SPECIAL ISSUE

The Shared Transatlantic Jurisprudence of Dignity

*By Russell Miller**

A. Introduction

Critiques of Robert Kagan's recent, inflamatory work on the nature and state of transatlanticisim[1] seem to come in three forms: material, analytical and emotional. By "material" I mean critiques of the fundamental and more or less obvious facts and structures out of which he has spun his claims. These facts amount to little more than the less than revelatory reminder that the U.S. devotes considerably more resources to security and defense spending than do Europeans.[2] Critiques of Kagan's work at this level are pointless. At least on this much, Kagan has it right: we are now all too familiar with the staggering statistic that reveals that American security and defense spending is equal to the total of the expenditures of the next twenty countries.[3]

There are, in any event, more important targets of critique, including bountiful opportunities to call his analysis and reasoning into question, what I call the "analytical" critique. Even here, it is necessary to concede that, at the most superficial level, Kagan's reasoning stands up. A nation's foreign and security policy naturally follows the budget allocations and in this sense it is entirely reasonable to expect a

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[1] Robert Kagan, *Power and Weakness*, POLICY REVIEW No. 113 June/July (2002); ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER (2003).

[2] ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 24-26 (2003).

[3] *Last of the Big Time Spenders: U.S. Military Budget is Still the World's Largest and Growing*, CDI Fiscal Year 2004 Budget < http://www.cdi.org/budget/2004/world-military-spending.cfm> (Visited 5 August 2003).

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more martial foreign and security policy from the U.S. than from the Europeans. However, beyond this most superficial analysis, Kagan fails completely and fatally by refusing to acknowledge context of any kind. Kagan's conclusions are unencumbered by any examination of the historical development of the facts upon which he relies. Kagan need not be bothered with a thoughtful consideration of the concepts with which he works. What, after all, does he mean when he speaks of "Europe" or "America"? Kagan need not define "power" before he identifies it as "the all-important question."[4] Most suspect from among all of Kagan's superficialities is his failure to acknowledge the determinative character of the self-selected comparative context in which he works. The dissimilarities between the U.S. and Europe that dominate Kagan's essay would look entirely different in a comparison of Latin America and the West (including the U.S. *and* European countries) or Africa and the West.

Lastly, emotional critiques really amount to a reaction against Kagan's often arrogant tone. It starts with the essay's first sentence and the tone must be a big part of the essay's popular appeal. On this point criticism should concede nothing. Kagan's tone of superiority has not only proven foolhardy in light of America's troubled post-war occupation of Iraq,[5] but it is also destructive of the chances to engage in a dialogue that might lead to changes in the landscape he describes. I must, however, warn that such tones of superiority are *always* unproductive, also when struck by Europeans in their characterization of the U.S. As any American who has traveled in Europe knows all too well, the caricature of unsophisticated and simplistic Americans is often delivered with similar tones of superiority that are equally destructive of the chances of dialogue.

I would like to return to the second of these categories and level a challenge to the superficiality of Kagan's reasoning by illuminating what I would like to call a "shared transatlantic jurisprudence of dignity." My claim is that, while on Kagan's superficial level of reasoning the diametrically opposed approaches of the U.S. and Europe to something as socially determinative as foreign and security policy or the death penalty prove up his claim that "the United States and Europe are fundamentally different today," an only slightly less superficial analysis suggests the very opposite. It is a move below the surface of his work that Kagan actually invites, especially with respect to the death penalty. He notes in the early paragraphs of the essay that:

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[4] ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 3 (2003).

[5] *See, e.g.*, Steve Schifferes, *U.S. Seeks Help to Rebuild Iraq*, BBC NEWS ONLINE, 4 June 2003 < http://news.bbc.co.uk/1/hi/world/americas/2964102.stm> (Visited 5 August 2003).

"European intellectuals are nearly unanimous in the conviction that Americans and Europeans no longer share a common 'strategic culture'. The European caricature at its most extreme depicts an America dominated by a 'culture of death', its war-like temperament the natural product of a violent society where every man has a gun and the death penalty reigns."[6]

And, while Kagan goes about capitalizing on this caricature as the basis for his dichotomous conclusions about Americans and Europeans, he nonetheless insists in the essay's closing paragraphs that:

"[a]fter all, it is more than cliché that the United States and Europe share a set of common Western beliefs. Their aspirations for humanity are much the same, even if their vast disparity of power has now put them in very different places."[7]

So which is it? Are we plagued by fundamental differences exemplified by policies like unilateralism and the death penalty, or are we really built of the same stuff even if we often come to radically different conclusions on many things. Kagan maliciously fails to even consider the later until the essay's final paragraph. The following is one possibility for what he might have written with regard to these shared "beliefs" and "aspirations," even in the context of the very different places Europe and the U.S. find themselves with regard to the death penalty.

B. The Shared Transatlantic Jurisprudence of Dignity

I. The European Example

1. Abolition in Europe

Article 102 of the German Basic Law dictates somewhat poetically: "Capital punishment is abolished."[8]

Similar domestic constitutional provisions, legislation and case law from across Europe complement and give effect to the general abolition of the death penalty in Europe. Protocol No. 6 of the European Convention on Human Rights provides that "The death penalty shall be abolished. No one shall be condemned to such

[6] ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 4 (2003).

[7] ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 103 (2003).

[8] Art. 102 GG.

penalty or executed."[9] This is now the law across forty-one of the fort-four Council of Europe member states,[10] after Turkey's recent ratification of the Protocol and the passage of domestic legislation and constitutional amendments necessary to abolish the death penalty.[11] Protocol 6 held open a limited exception to the general prohibition of capital punishment, permitting its implementation in times of war.[12] This exception has also now been closed with the recent entry into force of Protocol 13 to the European Convention on Human Rights.[13] In the recent *Öcalan* case[14] a Grand Chamber of the Court extended its previous jurisprudence regarding the torturous nature of lengthy stays on American death rows (which led to a prohibition on extradition to the U.S. in death penalty cases)[15] to find that the mere imposition of the death penalty, independent of the probability of its implementation and without regard to the duration of one's stay on death row, constitutes torture in violation of Article 3 of the ECHR.[16]

The Draft Constitution for the European Union, which will be considered at the forthcoming Inter-governmental Conference, incorporates the Charter of Fundamental Rights and therefore also prohibits the death penalty in Article II-2.[17]

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[9] Prot. 6, Art. 1 ECHR.

[10] Case of Öcalan v. Turkey, ECHR No. 00046221/99, 12 March 2003, Para. 55 <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=805140247&Notice=0&Noticemode=&RelatedMode=0> (Visited 5 August 2003).

[11] Case of Öcalan v. Turkey, ECHR No. 00046221/99, 12 March 2003, Paras. 55 and 172 <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=805140247&Notice=0&Noticemode=&RelatedMode=0> (Visited 5 August 2003).

[12] Prot. 6, Art. 2 ECHR.

[13] Prot. 13, Arts. 2 and 3 ECHR

[14] Case of Öcalan v. Turkey, ECHR No. 00046221/99, 12 March 2003 <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=805140247&Notice=0&Noticemode=&RelatedMode=0> (Visited 5 August 2003).

[15] Soering v. the United Kingdom, ECHR No. 00014038/88, 7 July 1989, <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=805141832&Notice=0&Noticemode=&RelatedMode=0> (Visited 5 August 2003).

[16] Case of Öcalan v. Turkey, ECHR No. 00046221/99, 12 March 2003, Paras. 187-198 <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=805140247&Notice=0&Noticemode=&RelatedMode=0> (Visited 5 August 2003). Article 3 of the Convention states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Art. 3 ECHR.

[17] Draft Treaty Establishing a Constitution for Europe, Secretariat of the European Convention, Conv. 850/3, 18 July 2003 < http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (Visited 5 August 2003). Art. II-2 states: "No one shall be condemned to the death penalty or executed."

2. Germany's Life Imprisonment Case

This is the point at which Kagan's analysis would stop. The U.S. imposes and implements the death penalty and Europe does not. Mars and Venus. Power and Weakness.

But even a modestly curious and slightly less ideologically determinative examination reveals a rich core of comparative material in the constitutional treatment of other severe punishments in Europe. Here, just below the surface, the extreme dissimilarities between the U.S. and Europe on something like the death penalty begin to give way to a shared transatlantic jurisprudence of dignity, what Kagan refers to as our shared "aspirations for humanity."[18]

In the *Life Imprisonment Case*[19] from 1977, the First Senate of the *Bundesverfassungsgericht* (German Federal Constitutional Court) was confronted with a challenge to the constitutionality of a sentence of life-long imprisonment without the possibility of parole.[20] Among other asserted constitutional violations the applicant claimed that this complete exclusion from society violated the right to human dignity guaranteed by Article 1 of the Basic Law.[21] The ordinary courts disagreed. Having considered the legislative history behind the framer's abolition of the death penalty, the ordinary courts concluded that the justifications offered in the *Parlamentarisches Rat* (1948 West German constitutional convention) in support of the abolition of capital punishment did not preclude life imprisonment as a substitute.[22]

The First Senate of the Constitutional Court rejected the ordinary courts' interpretive analysis, invoking a standard reminiscent of the American "evolving standard of decency" from the Supreme Court's Eighth Amendment jurisprudence.[23] The Senate explained: "Neither original history nor the ideas and intentions of the framers are of decisive importance … Since the adoption of the Basic Law [constitution], our understanding of the content, function, and effect of basic rights has

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[18] ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 103 (2003).

[19] BVerfGE 45, 187.

[20] BVerfGE 45, 187; *see*, Sections 212 and 213 StGB (1975).

[21] BVerfGE 45, 187 [206 and 213].

[22] BVerfGE 45, 187 [225-227].

[23] Trop v. Dulles, 356 U.S. 86, 100-101 (1958)

deepened … Current attitudes are important in assessing the constitutionality of life imprisonment."[24]

Thus, freed from the shackles of original intent, the Senate began its analysis with the dramatic proposition that "the free human person and his [or her] dignity are the highest values of the constitutional order."[25] From this foundational value the Court extracted the principle that "it is contrary to human dignity to make persons the mere tools of the state" in the context of criminal justice policy,[26] that the state "cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect."[27] The Court explained that life imprisonment without the possibility of parole violated the constitutional value that holds that every prisoner must possess some hope of regaining his or her freedom: "A sentence of life imprisonment cannot be enforced humanely if the prisoner is denied *a priori* any and every possibility of returning to freedom … The condemned criminal must be given the chance, after atoning for his crime, to reenter society."

Shortly after the Constitutional Court's ruling the *Bundestag* (federal parliament) amended Germany's *Strafgesetzbuch* (criminal code) to authorize courts to suspend a life sentence when the situation warranted the offender's release from prison.[28] In determining whether or not to release a person sentenced to life imprisonment, the amendments to the statute required courts to consider the personality of the offender, his or her behavior in prison, the circumstances of the crime, and his or her capacity to lead a normal life outside prison.[29] These are statutory terms of human dignity, the idea that respect for human dignity particularly requires consideration of the offender's background and the circumstances of his or her crime.

II. The American Example

There can be no doubt that America and Europe find themselves at opposite extremes on the death penalty. Forty American jurisdictions have death penalty stat-

[24] BVerfGE 45, 187 [227].

[25] BVerfGE 45, 187 [227].

[26] BVerfGE 45, 187 [228].

[27] BVerfGE 45, 187 [228-229].

[28] Sections 57 and 57a StGB (2003).

[29] Sections 57 and 57a StGB (2003).

utes on the books[30] and a number of states regularly implement the penalty, with Texas leading the way.[31] There are over 3,500 men, women and children on American death rows.[32] With the execution of Tim McVeigh in 2001,[33] the federal government rejoined the ranks of sovereigns that conduct executions.[34]

A casual glance at the Supreme Court's death penalty jurisprudence would seem to confirm the conclusion that, on the issue of severe criminal sanction, Europeans and Americans do not share a common view of the world, or even occupy the same world.[35] The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishment,"[36] but the Supreme Court has unequivocally held that the death penalty for murder does not, in and unto itself, constitute cruel and unusual punishment.[37]

To stop the analysis here, however, is to embrace Kagan's superficiality and miss the fact that the Supreme Court has nonetheless found that the process by which the death penalty is imposed must be subjected to strict constitutional scrutiny. It is now well settled that the laws that provide for the death penalty must meet the parameters set by the Court or risk being termed "cruel and unusual." This is the well-spring the Supreme Court's jurisprudence of dignity.

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[30] Thirty-eight states, the federal government (civilian) and the U.S. military. *See*, Death Penalty Information Center <http://www.deathpenaltyinfo.org/article.php?did=144&scid=10> (Visited 5 August 2003).

[31] Texas has executed 309 persons since reinstatement of the death penalty in 1976. *See*, *Number of Executions by State and Region Since 1976*, Death Penalty Information Center <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (Visited 5 August 2003).

[32] There are 3,525 inmates on death row in the U.S. *See*, *Death Row Inmates by State and Size of Death Row by Year*, Death Penalty Information Center <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188#year> (Visited 5 August 2003). There are 48 women and 82 juveniles who have been sentenced to death. *See*, Deborah Finns, Death Row U.S.A. – Spring 2003, Criminal Justice Project of the NAACP Legal Defense and Education Fund, p. 1 <http://www.deathpenaltyinfo.org/DEATHROWUSArecent.pdf> (Visited 5 August 2003).

[33] *McVeigh Execution: A "Completion of Justice,"* CNN.com Law Center, 11 June 2001 <http://www.cnn.com/2001/LAW/06/11/mcveigh.02/index.html> (Visited 5 August 2003).

[34] Some thirty-seven countries implemented the death penalty in 1998. The U.S. ranked third (tied with Iran) with 68, behind China (1,067) and Congo (100). *See*, *The Death Penalty: An International Perspective*, Death Penalty Information Center <http://www.deathpenaltyinfo.org/article.php?did=127&scid=30#interexec> (Visited 5 August 2003).

[35] ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 3 (2003).

[36] U.S. Const. Amend. 8.

[37] McGautha v. California, 402 U.S. 183 (1971).

In 1972, in *Furman v. Georgia*,[38] a haphazard, five-justice majority of the Court, operating in two blocks, voted to strike the death penalty as applied on process terms.[39] Justice Brennan and Justice Marshall joined the Court's bare majority expressing, along with their belief that the death penalty is in its essence unconstitutional, concern with the fairness of its application. They based this concern for procedural fairness on the respect the Constitution shows for human dignity. Justice Brennan and Justice Marshall invoked the Court's recent decision in *Trop v. Dulles*,[40] in which the Court held that, with respect to the Eighth Amendment, "the basic concept underlying the clause is nothing less than the dignity of man."[41] Thus, the Court concluded in *Trop*, "the state, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."[42] Justice Brennan, still relying on *Trop*, recalled that "the primary principle [that] supplies the essential predicate for the application of the others [in the Eighth Amendment context], is that a punishment must not by its severity be degrading to human dignity."[43] In the opinion of Justice Marshall the inequities in the death penalty process failed to adequately account for the principle of dignity inherent in the protections of the Eighth Amendment.[44]

Confronted with the procedural unconstitutionality of the death penalty, at least in part due to the human dignity concerns of Justice Brennan and Justice Marshall, the states revised their death penalty statutes. In *Gregg v. Georgia*,[45] decided a mere four years after *Furman*, the Court considered the states' new death penalty statutes and reinstated capital punishment after concluding that they had remedied the procedural deficiencies that had been illuminated by the majority in *Furman*. The statutory reform responded to the human dignity concerns posed by Justice Brennan and Justice Marshall by requiring in the death penalty process the consideration of what has come to be known as "mitigating factors," elements which might justify imposing a sentence of less than death. Justice Stewart, writing for the majority in *Gregg*, explained that in the new death penalty statutes "the jury's attention

[38] Furman v. Georgia, 408 U.S. 238 (1972).

[39] Furman v. Georgia, 408 U.S. 238 (1972).

[40] Trop v. Dulles, 356 U.S. 86 (1958).

[41] Furman v. Georgia, 408 U.S. 238, 270 (1972) (quoting, Trop v. Dulles, 356 U.S. 86, 100 (1958)).

[42] Furman v. Georgia, 408 U.S. 238, 270 (1972).

[43] Furman v. Georgia, 408 U.S. 238, 281 (1972).

[44] Furman v. Georgia, 408 U.S. 238, 365-366 (1972).

[45] Gregg v. Georgia, 428 U.S. 153 (1976).

is [also] focused on the characteristics of the person who committed the crime; … [posing the question] Are there any special facts about this defendant that mitigate against imposing capital punishment."[46] Further explaining the reform that went to the human dignity issue, Justice Stewart explained approvingly that "the new Georgia sentencing procedures, by contrast, focuses the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant."[47]

The American jurisprudence of dignity found its clearest articulation in the Supreme Court's 1978 decision in *Lockett v. Ohio*,[48] which clarified the concept of mitigating factors. The Court again invoked the language of dignity. Writing for the majority, Chief Justice Burger noted that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment … requires consideration of the character and record of the individual offender …"[49] Chief Justice Burger explained that the death penalty sentencing process must treat every person with that "degree of respect due the uniqueness of the individual."[50] Finally, Justice Burger explained that, in order to meet the Constitutional demands for fairness, the jury in the death penalty sentencing process must retain unlimited discretion to extend mercy. No process, Justice Burger held, can limit the jury from considering "as a mitigating factor, any aspect of a defendants character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death."[51] Significantly, following the statutory reform mandated by the Constitutional Court's *Life Imprisonment Case*, this is the same evaluation conducted by German courts when assessing the parole eligibility of a person sentenced to life in prison: the particularized nature of the crime and the particularized characteristics of the individual defendant.

The Rehnquist Court, to be sure, has gone about undermining this jurisprudence of dignity, most dangerously in two decisions in which it emasculated the constitutional requirement of the consideration of mitigating factors by excusing a judge's failure to define the concept for the jury prior to their deliberations in his or her jury

[46] Gregg v. Georgia, 428 U.S. 153, 206-207 (1976).

[47] Gregg v. Georgia, 428 U.S. 153, 206-207 (1976).

[48] Lockett v. Ohio, 438 U.S. 586 (1978).

[49] Lockett v. Ohio, 438 U.S. 586, 603-604 (1978).

[50] Lockett v. Ohio, 438 U.S. 586, 605 (1978).

[51] Lockett v. Ohio, 438 U.S. 586, 605 (1978).

instructions.[52] Nonetheless, mitigating factors serving as the expression of the Constitutional command for the respect of human dignity, remain one of the two pillars of the Court's death penalty jurisprudence.

C. Conclusion

It is worth simply reflecting again upon some of the language of the Constitutional Court and the Supreme Court:

In the *Life Imprisonment Case* the Constitutional Court declared that the state "cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect."[53]

In *Lockett v. Ohio*, the Supreme Court concluded that the death penalty process must treat every person with that "degree of respect due the uniqueness of the individual."[54]

The similarity in the spirit of these holdings is striking. And, in spite of the fact that Kagan would ignore them (except for a passing comment at the end of his essay), they are extremely meaningful. The Supreme Court has invoked a rhetorically rich jurisprudence of dignity that illuminates a set of values remarkably like those expressed by the Federal Constitutional Court. The importance of these shared values is, in my opinion, what gets lost in Kagan's superficial analysis: Europe has abolished the death penalty and America seems to lustily implement it; America favors a martial foreign and security policy and Europe favors international law and multilateralism. Europeans and Americans share an indisputable common foundation of values regardless of the very different ends we sometimes make of those values. This obvious commonality plagues Kagan's essay because he manages to ignore it until his final paragraph, but it is precisely there that he should begin a more thoughtful, less superficial analysis of the current state of transatlantic affairs. Perhaps we can expect a sequel: *Of Dignity and Democracy*.

[52] Buchanan v. Angelone, 118 S.Ct. 757 (1998); Weeks v. Angelone, 120 S.Ct. 727 (2000).

[53] BVerfGE 45, 187 [228-229].

[54] Lockett v. Ohio, 438 U.S. 586, 605 (1978).