

Supreme Court Majority Bars Death Penalty for Minors

by Nancy Spannaus

The March 1 decision by the U.S. Supreme Court majority, declaring that the execution of minors under the age of 18 is unconstitutional, represents another step toward bringing the United States back into the moral community of nations. Whereas most countries in the world have celebrated their liberation from oppression by banning the death penalty, the United States has remained a notorious example of retributive justice. At least 72 death row prisoners, who committed their crimes when they were under 18, are expected to be reprieved by this ruling—many of them in President Bush’s home state of Texas.

The Court decision, written by Justice Anthony Kennedy, reverses a ruling made in 1989 which okayed execution of minors over the age of 15. The current decision was endorsed by a 5-4 majority, including Justices Kennedy, Breyer, Ginsberg, Souter, and Stevens. Opposing, virulently, was Justice Antonin Scalia, who was joined by Thomas and Rehnquist. Justice Sandra Day O’Connor wrote her own, milder dissent from the majority.

Evolving Standards of Decency

What allegedly enraged Scalia was the fact that the Justices actually changed the Court’s ruling of 15 years before, without there having been an overwhelming outpouring of opposition, especially in state legislation, against executing minors over the intervening years. Only five states had passed legislation against it, Scalia railed. And that meant that only 47% of the states overall opposed executing juveniles, hardly enough to ban the practice, according to Scalia’s way of thinking.

In fact, Scalia was carrying out a sleight of hand to make this argument. For if you consider the 12 states which have banned capital punishment altogether, and add them to the 18 which have banned judicial murder of juveniles, that makes 30 states, or 60% of the states, against the practice. Scalia thinks that those states which oppose all capital punishment shouldn’t count.

While the numbers game seems crass, it does have its justification in law. The basis for the Justices’ banning was the Eighth Amendment to the U.S. Constitution, which prohibits “cruel and unusual punishments.” Thus, the less “usual” the execution of minors (a practice generally regulated by state statute) becomes, the more it rises to the standard of violating

the Amendment. In addition, the Federal Death Penalty Act which passed in 1994, determined that the death penalty should not be extended to juveniles.

Scalia, however, insists that whatever punishments were constitutional in the 18th Century, should be constitutional today. Being a textual literalist, he easily adopts a fascist “rule by force” approach.

Thus, when Justice Kennedy evoked the propriety and necessity of referring to “the evolving standards of decency that mark the progress of a maturing society,” as a context for the decision, Scalia went ballistic. Scalia doesn’t believe in “evolving standards of decency,” not for himself, or anyone else.

The Deeper Issue Involved

The philosophical state of mind which Justice Scalia (known to be a candidate for Chief Justice, should the ailing Justice Rehnquist leave the bench under the Bush Administration) demonstrates, should be a matter of deep concern to all Americans. Scalia denies the very basis for abiding by the Constitution, by rejecting the foundation upon which it was based: the understanding of the right, and obligation, of every individual to do good, and the recognition that these rights and obligations should constantly be *improved*. To have such a conception of the Constitution, of course, requires a recognition of the nature of man, as a creature of reason, made in the image of the Creator.

Scalia demonstrates his rejection in a myriad of ways. The most fundamental one, which was elaborated in some detail by Lyndon LaRouche in a 2000 article devoted to Scalia’s philosophy, is his denial of the role of *intention* in law. If you reject the purpose for which a law has been passed, you are left with a set of positive proscriptions, with no principles involved. You have taken the *soul* out of the law.

The very first words from Scalia’s pen, in his dissent in this case, exemplify this actually fascist approach. Scalia starts off by quoting Alexander Hamilton’s Federalist Paper No. 78, which outlines the case for a life-tenured Supreme Court. According to Scalia, Hamilton argued that the judiciary would be “bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them,” and therefore would never *change* a judgment such as the application of the death pen-

alty. But nothing could be further from the truth! Hamilton's own conception of law (and laws), went to the heart of the principle and purpose involved, rather than sticking to formal procedures and precedents.

Exemplary is the fact that Hamilton considered the Constitution to permit, if not mandate, the creation of a National Bank, as a necessary means of providing for the sovereign needs, and the *general welfare* of the nation. Hamilton was not a strict constructionist, but looked to the purposes for which the institutions of our government were established, for the improvement of our people. In an extreme case, Hamilton even recommended against fulfilling the Treaty of Paris provision for the return of slaves freed by the British, to the South. His respect for human freedom, a principled value, led him to dismiss the "rights" to property.

There is no question but that Scalia's method would have led him to make just the opposite ruling from Hamilton. This is a judge who would even support executing a man who could prove his innocence, if he had not gotten the paperwork in on time. In his view, refusing to follow strict procedure, would lead to "subjectivity," and thus would be disallowed.

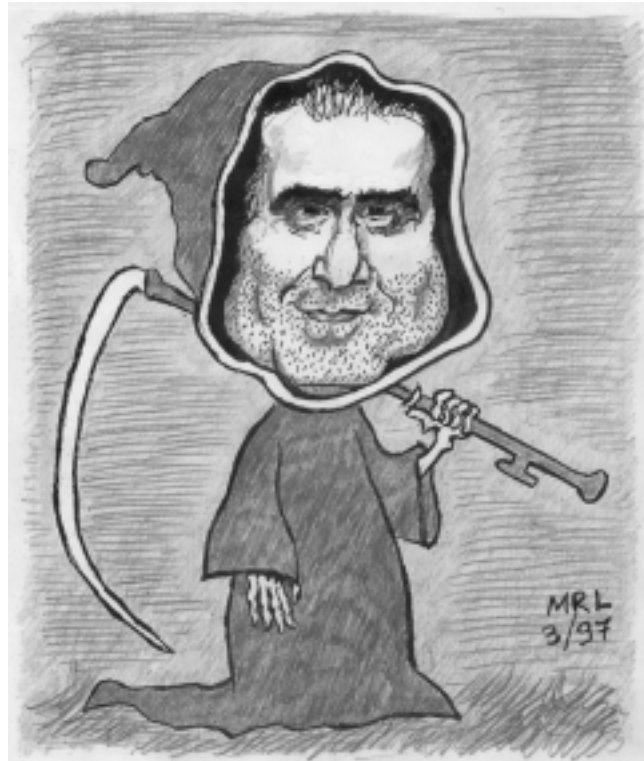
Behind Scalia's clinging to literal text and precedent, however, lies a much more evil method and intent: specifically, the doctrine of law as the assertion of arbitrary, irrational force. When it comes right down to it, Scalia believes that the imposition of such force by the state is what creates "order" in society, and he fully embraces the use of "retribution" against those who have broken the law. Retribution is not the purpose of law in a society which respects the sacredness of human life; rather, the purpose is both the protection of society and the rehabilitation of the criminal to that end. After all, this is a nominal Catholic who has attacked the Pope for having come out against the death penalty in the recent Catechism.

Put it all together, and Scalia's arguments for "tradition," "precedent," "stability," and "objectivity" amount to an argument for fascist law, pure and simple.

A Basic Precept of Justice

Justice Kennedy, however, stood firm. "The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions," he wrote. "The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to [the] offense. By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."

He went on: "The prohibition against 'cruel and unusual punishments,' like other expansive language in the Constitution, must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards



Antonin Scalia executes the law.

of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."

The Next Step?

This ruling reflects a decided move by the Court away from the horrendous descent into barbarism which has been reflected in decisions that approved executions for the mentally retarded, and even for those individuals who had proof of their innocence, which had not been heard for a variety of reasons. In 2002, the execution of the mentally retarded was finally banned. In part, this current decision depended upon the reasoning in that case, as Justice Kennedy argued that youth under 18 were not considered mature enough to be held as responsible for their actions, as were adults.

Clearly affecting the climate has been the hard-won overturning of more than 100 death-row cases by anti-death-penalty activists, who have shown the innocence of detainees through DNA evidence, or other methods. Increasingly, states, and the Federal government, are allowing more prisoners to seek exoneration through the use of DNA evidence.

It is still a long step from these measures, to the principled opposition to the state taking human life, which has been established in international legal codes at the United Nations, and in most nations of the world. It is to be hoped "evolving standards of decency" will take us to that position as soon as possible.