Understanding Capital Punishment Law
CAROLINA ACADEMIC PRESS UNDERSTANDING SERIES

Understanding Administrative Law, 6e
William Fox, Jr.

Understanding Alternative Dispute Resolution
Kristen Blankley and Maureen A. Weston

Understanding Animal Law
Adam Karp

Understanding Antitrust and Its Economic Implications, 6e
E. Thomas Sullivan and Jeffrey Harrison

Understanding Bankruptcy, 3e
Jeffrey Ferriell and Edward Janger

Understanding California Community Property Law
Jo Carrillo

Understanding Capital Punishment Law, 4e
Linda Carter, Ellen Kreitzberg, and Scott Howe

Understanding Civil Procedure, 5e
Gene Shreve, Peter Raven-Hansen, and Charles Geyh

Understanding Civil Procedure: The California Edition
Walter W. Heiser, Gene Shreve, Peter Raven-Hansen, Glen Earl Weston, and Charles Geyh

Understanding Civil Rights Litigation, 2e
Howard M. Wasserman

Understanding Conflict of Laws, 4e
William Richman, William Reynolds, and Chris Whytock

Understanding Constitutional Law, 4e
John Attanasio and Joel Goldstein

Understanding Contracts, 3e
Jeffrey Ferriell

Understanding Copyright Law, 6e
Marshall Leaffer

Understanding Corporate Law, 4e
Arthur Pinto and Douglas M. Branson

Understanding Corporate Taxation, 3e
Leandra Lederman and Michelle Kwon

Understanding Criminal Law, 8e
Joshua Dressler

Understanding Criminal Procedure: Vol. 1: Investigation, 7e
Joshua Dressler, Alan C. Michaels, and Ric Simmons

Understanding Criminal Procedure: Vol. 2: Adjudication, 4e
Joshua Dressler and Alan C. Michaels

Understanding Disability Law, 2e
Mark C. Weber

Understanding Election Law and Voting Rights
Michael R. Dimino, Bradley A. Smith, and Michael E. Solimine

Understanding Employee Benefits Law
Kathryn Moore

Understanding Employment Discrimination Law, 2e
Thomas Haggard

Understanding Employment Law, 2e
Jeffrey M. Hirsch, Paul M. Secunda, and Richard Bales

Understanding Environmental Law, 3e
Philip Weinberg and Kevin Reilly

Understanding Estate and Gift Taxation
Brant Hellwig and Robert T. Danforth

Understanding Evidence, 4e
Paul Giannelli

Understanding Family Law, 4e
John Gregory, Peter N. Swisher, and Robin Wilson

Understanding Federal and California Evidence
Paul Giannelli

Understanding Federal Courts and Jurisdiction, 2e
Linda Mullenix, Martin H. Redish, and Georgene Vairo

Understanding Federal Income Taxation, 5e
J. Martin Burke and Michael Friel

Understanding The First Amendment, 6e
Russell L. Weaver
For Michael, Michelle, and Laura

In memory of my Dad

For Jetty, Mario, and Jordan
Contents

Preface xxi

Chapter 1 · Introduction to Capital Punishment Law 3
§ 1.01 The Capital Punishment Controversy in the Twenty-First Century 3
§ 1.02 Capital Trials in the United States:
  The Importance of Constitutional Law 4
  [A] Overview 4
  [B] Organization of the Chapters on the Constitutional Constraints
      on Capital Punishment 7

Chapter 2 · The Death Penalty Debate 9
§ 2.01 Major Arguments for and Against the Death Penalty 9
§ 2.02 Penological Purposes
  [A] Deterrence 10
  [B] Retribution 15
§ 2.03 Systemic Fairness 18
§ 2.04 Financial Costs of the Death Penalty 20

Chapter 3 · Sources of Law 25
§ 3.01 Overview 25
§ 3.02 State and Federal Statutory Law and State Constitutional Law 25
§ 3.03 United States Constitutional Provisions 25
§ 3.04 The Importance of Federal Constitutional Law 26
§ 3.05 Constitutional Premises
  [A] Federalism 27
  [B] “Death Is Different” 27
§ 3.06 Case Law 28
§ 3.07 Treaties 28

Chapter 4 · Challenges to the Constitutionality of the Death Penalty 29
§ 4.01 Overview of Constitutional Challenges to the Death Penalty 29
§ 4.02 Challenges to the Arbitrariness of the Death Penalty
  [A] The Due Process Challenge 30
  [B] The Cruel and Unusual Punishment Challenge 31
§ 4.03 Challenge to the Death Penalty as Per Se Unconstitutional
  [A] Overview 33
  [B] Acceptability of the Punishment to Contemporary Society:
      Evolving Standards of Decency 33
  [C] Principle of Human Dignity: The Independent Evaluation
      of Excessive Punishments 33
§ 4.04 Challenges to the Proportionality of the Death Penalty 34
[A] Overview 34
[B] Proportionality as an Eighth Amendment Principle 35
[C] The First Prong: Contemporary Standards of Decency 37
   [2] Statistical Interpretation 39
[D] The Second Prong: Furthering Goals of Punishment 39

Chapter 5 · Methods of Execution
§ 5.01 Overview 41
§ 5.02 Legal Challenges to Methods of Execution: Analytical Framework 43
§ 5.03 Challenges to Method of Execution Before Lethal Injection 44
[A] Overview 44
[B] Firing Squad 45
[C] Hanging 46
[D] Lethal Gas 47
[E] Electrocution 48
§ 5.04 Challenges to Lethal Injection as a Method of Execution 50
[A] Overview 50
[B] Baze v. Rees 52
[C] The California Litigation: Morales v. Tilton 53
[D] Post-Baze Changes to the Three-Drug Lethal Injection Protocol 55
[F] Administrative Procedure Act Violations 58
[G] Source of Drugs Litigation 60
[H] Compounding Pharmacies 63
[I] Secrecy Legislation 66
[J] Food and Drug Administration Litigation 67
§ 5.05 Botched Executions 69
§ 5.06 Role of Physicians in Lethal Injection Executions 72

Chapter 6 · Modern Death Penalty Statutes
§ 6.01 Overview 75
§ 6.02 Furman v. Georgia 76
§ 6.03 The Georgia Statute 76
§ 6.04 The Florida Statute 78
§ 6.05 The Texas Statute 80
§ 6.06 The Mandatory Statutes: Louisiana and North Carolina 82
§ 6.07 Variations on Death Penalty Statutes: Guilt-Phase Determination of Aggravating Circumstances; Judge Sentencing; and Beyond a Reasonable Doubt Standard to Impose Death 83
[A] Guilt-Phase Determination of Aggravating Circumstances: California 84
[B] Judge Sentencing: The Nebraska and Alabama Approaches 85
[C] Beyond a Reasonable Doubt Standard to Impose Death: Utah 87
## Contents

### Chapter 7 · The Death Penalty Trial

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 7.01</td>
<td>89</td>
</tr>
<tr>
<td>§ 7.02</td>
<td>89</td>
</tr>
<tr>
<td>§ 7.03</td>
<td>90</td>
</tr>
<tr>
<td>[A]</td>
<td>91</td>
</tr>
<tr>
<td>§ 7.04</td>
<td>93</td>
</tr>
<tr>
<td>[A]</td>
<td>93</td>
</tr>
<tr>
<td>§ 7.05</td>
<td>94</td>
</tr>
<tr>
<td>[A]</td>
<td>95</td>
</tr>
<tr>
<td>[B]</td>
<td>95</td>
</tr>
<tr>
<td>[C]</td>
<td>95</td>
</tr>
<tr>
<td>[D]</td>
<td>97</td>
</tr>
<tr>
<td>[E]</td>
<td>98</td>
</tr>
<tr>
<td>[F]</td>
<td>101</td>
</tr>
<tr>
<td>§ 7.06</td>
<td>102</td>
</tr>
</tbody>
</table>

### Chapter 8 · Categorical Bars to the Death Penalty

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 8.01</td>
<td>109</td>
</tr>
<tr>
<td>[A]</td>
<td>109</td>
</tr>
<tr>
<td>[B]</td>
<td>109</td>
</tr>
<tr>
<td>§ 8.02</td>
<td>110</td>
</tr>
<tr>
<td>[A]</td>
<td>112</td>
</tr>
<tr>
<td>[B]</td>
<td>112</td>
</tr>
<tr>
<td>[C]</td>
<td>114</td>
</tr>
<tr>
<td>[1]</td>
<td>114</td>
</tr>
<tr>
<td>[2]</td>
<td>115</td>
</tr>
<tr>
<td>[D]</td>
<td>118</td>
</tr>
<tr>
<td>[1]</td>
<td>118</td>
</tr>
<tr>
<td>[2]</td>
<td>119</td>
</tr>
<tr>
<td>§ 8.03</td>
<td>120</td>
</tr>
<tr>
<td>[A]</td>
<td>120</td>
</tr>
<tr>
<td>[B]</td>
<td>120</td>
</tr>
<tr>
<td>[C]</td>
<td>121</td>
</tr>
<tr>
<td>[D]</td>
<td>122</td>
</tr>
<tr>
<td>[E]</td>
<td>123</td>
</tr>
<tr>
<td>[F]</td>
<td>124</td>
</tr>
<tr>
<td>§ 8.04</td>
<td>126</td>
</tr>
<tr>
<td>[A]</td>
<td>126</td>
</tr>
<tr>
<td>[B]</td>
<td>126</td>
</tr>
<tr>
<td>[1]</td>
<td>127</td>
</tr>
<tr>
<td>[2]</td>
<td>127</td>
</tr>
<tr>
<td>[3]</td>
<td>129</td>
</tr>
<tr>
<td>[C]</td>
<td>131</td>
</tr>
<tr>
<td>§ 8.05</td>
<td>133</td>
</tr>
<tr>
<td>[A]</td>
<td>133</td>
</tr>
<tr>
<td>[B]</td>
<td>134</td>
</tr>
</tbody>
</table>
[1] The Decision 134
[2] Rape, Race, and the Death Penalty 135
[C] Rape of a Child: *Kennedy v. Louisiana* 136
[D] Crimes Against the Government 138
[E] Drug Kingpins 140

Chapter 9 · Overview of Aggravating Evidence: The Eligibility Function and the Selection Function 141
§ 9.01 Overview 141
§ 9.02 Aggravating Evidence and Narrowing 143
[A] Eligibility/Narrowing in the Penalty Phase 144
[B] Narrowing During the Guilt Phase 145
[C] Hybrid: The California Model 146
§ 9.03 Selection Decision in the Penalty Phase 147

Chapter 10 · Aggravating Circumstances: Eligibility of the Case for the Death Penalty 151
§ 10.01 Constitutional Constraints on Aggravating Circumstances 151
§ 10.02 Aggravating Circumstances as “Elements” of a Capital Case 153
§ 10.03 Challenges to Aggravating Circumstances: Vagueness 154
[A] Eighth Amendment Vagueness v. Due Process Vagueness 154
[B] Eighth Amendment Vagueness Challenges 155
[1] “Outrageously or Wantonly Vile, Horrible or Inhuman”: Constitutional on Its Face 155
[3] Other “Heinous” Aggravating Circumstances: State Court Narrowing Interpretations 156
§ 10.04 Challenges to Aggravating Circumstances: Duplicative of the Crime 158

Chapter 11 · Aggravating Evidence and the Selection Decision 161
§ 11.01 Eligibility and Selection Decision 161
[A] Overview 161
§ 11.02 Evidence of Future Dangerousness 163
[A] Overview 163
[B] Can Experts Predict Future Dangerousness? 165
[C] Constitutional Issues with Psychiatric Interviews 167
[1] Overview 167
[2] Basic Fifth and Sixth Amendment Analysis 168
§ 11.03 Victim Impact Evidence 170
[A] Overview 170
[B] From *Booth* to *Payne* 171
[C] Limits on Victim Impact Evidence 172
[D] Examples of Victim Impact Evidence Admitted at Trial Since *Payne* 175
| § 11.04 Non-Statutory Aggravating Factors at Sentencing | 176 |
| [A] Overview | 176 |
| [B] Statutory Approaches to Non-Statutory Aggravating Evidence | 178 |

Chapter 12 · Selection Process: Mitigation | 181
§ 12.01 Overview | 181
§ 12.02 The Admissibility of Mitigation: The Legacy of *Lockett* | 182
| [A] The “No Preclusion” Principle of *Lockett* | 182 |
| [B] The Expansion of the *Lockett* Doctrine | 184 |
§ 12.03 The Limits of the *Lockett* Doctrine | 185
| [A] Irrelevant Evidence | 185 |
| [B] Structuring the Use of Mitigating Evidence | 187 |
| [1] The Sentencing Structure Must Allow for the Consideration of Mitigation by Individual Jurors | 188 |
| [a] The Sentencer Must Listen | 188 |
| [b] The Sentencing Structure Must Give Effect to the Mitigation | 188 |
| [c] Mitigation Decisions by Individual Jurors | 190 |
| [a] Mitigation Relevant Only to Future Dangerousness | 191 |
| [b] Burden of Persuasion on Mitigation | 193 |
§ 12.04 Constitutional Right to Assistance of Experts | 195
| [A] Overview | 195 |
| [B] *Ake v. Oklahoma* | 196 |
| [C] Post-*Ake* Issues | 198 |
| [2] Types of Experts | 199 |

Chapter 13 · Selection Process: The Life or Death Decision | 201
§ 13.01 Overview | 201
§ 13.02 No Constitutionally Mandated Formula: Variations in Decision-Making Structure | 203
| [A] Highly Structured Format: The Texas System of Specific Questions | 203 |
| [C] Mandatory Results | 205 |
| [D] Discretionary Results | 206 |
§ 13.03 Burden of Persuasion and Judge or Jury Issues | 206
| [A] Burden of Persuasion | 206 |
| [B] Judge or Jury? | 209 |
§ 13.05 Information About Defendant’s Potential Release: Commutation and Parole
   [A] Overview 214
   [B] Commutation Power of Governor 214
   [C] Meaning of “Life With Parole” 217
   [D] Effect of Hung Jury 220
§ 13.06 The Dual Requirements of Guided Discretion and Individualized Consideration 221

Chapter 14 · Direct Appeals 227
§ 14.01 Overview of Statutory Approaches 227
§ 14.02 Harmless Error in General 228
§ 14.03 Appellate Role When Aggravating Circumstance Invalidated 230
§ 14.04 Is It Possible to Determine the Effect of Error on a Death/Life Decision? 236
§ 14.05 Double Jeopardy 236
   [B] Double Jeopardy and Collateral Estoppel in Capital Cases 238
   [C] Statutorily Imposed Life Imprisonment After a Hung Jury 240

Chapter 15 · Postconviction Proceedings: The Writ of Habeas Corpus 245
§ 15.01 Overview 245
§ 15.02 The Nature of a Habeas Proceeding 247
§ 15.03 The Habeas Process 248
   [A] Statute of Limitations and Basis of Claim 248
   [B] Exhaustion of State Remedies 250
   [C] Adequate and Independent State Grounds: Procedural Default of Constitutional Claims 250
   [D] Evidentiary Hearings 253
§ 15.04 Grounds for Granting a Writ of Habeas Corpus 255
   [A] Non-Retroactivity 255
   [B] Contrary to or Unreasonable Applications of the Law or Unreasonable Determinations of Facts 257
      [1] Contrary to or an Unreasonable Application of Clearly Established Federal Law 258
   [C] Harmless Error 261
§ 15.05 Successive Petitions 262

Chapter 16 · Ineffective Assistance of Counsel 265
§ 16.01 Overview 265
   [A] The Role of Defense Counsel in Capital Cases 265
   [B] Ineffective Assistance of Counsel in a Capital Case 266
   [C] Raising a Claim of Ineffective Assistance of Counsel 267
§ 16.02 Right to Counsel 267
   [A] Introduction 267
   [B] The Scottsboro Case: A Failure to Provide Effective Representation 267
CONTENTS

[C] Gideon: Recognition of a Fundamental Need for Counsel in Criminal Cases 269

§ 16.03 Strickland: Development of a Test for Ineffective Assistance of Counsel 270
[A] Introduction 270
[C] The Two-Prong Test 271
[D] Applying the Two-Prong Test 272

§ 16.04 Ineffective Assistance of Counsel: The First Prong: Deficient Performance 273
[A] Overview 273
[B] Duty to Investigate and Present Penalty Phase Evidence 273

§ 16.05 ABA Guidelines for the Representation of Criminal Defendants in Death Penalty Cases 280

§ 16.06 Ineffective Assistance of Counsel: The Second Prong: Prejudice 282
[A] Overview 282
[B] Prejudice in a Penalty Phase 282

§ 16.07 Ineffective Assistance of Counsel: Presumption of Prejudice 284
[A] Overview 284
[B] Complete Breakdown of Adversary System 284
[C] Conflict of Interest 286
[D] The Mentally Impaired, Drug Addicted, or Alcoholic Lawyer 287
[E] The Sleeping Lawyer 288

§ 16.08 Conclusion 289

Chapter 17 · Innocence

§ 17.01 Overview 291
[B] Facts and Figures 291
[C] Direct Appeal and Claims of Innocence 293
[D] Habeas Corpus and Claims of Innocence 294
[E] Freestanding Claim of Innocence versus Innocence as a Gateway Claim 296

§ 17.02 Innocent of the Crime 297
[A] Is It Unconstitutional to Execute an Innocent Person? 297
[B] Freestanding Claims of Actual Innocence 299
[C] Innocence as a Gateway to Consideration of Constitutional Error 302
[D] The Effect of the Antiterrorism and Effective Death Penalty Act (AEDPA) 304

§ 17.03 Evidence of Innocence 305
[A] DNA Evidence 305
[B] Non-DNA Forensic Evidence and Crime Labs 308
[C] Police and Prosecutorial Misconduct 313

§ 17.04 Legislative Response 315
§ 17.05 New Voices on Innocence and the Death Penalty 316
§ 17.06 Current Debate and Controversy 319
Chapter 18 · Clemency

§ 18.01 Overview 323
§ 18.02 The Function of Clemency 325
§ 18.03 How Clemency Works 326
   [A] How Often Is Clemency Granted? 326
   [B] How Is Clemency Decided? 327
      [2] Reasons to Grant Clemency 328
§ 18.04 Due Process Restrictions on Clemency 330
   [B] Post-Woodard Cases 331
§ 18.05 Criticisms and Defense of the Clemency Process 333
   [A] Misguided Reliance on Clemency to Justify Limiting Judicial Review 333
   [B] Politics of Clemency 334
   [C] Lack of Procedures 335
   [D] The Response: In Defense of Clemency as Political and Unregulated 336

Chapter 19 · Death Row Issues: Insanity and Death Row Phenomenon 339

§ 19.01 Insanity or Incompetency at the Time of Execution 339
   [A] Eighth Amendment Prohibition Against Executing the Insane 339
   [B] “Medicate-to-Execute” Issues 344
      [3] Constitutionality of Involuntary Medication in Prison or for Competency to Stand Trial 345
         [b] Involuntary Medication for Competency to Stand Trial 346
      [5] Medication for the Purpose of Competency for Execution 347
         [a] Changing the Focus to Medical and Safety Needs 348
         [b] Is It Constitutional to Execute an “Artificially” Competent Death Row Inmate? 350
         [c] Is It Ethical for Physicians to Participate in Medicating a Death Row Inmate into Competency? 352
         [d] Legal, Medical, and Legislative Responses 353
§ 19.02 Death Row Phenomenon 353
§ 22.05 Competency of the Defendant 400
§ 22.06 Future Issues 402

Chapter 23 · International Treaty Rights and the Use of Foreign Law in Death Penalty Cases 403
§ 23.01 Overview 403
§ 23.02 The Nature of the Issue 404
§ 23.03 International Treaties in General 406
§ 23.04 Specific Treaties 410
  [A] International Covenant for Civil and Political Rights 410
  [B] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 412
  [C] Convention on the Elimination of All Forms of Racial Discrimination 414
  [D] Vienna Convention on Consular Relations 415
  [E] American Declaration of the Rights and Duties of Man 423
§ 23.05 Relevance of Foreign Law 425

Chapter 24 · The Federal Death Penalty 429
§ 24.01 Overview 429
§ 24.02 Historical Background 430
  [A] From the First Congress Through Furman 430
§ 24.03 Modern Federal Death Penalty Procedures 433
  [C] Facial Constitutionality of Federal Death-Penalty Statutes 438
§ 24.04 Administration of the Federal Death Penalty 439
  [A] Centralized Review by the Department of Justice 439
  [B] Questions about Racial Disparities 441
  [C] Continuing Geographical Issues 442

Chapter 25 · Military Death Penalty 445
§ 25.01 Introduction 445
§ 25.02 Historical Background 447
§ 25.03 The 1950 Uniform Code of Military Justice 447
§ 25.04 Response to Furman v. Georgia 448
§ 25.05 Capital Punishment Procedures Under the Modern Uniform Code of Military Justice 450
§ 25.06 Appeal of a Military Capital Case 453
§ 25.07 Capital Offenses Under the Uniform Code of Military Justice 454
§ 25.08 The Cox Commission and Examination of the Military System 455
§ 25.09 Military Appellate Review of Death Sentences 455
§ 25.10 “Death Is Different” in Military Courts 457
§ 25.11 Roadblocks to Military Executions After a Death Sentence Is Affirmed on Appeal 457
§ 25.12 Conclusion 459
Chapter 26 · The Death Penalty In a Global Context
§ 26.01 Overview 461
§ 26.02 International Treaties 463
§ 26.03 National Judicial and Governmental Decisions 465
§ 26.04 Recurring Issues: Mandatory Death Sentences and Death Row Phenomenon
  [A] Mandatory Death Sentences 467
  [B] Death Row Phenomenon 469
§ 26.05 Extradition 469

Chapter 27 · Evolving Attitudes on Capital Punishment: The Move Away from the Death Penalty
§ 27.01 Background 475
§ 27.02 Recent State Abolition of the Death Penalty 481
  [A] Abolition by the Courts 481
    [1] New York 481
    [2] Delaware 483
  [B] Abolition by the Legislature 484
    [1] New Jersey 484
    [2] New Mexico 485
    [3] Illinois 486
    [5] Maryland 489
§ 27.03 Voter Initiatives or Referendum 489
  [A] California 489
  [B] Other Voter Initiatives and Elections 492
§ 27.04 Moratorium 493
§ 27.05 Challenges to State Death Penalty Statutes 495
  [A] Florida 495
  [B] Alabama 496
§ 27.06 Other Challenges 496
§ 27.07 Cost and the Death Penalty Debate 497
§ 27.08 Conclusion 500

Chapter 28 · Future Issues in Capital Punishment Law
§ 28.01 Overview 501
§ 28.02 Publicizing Executions 502
§ 28.03 Terrorism, Civilian Trials, and Military Commissions 503
§ 28.04 “Fast-Tracking” Death Penalty Cases 508
§ 28.05 Executing Those Who are Severely Mentally Ill 509
§ 28.06 The Continuing Controversy 513

Table of Cases 515
Table of Statutes 525
Index 529