Roots
Resolving the Death Penalty: Wisdom from the Ancients

By Robert Blecker
Professor of Law
New York Law School

Reprinted from

America's Experiment With Capital Punishment
Reflections on the Past, Present, and Future
of the Ultimate Penal Sanction

Second Edition, Chapter 6

Published by Carolina Academic Press, 2003

Chapter 6

Roots

Robert Blecker

Controversy swirls about the death penalty, like fallen leaves blown by every passing breeze. Depending on the day's news and editorial slant, with each new brutal crime or last minute legal escape from death row, public opinion shifts—haphazardly it sometimes seems, to those trying to engage in the current debate.

Step back a half-century: In 1953, the Royal Commission declares no formula possible to determine who lives or dies. Six years later the Model Penal Code proposes what the United States Supreme Court has constitutionally demanded since 1972 when *Furman* began this modern era: Structured death penalty laws dictating that a jury first find guilt or innocence and then in a separate sentencing proceeding guiding its discretion as to whether the aggravated murderer deserves to die. Can we ensure equal protection and due process without race or class bias? Must the differences between those who do and do not die be explained, predicted, applied rationally and without emotion? Can a "maturing" society discern its own "evolving standards of decency," as the U.S. Supreme Court has required since 1958 (*Trop v. Dulles)*? Even as seasons change from abolition to moratorium to reinstatement; from legislation to judicial decision; from academic studies and commissions to media and political campaigns, where long dormant arguments spring again to life, and like autumn's canopy, burst into color and are shed, America's experiment with the death penalty continues, developing, reforming along better established lines. Looking back these past fifty years, random swirl now seems more like controlled swaying.

Now square that distance, and step back 2500 years or so, when the first five books of the Old Testament were finally assembled, and genius flowered in ancient Greece. Trace the death penalty debate in the U.S. today from its branches to its main limbs, down the trunk and underground to ancient roots in common soil from which Western culture has been generating....

"A man's character is his fate," Heraclitus declared in the 6th century B.C., with one of his slippery claims that still tantalizes us. A jury deliberates whether a convicted killer lives or dies: Was his homicidal act aberrant—was it essentially in or out of character? Mostly he will do what has been done to him; must we do to him as he has done? Who has he become and what will become of him? The jury's assessment of the defendant's character determines his fate.

Society's character, too, determines its fate. In the aggregate, our choices display—are—our character. Mostly we do what we do because of who we are. But character—traits and dispositions that make up each person or society's unique identity—is formed fatefully, sometimes fatally—largely without conscious choice or awareness.

It's a strange tree, this death penalty. The long view shows it growing smaller, limited to fewer crimes, imposed more and more rarely—morally compacting, progressively refined. Today, from all sides, states are pressed either to reform the death penalty or reject it—and soon. Whether we end up limiting death appropriately or eliminating it entirely seems far from settled. Meanwhile, sampling the soil—examining and interpreting some of the main roots of Western culture—the Old Testament and ancient Greece[1]—even cursorily and eccentrically in the dappled light of today's debate, would seem to nourish both past and present. And 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 Good Book

"In the Beginning..."

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*" (Genesis III:3). Found guilty, Adam and Eve were condemned to hard labor and permanently denied access to immortality. Adam would toil the fields, Eve would suffer in childbirth and perpetual subordination. And someday, both would die. By the time they did die, however, hundreds of years later, it seemed as if their 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 conditions that produced the capital crime, having placed the tree smack in the middle of

1. Although I have attempted here to map the Ancients onto today's death penalty debate, I am not a Biblical or Classical scholar, and have relied on others' translations, picking and choosing as seems elucidating. Conversations with Rabbis Lee Friedlander, Philip Schechter, David Sperling, and Michael Stressfeld, and Professors Alyssa Gray and Murray Lichtenstein helped inform my perspective. Our current death penalty, however, mostly drives this Biblical exegesis—easily, it turns out, because the Bible and Ancient Greek philosophy drive today's penalty. My challenge has been to extract the values and lessons from the Ancients neutrally, honestly, and with balance, while I feel and know to a moral certainty that death is sometimes rightful punishment.

the garden and making it tempting. Arguably, too, Adam and Eve were induced, perhaps entrapped by the serpent, the Lord's own agent. They each had raised a defense of sorts: Confronted by the Accuser, Adam instantly flipped the script, implicating Eve—*"the woman thou gavest to be with me, she gave it to me..."* (Genesis III:12). Eve pinned it on the snake. Still, both were condemned.

Looking back, this first capital crime—theft and possessing contraband—arguably seems trivial and the punishment extreme, even vindictive. Perhaps being mortal was the cost of knowing the difference between Good and Evil. If so, death is a stiff price to pay for our change in character. We were expelled from the Garden to prevent access to the Tree of Life and have rebelled through medical science ever since. In any case, so long delayed, disproportionate, and with no deterrent effect, from the beginning the death penalty seems to have failed miserably.

"More Than I Can Bear..."

When Cain killed his brother Abel, God not only spared but protected him. Abolitionists embrace this story: Just as God declined the death penalty, even for this intentional premeditated killing, so too humankind, made in the image of God, should show mercy and spare intentional murderers.

But *why* had Cain killed Abel? God had graciously accepted shepherd Abel's prized animal, but rejected farmer Cain's fruits. Cain must have felt humiliated and resentful toward his brother when God "did not respect Cain and his offering." Cain was "*very angry*" Scripture tells us, and depressed—"*his countenance fell*"—but he did not snap. He and his brother had a conversation to which we are not privy. Thereafter, out in the field Cain "arose" and intentionally slew him.

What was the nature of this killing? We cannot know for sure. Feeling 'dissed' by God, Cain must have stewed on it. It may have been premeditated, but perhaps also provoked and passionate. We can imagine an anguished Cain crying as he killed Abel. What legal fate awaits a person today whose intentional[2] killing was an outrageously unwarranted response to a minor slight that hurt him deeply or, as in this case, a provocation from the action of another—namely God's rejection? Life, or death for Cain? In traditional common law such brooding would not mitigate murder, unless the deadly act was a sudden reaction in the "heat of passion." Today, however, many states 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

2. Buber questions whether it was at all intentional: "Cain does not yet know what death and killing are," he insists. "He does not murder, he has murdered" (Buber:89).

death penalty even an *inadequately* provoked passion killing, although an aggressive prosecutor might characterize the homicide as cold blooded 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. 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 real lesson from the story of Cain and Abel is that not all killers deserve to die.

The incident can teach us more. Cain initially attempted to obstruct justice by answering evasively, if not outright lying to Authority: *"Am I my brother's keeper?"* He refused to cooperate or confess, disavowing any responsibility to care for the brother he had just killed. *"What hath thou done?"* an angry God demanded. *"The voice of your brother's blood is crying to me from the ground. And now you are cursed from the ground"* (Genesis IV:10–11).

The past counts. The earth does not belong only to the living. Bloodshed cries out to be avenged: Emotively, the blood of the dead victim compels us to act.

God spared Cain, the killer, but sentenced him to life as a fugitive, rootless, to "wander forever." When rejecting the death penalty today, we confine intentional murderers for life, also removing them from hearth and home.

It is *"more than I can bear,"* protested Cain. A perpetual stranger in a strange land, he would always feel vulnerable to attack. When Cain cried out in agony, 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"* (Genesis IV:13–15).

Cain's relief shows that he, and God believed that the threat of death, and sometimes only the threat of a ferocious kind of death—in this case "vengeance sevenfold"—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.[3] As God protected Cain against lethal violence during his lifetime banishment, so today, even while they confine them, states seek to protect convicted murderers by specifically threatening with death those who kill a fellow prisoner.

When Cain spoke in his own defense at sentencing, he never protested lack of notice. Though his parents, Adam and Eve, had been warned that eating the fruit was a capital offense, the Lord never explicitly forbade killing. Eating from the tree in the middle of the garden became evil only because it was positively prohibited. But killing a brother from jealousy was *malum in se*—self-evidently and objectively wrong, and thus no explicit notice was necessary. Without protest then, the trial of Cain had relied on the unarticulated natural

3. Dershowitz points to this, but offhandedly characterizes Cain as a "cold-blooded" murderer (Dershowitz 2000:204, 214).

law, the moral fact implicit in humanity, that murder is evil. The outcry of Abel's blood was the proof; the earth's pollution its consequence.

Today too, more than the killer's violation of previously announced law, the victim's lingering cry moves retributivist advocates of the death penalty. For them, deterrence is secondary. The story of Cain is less about a death penalty threatened for others, than it is about that punishment *not* visited upon him.

As a lesser substitute punishment, even lifetime banishment for Cain was not to be unbearable. But the past does count. 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." From the beginning, however, at least with homicide, God seems discriminating: Although he may have murdered Abel, Cain was not the "worst of the worst" and thus did not deserve to die.

God's Covenant with Noah: "By the Hand of Man..."

Things got worse. The "earth" generally was "corrupt" and *"filled with violence."* Disgusted, and regretting the whole Creation, the Lord decided to "blot out" all life, except for Noah and his family and one pair of each living thing. After the Flood, the Sovereign seems to have regretted this indiscriminate mass execution, and promises *"never again"* to repeat it. Blessing them, God tells Noah and his family to *"be fruitful and multiply, and fill the earth"* (Genesis IX:7).

"I give you everything," God continues, in this purely life-affirming moment. But the blessing comes with restrictions. *"For your lifeblood I will surely require a reckoning; of every beast I will require it and of man; of every man's brother I will require the life of man"* (Genesis IX:5). This reckoning with the past will not be God's domain alone. Scripture famously continues: *"He who sheds the blood of man, by man shall his blood be shed"*(Genesis IX:6).

This line from *Genesis* challenges Bible literalists who would be death penalty abolitionists.[4] Their best counter is to suggest that God's statement is merely a prediction: Humans will retaliate for homicide. God does not command the death penalty, the argument goes. God embeds retaliation in human nature, to be expected with certainty. Scholars say that although the original Hebrew text permits this future tense interpretation, it is most strained in light of repeated unambiguous commands for the death penalty elsewhere in the Old Testament. Why would God in this passage alone merely predict what elsewhere is repeatedly mandated, and refined?

4. Some Christian fundamentalists deny that non-Jews are bound by Mosaic law, thus making Genesis uniquely significant.

"By the hand of man shall his blood be shed," Scripture commanded, *"for God made man in his own image"* (Genesis IX:6). When a human made in the image of God has been murdered, other humans acting in the image of God will execute the person responsible for the lifeblood. "The guilt of the murderer is infinite because the murdered life is invaluable" (Greenberg 1970:26). But the image of God is not God, suggesting a state of perfection to which humans can only aspire, but never attain.

Unqualified, a command to humans to kill "whoever sheds the blood of man" would be grotesquely overbroad. Both *Leviticus* and *Numbers* refine that command and distinguish types of homicides, well beyond the example of Cain. But near the Beginning—destroying almost all life in the Flood and commanding Noah immediately afterwards—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. But the Hebrew refutes this, scholars agree. "Thou shalt not murder," it more literally enjoins, and not "Thou shalt not kill."[5] Thus 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, for which it calls throughout the Law. Abolitionists would do better to stop perverting this famous Commandment for rhetorical effect.[6]

"To Slay the Righteous with the Wicked..."

"Be blameless and I will make my covenant between me and you," the Lord had instructed Abraham (Genesis XVII:2). The implication was clear: The righteous would prosper; and the wicked would be struck down. *"Wilt thou indeed destroy the righteous with the wicked?"* (Genesis XVIII:23) Abraham later challenged God, who was about to obliterate Sodom with all its inhabitants. *"Will you destroy the innocent with the guilty?"* (Genesis, XVIII:23) Abraham protests in another translation. But today, the "guilty" are not always "wicked,"[7]

---

5. A categorical note accompanies the Oxford Bible translation, "you shall not kill": "This commandment forbids murder (see Gen. IX:5) not the forms of killing authorized,...e.g. war or capital punishment."

6. Worse, when abolitionists divert the Commandment from the killer to society broadly, "Thou shalt not kill" has no chance to stand emphatically for what it should: To each person individually, "Do not commit murder!" And to the People, the Community derivatively, "Do not knowingly execute the innocent or those who do not deserve to die."

7. Exodus XXIII:7 commands: *"The guiltless and the righteous slay thou not."* From this dual mention, the rabbis inferred that in capital cases, after the defendant had been condemned, a witness might step forward with exculpatory evidence and force a retrial, lest the guiltless be

nor are the "innocent" always "righteous." In contemporary bifurcated death penalty trials, the fact-finder first determines legal guilt or innocence. Then during the "penalty phase," the focus shifts from factual guilt to the moral plane of desert. No longer "did s/he do it?"—the separate question now becomes "does s/he *deserve to die* for it?"

Jesus' challenge to those who would execute the prostitute—"Let him who is without sin cast the first stone"—implies not that she is innocent, but either that there are no righteous people or that every righteous person is guilty of something. Today, many street criminals stand convicted of crimes they did not commit. But because they committed so many other crimes for which they were never apprehended[8], there is a prison saying: "Maybe you serve time not for what you've done all the time, but all the time you serve, you serve for what you've done" (Blecker1990:1166). The scales of justice balance out for the unrighteous-but-legally-innocent. In the furor over capital punishment today, as evidence mounts that "innocent" people are being released from death rows, the public officially concentrates on "legal" innocence, but more easily tolerates individual "legal error" as long as the mistake attaches to criminals already seen as unrighteous.[9]

"Far be it from thee to do such a thing, to slay the righteous with the wicked," Abraham's challenge continues, *"so that the righteous fare as the wicked"* (Genesis XVIII:25). Far wrong, indeed, to execute the innocent in order to slay the deserving. God is presumed to stay clear from working such injustice. And today we go to great lengths to ensure that the innocent shall not be put to death. But it tears at us when righteous victims suffer while their wicked killers thrive. Retributivists need to exact punishment so the wicked, too, shall suffer along with their righteous victims. Nor can retributivists tolerate sheer arbitrariness, where the wicked and righteous seem to be punished indifferently.

Abraham gets God to promise to spare Sodom if fifty righteous persons can be found dwelling within. Then Abraham has the guts to lead God down the slippery slope. Suppose there are forty-five, forty, thirty, twenty...? Abraham

---

slain. An acquittal, however, was final. Because, the rabbis reasoned, the accused had been found righteous, and newly discovered evidence against him might establish only that this righteous defendant was not innocent (*Babylonian Talmud Sanhedrin*1935:33b).

8. "Though he had not smitten him yet—he was termed a wicked man" (*Babylonian Talmud Sanhedrin*1935:54b).

9. When I witnessed the execution of Benny Demps in Florida, I was acutely aware but untroubled that the evidence left some doubt about whether Demps had murdered a fellow prisoner for which he was ostensibly being put to death. Years earlier, Demps brutally murdered two innocent passersby who happened to come upon him in an orange grove while he was trying to open a safe from an earlier robbery. He had been sentenced to die and only escaped execution when the Supreme Court emptied death rows across the U.S. in *Furman v. Georgia* (1972), a completely unrelated case.

bargains God down one last time and then he quits. And God concedes: *"For the sake of ten I shall not destroy it"* (Genesis XVIII:22–32).

Abraham's challenge to the Judge of Judges is justly celebrated as brave: Defense counsel acting on behalf of others (Adam, Eve, and Cain had all defended themselves)—denying the Supreme Authority's moral right to risk executing the innocent. God and man must spare many guilty persons who deserve to die rather than execute the innocent. Humans are, after all, made *"in the image of God."*

But Abraham had stopped at ten. 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. In the end, Lot's sons-in-law thought Lot was jesting when he warned them to flee; they, although not wicked, died along with the rest of Sodom and Gomorrah. It seems by destroying whole cities as punishment, the Judge of all Earth risked killing persons who did not deserve to die for the certainty of killing larger numbers of guilty who did. The lesson here—justice systems have limits. We must *greatly* favor sparing the guilty lest we execute the innocent. But there are limits: Some error is inevitable and unfortunately must be tolerated.[10]

When Lot and his family fled, God commanded them not to look back. Lot's wife almost instinctively stared at the rightful destruction of the wicked—and was instantly turned into a pillar of salt. Does this passage warn that the public generally should not witness death sentences carried out? Lot's family were innocents who happened to dwell among the wicked. There was no need to witness this mass destruction, done neither in their name nor as an object lesson for them.

On several occasions in the Old Testament God will punish entire populations, innocents along with the guilty.[11] But humans, although made in the image of God, are not God and must not slay the righteous indiscriminately with the wicked. Human life is special. Unlike all other contemporary Near Eastern cultures[12] (Greenberg1970:29–30), 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 XXIV:16 famously declares. And lest they slay the righteous with the wicked, humans are to uphold a presumption of innocence. *"Keep far from a false charge,"* God commands in Exodus XXIII:7, *"and do not*

10. *The Genesis of Justice* (pp. 86–89) independently makes the same point.

11. In the book of *Joshua,* God aids the Hebrews to slay whole cities. This divinely produced wholesale destruction of innocents defies contemporary humanistic justification, as does today's terrorist bombers, indiscriminately targeting innocent civilians.

12. For example, according to the Babylonian Code of Hammurabi (Laws:209–210), "if a man strike a [pregnant] woman" and caused her to die, his daughter was to be put to death.

slay the innocent, for I will not acquit the wicked." God guarantees it: Although acquitted by human judgment, the wicked shall be divinely punished.[13]

In today's secular society whose Constitution guarantees the separation of church and state, many citizens are skeptical that punishment somewhere else necessarily follows otherwise unpunished crime in this world. Government must overcome our natural resentment that wicked persons walk free and prosper. The People demand justice from their government in this world. We must rest our commitment to a presumption of innocence on a satisfaction that comes from believing that the righteous, although they have acted wickedly, will not die at the hands of the State. How better to "keep far" from a false charge, and thus "not slay the innocent and righteous," than to indulge all real doubts for a defendant's benefit?

"You Shall Inquire Diligently... and if It Be True and Certain"

"If there is found among you... a man or woman who has done evil... and 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 XVII:2–5).

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

This demand was for *factual* certainty only—and what else could be required? For a people whose very meaning of "moral" was to strictly apply God's command, a moral certainty that a defendant deserved to die flowed automatically from a finding of factual guilt, with no prerogative to commute the sentence. In Biblical days, eyewitness testimony was probably 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.

"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 fact as "true and certain" shall the defendant be put to death; and even then, only if two witnesses swear to the same events. This ancient imperative, "super due process," is as pulsing as the de-

13. The Old Testament does not explicitly mention an afterlife, but Divine Justice outside the human sphere is clearly implied.

mand for punishment: *"And you shall stone that man or woman to death. 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 XVII:5–7).

"Then You Shall Do to Him As He Had Meant to Do..."

What if witnesses were lying? Suppose two people conspired to have the defendant wrongly executed by the State? *"If a malicious witness rises against any man to accuse him of wrongdoing, then both parties to the dispute shall appear before the...judges [who] 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"* (Deuteronomy XIX:16–19).

Like kind punishment: We do to the false witness what he would have had done to the innocent defendant. This ancient retributive measure feels right; it is poetically just, retributively just, emotionally just. By it we restore a balance and satisfy the retributive impulse to purge, or to "put away the evil." We gratify a deeply felt need rooted in the past. Then Scripture immediately returns attention to the living and the future: *"And those that remain shall hear and fear and never again commit..."* (Deuteronomy XIX:20). Punishment then becomes forward-looking, its purpose to prevent other people from committing similar crimes. But deterrence, more frequently found throughout the text, is ultimately peripheral. The need to restore the balance, to strike down the one who destroyed the life force, drives the Biblical death penalty (Bailey 1987:37).

Retribution and deterrence, thus paired in the Old Testament, are still coupled today. The United States Supreme Court has repeatedly held that in order to be constitutional, the death penalty must serve either a retributive or a deterrent purpose (*Coker v. Georgia* 1977; *Enmund v. Florida* 1982; *Lockett v. Ohio* 1978; *Tison v. Arizona* 1987). Capital punishment may never rest solely on convenience or its efficiency in incapacitating those we catch. The individual must deserve it uniquely, and/or others must change as a result.

Scripture seems to make this same point: "Purge the evil" and "the rest shall hear." Much more often than it justifies punishment, the Old Testament explains its purpose. It speaks principally in terms of deterrence, focusing on the good punishment will do in keeping the congregation law-abiding.

However, independent of deterrence, a witness who would send a man to his death falsely, deserved to die: *"Your eye shall not pity; it shall be life for life, eye for eye, tooth for tooth..."* (Deuteronomy XIX:21). Scripture here 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.

Only a hardened heart can be emotionally distanced enough to rightly punish this defendant. As Adam Smith explored brilliantly 250 years ago in his *Theory of Moral Sentiments* (1759), we can have no pity for the defendant only if we have complete sympathy for the victim. If the victim is dead, we can remember, imagine, and stay angry at his suffering and tragic end.

What if the perjurer's scheme is detected before an innocent person is put to death? 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 died. But, as measured by his intent, the deserts of the perjurer are the same. What would be gross injustice to an innocent person becomes appropriate punishment for the guilty—homeopathically giving him a taste of his own medicine. Do to him exactly what he *would have* had done. "Moral luck"—the good fortune that his victim escaped harm—counts for nothing here. 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. Thus far, however, the states and federal government have rejected this. Many urged the death penalty 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." The U.S. Supreme Court, however, would probably hold the death penalty disproportionately "cruel and unusual" for attempted murder where nobody died.

But whether or not the scheme succeeds, Scripture demands that judges keep outrage fresh and cut off all sympathy. And witnesses, both lying and truthful, assume responsibility for the executions their testimony produced. Thus, *"the hand of the witnesses shall be first against him to put him to death, and afterward the hand of all the people. So you shall purge the evil from the midst of you"* (Deuteronomy XIX:18–19). The whole community participates in the punishment, with the witnesses casting the first stones. Today the citizenry participates by sending representatives to witness the execution. If contemporary practice were to preserve the spirit of Scripture, perhaps jurors, the sentencing judge, and/or the prosecutor would more actively participate, at least by witnessing the execution they had partly produced.

Biblical commands foreshadow today's "super due process" before we condemn a person to death. States have long since discarded the two-witness rule, but by making witness-killing capital, legislatures do attempt to protect witnesses from others who would slay them to prevent their truthful testimony.

On the other hand, the law inadequately protects innocent defendants against lying snitches, or "jail house informants" as they are more politely called. Today, we have nearly come full circle; commissions charged with reforming the death penalty recommend that the "two witness" requirement be restored, and executions be prohibited based solely on an informant's uncorroborated testimony.[14] At trial, of course "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death" (*Lowenfield v. Phelps*1988:258, Marshall, J., dissenting, quoting *Witherspoon v. Illinois*1968:521). What else does a special commitment to a presumption of innocence and super due process require in the context of capital cases?

A storm rages.

"You Shall Accept No Ransom..."

From earliest times, the victim's family responded to homicide. They would retaliate if they could; blood feuds would develop, or the killer might flee. Or a "blood price" could be paid as a settlement, buying the killer peace and the victim's survivors some measure of satisfaction. It has stayed that way in the streets.[15]

All other pre-Biblical Near Eastern cultures allowed the victim's family or the community to settle up and be compensated for their loss[16] (Greenberg1970:26–27). Seemingly, moral guilt was irrelevant. The slayer was simply worth more alive, perhaps as a slave. (Or today as a lifer inside.) For utilitarians it has always been about costs and benefits. The blood price worked: No one complains, and anyway, "Don't cry over spilt blood"—just put it behind you and move on.

As defendant-friendly as the Bible was when it came to *proving* capital murder, however, it did not allow murderers to live who deserved to die: *"And these things shall be a statute and ordinance to you throughout your generations,"* declared the Lord, emphatically laying down the law: *"The murderer shall be put to death...but no person shall be put to death on the testimony of one witness.*[17] *Moreover, you shall accept no ransom for the life of a murderer, who is guilty, but he shall be put to death"* (Numbers XXXV:29–31).

The ancient Hebrews recognized that money can never truly compensate for murder, and they also embraced its moral corollary—that no property crime

14. See the Illinois Governor's Commission on Capital Punishment (2002).

15. Today's no-fault insurance and civil negligence lawsuits also help settle the dispute.

16. Hittite Law provided: "Whoever commits murder, whatever the heir himself of the murdered man says (will be done). If he says, 'Let him die,' he shall die, but if he says 'Let him make compensation,' he shall make compensation. The King shall have no role"(Roth1997:225).

17. Defense attorney Martin McClain insists that New York prosecutors often exclude Orthodox Jews as jurors because of their commitment to this biblical requirement.

should be capital. Theft was one thing—but death was different. Successful prosecution for burglary brought double your money back. But 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 (Greenberg1970:26–27). Human life has no price: No amount of money given could ever 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.

"*Accept no ransom,*" in lieu of the death penalty, "*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*" (Numbers XXXV:33). No longer were close relatives competent to decide what was adequate compensation for the victim. Only the murderer's death could demonstrate the infinite value of human life.

Also 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.[18] 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,[19] 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.[20]

Abraham had argued against "sweeping" away the righteous with the wicked. God had swept away all except Noah and his family, but regretted it af-

18. Today, however, Sen. Edward Kennedy and O.J. Simpson cast their shadows.

19. Retributivists would expropriate anger as theirs exclusively; in this they are too often aided by abolitionists, although a growing minority insist on their share of emotion (see Bandes 1999).

20. The European Union today coerces all candidates to accept the great economic benefits of membership as the blood price in lieu of the death penalty that they are required to abolish as a price of entry.

terwards. Any true retributivist today must be committed to equal justice. While retributive death penalty supporters are coming to grips with their responsibility to ensure due *process* and equal protection, they seem less aware of *substantive* changes they must also make in the law.

For neither by application nor *by definition* are the rich to be favored over the poor. Today, most state statutes declare that a pecuniary motive aggravates an intentional killing. And society applies that aggravator to professional assassins, as it should. But the pecuniary motive is also applied routinely to robbery felony-murderers, who almost always are poor and rob from a pecuniary motive, but often do not kill from one. And at the same time that states extend the death penalty indiscriminately to poor people who robbed when somebody else did the killing, callous corporate executives who knowingly kill and maim scores of unsuspecting employees or hundreds of unsuspecting consumers, strictly from a pecuniary motive, not only are exempted from the death penalty, they are very rarely prosecuted at all.[21]

Justice must not be polluted by class bias. The poor must never be "swept along" to execution because they cannot pay.

"Thou Shalt Not Forget..."

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 desert as the primary purpose of punishment. But "*remember what Amalek did unto thee*," God specifically commands the Israelites. *"As ye came forth out of Egypt, how he met thee by the way, and smote the hindmost of thee, all that were enfeebled in the rear, when thou was faint and weary."* A person who attacks and kills society's most vulnerable members is never 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, *"that thou shalt blot out the[ir] remembrance under heaven; thou shalt not forget"* (Deuteronomy XXV:17).

Those who prey on children, the elderly, the weak and infirm—today's "vulnerable victim" aggravated killers should never be forgotten nor forgiven.[22]

---

21. See, for example *People v. Warner Lambert* (1980) and the infuriating saga of the Ford Motor executives who balanced settlement and trial costs from highway deaths, against the costs of modifying the Pinto's exploding gas tanks. Because it was cheaper, they left that deadly machine unmodified, to immolate victims of rear end collisions. Although hundreds of unsuspecting passengers were killed and thousands badly burned, not one corporate executive was even indicted.

22. Thus, retributivists today strongly oppose releasing imprisoned Nazi war criminals, however aged and infirm they may have become.

Rich or poor, the victims' "blood pollutes the land.... The voice of your brother's blood cries out." The past counts.

"Since He Had Not Hated His Neighbor in Time Past..."

It was one thing to declare "*the murderer he shall die*," and quite another to kill him. Commanded not to be satisfied with a blood price, the victim's family instead designated a "blood avenger"[23] to hunt down the killer of their kin. But not all killers deserve to die. Accidents 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*," declares Exodus categorically, indiscriminately. "*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*" (Exodus XXI:12). "*You shall set apart three cities...you shall prepare the roads...so that any manslayer...may flee to one of these cities and save his life.... But if a man willfully attacks another to kill him treacherously, you shall take him from my altar, that he may die*" (Deuteronomy XIX:2–12). Today instead of roads in good repair, the airwaves are kept clear and secure telephone lines maintained to the death chamber, for the Governor and the courts to issue last moment stays, so an execution can be reconsidered.

By statute 3000 years ago, premeditation made a killing capital, as it still does by statute today, in most death penalty states. But then and 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 and save his life; lest the avenger of blood in hot anger pursue the manslayer and overtake him...and wound him mortally, though the man did not deserve to die, since he had not hated his neighbor in time past*" (Deuteronomy XIX:4–7).

This compound retributive command at once excuses the avenger who in the heat of passion adequately provoked, intentionally slays the accidental killer of his kin before he can reach the city of refuge, while at the same time, explicitly resting just deserts on the initial killer's intent and attitude. Deuteronomy XIX displays an equally clear commitment not to execute those who do not deserve to die. The U.S. 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 retribu-

23. Today, of course, the State divides the role among police, prosecutors, judges, and corrections.

tivist, 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.

If the roads were good and the manslayer reached the city of refuge, the congregation assembled and two or more witnesses were examined. How were the factfinders to decide the killer's mental state, especially without a confession, to determine whether he deserved to die? Deuteronomy declares, and contemporary juries agree, that a killer who hated his victim most likely intended to kill him. Numbers XXXV also lays out the process by which intentional (and therefore capital) murder is inferred from the manner of the killing: *"If he struck him down with an instrument of iron, so that he died, he is a murderer; the murderer shall be put to death. And if he struck him down with a stone, in the hand, by which a man may die, and he died, he is a murderer; the murderer shall be put to death. The avenger of blood shall himself put the murderer to death"* (16–19). Numbers continues by inferring the motive of the killer from the manner of the killing: *"And if he stabbed him in hatred, or hurled at him lying in wait, so that he died, or in enmity struck him down with his hand, so that he died, then he who struck the blow shall be put to death; he is a murderer"* (XXXV:22).

A particular defendant may not have acted pursuant to his apparent motive. Because motives often cannot be established directly with certainty, the power of inference must supplement the limitations of the evidence. As long as the factfinder has made "*diligent inquiry*" so that by best efforts the motive appears "*true and certain,*" we cannot be frozen by fear of possible error or that a future technology we cannot now envision will reveal a different truth. Absolute certainty is simply impossible. Every age has its own standards of certainty, its own fineness of reality, its advancing means of being convinced.[24]

"Accustomed to Gore...and Its Owner Has Been Warned"

"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" (Exodus XXI:28).

We can presume this was no trained killer ox. Although it was the ox that gored, a human omission, failing to keep the animal confined, was a proximate cause of death. But the defendant-owner of the ox had not killed intentionally.

24. But see the district court opinion in *United States v. Quinones* (2002), declaring the entire federal death penalty unconstitutional on the possibility of error not yet discoverable by known means.

There was no past hatred of the victim, no malice at all. The owner simply did not care enough about other people's lives. He put human lives at risk, for convenience or profit. But once "warned" that he did have a goring ox—a beast out of control—like many drunk drivers, robbers high on crack, or callous corporate executives today, the owner consciously disregarded a deadly risk of danger.

Many killings are neither clearly premeditated nor as freakishly accidental as an ax head flying off its handle at an odd angle. Perhaps when the woodsman swung the ax he was negligent: He never noticed, but should have, that its head was loose and that the victim was standing close by in harm's way. Or he might have chosen not to repair the loose ax head, or give warning, thus knowingly putting his unsuspecting neighbor at risk. The recklessness may have been real, but the risk too remote for the killer to deserve to die.

Today many states identify a culpable mental state between negligence and intent by relying on the Model Penal Code's definition of "recklessly," *i.e.* being "aware of and consciously disregarding a substantial risk" of death. Most states recognize a more culpable recklessness that comes from subjecting others to a "grave" risk of death rather than the lesser "substantial" risk. Reckless homicide also may become murder when a number of people are placed at risk. Whatever risk the goring ox presented at the time, it seems grave looking back upon it after the victim has been gored. 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. Although it need not involve anger or hate, scheming or plotting, a "depraved indifference to human life"—unintentional but wanton and abandoned—can be every bit as heinous as a premeditated intent to kill.

Although the Goring Ox illustrates how non-intentional killings may sometimes deserve death, unlike the premeditated murderer or capital perjurer, the Old Testament did allow a depraved indifference reckless killer to settle up. Despite being death-eligible, the owner might escape with his life, if the court or victim's family were willing to accept a blood price. Only for this reckless and indirectly caused homicide does Biblical law permit ransom. How much? The sky was the limit: *"He shall give for the redemption of his life whatever is laid on him"* (Exodus XXI:30). As an alternative to death, no penalty was too great; whatever was demanded of the reckless killer, whether by the court or the victim's family, he was to give in return for his life. The greater power to execute included the lesser power to strip the offender of everything he owned, consigning him to poverty and misery.

Today too, states generally punish a depraved indifference reckless murder as the moral equivalent of intentional murder. Although the U.S. 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, reserving the death penalty and its temporary substitute, life without parole, exclusively for intentional killers.

Alive or dead, an ox was valuable. But the command was clear: *"It shall be stoned and its flesh shall not be eaten"* (Exodus XXI:28). Do not profit from the killer's death. The incalculable non-utilitarian value of human life demanded that any future benefits be sacrificed to the past. The instrument of death, a living being, was to be treated as responsible and not made an object of gain.[25] Usefulness must be shunned, lest the past and the humanity of the slain—the reason for the punishment—be forgotten. Although they often travel together, even in the same sentence, utilitarianism and retribution ultimately clash.

In Biblical times as now, the vast majority of unintentional killings did not deserve punishment by death. *"If he stabbed him suddenly without enmity,"* continues Numbers XXXV in its detailed gradations of homicide, *"or hurled anything on him without lying in wait, or used a stone, by which a man may die, and without seeing him cast it upon him, so that he died, though he was not his enemy, and did not seek his harm, then the congregation shall judge between the manslayer and the avenger of blood, in accordance with these ordinances"* (16–24).

If diligent inquiry determined the killing was accidental, negligent, or even ordinarily reckless, but not intentional, again, there must be *"cities of refuge for you, that the manslayer who kills any person without intent, through error or unawares—may flee there"* (Numbers XXXV:11). The negligent or reckless killer must live therein, until the high priest died. If the unintentional killer prematurely ventured from his place of refuge, the avenger of blood was authorized to kill him on the spot. Inside the city of refuge, however, the unintentional killer was free to live. Refuge and confinement were merged, oddly, it may seem, although today too, young convicted killers often consider their sentences in prison to be refuge from the mean streets.

Ancient Greece

"If I Order You to Set Me Free... You Must Tie Me Tighter"

Whereas the Israelites saw a transcendent God ruling the universe with humans created in His image and struggling to comprehend His ways, the ancient

25. This ripens into the Kantian retributive prohibition against using other people as a means to our ends.

Greeks saw a "world ruled by...gods human in their passions, a world ruled by caprice" (Guthrie 1962: Vol.I, at 44).[26]

Homer recounts that when the goddess Circe reluctantly released her beloved Odysseus to continue his progress home, she warned of several deadly perils awaiting him, especially the Sirens, whose song he must at all costs ignore. Odysseus prepared to withstand temptation by limiting his own power to lead his men to their mutual destruction. Thus, before they reached the Sirens, as their leader had commanded, his men put wax in their ears and bound him to the mast. "If I implore you and order you to set me free, you must tie me up tighter than ever," Odysseus demanded.

When Odysseus heard "sounds sweet as honey," the Sirens' call—"Come this way and listen to our voice!"—he was aroused: "I longed to listen and I ordered the men to set me free" (Homer:132). Now they were all in a bind: Did the later command take precedence? Then was then; now is now. Had Odysseus the right to change his mind?

The men rejected their leader's attempt to countermand his earlier command, and kept on rowing until the danger passed. Only because a rational Odysseus at an earlier time had provided procedures for keeping his own passion in check, and only because his men could subordinate the present and keep covenants with the past, did they all survive this trial.

The lesson should be clear to a society where the People are sovereign: We must limit our own power to act on our passions of the moment, or face self-destruction. In a republic, public passion is filtered through the People's elected representatives. And when legislatures or administrations are tempted summarily to execute society's outlaws, their passions too must be restrained, by their constitutions and judges sworn to uphold them. Appropriate punishment, morally commanded, becomes possible in the face of public outrage and the urge to act immediately only if we find a way to restrain passion long enough to investigate and deliberate. To be reliably and fairly administered, the death penalty must operate as a deliberate product of a deliberative process. Popular opinion counts, but only for so much.

And so it is today, roughly 3000 years after Odysseus ordered himself bound to the mast, that constitutional rights operate to check the passions of the People and their elected representatives. In the end, the constitutional guarantee of Due Process together with the Eighth Amendment's prohibition against "cruel and unusual punishments," operate, as Justice Thurgood Marshall de-

26. Overwhelmingly here, Guthrie's (1962) multivolume history brings alive the world of the Presocratics, Socrates and the Sophists, and much of Plato. Except for some later sections interpreting Plato's *Laws* and *Statesman*, and Aristotle's *Ethics* and *Politics*, this essay relies on Guthrie throughout, sometimes without quotes, in essential though fragmentary phrasing. Guthrie should not be held responsible, however, for mapping the death penalty.

clared, concurring in *Furman v. Georgia* (1972), as "our insulation from our baser selves" (at 345).

"If All Agree..."

Human beings feel a primal urge to retaliate when a member of their family is slain. In Homer's time, the Heroic Age, roughly 1200–800 B.C., homicide was strictly personal. The killer escaped, the victim's family caught and killed him, or the blood price settled it monetarily with the victim's family (Bonner and Smith 2000: Vol.II, at 192).[27]

Killers who escaped the family's initial wrath could go into exile and, as with Cain, were safe from retaliation, as long as they stayed away. The blood price acted only partly as compensation to the family for its loss. It also helped defray sacrifices "to appease the spirit of the dead" (Bonner and Smith 2000: Vol. I, at 21). Homer reveals no distinctions among homicides, except special horror at killing one's own kin. But early human beings must have known 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 revenge.

Draco's gift to Athens, its first written Constitution, was so indiscriminately bloody, with death as the standard punishment for a host of crimes, that even now "draconian" means "harsh, severe, barbarously cruel." The Old Testament also looks like a bloody code. Of course, today it is a crime against humanity for any government to exterminate homosexuals as such, or put people to death for worshiping the wrong gods. Today, we know *better.*

Except for homicide. We have refined but not rejected Scripture's substantive distinctions. Biblical homicide law's commanded process and presumption of innocence continue as basic mandates in the United States. We have grown but kept connected to those roots. So too, when Solon rid Athens of Draco's bloody code and substituted a whole new Constitution, a whole new set of laws designed to last unchanged for at least another hundred years, the great lawgiver kept virtually intact Draco's law of homicide, which was largely a codification of earlier practice (Bonner and Smith 2000: Vol. I, at 133).

But one great change had taken place in the culture since the time of Homer: The community had become consciously and emotionally involved. As with the ancient Hebrews, for the ancient Greeks the decisive change was the idea—really a *feeling*—that "*blood pollutes the land*" (Numbers XXXV:33).

Because he was polluted, the manslayer himself posed a public menace. While at large in public places, the guilty killer would contaminate society. In

27. Robert Bonner and Gertrude Smith's two-volume *The Administration of Justice from Homer to Aristotle* (2000) is the principal source here for homicide jurisprudence in ancient Greece.

Athens, the victim's family initiated the homicide prosecution, and once they publicly accused the killer, pollution immediately attached, and an interdiction automatically issued. During preliminary investigation the accused, now polluting, was strictly prohibited from appearing in public places. If he violated that interdiction, anybody could legally kill him on the spot (Bonner and Smith 2000: Vol. II, at 193).

Although the government had taken over homicide trials, the victim's family prosecuted. They might prefer a monetary settlement, but blood pollution complicated that remedy. A money settlement with the family would leave a contaminating killer at large. The response to homicide had become more than merely personal pay back: Only punishment sufficient to cancel the pollution would end the public threat. And only the community would determine which punishment was sufficient. But in a code where death is the casual and indiscriminate punishment for petty crimes, why not play it safe and make death the punishment for all homicide? Because all killings are not alike. Animating the Old Testament, this moral fact also animated the Ancient Greeks. There seems a basic impulse in Western culture to mark off officially—specially denounce and distinguish from all others—the worst killings. Today in the U.S. many states execute no one, yet cling to their capital statutes as a way to distinguish and denounce. Bonner and Smith (2000: Vol. I, at 103) suggest that homicide became a public concern less to assure prosecution, than to *limit* punishment by distinguishing different killings correctly.

This feeling that the victim's blood morally pollutes us until the killer is dealt with adequately—this felt need to sort out homicides and punish killers only as deserved—this deep-seeded retributive urge primarily moves death penalty advocates.

"Death is different" has become cliché in today's capital jurisprudence. But a host of crimes in ancient times brought the death penalty. As punishment, death may have been common, but as crime, killing has been treated specially. Even a lawgiver like Draco, who used death indiscriminately as a penalty, still carefully distinguished among homicides. Although execution has not always been a special punishment, murder since the beginning has been a special sort of crime.

The aristocratic Aeropagus, the highest court of legal guardians which descended from the Homeric Council of Elders, sat *en masse* to try premeditated murderers and would-be tyrants.[28] The Athenians so cared about distinguish-

28. Every society is most angry at "treason"—the direct attack on the core of the collective identity: For the Israelites the worst treason was to worship false gods or engage others in the attempt. For ancient Athenians and most Americans today, the worst treason is the attempt to establish a tyranny (Bonner and Smith 2000: Vol. I, at 108). Just as anyone could kill the killer who returned to pollute, anyone could kill the traitor. Faced with cumbersome legal process and sometimes a family not inclined to prosecute for homicide, Athenians found ways to prosecute

ing homicides that they established separate courts to try separate types of killings. One court of fifty-one tried unpremeditated killings; another dealt with justifiable killings. A special court was established for one who killed again while in exile for a prior killing. (Many states in the U.S. also single out prisoners serving life sentences and repeat killers.) Aristotle tells us that these recidivist killers, already banished and now facing another charge of homicide, conducted their defense from a boat lest they contaminate the court assembled on the shore (Aristotle 1974:135). Finally, there was a special denunciatory court for unidentified killers, with jurisdiction also over animals and inanimate objects that had caused the death of human beings (Bonner and Smith 2000: Vol. I, at 110).

After preliminary investigation,[29] at any time prior to trial the accused could voluntarily go into exile, thereby implicitly confessing his guilt, and be banished forever. Or he could stand trial and after hearing the prosecution's opening, still choose to go into exile. This also amounted to a guilty plea, and again the exile would be for life (Bonner and Smith 2000: Vol. I, at 108; 118). Forever banished from his homeland, forever contaminated, there could never be a pardon. Even after factional wars and coups were settled with general amnesties and wholesale pardons, in Ancient Greece homicide was always exempt from pardon. EWOP—exile without pardon—meant that. No hope of seeing home, ever. Today, there is no statute of limitations for murder, and so far in the United States although no longer in Europe, LWOP truly means life without parole or pardon.[30]

If a killer who had fled before trial found life without his native Attica unbearable without hope of parole, and snuck back home, anybody could legally kill him or alert the authorities—"hale him into court" (Bonner and Smith 2000: Vol. I, at 121). Like today's prison escapee, or lifer who kills again, he who violated exile would generally be considered incorrigible, undeterrable, permanently polluting—a continuing danger to the community—and deserving death. "Haling him into Court" was the innovation; killing him on sight (Bonner and Smith 2000: Vol. II, at 193) was the ancient option. "It shall be permitted to slay [illegally returning] homicides...but not to abuse them or to extort blackmail," the Athenian Code declared. No torture, even of the con-

---

some homicides as political offenses. Today too, the federal government sometimes pursues local homicide cases as Civil Rights violations.

29. As homicide procedure developed, successive investigations were conducted for three months, with trial on the last three days of the fourth month. During that time, the killer was free from harm: "Anyone [who] slays a homicide while he keeps away from markets and games," was to be tried as an ordinary murderer (Bonner and Smith 2000: Vol. I, at 116;114).

30. Today of course, LWOP holds out only the slimmest hope of executive clemency. Should the death penalty be eliminated tomorrow however, undoubtedly as in Europe, LWOP would be next under attack.

demned who had returned to pollute the community. And no blackmail—life could not be bought: No blood price—for blood pollutes the land.

Witnesses were always sworn in homicide cases, whereas in other cases they testified under oath only at the demand of the other side (Bonner and Smith 2000: Vol. I, at 108). An accused killer who stood trial and was convicted of *unpremeditated* homicide was banished for a year or two, or until he received a pardon from the victim's family, which paid the debt and thereby ended the pollution. But the family had to be unanimous: "If there is a father or a brother or sons let them grant pardon to the homicide if all agree. Otherwise the one who opposes it shall prevent pardon" (Bonner and Smith 2000: Vol. I, at 113). One holdout's simmering anger, a desire to continue punishing overrode the collective will to end it reasonably.[31]

"Like Members of the Same Body..."

Athough an accused who had gone into exile before the verdict could never receive a pardon from the family or the court, if he did stand trial and was found justified, he would be released without punishment or debt. But if convicted of premeditated murder, as in the Bible, he was put to death (Bonner and Smith 2000: Vol. II, at 194–195). Today too, many States continue to make a premeditated killer death-eligible, while other capital statutes reject planning *per se* as morally irrelevant.

But now as then, premeditated murder was worse than involuntary manslaughter, which was worse than justified or accidental killing. Passion killings have always been a problem: "If anyone kills *without* premeditation... he shall be exiled," the Athenian Code declared. "If one slays another who is the aggressor (*i.e.*, in a quarrel)...the kings shall decide the nature of the homicide.... The same procedure shall be followed whether a slave is killed or a free man" (Bonner and Smith 2000: Vol. I, at 114). And under the Athenian penal code, as today: "If a man while defending himself kills another on the spot who is unjustly and forcibly carrying off his property there shall be no punishment for the slaying"[32] (at 114). Although Draco reputedly was the first in Athens to distinguish premeditated, unpremeditated, and justified or accidental killing, 2500 years later these distinctions: intentional—provoked—reckless—accidental—justifiable—seem permanently part of human nature—deeply embedded, and real.

---

31. Today prosecutors routinely consult the victim's family on whether to seek death; judges before sentencing hear victim impact statements, but the family may not recommend a specific punishment.

32. Scholars have disagreed among themselves but where the killing was justified, the killer was probably not considered polluting, and definitely did not owe payback to the victim's family.

And then there was felony murder. In ancient Athens, where the homicide was connected with some other crime such as robbery or burglary or kidnapping, anyone with knowledge of the killing could initiate prosecution—there need be no interdict. The accused was imprisoned until trial, before a stripped-down court of eleven (Bonner and Smith 2000: Vol. II, at 214). Death was the penalty. So among homicides, only premeditated murder and felony murder got the death penalty. Twenty-three hundred years later in 1794, Pennsylvania became the first State again to reach this advanced stage by enacting a new statute that restricted the death penalty to "murder in the *1st degree,*" which comprised premeditated homicide and felony murder. More than two centuries later in many states, today these two aggravating circumstances account for the bulk of the condemned.

Although the victim's family generally initiated homicide prosecutions, and could commute sentences, trial and punishment were in the name of the People. "If a man obtain a conviction for murder," Demosthenes informs us, "even then he gets no power over the condemned, who for punishment is given up to the laws and to persons charged with that office." The victim's family, however, was guaranteed the right to "behold the condemned suffering the penalty which the law imposes, but nothing further" (Bonner and Smith 2000: Vol. II, at 193). 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.

Whether they went into exile before trial, or went to trial and were convicted and condemned, premeditated killers were allowed no pardon (Bonner and Smith 2000: Vol. II, at 194). Like Odysseus at the mast, the ancient lawgivers 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 permanently. The past counted, forever.

With one exception: Regardless of the community's or family's wishes, when a dying victim forgave his attacker, no pollution attached, even for premeditated murder. There would be no trial; the family could exact no penalty, nothing was owed. On the other hand, a dying victim could beg his surviving relatives to avenge his death, which then became their solemn moral obligation (Bonner and Smith 2000: Vol. II, at 195–196). 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 also 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.

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. The victim's next of kin initiated prosecution, accepted payment and granted pardon, or witnessed the execution, but there surfaced a communal urge to execute cold-blooded killers. In "the best governed State... those who were not wronged were no less diligent in prosecuting wrongdoers than those who had personally suffered," declared Solon. And not merely from abstract duty. "Citizens like members of the same body should feel and resent one another's injuries" (Bonner 1927:60). Ancient utilitarians must have urged execution to prevent a bad harvest, the surest proof of contamination. But 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, the urge to punish is real.

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 forced to regulate its every aspect, changes in death penalty jurisprudence appear to be fast and furious. It seems as though we are in the midst of one of those rare spurts of feverish activity and perhaps are experiencing a radical paradigm shift where the whole world will take on new meaning. Taking the long view, however, homicide substance and procedure continue to remain the most conservative aspect of law in Western culture. Although homicide law seems relatively unchanged in general, and remained virtually unchanged during the three centuries between Draco and Aristotle, seemingly stagnant, unselfconscious, and stuck in quasi-religious ancient ruts, beneath the surface Western culture was germinating core philosophical and scientific foundations on which modern death penalty jurisprudence rests.

Thales

Twenty-five centuries ago, science in the West began with Thales, Solon's contemporary, who faithfully sought the simpler order underlying this apparently complex and haphazard world in terms of the basic *stuff*—the substance that composed it. Western mathematics, too, begins with Thales, who discovered (or invented) an abstract *process* of proof by which we can all arrive at the same truth. Today's death penalty jurisprudence, concerned with substance and process, draws essentially from both.

As a scientist, Thales suggested that water was the simple stuff underlying the apparent diversity of the world (Guthrie 1962: Vol. I, at 68), a decidedly primitive explanation by today's standards. The Old Testament and Draco too gave us simple categories of killings such as by poison and premeditation, that are also rather primitive in comparison to today's death penalty statutes. Scientific legislators continually search for regularity and distinctions among the

great variety of killers and killings. They probe human nature and the reality of the streets to determine what "really" makes one murder worse than another. In June 2002, the United States Supreme Court weighed in substantively in *Atkins v. Virginia,* by holding that states may not execute the mentally retarded. Just two months later, when Texas executed a man for a murder committed when he was 17, three U.S. Supreme Court Justices publicly protested (*Patterson v. Texas* 2002). But as the fall term opened, the Court declined to decide whether a killer younger than 18 could ever constitutionally deserve to die (*In re Stanford* 2002), seemingly biding their time until they could declare a national consensus against it. Then the Sniper hit, terrorizing cities from Baltimore to Richmond. When the Sniper turned out to be a pair of multiple killers, the younger only 17, all hope for a national consensus against executing juveniles was dashed.

Is it worse to kill two people than one, or if the victim is a child, or if the killing is felony murder? Can depraved recklessness be as bad as intent? The substance of contemporary death penalty jurisprudence and debate goes to "aggravators" and "mitigators"—the killer's mental state, his character and background, the methods of the killing, the number and suffering of the victims—all of which set apart some murders and murderers as worse—and within that group, the worst of the worst. We seek simple death penalty statutes that reflect substantial differences. Who, if anybody, deserves to die, and why?

Thales, like Solon, traveled to Egypt and observed royal revenue agents trying to determine tax abatements due to farmers whose once rectangular plots had shrunk after the Nile flooded. A practical people, the Egyptians had developed rules of thumb for measuring the earth. Thales alone apparently felt the need to prove their truth (Kline 1953:16–17). Thus was the state of geometry—earth measure—when reason in the West leaped from taxes calculated on changing land masses to the permanently important abstraction, mathematics. Thales' great contribution was *truth by proof,* through methods that were repeatable, demonstrable, and permanent. Mathematics is an abstract *process* separate from concrete reality—the stuff to which it usefully applies. A proposition was true by virtue of a universally shared process of proof applied to basic axioms (Kline 1953:24; Cornford 1957:5; Guthrie 1975:23). Once the rules were given, the conclusions necessarily followed by pure analysis.

Mathematics became law's ideal. In a society with a rule of law, something deeply worth having, general rules classify situations and specify penalties. Given the substance—what counts, what features matter, what criteria the rules use in classifying—specific situations call for certain responses. Regardless of whether powerful people actually do get away with it, as a matter of analysis they have "broken the law." Capital murder can be said to have been committed even if it goes unpunished.

Capital jurisprudence today is largely about process: How do we *establish* substantial truth—who has the burden of persuasion and by what weight; who decides who lives or dies, and how? From ancient times until now, death penalty process has involved diligent inquiry to achieve a necessary measure of certainty before we risk executing the innocent. Today we dispute whether proof beyond a reasonable doubt is a standard sufficient to support a sentence of death. Within a few centuries after the Old Testament was stitched together, Talmudic rabbis resisted literally applying death penalty law to a host of substantive crimes that they sensed did not deserve capital punishment. Ever since, feeling constitutionally constrained to keep the punishment in principle, abolitionist jurists have attempted covertly to abolish an inhumane substantive law by making it impossible to apply in practice. "Proof to an absolute certainty,"[33] for example, is an absurd standard, simply unattainable in the real world.

Only since the 19th century have we become painfully aware that mathematics is not necessarily about the real world at all. It is devoid of content; pure process, and fit for all possible and impossible worlds. In today's death penalty debate, urging an impossible process for *this* world is disingenuous. Abolitionists would serve scientific traditions better if they were more forthright and did not mask substantive disagreement as "reformed" process.

Impossible process aside, before imposing death as punishment for murder, special, super due process remains a basic cultural norm: The Old Testament's two witness rule; deeply discounting snitch testimony; insisting on diligent inquiry; accepting proof only if it is true and certain; staying far from slaying the innocent with the guilty. Today's emphasis on DNA testing, competent counsel, diligent investigation, and proof beyond a reasonable doubt, is all about constitutionally guaranteed process for determining the truth. Whatever the content of the axioms or aggravators—whatever the stuff that makes a person deserve life in prison or death—equal protection requires assigning guilt and applying punishment *equally* across race and class.

Process—questions of who decides and how to decide who deserves to die—can, of course, directly influence who lives or dies. Solon redistributed power and wealth to the lower classes by giving them juries. In 2002, the U.S. Supreme Court held in *Ring v. Arizona* that juries and not judges must find the facts on which the death penalty is based. *Who* decides may determine *what* is decided: Substance and process do affect each other. Due process requires clear categories. Otherwise they will be held void for vagueness, for giving inadequate notice to the sentencer of what counts as the worst of the worst. Because we are unable to apply the category consistently, "especially, heinous, atrocious and cruel"—however real—as of now cannot by itself, be the stuff which distinguishes who lives and dies.

33. I have no absolute certainty that my computer will not attack and kill me this instant, yet I bravely write on.

Thus, with Thales, the first philosopher of the West, was born the great jurisprudential divide between substance—the real stuff—and the process for proving that stuff.

Anaximander, Thales' student, rejected his teacher's scientific theory that water was the single basic stuff, in favor of pairs of successively encroaching opposites such as hot-cold, moist-dry. Drawing upon more ancient retributive metaphor, Anaximander explained the essential dynamic, the changing seasons, as injustice followed by reparation. This explanatory metaphor of injustice and reparation, like the basic function of punishment in the Old Testament, drew on the most elemental feeling: A like-kind response can restore a prior balance thrown out of equilibrium (Guthrie 1962: Vol. I, at 84). When the United States was founded, this same metaphor of encroachment—power encroaching on liberty—saturated the debate. Leading opponents of the death penalty today embrace that metaphor, basing their opposition not so much on a conviction that no one deserves to die, but that government with the power to kill inevitably encroaches on liberty (see Bedau 1997).

Anaximenes, Anaximander's student, returned to Thales' credo of a single stuff underlying reality. The difference between earth, water, wind and fire was simply how much of that stuff was in any given space (Guthrie 1962: Vol. I, at140). Anaximenes had secured a basic foundation for death penalty jurisprudence: Differences of kind—substantial differences—were really at bottom differences of degree.

In the Old Testament as today, recklessness permits of more or less—more or less risky, more or less unconcerned with others' fate. Beyond a certain degree, a "substantial risk" becomes "grave," indifference becomes depraved, and reckless manslaughter becomes murder. Intent can be formed less and less suddenly until it becomes premeditated. Today, in many states, the killer's indifference to or positive enjoyment of the victim's suffering reaches a point where it becomes "callous" or "cruel," thereby making the killing death-eligible. And moral blameworthiness diminishes with youth or mental impairment until it becomes an absolute bar to the death penalty. "The word 'unusual'," declared the first Justice White almost a century ago, "primarily restrains the courts... from inflicting lawful modes of punishment to so unusual a degree as to cause the punishment to be illegal" (*Weems v. United States* 1910:409).

Differences in degree become differences in kind; too much discretion becomes unconstitutional caprice.

"Imposing Limits on the Unlimited to Make the Limited..."

The formal impulse leapt forward with Pythagoras: The universe was a *kosmos*—a well-ordered whole—proportional, measurable, rational. From

the beginning, Good—the limited and ordered—was set against Evil—chaotic and unlimited. The *kosmos* was maintained by imposing measures or limits on the unlimited to make the limited (Guthrie 1962: Vol. I, at 206–207).

So too, the moral *kosmos* of the death penalty.

Moved by a conviction that lesser crimes deserve proportionately lesser punishment, retributivist advocates today would punish with death all but only those who deserve it—the worst of the worst. Dividing the continuum of musical notes into discrete ratios, Pythagoras found that harmonics confirmed his world view of rational proportionality (Guthrie 1962: Vol. I, at 205). Today we do justice by dividing the continuum of killings into different types of homicide. Punishment must be proportional to the crime and the criminal.

"If the guilty man deserves to be beaten," declares Deuteronomy, *"the judge shall cause him to lie down and be beaten in his presence with a number of stripes in proportion to his offense."* Another translation has it, *"according to the measure of his wickedness, by number"* (XXV:1). This is thoroughly Pythagorean. Numbers not only explained the physical world, they were moral qualities[34] (Guthrie 1962: Vol. I, at 212). The Magna Carta shared this commitment to proportionality almost a thousand years ago when it declared, *"A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude"* (Eng. Magna Carta 1215: Sec. 20).

In 1892, dissenting in *O'Neill v. Vermont*—one of the Supreme Court's first forays into the meaning of "cruel and unusual"—Justice Field would have invalidated a punishment of 54 years at hard labor for selling liquor without a license. True, there was no physical torture, but the potential punishment was disproportional—"exceeding in severity considering the offense" (at 338). The Eighth Amendment was "directed against all punishments which by their excessive length or severity are *greatly disproportioned* to the offenses charged" (at 340, emph. added).

During the modern era of death penalty jurisprudence, the Supreme Court has embraced Justice Field's standard, consistently demanding proportionality when evaluating the constitutionality of the death penalty: In *Coker v. Georgia* (1977), the Court held that death is disproportionate for the rape of an adult woman; in *Thompson v. Oklahoma* (1988), for a killing committed when the defendant was less than sixteen; and in *Atkins v. Virginia* (2002), for the mentally retarded defendant. In each case, death was "cruel and unusual" precisely because it was disproportionate to the heinousness of the crime or criminal. In the tradition of Pythagoras, many states today require a "proportionality review," where an appellate court measures the death sentence in the particular

34. The essence of justice was equality—or requital. Thus, justice for the Pythagoreans was the first square number, 4.

case against other similar murders and murderers to determine whether it is comparatively disproportionate.

Committed to proportional punishment, today's retributivist death penalty advocates embrace a Pythagorean program, seeking to impose limits, to moderate unlimited anger at each particular murder and measure it instead against the worst possible. The retributivist resists the "kill them all" set, so bent on revenge they would indulge in limitless and formless rage. For the retributivist death penalty advocate, unlimited and unrestrained punishment is evil. The retributivist advocate also disagrees with abolitionists for whom death is *always* disproportionate, no matter how heinous the murderer. The retributivist embraces Pythagoras' faith that society can limit punishment without eliminating the legitimate impulse to hurt—yes *hurt*—those who injure us. Like Odysseus, we would impose categories and procedures in advance to keep in check human nature's passion for revenge. When it comes to homicide, restraints can be imposed on unlimited rage to ensure limited and proportional punishment.

Those who celebrate only reason and ratio, and allow only "objective" determinate measures, will disparage or discount non-rational factors that are not amenable to precise measurement. How much should count "the voice of your brother's blood," or the intensity of the victim's suffering, or "especially cruel" when it is so much easier, and more "objective" to count the number of bodies or a defendant's prior convictions?[35] Yet we know intuitively gradations that are real, but neither strictly rational nor discretely measurable.

Most of us painfully remember from high school that with his own theorem, Pythagoras destroyed his whole rational philosophy, when he proved the diagonal of a square was "incommensurable" with its sides. So too, the circumference and diameter of a circle had no measurable ratio. Pythagoras had discovered irrational numbers—real, but not rational.

Similarly today, for many of us death penalty advocates:[36] Utilitarian rationality, a future-oriented calculus of costs and benefits, is inadequate. No strictly rational death penalty law can be constructed and applied exhaustively to achieve justice. We need a richer language that includes non-rational, informed emotion. Moral desert can never be reduced strictly to reason, nor measured adequately by rational criteria: Forgiveness, love, anger, resentment are part of justice. The past counts. Not rationally, but really.[37]

---

35. Professor Laurence Tribe has noted this tendency of quantifiable measures to "dwarf soft variables" (1971:1361).

36. *I.e.,* non-Kantian retributivists—for Kant it is strictly duty, strictly rational, logical and ideological.

37. "Ancient Hebrew law discovering the principle of the sanctity of life, contrasting the severity with which it treats homicide (applying the *lex talion*), with its leniency towards crimes against property. In this view, too, exact retaliation is an advance over compensation, making as

"You Cannot Step in the Same River Twice..."

Heraclitus rejected Pythagoras' ideal of a stable, rational, peaceful and harmonious world. The basic fact was strife; everything was in continuous motion and change, all flux and flow. "You cannot step in the same river twice," he famously summed up, "for fresh waters flow on." Thus, he also rebelled against the Pythagoreans' clear-cut distinctions between good and evil. "To God, all things are good and fair and just"; it was all relative (Guthrie 1962: Vol. I, at 450; 448). A contemporary Heraclitean denies we can meaningfully categorize homicides in advance, by relying on real differences among types of killings. Since everything is in flux, no two situations ever repeat, therefore no two killings are alike. General rules can never deal adequately with non-repeating concrete specific situations. Every killing and killer is unique. And as Heraclitus declared, beneath all apparent calm and stability lies an unceasing struggle and the clash of contrary tensions. In order to reach a "just" result, a jury's verdict of guilt and its sentence of life—or death—must be the product of vigorous contention between active defense counsel and state prosecutor.

Extreme Heracliteans, today's moral anarchists, see the death penalty as the product of strife rather than consensus, where those in power arbitrarily and capriciously kill whom they choose and then call it justice. As Heraclitus insisted, everything was relative; opposites were identical (Guthrie 1962: Vol. I, at 452). One person's "martyr" was another person's "mass murderer." One murder committed by the defendant might be followed by another murder committed by the State. The difference between the worst of the worst and the thoroughly justified was *ad hoc*, depending on who had the power to make the label stick.

For Heraclitus, a river was nothing more than the constantly changing stuff that flowed through it. Any identity must be found in its form (Guthrie 1962: Vol. I, at 467). People, too, were constantly changing. Biologists inform us that all the cells in our bodies periodically are replaced, yet still we are the same persons we were. Or are we? In 1998, over a storm of protest, Texas executed Karla Faye Tucker, who had found Christ in prison. True, this beautiful woman had brutally murdered her two victims with a pick-ax, but by the time the State executed her, her supporters worldwide claimed that Karla Faye had morphed into someone different. Is this metaphor too much of a stretch? Plato used it in the *Symposium*: "Even during the period for which any living being lives and retains his identity—as a man is called the same man from boyhood to old age—he does not in fact retain the same attributes, although he is called the same person," says the wise Diotima to Socrates. "And not only his body, but his soul as well. No man's character, habits, opinions, desires, pleasures,

---

it does the important moral insight that life and property are incommensurable" (Henberg 1990:6).

pains and fears remain always the same: new ones come into existence and old ones disappear" (Guthrie 1962: Vol. I, at 467).

Oddly, those who believe that permanent rehabilitation or redemption is possible must also confront the Heraclitean challenge. Retributivist advocates of a proportional death penalty may acknowledge that while time marks a body, and personality does change, essential character remains constant. "A man's character is his fate." Retributivist advocates must also meet Heraclitus head on and insist that killings do resemble each other in relevant ways. They can be distinguished as more or less deserving of punishment, by criteria specified in advance and applied in an adversary setting.

In the end, even Heraclitus backed away from his extreme moral nihilism, embracing a mysterious concept of a "rational fire" which took physical form and operated as a standard against which all other stuff was measured and evaluated (Guthrie 1962: Vol. I, at 462). Retributivist death penalty supporters today might see this "rational fire" as "informed emotion"—at once subjective, particular, and evanescent—yet an intuitive standard whose heat, when felt, can be applied.

"Man Is the Measure..."

After Parmenides insisted that the entire world of the senses, including movement itself, was all an illusion, and his disciple Zeno backed up these claims with paradoxes that could not be refuted, the Greeks, in disgust at obviously absurd scientific theories, turned their attention inward, away from the universe and onto humankind. "Man is the measure of all things; of the things that are, *that* they are," proclaimed Protagoras, the first and greatest Sophist, "of the things that are not, that they are not" (Guthrie 1962: Vol. II, at 4; Plato 1957:152). A new age of humanism had dawned.

Professional teachers traveled from city to city, publicly competing for big fees, paid by anxious parents eager for their children to master the art of rhetoric so they could entertain at the Assembly and convince at the law courts. Wanting no problems from the local authorities, these Sophists proclaimed that whatever seemed right to an individual or a State, was right. They preached situational ethics: Good was whatever worked; truth whatever people found pleasing and could be persuaded to act upon; reality was appearance; everything was relative, subjective, arbitrary. We live today, and for tomorrow.

Man is the measure—the measured and the measurer.

In the other corner, looking like a boxer with a crushed nose, weighing in tenaciously against this relativist, individualist, empiricist outlook, Socrates battled the Sophists, insisting on "absolute standards, permanent and unvarying truths existing above." And for Plato, Socrates' disciple, good and evil—"concepts such as justice...and equality exist apart from the human mind." They are independent and constant standards "to which human perceptions and human actions can and must be referred" (Guthrie 1962: Vol. II, at 4).

Whether death penalty abolitionist or advocate, this commitment to the transcendence of moral facts such as "human dignity"—or not—still fractures the debate.

To the Sophists the solution was clear: If you convince people and entertain them, they will shower you with money and power. Live in the present; look forward to the future, learn how to manipulate the world to your advantage. A skilled rhetorician can convince anyone of anything. Appearances are deceptive but can be manipulated. Every question has two sides. Argue effectively—there is no truth. Appearance is reality. Whatever a person thinks is good, is good as long as he thinks it. If he thinks stealing from us or killing us is good, we merely have to change his mind.

"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" (Plato 1956:324b).

When it came to justifying punishment, Plato also looked forward, insisting in *The Laws,* his last and least idealistic dialogue and the only one where Socrates is absent, that almost every criminal could be rehabilitated through education. Plato did, however, anticipate some "hard shell"—today we call them "hard core"—recidivists who could not be softened to society. Even for these villains, Plato never expressed satisfaction at punishment as retributively deserved for past bad acts. "For truly judgment by sentence of law is never inflicted for harm's sake. Its normal effect is one of two: It makes him that suffers it a better man, or, failing this, less of a wretch." The worst of the worst were simply better off dead: "Longer life is no boon to the sinner himself in such a case, and that his decease will bring a double blessing to his neighbors; it will be a lesson to them to keep themselves from wrong, and will rid society of an evil man. These are the reasons for which a legislator is bound to ordain the chastisement of death for such desperate villainies, and for them alone" (Plato 1978:862e–863).

However they divided on other issues, Plato and Protagoras wanted the death penalty reserved only for incorrigibles, and justified capital punishment by its future benefit to society, especially its deterrent effect. "The ayme of punishment is not a revenge but terrour," concurred Hobbes, the first modern Sophist (Hobbes 1651:355).[38]

38. How and why would we punish today's suicide terrorists who are not terrified by death? They believe they are martyrs and will be rewarded, by death. They are coerced into committing suicide. The Model Penal Code mitigates the murder if the defendant believed his killing was

For today's Sophists—who for centuries have been calling themselves utilitarians—no less than for Protagoras, the past has passed. Retribution is "irrational," beastly. The rational person—a rational policy maker—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. And 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.

Disparaging polls as beside the point, many abolitionists and all retributive advocates maintain that there are moral facts. The death penalty is humane or inhumane—just or unjust—whether or not it is popular, or most effectively deters murder. There *is* a moral fact of the matter—transcendent, real, and divorced from present practice. Most abolitionists know—not merely believe, but know—that the death penalty is undeserved and inhumane, even if ninety percent of the people support it. Most proponents, both in the United States and Europe, know—also independently of public opinion—that capital punishment is necessary and just. Ironically, retributive advocates and many abolitionists can never ultimately reconcile, precisely because they share this anti-Sophistic commitment to moral facts, which can never be verified by polling.

Today's death penalty debate divides along original fault lines that separated the Sophists from Socrates and Plato. Some opponents seize on the increasing unpopularity of certain practices such as the electric chair, or executing juveniles and the mentally retarded, as grounds to find them unconstitutional. However, when confronted with overwhelming public support for a punishment he considered a basic violation of human dignity, Justice Marshall in *Furman* appealed not to public opinion, but rather to "informed public opinion"—an unwritten, transcendent Platonic ideal if ever there was one.

Less blatant than Protagoras, other justices have used actual public opinion to measure the death penalty's constitutionality. For example, the majority in *Atkins* purported to identify a discernable consensus against executing mentally retarded offenders by relying in part on the momentum of public opinion. Ostensibly reporting events, but in reality trying to effect abolition by changing attitudes, pollsters and leading media like the *New York Times* readily cooperate sophistically by consciously selecting and spinning their coverage, and then report the new "consensus" they so labor to create.

Homicide law Platonists, whatever their opinion about the death penalty, share a conviction that real moral differences exist among killings. The modern consensus that a planned torture murder is worse than an accidental killing

---

morally justified. Gorgias, the Sophist who extolled the art of persuasion above all others, insists that if Helen was persuaded into adultery, she was as guiltless as if she had been abducted by force. This reasoning ripens into today's "domination by another" metaphor.

feels like it must have been true forever. To Demosthenes 2500 years ago, it felt that way too. Punishing 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" (Guthrie 1962: Vol. III, at 118).

These objectively different types of killings deserve different responses not because society says so: Society says so because the types really are different. A Platonist perpetually searches further for the real distinctions among homicides that make them more or less deserving of punishment. As did Demosthenes, we look in the unwritten law and the hearts of men.

Sophists scoff. Herodotus showed that customs long accepted as absolute, universal and divine, were in fact local and relative. Many Sophists were atheists or agnostics, their disbelief in the gods based on the prosperity of the wicked and the sufferings of the just. For the Sophist Critias, religious practice and even the gods themselves were human inventions to keep people in check through their fear of punishment. Whereas the Hebrews and the Greeks during the Homeric age regarded law as immutable because divinely inspired, the Sophists saw written law as arbitrary, man-made and shifting.

Denying that moral facts existed apart from popular opinion, Sophists denounced the "unwritten law" (Guthrie 1962: Vol. III, at 70). Long denoting basic moral principles, universally valid, which overruled the positive laws, "unwritten law" now seemed sinister and menacing in a new democratic environment. Democrats saw the written law as the bulwark against tyranny, preventing an exercise of power essentially arbitrary and capricious. Written codes ensured *isonomia*—equal protection of the law—a watchword of the Age. There were "two sides to every question"; everybody's opinion at the Assembly and law courts counted. The People were sovereign; their consensus showed up as law.

When the Supreme Court struck down all state capital punishment regimes as arbitrarily and capriciously administered, a plurality identified the juries' unguided discretion to choose life or death as the fundamental constitutional flaw. Scrambling to meet *Furman's* constitutional objection, many states enacted detailed, written death penalty codes to guide the jury and limit caprice. Some states fully embraced the mathematical ideal of Thales and Pythagoras, enacting mandatory death penalty statutes which specified in writing all and only those factors which, once found, would result in automatic punishment by death.

The Court nevertheless invalidated those mandatory death penalty laws. States now must codify aggravating criteria to ensure equal protection and application of the law. Yet they must always leave possible mitigations *unwritten*. Justice requires mercy, when appropriate to the human heart. And mercy, a key component of the death penalty, requires the unwritten law. On the other hand, abolitionists denounce "non-statutory aggravators"—unwritten law that may tip the scale in favor of death. As Pythagoras discovered that accounting

for what is real requires a language richer than the rational, so too we have rediscovered that real justice is much richer than written law.

"Evolving Standards of Decency..."

Today, almost everybody on all sides of the death penalty debate embraces another sophistic article of faith: Progress. Protagoras especially embraced a progressive view of human history. In his myth of creation, Zeus sent Hermes to bring humans two indispensable moral virtues—*dike* and *aidos*. *Dike* is a sense of justice. *Aidos*, more complicated, is most like conscience—combining shame, modesty, and respect for others. Although they were not innate, all people must have these virtues for a community to survive (Guthrie 1962: Vol. III, at 66). Thus, Zeus decreed that anyone incapable of acquiring these virtues must be put to death, "for he is a plague of the state" (Plato 1956:322d). Nothing was objective, but certain feelings and attitudes so polluted the community they mandated death.

Mores may differ in different societies, and people might change their views, but in the long run, human history was progress. All practices and opinions may be equally true, but they were not equally sound. The Sophists were justified in charging people money to help substitute views that, once adopted, seemed and therefore were better. All standards may be variable and changing, but overall they were changing for the better.

This paradoxical faith in real progress while objective values are denied, commands the allegiance of the Court today. "Time works changes," a majority declared in 1910 in *Weems*. The cruel and unusual punishment "clause of the Constitution may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice" (at 378). The Eighth "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Chief Justice Warren declared famously in *Trop* in 1958 (at 101). For the past half century and especially since *Furman*, the entire Court has been thoroughly Protagorean. Public opinion may shift suddenly and wildly after a particularly egregious killing, or after a particularly sympathetic convicted killer is finally executed, but in the long term, society can and does progress. The justices unanimously agree that the constitutional meaning of "cruel and unusual" must cause and reflect that progress.

Abolitionists, such as Justice Brennan in *Furman*, tend to see human progress in the grand scheme as the progressive limitation and eventual elimination of the death penalty. As a matter of history, advocates find it undeniable that over millennia, punishment has become more and more limited. Retributivist advocates also believe in progress. Certain truths may be transcendent and timeless, but our 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.

Even American constitutional fundamentalists—strict constructionists who embrace the Founders' original intent—concede that some crimes which brought the death penalty in 1788 may not constitutionally do so today.[39] And they also concede that some methods of punishment such as ear cropping, standard at the birth of our Nation, have simply *become* cruel and unusual when measured against modern evolving standards of decency.

However starkly Protagoras and Socrates disagreed about whether justice and truth were entirely subjective, they both believed in progress and the social compact. Having shared in its formation, citizens must submit to the law, even as they struggle to enlighten the ignorant to change it. They must obey that product of an evolving, imperfect but progressing consensus. Thus it was, that facing his own execution based upon wrongful conviction and sentencing, Socrates refused to escape, blaming his unjust fate not on the laws themselves, but on their faulty administration.

Using the same distinction today, many abolitionists ground their opposition to capital punishment on government's inability to administer the penalty fairly, regardless of whether anybody can be said to deserve to die. These opponents, and even some supporters, back a moratorium on executions for as long as it takes to improve the death penalty's administration. Yet, those who would strictly abide by the social compact, having sworn an oath to uphold the Constitution and the law, including public officers personally opposed to the death penalty and private citizens sitting as jurors, ought to subordinate their individual opinions to the public consensus as reflected in the law. Through acting or restraining themselves, they should play their part in moving a killer toward State-sanctioned death. At the same time, motivated by a faith in progress—whether toward some transcendent pre-existent justice or toward practices popularly regarded as humane—like Socrates, they should remonstrate in the courts and the assemblies, and dedicate themselves to improving the regime by eliminating the death penalty.

Other abolitionists, however, like the Sophist Antiphon, deny all obligation flowing from the social compact. Since positive law is arbitrary and capricious, the plaything of the more powerful and persuasive, a person may violate the law when he can get away with it. Some abolitionist judges and jurors share this view, and would nullify the law while pretending to apply it.[40] Abolitionist

39. *E.g.*, The First Congress made forgery of federal currency a capital crime.

40. After *Ring*, the first federal court judge to declare the federal death penalty unconstitutional obscured his own personal antipathy in false history and highly questionable doctrine, and his decision was promptly reversed on appeal (*United States v. Quinones* 2002). In *United*

prosecutors do the same. For example, a Manhattan district attorney may declare that he will seek the death penalty according to the New York Penal Law in the "appropriate circumstances." Nevertheless, however heinous a murder or murderer may be, the appropriate circumstances never arise. Such covert disobedience violates the oath of office and the lesson of Socrates. The greater obligation is to submit to the law, all the while openly attempting to persuade the authorities of their mistake. The responsible capital defense counsel, too, adopts that model. But those who proclaim a faith in democracy, while they undermine it by substituting their own personal convictions for the consensus of the moment, may appeal to a consensus in a larger world. Whether world public opinion should inform the Eighth Amendment bitterly divides the U.S. Supreme Court.[41] A majority in the United States may support the death penalty today, abolitionists insist, but a united European Union and Canada have abolished it, in every instance in the teeth of overwhelming public support for its retention.[42]

Individuals thus can justify civil disobedience, as Antiphon himself did, by disparaging local convention in favor of a cosmopolitan, universal human dignity. The Greeks debated whether slavery should be abolished as inhumane, and many abolitionists believe that their campaign is a continuation of a crusade against slavery. The belief that universal laws of nature override local conventions can fuel a death penalty advocate's or abolitionist's genuine commitment to transcendent human dignity. But it had a brutal form historically, and still does today.

Surrounded by the Athenians and desperately trying to stay free and neutral in the war between Athens and Sparta, the inhabitants of the small island of Melos pled for justice with the Athenian representatives sent to convince them to submit. "Justice depends upon the equality of power to compel," Thucydides reports the Athenian representatives as warning. "In fact, the strong do what they can; the weak accept what they must." Forget justice: "What is looked for

---

States v. Fell (2002), however, a second federal judge more plausibly found unconstitutional the statute's relaxed evidentiary standards at sentencing. The stories are legion of single jurors promising during *voir dire* honestly to apply the law, yet at sentencing stubbornly rejecting the death penalty, although under current standards capital punishment is clearly warranted.

41. See *Atkins v. Virginia* (2002: 2249, n. 21) *citing* international opinion, and Chief Justice Rehnquist's dissent attacking that same opinion as irrelevant.

42. Cf., Steiker (2002). European abolitionists use a Protagorean defense that while all opinions are equally true, some are better than others. Elitists, claiming to be democrats, and their American disciples, insist that society does better without a death penalty. Thus, these "representatives" take it upon themselves to shape public opinion, confident that the People will eventually embrace the abolition forced upon them. Following the events of September 11, with rape-murders of children making headlines, European voices called anew for a death penalty, based, however, solely on grounds of deterrence.

is a preponderance of power in action" (Thucydides 1954:358–365). Callicles, the Sophist, scorns Socrates, insisting on the natural right of the strong to dominate the weak. This most selfish view, that the powerful rightfully dominate whenever they can, animates many murderers today, who see their own crimes and society's punishment as equal proof that the only real law is "the law of the jungle." Everyone does what they can get away with, or else dies in the attempt.

Cynics—they called themselves Realists then, and now—see the death penalty regimes as more proof of this philosophy. Legislatures, the People's representatives, supposedly have enacted neutral death penalty statutes to be applied by prosecutors and judges, equally to all. In his famous funeral oration, Pericles declared that in Athens, "Everybody is equal before the law." The United States claims a commitment to world leadership in continuing that humanistic tradition of equal protection of the law: Social status must be divorced from legal rights.

Sure.

Any class-based death penalty, any racist death penalty violates not only human dignity, but also our commitment to equality before the law. In the United States, many capital defendants still do not have competent investigatory, trial and appellate counsel, although more and more leading law firms supply topnotch abolitionist counsel *pro bono* in capital cases. But the core commitment to equality before the law must go deeper than improved counsel and increased funding for the process. *Isonomia* also attaches to how we *define* capital murder—its substance also can be infected with race or class bias.[43]

Our roots, Biblical and secular, demand an emphatic commitment to equality under law, from the definition of capital murder to its punishment by death. Whether from the command of Leviticus to *"love thy neighbor as thyself,"* or the rejection of a blood price, or injunctions in homicide law to treat slave and freeman equally, the message is clear: Like cases must be treated alike; and different cases treated differently. All persons must be treated equally. Equal treatment—*isonomia*—is an ideal at the very core of western humanism. If we fail to reflect this essential egalitarianism in the definition, detection,

43. Robbery felony-murder, the aggravator that may have put more people on death row today than all others combined, has a definite race/class bias and effect regardless of the legislature's intent. If the killer's monetary motive correctly aggravates the killing, what are we to say for society's tolerance and respect shown to ranking corporate executives who consciously maintain deadly workplaces, or manufacture unnecessarily lethal products from the best of motives—the profit motive. These "red collar killers" are morally indistinguishable from other mass murderers who, with a depraved indifference, kill unsuspecting innocents. Not only are these pillars of the community never executed; they are rarely indicted, much less imprisoned. Unless we are to confirm the cynicism of Callicles and street killers, we must respond to hired killers *as* hired killers, across class and race.

prosecution, and punishment of murder, we only will have confirmed Thrasymachus' definition of justice as "the interest of the stronger." Transcendent or progressing, our death penalty must never arbitrarily divide homicide into more or less egregious types that reflect only the desires of the dominant, with power and money to impose on the rest.

"On the Impulse of the Moment"

Socrates squared off against the Sophists. Whereas the Sophists saw a world where all was arbitrary, relative, and subjective, Socrates insisted on absolute objective values capable of being known, but very difficult to put into practice. As Guthrie observes, Socrates "lived and went to his death in the conviction that the moral problem: 'What am I to do?' cannot be adequately answered without an antecedent knowledge of objective standards of value" (Guthrie 1962: Vol. III, at 328, n.2).

Today, informed death penalty reformists who pursue moral refinements in substance and process while they administer the ultimate punishment in a deeply flawed system, 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. Socrates, with Plato and Aristotle, maintained that after examining enough particular instances, the human mind had an innate, intuitive ability inductively to divine their common essence (Guthrie 1962: Vol. III, at 429). This common quality or nexus of common qualities—"the one thing said of them all, running through them all, in them all, that by which they are all the same"—was their nature, essence, form, idea (Guthrie 1962: Vol. III, at 432).

The Supreme Court has upheld this methodology in *Furman* and its progeny, and repeatedly demanded that state legislatures guide jury discretion over life and death by "objective" categories—aggravators distinguished and defined in advance—capable in practice of being applied so as to ensure punishment proportionally correlated to desert or deterrence.

Rejecting the retributive assertion that "especially heinous, atrocious, and cruel" captures a real idea, a real essence of the most vicious and contemptible killings, the Court thus far has disqualified this aggravator (but not "torture"), as unconstitutional because it is essentially ill-defined, vague, subjective, and prone to be misapplied. Other aggravating circumstances, such as "in the course of and furtherance of robbery," "killing more than one victim," "endangering several other persons at the time of the killing," and "serving a life sentence" may be precise and provable by objective facts. But mental states or attitudes which can deservedly make a killer death-eligible, such as "extreme recklessness with a depraved indifference to human life," "cold, calculated, premeditated," and "especially heinous, atrocious, and cruel," are equally real and

morally more relevant, despite their fuzzy boundaries. Just because we can list and define an aggravator objectively and distinctly—because we can apply it consistently—hardly means it justifies making a killer death-eligible. Furthermore, as Aristotle emphasized repeatedly, we cannot discover nor should we demand the same precision in ethics as in science.

Although Plato proposed a homicide code which in substance went well beyond the traditional distinctions of intentional, negligent, accidental, and justifiable killings, he would have continued ancient and traditional practices, such as the dying victim's prerogative to pardon the killer (Plato 1978:868), and most emphatically, blood pollution, which he saw attaching automatically at the moment of the slaying with no need for a public pronouncement. Secular and rational, Plato nevertheless insisted on modern respect for the "venerable and ancient myth" that a victim who had died by violence "has his wrath kindled against the author of his death while the deed is still fresh. How he is likewise filled with fear and horror by his own bloody fate, how he is aghast to see his murderer haunting walks that were once familiar and his own." Because of the victim's "distract[ed] soul," Plato would continue to deny parole forever to any killer who fled before trial. If the alleged killer stayed, anybody could prosecute, and if found guilty, "the convicted offender shall be put to death, and shall not receive burial in the land of his victim" (Plato 1978:865d–e, 871d).

Parricide was the most "purely wicked homicide" imaginable to Plato, "for which it is a grim and repulsive task even to provide in a legislation." Any son otherwise tempted to commit such an act should be terrified by that "tale—or doctrine—call it what you please, on the authority of the priests of ancient days," that "tells us expressly that there is a justice watching to avenge a kinsman's blood, and...that he who has dealt in such guilt shall infallibly be done by as he has done" (Plato 1978:872c–e). Thus, in this mythological form of divine retribution, the gods would ensure that:

> If any man have slain his father, there shall come a time when he shall have to suffer the same violent end at the hands of a child; if his mother, his certain doom in later days is to be born himself a female creature, and in the end, to have his life taken by those whom he borne. When pollution has been brought on the common blood, there is no other way of purification but this; the stain refuses to be effaced until the guilty soul have paid life for life, like for like, and this atonement lulled the wrath of the whole lineage to sleep (Plato 1978:872e–873a).

This stern warning was remarkably similar to the Old Testament—as it was done, so shall it be done, in this world or the next. For Plato, this was "truth... firmly believed by those who occupy themselves with such matters...that vengeance is taken on such crimes beyond the grave, and when the sinner has

returned to our own world once more, he must infallibly pay nature's penalty—must be done by as he did—and end the life he is now living by the like violence at another's hand" (Plato 1978:870d–e).

Even as they witness a brutal murderer continue to enjoy and live a long life while the memory of the suffering victim decays, many abolitionists, especially religious Christians today, maintain their moral equilibrium through faith that justice will be done in the hereafter. However, ours is a society that separates church and state, and commits itself to human justice in this world.

What should we do to that worst of all non-believers—undeterred by "the dread of vengeance from heaven"—a son who contrives and deliberately slays his own father to inherit more quickly? The "magistrates shall put him to death," urges Plato, then "cast him out naked, outside the city at an appointed place," where "all the magistrates, in the name of the State, shall take each man his stone and cast it on the head of the corpse as in expiation for the State" (Plato 1978:873a–b). The body was not to be buried. This most extreme punishment, this collective ritual expression of extreme disgust, was inflicted on the killer's body only after execution, much like the Old Testament's hanging after death. Even here, however, there must be no torture. Certain punishments were simply too cruel and unusual, however heinous the crime.

The same penalty the Lord rejected for Cain as too painful in Genesis—being exiled at the perpetual mercy of hostile forces—Plato too, rejected: "For no offense whatsoever shall any man be made a hopeless outlaw, not even though he have fled beyond our borders. Death, prison, stripes, ignominious postures of sitting or standing... fines—these shall be our punishments" (Plato 1978:855c).

Essentially continuing traditional practices and punishments, Plato greatly refined homicide law substantively, by classifying killers according to their psychology. Anticipating today's aggravator, "killing from a pecuniary motive," Plato identified greed as "the chief source of the most aggravated charges of willful homicide." Also noting "the spirit of rivalry with its brood of jealousies and dangerous company," Plato anticipated today's "gang related" and "drug related" capital murders. His classification of killing committed from "craven and guilty terrors," especially motivated by fear that another person will expose past, private misdeeds, presaged today's "killing a witness" aggravator. A person who ordered a killing was, for Plato, nearly as guilty as the assassin; he was to be executed, but allowed to be buried in his native land. Plato's proposed homicide code was designed not for an ideal world but for this one—not for heroes, but for "slips of humanity" (1978:853c).

The Laws became most nuanced when Plato distinguished two types of intentional but passion-driven homicides: "It is an act of passion when a man is done away with on the impulse of the moment, by blows or the like, suddenly and without any previous purpose to kill, and remorse instantly follows on the act. It is also an act of passion when a man is roused by insult in words or dis-

honoring gestures, pursues his revenge, and ends by taking a life with purpose to slay and without subsequent remorse for the deed" (Plato 1978:866d–e).

Was a spur of the moment killing where the actor "lost it" for a moment and instantly regretted it, as bad as the "slow burn" or passion boiling and bubbling from insult or injury which ripened into a plan to kill? Are these distinctions with or without a moral difference? Did the killings differ only in degree or were they different in kind? Is the distinction relevant to judgments about which killers should live or die?

The Old Testament made the defendant's anger a basis for inferring premeditated intent and thus death-eligibility. This was refined in 1727 in *King v. Oneby,* and for the next 250 years in Anglo-American common law an intentional killing committed in "the heat of passion," but only on a "sudden quarrel," was manslaughter and therefore not death-eligible. If the defendant's passion "cooled" even for an instant, if he showed he could calculate or "deliberate" about anything, the killing was no longer passionate and the crime no longer manslaughter, but murder and deserving of death (*Oneby* 1727:465).

But Plato had not been so sure: "I take it we cannot treat these as two distinct forms of homicide; both may fairly be said to be due to passion and to be partially voluntary, partially involuntary." On the other hand:

> The man who nurses his passion and takes his revenge not at the moment and on the spot, but afterward and of set purpose, resembles the deliberate murderer. He who does not bottle up his wrath but expends it all at once, on the spot, without premeditation, is like the involuntary homicide; still we cannot say that even he is altogether an involuntary agent, though he is like one. Hence the difficulty of deciding whether homicides of passion should be treated in law as intentional or, in some sense, unintentional (Plato 1978:866e–867b).

Not until 1980 did the New York Court of Appeals catch up with Plato, holding that "simmering" emotional disturbance, no less than explosive rage, could mitigate murder to manslaughter. (*People v. Casassa* 1980).

Plato had pressed on. "The best and soundest procedure," the Athenian declared,

> is to class each sort with that which it resembles, discriminating the one from the other by the presence or absence of premeditation and legally visiting the slaughter where there is premeditation as well as angry feeling with a severer sentence while that which is committed on the spur of the moment and without purpose aforethought with a milder sentence. That which is like the graver crime should receive the graver punishment, that which resembles the lighter, a lighter (Plato 1978:867b–c).

Plato's psychology became more subtle when he allowed emotion to mitigate the killing, but less completely where emotion drives planning. Plato ultimately made it a matter of degree, providing a longer banishment for passionate but premeditated killing than for sudden passionate killing—but in neither circumstance was death deserved. Like Plato, modern statutes distinguish two types of passion killings: Adequately provoked passion mitigates murder to manslaughter; inadequately provoked passion is still murder, but may, although it need not, tip the balance from death to life.

For Aristotle, every moral question, including the justice of death as punishment, necessarily involved emotions. "It is easy to get angry—anyone can do that...but to feel or act towards the right person to the right extent at the right time for the right reason in the right way—that is not easy, and not everyone can do it" (Aristotle 1953:1109a). The killer's feelings count, but so too, do society's when we decide whether to kill in return.

Aristotle repeatedly warned that precision is impossible: "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" (Aristotle 1953:1126a). Should society be angry at rapists who murder and mutilate children? How angry? Why? For how long? And most important, "What is the right way to be angry?" These challenges confront legislatures in establishing punishments, and also juries in deciding between life and death in particular cases.

At the penalty phase of a capital trial, the defense typically argues that the killing is not reflective of the defendant's character. Aristotle saw passion killings as a particularly unreliable basis on which to judge character: "All acts due to temper or any other of the unavoidable and natural feelings to which human beings are liable...are injuries; but this does not of itself make them unjust or wicked men, because the harm that they did was not due to malice; it is when a man does a wrong on purpose that he is unjust and wicked" (Aristotle 1953:1135). "A man may lie with a married woman...under the influence of passion. Then although his conduct is unjust, he is not an unjust man; I mean that the act of stealing does not make a man a thief, nor the act of adultery make him an adulterer; and similarly in *all* other cases" (Aristotle 1953:1134a, emph. added). A person who has killed another does not thereby become "a killer." His conduct—an act and its accompanying mental state—was murder; yet his character may not be that of a murderer. What a person does is not necessarily who he is. Deliberate "choice," observes Aristotle wisely, "seems...a more reliable criterion for judging character than actions are" (Aristotle 1953:1111b).

The actor's intent and motive counted heavily in deciding his moral blameworthiness. But outcomes do not always match intentions. What if the would-be murderer failed in his purpose, and his victim, although wounded, fortunately survived? Plato wrestled with the perennial challenge of balancing intent and harm, including how to respond to offenses such as attempted murder and

assault with the intent to kill. "If anyone intend and purpose the death of a person with whom he is on friendly terms, he who wounds but fails to kill with such intent deserves no mercy, and shall be made to stand his trial for homicide with as little scruple as though he had killed" (Plato 1978:876e–877a).

Do we do to him as he has done, or as he would have done? Is attempted murder as bad as murder? Was Kant correct that the only purely evil thing is an evil will? Or should the would-be murderer get the benefit of the victim's good luck? These questions continue to plague us. The Supreme Court would almost certainly find the death penalty disproportionate for attempted murder, even for a would-be mass-murdering terrorist like the recent shoe-bomber who was only prevented from blowing up an airplane full of people by the last moment interference of alert passengers and crew.

Uncharacteristically irrational, Plato, too, would credit the lucky: "The law will show its reverence for his...propitious fortune...which has, in mercy to both wounder and wounded, preserved the one from a fatal hurt and the other from incurring a curse and disaster. It will show its gratitude and submission...by sparing the criminal's life and dooming him to lifelong banishment to the nearest state, where he shall enjoy his revenues in full" (Plato 1978:877a–b).

Attitude counts, but so does luck. Death is different.

"If We Know Anything We Know This..."

"The most indisputable of all beliefs," Aristotle called it: "Contradictory statements are not at the same time true." The law of non-contradiction is the most elementary law of logic. A thing cannot be and not be in the same sense at the same time (Aristotle 1941:1005b). "Our jurisprudence and logic have long since parted ways," Justice Scalia bemoaned. The law cannot require and prohibit the same practice at the same time. "The practice *Furman* pronounced Constitutionally prohibited, *Woodson* and *Lockett* pronounced Constitutionally required" (*Walton v. Arizona* 1990:657, 663).

Is the Supreme Court's whole modern death penalty jurisprudence self-contradictory? Consider its well known outlines through the prism of ancient antagonism.

"You are entirely free to act according to your own judgment, conscience and absolute discretion," McGautha's jury had been instructed. Beyond life or death, "the law itself provides no standard for [your] guidance" (*McGautha v. California* 1971:183). The Supreme Court held in *McGautha* that it did not violate due process for states to give juries "absolute discretion" to decide life or death. There was no real alternative to standardless discretion, the majority declared: "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of murder" (*citing* Royal Commission on Capital Punishment §595). It was simply, "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, their infinite complexity made every killing different. Situations do not repeat; every person is unique. Because we cannot step in the same river twice, the *McGautha* majority permitted absolute discretion. "The very antithesis of due process," the dissent called this same standardless discretion; "nothing more than government by whim" (at 250).

The next year, *Furman v. Georgia* reversed course and ushered in the modern age of capital punishment by striking down as "cruel and unusual" the death penalties haphazardly administered across the United States. Absolute discretion allowed for race and class bias, and produced arbitrariness resulting in the execution of a "capriciously selected random handful" (*Furman v. Georgia* 1972:248, opinion of Douglas, J.). In *Furman*, the Supreme Court demanded of death penalty law in the United States what Pythagoras had demanded of the *kosmos:* that it impose limits on the unlimited to make the limited. That there be proportional punishment based on rational criteria.

Reacting to *Furman*, the states adopted structured death penalty statutes, based largely on the Model Penal Code. Four years later, the first post-*Furman* death sentences reached the Supreme Court: "The Georgia 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, and [we] cannot accept...that the effort is bound to fail," three justices concurred, upholding the new state statute *(Gregg v. Georgia* 1976:221). "Furman mandates...discretion must be suitably directed and limited," Justice Stewart said for the plurality (at 189). Georgia, Florida, Texas had satisfied that requirement. A state could have it both ways—limited aggravation with unlimited mercy.

At the same time it upheld states' "guided discretion" legislation, the Court struck down mandatory death penalties. Death could not be imposed automatically, even for aggravated murder (*Woodson v. North Carolina* 1976). The Constitution prohibited standardless capital sentencing discretion and required guided discretion. Mandatory death penalties, however, gave sentencers no discretion at all. *Lockett v. Ohio* (1978) built upon *Woodson's* constitutional demand for "particularized consideration," holding that a jury "may not be precluded from considering as a mitigating factor any aspect of a defendant's character" (at 304). Lest mercy be prevented, "respect due to the uniqueness of the individual" (at 304) forbade defining mitigating circumstances exhaustively in advance.

"The Court has now completed its about-face since *Furman,*" complained Justice White, dissenting in *Lockett* (at 631). "Today's opinion undercuts *Furman,*" Justice Rehnquist agreed (at 631). Allowing the defendant to offer "any fact, however bizarre...will not eliminate arbitrariness but codify and institutionalize it." In short, "it can scarcely be maintained that today's decision is the logical application of a coherent doctrine" (at 629).

Two streams of cases flowed from *Furman. Gregg* and its progeny required consistency, based on aggravators clearly defined by the legislature and regularly applied in practice. The other line of cases, based on *Woodson* and *Lockett,* required that each offender be considered individually, as a concrete but complex, unique human being. Together, these doctrines seemed simultaneously to prohibit and require a jury's absolute discretion. As a matter of basic logic, "at least one of these judicially announced irreconcilable commands must be wrong," Scalia insisted (*Walton v. Arizona* 1990:673). Was the jury's discretion to decide life or death limited, or not? Surely it could not be both. Aristotle had laid our logical foundations: "The same attribute cannot at the same time belong and not belong to the same subject and in the same respect." This was "the most certain of all principles. If we know anything, we know this" (Aristotle 1941:1005b).

Purportedly then, the Court's modern Eighth Amendment jurisprudence has been built on two core values—consistency and fairness. However, consistency—essentially treating like cases alike and ensuring equality before the law—clashed directly with fairness—treating every human being as a unique individual and recognizing that the measure of a person is more than a single act. Heraclitus may have delighted in contradiction and the simultaneous truth of opposites, but Heraclitean "logic" was to Aristotle what the Supreme Court's jurisprudence is to Justice Scalia and like-minded critics—simply "absurd" (*Walton v. Arizona* 1990:667).

The Court "has completely exploded whatever coherence the notion of 'guided discretion' once had," Justice Scalia complained (*Walton v. Arizona* 1990:661). The basic doctrine of the whole post-*Furman* era rested on illogic—a "simultaneous pursuit of contradictory objectives" (at 667). The entire show was nothing more than a "jurisprudence containing the contradictory commands that discretion to impose the death penalty must be limited but discretion not to impose it must be unconstrained" (at 668).

"This Court's Eighth Amendment jurisprudence is *not so patently irrational* that it should be abruptly discarded," Justice Blackmun countered weakly, for four dissenting Justices in *Walton,* damning death penalty logic with faint praise (at 680). Four years later in 1994, near the end of his career, Blackmun himself was finally driven over the edge (*Callins v. Collins* 1994).

Accumulating evidence from the modern era finally convinced him that a death penalty could never be "at once consistent and principled but also humane and sensible to the uniqueness of the individual," as the Court previously had demanded (*Eddings v. Oklahoma* 1982:110). The Court's modern jurisprudential contradiction could never be reconciled in practice.[44] To chase the problem "down one hole"—whether fairness or consistency—was to force it

44. "Experience has taught us that the Constitutional goal of eliminating arbitrariness and discrimination from the administration of death can never be achieved without compromising

out the other. This irrationality released Justice Blackmun's long-standing deep-seated personal revulsion at the death penalty. Now at long last, when his understanding had finally caught up to his feelings, the Justice could famously proclaim: "From this day forward I no longer shall tinker with the machinery of death" (*Callins v. Collins* 1994:1130). Justice Scalia publicly welcomed his new ally into the logical fold, joining "those of us who have acknowledged the incompatibility of the Court's *Furman* and *Lockett-Eddings* lines of jurisprudence" (at 1128).

If the whole modern death penalty jurisprudence did rest on self-contradictory logical foundations and therefore was impossible in practice, the jurisprudence if not the death penalty itself must be discarded. Rather than continuing to "coddle the Court's delusion," Justice Blackmun would have abolished the death penalty as unconstitutional *(Callins v. Collins* 1994:1130). Justice Scalia, on the other hand, would abandon the entire "*Woodson-Lockett*" line of reasoning. Fairness would no longer be constitutionally guaranteed; mandatory death penalty schemes without individualized attention to the murderer's character would be permitted. For Scalia, even "cruel" punishment was permissible, as long as it was regularly applied. A constitutional fundamentalist, Justice Scalia would rest a jurisprudence of death on consistent if non-humane, solid logical foundations: "If it is not [unusual] then the Eighth Amendment does not prohibit it, no matter how cruel" (*Walton v. Arizona* 1990:670).

The assault on the logical "machinery of death," begun by Justices Marshall and Brennan, now championed by Scalia and Blackmun, demanded rebuttal. More than any other member of the Supreme Court in the modern era, Justice Stevens has upheld the logic of states' death penalty machinery, even as he has helped construct a capital jurisprudence founded on fairness and consistency. Upholding Georgia's death penalty regime as a model in *Zant v. Stephens* (1983), Stevens adopted the state supreme court's analysis of its own statute: Georgia law was a pyramid which contained "all cases of homicide of every category." The punishment became more severe as one moved "from the base to the apex, with the death penalty applying only to those few cases which are contained in the space just beneath the apex. To reach that category a case must pass through three planes of division" (at 871).

The first plane separated the murderers from lesser homicides such as reckless manslaughter, accidental killings, and self-defense. Here "the function of the trier of facts is limited to finding facts. The plane remains fixed unless moved by legislative act." The second plane separated out the death-eligibles. Again, a jury as factfinder must find aggravating factors previously defined by statute. And "the third plane separates from all cases in which...death *may be*

---

an equally essential component of fundamental fairness—individualized sentencing" (*Callins v. Collins* 1994:1129, Blackmun, J., dissenting).

imposed, those cases in which it *shall be* imposed. There is an *absolute discretion* in the factfinder to place any given case below the plane and not impose death" (*Walton v. Arizona* 1990:717, citing *Zant v. Stephens* 1983:871, emphasis added).

In short, consistency could be demanded at the stage of death-eligibility; fairness, however, required absolute discretion in the selection of who lives or dies. The scheme involved one "final limitation." The Georgia Supreme Court trumpeted itself as the last great backstop against arbitrariness. Reviewing the jury's exercise of discretion in the automatic appeal, the state's high court would decide whether the death penalty was "imposed under the influence of passion, prejudice, or any other arbitrary factor; whether the statutory aggravating circumstances are supported by the evidence; and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases" (*Zant v. Stephens* 1983:872).

Justice Marshall, in dissent, had scoffed at this notion. "Under today's decision all the State has to do is require the jury to make some threshold finding. Once that finding is made, the jurors can be left completely at large, with nothing to guide them but their whims and prejudices" (*Zant v. Stephens* 1983:910, dissenting opinion). Georgia's death penalty structure made "an absolute mockery" of *Furman* (at 910).

"Two themes have been reiterated in our opinions," Stevens countered (*Zant v. Stephens* 1983:884). "There can be no perfect procedure," as Chief Justice Rehnquist had declared (at 904). But because death was qualitatively different from all other punishment, "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be and appear to be, based on reason rather than caprice or emotion" (at 885).

Although sharply disagreeing on the constitutionality of the death penalty and the coherence of the logic which supported it in *Zant*, Justice Marshall, Justice Stevens, and the Georgia Supreme Court all rejected emotion as irrational and thoroughly inappropriate for deciding life or death. That decision, all sides agreed, must be entirely rational—the product of rational categories clearly defined and accurately applied. Otherwise, said Marshall, it was "mere prejudice and whim" (*Zant v. Stephens* 1983:910).

Furman outlawed caprice and demanded "guided discretion," thus requiring every state with a death penalty to impose limits on the unlimited to make the limited. By insisting that individual persons are unique and forbidding an exhaustive list of mitigating factors, the *Lockett-Eddings* line of decisions effectively outlawed Socrates' program of collecting instances, then finding the common essence, and categorizing exhaustively in advance all and only those who deserve to die. We could not step in the same situation twice for new characters and fresh facts flow on. Pythagoras or Heraclitus? Justice Scalia demanded in effect: One or the other (and possibly neither)—but not both.

In a world where logic is strictly limited to non-emotional rationality, Scalia's scathing attack seems persuasive. Choosing between life and death, after all, involves only a single decision. The Court cannot logically command *unlimited* discretion *not to* impose death *and* at the same time insist on *limited* discretion *to* impose the death penalty. *X*—limited discretion—cannot be both true and false, commanded and prohibited, in the same sense at the same time. Like Heraclitus' tightly strung bow apparently resting in a corner, underlying the modern era's seemingly stable reconciliation of fairness with consistency is a tension of irreconcilable warring opposites. If examined through a strictly limited rational lens, death penalty jurisprudence—at once demanding fairness and consistency—does appear internally incoherent.

Rejecting emotion as irrational and unlawful, defenders of the Court's current death penalty jurisprudence are hamstrung: "The size of the class may be narrowed to reduce sufficiently that risk of arbitrariness," declared Justice Stevens valiantly, "even if a jury is then given complete discretion to show mercy when evaluating the individual characteristics of the few individuals who have been found death-eligible" (*Walton v. Arizona* 1990:716). But could "showing mercy" and "evaluating" a person's character be accomplished strictly rationally by applying general criteria?

The "final stage" or penalty phase of a capital trial is "significantly different" from the guilt phase, concurred Justice Rehnquist in *Zant*. The jury at sentencing "makes a unique individualized judgment regarding the punishment that a particular person deserves" (*Zant v. Stephens* 1983:900).

All supporters of the Supreme Court's jurisprudence in this modern era demand fairness and consistency. Retributivist supporters of the death penalty especially need to show how both core values can be respected simultaneously—how we can generally treat like cases alike and at the same time act on the uniqueness of each particular case. We need a special kind of justice that can give us fairness *and* consistency, and we need a language rich enough to meet that challenge.

Heraclitus and Pythagoras, Plato and Aristotle show us the way.

Pythagoras' proof of incommensurability had exploded his own philosophy that rationality, discreteness, and proportionality underlay the *kosmos*, and formed a well-ordered whole. Real numbers are not all rational. The guilt phase narrows the class of death-eligible offenders rationally, factually, according to general criteria. The sentencing phase, however, assesses more than guilt—more than conduct, it measures character. In deciding between life and death, we need an incommensurably richer language to express, and a particular non-rational human faculty of moral intuition to measure, character and desert.

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 non-rational language to explain the particular justice of desert. Without emotion we

are trapped in "Flatland."[45] It may sound mystical, new age, and eccentric to insist that rationality, reason, proportionality, and issues of fact do not, and cannot exhaust the inquiry. Although the discovery of a real language "unutterably" richer than the rational was startling for Pythagoras, the need for a concept of justice that transcends general consistency to reconcile it 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*; "it cannot prescribe with accuracy what is best and just for each member of the community at any one time. 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 holding good on all questions at all times" (Plato 1957:294b).

Death "is the one punishment that cannot be prescribed by a rule of law," Justice Stevens declared (without citing Plato), arguing unsuccessfully at the time that only juries and not judges in capital trials could be constitutionally entrusted with the decision of life or death (*Spaziano v. Florida* 1984:469). The death penalty, Stevens 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" (at 469). A community's "outrage"—its "moral sense"—must be more than a strictly rational measurement, but this was as close as Justice Stevens came to explicitly acknowledging the richer realm of real informed emotion necessary for capital justice.

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

In *McGautha*, where the majority affirmed "standardless discretion," the trial judge had instructed the jury that "[you] may be influenced by pity...and

45. Edwin Abbott, a mathematician, wrote the charming parable *Flatland*, in which the characters—circles, squares, and triangles all live on a plane, disparaging the points who live in only one dimension. A sphere visits from Spaceland and lifts up a circle from the plane to get a sense of "up". Returning to Flatland, the circle preaches a third dimension, insisting on a language rich enough to include—"up". Proclaiming a richer reality lands the circle in prison (Abbott 1884). While the Georgia Supreme Court did use the three-dimensional pyramid to explain its jurisprudence, it could have done so with no loss of meaning by using triangles with bases and apexes. Perhaps the more apt analogy from plane geometry, for Georgia, would be concentric circles moving toward the center of evil.

you may be governed by mere sentiment and sympathy" (*McGautha v. California* 1971:189). *Absolute* discretion might include anything. Yet, McGautha's jury was warned, the "law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling" (at 189). But that was pre-*Furman*. Post-*Furman*, there was no place for emotion in the law. So in *California v. Brown* (1987), the Supreme Court allowed a jury, when deciding life or death, to be strictly prohibited from being "swayed by mere sentiment... sympathy, or passion" (at 538). Justice O'Connor, attempting to resolve the conflict between fairness and consistency, issued the Court's new watchword: The death sentence must be "a reasoned moral response" to the evidence (at 545, concurring opinion). Sentencing was "a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence" she insisted (at 545), as if it could ever be moral if it were not also partly emotional.

"It is impossible, then, for something invariable and unqualified to deal satisfactorily with what is never uniform and constant," Plato had declared (1957:294c). Thus, a "legislator... in matters of right... will never be able in the laws he prescribes for the whole group to give every individual his due with absolute accuracy" (at 294e–295). Aristotle agreed. Like Plato, he revered the law as a rational, consistent application of general rules. Yet he too wrestled with its limitations in particular cases of human conduct: "It is obvious that to rule by the letter of the law or out of a book is not the best method.... On the other hand, rulers cannot do without a general principle to guide them; it provides something which, being without personal feelings is better than that which by its nature does feel. A human being must have feelings; a law has none. Against that one might say that a man will give sounder counsel than law in individual cases. It seems clear then that... laws must be laid down, which shall be binding in all cases, *except those in which they fail to meet the situation*" (Aristotle 1962:139, emphasis added).

Who could know, and how, when rational criteria strictly applied failed to do justice? Could rationality alone demonstrate the limits of rationality alone? And when the law failed, how could people "deal with these undetermined matters to the very best of their just judgement?" Setting the tone for modern jurisprudence, Aristotle struggled to deny emotion: "He who asks Law to rule is asking God and Intelligence and no others to rule; while he who asks for the rule of a human being is bringing in a wild beast; for human passions are like a wild beast and strong feelings lead astray rulers and the very best of men. In law you have the intellect without the passions" (Aristotle 1962:143).

But in the end, there was nowhere else to turn but to human beings—passionate and unregulated—for that necessary supplement to "reasonable consistency" which makes true moral justice possible. "The advocates of the rule of law do not deny this," Aristotle conceded, "do not suggest that the intervention

of a human being in such decisions is unnecessary; they merely say that there should be not one person only but many" (Aristotle 1962:145). Thus, "when the law either will not work at all or will only work badly" in singular instances, the power to correct it should not rest with a single person. "As a larger amount of water is less easily polluted, so a larger number of people is less easily corrupted than a few," Aristotle observed, reluctantly admitting an *ad hoc* decision-making based upon collective human deliberation inevitably guided by informed emotion. "The judgement of one man is bound to be warped if he is in a bad temper or has very strong feelings about something. But...it would take a lot of doing to arrange for all simultaneously to lose their tempers and warp their judgements" (Aristotle 1962:140). "A capital sentencing jury representative of a criminal defendant's community assures a *'diffused impartiality,'*" Justice Powell agreed. (emph. added) (*McCleskey v. Kemp* 1987:310, quoting *Witherspoon v Illinois* 1968:519).

Can we conceive, much less put into practice, an equitable death penalty regime that provides "fairness and consistency"? Plato embraced the written law as "the fruit of long experience," and yet imagined "the true Statesman," who would know when to "allow his activities to be dictated by his *art* and pay no regard to written prescriptions. He will do this whenever he is convinced that there are other measures which are better" (Plato 1957:300b–c). The jury at the guilt phase are like all other citizens, bound strictly by the written law. Once they decide guilt, however, at the sentencing phase, the jury become a *"true statesman."* With the code to guide but not bind them, they are bound to do their best in this particular case.

Aristotle, ever practical, saw little chance of a true statesman ever emerging in this world, but rested his faith on the jury to approach the ideal as nearly as possible. The jurors would be empowered to do justice. But justice must transcend the universalism of the strictly legal and encompass the infinitely more complex particular human dimension. And thus, in the *Ethics,* Aristotle gave the West "equity"—*"neither absolutely identical nor generically different"* from legal justice (Aristotle 1962:1137a). "Although both are morally good, the equitable is better of the two" (at 1137b).

Thus, fairness did limit consistency: "What causes the problem," said Aristotle, "is that the equitable is not just in the legal sense of 'just' but as a corrective of what is legally just. The reason is that all law is universal, but there are some things about which it is not possible to speak correctly in universal terms. Now, in situations where it is necessary to speak in universal terms but impossible to do so correctly," we need equity. "So in such a situation in which the law speaks universally, but the case at issue happens to fall outside the universal formula, it is correct to rectify the shortcoming," Aristotle explained. "Such a rectification corresponds to what the lawgiver himself would have said if he were present, and what he would have enacted if he had known of this particular case" (Aristotle 1962:1137b). In a democracy the People are the lawgiver. Their legis-

latures enact general statutes. And later in court, with a particular capital case before them, their juries further shape the law.[46]

Modern death penalty jurisprudence—both equitable and legal—demands and supplies fairness and consistency. "That is why the equitable is both just and also better than the just in one sense," Aristotle explained. "This is also the reason why 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" (Aristotle 1962:1137b).

"If this is not a scheme based on 'standardless jury discretion,' what is?" Justice Marshall had demanded in *Zant* (at 906). But at the sentencing phase, has the jury really been "left completely at large, with nothing to guide them but their whims and prejudices" (at 910)? Because it will be emotional must it thereby be pernicious and uninformed?

"In the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of what we called in *Enmund* the 'moral guilt' of the defendant," Justice Stevens had insisted, dissenting in *Spaziano*. "And if the decision that capital punishment is the appropriate sanction in extreme cases is justified because it expresses the community's moral sensibility—its demand that a given affront to humanity requires retribution—it follows I believe... that the life or death decision depends upon its link to community values for its moral and constitutional legitimacy" (*Spaziano v. Florida* 1984:483).[47] Eighteen years later, in *Ring v. Arizona* (2002), he finally became part of a majority which recognized that retributively, only a jury could reliably make this moral and emotional decision.[48]

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 be partly emotional. Every moral question is essentially emotional. Aristotle

46. Thus, according to Chief Justice Rehnquist and Justices Scalia and Thomas dissenting, legislation and jury verdicts should be "the sole indicators...of decency for the purposes of the Eighth Amendment" (*Atkins v. Virginia* 2002:2253).

47. If we are fully to incorporate Aristotle's wisdom and acknowledge that a collective jury is better able than a single judge to reflect the moral sense of the community, and through its greater numbers to defeat the unjust effects of extreme, eccentric, and uninformed passion—then after successive filtrations, when we do reach that final penalty stage, perhaps a vote of eleven-to-one for death should suffice.

48. Formally, *Ring* requires only that a jury decide "any fact on which the legislature conditions an increase in punishment" (*Ring v. Arizona* 2002:2432), and does not specifically require that the jury make the final sentencing decision. But if a judge were to decide whether jury-determined aggravating circumstances substantially outweighed mitigating factors, would that moral "fact" not thereby also be covered by *Ring*? Responding to *Ring*, states have generally allocated the life or death decision to juries.

and Adam Smith, and increasingly in our own times moral philosophers—both for and against the death penalty—realize this.[49] We should acknowledge the inevitable, and declare legitimate the inescapable role of emotion. Mercy and justice require it.

By its tone, if not by definition, the very measure of desert is partly emotional. Juries will err, morally, and condemn to death factually guilty death-eligibles who do not deserve to die. As Aristotle reiterated, we cannot expect the same degree of accuracy in moral as in scientific questions. But the categories can 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—our jurisprudence on which that condemnation rests becomes explicable and coherent. A thing cannot both be and not be *in the same sense at the same time.*

Discretion is at once limitless and limited—but in different senses at different times.

Dissenting in *Callins v. Collins,* Justice Blackmun went right to the edge of this separate dimension: "Prohibiting a sentencer from exercising its discretion to dispense mercy on the basis of factors too intangible to write into a statute is offensive to our sense of fundamental fairness and respect for the uniqueness of the individual" *(Callins v. Collins* 1994:1133). But ultimately, he shied away: "The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative" (at 1130).

Without intuition and emotion, it cannot be answered at all.

Dissenting in *Walton,* Justice Brennan (joined by Marshall) did acknowledge separate dimensions, but also failed to acknowledge the emotional and intuitive implications: "*Lockett* and *Furman* principles speak to different concerns...the *Lockett* rule flows primarily from the Amendment's core concern for human dignity, whereas the *Furman* principle reflects an understanding that the Amendment commands that punishment not be meted out in a wholly arbitrary and irrational manner" (*Walton v. Arizona* 1990:676). Applying these cases together leads the Court to "insist that capital punishment be imposed fairly, and with reasonable consistency, or not at all"[50] (*Walton v. Arizona* 1990:676, quoting *Eddings v. Oklahoma* 1982:112).

---

49. *Cf.,* Pillsbury (1989) and the collection of essays in Bandes (1999).

50. Scalia in *Walton* also comes close—again without acknowledging the emotional basis for moral decision-making: "Since the individualized determination is a unitary one (does this defendant deserve death for this crime?), once one says each sentencer must be able to answer 'no' for whatever reason it deems *morally* sufficient (and indeed for whatever reason any one of 12 jurors deems morally sufficient), it becomes impossible to claim that the Constitution

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, based on *mens rea*, defenses, affirmative defenses, and other factors that can be applied rationally and consistently. But when it comes to the penalty phase, where character and not conduct is the issue, each defendant's unique personality and background assume center stage. There, we seek fairness: "Equity"—the moral truth, based in the jury's intuition—that mysterious rich mix of reason *and* emotion that combines to determine whether a person *really*—not merely rationally—deserves to die.

To Root in a Flowing Stream: Conclusion

We navigate in a leaking boat, repairing as we sail.[51] We drag behind us what sailors call a "sea anchor"—an ancient core that slows our progress but keeps us steadier, staying our course, even in the midst of emotional storms. The Sophists called these essential standards of decency, *nomos in physis*—deep-seated customs that characterize a culture. "Trials for homicide," Aristotle informs us, "were to be conducted according to the ancestral custom"[52] (Aristotle 1974:111).

Ancestral custom—the past counts: Blood pollutes the land. Many abolitionists may feel this, but they have learned to suppress the sentiment as shameful. Because the past counts and blood pollutes the land, the malevolent killer must suffer.[53] The victim's family shall have a voice greater than strangers—the victim greater still—but, in the end, the killer's fate deeply concerns the community.

The essential human punitive impulse cannot be denied, but to do justice it must be limited. "*Imposing limits on the unlimited to make the limited,*" Pythagoras teaches. We limit the *measure* of punishment: "Like for like" feels appropriate for starters. We shall do to the scheming snitch as he would have done to his victim. "*He who sheds the blood of man by man shall his blood be shed,*" God declares. "The extraordinary and symmetrical syntax of this great command—(shed-blood-man/man-blood-shed) mirrors the situation. Action demands an equal and apposite reaction."[54] The Pythagoreans defined justice,

---

requires consistency and rationality among sentencing determinations to be preserved by strictly limiting the reasons for which each sentencer can say 'yes'" (*Walton v. Arizona* 1990:656).

51. The author of this metaphor escapes me.

52. Magna Carta guaranteed London its "ancient liberties" without ever specifying what they were.

53. Today more retributivists might oppose the death penalty as unnecessarily cruel if the alternative—LWOP—were made more necessarily cruel.

54. Prof. Murray Lichtenstein in conversation.

Aristotle tells us, as "suffering that which one has done to another" (Aristotle 1962:1132b). Although "Eye for an eye" began as the great *limit* on punishment —*only* an eye for an eye—it "has been perverted, in common understanding, into an act of cruelty. Properly understood, it intends to limit the excesses which codes in the ancient Near East allowed" (Bailey 1987:50). In the same spirit *Deuteronomy* demands strictly measured corporal punishment only as deserved, lest the person punished be degraded. This sense of "appropriate" as like-kind limited punishment, becomes "proportional punishment" under the Eighth Amendment.

Imposing limits on the unlimited, channeled discretion is the central demand of Pythagoras and *Furman.* Like Socrates, we collect instances and find essences. We discover and clearly mark off the continuum of homicide into different degrees of blameworthiness. We guide the jury's discretion by announcing and applying these aggravators, so that punishment will be proportional and only the worst of the worst shall be put to death.

Substantively, the decision—life or death—*must* be morally just. Formally, law aspires to become a calculus of categories applied objectively. Life or death would follow demonstrably from a set of rules applied to a particular act under any given set of circumstances. Ideally, Western homicide law, like mathematics, would be perfectly cumulative—once established, true for always. Over time, capital crimes and procedures would only be refined by being made more limited and precise. In fact, however, homicide and death penalty jurisprudence have developed more like science or chess. Progressively, they have acquired new lines, embraced new understandings and fashions, and occasionally have rejected conventional wisdom as error and returned to ancient roots, which take on new meaning. Over millennia, even as we have jettisoned morally primitive and cultish practices and penalties, we continue to draw from our ancient homicide law as cultural wellspring.

But Socrates and Jesus were executed. Both prosecutions, however, were political. And neither defendant was tried for murder. Although each was unjustly put to death, neither condemned the death penalty *per se.* Jesus refused to put up a defense at trial. And Socrates virtually "volunteered" for death. After being convicted by a bare majority of a 500-person jury, in a separate penalty phase to determine his fate, after the prosecutor weakly called for his death, rather than propose a brief exile, Socrates submitted to that same jury as their only alternative his own "just deserts"—a lifetime of free meals in the hall reserved for the most honored Olympic athletes.

Those who followed Socrates sought to give content to the "good" that he had urged we seek, but had left undetermined. We adopted the Socratic program, as well as the Biblical goal of separating the righteous from the wicked by attempting to give more precise content to "evil": Capital killings essentially included the coldly calculated and planned, and excluded accidents, negligent and justified killings, and homicides by children and the insane. At the ex-

treme, the *scheming* who kill even their own kin for money should be destroyed.[55] Also at the extreme are coldly calloused and depraved killings, such as the goring ox in the Bible, and before that in the Code of Hammurabi the collapsing house badly built. In the 19th century, allowing a horse to run in a crowd exhibited a special depravity. Spray shooting into a crowd is the contemporary analogue. Perhaps the most callous of all, a wealthy pharmacist dilutes chemotherapy for extra profit, not caring about the agonies he causes hundreds of trusting cancer patients who rely on his medicine to treat their disease. Even absent a specific intent to kill, a wanton recklessness with a depraved indifference to human life can be sufficiently heinous to deserve death.

Before convicting and condemning, we must make most diligent inquiry, as the Bible commands, never presuming guilt from accusation, nor accepting its first, superficial appearances. Homicide *is* special. The victim's death is a special injury; the killer's death is a special punishment. We commit ourselves to careful, thorough investigation. A presumption of innocence attaches from the beginning. Resolving reasonable doubts for the defendant, we demand corroboration. Snitch testimony alone is never enough. Super due process is owed throughout: *We must be certain before we kill a person.* Even after conviction and sentence we will entertain new evidence, and be willing to reconsider.

When it comes to punishing murder, both the Bible and the Ancient Greeks teach us that rich and poor shall be treated alike. The wealthy may not buy their way out. All stand *equal before the law.* There must be no class or race bias, but we must be discriminating. Today, as in Exodus XXIII:1, while a homeowner may slay a nighttime burglar, burglary itself is not a capital crime. The ancients teach us to limit our confidence in these measures—to limit our faith that we can achieve proportional punishment through classifying crimes and attaching punishments as deserved.

Humbled and tentative as we declare and apply our death penalty, we must limit our rage. There is a time for anger, the Bible tells us—"*your eye shall not pity him*"—even "*a time to hate and kill*" (Ecclesiastes III:3). But all emotion, especially anger, must be kept in check, warned Aristotle, preaching the Golden Mean throughout, and specially praising "gentleness"—moderation in anger. "Being gentle means to be unruffled and not to be driven by emotion, but to be angry only under such circumstances and for as long a time as reason may bid." Aristotle warned against "excessive" anger, "shown against the wrong persons, under the wrong circumstances, to an improper degree, too quickly, and for an unduly long time.... Short tempered people are quick to be angered at the wrong people, under the wrong circumstances, and more than is right,

55. "The law of homicide demanded forfeiture of 'the psyche which did or planned the deed' combining (in the word) the senses of life and the power of thought and deliberation" (Guthrie 1962: Vol. III, at 468).

but they get over it quickly, and that is their best quality." But "bad tempered" people "cannot be reconciled without exacting their revenge" (Aristotle 1962:1125b).

"A gentle person is forgiving rather than vindictive" (Aristotle 1962:1126a). But even gentleness was not perfectly moderate. The "gentle" person was likely to "be more prone" to too little anger—"a kind of apathy or whatever else it may be," Aristotle criticized. "For those who do not show anger at things that ought to arouse anger are regarded as fools.... Such people seem to have no feelings, not even for pain" (at 1126a).

"It is morally right to hate criminals," declared Fitzjames Stephen, the great 19th century English judge and historian, and emotive retributivists' patron saint (Stephen 1883: Vol. II, at 81–82). Capital murderers especially should be hated. Abolitionists sometimes seem abstractly ideological in rejecting all hatred or anger, except at the government or the social conditions they hold responsible for the brutal murder. Often they seem emotionally one-sided, reserving pity mostly for the condemned, and dislike for those who would execute them. Reflexively they favor the underdog, regardless of why the condemned has been rendered powerless to stop those who would execute him. They show their true gentle spirit by emphasizing restoration and rehabilitation.[56]

At the opposite extreme, carried away by an indiscriminate thirst for revenge, many death penalty proponents issue their inhumane battle cry, urging us to "Kill them all; let God sort it out later." For Aristotle, rage was more dangerous than apathy—it was "much more common for it is more human to seek revenge" (Aristotle 1962:1126a). For the last 150 years apathy and rage have been in closer balance.

"We must watch the errors which have the greatest attraction for us personally," Aristotle warned (Aristotle 1962:1109b). The true retributivist who calls for punishment—pain and suffering because it is deserved—especially despises sadists. In fact, feeling satisfied at deserved punishment, the retributivist hates sadists more deeply for subjecting vulnerable victims to their selfish whims.

From the Bible we learn that the victim's human dignity is paramount. From Aristotle we explicitly learn that "*righteous indignation*" is the right attitude here—"the mean between envy and spite."[57] That old Hellenic virtue of *aidos*—an "inner feeling of respect for what deserves respect and revulsion from wrongdoing as such and not from fear of punishment" still animates us (Guthrie 1962: Vol. II, at 494).

---

56. In this respect Plato was a kindred spirit.

57. "The righteously indignant man feels pain when someone prospers undeservedly; an envious man exceeds him in that he is pained when he sees anyone prosper; and a spiteful man is so deficient in feeling pain that he even rejoices when someone suffers undeservedly" (Aristotle 1962:1108b).

And when we do slay the condemned, even as we seek "solace in the face of suffering" (Henberg 1990:6) by the execution, we should feel pain mixed with satisfaction. "These severe penalties are at once supremely right and superlatively shameful," says Plato (1978:860b).

From the ancient Hebrews in their Torah and Talmud and the Ancient Greeks in their philosophy and practice, our humility in identifying those who deserve to die calls for continuous study, and at trial, skilled champions on both sides. But in academic writing and public discussion, we should model ourselves less on Protagoras, for whom debate was a "verbal battle," and more on Socrates, who engaged in dialectic: Minds not bent on winning an argument antagonistically but commonly searching, "One helping the other that both may come nearer the truth" (Guthrie 1962: Vol. III, at 43; 449).

To arrive at true desert, however, we need more than a Socratic catalogue. We need a jurisprudence of informed emotion, expressed in a language richer than the strictly rational, employing a grammar that allows for reason *and* emotion, deep enough to cover law and equity, and embracing both consistency *and* fairness. Discrete legal categories can never be sufficient, for reality flows, as Heraclitus was insisting 2500 years ago. "There are not two classes of murder but an infinite variety, which shade off by degrees from the most atrocious to the most excusable," declared the Royal Commission on Capital Punishment Report 50 years ago, implicitly siding with Heraclitus against Pythagoras, and with *McGautha* against *Furman*. Factors making death appropriate in particular cases "are too complex to be compressed within the limits of a simple formula" (§498). Where law leaves off, equity enters: Real justice can never be compressed fully into a rational design. "Infinite" factors "affect the gravity" of the murder. Ultimately the life or death decision is real, and as such, infinitely finer than a strictly legal decision. "Motives of the offense and the character... of the offender can never be inferred from the legal quality of his criminal act" (Royal Commission §595). The Greeks generally believed that humans had an intuitive faculty that allowed them immediately to apprehend the true nature of a situation (Guthrie 1962: Vol. II, at 19). Some moral intuition, although non-rational, is indispensable.

For 3000 years, and especially these last 50, we have been building upon stable homicide law, refining categories of those who deserve to die, occasionally shedding former beliefs, sometimes severing roots such as capital punishment for religious or morals offenses—progressively shrinking the class of death-eligibles. We draw up and apply our codes, approaching the substance and process with Socratic humility and great caution.

"The Gods did not reveal to men all things in the beginning," declared Xenophanes a century before Protagoras, "but in course of time, by searching, they find out better" (Guthrie 1962: Vol. I, at 399). Must this search inevitably culminate in abolition? The ancient Greeks were aware of an asymptote—a curve that progressively approaches but never quite reaches another. Trusting

that "over time the types of murder for which the death penalty may be imposed would become more narrowly defined and would be limited to those which are particularly serious or for which the death penalty is particularly appropriate," (*Zant v. Stephens* 1983:877, *quoting* Justice White in *Gregg v. Georgia* 1976:222), we, too, might be moving toward a morally more refined death penalty where *we execute virtually all and only those very, very few who truly deserve to die.*

We have far from reached that point. Meanwhile, fallible human beings "made in the image of God," we stumble along, erring but doing our best at justice. "*Justice, justice, shall you pursue*"—literally "*chase after*" (Deuteronomy, XVI:20). We can all envision more perfect worlds. But in the end, said Plato, "We must take things as they are...and gather together to work out written codes, chasing to catch the tracks of the true constitution" (Plato 1957:301d–e), dragging behind us, however chipped away and crusted, our common core of deeply rooted values.

We can only and we must do our best chasing justice, striving to do better. We know there is "no perfect procedure," nor perfectly defined set of substantive aggravators. "Who lives or dies?" ultimately is an ethical question, whose correct answer necessarily must be partly emotional. We cannot demand the same precision in ethics as in physics. Each sphere, each age has its own measure of progress and error, tuned to its developing technical skill and moral sensibility. When it comes to the death penalty, some truth is eternal, some out of reach. Evolution is inevitable and progress possible.

References

Abbott, E. (1884) *Flatland.* London: Seeley & Co., Ltd.

Aristotle (1974) *Constitution of Athens and Related Texts.* Von Fritz, K. and E. Kapp (trans.). New York: Hafner Press.

Aristotle (1962) *Nicomachean Ethics.* Ostwald, M. (trans.). Englewood Cliffs: Prentice Hall.

Aristotle (1962) *The Politics.* Sinclair, J.A. (trans.). Baltimore: Penguin Books.

Aristotle (1953) *Ethics.* Thomson, J.A.K. (trans.). London: George Allen Ltd.

Aristotle (1941) *Metaphysics.* Ross, W.D. (trans.), in R. McKeon (ed.), *The Basic Works of Aristotle.* New York: Random House.

Atkins v. Virginia (2002) 122 S.Ct. 2242.

Babylonian Talmud Sanhedrin (1935). London: Soncino Press.

Bailey, L.R. (1987) *Capital Punishment: What the Bible Says.* Nashville: Abingdon Press.

Bandes, S. (1999) *The Passions of Law.* New York: New York University Press.

Bedau, H.A. (1997) "Why the Death Penalty is a Cruel and Unusual Punishment." Pp. 232–237 in H.A. Bedau (ed.), *The Death Penalty in America.* New York: Oxford University Press.

Blecker, R. (1990) "Haven or Hell? Inside Lorton Central Prison: Experience of Punishment Justified." *Stanford Law Review* 42:1149–1249.

Bonner, R.J. (1927) *Lawyers and Litigants in Ancient Athens.* Chicago: The University of Chicago Press.
Bonner, R.J. and G. Smith, (2000) *The Administration of Justice from Homer to Aristotle, Volumes I and II.* New Jersey: The Lawbook Exchange, LTD.
Buber, M. (1952) *Good and Evil.* New York: Charles Scribners & Sons.
California v. Brown (1987) 479 U.S. 538.
Callins v. Collins (1994) 510 U.S. 1141.
Coker v. Georgia (1977) 433 U.S. 584.
Dershowitz, A. (2000) *The Genesis of Justice.* New York: Warner Books, Inc.
Eddings v. Oklahoma (1982) 455 U.S. 104.
Enmund v. Florida (1982) 458 U.S. 782.
Furman v. Georgia (1972) 408 U.S. 238.
Greenberg, M. (1970) "Some Postulates of Biblical and Criminal Law." Pp. 18–37 in J. Goldin (ed.), *The Jewish Expression.* New York: Bantam Press.
Gregg v. Georgia (1976) 428 U.S. 153.
Guthrie, W.K.C. (1975) *The Greek Philosophers From Thales to Aristotle.* New York: Harper and Rowe Publishers.
Guthrie, W.K.C. (1962) *A History of Greek Philosophy, Volumes I, II, and III.* Cambridge: University Press.
Henberg, M. (1990) *Retribution: Evil for Evil in Ethics, Law and Literature.* Philadelphia: Temple University Press.
Hobbes, T. (1651/1968) *Leviathan.* C.B. MacPherson (ed.). Baltimore: Penguin Books.
Homer: The Odyssey (1937) Rouse, W.H.D. (trans.). New York: Mentor Press.
Illinois Governor's Commission on Capital Punishment (2002). Springfield, IL.
In re Stanford (2002) 123 S.Ct. 472.
King v. Oneby (1727) 92 Eng. Rep. 465.
Kline, M. (1953) *Mathematics in Western Culture.* London: Oxford University Press.
Lockett v. Ohio (1978) 438 U.S. 586.
Lowenfield v. Phelps (1988) 484 U.S. 231.
McCleskey v. Kemp (1987) 481 U.S. 279.
McGautha v. California (1971) 402 U.S. 183.
New King James Bible (1990) New York: American Bible Society.
The Oxford Annotated Bible with the Apocrypha (1965) Revised Standard Version, H. May and B.Metzger (eds.). New York: Oxford University Press.
O'Neill v. Vermont (1892) 144 U.S. 323.
Patterson v. Texas (2002) 536 U.S. 984.
The Pentatuch and Haftorahs (1960) Hertz, J.H. (ed.). London: Soncino Press.
People v. Casassa (1980) 404 N.E.2d 1310 (N.Y.), *cert. denied*, 449 U.S. 842 (1980).
People v. Warner-Lambert (1980) 414 N.E.2d 660 (N.Y.).
Pillsbury, S.H. (1989) "Emotional Justice: Moralizing the Passions of Criminal Punishment." *Cornell Law Review* 74:655–710.
Plato (1978) *Laws.* A.E. Taylor (trans.), in E. Hamilton and H. Cairns (eds.) *The Collected Dialogues of Plato.* Princeton, New Jersey: Princeton University Press.
Plato (1957) *Statesman.* Ostwald, M. (ed.) and J.B.S. Kemp (trans.). Indianapolis: Bobbs-Merrill Educational Publishing.
Plato (1957) *Theaetetus.* Cornford, F. (trans.), in *Plato's Theory of Knowledge.* New York: The Liberal Arts Press.

Plato (1956) *Protagoras*. Ostwald, M. and B. Jowett (trans.). New York: The Liberal Arts Press.
Ring v. Arizona (2002) 122 S.Ct. 2428.
Roth, M. (1997) *Law Collections from Mesopotamia and Asia Minor* (2nd ed.). Atlanta: Scholars Press.
Royal Commission on Capital Punishment (1949–1953).
Smith, A. (1759/2000) *Theory of Moral Sentiments*. New York: Prometheus Books.
Spaziano v. Florida (1984) 468 U.S. 447.
State v. Walton (1989) 769 P.2d 1017 (Ariz.).
Steiker, C. (2002) "Capital Punishment and American Exceptionalism." *Oregon Law Review* 81:97–130.
Thompson v. Oklahoma (1988) 487 U.S. 815.
Thucydides: The Peloponnasian War (1954) R. Warner (trans.). Baltimore: Penguin Books.
Tison v. Arizona (1987) 481 U.S. 137.
Tribe, L. (1971) "Trial by Mathematics." *Harvard Law Review* 84:1329–1393.
Trop v. Dulles (1958) 356 U.S. 86.
United States v. Fell (2002) 217 F.Supp.2d 469 (D.Vt.).
United States v. Quinones (2002) 205 F.Supp.2d 256 (S.D.N.Y.),*reversed*, 313 F.3d 49 (2d Cir.).
Walton v. Arizona (1990) 497 U.S. 639.
Weems v. United States (1910) 217 U.S. 349.
Witherspoon v. Illinois (1968) 391 U.S. 510.
Woodson v. North Carolina (1976) 428 U.S. 280.
Zant v. Stephens (1983) 462 U.S. 862.