

## Death Penalty in America, Legal Studies 485, Spring 2003

### COURSE GOALS

- Examine the basis of your ideas about the death penalty
- Learn the history of the death penalty in the United States
- Analyze empirical data about the death penalty
- Study U.S. Supreme Court decisions concerning the death penalty
- Consider political and moral arguments about the death penalty
- Develop the reasoning underlying your opinion of the death penalty
- Improve your critical thinking and writing skills
- Increase your web browsing skills

### POLICIES

Class attendance: Because this course requires the active participation of all members, attendance at all classes is expected and required. If you have any absences, excused or unexcused, you must make up the work promptly (no later than 2 weeks). If you fail to make up the class, your final grade will be lowered by 2.5 points for each missed class.

Missed classes: In order to make up a missed class, you must follow these steps:

1. Do all the reading due on the day of the missed class.

2. Review any class notes which may be posted on the course website. If there are no notes posted, contact a member of your group and get his/her notes.
3. Review the small group discussion questions posted on the course website. Write out the answers.
4. After you have read the material for the missed class, reviewed the class notes, and answered the discussion questions, then come and see me during office hours, Wednesday, 1:30 - 4:30, and by appointment.

## REQUIRED COURSE MATERIALS

Available at Jeffrey Amherst College Store, 26 S. Prospect Street, Amherst:

The Death Penalty in America: Current Controversies, Hugo Adam Bedau, ed., New York: Oxford, 1998

Dead Man Walking: An Eyewitness Account of the Death Penalty in the United States, Helen Prejean, New York: Random House, 1994

Available at CopyCat Print Shop (next to Bertucci's)

Course Packet

## ASSESSMENT

Your grade will be determined as follows:

10% Class participation

05% Internet assignments

60% Three review essays (20% each) March 4, April 1, April 29

25% Final essay, due May 19

Class participation. Class participation is based on attendance, evidence of preparation, and participation in small and large group discussion.

Internet assignments. There is an abundance of factual information as well as propaganda about the death penalty on the Internet. Each week, you will explore one or two websites. At the end of each section of the course, you will write a two-page review of the websites. These reviews are due on Feb. 27, March 27, and May 13.

Review essays: The three review essays give you the opportunity to organize and synthesize information on discrete topics that we will be studying in some depth:

Due March 4 “An Overview: Who’s on death row, What does the public want, and Is the death penalty a deterrent?”

Due April 1 “Death Penalty Jurisprudence

Due April 29 “Systemic Problems in the Administration of Justice”

Final essay: The final essay, “Death Penalty in America,” brings together everything you have read, discussed, and thought about over the course of the semester. It is a presentation of your views on the death penalty and the justifications for your position. It is due on May 19.

Assigned readings:

Alabama Code. Title 31A, Chapter 5, Article 2. Death Penalty.

Gallup polls

Furman v. Georgia, 408 U.S. 238 (1972)

Thompson v. Oklahoma, 487 U.S. 815 (1988)

Stanford v. Kentucky, 492 U.S. 361 (1989)

Atkins v. Virginia, 536 U.S. 304 (2002)

“Capital Murder: A Prosecutor’s Observations”

“Capital Attrition: Error Rates”

“Cost of Gilbert Trial”

“High Cost of Prosecuting Death Penalty Cases”

Status of Death Penalty Worldwide

## DEATH PENALTY WEBSITES

Week of January 28–30

Death Penalty Information Center,  
<http://www.deathpenaltyinfo.org/>

Week of February 4–6

Cyberspace Inmates, <http://www.cyberspace-inmates.com/>

Week of February 11–13

US Department of Justice, Bureau of Justice Statistics,  
<http://www.ojp.usdoj.gov/bjs/>

Week of February 18–20

Deterrence, <http://www.deathpenaltyinfo.org/deter.html>

Week of February 25–27

Ten Anti-Death Penalty Fallacies,

[http://www.thenewamerican.com/tna/2002/06-03-2002/vo18no11\\_fallacies.htm](http://www.thenewamerican.com/tna/2002/06-03-2002/vo18no11_fallacies.htm)

February 27, Internet Report #1 due

Week of March 4–6

U.S. Supreme Court, <http://www.supremecourtus.gov/>

Week of March 11–13

Pro-Death Penalty, <http://www.prodeathpenalty.com/>

Week of March 25–27

ACLU Anti-Death Penalty, <http://www.aclu.org/death-penalty/>

Week of April 1–3

National Association of Criminal Defense Attorneys,  
<http://www.criminaljustice.org/>

Week of April 8–10

The Case for Innocence,  
<http://www.pbs.org/wgbh/pages/frontline/shows/case/>

April 10, Internet Report #2 due

Week of April 15–17

Amnesty International Against the Death Penalty,

<http://www.amnesty.org/ailib/intcam/dp>/<http://www.amnesty.org/ailib/intcam/dp/>

Week of April 22–24

Office of Lexington KY Prosecutor,

[http://www.lexingtonprosecutor.com/death\\_penalty\\_debate.htm](http://www.lexingtonprosecutor.com/death_penalty_debate.htm) –  
Innocence%20Argument

Week of April 29–May 1

Sister Helen Prejean,

<http://www.pbs.org/wgbh/pages/frontline/angel/>

Week of May 6–8

Abolitionist Action Committee, <http://www.abolition.org/>

May 13, Internet Report #3 due

February 4, 2003, Group Discussion Questions

HANDOUT

1. Do you think the Bible is a legitimate source to determine what acts warrant the death penalty? Why, or why not?
2. If we agree that a community gives the death penalty to people it considers the worst offenders, what do the colonial capital laws tell us about colonial society? What issues were the colonists concerned about? Would people today accept these as appropriate uses of capital punishment? What has changed?
- 3 What are the reasons Rev. Increase Mather, in his execution sermon, gives to support the death penalty? Do you think those are appropriate reasons for carrying out what he calls “Publick Justice”? Do we have a different view of what justice requires today? If so, how is it different?
- 4 According to Rev. Mather and to James Morgan, the condemned man, what is Morgan’s behavior which is being condemned and

which led him to commit the murder? Would people today agree that this behavior warrants the death penalty? What has changed?

5. According to Lydia Maria Child, how were people behaving just before the scheduled execution? What was the response of the crowd when word got out that the prisoner has committed suicide?

6. According to Lydia Maria Child, was the death penalty being used consistently? (P. 60, paragraph at bottom of page)?

7. According to Child, how do juries act when faced with capital offenses? (P. 61, paragraph at top of page)

## BEDAU

1. Look at Table 1-1 on page 10 and the updated table on the inside cover of your course packet. Why isn't the number of executions steady? What are some of the factors that affect how many people get executed?
2. Bedau states that the number of death sentences is rising faster than the number of executions (p. 13-14). How do you explain this? What do you think will be the impact of increasing numbers of people on death row on (a) the prison system; (b) the legal system; (c) the costs associated with the death penalty; (d) politicians; (e) the debate over capital punishment?
3. Here's a quick exercise in graph reading skills: look at Figure 1-3, on page 17. In 1981, what were the percentages of people for, against, and undecided about the death penalty. (If you don't know how to find this information, get your group (or me) to help you.) How do you explain the fluctuation in public opinion?
4. How has the debate over the death penalty influenced elections? Do you know what Bush and Gore's positions were on the death penalty? Do you remember if the death penalty came up during the debates? Do you think a person could be elected president who did NOT support the death penalty?
5. Which states have the highest rate of executions? How do you explain these regional differences?

## Group discussion questions

1. Finish any questions that your group didn't get to on Tuesday.
2. Bedau says on p. 29 (2nd paragraph) "...it may come as a surprise to those who believe the death penalty is blatantly racist in character to learn that black murderers are slightly less likely to end up on death row than their white counterparts." Do you think this

means racism has been eliminated from the criminal justice system? Later in that paragraph, Bedau says, “Killers of blacks (whether white or black) rarely get sentenced to death, much less executed, whereas killers of whites (whether white or black) are far more at risk.” How do you account for this difference? Be specific.

3. Look at the numbers in “Risk of Execution,” pp. 31–33. Make sure that everyone in the group understands what the numbers represent. How do you account for the fact that so few murderers are executed? Be specific. Do you see these numbers as supporting imposition of the death penalty or opposing it? Explain.

4. Think back to your reading and discussion about capital punishment in the colonial era and in the 1800s. Thinking as a sociologist would, what do you see as the purpose or function of capital punishment in their culture? Be specific.

5. Still thinking as a sociologist, what do you think is the purpose or function of capital punishment in our culture today? Do you see any similarities? Be specific.

2-11-02

Class discussion

1. Look at Tables 2-1 and 2-2. How do capital crimes under state law compare to capital crimes under federal law?

2. Do Tables 4-1, 4-2, 4-3, and 4-4 support or refute the argument that the death penalty is an effective deterrent? Explain. Be specific.

3. Look at Tables 4-5, 4-6, 4-7, and 4-8. Can you draw out from these tables a profile (e.g. race, sex, age) of a person most likely to be a victim of criminal homicide? Who is that person’s murderer most likely to be? Who is next most likely to be a victim of a criminal homicide? Who is that person’s murderer most likely to be?

4. Look at table 4-9. In which of these circumstances are murderer and victim likely to have known each other? Without struggling over exact arithmetic calculations, is it more likely or less likely that the victim of a homicide knew his/her murderer? If you want to avoid getting killed, what activities does Table 4-9 tell you to stay away from?

5. Look at Table 5-1. Which state had the most prisoners on death row in 1995? Which state had the least? Of all prisoners on

death row in 1995, how many of them were White? How many were Black? What percent of prisoners on death row were Black? How does that percentage compare to the percentage of Blacks in the entire population?

6. Do you think children should be executed if they commit first degree murder? At what age would you draw the line? Look at Table 5-2. Which states have sentenced the most juvenile offenders to death? What is the racial breakdown of these juvenile offenders? How does the proportion of Black and White juvenile offenders on death row compare to the proportion of Black and White adult prisoners?

7. Look at Table 5-3. How does the proportion of Black and White women prisoners on death row compare to the proportions for Black and White men?

8. What, if anything, do you conclude from your answers to Questions 5, 6, 7?

9. Look at Table 5-4. About how long do convicted capital offenders spend on death row?

10. Look at Tables 5-5 and 5-6. What are the ways a capital prisoner is removed from death row? What is the most likely way that a prisoner is removed from death row? Which state(s) had the most sentences or convictions overturned?

11. Look at Table 5-9. What does the data in this table suggest about the role of racism in the way the death penalty is carried out?

### 02-13-03, Class discussion questions

1. On p. 92 of the text, the authors say “general opinions about the death penalty are subjectively important to many, perhaps most, people in this society.” What do they mean by this? What data do they use to support this position?

2. On p. 95, the authors say “Ellsworth and Ross concluded that most people’s attitudes toward capital punishment are basically emotional. The ‘reasons’ are determined by the attitude, not the reverse.” What do they mean by this? Do you think this is true for yourself? Why does this happen?

3. How has the reason given for supporting the death penalty changed over time?

4. On p.101, the authors say “For both proponents and opponents, their preferred rationale is moral and absolute; they are taking a stand that brooks no argument and suggests little

differentiation. Such attitudes are unlikely to be swayed by arguments based on factual information.” Do you agree or disagree with this statement? Why?

5. Justice Thurgood Marshall in *Furman v. Georgia* argued that if the public were well informed about the death penalty, they would oppose it. Do the authors agree with that statement?

6. According to the authors, how do people decide which crimes warrant the death penalty? (P. 104–107)

7. What do the authors say about the relationship between the rise in crime and support for the death penalty? (P. 107–108)

8. Do the authors find data to support the hypothesis that people who are most victimized by crime are more likely to support the death penalty? (P. 108, bottom)

9. How much has the death penalty affected presidential elections? How do the authors explain the dramatic change in opinion between May and October, 1988, during the Bush–Dukakis campaign? (p. 110)

10. The authors conclude that people’s attitudes about the death penalty are based on emotions, not reason. Are you convinced by their argument and data? If so, do you think courts should rely on public opinion to decide whether capital punishment violates the Eighth Amendment’s prohibition against cruel and unusual punishment?

11. How does public opinion about the death penalty change when people are given alternatives, such as Life Without Parole? What does Bedau suggest is the reason for this? (p. 116 – 118)

12. What is the general public’s perception of how long a convicted murderer will serve before being released on parole? How does this differ from reality? (p. 118–120)

13. How aware are juries of alternative sentencing? Do you think they should be instructed by the judge on these alternatives? (p. 120–122)

14. What role do politicians play in [mis?]informing the public about alternatives to death sentences? (p. 120–124)

15. Which do you think is worse: a death sentence or life in prison without parole? Which one would you want for yourself?

Class discussion questions, February 20, 2003 (Deterrence)

1. What is deterrence? (p. 127) What are some of the factors that must be present for a punishment to be a deterrent? Think about

this in relationship to yourself. What stops (and what doesn't stop) you from doing something you know is wrong?

2. What is the difference between deterrence and incapacitation?

(P. 128)

3. Bedau argues that “abolitionists might as well concede that, indeed, the death penalty probably does deter someone, sometime, somewhere—just as retentionists must concede that the thousands of criminal homicides...prove the death penalty is at best a far cry from a perfect deterrent.” Why does he say this? What does he say is the relevant question? (P. 129)

4. Chapter 9 is a review of studies on the deterrent effect of capital punishment going back to the 1930s. Go through their analysis; be sure to discuss the Ehrlich study (p. 141), the issue of celerity (p. 143–144), the brutalization effect (p. 144–146), and police killings (p. 150–152). According to the authors, does the empirical evidence support the argument that the death penalty is a more effective deterrent to murder than life imprisonment? Explain. Be very specific. Do you agree or disagree with their conclusions? Explain. Be specific.

5. Some retentionists argue that the death penalty is not a deterrent because it is not carried out enough. If we use Bedau's figure of 22,000 criminal homicides each year, how many of those murderers would have to be executed for the death penalty to be a deterrent?

6. Do you think that televising executions would be a deterrent? Explain.

## 02-25-03, Group discussion questions

Chapters 11 and 12 address the question of incapacitation; that is, whether the only way to protect society is to execute (and thereby permanently incapacitate) convicted murderers.

1. Following the 1972 U.S. Supreme Court decision, *Furman v. Georgia*, 558 murderers on death row had their sentences reduced and some were paroled within a few years. If it turns out that incapacitation is the only way to protect society, what would you expect to see about the behavior of these former death row inmates?

2. The authors note that “Custodial officers, psychiatrists and prison administrators feared the release of the Furman–commuted inmates into the general prisoner population.” (p. 168) What were they afraid of? Were their fears borne out?
3. The authors also note that “the greatest fear expressed after the Furman decision was that commuted inmates would someday be released to society and commit more heinous crimes.” (p. 170) Were these fears borne out? Are released murderers more likely to commit new crimes than other released criminals? Be specific.
4. What is recidivism? Were the Furman–commuted murderers more likely to murder again than other murderers? What does this tell us about whether capital punishment is reserved for the “worst of the worst”? In order to address the question of recidivism, what would have to be done?
5. Do these authors conclude that capital offenders are a threat to society? Or, put another way, do capital murderers need to be incapacitated (e.g. executed) in order to protect society? Do you agree or disagree with them? Be specific.
6. How much time do murderers sentenced to a term of years (as opposed to LWOP) actually serve? (p. 180) Do you think juries should be informed about parole eligibility? Should juries be instructed about the difference between a sentence for a term of years and a LWOP sentence?

## 2-27-03, Class discussion

1. Where do you think you got your moral values from? Be specific. See if you can remember your earliest memory of knowing something (perhaps something you did) was wrong?
2. If the cashier at WalMart gives you an extra \$10 in change, which you notice right away, do you give it back? Why or why not? If the cashier at a Mom&Pop corner store gives you an extra \$10 in change, do you give it back? What’s the difference?
3. What do you think are morally justifiable reasons for punishment in general? For the death penalty in particular?
4. This is a story about two men in their early 20's. Let’s call them Joe and Mike. They are brothers. They grew up in a terrible household. Their mother was addicted to crack and earned money for her habit through prostitution. They never knew their father.

Some of their mother's boyfriends brutalized them physically; their uncle abused them sexually from about the ages of 2 to 12. Joe and Mike grew up on the streets. They were in and out of juvenile detention and are functionally illiterate.

One day, Joe and Mike got hold of some Angel Dust which they consumed along with some alcohol. Both were very high. Joe went off with the guys he hangs out with. They stole a car and went joyriding. Joe was driving even though he was drunk and his license had been suspended for drunk driving. He swerved into the lane of oncoming traffic and front ended the car coming toward him. The driver survived but has multiple injuries and will never walk again; her two small children were both killed in the crash. Joe pled guilty to Vehicular Manslaughter and was given a sentence of 10 years.

After getting high with Joe, Mike went off with his buddies. They went to a park where they hung out and drank some more beer. They stumbled across a teen-age couple making out in the bushes. Mark's buddies pinned down the boy, while he attempted to rape the girl. As she struggled with him, he accidentally strangled her when he put his arm across her neck to hold her down. He has no recollection of any of these events. It all happened very quickly. He was charged with Murder in the First Degree, went to trial, was found guilty and sentenced to death based on the felony murder rule.

How do you differentiate between these two cases morally? Do both brothers have the same level of culpability? Is one crime more horrific than the other? How can we justify giving Mike the death penalty and Joe 10 years?

03-06-03 Class discussion: Furman v. Georgia

BRENNAN, concurring (from Bedau)

1. On p. 191, Brennan says "an individual in prison does not lose the rights to have rights." What does this mean? How does it support his argument? Do you agree or disagree with him?
2. On p. 192, he says "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the

conclusion is virtually inescapable that it is being inflicted arbitrarily.” What does he mean? How does it support his argument? Do you agree or disagree with him?

3. On p. 193 (a few lines before “IV”), Brennan says “...the inference is compelling that there is a deep-seated reluctance to inflict [the death penalty].” Do you make the same inference from the facts he uses? Do you find it “compelling”?

4. Do you agree or disagree with Brennan’s analysis that the death penalty does not serve any penal purpose more effectively than life imprisonment? (P. 193–194)

5. Brennan remarks that retribution is not an appropriate penal purpose: “..we have no desire to kill criminals simply to get even with them.” (P. 194) Do you agree or disagree?

DOUGLAS, concurring (course packet)

6. On p. 8, Douglas concludes that: “Thus, these discretionary statutes are unconstitutional in their operation.” What does he mean? Where does the discretion come in? Why does he find that the discretion has gone too far and is unconstitutional? Do you agree?

WHITE, concurring (course packet)

7. On p. 9, last paragraph, White concludes that “the death penalty is exacted with great infrequency even for the most atrocious crimes and there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” What evidence does White rely on to reach this conclusion? Why does it lead him to hold that the death penalty is unconstitutional?

MARSHALL, concurring (course packet)

8. Marshall argues that if a less severe sentence (e.g. life imprisonment) would serve the same legislative goals, then the death penalty is “unnecessarily cruel, and, therefore, unconstitutional.” Do you agree or disagree? Do you think that life imprisonment serves the same purposes?

9. What does Marshall say about retribution? (p. 12)

10. On p. 15, Marshall says: “While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great... the question is

not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in light of all information presently available.” Do you agree or disagree?

BURGER (dissent) (course packet)

11. How do Burger’s and Marshall’s views on public opinion differ? According to Burger, what role do juries play in determining public opinion?

12. Compare Burger’s (p. 20) and Marshall’s (p. 12) views on retribution as a goal of punishment. Try to figure out exactly what their argument is. Which one do you agree with? Why?

ALL DISSENTERS

13. All of the dissenters agree that the death penalty is a matter that should be left up to the legislature. Why do they say this? Where would you draw the line between legislative and judicial issues? In what circumstance is it appropriate for the Supreme Court to strike down legislation? Can you come up with an example?

03-11-03, Group discussion questions

Gregg v. Georgia (in Bedau)

1. The Georgia statute has been used as a model by many other states. What are the capital crimes as defined by the statute?

2. What does a bifurcated proceeding mean? How is the guilty/not guilty phase different from the penalty phase?

3. How do the aggravating circumstances fit in? Do you agree with the list (see endnote 1, p. 203)? Would you have put anything different in the list?

4. How do mitigating circumstances fit in? Are they as clearly defined as the aggravating circumstances? What might you argue is an appropriate mitigating circumstance? (See endnote 7, p. 204. This is not what’s in the Georgia statute; it’s just a model for states to consider.)

5. What is the appeal process that the Georgia statute sets up?

6. Does the statute make any provisions for assigning counsel?
7. What is the Court's reasoning for its holding that the death penalty is constitutional?

Woodson v. North Carolina and Coker v. Georgia (in Bedau). For each of the cases :

1. What is the issue raised by the case?
2. What is the Court's ruling, e.g. what is the outcome, who won?
3. What is the Court's reasoning; how did the Court analyze the issues?
4. Did the Court use the "evolving standards of decency" test? If so, where does the Court look to find out what those standards are?
5. Does the Court seem willing to override the "evolving standards of decency" if they conflict with its own judgment?
6. Do you agree or disagree with the Court's conclusions? Explain.

#### 03-13-03 Group discussion questions

Thompson v. Oklahoma and Stanford v. Kentucky

1. Compare how the Court analyzed the information from state legislatures in both cases. Based on this information, how does the Court reach different conclusions about executing 15 year olds vs. 16 and 17 year olds?
2. Compare how the Court analyzed the information about jury behavior in both cases. Based on this information, how does the Court reach different conclusions in the two cases.
3. In Thompson, the Court looked at evidence from professional organizations and other nations. (p. 25, 3rd full paragraph) What did it conclude about this evidence? What does the Court in Stanford say about this kind of evidence? (p. 31, below V) Which do you agree with?
4. In Thompson, the Court said "it is ultimately for us to decide whether the Eighth Amendment permits imposition of the death penalty." (p. 26, 3rd paragraph) To make that judgment, what factors did the Court look at? What does the Court in Stanford say about this approach? (p. 32) Which do you agree with?
5. Do you think the death penalty serves as a deterrent for minors? Is execution of Minors an appropriate goal of retribution?

6. Setting aside the Court's reasoning, for purposes of deciding whether to impose the death penalty, do you think there are distinctions between a 15 years old who commits murder and a 16 year old who commits murder and a 17 year old who commits murder and an 18 year old who commits murder? Where would you draw the line?

Class discussion questions: *McClesky v. Kemp*

1. What was the Baldus study and what did it show? (p. 254–255) According to the Court, what didn't it show?

2. Why did the Court reject *McClesky's* argument based on the Equal Protection Clause of the 14th Amendment? (Part II of decision) What is "discriminatory purpose"? (p. 256, last paragraph)

3. The Court says that "discretion is essential to the criminal justice process." (p. 258, top paragraph) What does the Court mean? Do you agree or disagree with this statement? Can we ensure that discretion will always be exercised in a non-discriminatory manner? Does it matter?

4. Why does the Court reject *McClesky's* argument based on the Eighth Amendment? (Part III of the decision) Why does the Court say that statistics cannot prove that the death penalty is being implemented in an arbitrary and capricious manner?

5. The Court says that "apparent disparities in sentencing are an inevitable part of our criminal justice system." (p. 260, 1st paragraph after C AND Footnote 15, p. 265) What does the Court mean? Do you agree with this statement, e.g. that it is "inevitable"? Is this acceptable to you?

6. The Court says that "*McClesky's* claim, taken to its logical conclusion throws into serious questions the principles that underlie our entire criminal justice system." What does the Court mean here. Do you agree with the Court? How important is this point to the outcome of the case? (p. 260, 1st paragraph after V)

03–27–03, Group discussion questions, *Atkins v. Virginia*

Majority

1. What crime was Daryl Atkins convicted of? What happened to Atkins' co-defendant? (p. 33, n.1)
2. What are the AAMR and APA definitions of mental retardation? (p. 34, n. 3)
3. What evidence was used to support the claim that Atkins was mentally retarded? What evidence was used to refute the claim? (p. 34-35 and n. 4-6)
4. What does the Court mean by a "proportionality review"? (p. 36, 3rd paragraph)
5. The Court says "our own judgment is 'brought to bear' by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators." (p. 36, 6th paragraph) What does the Court mean here? Do you agree with this approach? Is the judgment of each individual judge relevant?
6. What evidence does the Court rely on to determine that there is a consensus against executing the mentally retarded? (p. 37)
7. Why does the Court think that mentally retarded defendants are less culpable? (p. 38-39)
8. Does the Court think that executing the mentally retarded will further the goals of retribution and deterrence? Why? (p. 39-40)

#### Dissent

9. RHENQUIST dissent: Why does Rhenquist disagree with considering the opinion of professional organizations and other nations? Do you agree or disagree with Rhenquist?
10. SCALIA dissent: On what grounds does Scalia dispute the finding that a consensus exists? (p 44-46)
11. Does Scalia think the mentally retarded are less culpable? Why not? (p. 46-47)

04-03-03

#### Class discussion questions

1. What are some of the things an inexperienced or incompetent lawyer can do (or not do) that would increase a capital defendant's chances of getting the death penalty?
2. What does the term "effective assistance of counsel" mean to you? What resources are the bare minimum that you think a capital defendant's lawyer should have? How much do think this might cost, per case?

3. Go through the reasons the author cites for the pervasive inadequacy of counsel for the poor. (P 279–292) For each reason, discuss what would have to be done to rectify the situation.
4. Why do think state courts tolerate the present system where indigent capital defendants are routinely denied effective assistance of counsel? (P. 293–299)
5. What is the standard the U.S. Supreme Court laid down in *Strickland v. Washington* to determine if the Sixth Amendment’s right to counsel has been violated? (P. 288) Do you think it’s fair that, according to the author, “courts employ a lesser standard for judging the competence of lawyers in a capital case than the standard for malpractice for doctors, accountants, and architects.”
6. The author says that “What is lacking is not money, but the political will to provide adequate counsel for the poor in capital and other criminal cases.” (P. 296, bottom paragraph) Do you agree or disagree? Explain.

04–10–03, Class discussion questions

FROM BIENEN ARTICLE IN BEDAU:

1. In chapter 23, “A Good Murder,” the author looks at which murders in New Jersey were prosecuted as capital murder and which are not. What are some of the reasons why a capital crime would NOT be prosecuted as a capital case?
2. What does it mean about justice and fundamental fairness when one county seeks the death penalty in a higher percentage of eligible cases than another county? What does the author find about urban, inner city prosecutions (Essex County)? What does the author find about prosecutions from the rural, coastline (Ocean County)? (p. 323–24)
3. The author’s title, “A Good Murder,” refers to the capital prosecution of Robert Marshall. Why has this case (and others like it) gotten so much press attention? (P. 325–329) What other capital cases are you familiar with? Do they fit the “good murder” definition? Do you agree with Bienen’s conclusion that publicity about these cases make people think that the system is working?
4. The author concludes that: “The Hollywood version of capital murder cases--which implies that the good guy cops are catching bad guy murderers, and that it all ends up all right when a bad person is executed--is reassuring, but inaccurate.” (P. 331) Do you

agree with this? Does the Timothy McVeigh case promote the “Hollywood version of capital murder cases”? How? Why is this description of capital murder cases inaccurate? How might this phenomenon affect public opinion about the death penalty?

FROM SIEVERT ARTICLE IN COURSE PACKET:

5. What are the factors prosecutors consider in deciding whether to seek the death penalty? How does prosecutorial discretion enter into the selection of defendants? In Texas, who makes the final decision? (p. 51–53)

6. How does race enter into the process of jury selection? (p. 53–54) According to Bienen, race helps explain why urban juries are less likely to convict than rural juries. (p. 328, 2nd and 3rd paragraph) Do both authors seem to be saying the same thing?

7. What type of evidence do prosecutors use at the sentencing phase of the trial? (p. 55–56)

8. What do you think about the arguments Sievert made to the jury? (p. 56 and n. 2 on p. 58) Do you think they were effective? Would you feel comfortable making those arguments? Why or why not?

9. Do the conclusions Bienen reaches about capital cases in New Jersey hold true for the capital cases Sievert discusses? Why or why not?

#### 04–10–03, Group Discussion Questions

1. A jury which is selected to sit on a capital case must be what’s called a “death qualified” jury. What does this mean? (P. 334) Here are some of the questions potential jurors for the Kristen Gilbert case had to answer on a written questionnaire:

1. Do you have an opinion about the death penalty? If so, what is your opinion?

2. Has your opinion about the death penalty changed over time? If so, how?

3. Is it your opinion that the death penalty should never be imposed, regardless of circumstances? If so, please explain.

4. Is it your opinion that anyone who commits a murder intentionally should get the death penalty, regardless of circumstances? If so, please explain.

5. Is it your opinion that anyone who intentionally murders two or more people should get the death penalty, regardless of circumstances? If so, please explain.

6. Do you believe that the death penalty should be carried out more than, less than, or about the same as, it is now being carried out in the United States? Please explain your answer.

7. Do you belong to, or have you contributed money to, any organization that takes a position for or against the death penalty, or any organization that supports the rights of victims of crime? If so, please specify the organization and describe the nature of your support or involvement.

Do you think these questions should be part of the jury selection process? Explain. How might the requirement of a “death qualified” jury skew jury verdicts? Do you think people who support the death penalty would be more or less likely to convict?

2. The author characterizes the jury’s role in the sentencing phase of a capital trial as deciding a “moral question that has not “true” or “false” answer: Is the defendant a person who deserves to live or to die?” Do you agree with the author that the law “gives the jury no definitive guidance.” (P. 335) How might you change this?

3. Look at Table 24–1. What are the topics that jurors discussed a “great deal” or a “fair amount”? Do you see any differences in topics discussed by juries that give life sentences and juries that gave the death penalty? How do you account for this?

4. According to the authors, over 60% of the jurors discussed the future dangerousness of the defendant a “great deal” or a “fair amount” in their deliberations. Why do the authors think this is a problem? (pp. 338–339)

5. The author concludes that jurors avoid taking personal responsibility for their decision by believing that the law required their decision. (P. 342) If this is true, what is its impact on the argument that jury decisions are representative of community standards on the death penalty?

## Class discussion questions

From Bedau, chapter 25:

1. Who are the authors of this article?
2. Why was Clarence Bradley convicted (p. 350–251)? How was Walter McMillian convicted (p. 351)? What did it take to overturn their death sentences? How was Federico Macias's conviction overturned (p. 352)?
3. The authors of this article suggest that the burden shifts to the defendant to prove his innocence after a capital conviction (p. 356). Why do they say this? What is the standard for post conviction relief? Do you think this standard is too high or too low or just right? Explain

From "Capital Attrition" on course website:

4. What did the researchers purport to do in this study? What were their goals? How did they go about collecting data? (Sec. I and II)
5. What are their principal findings? What do they conclude is the overall capital error rate? How does that compare to the error rate in noncapital cases? What do they find are the two most common errors found during post-conviction review? What happens to cases that are retried? Are elected state judges more or less likely to overturn a conviction? (Section II)
6. What is the purpose of including Section III?
7. The researchers state certain implication of their principal findings? Do you agree or disagree with the implications they draw from the data? Be specific. (Section IV)

04-17-03, Group discussion questions

Bedau, Chapter 26

1. What is clemency? Who has power to grant it? What kind of relief is available? (P. 362)
2. What are some of the reasons why clemency had been granted in the twenty years prior to Otey's case? (p. 363)

3. Who was Harold Otey? What was he convicted of? What were the reasons his advocates thought he should be granted clemency? (p. 363)

4. What do you think about Attorney General Stenberg's role in the Pardons' Board hearing and decision?

5. What witnesses and evidence did Otey present at the hearing? How strong do you think it was? (p. 368–371) What witnesses and evidence did the state present? How strong was it? (p. 371–373)

6. The dissenter, Secretary of State Beermann, said that "clemency is the conscience of the people"? (p. 373) What did he mean by that? Do you agree with him?

7. What do you think about the Governor's role? (p. 375–381)

8. Should Harold Otey have been granted clemency? Why or why not?

4-22-03

Class discussion questions

From Bedau, Chapter 29:

1. Why do death penalty cases cost so much more than non-capital cases? Be specific.

2. What were the results of the Duke University study? Be specific. Who commissioned this study?

3. What is the range of figures presented in this chapter for the additional costs required in capital cases? Why do you think these figures vary so much?

From "Cost of Gilbert trial," (Course packet, pp. 66–69)

4. Go over the expenses in the Kristen Gilbert case. Do you think they seem justified or are they excessive? Explain.

5. Which of these expenses are unique to a capital case?

From "Counties Struggle," (Course packet, 70–72) [I forgot to put this article on the syllabus.]

6. What does the Katherine Baicker study indicate?

7. What is the state "risk pool" that the author refers to?

From all readings:

Do you think the general public would respond favorably or unfavorably to an argument that the death penalty should be abolished because the money could be put to better use? Explain. Be specific.

04-29-03, Class discussion questions  
From Bedau, chapter 6.

Look through tables 6-1 through 6-5.

1. How would you characterize the countries listed in tables 6-1 – 6-3? Do they have any common characteristics?
2. How would you characterize the countries listed in table 6-4? Do they have any common characteristics?
3. Is there anything that surprises you from looking at these lists? Anything you would not have predicted?
4. In his dissent in *Atkins v. Virginia*, Justice Scalia states (and quotes himself from Thompson):

But the prize for the Court's Most Feeble Effort to fabricate "national consensus" must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called "world community," and respondents to opinion polls. . . Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. 'We must never forget that it is a Constitution for the United States of America that we are expounding . . . Where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justice of this Court may think them to be, cannot be imposed upon Americans through the Constitution.' Thompson (SCALIA, dissenting).

Do you agree or disagree with Justice Scalia? If you disagree, what argument would you make to him? If you agree, do you think there is ever any reason to pay attention to international law and world opinion?

05-01-03  
Class Discussion Questions

1. How does Sister Prejean resolve the moral dilemma she identifies as: “The victims are dead and the killer is alive and I am befriending the killer.” (P. 21–22)
2. What is Sister Prejean’s relationship with the Catholic priest who is the Prison Chaplain? (P. 25, 90)
3. Do Eddie and Patrick Sonnier seem remorseful? Does it matter? (P. 38–42)
4. Where did Eddie and Patrick go wrong? What would it have taken for them to have been law-abiding, productive members of society?
5. Who is Millard Farmer? What are the mistakes he identifies that Sonnier’s trial lawyer made? What is his analysis of who gets the death penalty, and why? (P. 45–53)
6. What is the governor’s “moral niche”? How does politics influence his decisions about clemency? (P. 57) What about the Board of Pardons?
7. Why would people call Sister Prejean a Communist? Why were the victims’ families so upset with her? (P. 63–66)
8. How is the process of executing Pat Sonnier different from (or similar to) the executions we learned about in the two videos?
9. How does Sister Prejean explain her moral belief that the death penalty is wrong? What does she rely on? What is your moral opinion of the death penalty? What do you base it on?