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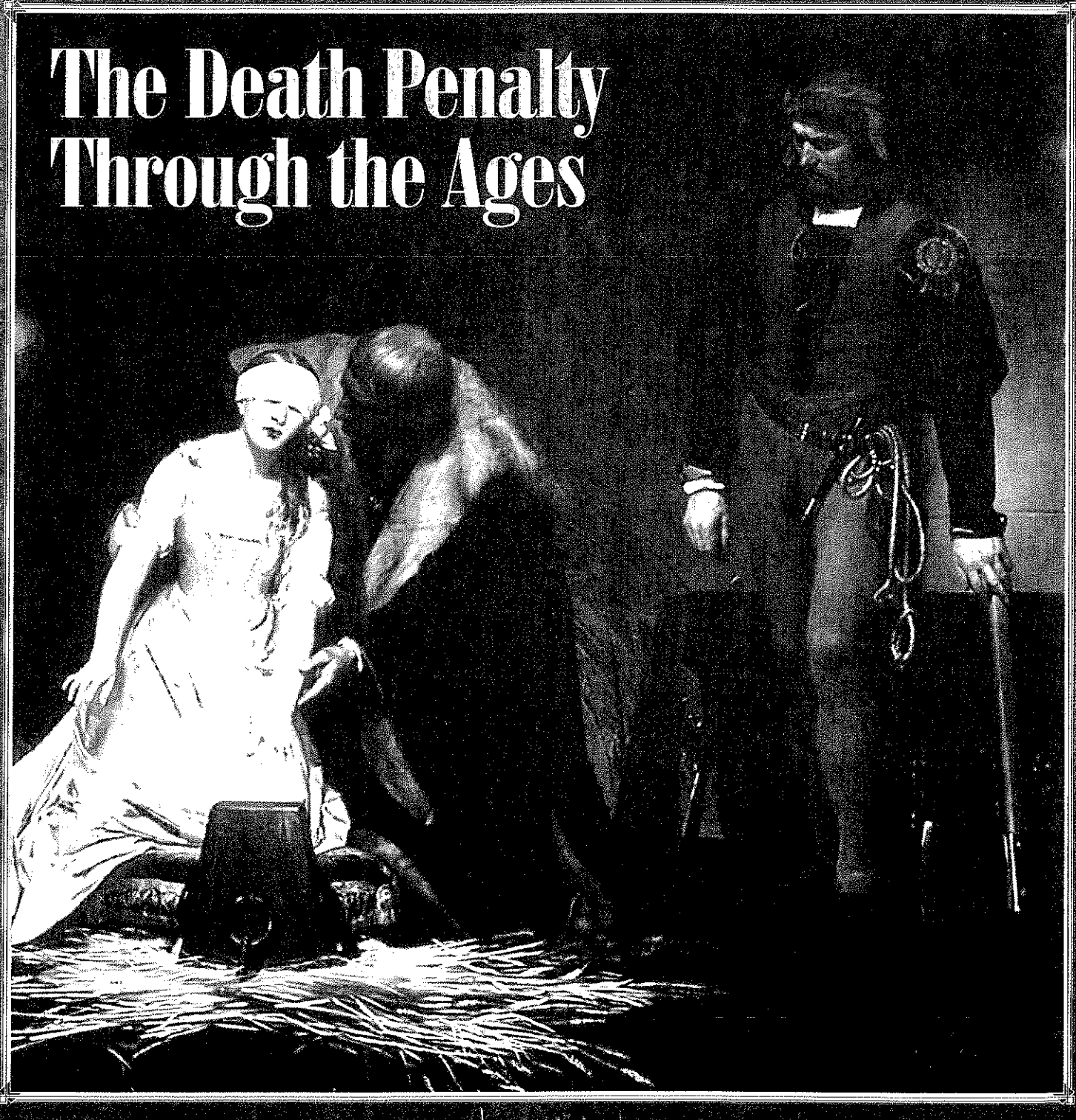
The Death Penalty Through the Ages



The Death Penalty as Delineated by the Old Testament

BY ROBERT BLECKER

From Adam and Eve to Cain and Abel to Noah and the Flood to Abraham and Sodom to Moses and the Ten Commandments, Biblical passages trace the roots for how modern society deals with the execution of killers.

AN OVERWHELMING MAJORITY of Americans support a death penalty for those—and only those—who deserve to die. These same citizens also embrace the Constitution, which ensures equal protection under the law, commands due process, and forbids "cruel and unusual" punishment. For the past half-century, the Supreme Court has agreed that these fundamental concepts, these Constitutional limits on death as punishment, are not fixed. Rather, their meaning is informed "by the evolving standards of decency of a maturing society."

Certainly, our standards have evolved and our practices have been refined since 1972 when the Court began the modern era by tossing out all death penalty statutes as administered, and effectively demanding carefully structured laws guiding the jury's discretion in a bifurcated trial, where they first find a defendant's guilt, and then, in a separate sentencing proceeding, determine whether this aggravated murderer deserves to die.

While standards do evolve, we continue more fundamentally than we change. It is a strange tree, this death penalty. The long view shows it growing smaller, limited to fewer crimes, and imposed more and more rarely. States are pressed from all sides either to reform or reject it—and soon. Can the differences between those who do and do not die be explained and predicted, applied rationally and without emotion? Can a maturing society discern its own evolving standards of decency? Perhaps, perhaps not. One thing is clear, though. We never can hope to identify new growth without appreciating the living roots which sustain it.

Whether we end up limiting the punishment of death appropriately, or eliminating it entirely, seems far from settled. Meanwhile, sampling the soil, stepping back 2,500 hundred years or so, when the Old Testament was being assembled and genius flowered in ancient Greece, examining and interpreting the core of Western culture—even cursorily and eccentrically—in the light of today's debate, would seem to nourish past and present. If it cannot enable us to predict precisely our future shape, it may at least help guide us in pruning well to grow better.

The first sin—or crime (in the Beginning there was no distinction)—was capital. The Sovereign had warned Adam not to eat the apple lest he "surely die on that day." Found guilty, Adam and Eve were condemned. By the time they did die, hundreds of years later, it seemed as if the original sin had been forgotten, if not forgiven. With long procedural delays, while the condemned live out their lives in prison, it still seems that way today.

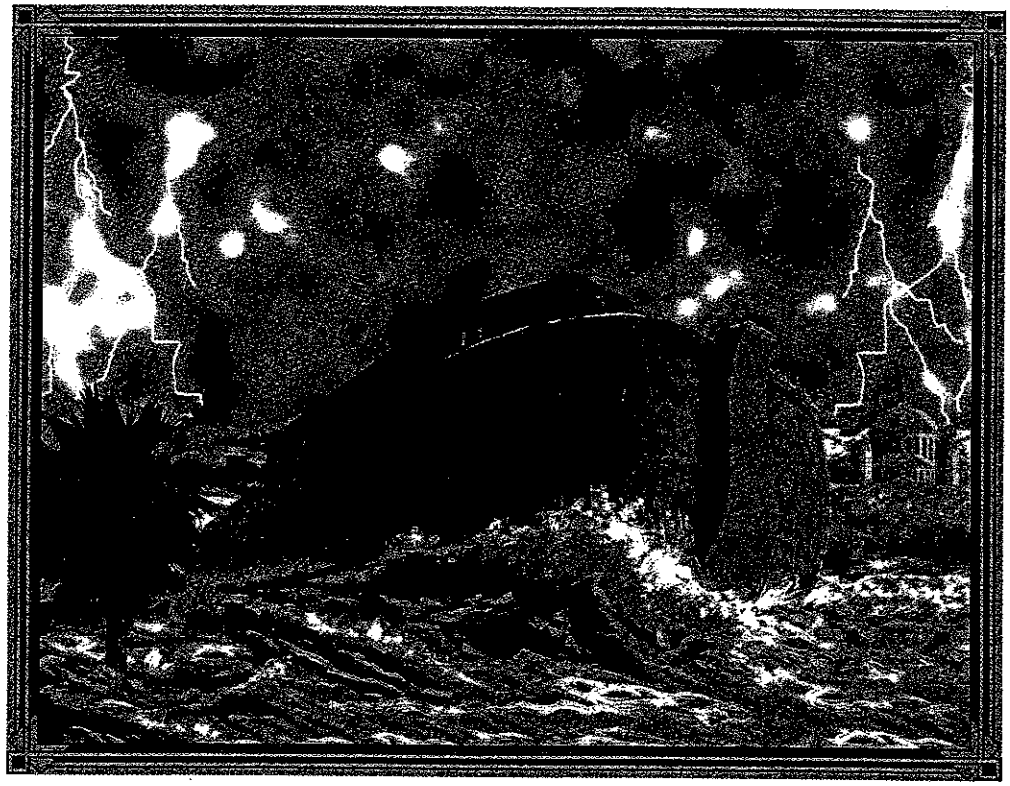
What took the Sovereign so long to execute this first death sentence? Perhaps, on reflection, God accepted some responsibility for the environment that produced the crime, having placed the tempting tree smack in the middle of the Garden of Eden. In any case, so long delayed, disproportionate, and with no deterrent effect, from the Beginning, the death penalty seems to have failed miserably.

When Cain killed his brother Abel, God not only spared, but protected, him. Abolitionists embrace this story—a leading group of death-penalty opponents has named itself Hands Off Cain. Just as God declined the death penalty, even for

this intentional premeditated killing, they argue, so too humankind, made in the image of God, should show mercy and spare intentional murderers.

Why did Cain kill Abel? When God rejected Cain's offering but praised Abel's, Cain must have felt humiliated and resentful. Cain was "very angry," the Scripture tells us, and depressed—"his countenance fell"—but he did not snap. Feeling disrespected by God, Cain must have stewed on it. Sometime later, in the field, Cain "arose" and intentionally slew his brother.

It may have been premeditated, but perhaps also provoked and passionate. We can imagine an anguished Cain crying as he killed Abel. In traditional common law, such brooding would not mitigate murder, unless the deadly act was a sudden reaction in the heat of passion. Like the Greek philosopher Plato 2,400 years ago, however, many states today permit the defendant's slow burn to mitigate the murder to manslaughter. Such a killing probably would not be capital—statutes often specifically exempt from the death penalty even an inadequately provoked passion killing, although an aggressive prosecutor might characterize the homicide as premeditated and try to convince a jury that Cain had lured Abel to the field in order to kill him.



Looked at in this light, the story of Cain hardly stands for categorically rejecting capital punishment, even for premeditated murder. Perhaps, as the Hebrew text suggests, Cain did not "murder" Abel; he "killed" him. God spared Cain because Cain was not the worst of the worst. The great lesson we derive from the story of Cain and Abel is that not all killers deserve to die.

The incident can teach us more. Cain initially refuses to cooperate or confess, even attempting to obstruct justice by answering evasively, if not outright lying to Authority: "Am I my brother's keeper?" God sweeps aside that self-protective impulse. "What hath thou done? The voice of your brother's blood is crying to me from the ground. And now you are cursed from the ground."

Avenging bloodshed

The past counts. The Earth does not belong only to the living. Bloodshed cries out to be avenged. Emotively, and not merely rationally, the blood of the dead victim compels us to act. Today, too, the victim's lingering cry moves us retributivist advocates of the death penalty.

God spared Cain's life, but sentenced him to "wander forever." It is "more than I can bear," Cain cried out in agony. So God comforted and protected him. "If any one slays Cain, vengeance shall be taken on him sevenfold. And the Lord put a mark on Cain, lest any who came upon him should kill him."

Cain's relief at being marked shows that he and God believed that the threat of death—and sometimes only the threat of a ferocious kind of death—could deter murder. Ironically, then, the first murderer heard the first death penalty pronounced not as punishment for, but as protection from, the consequences of his own conduct.

The story of Cain is less about a death penalty threatened for others, than it is about that punishment not visited upon him. The past does count; deterrence is secondary. There must be a reckoning. Unless we heed the anguish of the victim and inflict deserved punishment, we too shall suffer and "be cursed from the ground." However, from the Beginning, at least with homicide, God seems discriminating.

Things got worse. Disgusted, and regretting the entire Creation, the Lord decided to "blot out" all life indiscriminately, except for Noah and his family and one pair of each living creature. After the Flood, the Sovereign seems to have regretted this mass execution, and promises "never again" to repeat it. "I give you everything," God declares in a purely life-affirming moment. Yet, the blessing comes with restrictions. "For your lifeblood I will surely require a reckoning." This reckoning with the past will not be God's domain alone. The Scripture continues: "He who sheds the blood of man, by man shall his blood be shed."

Unqualified, God's command to humans in Genesis to kill "whoever sheds the blood of man" would be grotesquely overbroad. Both Leviticus and Numbers later refine that command and distinguish types of homicides, well beyond the example of Cain. Near the Beginning, though, destroying almost all life in the Flood, God appears to administer and ordain the death penalty without much concern for individual desert.

At the other extreme, abolitionists today cling to "thou shalt not kill" as if God's great commandment delivered to Moses from Sinai was a blanket prohibition covering the death penalty. Yet, the Hebrew text refutes this, virtually all scholars agree. "Thou shalt not murder," it more literally enjoins. To insist that the death penalty itself is murder begs the question and butchers the text. Semantically, Scripture does not, and logically could not, prohibit the death penalty, which it calls for throughout the law. Abolitionists would do better to stop perverting this famous Commandment for rhetorical effect.

"Wilt thou destroy the righteous with the wicked?" Abraham later challenged God, who was about to obliterate Sodom with all its inhabitants. "Far be it from thee to do such a thing," Abraham's challenge continues. Far wrong, indeed, to execute the innocent in order to slay the deserving. God is presumed to stay clear from working such injustice.

Abraham gets God to promise to spare Sodom if 50 innocent persons dwell within. Then Abraham has the courage to lead God down the slippery slope. Suppose there are 45, 40, 30, 20 . . . ? Abraham bargains God down one last time and then quits. God concedes: "For the sake of ten I shall not destroy it."

Abraham's challenge justly is celebrated as

brave—defense counsel acting on behalf of others (Adam, Eve, and Cain all had defended themselves)—while denying the Supreme Authority's moral right to risk executing the innocent. Abraham, though, stopped at 10. He did not suggest that God spare all the wicked of Sodom for the sake of a single righteous soul, at least one of whom—Lot—he knew resided there. The lesson here is that criminal justice systems have limits. We must favor sparing the guilty lest we execute the innocent. Yet, there are boundaries. Some error is inevitable and has to be tolerated.

On several occasions in the Old Testament, God will punish entire populations, innocents and guilty alike. Humans, however, although made in the image of God, must not slay the innocent indiscriminately with the guilty. Unlike all other contemporary Near Eastern cultures, the Bible embraces individual culpability, rejecting collective or vicarious punishment. "Parents shall not be put to death for children, nor children for parents; each shall be put to death for his own crime," Deuteronomy famously declares. Lest they slay the innocent with the guilty, humans are to uphold a presumption of innocence. "Keep far from a false charge," God commands in Exodus, "and do not slay the innocent, for I will not acquit the wicked." God guarantees it. Although acquitted by human judgment, the wicked shall be divinely punished.

In today's secular society, many citizens are skeptical that punishment somewhere else inevitably follows otherwise unpunished crime in this world. Although the people demand from their government justice in this world, still they must "keep far" from a false charge, and avoid slaying the innocent by indulging all real doubts for a defendant's benefit. This, too, the Bible commands.

If "it is told to you and you hear of it then you shall inquire diligently, and if it is true and certain that such an abominable thing has been done . . . you shall stone that man or woman to death," Deuteronomy demands.

No subtle message here. We are obliged to investigate, prosecute, and punish with death, the worst of all crimes. Prosecution and punishment demand diligent inquiry. Reports and rumors may not be true. There is a dual fervor at work. The Bible commands us to punish the wicked, but only if it is true and certain that an abominable thing has occurred.

In Biblical days, eyewitness testimony probably was the most reliable of all evidence. Yet, even the testimony of a witness of sound mind with no motive to lie, who swore to being absolutely certain that the defendant committed the capital crime, was not enough to sentence a person to die, even if corroborated by circumstantial evidence. "On the evidence of two witnesses or of three witnesses he that is to die shall be put to death; a person shall not be put to death on the evidence of one witness," Deuteronomy demands.

The presumption of innocence

Thus, the "presumption of innocence," and "proof beyond a reasonable doubt" are modern terms with ancient roots. "Keep far" from a false charge, and only after "diligent inquiry" demonstrates the crime as "true and certain" shall the defendant be put to death; even then, only if two witnesses swear to the same events. Today, we call it "super due process." But this imperative is ancient, and as pulsing as the demand for punishment itself.

What if witnesses were lying? Suppose two people conspired to have the defendant wrongly executed? The "judges shall inquire diligently, and if the witness is a false witness and has accused his brother falsely, then you shall do to him as he had meant to do to his brother so you shall purge the evil from the midst of you. And the rest shall hear, and fear, and shall never again commit any such evil among you," warns Deuteronomy.

We do to the false witness what he would have had done to the innocent defendant. This ancient measure feels right; it is poetically, retributively, and emotionally just. By it we restore a balance and satisfy the retributive impulse. We gratify a deeply felt need rooted in the past. Punishment then becomes forward-looking, its purpose to prevent other people from committing similar crimes. Remember, though, deterrence here ultimately is peripheral. A witness who would send a man to his death falsely simply deserves to die. "Your eye shall not pity; it shall be life for life, eye for eye, tooth for tooth . . ." according to Deuteronomy. Scripture demands attitude. It exudes righteous indignation that one person would lie and scheme to use the community's justice process as a murder weapon. Inflict like-kind punishment—let him experience what he would have his victim experience. Show no pity.

What if the perjurer's scheme is detected? The putative victim, relieved to be alive, and recognized as an innocent person nearly executed unjustly, might want to put the incident to rest. The crime may seem less heinous because no one perished. As measured by his intent, however, the perjurer is no less evil. "Moral luck"—the good fortune that his victim escaped harm—counts for nothing. The judges must imagine what would have happened and punish the intent fully.

The passage instructs that an attempt that fails or is nipped in the bud should sometimes bring the death penalty. Whether or not the scheme succeeds, Scripture demands that judges keep outrage fresh and cut off all sympathy. Many urged death for Richard Reid, the Al Qaeda-trained "shoe bomber" who would have blown up a plane full of people but for the timely restraint of alert passengers and crew, moments before the bomb was to have gone off. "You shall do to him as he had meant to do." States' death penalty statutes reject this, and the Supreme Court probably would hold death disproportionately "cruel and unusual" punishment for attempted murder where nobody died.

States long ago discarded capital perjury as well as the two-witness rule, relying on improved forensics to provide the check. Still, we recognize that defendants need protection against lying snitches, or "jail house informants," as they are more politely called. We nearly have come full circle. Commissions charged with reforming the death penalty recommend that the "two witness" requirement be restored, and executions based solely on an informant's uncorroborated testimony be prohibited.

From earliest times, the victim's family responded to homicide. They would retaliate if they could, or they might accept a "blood price" as settlement. All other pre-Biblical Near Eastern cultures allowed the victim's family or the community to settle up and be compensated for its loss. Seemingly, moral guilt was irrelevant. The slayer simply was worth more alive, perhaps as a slave. For utilitarians, it always has been about costs and benefits. The blood price worked. No one complained. Besides, "Why cry over spilled blood?" Just put it behind you and move on.

Although pro-defendant when it comes to proving capital murder, the Bible forbids allowing murderers to live who deserve to die: "[You] shall accept no ransom for the life of a murderer, who is guilty, but he shall be put to death," says Numbers. "For blood pollutes the land, and no expiation can be made . . . for the blood that is shed in it, except by the blood of him who shed it." No longer were close relatives competent to agree on compensation. Only the murderer's death could demonstrate the infinite value of the victim's life. The ancient Hebrews also embraced the moral corollary—no property crime should be capital. Successful prosecution for theft brought double your money back. Murder brings only death. By refusing to allow the killer to buy his way out, the Old Testament taught that individual human life is incommensurably valuable. No amount of money given ever could equal the value of an innocent life taken. Life was neither expressible nor dischargeable in monetary terms, as humans are made in God's image. Justice shall not be bought; the victim's family shall not be bought off.

Repulsed by blood pollution, and compelled to reject the blood price, while the Old Testament was being assembled, the ancient Greeks, too, expressed the ultimate value of human life concretely. The convicted murderer must die. As with the ancient Israelites, the ancient Athenians decreed that when it came to murder—powerful and weak, rich and poor—all were equal before the law. In the spirit of equal protection, nobody bought his way out of homicide.

Condemned to die

The core moral correlate equally demanded that no one could be condemned to die because he was too poor to show why he should live. No ransom was allowed, but executions were prohibited until diligent inquiry showed the murder was true and certain. When it came to death as crime and death as punishment, there was a single standard of justice, based upon anger and mercy, but never money.

Abolishing the blood price, and thus extending the death penalty to the wealthy who deserve it, advanced Western civilization. Many deep-seated values combined to produce this great advance. The Hebrews recognized that the dignity of the individual victim demands the death of the killer. What can be said for those abolitionists today who claim human dignity as exclusively their own concern, while they also claim public support for what they call the better option of life without parole plus some monetary restitution to the victim's family? To retributivists, this seeming embrace feels retrograde and wrong.

While retributive death penalty supporters today are coming to grips with their responsibility to ensure due process and equal protection, they seem less aware of substantive changes they also must make in the law. For neither by application nor by definition are the rich to be favored over the poor. Most state statutes declare that a pecuniary motive aggravates an intentional killing. Society applies that aggravator to professional assassins, as it should. Yet, the pecuniary motive also is applied routinely to robbery felony-murderers, who almost always are poor. While they do rob from a pecuniary motive, often they do not kill from one. At the same time that states extend the death penalty indiscriminately to poor people who killed in the course of robbing, callous corporate executives who knowingly kill and maim scores of unsuspecting employees or hundreds of consumers, strictly from a monetary motive, not only are exempted from the death penalty, they very rarely are prosecuted at all.

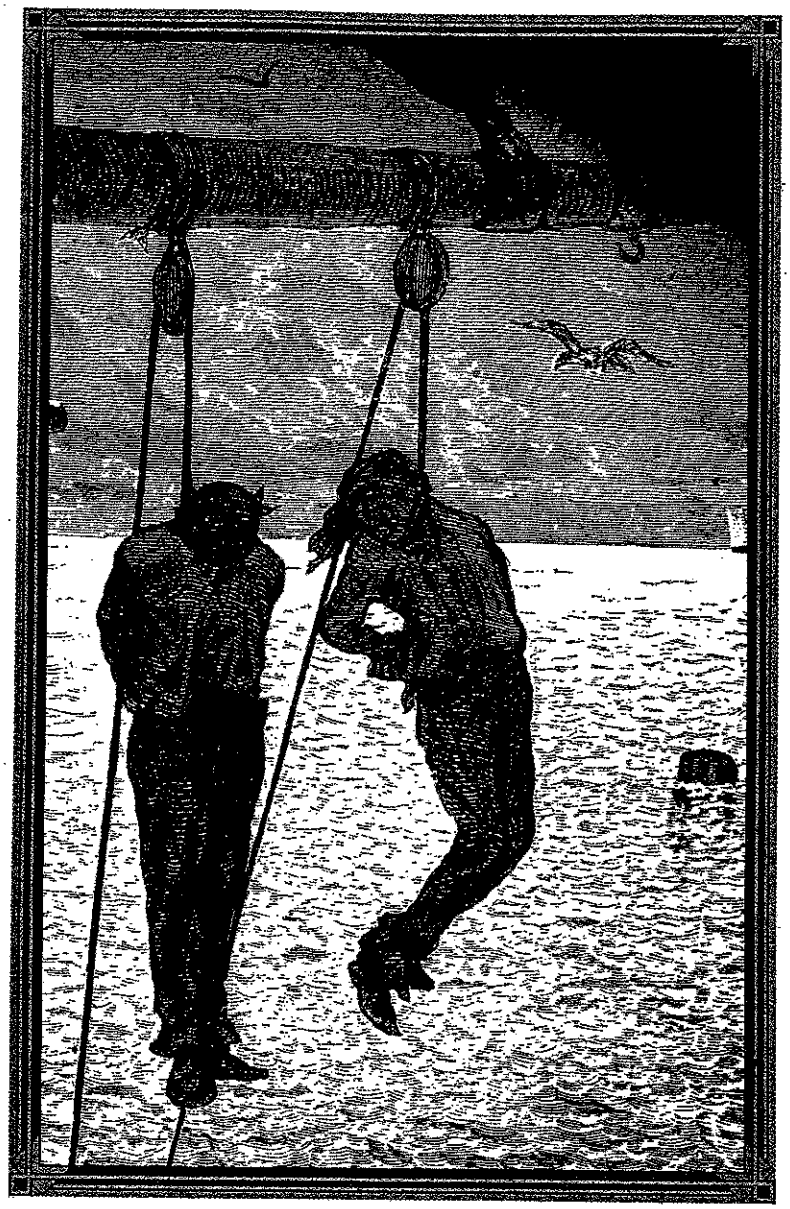
A retributivist who maps the Old Testament onto the death penalty debate today is likely to emphasize an independent obligation to the past, when, by and large, the law looks forward, emphasizing deterrence far more than just deserts as the primary purpose of punishment. "Remember what Amalek did unto thee," God specifically commands the Israelites. "As ye came forth out of Egypt, how they met thee by the way, and smote the hindmost of thee, all that were enfeebled in the rear, when thou was faint and weary." Those who attack and kill society's most vulnerable members never are to be forgotten or forgiven.

Even if God were to give the Jews "rest from all thine enemies," they must forever kill Amalek on sight because "thou shalt not forget."

Those who prey on children and the elderly, weak, and infirm—today's "vulnerable victim" killers—never should be forgotten nor forgiven. Rich or poor, the victims' "blood pollutes the land . . . The voice of your brother's blood cries out." The past counts.

Of course, accidents do happen. For thousands of years, cultures have marked this basic moral fact, deeply embedded in human nature. Different homicides call for different punishments. Intention counts.

"Whoever strikes a man so that he dies, shall be put to death," Exodus categorically declares. "But if he did not lie in wait for him," the passage continues, "then I will appoint for you a place to which he may flee." Deuteronomy adds, "But if a man willfully attacks another to kill him treacherously, you shall take him from my altar, that he may die."



By statute 3,000 years ago, premeditation made a killing capital, as it still does by statute today, in most death penalty states. Then, as now, "Whoever kills his neighbor unintentionally, not having hated him in time past —as when a man goes into the forest with his neighbor to cut wood, and his hand swings the axe to cut down a tree, and the head slips from the handle and strikes his neighbor so that he dies, he may flee to one of these cities [of refuge] and save his life," assures Deuteronomy.

Just deserts

This retributive command explicitly rests just deserts on the killer's intent and attitude. The Supreme Court now recognizes in its death penalty jurisprudence that retribution, perhaps the principal justification for punishment, limits even as it supports punitive measures. A true retributivist, drawing an essential lesson from Scripture, must feel at least as constrained to ensure that those who do not deserve to die are not killed, as to ensure that those who do are put to death.

Many killings neither are clearly premeditated nor as freakishly accidental as an axe head flying off its handle at an odd angle. Perhaps the woodsman was negligent, or reckless.

"When an ox gores a man or a woman to death, the ox shall be stoned . . . but the owner of the ox shall be clear. But if the ox has been accustomed to gore in the past, and its owner has been warned but has not kept it in, and it kills a man or a woman, the ox shall be stoned, and its owner also shall be put to death," states Exodus.

We can presume this was no trained killer ox. Although human omission (failing to keep the animal confined) was a proximate cause of death, the defendant-owner of the ox had not killed intentionally. The owner simply did not care enough about other people's lives. He put innocent people's lives at risk from laziness, or for convenience or profit. Once warned that he did have a goring ox—a beast out of control—the owner consciously disregarded a deadly risk of danger, much like drunk drivers, thieves high on crack, and callous corporate executives.

Most states currently recognize an extremely culpable recklessness that comes from subjecting others to a "grave" risk of death rather than the lesser "substantial" risk of ordinary recklessness. Looking back upon it after the victim has been gored to death, the risk seems grave. Back then and today, however, what morally makes the killing murder was not the risk as much as the attitude of the risk-taker. Taking grave risks and ignoring a prior warning support the inference that the actor was indifferent to the lives of others. A "depraved indifference to human life," involving neither anger nor hate, neither scheming nor plotting, can be every bit as heinous as a premeditated intent to kill.

Although a depraved killer was death-eligible, unlike the premeditated murderer or capital perjurer, the Old Testament allowed that reckless individual to settle up. The ox owner might escape with his life, if the court or victim's family were willing to accept a blood price. The sky was the limit. "He shall give for the redemption of his life whatever is laid on him," explains Exodus.

The Supreme Court ruled in *Tison v. Arizona* (1987) that a state may execute a person who does not intend to kill as long as the actor's reckless indifference was a primary cause of the victim's death. Many states reject that option, however, reserving the death penalty and its substitute, life without parole, exclusively for intentional killers.

We derive from the Bible many lessons and deep commitments. Not all killings are alike; the victim's voice cries out to us; killing is, at times, deterrable; and some killers should be put to death. Because human life is uniquely valuable, it cannot be compensated by money. We must presume a defendant's innocence, tolerate very little error, engage in diligent inquiry, and adopt a very high standard of proof. The killer's attitude counts—premeditated and wantonly reckless killing is especially evil—but while the past cries out, only the worst of the worst deserve to die. ★

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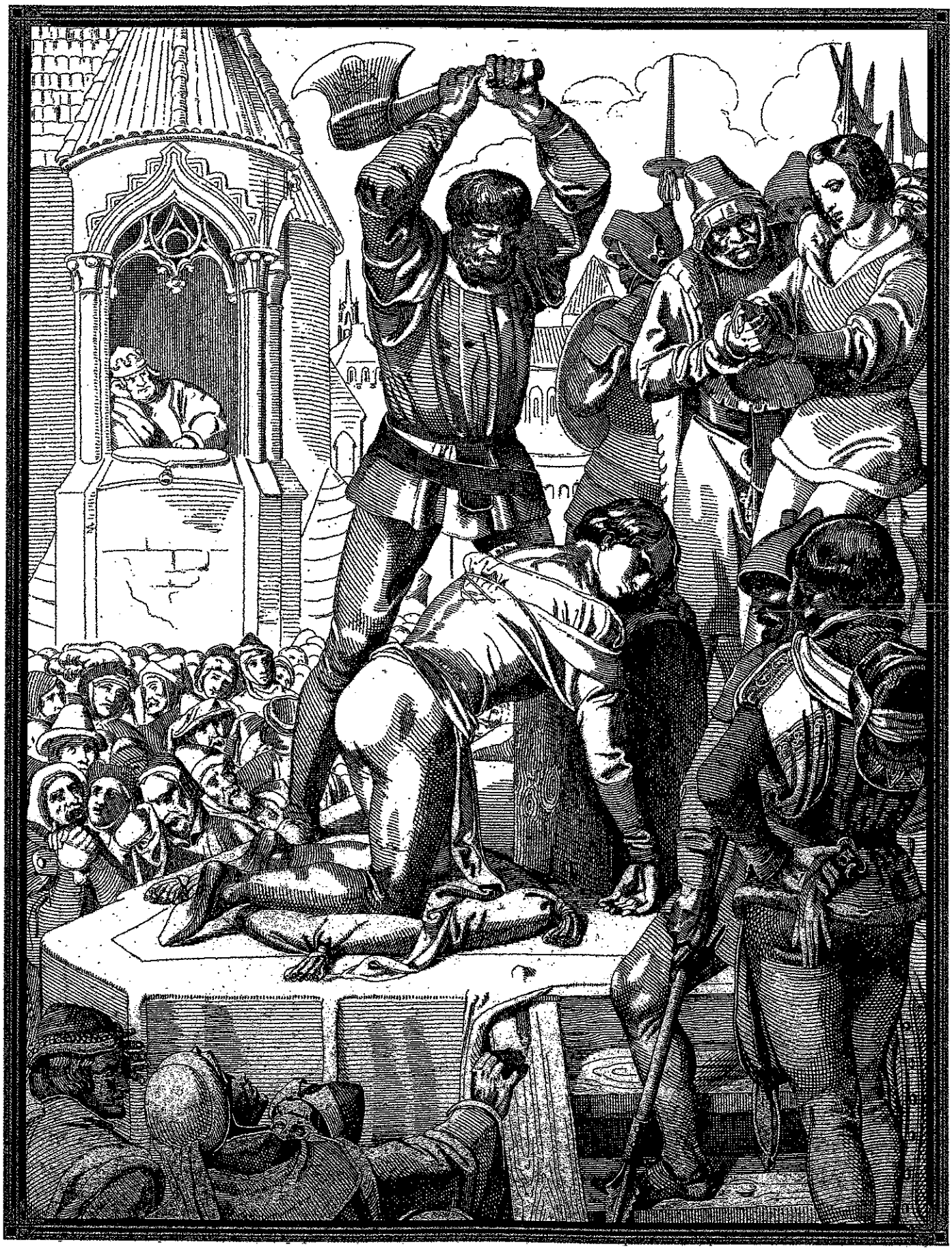


ANCIENT GREECE'S DEATH PENALTY DILEMMA AND ITS INFLUENCE ON MODERN SOCIETY

BY ROBERT BLECKER

". . . The moral truth, based in the jury's intuition . . . is that mysterious mix of reason and emotion that combines to determine whether a person really, not merely rationally, deserves to die."

ABOLITIONISTS attack capital punishment as cruel. Its administration, they insist, is inconsistent, and the jurisprudence which supports it is incoherent. Furthermore, they claim, death as punishment is disproportionate to any crime and out of step with essential values which are at the core of a mature Western democracy. Their attack is substantive (the law cannot adequately define who deserves to die) and procedural (the process of deciding who lives or dies must, but cannot, simultaneously embrace the two core constitutional values of fairness and consistency). Every individual defendant must be treated as a unique human being and, at the same time, like cases must be treated alike.

Death penalty advocates also look to human dignity as their touchstone. They agree that, unless the practice is worthy of a humane culture and the procedures consistent with basic long-standing core commitments, it must be abolished. These last 30 years during the death penalty's "modern era," in a society deeply split over how to punish murder, and with a Supreme Court regulating every aspect, the changes to death penalty jurisprudence appear to be fast and furious. Taking the long view, however, homicide and how to react to it remain the most conservative aspects of law in Western culture. Thus, we can better hope to resolve this contemporary and complex problem by stepping back 2,500 years, drawing from our cultural wellspring in ancient Greece where Western genius first flowered.

Human beings feel a primal urge to retaliate. From 1200-800 B.C., homicide strictly was personal. If the killer did not escape, the victim's family caught and killed him, or they accepted a "blood price," settling it monetarily—buying the killer peace and the victim's survivors some measure of satisfaction. Yet, within a few centuries after the musings of the poet Homer, a great change took place: The community became consciously and emotionally involved.

The decisive change was the idea (a feeling, actually) that "blood pollutes the land." Thus, independently and at about the same time that the ancient Hebrews in their Bible rejected the "blood price," refusing to allow the killer to buy his way out, so, too, did the ancient Greeks. Repulsed by blood pollution and rejecting the blood price, they expressed the ultimate value of human life concretely—the convicted murderer must die.

In Athens, once the victim's family publicly accused him, the defendant was considered polluting. Anybody who saw him in a public place was allowed to kill him on the spot. The victim's family still might prefer a monetary settlement, but the response to homicide became more than personal payback. Only punishment that canceled the pollution would end the public threat, and only the community could determine how much punishment was enough. This feeling that the victim's blood morally pollutes us until the killer is dealt with adequately—a deep-seated retributive urge—is what moves death penalty advocates today.

While Homer's epics reveal no distinctions among homicides, except a special horror at killing one's own kin, within a few centuries the Athenians established disparate courts to try separate types of killings. The Aeropagus, the highest court of legal guardians, sat en masse to try premeditated murderers and would-be tyrants. A lesser court of 51 members tried unpremeditated killings; another

Aristotle (center, next to the white-bearded Plato) emphasized repeatedly that we cannot discover, nor should we demand, the same precision in ethics as in science.

Wikipedia and the Vatican Museum

dealt with justifiable killings. A separate court tried a person who killed again while in exile for a prior killing. (Many states today also single out prisoners serving life sentences and repeat killers.) The philosopher Aristotle tells us that these recidivist killers conducted their defense from a boat lest they contaminate the court assembled on the shore.

Finally, there was a special denunciatory court for unidentified killers, animals, or inanimate objects that had caused the death of human beings. If this seems primitive, consider the intense public concern when a California jury condemned Scott Peterson to die, although it is unlikely the state ever will execute him for the murder of his wife Laci and their unborn child. In this case, supporters of the death penalty focused on the jury's declaration of death, its official denunciation, as significant in and of itself. This basic impulse to mark off officially and denounce the worst killings long runs through Western culture.

In ancient Athens, at any time before trial, the accused voluntarily could go into exile, thereby confessing his guilt. Banished forever, still contaminated and contaminating, he never could return. The ancients put it out of their own power to reconsider. No matter how old and infirm the killer, how distant the memory of the victim, how diminished the cost to the family, the pollution never ended—"the voice of your brother's blood" cried out forever. Even after general amnesties and wholesale pardons settled factional wars, in ancient Greece, premeditated homicide always was exempt from pardon.

Today, although abolished in Europe, many states in the U.S. embrace "life without parole" as an alternative for the defendant who pleads guilty. Gallup polls tell us that much of the public prefers life "with absolutely no possibility of parole," although it is highly doubtful that, should we ever abolish the death penalty, those who cry loudest for LWOP will remain as committed as the ancient Athenians never to reconsider that punishment.

If a killer who had fled before trial found permanent exile unbearable, and made his way back home, anybody legally could kill him or alert the authorities. "It shall be permitted to slay [them] but not to abuse them or to extort blackmail," the Athenian Code declared. No torture, even of the condemned who had returned to pollute the community. No blackmail—life could not be bought. No blood price—for blood pollutes the land. There was one exception, however. Regardless of the community's or family's wishes, if a dying victim forgave his attacker, no pollution attached, even for premeditated murder, then there would be no trial; the family could extract no penalty. Nothing was owed.

Emphasizing forgiveness by the slain, some abolitionists today press for a legally binding "living will"—formally declaring in advance that, "Should I be murdered, no matter how heinously, I wish my killer's life to be spared." Retributivist advocates, too, should give such declarations great weight, short of making them absolutely binding on prosecutors. The past counts and, in life as in death, we should, if we can, give victims a voice, if not a veto.

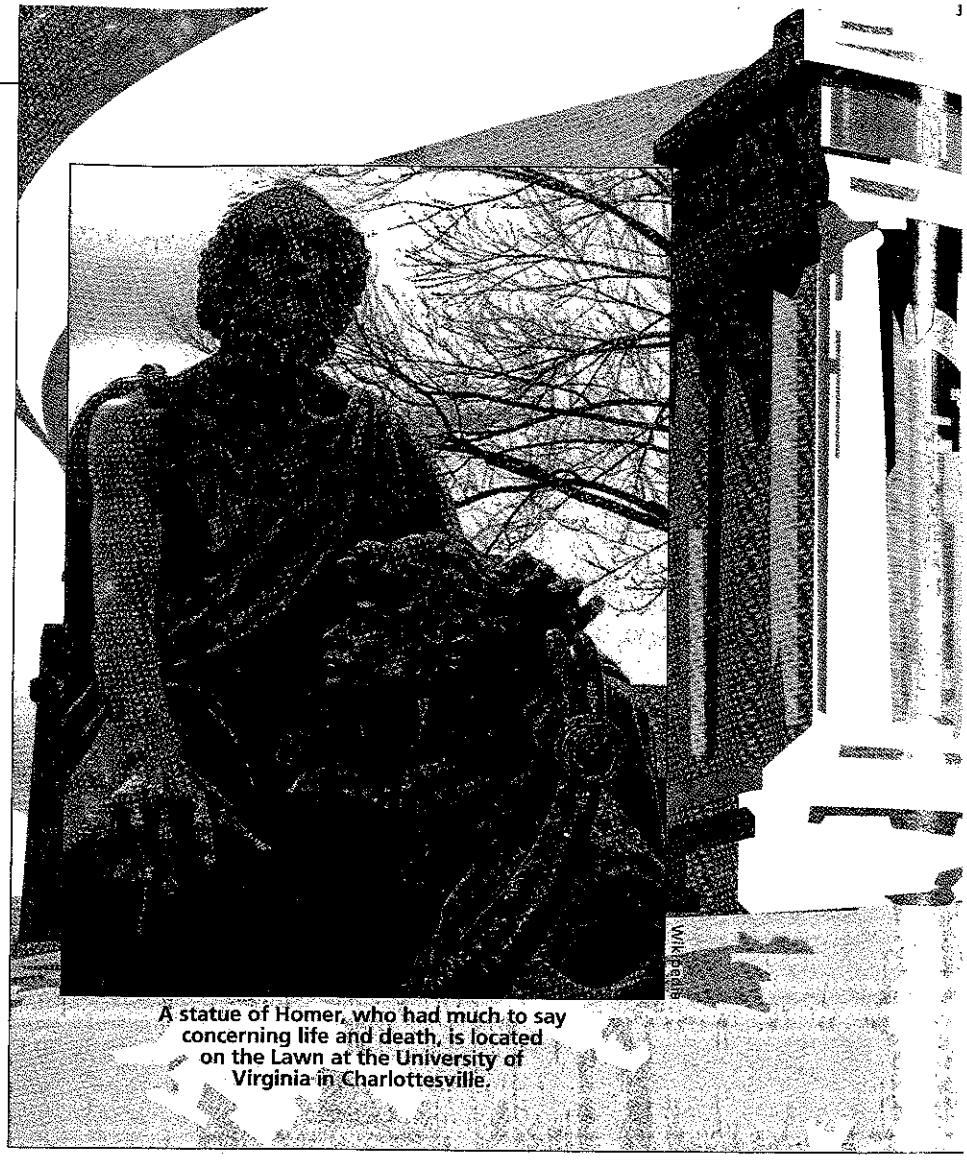
In ancient Athens, a killer convicted of unpremeditated homicide was banished unless the victim's family pardoned him, which canceled the debt and thereby ended the pollution. The family, though, had to be unanimous. "Otherwise the one who opposes it shall pre-

vent pardon." Although they could not commute the sentence of a premeditated murderer, the victim's family was guaranteed the right to "behold the condemned suffering the penalty which the law imposes." When Timothy McVeigh, the Oklahoma City bomber, was put to death, opinion was split over whether the public generally, or only the families of the 168 victims, should be allowed to witness the execution. The U.S. Attorney General ultimately ordered the execution broadcast on closed-circuit TV, but only to the victims' families.

The ruler Draco gave Athens its first written Constitution. It was so indiscriminately bloody, with death as the punishment for a host of crimes, that even now "draconian" means "harsh, severe, barbarously cruel." The Old Testament, too, called for death for behavior that today is not even criminal. We know better now—except for homicide. Draco reputedly was the first in Athens to distinguish premeditated, unpremeditated, and justified or accidental killing; 2,500 years later, these distinctions seem permanently part of human nature—deeply embedded and real.

When Solon, the great law-giver, rid Athens of Draco's bloody code and substituted an entirely new constitution, he virtually kept intact Draco's law of homicide. In ancient Athens, only premeditated murder and felony murder got the death penalty. Today, in many states, these two aggravating circumstances continue to account for the bulk of the condemned.

With the idea of "blood pollution" in the Old Testament and ancient Greece, humanity had taken a giant step. Blood pollution binds the community to the slain. In "the best governed State," declared Solon, "those who were not wronged were no less diligent in prosecuting wrongdoers than those who had personally suffered," and not merely from abstract duty. "Citizens, like members of the same body, should feel and resent one another's injuries." Ancient utilitarians must have urged execution to prevent a bad harvest, the surest proof of contamination. However, blood pollution—the voice of the dead crying out in anger and anguish as his killer, living free, pollutes the land—calls to us in a manner not strictly empirical, moves us to act from motives not strictly rational. Nevertheless, to those who feel morally obliged, this urge to punish is real.



A statue of Homer, who had much to say concerning life and death, is located on the Lawn at the University of Virginia in Charlottesville.

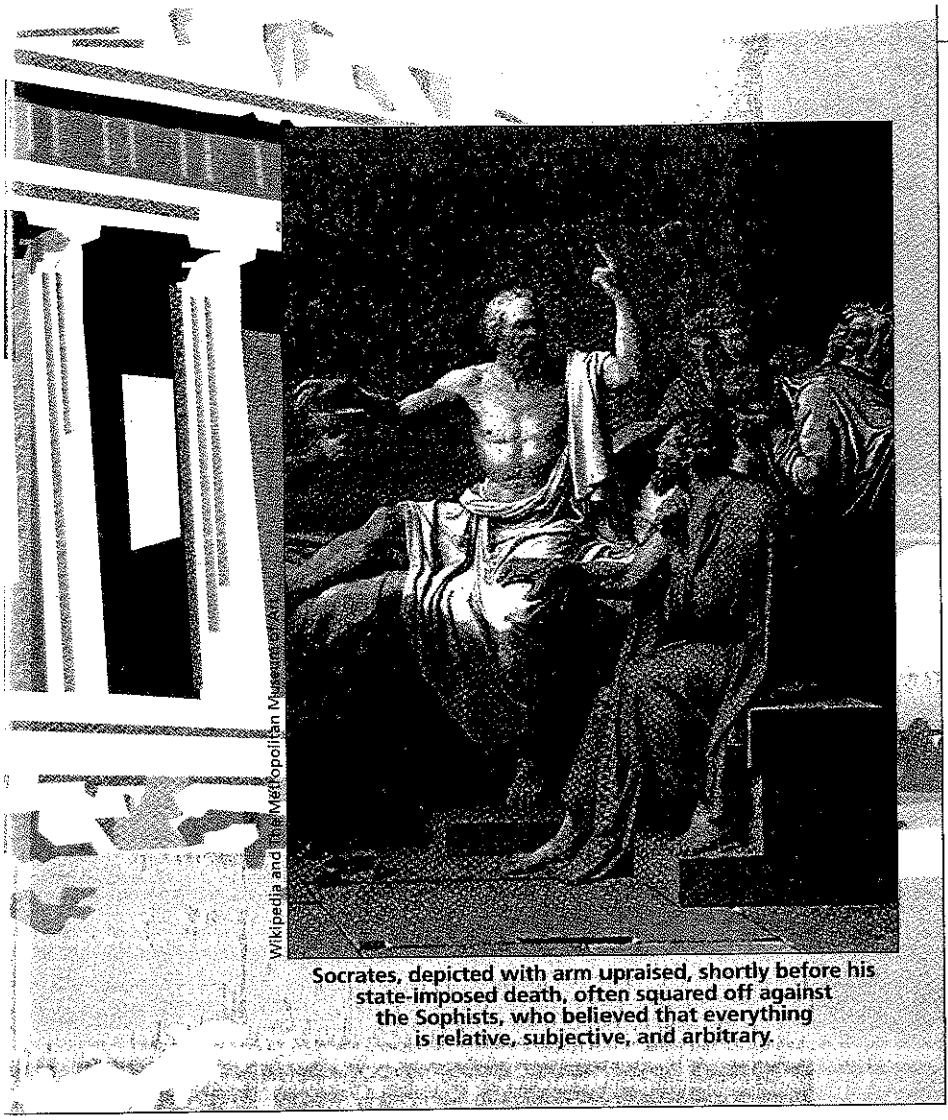
The constitutionality of death

Constitutional contests over the death penalty during the modern era sometimes have focused on substance—finding or fashioning objective categories that can make a killer deserve to die. These "aggravators" often include the nature of the victims (children, police officers, multiple victims) or the motive of the killer (for money; sadistically, for kicks) or the methods of killing (torture, mutilation). Other substantive limits categorically exclude entire classes of killers from the "worst of the worst." These include the mentally retarded and juveniles, for instance. Mostly, however, the contest has focused on process. Not so much who deserves to die, but how to establish it.

Long before the philosopher Plato came along, the debate was joined. "You cannot step in the same river twice," Heraclitus, the dark philosopher of Ephesus, famously summed up, "for fresh waters flow on." Today's Heracliteans deny that we can categorize homicides meaningfully in advance by relying on real differences among types of killings or killers. Everything is in flux; no two situations ever repeat. Each killing and killer is unique. General rules never can deal adequately with nonrepeating concrete specific situations. Those in power arbitrarily and capriciously execute whom they choose and then call it justice, today's moral anarchists insist. Thus, for them, as for Heraclitus, everything is relative; opposites are identical. One person's "martyr" is another's "mass murderer." The difference between the worst of the worst and the thoroughly justified is ad hoc, depending on who had the power to make the label stick.

A couple of centuries after Heraclitus, Socrates squared off against the wandering teachers known as Sophists in a similar contest of world views. "Man is the measure of all things; of the things that are, that they are," proclaimed Protagoras, the first and greatest Sophist. Every question has two sides. There is no truth. Appearance is reality. Whatever a person thinks is good, is good as long as he thinks it. Manipulate the world to your own advantage, they preached. Everything is relative, subjective, arbitrary.

Socrates and his disciple, Plato, relentlessly battled the Sophists, insisting on absolute values, permanent and unvarying truths, difficult to discern, but ultimately real and knowable. Good and evil—justice and equality exist apart from the human mind. Today's death penalty supporters share a conviction that real moral differences exist among killings. The modern consensus that a planned torture murder is worse than an accidental killing feels like it must have been true forever. To the orator Demosthenes 2,500 years ago, it felt that way, too. Why should we punish deliberate crime but not accidents? "Not only will this be found in the (positive) laws, but nature herself has decreed it in the unwritten laws and in the hearts of men." Human beings probably always knew intuitively that some killings were worse than others. Recognizing that accidents do happen brings a feeling of restraint, nearly as primal as the urge for retaliation. These objectively different types of killings deserve different responses not because society says so. Rather, society says so because the types really are different.



Wikipedia and the Metropolitan Museum of Art

Socrates, depicted with arm upraised, shortly before his state-imposed death, often squared off against the Sophists, who believed that everything is relative, subjective, and arbitrary.

Pursuing moral refinements while they administer the ultimate punishment in a deeply flawed system, today's death penalty Platonists embrace Socrates' amalgam of humility about substance and also his confidence in the method. Like Socrates, we first collect instances that almost all would agree are the worst of the worst. Next, we examine these cases to find common qualities, or the essential characteristics they share.

"In punishing wrongdoers," Protagoras declared, "no one concentrates on the fact that a man has done wrong in the past, or punishes him on that account, unless taking blind vengeance like a beast. No, punishment is not inflicted by a rational man for the sake of the crime that has been committed [after all one cannot undo what is past] but for the sake of the future, to prevent either the same man or, by the spectacle of his punishment, someone else, from doing wrong again." When it came to justifying punishment, Plato also looked forward, insisting in *The Laws*, his last and least idealistic dialogue, that almost every criminal could be rehabilitated through education. Some "hard shell"—today we call them "hard core"—recidivists who could not be softened to society simply were better off dead.

Today's Sophists—who for centuries have been calling themselves utilitarians—attack retribution as irrational. The rational person—the rational policymaker—looks only to the future, comparing costs and benefits. Punishment rehabilitates if possible, incapacitates when necessary but, in any case, primarily deters. Utilitarians today continue to make capital punishment a question of cost and benefit. They consult public opinion exclusively for what is just. Does the majority support the death penalty? If so, let's have it—if not, let's not. Man is the measure.

Morals matter

Rejecting deterrence and public opinion polls as ultimately beside the point, many abolitionists and nearly all retributive advocates insist that there is a moral fact of the matter—transcendent, real, and divorced from present practice. Most abolitionists know—not merely believe, but feel certain—that the death penalty is undeserved and inhumane, even if 90% of the people support it. Most proponents also feel certain—independently of public opinion—that capital punishment is necessary and just. Ironically, then, retributive advocates and abolitionists ultimately never can reconcile precisely because they share this anti-Sophistic commitment to real, transcendent moral facts.

Today, almost everybody on all sides of the debate embraces another Sophistic article of faith—progress. Mores may differ in different societies, and people may be persuaded to change their views arbitrarily but, in the long run, human history progressed.

Protagoras' paradoxical faith in real progress, while denying objective values, commands the allegiance of our Supreme Court. "Time works changes," a majority declared in *Weems v. U.S.* (1910). "Cruel and unusual" was "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." The Eighth "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Chief Justice Earl Warren famously declared in *Trop v. Dulles* (1958). For the past half-century, the Court unanimously has agreed that the Eighth Amendment must cause and reflect this progress.

Abolitionists anticipate the progressive limitation and eventual elimination of the death penalty. Retributivist advocates also believe in progress. Certain truths may be transcendent and timeless, but society's understanding of these moral facts and practices that reflect this awareness do evolve and improve. Platonists, motivated by a belief in the possibility of progress and an obligation to achieve it, thus continue to search for moral categories that more nearly result in homicides being classified correctly and killers more nearly getting what they deserve.

In his famous funeral oration, the great statesman Pericles declared that, in Athens, "Everybody is equal before the law." Equal treatment—*isonomia*, the watchword of the ancient Athenians—is an ideal at the very core of Western humanism. The United States long has embraced the ideal of equal protection under the law. Legislatures, the people's representatives, purportedly enact neutral death penalty statutes, to be applied by prosecutors and judges, equally to all. Any class-based death penalty, any racially discriminatory death penalty, as defined or administered, violates our commitment to equality before the law.

Yet, robbery felony-murder—the aggravator that has put more people on death row than any other—has a definite race/class effect, regardless of the legislatures' intent. If the killer's "pecuniary motive" correctly (as it commonly does) aggravates a murder, how are we to justify the tolerance and respect shown to ranking corporate executives who consciously maintain deadly workplaces, or manufacture unnecessarily lethal products from the best of motives—profit? These "red collar killers" are morally indistinguishable from other mass murderers who, with a depraved indifference, kill unsuspecting innocents. Yet, these pillars of the community rarely are indicted, almost never imprisoned and, of course, not executed for their uncaring mass murder. Unless we respond to hired killers as hired killers of whatever social class—if we fail to reflect this es-

sential egalitarianism in the definition, detection, prosecution, and punishment of murder—we will have confirmed the Sophist Thrasymachus' definition of justice as nothing more than "the interest of the stronger."

Although this core commitment to equality before the law must extend to the substance of who deserves to die, the attack on capital jurisprudence today largely is about process. Once again in the West, it begins with the philosopher and mathematician Thales, who discovered (or invented) an abstract process of proof by which we all can arrive at the same truth. Thales, like his contemporary, Solon, traveled to Egypt and observed how revenue agents, using workable rules of thumb, determined tax abatements due to farmers whose land had shrunk after the Nile River flooded. Thales alone felt the need to prove their truth. Thus, came geometry (literally "Earth measure"), when reason in the West leapt from taxes calculated on changing land masses to the permanently important abstraction of mathematics. Thales' great contribution was truth by proof, through methods that are repeatable, demonstrable, and permanent.

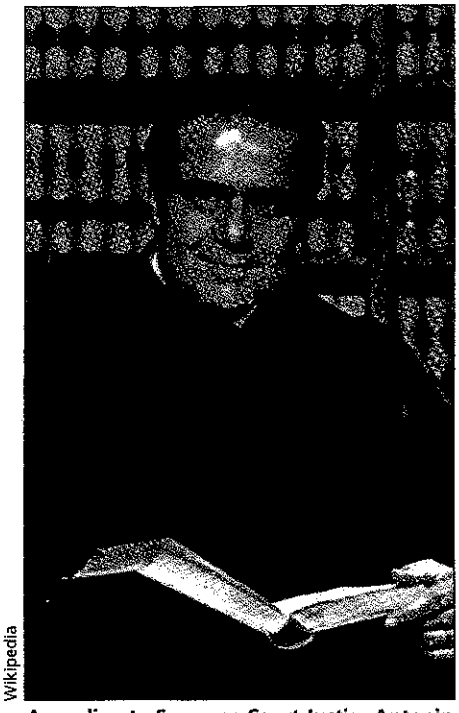
The formal impulse in the West jumped forward with the metaphysician Pythagoras, who conceived the universe as a *kosmos*—a well-ordered whole—essentially rational, limited, and proportional. Reflecting this Pythagorean philosophy during the modern era of death penalty jurisprudence, the Supreme Court has demanded rational proportionality between crime and punishment, using retribution to limit punishment. Thus, for example, it held death as disproportionate for raping an adult. In the tradition of Pythagoras, many states today require a "proportionality review," where an appellate court measures the death sentence in the particular case against other similar murders and murderers to determine whether it is comparatively disproportionate.

Retribution and revenge

Seeking to impose limits, to moderate unlimited anger at each particular murder and measure it instead against the worst possible, retributivist death penalty advocates resist the "kill-them-all" set, so bent on revenge they would indulge in limitless rage. At the same time, they also resist the abolitionists for whom death always is disproportionate, no matter how heinous the murderer. When it comes to homicide, restraints must be imposed on unlimited rage to ensure limited and proportional righteous indignation. Is this possible?

Most of us painfully remember from high school geometry how Pythagoras proved the diagonal of a square was "incommensurable" with its sides. He discovered that pi and the square root of two were real, but not rational, thus destroying his whole rationalist philosophy. Those who celebrate only reason and ratio today disparage nonrational factors, not amenable to precise measurement. How much should we count "the voice of your brother's blood," or the intensity of the victim's suffering, or the killer's cruelty when it is so much easier, and more "objective" to count the number of bodies or a defendant's prior convictions? Retributivists know intuitively, however, that, although these emotive gradations are real, they are neither strictly rational nor discretely measurable.

Thus, retributive death penalty advocates reject as incomplete utilitarian rationality with its future-oriented calculus of costs and benefits. No strictly rational death penalty law can be constructed and applied exhaustively to achieve justice. We need a richer language that includes nonrational, informed emotion. Moral



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According to Supreme Court Justice Antonin Scalia, the entire concept of modern capital jurisprudence rests on illogic —a "simultaneous pursuit of contradictory objectives."

desert never can be reduced strictly to reason, nor measured adequately by rational criteria. Forgiveness, love, anger, and resentment are part of justice. The past counts. Not rationally, but really.

Aristotle called them "The most indisputable of all beliefs. . . . Contradictory statements are not at the same time true." The law of noncontradiction remains the most elementary law of logic and the essential logic in law: A thing cannot be commanded and prohibited at the same time. Is the Supreme Court's entire modern death penalty jurisprudence self-contradictory? In 1971, the Court held that states may give juries "absolute discretion" to decide life or death. "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of murder," the majority declared, implicitly siding with Heraclitus. It simply was "beyond present human ability . . . to identify before the fact characteristics of homicides and their perpetrators which call for the death penalty." The flux and flow of different circumstances and infinite complexity made every killing different. We could not step in the same situation twice.

In *Furman v. Georgia* (1972), a majority reversed course and ushered in the modern era of capital punishment by striking down as haphazardly administered and therefore "cruel and unusual" all the death penalties across the U.S. Absolute discretion apparently produced arbitrariness resulting in the execution of a "capriciously selected random handful." Scrambling to meet the constitutional objection of *Furman*, many states put forth detailed, death penalty codes that guided the jury and limited capriciousness. Some states fully embraced the mathematical ideal of Thales and Pythagoras, enacting mandatory death penalty statutes which specified in writing all the factors—and only those factors—which, once found, automatically resulted in punishment by death. On July 2, 1976, the Supreme Court struck these down, but affirmed Georgia's new death penalty: This state "legislature has plainly made an effort to guide the jury's discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute." Apparently, a state must have it both ways, specifically defining in advance aggravating circumstances while allowing limitless and unwritten factors of mercy.

Two streams of cases have flowed from *Furman*. One requires consistency, based on aggravators clearly defined by the legislature and regularly applied in practice. The other requires that each offender be considered individually, as a concrete, but complex, unique human being. Together, these doctrines simultaneously seem to prohibit, yet require, a jury's absolute discretion. The entire modern capital jurisprudence rests on illogic—a "simultaneous pursuit of contradictory objectives," Justice Antonin Scalia complains. Heraclitus would have delighted in this contradiction and simultaneous truth of opposites, but Heraclitean "logic" was to Aristotle what the Supreme Court's jurisprudence is to Scalia and like-minded critics—simply "absurd."

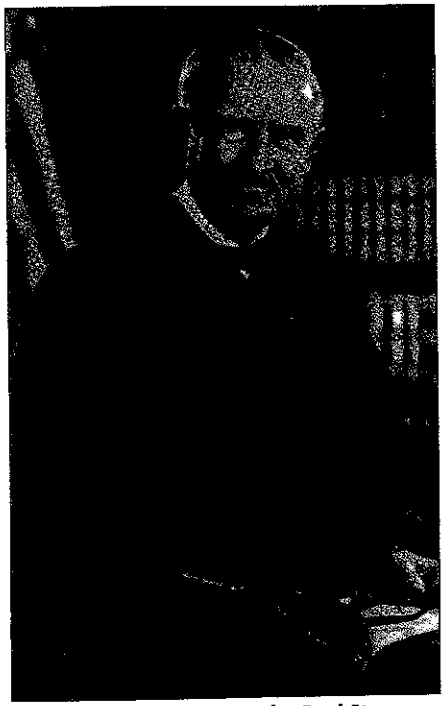
In a world where logic strictly is limited to nonemotional rationality, the attack seems persuasive. Choosing between life and death, after all, involves a single decision. If examined through this strictly rational lens, death penalty jurisprudence—demanding fairness and consistency—does appear internally incoherent.

Retributivist supporters of the death penalty need to show how both core values can be respected simultaneously—how we can generally treat like cases alike and, at the same time, respect the uniqueness of each particular defendant. Heraclitus, Pythagoras, Plato, and Aristotle show us the way. Pythagoras' proof of incommensurability had demonstrated that rationality, discreteness, and proportionality were too limited for a moral universe. As the real numbers are incommensurably richer than

mere rationales, so, too, capital justice, requiring nonrational emotion cannot be exhausted by written rules of law.

In capital trials, first the guilt phase narrows the class of death-eligible offenders rationally and factually, according to general criteria. The sentencing phase which immediately follows, however, assesses more than guilt. More than conduct, it measures character. Because the debate during the modern era of the death penalty has taken place almost exclusively on a rational plane, it has failed to use real but nonrational language of moral intuition to explain the particular justice of desert.

It may sound mystical and new age to insist



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Supreme Court Justice John Paul Stevens maintains that the death penalty is an expression of a community's outrage, "its sense that an individual has lost his moral entitlement to live."

that reason does not—and cannot—exhaust the inquiry. Yet, the need for a transcendent concept of justice that reconciles general consistency with the defendant's particular humanity was neither new age nor mystical to Aristotle, the rationalist, nor to Plato, his teacher.

"Law can never issue an injunction binding on all which really embodies what is best for each," Plato declared in the *Statesman*. "The differences of human personality, the variety of men's activities, and the restless inconstancy of all human affairs make it impossible to issue unqualified rules." Death "is the one punishment that cannot be prescribed by a rule of law," Justice John Paul Stevens declared (without citing Plato). The death penalty, the Justice insisted, was "ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live." A community's outrage—its moral sense—must be more than strictly a rational measurement. This was as close, though, as the justices came to acknowledging explicitly the richer realm of real informed emotion necessary for capital justice.

The Court, by and large, has united to imprison itself on a rational plane. Fearing that hatred cannot be bridled and once admitted inevitably must burst into uncontrollable rage, the Court has sought to suppress emotion. The dead victim's relatives are allowed their grief and public soundbites of fury. A grim detached rationality is expected of the rest of us, including the jury that decides the killer's fate.

Thus, in *California v. Brown* (1987), the Supreme Court held that, when deciding life or death, a jury strictly may be prohibited from being "swayed by mere sentiment . . . sympathy, or passion." Attempting to resolve the conflict between fairness and consistency, Justice Sandra O'Connor issued the Court's new watchword: The death sentence must be "a reasoned moral response" to the evidence. Sentencing was "a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence" she maintained, as if it ever could be moral if it were not also partly emotional.

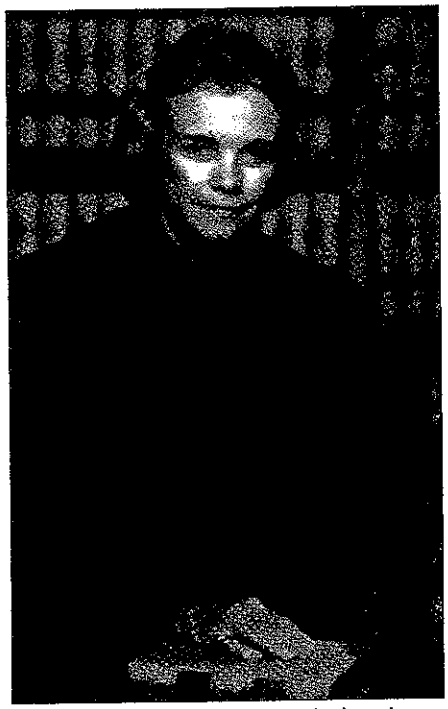
The law has its limits

Can we conceive, much less put into practice, a death penalty regime that provides "fairness and consistency"? Plato and Aristotle, who revered the law as rational—"the intellect without the passions"—felt forced to concede the limits to rules and rationality. Thus, in *Ethics*, Aristotle gave the West "equity, not just in the legal sense of 'just' but as a corrective of what is legally just. Not all things are determined by law. . . . For where a thing is indefinite, the rule by which it is measured is also indefinite and shifts with the contour." It is, in short, "adapted to a given situation." As Aristotle emphasized repeatedly, we cannot discover, nor should we demand, the same precision in ethics as in science. "It is not easy to determine what is the right way to be angry, and with whom, and on what grounds, and for how long."

Should society be angry at rapists who murder and mutilate children? How angry? For how long? Most important, as Aristotle asked, "What is the right way to be angry?" Struggling to deny emotion, in the end, Aristotle found nowhere else to turn but to the jury—passionate and unregulated—for that necessary supplement to "reasonable consistency" which makes true moral justice possible. In deciding between life and death, we need an incommensurably richer language to express, and a particular nonrational human faculty to assess character and desert.

Abolitionists and advocates during our modern era who have fought valiantly to maintain consistency and fairness must understand—must feel—that in that final stage where the jury goes with its gut, moral intuition must and should be partly emotional. Increasingly, in our own times, moral philosophers both for and against the death penalty realize this. We should acknowledge the inevitable, and declare legitimate the inescapable role of emotion. Fairness and consistency, mercy and justice require it.

Aristotle was right. We cannot expect the same degree of accuracy in moral as in scientific questions. The categories can and should be narrowed, and the jury can be made to feel its responsibility to separate the legal question (Is this murder death-eligible?) from the moral question (Does this murderer deserve to die?). Once law and equity are brought together, once we explicitly allow informed emotion—moral intuition, that innately human sense—



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Justice Sandra Day O'Connor insists that a death sentence must be a "reasoned moral response . . . not an emotional response to the mitigating evidence."

our jurisprudence on which that condemnation rests becomes explicable and coherent.

Legal justice—rule-bound consistency—is what we demand of the jury at the guilt phase of a capital trial. Legal discretion must be limited and guided at this stage by well-defined homicide distinctions, defenses, affirmative defenses, and other factors that can be applied rationally and consistently. When it comes to the penalty phase, however, where character and not conduct is the issue, each defendant's unique personality and background assume center stage. There, the ancient Greeks teach us, we seek fairness. "Equity"—the moral truth, based in the jury's intuition—is that mysterious rich mix of reason and emotion that combines to determine whether a person really, not merely rationally, deserves to die. ★

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