CHICAGOLAWBULLETIN.COM

Serving Chicago's legal community for 159 years

WEDNESDAY, NOVEMBER 5, 2014

Chicago Daily Law Bulletin®

Volume 160, No. 218

Anthony Kennedy consistently proves himself the justice of dignity

CRIMINAL PROCEDURE

TIMOTHY P. O'NEILL

Timothy P. O'Neill is the Edward T. and Noble W. Lee Chair in Constitutional Law for 2014-15 at The John Marshall Law School in Chicago. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

Law professors love to write about Supreme Court justices. There is an enormous body of work analyzing Justices Antonin G. Scalia, Ruth Bader Ginsburg, Stephen G. Breyer and Elena Kagan. (And, no, I do not think it's just a coincidence that all four are former law professors.)

Sonia M. Sotomayor gets attention for asking a lot of questions at oral argument, while Clarence Thomas gets even more attention for asking none. John G. Roberts Jr.'s role as chief justice will always make him a person of interest. And Samuel A. Alito is increasingly a favorite among Federalist Society types.

The odd man out is Anthony M. Kennedy. In more than a quarter-century on the court, the article about him that stands out most was a scathing attack by Jeffrey Rosen in the New Republic in 2007. Yet two recent books have reminded me that, in the words of Arthur Miller, attention must be paid.

First, consider some of the high points of Kennedy's career on the court. Kennedy (along with Justices Sandra Day O'Connor and David Souter) earned the eternal enmity of Scalia by refusing to overrule *Roe v. Wade* in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Four years later he wrote for the majority in *Romer v. Evans*, which prohibited Colorado voters from amending the state constitution to void all anti-discrimination laws that covered gays and lesbians. 517 U.S. 620.

He later wrote the historic majority opinion in *Lawrence v. Texas* that held anti-sodomy laws to be unconstitutional. 539 U.S. 558 (2003). And, of course, it was Kennedy who wrote the landmark opinion last year striking down the federal Defense of Marriage Act as unconstitutional under the Fifth Amendment. *U.S. v. Windsor*, 570 U.S. (2013).

In criminal law, it was Kennedy who wrote the 5-4 majority opinion that states could not sentence defendants to death for crimes they had committed as juveniles. *Roper v. Simmons*, 543 U.S. 551 (2005). It was Kennedy again who wrote the 6-3 majority opinion that juveniles could not be sentenced to life imprisonment without parole for anything but homicide. *Graham v. Florida,* 130 S.Ct. 2011 (2010). And it was Kennedy who cast the deciding fifth vote forbidding states from sentencing juveniles to mandatory life without parole in murder cases. *Miller v. Alabama*, 567 U.S. (2012).

During this past term, once again Kennedy wrote an important 5-4 opinion. A decade ago, Kennedy had joined a 6-3 holding that the Eighth Amendment forbade states from imposing the death penalty on defendants having intellectual disabilities. *Atkins v. Virginia*, 536 U.S. 304 (2002). This time he held that it was unconstitutional for Florida to impose a rigid requirement that a defendant had to show an IQ under 70 before he could submit evidence showing intellectual disability. *Hall v. Florida*, 572 U.S. (2014).

(I)t was Kennedy who wrote the landmark opinion last year striking down the federal Defense of Marriage Act as unconstitutional under the Fifth Amendment.

Garrett Epps in his new book "American Justice 2014" focuses on a word that recurs in Kennedy's opinion in *Hall*: "dignity." Kennedy writes "The Eighth Amendment's protection of dignity reflects the nation we have been, the nation we are, and the nation we aspire to be." He adds, "The states are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects." And finally, "[T]o impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being."

This concept of dignity plays a major role in Jonathan Simon's new book "Mass Incarceration on Trial." Simon chronicles the huge increase in California's prison population starting in the 1970s. In 1977, it had fewer than 20,000 prisoners; by 2003 it had nearly 160,000. This resulted in severe overcrowding.

It also resulted in an increase of prisoners in supermax facilities, which provided for confinement in an 80-square-foot cell for 23 hours a day. The huge increase of prisoners also swamped the already underfunded prison medical care facilities, causing some appalling results.

A lawsuit was brought alleging that the overcrowding created an Eighth Amendment violation. A lower federal court agreed, and mandated the largest prison-reduction order in history. It directed California to bring its prison population down to 137 percent of capacity within two years. This would result in the release of 46,000 prisoners.

On appeal, a 5-4 Supreme Court affirmed the decision. *Brown v. Plata*, 131 S.Ct. 1910 (2011). Writing for the majority, Kennedy said, "Prisoners retain the essence of human dignity. ... A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."

Kennedy stressed that the Eighth Amendment violation was not based on discrete failings, but rather on "systemwide deficiencies in the provision of medical and mental health care that ... cause the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society." Tellingly, Kennedy appended pictures of the overcrowded conditions as an appendix to the majority opinion. The effect of the decision has been to reduce California's prison population by almost 25 percent during the last five years.

Simon believes that Kennedy's opinion may signal a shift in viewing prison-condition cases from a civil rights framework to a human rights framework. In fact, he describes the *Brown* decision as the most recent instance of what he calls a "dignity cascade." Simon uses this term to describe moments when a society finally recognizes it has been systematically violating rights, and, in response, expands its understanding of what is required under the law.

Epps describes *Hall v. Florida* as "almost a perfect capsule of the Kennedy approach. When his concept of dignity was at stake, he would throw the cloak of the Constitution over those in need. But to his conservative colleagues, his view of dignity meant little more than soft-headed dithering."

Fortunately, Kennedy has never been afraid of the ire of his colleagues when he believes an issue of human dignity is at stake. For this, we should be grateful.