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COVER STORY

Scalia, Brexit & personal pronouns

By Mitchell Keiter

Thursday will conclude one of the two campaigns commenced in late February, concerning who should succeed Justice Antonin Scalia and whether the United Kingdom should leave the European Union (aka "Brexit"). The former question asks indirectly what the latter asks directly: How much should the common law world follow the norms of continental Europe?

Scalia debated Justice Stephen Breyer on this general question, and they further differed specifically on three issues dividing the continent from the Anglophonic world: trial by jury, punishment and speech. The first two issues ask whether the law should protect criminal defendants by minimizing the severity of the sentencing *outcome*, or by maximizing the fairness of the trial *process*. *See* Mitchell Keiter, "From *Apprendi* to *Blakely* to *Cunningham*: Popular Sovereignty Enters the Courtroom," 34 W. St. U. L. Rev. 111 (2007). Similarly, public debate on controversial subjects like migration either imposes an unduly harsh outcome on vulnerable minorities or is essential to the process of self-government. Brexit offers Britain the choice between the American process of bottom-up self-determination championed by Scalia and the European outcome of top-down equality favored by Breyer.

Alexis de Tocqueville's contrast of how nations prevent tyranny aptly describes the choice between sentence limits and procedural fairness. "The first is to weaken the supreme power [by] preventing society from acting in its own defense ... [which] is the European way of establishing freedom," which could describe limits on punishment. The second occurs by "distributing the exercise of [state] powers among various hands and in multiplying functionaries." This describes the (Anglo-)American practice of citizens' deciding proper sentencing norms, as voters, and applying them, as jurors. As Scalia observed, "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296 (2004).

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Breyer favored sentencing by judges for the raison d'etre of the French Revolution: equality protected through centralized authority. His dissents in *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), lamented how the Supreme Court undercut the sentencing guidelines, which had been developed by experts to equalize outcomes. Scalia, favoring the "common law ideal of limited state power" over "the civil law ideal of administrative perfection," preferred jury sentencing for the rationale underlying the American Revolution: self-determination.

These competing values define the debate between the common law adversarial system, where parties and attorneys choose which witnesses to present and which questions to ask, and the civil law inquisitorial system, where judges control the process. The former enables defendants to shape their own defense, and control their fate, whereas the latter minimizes inequalities based on counsel's skill.

The contrast between self-determination and equality extends beyond the courtroom. Anglo-American law has long allowed testators to distribute their property as they wish, whereas French and German law guarantees a relatively equal distribution for heirs. Restaurant customers in the U.S. and U.K. decide for themselves how much to tip, whereas the continental custom authorizes a fixed rate, ensuring more equal distribution. Most significantly, Americans and Britons directly elect their legislators ("first-past-the-post"), maximizing voters' self-determination. More popular on the continent is proportional representation, where voters choose the party and party leaders choose the legislators. It fosters equality by ensuring that parties winning an equal number of votes receive an equal number of seats.

Americans' exceptional right to determine their own laws has generated distinctive punishment norms. American states may prescribe their sentencing maxima, and every state authorizes permanent imprisonment for aggravated murder. But when the United Kingdom sentenced a quintuple-murderer to "whole life" imprisonment, the European Court of Human Rights found such permanent sentencing violated defendants' rights. *Case of Vintner and Others v. United Kingdom* [2013] ECHR 66069.

But there is also less demand for punishment on the continent, due in part to the common law's superior procedural protections, including jury trial. John Stuart Mill observed "the objection to [capital] punishment began ... earlier, and is more intense and more widely diffused, in some parts of the Continent of Europe than it is here [because] … There are on the Continent great and enlightened countries, in which the criminal procedure is not so favorable to innocence, does not afford the same security against erroneous conviction, as it does among us." Eight centuries of Magna Carta have left their mark.

Trial by jury tightened the link between offenders' punishment and moral culpability. While the fate of 19th century European defendants often turned on royal caprice, American juries reserved imprisonment for serious, usually violent, criminals, and not political dissidents. The role of juries in desert-based punishment influenced both Justices Scalia and Breyer to concur in *Ring v. Arizona*, 536 U.S. 584 (2002), agreeing that juries, not judges, needed to find the facts justifying a capital sentence, though for opposite reasons. Scalia wished to empower juries over judges, while Breyer wished to limit the reach of the death penalty. (*Ring* was a personal "defeat" for me; as a California Supreme Court chambers attorney, I had drafted an opinion citing its predecessor — only to see *Ring* invalidate the precedent, and the opinion I drafted, several months later.)

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How much should common law follow European norms?

run by the Pew Research Center in the past decade, a majority of Americans and Britons have rejected the thesis that "Success in life is pretty much determined by forces outside our control," but never has a majority of French, Germans or Spaniards rejected it. English-speaking nations have most fully embraced Shakespeare's admonition that "fault ... is not in our stars, but in ourselves."

English itself reflects a different culture, using only one second-person pronoun ("you"). Continental languages have retained two forms for the second person (e.g. tu/usted in Spanish, tu/vous in French): one for adults and social "superiors," and one for children and lower-status individuals. Social hierarchy is thus built into every conversation. Status consciousness also shapes free speech policy. When Pew asked whether governments should be able to "censor statements offensive to minorities," Americans and Britons were opposed, but there was strong support among Germans and Italians, while the French were split.

But while every Anglo-American is, linguistically, an adult, every European is, legally, a child. *Roper v. Simmons*, 543 U.S. 551 (2005), invalidated the juvenile death penalty by citing both the European prohibition and state bars on juvenile jury service. Justice Breyer then cited Roper's description of teenage immaturity in his dissent in *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), where Justice Scalia's majority opinion cited the First Amendment to reject California's restriction on violent video games. But *Roper* inadvertently highlighted the comparable status of European adults and American children. Neither may serve on a jury (or directly elect their representatives), they have reduced speech rights, but they are shielded from capital punishment. In fact, American juveniles but not European adults may be sentenced to life imprisonment without parole.

C.S. Lewis connected the values of jury trial and punishment, as both require man's rational and moral agency. "[A]s we are thinking in terms of Desert ... being a moral question, is a question on which every man has the right to an opinion ... simply because he is a man, a rational animal … But all this is changed when we drop the concept of Desert … Only the expert 'penologist' ... can tell us what is likely to deter: only the psychotherapist can tell us what is likely to cure. The Humanitarian theory, then, removes sentences from the hands of jurists whom the public conscience is entitled to criticize and places them in the hands of technical experts whose social sciences do not even employ such categories as Rights and Justice." "The Humanitarian Theory of Punishment," 6 Res Judicatae 224 (1953).

Penal accountability also reflects moral agency. "[I]nfants, imbeciles, and domestic animals," are spared punishment because they cannot reason. "But to be punished, however severely, because we have deserved it, because we 'ought to have known better,' is to be treated as a human person made in God's image."

Geographically, the U.K. lies between the U.S. and the E.U., as it does philosophically. Today it will choose between these two models. The European Union offers the U.K. the path of childhood, where authority figures limit one's speech and punishment and make all the important decisions. Or it can move out of the family basement, declare independence, and choose the rights and responsibilities of self-determining citizenship.

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