

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

- Understanding Immigration Law, 2e**
Kevin R. Johnson, Raquel Aldana, Ong Hing,
Leticia Saucedo, and Enid Trucios-Haynes
- Understanding Insurance Law, 6e**
Robert H. Jerry, II and Douglas Richmond
- Understanding Intellectual Property Law, 3e**
Donald Chisum, Tyler T. Ochoa, Shubha
Ghosh, and Mary LaFrance
- Understanding International Business and
Financial Transactions, 4e**
Jerold Friedland
- Understanding International Criminal
Law, 3e**
Ellen S. Podgor and Roger S. Clark
- Understanding International Law, 2e**
Stephen McCaffrey
- Understanding Jewish Law**
Steven Resnicoff
- Understanding Juvenile Law, 5e**
Martin Gardner
- Understanding Labor Law, 4e**
Douglas E. Ray, Calvin William Sharpe,
and Robert N. Strassfeld
- Understanding the Law of Terrorism, 2e**
Erik Luna and Wayne McCormack
- Understanding the Law of Zoning and
Land Use Controls, 3e**
Barlow Burke
- Understanding Lawyers' Ethics, 5e**
Monroe H. Freedman and Abbe Smith
- Understanding Local Government, 2e**
Sandra Stevenson
- Understanding Modern Real Estate
Transactions, 4e**
Alex M. Johnson, Jr.
- Understanding Negotiable Instruments and
Payment Systems**
William H. Lawrence
- Understanding Nonprofit and Tax Exempt
Organizations, 2e**
Nicholas Cafardi and Jaclyn Cherry
- Understanding Partnership and
LLC Taxation, 4e**
Jerold Friedland
- Understanding Patent Law, 3e**
Amy Landers
- Understanding Products Liability Law, 2e**
Bruce L. Ottley, Rogelio Lasso, and
Terrence F. Kiely
- Understanding Property Law, 4e**
John Sprankling
- Understanding Remedies, 3e**
James Fischer
- Understanding Sales and Leases of Goods, 3e**
William H. Henning, William H. Lawrence,
and Henry Deeb Gabriel
- Understanding Secured Transactions, 5e**
William H. Lawrence, William H. Henning,
and R. Wilson Freyermuth
- Understanding Securities Law, 6e**
Marc I. Steinberg
- Understanding Taxation of Business Entities**
Walter Schwidetzky and Fred B. Brown
- Understanding Torts, 6e**
John Diamond, Lawrence C. Levine,
and Anita Bernstein
- Understanding Trademark Law, 3e**
Mary LaFrance
- Understanding Trusts and Estates, 6e**
Roger W. Andersen and Susan Gary
- Understanding White Collar Crime, 4e**
J. Kelly Strader

Understanding Capital Punishment Law

FOURTH EDITION

Linda E. Carter

DISTINGUISHED PROFESSOR OF LAW EMERITA
UNIVERSITY OF THE PACIFIC, MCGEORGE SCHOOL OF LAW

Ellen S. Kreitzberg

PROFESSOR OF LAW AND DIRECTOR, DEATH PENALTY COLLEGE
DIRECTOR OF THE CENTER FOR SOCIAL JUSTICE AND PUBLIC SERVICE
SANTA CLARA UNIVERSITY SCHOOL OF LAW

Scott W. Howe

FRANK L. WILLIAMS PROFESSOR OF CRIMINAL LAW
CHAPMAN UNIVERSITY, FOWLER SCHOOL OF LAW



CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2018
Carolina Academic Press, LLC
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: Carter, Linda E., author. | Kreitzberg, Ellen, author. | Howe, Scott W., author.

Title: Understanding capital punishment law / Linda E. Carter, Ellen S. Kreitzberg, Scott W. Howe.

Description: Fourth edition. | Durham, North Carolina : Carolina Academic Press, LLC, [2018] | Includes bibliographical references and index.

Identifiers: LCCN 2017053809 | ISBN 9781531008567 (alk. paper)

Subjects: LCSH: Capital punishment--United States.

Classification: LCC KF9227.C2 C36 2018 | DDC 345.73/0773--dc23

LC record available at <https://lcn.loc.gov/2017053809>

eISBN 978-1-53100-857-4

Carolina Academic Press, LLC
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

For Michael, Michelle, and Laura

—L.E.C.

In memory of my Dad

—E.S.K.

For Jetty, Mario, and Jordan

—S.W.H.

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	10
[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	27
[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	29
[A] The Due Process Challenge	30
[B] The Cruel and Unusual Punishment Challenge	31
§ 4.03 Challenge to the Death Penalty as <i>Per Se</i> Unconstitutional	33
[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
[1]	Whose Views Count?	37
[2]	Statistical Interpretation	39
[D]	The Second Prong: Furthering Goals of Punishment	39
Chapter 5	· Methods of Execution	41
§ 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]	<i>Baze v. Rees</i>	52
[C]	The California Litigation: <i>Morales v. Tilton</i>	53
[D]	Post- <i>Baze</i> Changes to the Three-Drug Lethal Injection Protocol	55
[1]	The Three-Drug Protocol	55
[2]	The Two-Drug Protocol	56
[3]	The One-Drug Protocol	57
[E]	<i>Glossip v. Gross</i>	58
[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	75
§ 6.01	Overview	75
§ 6.02	<i>Furman v. Georgia</i>	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

Chapter 7 • The Death Penalty Trial	89
§ 7.01 The Bifurcated Trial	89
§ 7.02 The Penalty Phase	90
[A] Decision Making by Jury	91
§ 7.03 The Decision Process	93
[A] The Structure: Weighing v. Non-Weighing	93
§ 7.04 Automatic Appeal	94
§ 7.05 Jury Selection	95
[A] Overview	95
[B] Challenges to the Panel	96
[C] Challenges to Individual Jurors	97
[D] “Death Qualification” of a Capital Jury: Juror Attitudes Towards the Death Penalty	98
[E] “Reverse” Witherspoon: Jurors who are “Mitigation Impaired”	101
[F] Improper Inclusion or Exclusion of Jurors Challenged for Cause	101
§ 7.06 Peremptory Challenges: Discriminatory Use	102
Chapter 8 • Categorical Bars to the Death Penalty	109
§ 8.01 Overview of Categorical Bars to the Death Penalty	109
[A] Categories of Defendants or Crimes	109
[B] Challenges to the Proportionality of the Death Penalty for Categories of Defendants and Crimes	110
§ 8.02 Felony Murder and the “Non-Killer” Accomplice	112
[A] Overview	112
[B] Categorical Bar for a Non-Killer Accomplice Without <i>Mens Rea</i>	114
[1] <i>Enmund v. Florida</i>	114
[2] <i>Tison v. Arizona</i>	115
[C] How Is the Categorical Bar Applied?	118
[1] How Do the Courts Apply the Major Participant Reckless Indifference Test?	118
[2] Who Decides the Major Participant Reckless Indifference Issue?	119
§ 8.03 Persons Who Are Mentally Retarded or Intellectually Disabled	120
[A] Overview	120
[B] Between <i>Penry</i> and <i>Atkins</i>	121
[C] The Court’s Proportionality Review	122
[D] The Dissent’s Proportionality Review	123
[E] Post- <i>Atkins</i> Procedures	124
§ 8.04 Juveniles	126
[A] Overview	126
[B] The Road to <i>Roper v. Simmons</i> and the Abolition of the Juvenile Death Penalty	127
[1] The Fifteen-Year-Olds	127
[2] Sixteen- and Seventeen-Year-Old Juveniles	129
[C] <i>Roper v. Simmons</i> : The Death Penalty Is Unconstitutional for Juveniles	131
§ 8.05 Non-Murder Crimes	133
[A] Overview	133
[B] Rape of an Adult Woman: <i>Coker v. Georgia</i>	134

[1] The Decision	134
[2] Rape, Race, and the Death Penalty	135
[C] Rape of a Child: <i>Kennedy v. Louisiana</i>	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
[2] “Outrageously or Wantonly Vile”: Unconstitutionally Vague as Applied	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
[B] Use of the Aggravating Evidence in the Selection Decision: Weighing v. Non-Weighing Statutes	162
§ 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
[3] Constitutional Violations and Psychiatric Interviews	169
[4] Waiver of Constitutional Rights	169
§ 11.03 Victim Impact Evidence	170
[A] Overview	170
[B] From <i>Booth</i> to <i>Payne</i>	171
[C] Limits on Victim Impact Evidence	172
[D] Examples of Victim Impact Evidence Admitted at Trial Since <i>Payne</i>	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 <i>Lockett</i>	182
[A] The “No Preclusion” Principle of <i>Lockett</i>	182
[1] <i>Lockett v. Ohio</i> : The Facts	182
[2] <i>Lockett v. Ohio</i> : The Constitutional Standard	183
[B] The Expansion of the <i>Lockett</i> Doctrine	184
§ 12.03 The Limits of the <i>Lockett</i> 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
[2] State Variation Allowed in Structuring How the Sentencer Uses Mitigating Evidence	191
[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] <i>Ake v. Oklahoma</i>	196
[C] Post- <i>Ake</i> Issues	198
[1] Independent v. Neutral Experts	198
[2] Types of Experts	199
[3] Expert Assistance to Rebut Non-Expert Evidence of Future Dangerousness	200
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
[B] Unstructured, Open-Ended Format: The Georgia Process of General Consideration of All Evidence	205
[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
§ 13.04 Constitutional Limitation on the Sentencing Process: Cannot Affirmatively Mislead Regarding Role and Responsibility of Decision-Maker	212

§ 13.05 Information About Defendant’s Potential Release: Commutation and Parole	214
[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
[A] General Principles of Double Jeopardy and Collateral Estoppel	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 <i>Habeas Corpus</i>	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 <i>Habeas Corpus</i>	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
[2] Unreasonable Application and Unreasonable Determination of Facts	260
[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

[C] <i>Gideon</i> : Recognition of a Fundamental Need for Counsel in Criminal Cases	269
§ 16.03 <i>Strickland</i> : Development of a Test for Ineffective Assistance of Counsel	270
[A] Introduction	270
[B] The Case: <i>Strickland v. Washington</i>	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	291
§ 17.01 Overview	291
[A] What Is Innocence?	291
[B] Facts and Figures	291
[C] Direct Appeal and Claims of Innocence	293
[D] <i>Habeas Corpus</i> 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
[1] <i>Herrera v. Collins</i>	299
[2] <i>House v. Bell</i>	301
[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	323
§ 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
[1] The Process	327
[2] Reasons to Grant Clemency	328
§ 18.04 Due Process Restrictions on Clemency	330
[A] “Minimal” Due Process: The <i>Woodard</i> Case	330
[B] Post- <i>Woodard</i> 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
[1] The Nature of the Issue	339
[2] The <i>Ford</i> Opinion	339
[3] What Is Meant by “Insane” or “Incompetent” at Time of Execution?	340
[4] The <i>Panetti</i> Opinion	342
[5] What Procedure Is Required?	343
[B] “Medicate-to-Execute” Issues	344
[1] The Nature of the Issue	344
[2] Overview of the Legal Issues	345
[3] Constitutionality of Involuntary Medication in Prison or for Competency to Stand Trial	345
[a] <i>Washington v. Harper</i> : Involuntary Medication of Prison Inmates	346
[b] Involuntary Medication for Competency to Stand Trial	346
[4] Questions from the Confluence of <i>Ford</i> , <i>Panetti</i> and <i>Harper/Sell</i>	347
[5] Medication for the Purpose of Competency for Execution	347
[6] Medication for the Purposes of the Inmate’s Medical Interest and Prison Safety	348
[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

[A] The Nature of the Issue	353
[B] Cruel and Unusual Punishment?	354
Chapter 20 · Race and the Death Penalty	359
§ 20.01 Historical Background	359
§ 20.02 The Criminal Justice System	360
[A] Overview	360
[B] Rape, Race and the Death Penalty	361
[C] The Modern Era of Death Penalty Trials and Race	362
§ 20.03 Measures of Racial Discrimination	363
§ 20.04 <i>McCleskey v. Kemp</i>	365
[A] The Case	365
[B] The Baldus Study: Statistical Evidence of Sentencing Disparities in Georgia	365
[C] The Five-Justice Majority	367
[D] An Impassioned Dissent	369
§ 20.05 Post- <i>McCleskey</i> : Judicial Response	370
§ 20.06 Post- <i>McCleskey</i> : Legislative Response	372
§ 20.07 Racial Issues	373
[A] Racial Attitudes of the Decision Makers	373
[B] Racial Attitudes of the Defense Attorney	375
[C] Race and Future Dangerousness	376
Chapter 21 · Gender Bias and the Death Penalty	379
§ 21.01 Overview	379
§ 21.02 Statistics	379
§ 21.03 Theories of Gender Discrimination	380
[A] Chivalry Theory	381
[B] Evil Woman Theory	381
[C] Legislative Selection of Death Eligible Crimes	382
[D] Retribution	382
§ 21.04 Case Studies	383
[A] Velma Barfield	383
[B] Karla Faye Tucker	384
[C] Susan Smith	384
§ 20.05 The Future of Executing Women	385
Chapter 22 · Volunteers: Defendants Who Want to Die	387
§ 22.01 Nature of the Issues	387
§ 22.02 Defendant Advocates Death at Trial Level	388
[A] Overview	388
[B] Eighth Amendment: Is Mitigation Required?	390
[C] Sixth Amendment: What is Effective Assistance of Counsel for a Volunteer?	394
[D] Ethical Issues for Defense Counsel	395
§ 22.03 Defendant Advocates Death on Appeal or in Postconviction Proceedings	398
§ 22.04 Raising the Issue: “Next Friend” and Individual Standing	399

§ 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 <i>Furman</i>	430
[B] The Post- <i>Furman</i> Era Through 1988	432
§ 24.03 Modern Federal Death Penalty Procedures	433
[A] The 1988 Drug Kingpin Act	433
[B] The 1994 Federal Death Penalty Act	434
[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 <i>Furman v. Georgia</i>	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	461
§ 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	467
[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	475
§ 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
[4] Connecticut	488
[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	501
§ 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