

Wonder

Volume: 1 Number: 2 Theme: **Capital Punishment**

Title: **“Legal Background of Capital Punishment”** Author: **Jessie Kirchner**

Three hundred and fifty-five people currently await execution on Texas’s death row. By the time this article is published, there may be one less. Hank Skinner is due to die on March 24 unless Texas grants him the reprieve he is requesting for DNA tests that he claims will prove his innocence.

Skinner is one of over thirty-two hundred death row inmates in the United States, where the distribution of capital punishment forms a complex patchwork of authorizations, moratoria, and bans. Essentially, thirty-three states and the federal government authorize it, though several have not executed anyone in decades. The death penalty is reserved for those convicted of murder and some federal crimes including treason and espionage. Kansas, New Hampshire, and the U.S. military have de facto moratoria, meaning that although they permit execution, they have not carried it out since the so-called modern era of capital punishment began. Thirteen other states and Washington D.C. have abolished it altogether. New York and Massachusetts have technically banned it as well, since they do not have death rows and have not attempted to amend their death penalty statutes after they were ruled unconstitutional by state supreme courts.

Capital punishment dates back to the Colonial Era and was widely authorized until it underwent a national suspension in 1972, when the U.S. Supreme Court found it unconstitutional in *Furman v. Georgia*. The case consolidated several death penalty impositions involving trials where a jury determined guilt and sentenced the defendant in one phase. Typical of many capital punishment cases, the Supreme Court split 5:4. The majority was unable to agree on anything but the unconstitutionality of the trial procedure as a violation of the Eighth Amendment’s prohibition of cruel and unusual punishment.

Yet *Furman* halted executions until 1976, when the Court ruled a two-phase trial constitutional in *Gregg v. Georgia*. In this procedure, a jury first determines guilt and later deliberates on the sentence based on the crime and a balance of aggravating and mitigating factors. States speedily conformed their statutes to comply with these requirements. *Gregg* served as the watershed decision that ushered in the modern era of capital punishment, whose first execution occurred on January 17, 1977.

Since then, the Supreme Court has issued numerous opinions on the death penalty that aim to clarify its substantive and procedural scope. I touch on only a few relevant ones here, most of which expand or overturn early post-*Gregg* cases.

In this contentious area of constitutional law, the Court shows some unease and an unusual willingness to depart from the traditional principle of *stare decisis* — i.e., consistency in upholding established precedent. For example, regarding the crimes for which a death sentence can be imposed, the Court ruled in *Kennedy v. Louisiana*(2008) that states could only use it in convictions involving murder. This expanded an earlier holding that it was a disproportionate sentence for rape when the victim’s life was not taken.

The Court also circumscribed the kinds of defendants who may be executed, making exceptions for the insane in *Ford v. Wainwright* (1986), the mentally handicapped in *Atkins v. Virginia* (2002), and juveniles in *Roper v. Simmons* (2005). *Roper* is particularly noteworthy for its uncharacteristic reliance on foreign law to demonstrate how rare the U.S. was in its practice of imposing the sentence on offenders less than eighteen at the time of commission.

Another important case addressed concerns about the high rates of death sentences imposed on members of racial minorities as contrasted with white defendants. In *McCleskey v. Kemp* (1987), the Court found that such arguably incidental disparities weren't unconstitutional per se, but that proven intentional racial discrimination would violate equal protection of the law.

Finally, *House v. Bell* (2006), dealt with new forensic DNA tests that sometimes uncover previously inaccessible evidence. The decision authorized judges to consider post-conviction DNA evidence in appeals of death sentences. Other procedural cases have discussed the kinds of circumstances a jury should consider at trial and the importance of providing defendants with adequate counsel.

Interestingly, the U.S. is the only industrialized democracy where the death penalty is authorized and still carried out, as the others currently have *de facto* moratoria. Given the vast majority of states that still permit the practice and the tendency of the Supreme Court to set cautious boundaries around it rather than banning it altogether, it's likely that it will main entrenched in the American criminal justice system for a long time to come. Proponents usually cite the possibility of deterrence – i.e., the protection of society from particularly dangerous offenders and the strong incentive not to follow their example. Retribution for especially brutal or heinous crimes is another major justification along with the sense of finality execution can offer to the families of crime victims.

The Orthodox Church, and Christianity in general, accommodates a full range of stances on the issue of capital punishment. Whether for it, against it, or somewhere in between, we can all unite in praying for death row inmates, their families, and those of their victims. One specific concern is the fairness and integrity of the process. As long as a fallible criminal justice system continues to sentence people like Hank Skinner to death, it is essential that the state at least do its best to avoid executing the innocent.

Editor's Note: It was announced that Hank Skinner was granted an indefinite stay of execution by the Supreme Court just hours before his scheduled execution so that he can attempt to prove his innocence through DNA testing.

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Discussion Questions:

Is Capital Punishment a defining part of our American culture and political landscape?

Does it reflect poorly on our nation that we still allow Capital Punishment or should it be a source of pride for us?

What have you done lately to reach out to those in prison as commanded by Christ in the Gospels? What could you do?