

**The Death Penalty**  
**Social and Historical Perspectives**  
(L06.3577)

Spring 2006  
Wednesdays 2-4 pm

Furman 310

Professor David Garland

This aim of this seminar is to develop an in-depth analysis of the institution of capital punishment and to address a series of questions to which it gives rise. Using historical research and sociological theory, the seminar will explore how the forms, functions and social meanings of capital punishment have changed over time, and what social forces have driven these changes. The class will focus primarily upon the modern American death penalty, and the specific characteristics of the institution that has taken shape in the post-Furman era.

*(NB. This class is intended to complement the course on “Capital Punishment Law and Litigation” taught by Professor Stevenson. Students wishing to obtain training in death penalty advocacy ought to take that class rather than this one. The primary focus of this seminar is on the institution, its social causes, and its consequences, rather than on the details of case law, legal doctrine or legal procedure.)*

Requirements. Students are required to attend all classes, do all of the reading each week, and come prepared to take an active part in class discussions.

Reports of the seminar discussion. Each week an individual student will be responsible for noting the main points of the classroom discussion and preparing a two-page typed memo, copies of which will be distributed to students prior to the following week’s class.

Assessment will be by a term paper (which can count for the Part B writing requirement) or else a Part A research paper. The professor’s assessment of a student’s class participation throughout the semester will be used to modify grades in borderline cases.

Part A papers: Any student considering doing a Part A paper should discuss this with Professor Garland **by 31<sup>st</sup> January at the latest.**

Office hours By appointment. Contact Prof. Garland at [David.Garland@nyu.edu](mailto:David.Garland@nyu.edu)

Credits: The course counts for 2 credits, or for 3 if assessed by means of a Part A paper.

**Books to purchase:**

*The following books are recommended for purchase. Bedau should be read as a background source book for the seminar as a whole. It provides an overview of the issues and a sampling of the capital punishment literature. Banner's book provides an excellent historical overview and will be the subject of two classes. Garland's book is a general introduction to sociological theories of punishment and penal history. Like Bedau it should be read as background and source book. All three books should be available in the Professional Bookstore.*

Stuart Banner, The Death Penalty: An American History (Harvard University Press)

Hugo A. Bedau, The Death Penalty in America (Oxford University Press)

David Garland, Punishment and Modern Society (University of Chicago Press).

*Other assigned books and articles will be on reserve in the Law Library and also available from Prof. Garland's assistant, Janelle Pitterson in Room 322 Vanderbilt Hall*

**For current events and information, see generally:**

The Death Penalty Information Center website:

<http://www.deathpenaltyinfo.org>

Amnesty International "Website Against the Death Penalty":

<http://www.web.amnesty.org>

For information and viewpoints supporting capital punishment, see

<http://www.prodeathpenalty.com/>

**Readings**

All students must read all of the week's assigned readings in advance of the class and be able to discuss them in class. Anyone who is unable to do the readings for a particular class should notify Prof. Garland in advance.

If the readings are not drawn from the Bedau, Banner or Garland books named above then they will be available from Prof. Garland's assistant, Janelle Pitterson, in Room 322.

### Seminar themes

Although much of our reading will be historical, the central questions we will address are contemporary, and relate to the institutions of capital punishment as they operate in the USA today. (Michel Foucault, whose work we will read, describes this as a “history of the present.”)

Here are some of these questions. You should familiarize yourself with them, and bear them in mind when doing the reading or preparing for class.

- (i) How have social theorists and historians understood the functions and social meanings of capital punishment? How well do existing theories explain the system of capital punishment in contemporary America?
- (ii) The USA is currently the only western democracy to use capital punishment. How should we understand this distinction? Is it an example of “American Exceptionalism”?
- (iii) Prior to 1972, the USA was in step with the rest of the western world in gradually reducing its reliance upon the death penalty. Since 1976, this trend has been reversed and the annual number of executions is now higher than at any time since the early 1950s. How are we to explain this reversal?
- (iv) Are the developments of the last 30 years a predictable expression of an underlying ‘killing state’ culture, indicative of an essential and abiding feature of American society? Or ought we to see them as a contingent and perhaps temporary response to high levels of violent crime and public fear? As a counterfactual, we might consider whether other western nations would also have begun to execute more offenders if capital punishment were still available to them during the post-1960s crime wave.
- (v) There are currently about 3,500 prisoners on death row, and yet fewer than 100 are executed in any one year. (In 2004 the number executed was 59; in 2005 it was 60.) The average time between sentence and execution is upwards of a decade. How are we to understand this disparity between sentencing and sanctioning? What are the system features that resist and delay executions? Should we see this as institutional ambivalence? (That the death penalty is imposed in only a small number of eligible homicide cases also suggests some such reluctance.) If so, does this ambivalence reflect conflicts within the criminal justice system, or broader social currents and conflicts?
- (vi) How should we make sense of the distinctive geography of the death penalty, with the states that most frequently execute offenders being located overwhelmingly in the south and southwest?
- (vii) The preferred means of execution today is the lethal injection – a quasi-medical procedure that is supposed to minimize pain and suffering. What is the

- significance of this choice of method? What are its advantages when compared to electrocution or gassing or hanging? Why are we reluctant to injure those whom we kill?
- (viii) The criminal justice system insists that killers be held fully responsible for their deeds – and contemporary pro-death discourse emphasizes the importance of taking (or imposing) “responsibility”. But the same system spreads responsibility for imposing the death penalty – between prosecutors, judges, jurors, appeal courts, federal courts and state governors. Criminal justice actors often deny responsibility for their decision by pointing to others who also decide. Similarly, execution protocols take elaborate steps to parcel out tasks among the members of the execution team, and thus diminish their sense of individual responsibility. How should we regard these bureaucratic arrangements and their psychological effects? As necessary checks and balances? As efficient procedures? As denial mechanisms?
  - (ix) How should we make sense of the calculus of aggravation and mitigation that now surrounds its use? Is there a hierarchy of victims (law officers, prison guards, children, etc.)? What makes a murder especially heinous?
  - (x) Public opinion is frequently cited as the primary justification for this institution. What do we know about ‘public opinion’? And what significance should it be accorded? Is it significant that other nations have typically abolished capital punishment in the face of majority public support for retention?
  - (xi) The death penalty appears to have a symbolic significance that is out of proportion to its instrumental effects. In recent years, about 15,000 suspects have been arrested annually for homicide, 150 or so have been sentenced to death, and fewer than 100 have been executed in any one year. Research on marginal deterrence – which compares the deterrent potential of execution compared to life sentences of imprisonment – casts doubt on the instrumental crime-reducing role of capital punishment. And life-without-parole would satisfy the aim of incapacitation. If capital punishment is not primarily an instrumental, crime-control measure, what kind of measure is it? What does it mean to talk about the death penalty as “symbolic”?
  - (xii) If this institution is, in some important sense, a symbolic one, then how is its symbolism conveyed and what do its symbols say? What are the implicit and explicit messages conveyed by the death penalty today? How does the modern death penalty communicate its meanings? Through which media? To which audiences? In what idiom? Via which discourses, statements and images?
  - (xiii) Why does this penal institution command so much attention – compared, for instance, to the 2 million people who are in custody on any given day? What are the sources of this popular resonance, this hyper-significance, when so few people

are directly affected by the threat or reality of capital punishment? Why is death different, at least in this respect?

- (xiv) What are the criminological assumptions that underpin the death penalty today? Is it intended as a measure of deterrence, incapacitation, retribution, victim satisfaction, or what? How do its legitimating narratives compare with those used in the past?
- (xv) What are the cultural commitments with which death penalty support is associated? How does it function in the “culture wars”?
- (xvi) What are the sources of opposition to the death penalty? How is that opposition phrased? What values does it convey? Have these sources, phrasings and values changed over time and if so why?
- (xvii) There is a literature on the criminological effects of the death penalty – discussing deterrence, incapacitation and victim satisfaction. But what are the social, political, and cultural effects of the death penalty? What impact, if any, does the death penalty have upon American society and culture? We have a sense of what the death penalty does for us, as a society. But what does it do to us?

## Reading

### 1. Introduction:

Death Penalty Information Center, The Death Penalty in 2005 End of Year Report (available online at <http://www.deathpenaltyinfo.org> )

### 2. Capital Punishment in Comparative Perspective

Roger Hood, 'Capital Punishment: A Global Perspective' in Punishment & Society vol 3 No 3 (2001) pp. 331-54

D. Greenberg and V. West, 'Siting Capital Punishment Internationally' (unpublished paper)

A. Sarat & C. Boulanger, The Cultural Lives of Capital Punishment Introduction

Joshua Micah Marshall, "Death in Venice: Europe's Death-Penalty Elitism" in The New Republic July 31<sup>st</sup> 2000

### 3. The Law of Capital Punishment

Hugo Bedau, The Death Penalty in America pp. 183-213 and 238-248, excerpts from *Furman v Georgia 1972; Gregg v. Georgia 1976; Woodson v. North Carolina 1976; Coker v. Georgia 1977* and sections on habeas

Welsh S. White, The Death Penalty in the Nineties ch. 1 'The Supreme Court's Role in Administering Capital Punishment' pp. 4-32

Robert Burt, 'Disorder in the Court', Michigan Law Review (1987) pp 1741-1819

Robert Weisberg, 'Deregulating Death', Supreme Court Review (1983) 305-95

### 4. The Practice of Capital Punishment 1

D. Dow, 'How the Death Penalty Really Works' in D. Dow and M. Dow (eds) The Machinery of Death

A. Kosinski and S. Galligher, 'Death: the Ultimate Run-on Sentence', Case Western Reserve Law Review, vol 46 No 1 (1995) pp. 1-32

J. Simon and C. Spaulding, 'Tokens of our Esteem' in A. Sarat (ed) The Killing State pp. 81-116

### 5. The Practice of Capital Punishment 2

J. Liebman, 'The Overproduction of Death' Columbia Law Review (Dec 2000) pp 2031-2156

Stephen Bright, "Counsel for the Poor: The Death Sentence not for the Worst Crime but for the Worst Lawyer", Ch. 22 in Bedau (ed) The Death Penalty in America pp 275-309

Joseph Hoffman, "How American Juries Decide Death Penalty Cases", Ch. 24 in Bedau (ed) The Death Penalty in America pp. 333-342

**6. Death Row and Executions**

Robert Johnson, Death Work chapters 4-7, pp. 92-191.

J. Lofland, 'The Dramaturgy of State Executions' pp. 275-321

David I. Kertzer, "The Power of Rites" in Ritual, Politics and Power pp 1-14

Garry Wills, 'On the dramaturgy of death', New York Review of Books, 21 June 2001

**7. Sociological Perspectives: Durkheim, Marx, ritual and rule**

David Garland, Punishment and Modern Society chs 1-5

Douglas Hay, "Property, Authority and the Criminal Law" in Hay et al, Albion's Fatal Tree pp 17-63

**8. Sociological Perspectives: Foucault, Weber, power and rationalization.**

D. Garland, Punishment and Modern Society chapters 6-8 pp. 131-192

M. Foucault, Discipline and Punish, pp. 3-16 and pp. 47-69

M. Foucault, History of Sexuality vol 1 pp. 135-145

M. Meranze, 'Michel Foucault, the Death Penalty, and the Crisis of Historical Understanding' Historical Reflections 29/2 (Summer 2003) pp 191-209.

**9. Sociological Perspectives: Norbert Elias, culture and sensibility**

D. Garland, Punishment and Modern Society ch.10, pp. 213-247

D. Garland, "A Peculiar Institution: American Capital Punishment and the "Civilizing Process" (unpublished manuscript)

**10. Historical Perspectives: 18<sup>th</sup> and 19<sup>th</sup> Century America**

H. Bedau, The Death Penalty in America pp 3-25

S. Banner, The Death Penalty: An American History chapters 1-5 pp. 1-143.

**11. Historical Perspectives: Lynching in 19<sup>th</sup> and 20<sup>th</sup> Century America**

Leon Litwack, "Hellhounds" in J.Allen et al (eds) Without Sanctuary: Lynching Photography in America pp. 8-37

W. Fitzhugh Brundage, Under Sentence of Death: Lynching in the South pp. 1-20

R. Senechal de la Roche, "The Socio-Genesis of Lynching" in Brundage (ed), Under Sentence of Death pp 48-76

D. Garland, "Penal Excess and Surplus Meaning: Public Torture Lynching in 20<sup>th</sup> Century America", Law & Society Review 39/4 pp. 793-833

**12. Historical Perspectives: 19<sup>th</sup> and 20<sup>th</sup> Century America**

S. Banner, The Death Penalty: An American History chapters 6-10 and Epilogue pp. 144-311

H. Haines, Against Capital Punishment: The Anti-Death Penalty Movement in America 1972-94 Introduction and Ch. 1, pp 3-54.

**13. Race, class, and capital punishment today**

H. Bedau, The Death Penalty in America Part V pp. 249-309 *Excerpts from McCleskey v. Kemp; US GAO report; and S. Bright article, "Counsel for the Poor"*

Sheri Lynn Johnson, 'Race and Capital Punishment' in S. Garvey (ed) Beyond Repair? America's Death Penalty pp. 121-143

Randall Kennedy, Race, Crime and the Law pp. 311-350

**14. Vengeance and Victims**

W. Miller, 'Clint Eastwood and Equity: The Virtues of Revenge' in Sarat and Kearns (eds) Law in the Domains of Culture pp 161-202

A. Sarat, When the State Kills, Ch. 2 'The Return of Revenge: Hearing the Voice of the Victim in Capital Trials' pp. 33-59

John Gardner, "Crime: in Proportion and in Perspective" in Ashworth and Wasik (eds) Fundamentals of Sentencing Theory (1998)