

Death Penalty in America: Law, History and Policy (Law 138)

Summer 2021

Dennis M. Fitzpatrick

Syllabus

Class Schedule:

Class meets Online Mondays and Wednesdays from 8:00 to 9:50 p.m.

Contact Information and Availability:

I will announce my contact information on the first day of class. Do not hesitate to contact me with any class-related questions, concerns or with requests to schedule a meeting. Please be mindful that my work schedule is often unpredictable. It may take me several hours or even overnight to return a call or email, but I always return calls or emails.

Required Course Materials, Objectives, and Assignments:

Nina Rivkind, Steven F. Shatz, Sam Kamin & Justin Marceau, *Cases and Materials on the Death Penalty*, Fourth Ed. (2016)(cited as Rivkind Shatz).

I will supplement the casebook with outside materials, which will be made available to you with sufficient advance notice and other disclaimers, if applicable (*i.e.*, not mandatory but for informational purposes only). The assignments may be adjusted from time to time given the pace of the course, and in consideration of certain subjects or topics that require more attention or less attention, as the case may be. The core objective of this course is to address the history of the death penalty punishment in America and the evolution of the legal framework for addressing the death penalty. However, the subject matter necessarily touches upon larger issues of justice and the relationship of between law and morality, if any. Accordingly, class discussion periods will take on these issues and unique discussion topics will be raised in an effort to find the answers to difficult questions: What is justice? Can we “process” our way to justice? Are some issues beyond the reach of justice?

Further information about the expectations for reading assignments will be provided during the first class.

Classroom Participation and Attendance:

Classroom participation is part of the course requirements. As this class covers very thought provoking subject matter, I want to place more emphasis on class participation. Naturally, the purpose of class participation is never to cause embarrassment and I'll never do that. However, class participation is beneficial to everyone and helps everyone "think like a lawyer." Everyone should get in the habit of reciting facts, applying the facts to the law, and arriving at a plausible analysis. This is a skill you will continue to develop for the remainder of your career.

Class attendance is obviously important and will be monitored. If you fail to attend class with some frequency without sufficient explanation, you may be precluded from taking the final exam.

Internet, Phone and Recording Policies:

Unauthorized use of the internet in any form is prohibited during class. Also, please "silent" or turn off your phones during class – "texting" or any other phone use is prohibited during class. Recording of the class in any way is prohibited.

Grading and Final Exam:

The exam period for the Summer session is Thursday-Friday, July 8-9, 2021. My inclination is to offer a take home exam with a page limit for your response – when this course was last offered the page limit was 12 pages, which seems reasonable. However, we will discuss the course requirements during the first class and I'll confirm the class requirements during the first week.

CLASS ASSIGNMENTS:

1. 05/17/2021 INTRODUCTION

DISCUSSION

- *Lawmakers Vote to Make Virginia First Southern State to Abolish Death Penalty, Washington Post, February 22, 2021.*
- *Murder Convict is 1st Death Row Inmate Resentenced to Life, AP June 15, 2016 (Notorious Connecticut Triple Murder where Connecticut legislature abolished the death penalty after these convictions were imposed.)*
- *Opinion: I Support the Death Penalty, But an Innocent Man is on Death Row, Bill Baxley, Washington Post, March 10, 2021*

- *Opinion: Why Capital Punishment is Finally Coming to an End*, George Will, Washington Post, April 23, 2021
- **Can the Death Penalty Achieve Justice?**

TEXTBOOK

- Rivkind Shatz pps. 1-40

2. 05/19/2021 INTRODUCTION AND SEMINAL CASES

DISCUSSION

- *Oklahoma Man Released Early From Prison Accused in 3 deaths*, Washington Post/AP, February 24, 2021
- *Oklahoma Man Accused of Triple Murder Confessed to Killing Neighbor and Cooking Her Heart “With Potatoes,” Investigators Say*, Washington Post, February 24, 2021
- *Study: 1 in 7 U.S. prisoners are Serving a Life Sentence*
- *Supreme Court Will Consider Restoring the Boston Marathon Bomber’s Death Sentence*, Washington Post, March 22, 2021

TEXTBOOK

- Rivkind Shatz pps. 41-53; 55-86

3. 05/24/2021 SEMINAL CASES

DISCUSSION

- **What is justice? Can the law guarantee a moral result?**
 - The Runaway Trolley
 - The Afghan Goatherds
 - Both excerpted from *Justice: What’s the Right Thing to Do?* Sandel (2009).

TEXTBOOK

- Rivkind Shatz pps. 87-122

4. 05/26/2021 CONSTITUTION AND DEATH PENALTY SCHEMES

DISCUSSION

- *Loose The Fateful Lightning*, Rivkind Shatz pps. 122-134

TEXBOOK

- Rivkind Shatz pps. 137-183 (limiting the risk of arbitrariness)

5. 06/02/2021 CONSTITUTION AND DEATH PENALTY SCHEMES

DISCUSSION

- How do political leaders (or constitutional office holders, if you prefer) address the death penalty?
- In class discussion exercise.

TEXTBOOK

- Rivkind Shatz pps. 184-220 (limiting the risk of arbitrariness)

6. 06/07/2021 CONSTITUTION AND DEATH PENALTY SCHEMES

DISCUSSION

- TBD

TEXTBOOK

- Rivkind Shatz pps. 221-265 (individualized penalty determinations)

7. 06/09/2021 CONSTITUTION AND DEATH PENALTY SCHEMES

DISCUSSION

- *Glossip v. Gross*, Rivkind and Shatz pps. 967-1000

TEXTBOOK

- Rivkind Shatz pps. 267-317 (proportionality)

8. 06/14/2021 CONSTITUTION AND DEATH PENALTY SCHEMES

DISCUSSION

- The Death Squad, Rivkind Shatz pps. 360-372

TEXTBOOK

- Rivkind Shatz pps. 317-357 (Proportionality)

9. 06/16/2021 Litigating the capital case (the defendant and defense counsel)

DISCUSSION:

- Professional Responsibility
 - *Mickens v. Taylor*, Rivkind Shatz pps. 442-454
 - The ABA Guidelines, Rivkind Shatz pps. 467-470

TEXTBOOK

- Rivkind Shatz pps. 373-414

10. 06/21/2021 Litigating the Capital Case (the prosecutor)

DISCUSSION:

- Professional Responsibility
 - ABA Model Rule 3.8
 - What is exculpatory evidence in the capital (death penalty) context?

TEXTBOOK

- Rivkind Shatz pps. 471-507

11. 06/23/2021 LITIGATING THE CAPITAL CASE

DISCUSSION

- TBD

TEXTBOOK

- Rivkind Shatz pps. 509-569 (selecting the jury)

12. 06/28/2021 TRIAL AND TRIAL RELATED RIGHTS

DISCUSSION

- TBD

TEXTBOOK

- Rivkind Shatz pps. 571-607 (penalty hearing – procedural requisites)
- Rivkind Shatz pps. 671-741 (Guiding the Sentencer)

13. 06/30/2021 After the Death Judgment AND Death Penalty Reconsidered

DISCUSSION

- Where are we now with the death penalty?
- Where are you now with the death penalty?

TEXTBOOK

- Rivkind Shatz pps. 929-967 (execution)
- Rivkind Shatz pps. 1009-1034 (perspectives on the death penalty)

14. 07/06/2021 Class Review

DISCUSSION

- TBD