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

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

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

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

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

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

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

While Homer's epics reveal no distinctions among homicides, except a special horror at killing one's own kin, within a few centuries the Athenians established disparate courts to try separate types of killings. The Aeropagus, the highest court of legal guardians, sat en masse to try premeditated murderers and would-be tyrants. A lesser court of 51 members tried unpimediated killings; another
Aristotle (center, next to the white-bearded Plato) emphasized repeatedly that we cannot discover, nor should we demand, the same precision in ethics as in science.

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

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

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

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

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

In ancient Athens, a killer convicted of unpromeditated homicide was banished unless the victim's family pardoned him, which canceled the debt and thereby ended the pollution. The family, though, had to be unanimous. "Otherwise the one who opposes it shall pre-
vent pardon.” Although they could not commute the sentence of a premeditated murderer, the victim’s family was guaranteed the right to “hold the condemned suffering the penalty which the law imposes.” When Timothy McVeigh, the Oklahoma City bomber, was put to death, opinion was split over whether the public generally, or only the families of the 168 victims, should be allowed to witness the execution. The U.S. Attorney General ultimately ordered the execution broadcast on closed-circuit TV, but only to the victims’ families.

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

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

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

The constitutionality of death

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

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

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

Socrates and his disciple, Plato, relentlessly battled the Sophists, insisting on absolute values, permanent and unvarying truths, difficult to discern, but ultimately real and knowable. Good and evil—justice and equality exist apart from the human mind. Today’s death penalty supporters share a conviction that real moral differences exist among killings. The modern consensus that a planned torture murder is worse than an accidental killing feels like it must have been true forever. To the orator Demosthenes 2,500 years ago, it felt that way, too. Why should we punish deliberate crime but not accidents? “Not only will this be found in the (positive) laws, but nature herself has decreed it in the unwritten laws and in the hearts of men.” Human beings probably always knew intuitively that some killings were worse than others. Recognizing that accidents do happen brings a feeling of restraint, nearly as primal as the urge for retaliation. These objectively different types of killings deserve different responses not because society says so. Rather, society says so because the types really are different.
Pursuing moral refinements while they administer the ultimate punishment in a deeply flawed system, today’s death penalty Platonists embrace Socrates’ amalgam of humility about substance and also his confidence in the method. Like Socrates, we first collect instances that almost all would agree are the worst of the worst. Next, we examine these cases to find common qualities, or the essential characteristics they share.

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

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

Morals matter

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

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

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

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

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

Yet, robbery felony-murder—the aggravator that has put more people on death row than any other—has a definite race/class effect, regardless of the legislatures’ intent. If the killer’s “pecuniary motive” correctly (as it commonly does) aggravates a murder, how are we to justify the tolerance and respect shown to ranking corporate executives who consciously maintain deadly workplaces, or manufacture unnecessarily lethal products from the best of motives—profit? These “red collar killers” are morally indistinguishable from other mass murderers who, with a depraved indifference, kill unsuspecting innocents. Yet, these pillars of the community rarely are indicted, almost never imprisoned and, of course, not executed for their uncaring mass murder. Unless we respond to hired killers as hired killers of whatever social class—if we fail to reflect this es-
sentential egalitarianism in the definition, detection, prosecution, and punishment of murder—we will have confirmed the Sophist Thrasy-machus’ definition of justice as nothing more than “the interest of the stronger.”

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

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

**Retribution and revenge**

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

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

Thus, retributive death penalty advocates reject as incomplete utilitarian rationality with its future-oriented calculus of costs and benefits. No strictly rational death penalty law can be constructed and applied exhaustively to achieve justice. We need a richer language that includes nonrational, informed emotion. Moral desert never can be reduced strictly to reason, nor measured adequately by rational criteria. Forgiveness, love, anger, and resentment are part of justice. The past counts. Not rationally, but really.

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

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

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

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

Retributivist supporters of the death penalty need to show how both core values can be respected simultaneously—how we can generally treat like cases alike and, at the same time, respect the uniqueness of each particular defendant. Heraclitus, Pythagoras, Plato, and Aristotle show us the way. Pythagoras’ proof of incommensurability had demonstrated that rationality, discreteness, and proportionality were too limited for a moral universe. As the real numbers are incommensurably richer than
moral entitlement to live." A community's outrage—its sense that an individual has lost his moral entitlement to live—is an expression of the community's outrage, its sense that an individual has lost his moral entitlement to live. Plato maintained that the death penalty is an expression of a community's outrage, "its sense that an individual has lost his moral entitlement to live." It may sound mystical and new age to insist that reason does not—and cannot—exhaust the inquiry. Yet, the need for a transcendent concept of justice that reconciles general consistency with the defendant's particular humanity was neither new age nor mystical to Aristotle, the rationalist, nor to Plato, his teacher.

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

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

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

The law has its limits

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

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

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

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

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

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