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## Judicial Ethics May Decide Whether a Prisoner Can Be Touched As He Is Executed

Mikayla Lewison\*

A critical piece to the functionality of democracy is the public's trust and confidence in the government.<sup>1</sup> The general public does not have a direct role in building or maintaining the judiciary, but the independent courts rely on the trust and confidence of the public.<sup>2</sup> If the community lacks trust and confidence in the judiciary, it not only undermines the judicial system, but also democracy.<sup>3</sup> Americans have more confidence in the Court when they believe the justices are acting apolitically.<sup>4</sup> Personal interests of justices, however, have likely played a major role in recent death penalty cases regarding whether or not prisoners may have the cleric of their religious choice inside the chamber as they are executed.<sup>5</sup>

The law has made it clear the death penalty is now constitutional.<sup>6</sup> Capital punishment is an intolerable denial of civil liberties, is unfair, and is unjust.<sup>7</sup> The death penalty is permitted in 24 states, abolished in 23 states, and 3 states have governor-imposed moratoriums.<sup>8</sup> Is condemning a

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<sup>1</sup> Natalie Anne Knowlton, *Trusting the Publics Perception of Our Justice System*, IAALS (Aug. 27, 2020), <https://iaals.du.edu/blog/trusting-public-s-perception-our-justice-system>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Rachel Sheldon, *The Supreme Court used to be openly political. It traded partisanship for power.*, WASH. POST (Sept. 25, 2020), [https://www.washingtonpost.com/outlook/supreme-court-politics-history/2020/09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67\\_story.html](https://www.washingtonpost.com/outlook/supreme-court-politics-history/2020/09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67_story.html).

<sup>5</sup> Jessica Gresko, *Religion and the death penalty collide at the Supreme Court*, AP NEWS (Feb. 12, 2021), <https://apnews.com/article/religion-alabama-executions-us-supreme-court-b-smith-ad3e55ced26c554f4a962423087d5a90>.

<sup>6</sup> *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>7</sup> Hugo Adam Bedau, *The Case Against The Death Penalty*, AMERICAN CIVIL LIBERTIES UNION (2012), <https://www.aclu.org/other/case-against-death-penalty>.

<sup>8</sup> *States with and without the death penalty – 2021*, DEATH PENALTY INFORMATION CENTER <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Jan. 6, 2022); *See Gregg*, 428 U.S. 153 (concluding American modern law has made is clear the death penalty is constitutional).

person to death a morally justifiable response to voluntary criminal conduct?<sup>9</sup> As of May 2021, 55% of Americans reported the death penalty was morally acceptable, while 40% said it was morally wrong, 5% decided it depended, and 1% had no opinion.<sup>10</sup> The Court even noted if there is an “especially heinous and atrocious murder, [] the law said those are the ones that get the death penalty.”<sup>11</sup> Once the death penalty was reinstated in 1976 post *Furman*,<sup>12</sup> Justice Sotomayor reported judges sentenced ninety-five Alabama death row prisoners to death when juries recommended a sentence of life in prison.<sup>13</sup> This is despite the fact that in a democracy, it is vitally important that individual judges and the judiciary are impartial by avoiding exerting their own self-interests.<sup>14</sup> Currently, the Court has a conservative supermajority, with the conservative justices in the driver’s seat.<sup>15</sup> Justices Sotomayor, Kagan, and Breyer are in the

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<sup>9</sup> Robert Hoag, *Capital Punishment*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://iep.utm.edu/cap-puni/>.

<sup>10</sup> These numbers are based on the most recent survey conducted by Gallup. *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx>.

<sup>11</sup> *State v. Rouse*, 451 S.E.2d 543, 562 (1994); *See also State v. Shurn*, 886 S.W.2d 447, 464 (Mo. 1993) (en banc) (finding that asking the jury to consider an eye for an eye in a death penalty case was acceptable); *Christenson v. State*, 402 S.E.2d 41, 50 (Ga. 1991) (deciding it was permissible to explain retribution as an eye for an eye, like it was learned in Sunday School).

<sup>12</sup> *Furman v. Georgia*, 408 U.S. 238 (1972) (declaring capital punishment unconstitutional arguing the death penalty was cruel and unusual punishment in violation of the Eighth Amendment); *Constitutionality of the Death Penalty in America*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/constitutionality-of-the-death-penalty-in-america> (last visited Nov. 18, 2021) (Ruling in *Furman* the death penalty violated the Eighth Amendment “essentially open[ed] the door” to rewrite new death penalty statutes).

<sup>13</sup> Valarie P. Hans, et al., *The Death Penalty: Should the Judge or the Jury Decide Who Dies?*, 12 J. EMPIRICAL LEGAL STUDIES 70, 81 n.65 (2015).

<sup>14</sup> *Independence*, COURTS AND TRIBUNALS JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/the-judiciary-the-government-and-the-constitution/jud-acc-ind/independence/> (last visited Nov. 19, 2021).

<sup>15</sup> Laura Bronner & Elena Mejia, *The Supreme Court’s Conservative Supermajority Is Just Beginning To Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), <https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/>.

minority.<sup>16</sup>

Looking closely at recent death penalty cases requesting clerics in the chambers, the Court is negligibly inconsistent. The Supreme Court first denied Alabama prisoner Dominique Ray stay of execution and the right to have his Muslim cleric present.<sup>17</sup> However, one month later the Court stayed Texas prisoner Patrick Murphy's execution over the right to have his Buddhist cleric present in the death chamber.<sup>18</sup> In both cases, the applications for a stay of execution were presented to Associate Justice Samuel Alito,<sup>19</sup> who is one of the most conservative judges on the Court.<sup>20</sup> After staying Murphy's execution, Justice Kavanaugh, a former President Trump appointee who also likely aligns with Justice Alito's conservative views,<sup>21</sup> advised states to make a choice.<sup>22</sup> He ordered states must choose between allowing all prisoners to have the religious cleric of their choice present or banning all clerics.<sup>23</sup> In response, the Texas Department of Criminal Justice ("TDCJ") changed its policy to allowing only prison security staff in the chamber.<sup>24</sup> After the policy change in Texas, the Court then stayed Texas prisoner Ruben Gutierrez's execution over the right to have his Catholic cleric present due in large part to TDCJ's ban on all clerics in the death chamber.<sup>25</sup> Gutierrez's application for stay of execution was also presented to and granted by Justice Alito.<sup>26</sup>

Most recently is the case of John Henry Ramirez, who is among one of the

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<sup>16</sup> Vanessa Taylor, *A guide to the 2021 Supreme Court – and how it's likely to rule on today's biggest issues*, MIC (June 7, 2021), <https://www.mic.com/impact/supreme-court-justices-political-leanings-a-guide-to-the-2021-court-81060330>.

<sup>17</sup> *Dunn v. Ray*, 139 S.Ct. 661 (2019).

<sup>18</sup> *Murphy v. Collier*, 139 S.Ct. 1475 (2019).

<sup>19</sup> *See Dunn*, 139 S.Ct. 661; *See Murphy*, 139 S.Ct. 1475.

<sup>20</sup> Taylor, *supra* note 16.

<sup>21</sup> *Id.*

<sup>22</sup> Gresko, *supra* note 5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Juan A. Lozano, *US Supreme Court halts Texas execution over clergy question*, AP NEWS (June 16, 2020), <https://apnews.com/article/4e9159f5a14395d6aaad24a7d545e738>.

<sup>26</sup> *Gutierrez v. Saenz*, 141 S.Ct. 127 (2020).

one hundred and ninety eight Texas prisoners on death row.<sup>27</sup> He was sentenced with the harshest punishment within the judicial system in 2008 and sentenced to death.<sup>28</sup> While crime and punishment have seemingly always gone together,<sup>29</sup> capital punishment given to Ramirez was *meant* to inflict pain, and to deprive him of life, liberty, any natural right, and privilege.<sup>30</sup> Although a capital sentence is unappealing to 43% of Americans,<sup>31</sup> Ramirez takes full responsibility for the crime he committed and said he is ready for his punishment.<sup>32</sup>

Ramirez's case is not about capital punishment per se. It is over a religious issue arising regarding his punishment.<sup>33</sup> Ramirez is a religious man and requested his Baptist cleric, Pastor Dana Moore, to lay a hand on him and pray audibly during his execution.<sup>34</sup> TDCJ refused to allow Moore to touch Ramirez or pray audibly during the execution which is, therefore, a violation of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) *and* a violation of his First Amendment right of free exercise

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<sup>27</sup> *Prisoners on Death Row as of July 1, 2021 (per Death Row USA)*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/death-row/overview> (last visited Jan. 6, 2022).

<sup>28</sup> Jolie McCullough, *For the third time in recent years, U.S. Supreme Court halts Texas execution over rules for religious advisers in the death chamber*, THE TEXAS TRIBUNE (Sept. 8, 2021), <https://www.texastribune.org/2021/09/08/texas-execution-john-ramirez/>.

<sup>29</sup> Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 852 (2002); The story of an impoverished student struggling between good and evil. Fyodor Dostoevsky, CRIME AND PUNISHMENT (Dover Publications, Reprint ed. 2001).

<sup>30</sup> See *Cummings v. Missouri*, 71 U.S. 277, 286 (1866): "A sanction – such as a fine, penalty, confinement, or loss of property, right, or privilege – assessed against a person who has violated the law." Punishment, *Black's Law Dictionary* (11th ed. 2019), available at Westlaw.

<sup>31</sup> These numbers are based on the most recent survey conducted by Gallup. *Supra* note 10.

<sup>32</sup> See Ruth Graham, *On Death Row in Texas, a Last Request: A Prayer and 'Human Contact'*, N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/2021/08/30/us/on-death-row-in-texas-a-last-request-a-prayer-and-human-contact.html>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

of religion.<sup>35</sup> If more than half of the people in America favor the death penalty,<sup>36</sup> Ramirez should be allowed to have the cleric in the chamber of his choice as comfort as “the fatal drug cocktail snakes through an IV line into his arm.”<sup>37</sup>

During oral arguments on November 9, 2021 for Ramirez, some of the conservative justices accused Ramirez of alleging religion claims to strategically delay the execution.<sup>38</sup> Both Chief Justice Roberts and Justice Thomas asked about the sincerity of Ramirez’s claim.<sup>39</sup> Seth Kretzer, Ramirez’s defense attorney, argued Ramirez is only seeking to fully exercise his religious beliefs as a Christian and not to delay his execution.<sup>40</sup> Justices Kagan, Breyer, Sotomayor, and surprisingly Barrett appeared to lean in favor of Ramirez and seemed troubled by Texas’ refusal to honor Ramirez’s request.<sup>41</sup> Justice Gorsuch was silent during the argument but did vote in favor to stay another Alabama prisoner’s execution in February of 2021 who asserted a similar religion claim.<sup>42</sup> Chief Justice Roberts and Justices Thomas and Kavanaugh appeared to lean in favor of the state’s argument over concerns ruling in Ramirez’s favor would open the floodgates of last minute execution litigation on the Court’s docket.<sup>43</sup>

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<sup>35</sup> *Condemned Prisoner Asks U.S. Supreme Court to Stay His Execution Unless Texas Corrections Official Permit His Religious Advisor to ‘Lay on Hands’ While He is Being Put to Death*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/news/condemned-prisoner-asks-u-s-supreme-court-to-stay-his-execution-unless-texas-corrections-officials-permit-his-religious-advisor-to-lay-on-hands-while-he-is-being-put-to-death> (last visited Jan. 6, 2022).

<sup>36</sup> These numbers are based on the most recent survey conducted by Gallup. *Supra* note 10.

<sup>37</sup> Graham, *supra* note 32.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Graham, *supra* note 32; *Dunn v. Smith*, 141 S.Ct. 725 (2021).

<sup>43</sup> *A Divided Supreme Court Appears Troubled By Texas Death Penalty Religious Freedom Case*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/news/a-divided-supreme-court-appears-troubled-by-texas-death-penalty-religious-freedom-case-in-ramirez-v-collier-oral-argument> (last visited Jan. 6, 2022).

The justices on the Court care about other things more than Ramirez's religious freedom issue<sup>44</sup> because they also devote much of their time to hearing polarizing issues.<sup>45</sup> The conservative leaning justices seemingly care more about accelerating capital punishment, which trumps religious liberty.<sup>46</sup> The liberal justices care more about gay rights, which also trumps religious liberty.<sup>47</sup> While some predict the Court to rule against Ramirez,<sup>48</sup> it is "jarring hearing conservative justices writing their hands over whether and how to accommodate a death row inmates' religious beliefs when they have been far more concerned about protecting an individual's religious beliefs."<sup>49</sup>

The Court should allow Moore to be present during Ramirez's execution and lay a hand on him because his "[claim] has significance with respect to human dignity and basic decency."<sup>50</sup> Comparative to Justice Kavanaugh spelling out his reasoning why it would be unconstitutional for Texas to execute Murphy without his Buddhist cleric in the room, Ramirez's request to have Moore present during his execution should be granted because "the Constitution prohibits such denominational discrimination."<sup>51</sup>

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<sup>44</sup> Michael Hall, *What Do We Owe Those We've Condemned To Die?*, TEXASMONTHLY (Nov. 11, 2021), <https://www.texasmonthly.com/news-politics/supreme-court-death-penalty-john-henry-ramirez/>.

<sup>45</sup> Ryan C. Williams, *Supreme Court justices say the institution must be non-partisan – but they make it political*, NBC NEWS (Sept. 19, 2021), <https://www.nbcnews.com/think/opinion/supreme-court-justices-say-institution-must-be-nonpartisan-they-make-ncna1279280>

<sup>46</sup> Hall, *supra* note 44.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> DEATH PENALTY INFORMATION CENTER, *supra* note 43.

<sup>50</sup> *Id.*

<sup>51</sup> *Murphy*, 139 S.Ct. at 1475; Robert Barnes, *Brett Kavanaugh pivots as Supreme Court allows one execution, stops another*, WASH. POST (Mar. 30, 2019), [https://www.washingtonpost.com/politics/courts\\_law/brett-kavanaugh-pivots-as-supreme-court-allows-one-execution-stops-another/2019/03/29/26b28b32-5245-11e9-88a1-ed346f0ec94f\\_story.html](https://www.washingtonpost.com/politics/courts_law/brett-kavanaugh-pivots-as-supreme-court-allows-one-execution-stops-another/2019/03/29/26b28b32-5245-11e9-88a1-ed346f0ec94f_story.html).

Edited by Alex Beezley