure of their systems. You might find useful the commentary on these cases in Black, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* 111-34, 135-56 (2nd ed. 1981). And, as a relief from all this law, you might enjoy the account of Furman and Gregg in Woodward & Armstrong, *THE BRETHERN* 204-20, 430-42 (1979). Both of these books are on reserve.

III. Exemptions From Execution

Note: At the end of our class hour coverage of this unit we will be viewing a videotape of oral argument in a case called Copeland. An introductory handout to the tape is posted on the TWEN site and you should read it before that class.

A. The Crime

Coker v. Georgia, 433 U.S. 584 (1977) (Course Book 241)
Kennedy v. Louisiana, 128 S.Ct 2641 (2008) (Course Book 291)

B. Mens Rea

Enmund v. Florida, 458 U.S. 782 (1982) (Course Book 240)
Tison v. Arizona, 481 U.S. 137 (1987) (Course Book 246)

C. The Criminal

1. Age

Thompson v. Oklahoma, 487 U.S. 815 (1988)
Stanford v. Kentucky, 492 U.S. 361 (1989)

Note: The same petitioner asserted the same claim in Stanford v Kentucky, 123 S.Ct. 472, 475 (2002) and lost on a 5-4 vote. The following year, the Governor of Kentucky commuted his sentence to life imprisonment because he had been 17 at the time of his crime. What do we learn from this?

Roper v. Simmons, 543 U.S. 551(2005)(Course Book 276)
Miller v. Alabama, 132 S.Ct. 2455 (2012)

2. Mental Condition

Ford v. Wainwright, 477 U.S. 399 (1986) (Course Book 806).

Note: This case raises a serious question of medical ethics. What is it?
Panetti v. Quarterman, 551 U.S. 930 (2007)(Course Book 820-33)
Atkins v. Virginia, 536 U.S. 304 (2002) (Course Book 258)
Hall v. Florida, 134 S.Ct. 1986 (2014) (Edited version on TWEN site).

Note: the most immediate effect of this case was to set off a debate, whose significance you will see later on in the course, over whether it was an implementation of Atkins or an expansion of it.

ABA Resolution 122.A - proposed policy on capital punishment and mental illness (on TWEN site)

Notes: Very different conceptions of the Eighth Amendment, and the role of the courts in its enforcement, underlie the opinions in the cases in this Unit. As an exercise, try to state and evaluate the various analyses that would be applied to the question of whether it is unconstitutional to execute someone who was 100 years old at the time of his crime.

IV. The Capital Jury

A. Selecting the Jury

Witherspoon v. Illinois, 391 U.S. 510 (1968) (Course Book 329)

Adams v. Texas, 448 U.S. 38 (1980)

Wainwright v. Witt, 469 U.S. 412 (1985)

Lockhart v. McCree, 476 U.S. 162 (1986) (Course Book 348)

Liptak, "Court Ruling Expected to Spur Convictions in Capital Cases," 2007 WLNR 10753800, 6/9/07 N.Y. Times A1

Turner v. Murray, 476 U.S. 28 (1986) (Course Book 358)

Morgan v. Illinois, 504 U.S. 719 (1992) (Course Book 348)

Miller-el v. Dretke, 545 U.S. 231 (2005) (Course Book 366-83)

B. Influencing the Jury

1. Guilt

Beck v. Alabama, 447 U.S. 625 (1980)

Note: The Supreme Court's latest foray into this field is Hopkins v. Reeves, 524 U.S. 88 (1998). If you were working to expand the death penalty, this case might inspire you with several creative ideas. Can you think of them?

2. Sentencing

Caldwell v. Mississippi, 472 U.S. 320 (1985) (Course Book 623)

Note: As the opinion indicates, a related claim was before the Court in California v. Ramos, 463 U.S. 992 (1983) (Course Book 615). Do these cases lead to the conclusion of Dugger v. Adams, 109 S.Ct. 1211 (1989) that an Eighth Amendment violation occurs only when the comments inaccurately portray state law? You might want to review this question after completing Assignment VII, as a way of reminding yourself of the intimacy of the connection between procedure and substance in death penalty litigation.

Simmons v. South Carolina, 512 U.S. 154 (1994)(Course Book 631).

Note: As Course Book 640 n.4 suggests this is an active area of litigation and it is reasonably clear that there are four, but not five, votes on the Supreme Court for the proposition that Simmons is violated if the judge refuses to inform a capital jury that the alternative punishment is a thirty-five year prison sentence. What is the right answer? Does it make a difference if the same state has jury sentencing in non-capital cases, and requires that juries in those cases be instructed on parole eligibility? See Brown v. Texas, 522 U.S. 940 (1997).

C. The Jury as Sentencer

Bullington v. Missouri, 451 U.S. 430 (1981) (Course Book 506) (Read on site)

Note: The Supreme Court held in Monge v. California, 118 S. Ct. 2246 (1998) that Bullington did not apply to formal sentencing hearings conducted in non-capital cases. Capital defense lawyers were pleased with this opinion. Why?

n.1. Spaziano v. Florida, 468 U.S. 447 (1984) (Course Book 514). Don't miss CB 525

Cabana v. Bullock, 474 U.S. 376 (1986)

Note: Does this case survive Ring v. Arizona below?

Mills v. Maryland, 486 U.S. 367 (1988)

Note: There are two holdings here. One of them applies primarily to Maryland and North Carolina, caused no controversy on the Court, and is of little practical importance; the other is cited by the defense in a very high proportion of death cases. You should be able to articulate each.

Ring v. Arizona, 536 U.S. 584 (2002)(Course Book 526)

Kamin & Marceau, The Facts About Ring v. Arizona and the Jury's Role in Capital Sentencing, 13 U. Pa. J. Const. L. 529 (2011)) (on TWEN site).