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The Supreme Court Strikes Again—'Evolving Standards'

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Unsurprisingly, the majority opinion was written by Justice Anthony Kennedy, who has emerged as one of the leading advocates for the Court's imposition of its own morality in the place of elected legislators. In this case, *Roper v. Simmons*, Kennedy has once again shown himself to be one of the most dangerous legal activists of our times, ready to impose his own sense of morality and law upon the rest of society, putting the Supreme Court in the place of the legislatures and the Justices' dictates in the place of reasoned national debate.

The particulars of this case are unusually chilling. Christopher Simmons, then just seven months short of his eighteenth birthday, planned with teenage friends to "murder someone." As the Court's opinion details, "In chilling, callous terms he talked about his plan, discussing it for the most part with two friends . . . Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends that they could 'get away with it' because they were minors."

Simmons carried out his plan, breaking into the home of Shirley Crook, binding her with duct tape, driving her to a state park, and tossing her off a railroad trestle into Missouri's Meramec River. Mrs. Crook drowned in the river, and her body was later found by fishermen. Police quickly traced the murder to Simmons, who had been bragging about the crime to his high school classmates. Shortly after his arrest, Simmons confessed to the murder and cooperated with police in producing a videotaped reenactment at the crime scene.

In the course of his trial, the jury recommended the death penalty, but only "after finding the State had proved each of the three aggravating factors submitted to it." Simmons appealed the death penalty, and his argument was accepted by the Missouri Supreme Court. The State of Missouri eventually appealed the case to the U.S. Supreme Court, leading to this month's decision.

In his majority opinion, Justice Kennedy cited "the evolving standards of decency that mark the progress of a maturing society" as his license to find the death penalty for juveniles to be cruel and unusual punishment, and thus unconstitutional.

In tracing the history of the Court's rulings on capital punishment, Kennedy admitted that the same Court had affirmed the death penalty for murderers age 16 and older as recently as 1989. Nevertheless, the High Court's 2002 decision in *Atkins v. Virginia* the Court ruled that the death penalty was unconstitutional in the case of mentally retarded murderers.

In framing his majority opinion, Kennedy turned to psychology as the platform for his argument. He first asserted that

juveniles under age 18 lack maturity and have “an underdeveloped sense of responsibility.” Secondly, he identified juveniles as “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” Finally, he argued that “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.” As his authority for that last assertion, Kennedy cited psychologist Eric Erikson, as if that should end all debate and settle the subject.

Putting his three arguments together, Kennedy proposed that, “These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”

The triumph of psychology over jurisprudence was fully evident in Kennedy’s opinion, as he deferred to psychiatrists and psychologists in making a determination about the maturity and moral responsibility of older adolescents. “It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity,” he argued, “and the rare juvenile offender whose crime reflects irreparable corruption.” He went on to cite the American Psychiatric Association as his authority in noting that the APA has a rule “forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.”

The direction of Kennedy’s argument is obvious—if psychiatrists are reluctant to draw such conclusions, juries should not be allowed even to consider the death penalty when the defendant is a juvenile.

In the end, Kennedy’s opinion argued that the Eighth and Fourteenth Amendments “forbid imposition of the death penalty on offenders who under the age of 18 when their crimes were committed.” But, Kennedy’s decision was not based in the actual text of the Constitution, but in the subtext of his own amateur psychologizing, and in his impression of international opinion on the question. In arguing for a national consensus against the death penalty for all juveniles, Kennedy argued, “A majority of states have rejected the imposition of the death penalty on juvenile offenders under 18.” Yet, in order to come up with a “majority” of states against the juvenile death penalty, he had to add all the states that outlaw the death penalty in any form.

Nevertheless, Kennedy’s determination to rule that the death penalty for juveniles is unconstitutional was less grounded in U.S. opinion than in the moral determination of the international community. “Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty,” Kennedy claimed. He went on to argue that this international consensus “does not become controlling” for American courts, yet it clearly controlled his own opinion. “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty,” Kennedy insisted, “resting in large part on the understanding that the instability and emotional imbalance of young people may be a factor in the crime.”

This was too much for Justice Sandra Day O’Connor, who accused Kennedy of drawing an arbitrary line at age 18, “no matter how deliberate, wanton, or cruel the offense.” In O’Connor’s view, “Neither the objective evidence of contemporary societal values, nor the Court’s moral proportionality analysis, nor the two in tandem suffice to justify this ruling.” O’Connor insisted that though 17-year-old offenders might be, as a class, “undoubtedly less mature, and therefore less culpable for their misconduct, than adults,” she argued that “at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case.”

But, if O’Connor was ready to correct Kennedy’s overreach, Justice Antonin Scalia trounced Kennedy’s majority opinion as an egregious example of a judge legislating from the bench.

Scalia’s dissent, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, punctured Kennedy’s arguments. Scalia first rejected Kennedy’s claim that a national consensus led the Court to find the execution of juvenile murderers to be cruel and unusual punishment. Scalia is no friend of the “evolving standards of decency” argument in the first place, for he understands that this elastic clause has allowed the Court to launch itself from the task of constitutional interpretation into the arena of judicial legislation.

When Kennedy argued that juveniles under age 18 should not be executed because they do not enjoy other privileges

granted to adults—such as the ability to vote and serve on juries—Scalia dismissed this argument as “patently irrelevant.” He cited the Court’s decision in *Stanford v. Kentucky* as finding that it is “absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong.”

In a fascinating turn, Scalia then raised the question of juvenile access to abortion—a supposed “right” upon which a majority of Justices has insisted. “Whether to obtain an abortion is surely a much more complex decision for a young person than whether to kill an innocent person in cold blood,” Scalia asserted.

What about the right of juries to make determinations in capital murder cases? Scalia noted that Kennedy’s majority opinion fails to “suggest a stopping point” for taking the decision-making power away from juries.

In the end, Scalia reserved his most bombastic language to oppose Kennedy’s citation of foreign law and an international “consensus” as the basis for his decision. Kennedy had cited the United Nations Convention on the Rights of the Child as prohibiting the juvenile death penalty. Scalia documented the fact that the United States Senate ratified that convention, only when subject to a reservation that the United States “reserves the right, subject to its Constitutional restraints, to impose capital punishment on any person . . . duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crime committed by persons below eighteen years of age.” In his inimitable style, Scalia stated the obvious: “Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position.”

Beyond this, Scalia asserted that the very idea “that American law should conform to the laws of the rest of the world” ought to be rejected. He noted that the Court is pleased to cite international precedents that agree with its already-decided opinions, but certainly does not cite international consensus when dealing with issues like abortion.

In the end, Scalia lamented, “This is no way to run a legal system.” He suggested that the Court’s continual “updating” of the Eighth Amendment will eventually “crown arbitrariness with chaos.”

Responding to the majority decision, *The Wall Street Journal* accused the Court of invoking international opinion because this offers “one more convenient rationale that the Justices can use to make their own moral values the law of the land.” Citing Kennedy as the author of the majority opinion, the *Journal* did find one positive aspect to the decision. “If there is a silver lining to this case, it is that it probably disqualifies Justice Kennedy from any consideration to be promoted to Chief Justice when William Rehnquist resigns.”

Constitutional specialist Douglas W. Kmiec, Professor of Constitutional Law at Pepperdine University, reduced the case to its barest essential: “The problem with the U.S. Supreme Court’s decision last week . . . banning the execution of minors is that it was based, when you get right down to it, only on the personal beliefs of five justices and buttressed by the opinions of people who live in other countries.”

Kmiec rightly reasons that the Framers of the U.S. Constitution never intended the country to be bound by 18th century notions of “cruel and unusual punishment.” Nevertheless, they certainly did not intend the courts to adjudicate this issue, but trusted the people, through their elected legislators, to decide such difficult questions.

The *Roper* decision will go down as one more milestone in the U.S. Supreme Court’s project of judicial activism and moralizing. Once more, a majority of Justices on the Court have decided to impose their own personal views, couched in the most strident moral language, for the will of the people and the role of legislators.

In the end, this decision will serve as one more reminder of what is at stake in the battle for the nation’s courts and the nomination of judges. Until this pattern is reversed, this nation will effectively be ruled by unelected judges.

