



## **DEATH PENALTY IN AMERICA: LAW, HISTORY, AND POLICY COURSE SYLLABUS**

**Professor Akin Adepaju**

**Summer Semester 2023**

### **Course Description**

The death penalty has been part of the American legal system since the founding of the British colonies. This course examines the legal, social, and moral implications of capital punishment in America, focusing particularly on Supreme Court decisions since the early 1970s. Main themes of the course will include: the right to, and role of counsel; jury selection; the allocation of decision-making authority between judges and juries; the role of aggravating and mitigating factors; efforts to limit the arbitrary and racially discriminatory application of the death penalty; and the rules governing juveniles and the intellectually disabled. While legal analysis is the major focus, some attention is given to empirical analyses of the practice and philosophical examinations of its wisdom. All views on capital punishment are welcome. Understanding the law and engaging in proper analysis is the only benchmark of success in this course.

### **Required Course Text**

*Cases and Materials on the Death Penalty* by Nina Rivkind & Steven Shatz (West Academic Publishing, Fourth Edition, 2016; ISBN-13: 978-1634590419).

Other materials, including news articles, speakers, and videos may be assigned to offer a more practical view of capital litigation.

### **Consultation**

Students should feel free to consult with me via e-mail (AkinAdepaju1@gmail.com), phone, videoconference, or in person. Simply put, never hesitate to reach out.

It is an honor to be involved in your education and I look forward to personally interacting with you!

## Course Objectives and Student Learning Expectations

1. Students will understand the modern death penalty in the United States, and be able to spot, analyze, and evaluate criminal law issues in given fact patterns.
2. Students will be able to analyze and evaluate the legal requirements (substantive and procedural) for imposition of the death penalty in the United States.
3. Students will articulate cogent legal issues; write objective and persuasive analysis and be able to engage in other skills exercise.
4. Students will be able to evaluate a fact pattern to determine whether the legal requirements (substantive and procedural) for imposition of the death penalty in the United States have been met.
5. Students will further develop and display effective written and oral communication skills by debating alternating positions.

The reading material consists of Supreme Court opinions. These can be very challenging to read and digest. There are problems within the reading assignments. Students are expected to think and prepare answers to the problems for class. Time will also be given in class for students to discuss the proposed solutions in small groups and with the entire class.

## Attendance and Participation

Students are expected to be on time for all class meetings. Attendance will be taken at each class meeting. A student who fails to meet the Law School's attendance requirement for this course may be administratively withdrawn from this course. Unexcused absences will have a negative impact on your grade. Please email me *before* class if you must leave class early. If you are unprepared for class, please email me by noon on the day of class.

Punctual, regular attendance and thoughtful class participation are not only required, but are critical to your success in this class, as well as your success on the Bar exam, and as a lawyer. Good class participation distinguishes itself not by its quantity, but by its insightful and timely contribution to advancing the class discussion over the course of the semester.

I look forward to teaching and learning with, and from all of you.

## **Professionalism**

We will often discuss difficult and challenging topics in this class, as the legal system, by its very nature, grapples with societal and interpersonal conflict in some of its most troubling manifestations. Death penalty issues can be emotional so expect disagreeable discussions. Yet, always remain mindful of the diversity of perspectives and experiences in our class and respectful as you articulate your arguments. Please listen respectfully to others and feel free to express your thoughts.

This course will focus on the law regarding the death penalty but there may be disagreements over policy. It is possible that you or your colleagues, or people close to you, have had experiences that directly relate to topics we will discuss in class—including perhaps having been stopped or questioned by the police, or having been the victim of a crime. Your experiences will, of course, inform your perspectives on the topics we discuss. Your comments in class, however, should not directly recount those experiences.

For instance, rather than frame a class comment by saying, “My friend was falsely accused of assaulting someone, and I don’t think the Court gave enough weight to...” Or to say, “As a Black man, I think the police should...,” consider expressing the substance of your views stripped of the personal narrative. Perhaps, “Some people are falsely accused, and I think it is important for the court to consider...” or “I think race and ethnicity factor into these interactions by...”).

This policy is designed to foster full and open communication, which is often difficult to maintain if discussion shifts from the merits of the laws, policies, and problems we will discuss, to the merits of individual classmates’ personal reactions to events in their own lives—reactions that are often difficult to debate or contest.

Should you feel our classroom interactions do not reflect an environment of civility and respect, I encourage you to reach out directly to me. I welcome your feedback.

## **Course Grade and Final Examination**

Your grade will be based on your class participation and any assignment given (which may include a quiz), and a final exam. Please timely notify the Dean of Students of any conflict so you can be properly accommodated.

Professor Adepoju will discuss his expectations about the final examination during several class sessions. The final examination will likely consist of short answers and essay questions.

The weight assigned to each part of the class is as follows:

<b>Assignment</b>	<b>Percent of Grade</b>
Class participation, exercises, and quiz	30%
Final examination	70%
Total	100%

### **Course Schedule**

This class normally meets on Mondays and Wednesdays, 6 – 7:50 p.m. Students are expected to have studied the assignment thoroughly before each class and attend class prepared to discuss the readings and concepts. The syllabus is designed to accommodate the pace and dynamics of our discussions. Subject to external contingencies and the vagaries of coverage, class topics and readings assignments are as listed:

1. May 22, 2023

#### **INTRODUCTION: WHY THE DEATH PENALTY?**

Chapter 1: Introduction: pages 10-20  
*Powell v. Alabama*, 32-40

This class session will provide a course overview, discussion of the syllabus, arguments on the purpose of the death penalty, whether the United States should have a death penalty, and review material on the legal history of the death penalty leading up to the two landmark death penalty decisions of the Supreme Court in the 1970s ushering in the modern death penalty.

2. May 24, 2023

#### **SUPREME COURT'S SEMINAL CASES**

*Furman v. Georgia*, pg. 56-87  
*Gregg v. Georgia*, pg. 87-104  
*Woodson v. North Carolina*, pg. 106-115

This class session will review the Supreme Court's struggle over the constitutionality of the death penalty particularly in *Furman v. Georgia* and *Gregg v. Georgia*. Students must be prepared to present the Court's several rationale and death penalty jurisprudence in the modern era. The holding in *Jurek v. Texas* will be discussed.

**MAY 29, 2023: MEMORIAL DAY HOLIDAY (NO CLASS)**

3. May 31, 2023

**LIMITING RISK OF ARBITRARINESS**

*Zant v. Stephens*, 138-151

*Lowenfeld v. Phelps*, 156-162

*Godfrey v. Georgia*, 163-170

One of the holdings of the *Furman* case, as understood by the Court in *Gregg* and subsequent cases, was that, to satisfy the Eighth Amendment, a death penalty scheme had to limit the risk of arbitrary application. This class session will surround the jurisprudence that has developed to limit the risk of arbitrariness in the application of the death penalty.

4. June 5, 2023

**LIMITING RISK OF ARBITRARINESS (PART II)**

*Arave v. Creech*, 170-182

*McCleskey v. Kemp*, 201-217

■ Notes, 217-220

The intersection of race and capital punishment has posed a profound challenge for the American legal system. Studies going back to the early twentieth century establish that minorities, particularly African-Americans, have been sentenced to death in numbers disproportionate to their conviction of capital crimes. When the race of the victim is considered, the disparities in sentencing have been substantial.

In *Furman v. Georgia* and its two companion cases, the defendants were black, and Justices Douglas (408 U.S. at 249–53) and Marshall (408 U.S. at 363–65) cited the incidence of racial discrimination as support for finding the

death penalty unconstitutional. Justice Powell, in dissent, conceded that racial discrimination had been a factor in the past, but he argued both that there was insufficient evidence that it continued to affect capital sentencing and that, in any case, the issue should be analyzed under the Equal Protection Clause rather than under the Eighth Amendment (408 U.S. at 449–50). In *McCleskey v. Kemp*, the Court addresses the core question of race and the death penalty when it considers a black defendant’s Equal Protection and Eighth Amendment challenge to his death sentence, a challenge supported by an extensive empirical study of one state’s administration of the death penalty.

This class session will focus on race and the Supreme Court’s jurisprudence regarding the use of statistical analysis to demonstrate “racially disproportionate impact” and “racially discriminatory purpose.” Students should be prepared to discuss how the Court addresses the core question of race and the death penalty when it considers a black defendant’s Equal Protection and Eighth Amendment challenge to his death sentence, a challenge supported by an extensive empirical study of one state’s administration of the death penalty.

5. June 7, 2023

## **INDIVIDUALIZED PENALTY DETERMINATION**

*Lockett v. Ohio*, 221-229

*Eddings v. Oklahoma*, 229-235

■ Note 235-236

In *Woodson v. North Carolina* and *Roberts v. Louisiana*, the Court held unconstitutional mandatory death penalty statutes because they failed “to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant.” Thus, the defendant must be permitted to present mitigation evidence.

This class session will focus on the question of what extent the state may guide or limit the sentencer’s consideration of such mitigation evidence.

6. June 12, 2023

## PROPORTIONALITY

*Coker v. Georgia*, 268-273

*Tison v. Arizona*, 273-286

■ *Problems 5-1 and 5-2*, 287

[\*Kennedy v. Louisiana\*](#), 334-357

After holding in *Gregg v. Georgia* that the death penalty was not, in all cases, a disproportionate punishment for murder, the Court has addressed several proportionality challenges to particular applications of the death penalty. This class session will be centered on challenges to the death penalty as disproportionate based on the nature of the offense or objective traits that arguably makes the individual less culpable.

7. June 14, 2023

## PROPORTIONALITY (PART II)

*Atkins v. Virginia*, 287-303

■ *Problem 5-3*, pg. 303

*Hall v. Florida*, 304-316 (***not required reading***)

*Roper v. Simmons*, 317-333

This class session will continue our discussion on proportionality based on the objective traits that arguably makes the individual less culpable. Additionally, federal law now authorizes the death penalty for a wide range of homicides, including several categories of unintentional killings. In addition, federal law authorizes the death penalty for four categories of non-homicidal crimes: treason (18 U.S.C. § 2381); espionage (18 U.S.C. § 794); drug trafficking in large amounts (18 U.S.C. § 3591(b)(1)); and attempted murder of a public officer, juror or witness by a major drug trafficker (18 U.S.C. § 3591(b)(2)). Would the death penalty be constitutional for any of these nonhomicidal crimes?

**JUNE 19, 2023: JUNETEENTH HOLIDAY (NO CLASS)**

8. June 21, 2023

**LITIGATION: CLIENT AND DEFENSE COUNSEL**

*Godinez v. Moran*, 375-383  
*Strickland v. Washington*, 387-399  
*Wiggins v. Smith*, 399-415  
*Rompilla v. Beard*, 415-425

This class session will focus on the respective roles of the parties in capital cases, with particular focus on client (defendant) and their counsel in a capital case. Discussions will include clients who decide(d) not to resist execution to claims of ineffective assistance of counsel at trial.

9. June 26, 2023

**LITIGATION: CLIENT AND DEFENSE COUNSEL**

*Wiggins v. Smith*, 399-415  
*Rompilla v. Beard*, 415-425.

This class session will focus on the standards and norms set for criminal defense attorneys in capital cases and the analysis to determine ineffective assistance of counsel.

10. June 28, 2023

**THE PROSECUTOR: MISCONDUCT & DISCRETION**

*Kyles v. Whitley*, 471-488  
*Darden v. Wainwright*, 491-500  
*Jacobs v. Scott*, 502-504

Most prosecutorial misconduct claims concern either the prosecutor's failure to disclose evidence to the defense prior to trial or the prosecutor's conduct during the trial. *Brady v. Maryland*, 373 U.S. 83 (1963) is the leading case in the former category. This class session will discuss prosecutorial discretion and misconduct in capital cases.

11. July 3, 2023

## **RACE AND “JURY SELECTION”**

*Witherspoon v. Illinois*, 510-514

*Turner v. Murray*, 541-550

*Miller-El v. Dretke*, 550-567 (including note on *Snyder v. Louisiana*)

*Philadelphia District Attorney’s Office* [training video](#)

- Locate video on Youtube

This class session will focus on death qualification in capital cases and the issues surrounding race and jury selection. Should potential jurors who have expressed feelings against the death penalty be removed for cause based on their death penalty views? Does jurors’ race matter? Empirical studies of decision-making by mock and actual jurors have attempted to determine whether, and how, jurors’ race affects penalty decisions in capital cases.

12. July 5, 2023

## **THE PENALTY HEARING**

*Green v. Georgia*, pp. 607-609

*Barefoot v. Estelle*, pp. 609-624

This class session addresses the constitutional procedural rights guaranteed to the defendant at the penalty hearing. To what extent do the rights applicable at the guilt phase apply in the penalty hearing? Are there any constitutional limits on the application of state evidence rules at the penalty hearing?

13. July 10, 2023

## **THE DEATH PENALTY RECONSIDERED**

*Minister of Justice v. Burns*, pp. 1010-1018

*Domestic Perspective: Victims’ Families, Prison Officials, and Reformers*, pp. 1024-1034

This class session will take a step back from the details of the Supreme Court’s regulation of the death penalty and to have a more informed and more nuanced discussion of some of the issues we raised since the first week. Students will have the benefit of several perspectives from which to analyze the death penalty in the United States. First, we look at the death penalty from the international

perspective and note how differently other countries and international organizations view the death penalty. Then we look at the death penalty from the perspectives victims' families, prison officials and reformers who have studied the death penalty in operation.

14. July 12, 2023

### **CONCLUSION AND COURSE/EXAM REVIEW**

This class session is for the students to ask any questions they have about the course, the final exam, the practice of law, and all things related.

### **FINAL EXAMINATION**