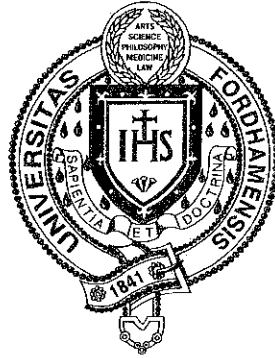


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KILLING THEM SOFTLY: MEDITATIONS ON A PAINFUL PUNISHMENT OF DEATH

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THE CURRENT CONTROVERSY: A FRAGMENT

Controversy continues to swirl around lethal injection. Opponents emphasize the real risk of ill-trained corrections personnel botching executions and turning capital punishment into official rituals of torture—inhumane and unconstitutional. Worse, pancuronium, a paralytic agent, masks the real agony of the condemned who appears to die in peace without pain. Supporters counter that although some risk of unintended pain remains, when administered properly by physicians or other trained personnel, lethal injection produces a quick, painless, and constitutional death.

A de facto national moratorium on executions occurred while the Supreme Court considered the constitutionality of lethal injection in *Baze v. Rees*.¹ Of course, many opponents of lethal injection simply detest the death penalty itself, however administered, seizing on the remote but real possibility of a state-administered, painful execution to oppose lethal injection, and every other method as unconstitutionally “cruel and unusual punishment.”² Others reject the death penalty, fearing that states will execute the innocent or be spurred by racist motives. Some admit that monsters may deserve a painful death, if only the government could be trusted to determine who and how. Still others, while opposing the death penalty itself, may recognize that rightful punishment must be painful in order to be punishment.

Some critics point out, however, that people are largely driven to destructive acts by forces outside their control or beyond their responsibility. Public safety may require us to incapacitate, and those confined may feel uncomfortable. But, they insist, we always punish most reluctantly, and treat civilly those who threaten us until we can cure or rehabilitate and then release them, all this time

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1. Ed Stoddard, *Execution “Moratorium” Takes Hold*, REUTERS, Nov. 1, 2007.
2. U.S. CONST. amend. VIII.

striving with compassion to ease their suffering as much as possible. This camp generally acknowledges painful punishment as an unpleasant necessity, but urges us to make it as painless as practical. At one extreme, psychiatrist Karl Menninger, in *The Crime of Punishment*, acknowledging that punishment requires intentionally inflicting pain, famously called upon society to abandon punishment entirely.³

At the other extreme, the most indiscriminately vindictive call for revenge, angrily demanding that the state kill all murderers, and do it painfully. Other death penalty supporters, however, insist that only the "worst of the worst of the worst"—brutal and sadistic mass-murdering rapists, for example—deserve to die. Death penalty supporters, following Immanuel Kant, demand a mostly painless execution process, insisting that simply killing the condemned balances the scales.⁴ These retributivists may derive satisfaction from imagining (however contrary to fact) the condemned suffering every day for years on death row, remorseful for his murder, haunted by ever-pressing thoughts that one day state agents will kill him prematurely. They may believe this drawn-out, anguished death-wait requires no additional pain in the dying process. Others, however insist that the most brutal and vicious killers deserve to experience physical pain while they die.

Almost everyone accepts that imprisonment should be psychologically and physically unpleasant. When it comes to capital punishment, however, as the Supreme Court consistently declares in the modern era, seemingly death is different.⁵ Deeper reflection, and two decades documenting daily life inside prisons and on death rows in four states, however, convinces me otherwise. Our wide-

3. KARL MENNINGER, *THE CRIME OF PUNISHMENT* 201-07 (The Viking Press 1968) (1966). "The principle of *no* punishment cannot allow of any exception; it must apply in every case, even the worst case, the most horrible case, the most dreadful case, not merely in the accidental, sympathy-arousing case." *Id.* at 207; *see also id.* at 260-62 (calling for society to substitute the "therapeutic attitude" for the "punitive attitude").

4. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 139 § 333 (John Ladd, trans., Hackett Publishing 2d ed. 1999) (1797).

5. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 286-89 (1972) (Brennan, J., concurring) ("[d]eath is a unique punishment;" "[d]eath . . . is in a class by itself"); *id.* at 306 (Stewart, J., concurring) ("[P]enalty of death differs from all other forms of criminal punishment, not in degree but in kind."); *see also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (Stewart, J., concurring) (stating that "penalty of death is different in kind from any other punishment" and emphasizing its "uniqueness"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Stewart, J., concurring) ("[P]enalty of death is qualitatively different from a sentence of imprisonment, however long."); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

spread revulsion at painful executions and the rising demand for a guaranteed painless death penalty is but the most visible part of a deeper disavowal of pain, and therefore punishment itself.

Difficult questions of pain and punishment can divide us starkly or subtly, but mostly they lay unexposed, unexplored, overlooked, and overshadowed in the death penalty debate itself. But then the Court commanded us in *Baze* to put aside the question of capital punishment per se, and focus instead upon the constitutional limits of painful punishment. Thus, we take as given that the state may execute some people, and ask instead, how shall we kill them? How *should* it feel to die?

Earlier eras and other cultures in the bloodthirsty history of humankind have indulged in mass torture, mindless vengeance, and boundless, misdirected, collective hatred. In the United States today, however, reacting officially to individual child killers or serial rapist murderers, "it is now far more likely that people should witness acts of grievous cruelty . . . with too little hatred and too little desire for deliberate measured revenge than that they should feel too much."⁶

We must no longer haphazardly employ execution methods that seem indifferent to the experience of dying, attempting to obliterate from memory the agonizing death of the victim which gives us the right, if not the obligation, to execute the aggravated murderer. Whether or not we examine it carefully or declare it openly, most of us assume that simply killing the condemned balances the scales by inflicting enough pain. Can we not soberly ask ourselves whether, in certain cases, death alone is enough?

Punishing by torture violates human dignity and the Constitution rightly forbids it. But, by fully rejecting *all* pain in punishment, we abandon punishment itself. The time has come to humanize the punishment of death—not by abolishing it, nor bureaucratizing it and shamefully laying responsibility elsewhere, but by infusing it with concern and emotional denunciation.

I. "PUNISHMENT" MUST BE PAINFUL

From the beginning, as defined and experienced, etymologically and existentially, "punishment" and "pain" have been inseparably connected. The very word "pain" comes from the ancient Greek *poine*, the Latin *poena* meaning penalty, or punishment.⁷ As a

6. 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 82 (McMillan & Co. 1883).

7. See, e.g., MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 835 (10th ed. 2001).

noun, "punishment" means "suffering, pain, or loss that serves as retribution."⁸ H.L.A. Hart lists pain as the first of five elements that constitute "the standard or central case of punishment."⁹ Our commonsense notion of punishment reflects this: punishment involves intense physical and/or psychological discomfort. Whether the condemned feel their pain physically or psychologically, their punishment, to be punishment, must and should be painful.

"All punishment in itself is evil," Jeremy Bentham declared, precisely because it is painful. "It ought only to be admitted in as far as it promises to exclude some greater evil."¹⁰ For the utilitarian, pleasure is good; pain is evil, plain and simple. Accordingly, society rationally only inflicts pain to prevent greater pain, by deterring others, incapacitating or reforming the dangerous offender, all for the public good. Therefore, utilitarians firmly believe society must never inflict pain for the sake of the past. Dead victims cannot be brought to life; they are beyond all feeling.

"The end of punishment, therefore, is no other, than to prevent others from committing the like offense," declared Cesare Beccaria.¹¹ *An Essay on Crimes and Punishments*, first published in 1769 in Britain and 1773 in America,¹² set the perspective of America's founding generation on punishment. "Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal."¹³

Beccaria resolutely rejected the death penalty. His *Essay* remains the greatest abolitionist tract ever written in the West. But while rejecting all gratuitous pain and suffering, Beccaria held that we ought to consciously inflict painful bodily punishments upon criminals who have intentionally and gratuitously hurt their victims. "When robbery is attended with violence . . . corporal punishment should be added to slavery."¹⁴ Thus Beccaria, too,

8. *Id.* at 947.

9. H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 4 (1968).

10. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. 1996) (1789).

11. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 51-52 (1788).

12. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 6 (Adolph Caso ed., Intl Pocket Lib. 1992).

13. See BECCARIA, *supra* note 11, at 51.

14. *Id.* at 87.

embraced non-lethal but physically painful punishment calibrated to produce the best effects.

Retributivists reject utilitarianism. We make covenants with the past, feeling obliged to respond on behalf of the dead victim. Retribution persists as punishment's essential measure, justification, and limit. Naturally grateful, we reward those who bring us pleasure. Instinctively resentful, we punish those who cause us pain. Retributively, society intentionally inflicts pain and suffering on criminals because they deserve it, but only to the extent they deserve it.

The basic retributive measure of pain—like for like—“as he hath done, so shall it be done to him,”¹⁵ “giving a person a taste of her own medicine; fighting fire with fire”¹⁶ primally satisfies. Beccaria, as well, called for like-kind punishment as a response to crime.¹⁷ Having the punishment resemble the crime better deters would-be criminals by creating this association of ideas. Retributivists, however, would connect the criminal's attitude while committing a crime along with the suffering victim's experience to that criminal's later painful experience of punishment. In short, for the sake of justice, we would connect crime to punishment.

Critics commonly equate retribution with revenge—disparaging “an eye for an eye” as barbaric. But retribution is not simply revenge. When a regime decimates a family or community for the despicable acts of a single member, they exact revenge, but hardly respond with retributive justice. Revenge may be limitless, much more than deserved, even misdirected at the undeserving. Retribution, a painful measure, however, must be limited and in its more mature measurement, proportional—no more (or less) than deserved. The Biblical “eye for an eye,” originally understood as no more than an eye for an eye, exemplifies retribution as a restriction on pain as much as justification of punishment.

Thus, we reject even a painless execution for simple robbery, no matter how effectively it might deter other would-be robbers, insisting it would be cruel and wildly disproportionate to the moral gravity of that crime. Similarly, we might also insist that a painless death for a mass-murdering rapist child killer, so much less than deserved and thereby inhumane, would again be wildly disproportionate to the gravity of the crime.

15. *Leviticus* 24:19.

16. Colloquial.

17. BECCARIA, *supra* note 11, at 87.

Collectively, then, retributivists disregard punishment's future costs or benefits, resting justice—limited, proportional punishment—exclusively on a criminal's past moral culpability. They dismiss the cry of contemporary utilitarians who declare it “irrational” to cry over spilt blood and rebut the challenge that certain punishments are pointless—“what good will it do to inflict more pain”—as beside the point. Justice, a moral imperative in itself, requires deserved punishment. And punishment requires pain.

How the past matters fundamentally divides utilitarians from retributivists to this day. Together, however, we all oppose gratuitous pain and suffering—whether because it's inefficacious or undeserved.

II. THE MODERN TRANSFORMATION OF PAINFUL PUNISHMENT

Although the Old Testament explicitly calls for painful execution by stoning and burning, an amicus brief by the American Association of Jewish Lawyers and Jurists submitted to the Supreme Court in *Baze* insisted that the Talmud commits the authorities to the least painful and most certain execution possible:

2000 years ago the rabbis of the Talmud agreed that notwithstanding the apparent literal meaning of the Biblical text, execution must be carried out as painlessly as possible. The relevant passages from the Talmud demonstrate that the rabbis sought—with the scientific knowledge and means available to them in their time—to formulate the quickest, least painful, and least disfiguring methods of execution that the technology of the day would allow within the framework of Biblical texts.¹⁸

The amicus further assured the Court that this Judeo-Christian tradition “known to the Framers of the Constitution and to the draftsmen of the Eighth Amendment,”¹⁹ supports an originalist, as well as contemporary, rejection of all execution methods that unnecessarily risk avoidable pain.

Unfortunately, the authors of the brief cherry-picked their sources, ignoring passages that clearly rebutted this claim. *Tractate Sanhedrin* 81a states that “[h]e who incurs two death penalties imposed by Beth Din [the Court] is executed by the severer. If he committed one sin for which a twofold death penalty is incurred,

18. Brief for American Association of Jewish Lawyers and Jurists (“AAJLJ”) as Amicus Curiae Supporting Petitioners, *Baze v. Rees*, No. 07-5439, 2008 WL 1733259 (U.S. Apr. 16, 2008).

19. *Id.* at 3-4.

he is executed by the severer”²⁰ *Tractate Sanhedrin* 49b states that “[s]toning is severer than burning, since thus the blasphemer and the idol-worshipper are executed.”²¹

Plainly, contrary to the amicus brief, the Talmud repeatedly calls for executions deservedly more painful than necessary, and far from “virtually certain” to be “instantaneous.”²² True, scholars interpreting Biblical text two thousand years ago did reject even more painful drawn-out tortuous deaths—whether by burning flame, or pelting small stones, and the rabbis did derive limits to how much the condemned should suffer from the Biblical commandment “[y]ou shalt love thy neighbor as yourself.”²³ But while the Talmud *limits* bodily pain, it hardly eliminates all technologically avoidable physical pain and suffering. The authors understood the difference in suffering among execution methods, and deemed more painful methods to be more appropriate in some cases. This not only refutes the amicus brief’s thesis, as a measure of punishment, it embraces retribution while rejecting the disproportionality of crude revenge.

Only relatively recently, in the past few centuries, did punishment morph into something which denies its own nature. The Enlightenment celebrated the pursuit of personal liberty as life’s central purpose. How rational, then, to calibrate punishment—not by inflicting physically painful sensations, but instead by depriving a person of liberty, matching units of time spent in prison to the seriousness of crime. Foucault clearly saw this: “[o]ne no longer touched the body, or at least as little as possible, and then only to reach something other than the body itself.”²⁴

Colonial Americans participated in this transformation. Continuing traditions from Jewish, Roman, and English law, Americans at first adopted different execution procedures to correspond to more or less serious capital crimes. “The aggravated death sentence for particularly egregious murder,” Stewart Banner informs us, “was to gibbet the body: leave it suspended in chains in an iron cage where the birds could pick at it.”²⁵ In the very worst cases of murder during the nineteenth century, the body of the condemned

20. BABYLONIAN TALMUD, TRACTATE SANHEDRIN 81a 537 (Soncino ed., 1961).

21. *Id.* at 49b 332.

22. See Brief for AAJLJ, *supra* note 18, at 9.

23. *Leviticus* 19:18.

24. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 11 (Alan Sheridan trans., 1979).

25. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 74 (2002).

would be dissected, thus “signifying that some murderers deserved a greater punishment than others.”²⁶

James Madison declared to the first Congress, “[w]e ought to proportion the terror of punishment to the degree of the offense,” supporting dissection, while rejecting torture by proposing the Eighth Amendment.²⁷ Capital punishment, then, was “a spectrum of penalties”—some more psychologically painful in contemplation than others—“providing government officials with gradations of severity above and below ordinary execution.”²⁸

In the early decades of the new republic, progressive Americans embraced a new approach to punishment, “based on the conviction that crime was more like disease than like sin.”²⁹ Scientific determinism challenged free will along with the retributive basis for punishment.³⁰ Treatment replaced punishment as the enlightened response to crime.³¹ The nineteenth century saw a rising middle class with a new “aversion to the sight of death. Disease and dying moved away from the homes into hospitals. Cemeteries moved away from urban areas to garden-like spots far from living people.”³² Only the “vulgar mob” enjoyed watching the infliction of pain.³³

The invention of anesthesia in the nineteenth century recast pain itself as largely avoidable.³⁴ New technologies emerged, allowing the state to adapt therapeutic methods, such as electric baths, into painless instruments for killing.³⁵ Electrocution and gas replaced hanging, by and large to avoid pain.³⁶ Then, lethal injection replaced them both, to end all pain, even in the punishment of death. Executions became more mechanical, more impersonal, transformed into hidden, professionally administered events “in small indoor spaces in remote state prisons.”³⁷

At every opportunity we banish pain from our sight; we professionalize and bureaucratize its infliction in private settings. Pain,

26. *See id.* at 78.

27. *See id.*

28. *See id.* at 86.

29. *See id.* at 120.

30. *See id.*

31. *See id.* at 120-21.

32. *Id.* at 153.

33. *See id.*

34. *See id.* at 170.

35. *Id.* at 178.

36. *Id.*

37. *Id.* at 207.

and with it punishment itself, became an abstraction; its intentional infliction is a sight and act to be avoided, a source of shame.

With the decline of public executions (and lesser punishments), and the rise of prisons run by professional bureaucrats, punishment “become[s] the most hidden part of the penal process,” Foucault observed.³⁸ “[I]t leaves the domain of more or less everyday perception and enters that of abstract consciousness.”³⁹ Of course, initially, with harsh prison conditions and enforced isolation, neither society nor the prisoner could clearly distinguish physical from psychological pain. But, in the modern era of the bureaucratic prison, with corrections officers whose official mission was safety and security but not punishment, as Foucault sums it up, “[p]hysical pain, the pain of the body itself, is no longer the constituent element of the penalty. From being an art of unbearable sensations punishment has become an economy of suspended rights.”⁴⁰ These days, inside prisons, punishment has become largely the economy of suspended privileges.

The legal culture seems to accept this evolution as necessary and inevitable, but it could have been, and it still can be, otherwise.

III. *BAZE V. REES*: ORAL ARGUMENT OR AGREEMENT?

While opponents constitutionally challenged almost every aspect of capital punishment during the past several decades, more than a century had passed since the U.S. Supreme Court last specifically confronted the constitutional issue of death as painful punishment. With a moratorium restraining states from executing anyone, and all parties commanded not to question the constitutionality of the death penalty itself,⁴¹ the Supreme Court finally seemed ready to discuss the issue of painful punishment.

During oral arguments in *Baze*, counsel and the Justices sometimes disagreed about the constitutionally permissible risks of a painful death. Other times, they argued about the Constitutional appearance of a painful death. Or, they sparred over the constitutional right to inflict an unintended but unnecessarily painful death. Whether intentionally, apparently, or probably—the punishment of painful death for once seemed to have grabbed the Court’s attention.

38. See FOUCAULT, *supra* note 24, at 9.

39. *Id.*

40. *Id.* at 11.

41. See *Baze v. Rees*, No. 07-5439, 2008 WL 1733259 (U.S. Apr. 16, 2008).

During oral arguments, however, everybody assumed without discussion that less painful punishment becomes, thereby, more humane. Can punishment be so inadequate as to fail the victims, or their surviving loved ones? Can a painless death be inhumane, precisely because it was painless? Sometimes we can better understand an era by focusing less on its leading controversies and more by unearthing in its silence deeply embedded assumptions that no leader thought to challenge.

In *Baze*, what nobody argued most reveals the deeper significance of the oral argument. Although everybody consciously assumed that capital punishment itself was constitutional, obscured from consciousness, without discussion or contention, everybody also assumed that no state would intentionally inflict a painful death. Counsel for the condemned, the State, the United States, and the Supreme Court Justices themselves—all seemed to take it as given that wherever practical, human dignity always supports the least painful punishment.

Chief Justice Roberts questioned Donald Verilli, counsel for the condemned, “I thought your expert agreed that if the two grams of sodium pentothal is properly administered . . . in virtually every case there would be a humane death.”⁴² Counsel readily concurred with the Chief Justice—a massive dose of barbiturate properly administered would ensure a painless and therefore humane punishment of death.⁴³ “It seems to me that it couldn’t be cruel and unusual punishment, because there is no pain.”⁴⁴ Arguing later for a lethal dose of anesthetic alone with no paralytic agent or heart-stopping lethal potassium, Verilli repeated, “if it doesn’t cause pain it can’t be a cruel and unusual punishment.”⁴⁵ The Chief Justice during oral argument and again in his plurality opinion, simply equated without discussion “painless” with “humane.”⁴⁶

“Where does that come from, that you must find the method of execution that causes the least pain?”⁴⁷ protested Justice Scalia, to the counsel for the condemned. “We have approved electrocution. We have approved death by firing squad. . . . Where does this

42. See Transcript of Oral Argument at 4, *Baze v. Rees*, No. 07-5439, 2008 WL 1733259 (Apr. 16, 2008) [hereinafter Transcript of Oral Argument].

43. See *id.* at 5.

44. *Id.* at 11-12.

45. *Id.* at 21.

46. “The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today’s consensus on lethal injection.” *Baze*, 2008 WL 1733259, at *16.

47. See Transcript of Oral Argument, *supra* note 42, at 21.

come from, that in the . . . execution of a person who has been convicted of killing people we must choose the least painful method possible?"⁴⁸

Justice Scalia had come close to surfacing the buried issue: could a state today continue Biblical, Talmudic, Roman, English, and American traditions by consciously selecting and calibrating a method of painful execution? If only the Justice's righteous indignation had moved him at that moment to ask the question slightly differently: where does it come from that in the execution of a person who has been convicted of killing people painfully, we must choose the least painful method possible? Adding "painfully" would have forced the retributive question by implication. May the people respond to consciously inflicted physical pain with consciously inflicted physical pain? While rejecting torture as the Eighth Amendment commands, may we consciously, retributively calibrate pain to respond as deserved? By omitting the word "painfully," Scalia's question obscures the deepest retributive issue, instead making it appear solely as a question of a state's right to reject untried or inefficient-although-less-painful options.

The opportunity seemingly passed unnoticed, but later sparked again with counsel insisting that preventing the risk of excruciating pain from a botched execution would have been a "core concern of the Eighth Amendment at the time of its ratification."⁴⁹ "No, I don't agree with that," Justice Scalia shot back. "The concern was with torture, which is the intentional infliction of pain [T]he three-quarters of the States that have the death penalty, all except one of whom use this method of execution, they haven't set out to inflict pain."⁵⁰ And what if a state had consciously capitally punished, not penalized but punished the aggravated murderer with a painful death? The question went unasked. Oral argument in *Baze* turned into silent agreement. It takes a very sophisticated fish to know that it's wet.

Unquestionably, the U.S. Constitution precludes deliberate torture as punishment. But torture is not, as Justice Scalia insisted, simply "the intentional infliction of pain." The dictionary defines "torture" as "the infliction of intense pain to punish, coerce, or afford sadistic pleasure."⁵¹ As punishment, torture requires intentional pain above a certain threshold, inflicted from a motive of

48. *Id.*

49. *Id.*

50. *Id.* at 21-22.

51. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 7, at 1246.

revenge. As we have seen, retribution contrasts sharply with revenge.

Thus, it simply begs the question to assert that intentionally inflicting severely painful punishment automatically becomes torture and inhumane. Retributively deserved painful punishment, not amounting to mere revenge, does not necessarily constitute torture. Torture may include the intentional infliction of pain, but so does verbal insult, a slap in the face, prison, fines, punitive damages, and a host of other responses nobody would consider torture. If punishment itself, by definition, essentially requires the intentional infliction of pain, then according to Justice Scalia's broad definition, all punishment is torture and unconstitutional.

Justice Scalia's apparent support for a state's right to adopt an execution protocol risking painful death seemed to imply that they may not impose it by design. States using lethal injection "haven't set out to inflict pain," the Justice continued. "To the contrary, they have introduced it presumably because they, indeed, think it's a more humane way, although not one that is free of all risk."⁵²

Counsel for the condemned, however, countered that beyond a certain probability threshold, the Constitution limited risking "unnecessary pain."⁵³ "No . . . unnecessary and wanton," Justice Scalia corrected, returning to motive. "[U]nnecessary and wanton infliction of pain."⁵⁴ The dictionary defines "wanton" as "immoral, senseless, unjustifiable, recklessly disregarding of justice or decency."⁵⁵ If Justice Scalia was correct, and only wanton unnecessary pain was prohibited, it would beg the question to characterize all purposefully painful punishment as wanton. Such pain would be intentionally but not recklessly inflicted, and would only be wanton if it were unjustified.

This and other similar exchanges ended inconclusively with counsel emphasizing the real risk of pain so excruciating to the condemned as to amount to torture per se, separate from the state's motive.⁵⁶ Scalia, the Justice who had nearly surfaced the question by linking torture to penological motive, then buried it by broadly defining "torture" as painful death intentionally inflicted, while assuming that no state's current lethal injection protocol intentionally inflicted such a painful death. Thus, their exchange col-

52. Transcript of Oral Argument, *supra* note 42, at 22.

53. *Id.* at 23.

54. *Id.* at 22.

55. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 7, at 1330.

56. Transcript of Oral Argument, *supra* note 42, at 24-25.

lapsed upon unchallenged common ground that the Constitution permitted a risk-free punishment of painless death, while it forbade the intentional infliction of painful death.

A. *Baze v. Rees*

Three months after this joust, the Supreme Court finally decided *Baze v. Rees*. The Court split, 7-2, permitting Kentucky, and other states, to continue using a three-drug protocol, thereby risking and masking an unintentionally painful execution.⁵⁷ As in oral argument, the Justices never seemed to contemplate, much less discuss, whether justice itself might sometimes actually require imposing a painful death.

Justice Stevens alone, finally revealing himself as an abolitionist, suggested that too little pain might undermine capital punishment's retributive function, thus eliminating its "primary rationale" and only possible constitutional justification.⁵⁸ "[B]y requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim,"⁵⁹ he observed. "This trend, while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution rationale is based."⁶⁰

In his concurrence, Justice Scalia struck back derisively:

The infliction of any pain, according to Justice Stevens, violates the Eighth Amendment's prohibition against cruel and unusual punishments, but so too does the imposition of capital punishment without pain because a criminal penalty lacks a retributive purpose unless it inflicts pain commensurate with the pain that the criminal has caused. In other words, if a punishment is not retributive enough, it is not retributive at all. To state this proposition is to refute it, as Justice Stevens once understood. "[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death."⁶¹

57. *Baze v. Rees*, No. 07-5439, 2008 WL 1733259 (U.S. Apr. 16, 2008).

58. *Id.* at *24 (Stevens, J., concurring).

59. *Id.*

60. *Id.* at *24.

61. *Id.* at *30 (Scalia, J., concurring) (citing *Gregg v. Georgia*, 428 U.S. 153, 184 (1974)).

This classic quote from *Gregg*'s plurality opinion, in which Justice Stevens concurred, does not really refute Justice Stevens, nor does it fully engage the issue. If *Gregg* had declared that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of a "painful" death, then the contradiction would be unavoidable. But Justice Scalia had a point: given the alternative—life in prison with its many privileges, satisfactions, and reliefs—even a painless death might more nearly approach true retribution, although neither a pain-free death, nor a privileged prison life achieved real justice.

While Justice Stevens, alone, acknowledged that intentionally sparing the condemned all pain in dying would undermine retributive justice, Justice Thomas, alone, acknowledged the possibility that a state might intentionally inflict a painful death. "A method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain."⁶² Justice Thomas reviewed horrific methods of execution the founding generation had definitely prohibited by the Eighth Amendment, concluding "they were purposely designed to inflict pain and suffering beyond that necessary to cause death."⁶³ With no discussion of the inextricable connection between punishment and pain, the Justice declared flatly: "[t]he evil the Eighth Amendment targets is intentional infliction of gratuitous pain."⁶⁴ Everything else was permitted, including easily avoidable risks of gratuitous pain, and reckless pain, haphazardly inflicted.

Not for a moment did Justice Thomas so much as consider whether the intentionally inflicted painful death could ever be deserved. To the contrary, "[b]ecause Kentucky's lethal injection protocol is designed to eliminate pain rather than to inflict it," he concluded, "petitioners' challenge must fail."⁶⁵ The rest of the Court remained silent, content to simply equate humaneness with painlessness, and debate the constitutional limits of *risking* a painful death through a botched execution.

62. *Id.* at *32 (Thomas, J., concurring).

63. *Id.* at *33 (Thomas, J., concurring).

64. *Id.* at *35 (Thomas, J., concurring).

65. *Id.* at *39 (Thomas, J., concurring).

IV. NEBRASKA OUTLAWS THE CHAIR

Many lethal injection states kept the electric chair as an option for those originally sentenced to die that way.⁶⁶ Nebraska, however, was the last state to designate electrocution as its exclusive method of execution.⁶⁷ On February 8, 2008, Nebraska's State Supreme Court in *Nebraska v. Mato* held the electric chair unconstitutionally cruel and unusual, in violation of the state constitution.⁶⁸

Nebraska had argued that the condemned "must show that the Legislature intended to inflict unnecessary pain or a lingering death."⁶⁹ Not so, the majority countered. There is "[n]o requirement to show [the] legislature intended to cause pain or lingering death."⁷⁰ At most "a prisoner must show two things: that there is a significant risk of unnecessary pain during the execution and that prison officials have been deliberately indifferent to that risk in developing an execution protocol."⁷¹

But even the state's indifference to a risk of pain was too much to require before outlawing an execution method. The constitutional prohibition of "wanton" pain in punishment required no culpable attitude at all, the Nebraska high court flatly declared, holding the state strictly liable for risks of unnecessary pain.⁷² "[W]anton means that the method itself is inherently cruel. We believe that if a prisoner were required to show a legislature's malicious intent in selecting a method of punishment, . . . [no court] would ever find any punishment to be unconstitutional."⁷³

In the fastidious newspeak of today's painless punishment, the court assumed, without question or analysis, that the people's representatives would never in anger or from moral conviction intentionally inflict pain and suffering on a mass-murdering, sadistic child killer. For the Nebraska Supreme Court, such purposeful painful death would automatically constitute "malicious intent."⁷⁴

66. See TRACY L. SNELL, CAPITAL PUNISHMENT 2005, BUREAU OF JUSTICE STATISTICS BULLETIN (U.S. Dept. of Just. Dec. 2006) (Table 2: Method of Execution, by State, 2005).

67. *Id.* Seven states allow at least some inmates to choose the electric chair instead of lethal injection. Two other states, Illinois and Oklahoma, have designated electrocution as the fallback method should lethal injections be ruled unconstitutional. *Id.*

68. See *Nebraska v. Mata*, 745 N.W.2d 229 (Neb. 2008).

69. *Id.* at 265.

70. *Id.*

71. *Id.* (citing *Lambert v. Buss*, 498 F.3d 446 (7th Cir. 2007)).

72. *Id.* at 265.

73. *Id.*

74. *Id.*

Thus, "presum[ing] that the Legislature intended to select an execution method within constitutional bounds" the court "conclude[d] that whether the Legislature intended to cause pain in selecting a punishment is irrelevant to a constitutional challenge."⁷⁵

Taken literally, this last declaration seems to show the court's complete disregard of any state's intention to inflict pain. Understood in context, however, it shows just the opposite. Even unintentional infliction of pain could not be justified, precisely because the state's intentional infliction of pain was unthinkable, inhumane, and unconstitutional.

"Besides presenting a substantial risk of unnecessary pain, we conclude that electrocution is unnecessarily cruel in its purposeless infliction of physical violence," the court concluded. This again begged the question:⁷⁶ what if violence had a purpose? Perhaps the condemned deserved it; perhaps it was necessary and just.

Upholding Utah's firing squad in 1879, the U.S. Supreme Court famously declared it "safe to affirm" that the 8th Amendment forbade "punishments of torture . . . and all others in the same line of unnecessary cruelty."⁷⁷ Repeating this while upholding electrocution in 1890, the Court in *Kemmler* had prohibited a "lingering death."⁷⁸ One hundred eighteen years later, outlawing electrocution, the Nebraska court specifically held that fifteen to thirty seconds of intense pain was unconstitutionally lingering.⁷⁹ They also cited "a lingering odor of burning flesh in the death chamber."⁸⁰ What must not linger? The experience of pain to the condemned? The biological process of dying, separate from the conscious experience of any pain? Or, perhaps the victim's apparent suffering must not linger in the memory of those witnessing it.

In sum, the Nebraska court held that separate from preventing a risk of pain and suffering as he died, the state must minimize "physical violence and mutilation of the prisoner's body," whether or not intentional, whether or not the prisoner was conscious.⁸¹ Thus, the Nebraska court located cruelty not only in the experience of the condemned, but also in the appearance of dying painfully, and the lingering after effects on the witnesses.

75. *Id.* at 266.

76. *Id.* at 278.

77. *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879) (emphasis added).

78. *In re Kemmler*, 136 U.S. 436 (1890).

79. *Mata v. State*, 745 N.W.2d 229, 272 (Neb. 2008).

80. *Id.* at 269.

81. *Id.* at 266.

V. BECCARIA AND *BAZE*

A month before Nebraska outlawed its electric chair, in oral arguments in *Baze*, the Justices of the U.S. Supreme Court also wrestled with lingering appearances and realities. Whereas the Nebraska high court cited scientific evidence that dying contractions or quivers in the chair might well indicate excruciating and unconstitutional pain, with lethal injection, the anesthetic when properly injected renders the condemned unconscious and impervious to all pain.⁸² Dying quivers that those chemicals produced would falsely appear painful, while in no way symptomatic of a painful death. On the other hand, if the state improperly administered an anesthetic, and followed it with a paralytic agent painful in itself, this combination would produce but mask real pain and suffering which the condemned, now paralyzed, would experience but could not publicly express.⁸³ He would die *apparently* peacefully while *really* suffering.

Twenty-five hundred years ago, the sophists insisted that appearance was reality. Rejecting this, Plato emphasized the reality beneath appearances.⁸⁴ Oddly, much of the controversy over painful punishment replays this ancient controversy: the debate today revolves not only around how the condemned actually experiences his painful punishment, but also how the pain appears to the observer. When it comes to lethal pain and suffering, must appearance match reality? Does the Constitution demand truth in dying? Nothing could be more perverse and unjust to a true utilitarian than pancuronium causing the condemned to suffer an agonizing death, all the while appearing peaceful.

Classic utilitarians insist that rationally structured punishment should most effectively deter others while least injuring the criminal by appearing much more painful than it feels. Thus, Beccaria thoroughly rejected capital punishment itself, embracing instead

82. See Brief for the American Society of Anesthesiologists as Amicus Curiae Supporting Neither Party at 5, *Baze v. Rees*, No. 07-5439, 2008 WL 1733259 (U.S. Apr. 16, 2008) ("There is no medical dispute that a massive or superclinical dose of thiopental (as those being considered by the courts), if effectively delivered into the circulation, will reliably produce prolonged and deep unconsciousness.").

83. See generally Brief for Anesthesia Awareness Campaign, Inc. as Amicus Curiae Supporting Neither Party at 4-6, *Baze*, 2008 WL 1733259 (describing anesthesia awareness, the phenomenon of being mentally alert while supposedly being under full anesthesia, and how the use of neuromuscular blockers make it impossible to signal their awareness).

84. See, e.g., PLATO, PHAEDO (R. Hackforth trans., The Liberal Arts Press 1960) (1952) [hereinafter PLATO, PHAEDO]; PLATO, THE REPUBLIC OF PLATO (Allan Bloom trans., Basic Books 2d ed. 1968).

life in prison, hard labor, or "slavery," as "more terrible to the spectator than to the sufferer himself."⁸⁵ We do well, utilitarians insist, to perpetuate the myth of prison, and death row as "living hell." Imagining prison life as intolerably harsh, law abiding citizens would project their own delicate sensibilities into a hardened criminal. "For the spectator considers the sum of all his wretched moments," Beccaria explained, "whilst the sufferer, by the misery of the present, is prevented from thinking of the future."⁸⁶ All evils are increased by the imagination," he continued, "and the sufferer finds resources and consolations, of which the spectators are ignorant, who judge by their own sensibility of what passes in a mind, by habit grown callous to misfortune."⁸⁷

Punishment, then, should never be more painful than it appears. To the contrary, all punishment, including death, should appear much more painful to observers than it feels to criminals, because as Beccaria explained, "the severity of punishment [is] intended more for them than for the criminal."⁸⁸

The state's good motives, to spare witnesses discomforting appearances, may justify risking actual pain to the condemned, explained Chief Justice Roberts for the plurality in *Baze*, upholding Kentucky's right to administer the paralytic agent precisely because the state has "an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress."⁸⁹

While opponents of the paralytic agent would tolerate falsely painful appearances, as a price worth paying for a guaranteed painless, although extended, death, the Chief Justice insisted that "dignity" might justify a real risk of painful death in order to avoid a messy looking painless one. This would have seemed very strange to Beccaria.

Classic utilitarians sought false appearances of pain: "*The degree of the punishment and the consequences of a crime, ought to be so contrived, as to have the greatest possible effect on others, with the least possible pain to the delinquent.*"⁹⁰ Bentham took the appearance-reality gap to its logical conclusion, proposing that the gov-

85. BECCARIA, *supra* note 11, at 109.

86. *Id.*

87. *Id.*

88. *Id.* at 107.

89. *Baze v. Rees*, No. 07-5439, 2008 WL 1733259 at *13 (U.S. Apr. 16, 2008).

90. BECCARIA, *supra* note 11, at 79.

ernment stage phony hangings, actually sparing the condemned.⁹¹ Let the public be conned.

Perversely, with too little barbiturate injected initially, the paralytic agent will cause the very agony it obscures.⁹² Rather than seem worse than it feels, botched executions may feel much worse than they seem. Thus, today's utilitarians, following Beccaria and Bentham, should relentlessly attack the current regime.

Witnesses whom the Chief Justice would protect from false appearances of pain would usually include victims' family members choosing to watch their loved-ones' killer die, probably deriving comfort from believing, however falsely, that their child's rapist murderer died a painful death. If we give greater priority to victim's survivors than other witnesses, we might owe them real solace from the killer's apparent suffering.

And what of the victim himself? Suppose retributivists commit themselves to keep covenants with the past. As Adam Smith points out, we place ourselves in the dead victim's shoes, imagining his righteous satisfaction at witnessing his murderer's fate.⁹³

Ultimately, then, for retributivists, false appearances will not do. By tradition, retributivists believed that Socrates, wrongly condemned, at least died painlessly by hemlock. Now scientists inform us that hemlock contains properties similar to pancuronium,⁹⁴ leaving us pained to contemplate that this great and good man may have died in an agony obscured from his disciples. Ironically, for all his faith in a knowable objective reality underlying appearance, Plato himself, may have been deceived here by the apparent serenity of his beloved mentor's death.⁹⁵

The paralytic agent should not be employed to mask pain; neither should the initial anesthetic alone be allowed to produce its false appearance. If a killer deserves a quick but painful death, we deserve the satisfaction of knowing he experiences it. If most con-

91. See generally JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM: PRINCIPLES OF PENAL LAW* pt. II, bk. I, ch. V (William Tait ed., 1843), available at <http://oll.libertyfund.org/title/2009/139816>.

92. See Brief for the American Society of Anesthesiologists, *supra* note 82, at 6-7.

93. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 82 (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759).

94. See Thomas Laarson, *Some History and Effects of Conium Maculatum L* (Uppsala Univ. 2004) at 25, available at http://www.fkog.uu.se/course/essays/conium_maculatum.pdf (describing effects of hemlock); J. Higa de Landon, *Conium Maculatum L* (Univ. of Buenos Aires), <http://www.inchem.org/documents/pims/plant/conium.htm> (last visited May 7, 2008) (describing effects of hemlock).

95. See PLATO, *PHAEDO*, *supra* note 84 (compare this description with that cited in footnote 94).

demned killers deserve to die, but without pain, we commit a great injustice by creating false appearances that obscure their wrongly inflicted, unjustly suffered pain.

VI. "THIS IS AN EXECUTION, NOT SURGERY"⁹⁶

Lethal injection's most pernicious false appearance of all, what condemns it if nothing else does, is the medical illusion. Through painstaking research, repeatedly cited by the Supreme Court in *Baze*,⁹⁷ Professor Deborah Denno has unmasked recent tradition, forcing the origins of this execution method into conscious memory.⁹⁸ Haphazardly conceived and hastily designed by two Oklahoma doctors under pressure to suggest a "medically humane,"⁹⁹ aesthetically pleasing method of killing, lethal injection so nearly resembles a medical procedure that controversy swells today whether doctors and other trained medical personnel are necessary and proper for painless executions.¹⁰⁰

During oral argument in *Baze*, the state conflated punishment with medicine: "Kentucky uses what is probably literally the best qualified human being in the Commonwealth," insisted Roy Englert, counsel for the state.¹⁰¹ "It uses a phlebotomist who in her daily job works with the prison population."¹⁰² "It's someone *like* the person who inserts an IV in a *hospital*. The experts in this case all agreed that in a hospital setting IVs are not inserted by medical doctors, they are inserted by phlebotomists."¹⁰³ How perversely ironic, that Kentucky's counsel would employ hospital imagery to prove doctors unnecessary for the first stage of lethal injection.

The American Medical Association officially condemns it, and many physicians agree that doctors who participate in executions violate the Hippocratic Oath to do no harm.¹⁰⁴ A doctor should not medically kill a patient in the service of the state. Some physi-

96. Transcript of Oral Argument, *supra* note 42, at 16.

97. See generally *Baze v. Rees*, No. 07-5439, 2008 WL 1733259 (U.S. Apr. 16, 2008).

98. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Diminished the Death Penalty*, 76 FORDHAM L. REV. 49 (2007).

99. *Id.* at 59.

100. *Id.* at 65-66, 84-88.

101. Transcript of Oral Argument, *supra* note 42, at 27.

102. *Id.*

103. *Id.* at 28.

104. AM. MED. ASS'N., CODE OF MEDICAL ETHICS, E-2.06: CAPITAL PUNISHMENT, http://www.ama-assn.org/apps/pf_new/pf_online (enter "e-2.06" into "Enter search term" field and click on "Search", follow "E-2.06 Capital Punishment" hyperlink) (last visited May 7, 2008).

cians counter that as long as the state will kill the condemned anyway, a trained physician should mercifully diminish his suffering. "I argue that it is honorable for physicians to minimize the harm to these condemned individuals and that organized medicine has an obligation to permit physician participation in legal execution," Doctor David Waisel insisted in a recent exchange.¹⁰⁵ "By participation, I mean to the extent necessary to ensure a good death."¹⁰⁶ "Physicians are permitted to let people die," Waisel observed, "such as in the withdrawal or withholding of care. Physicians are even permitted to be a proximate cause of death, in the sense that sometimes the medications needed to treat pain and discomfort unintentionally hasten death."¹⁰⁷

Unintentionally? Too many of us have gone through it: family members riddled with inoperable terminal cancer, wracked with pain, grieving loved ones suffering with them, finally helped to die by morphine drip at a hospital or hospice. Medical personnel clinically justify this lethal dose as the least necessary to ease the patient's excruciating pain and suffering. But make no mistake about it: these angels of mercy—doctors and nurses—through an IV line, knowingly administer that lethal dose of painkiller.

Here, medical personnel have acted in the best interests of the patient and family. With execution by lethal injection, however, Dr. Waisel observed that we may "legitimate[ly] question whether the physician is acting as a tool of the individual [patient] to minimize suffering and further [the patient's] goals or whether the physician is acting as a tool of the government to ensure a successful execution."¹⁰⁸

Historically, doctors did quarantine infectious patients, depriving them of liberty, perhaps against their individual best interests, but to serve society.¹⁰⁹ "But," Dr. Waisel cautioned, "physician participation in capital punishment provides no societal health benefit."¹¹⁰ Of course, retributivist death penalty supporters profoundly disagree. The health of the body politic fundamentally rests on doing justice. But perhaps we stray here from the medical to the metaphorical.

105. David Waisel, *Physician Participation in Capital Punishment*, 82 MAYO CLINIC PROC. 1073 (2007).

106. *Id.*

107. *Id.* at 1075.

108. *Id.* at 1076.

109. *Id.*

110. *Id.*

Ultimately, “although the outcome may be death,” Dr. Waisel concluded his analysis, the physician assisting an execution acts “solely to provide comfort.”¹¹¹ Thus, that physician acts not as “a tool of the government; he is acting as a physician whose goals temporarily align with the goals of the government.”¹¹² Once again, the actor’s motive to diminish pain would legitimize the deadly act.

Commenting on this, Dr. Mark Heath, a death penalty opponent and leading anesthesiologist, dissected current lethal injection protocols. Inserting the IV line and introducing the anesthetic do have medical and therapeutic purposes, he observed, but injecting the pancuronium solely “to produce cosmetic paralysis,” and then administering potassium to stop the heart and kill the condemned “are not performed with therapeutic intent” and therefore, “they are not medical procedures.”¹¹³ Thus, he concluded, “lethal injection is concurrently both a medical and a non-medical procedure.”¹¹⁴

Of course, if counsel for the condemned had their way in *Baze*, the Court would have commanded states to discontinue the paralytic agent, along with the heart-stopping potassium, relying on a single lethal dose of the anesthetic thiopental. Then what? “If thiopental were the only drug administered, it would not be serving an anesthetic function; instead,” observed Dr. Heath, “it would be functioning to cause death by apnea.”¹¹⁵

If states were to eliminate the paralytic agent and lethal heart stopper, finding the vein and injecting the deadly dose of anesthetic would now be strictly punitive, and no longer medical. One could argue then, although Dr. Heath does not, doctors would not be necessary. The entire execution procedure would be pure punishment and not medical at all. Arguably, too, doctors could, if they volunteered, properly participate not as doctors, but rather as citizen executioners, just as they could serve on firing squads, because in neither case would they be administering deadly medicine in the name of the state.

States, however, should not allow this. Whether strictly medical or not, lethal injection resembles, appears, feels, and seems medical. Ironically, by eliminating the paralytic agent along with the

111. *Id.* at 1077.

112. *Id.*

113. Mark Heath, *Revisiting Physician Involvement in Capital Punishment: Medical and Nonmedical Aspects of Lethal Injection*, 83 *MAYO CLINIC PROC.* 115, 116 (2008).

114. *Id.* at 115.

115. *Id.* at 116.

heart-stopping potassium—even as we make it non-medical—we make it appear more medical.

We are thrown back, again, to appearances.

“[W]e propose that physicians and their drugs should be physically, philosophically, and symbolically removed from the execution suites,” doctors William Lanier and Keith Berge declared in the Mayo Clinic proceedings, sharply disagreeing with Dr. Waisel.¹¹⁶ “Instead, they should be replaced by personnel and tools that are clearly representative of the legal system and clearly distinguished from representing medical care.”¹¹⁷

“The image of physician as executioner under circumstances mimicking medical care risks the general trust of the public,” the American Medical Association has officially warned, firmly opposing all doctor participation in lethal injections.¹¹⁸ The vast majority of doctors agree.

Are doctors necessarily and properly involved in lethal injection? Can we eliminate pain and the substantial risk of pain with or without physicians and without compromising other values? By demanding doctor participation in order to help ensure a painless death, do we, as the American Medical Association insists, contaminate the public image of medicine?

Opponents rightly reject lethal injection as essentially and symbolically flawed. The condemned dies in a gurney, wrapped in white sheets with an IV in his veins, surrounded by his closest kin, monitored by sophisticated medical devices. The whole setting appears medicinal, although it aims solely to kill. Witnessing Benny Demps’ execution by lethal injection in Florida, I shuddered at my associations with hospital and hospice. How we kill those we rightly detest should in no way resemble how we kill or euthanize beloved parents or pets.

Almost everybody opposes physician participation as either unnecessary or improper. And yet, perhaps because they have unconsciously embraced the ideal of a painless execution, almost everybody looks to medicine for guidance as to how we should execute. In *Baze*, for example, Justice Stevens found the use of pancuronium “particularly disturbing because . . . it serves no ther-

116. William L. Lanier & Keith H. Berge, *Physician Involvement in Capital Punishment: Simplifying a Complex Calculus*, 82 MAYO CLINIC PROC. 1043, 1046 (2007).

117. *Id.*

118. Council on Ethical and Judicial Affairs, American Medical Association, *Physician Participation in Capital Punishment*, 270 J. AM. MED. ASS’N 365, 366 (1993).

apeutic purpose.”¹¹⁹ Citing practices in the Netherlands “where physician-assisted euthanasia is permitted,”¹²⁰ Justice Roberts upheld the use of the paralytic agent.¹²¹ Justice Breyer concurred, also citing Dutch medical practices in assisting suicide.¹²²

Just as we do not look to medical therapists to tell us whom to execute, so too medicine should no more tell us how. Today’s regimen delivers poison to the heart solely to kill the condemned. This last phase clearly constitutes punishment and cannot be confused with medicine. Eliminate that deadly poison, painful in itself, and we obliterate the last clear line between treating the sick and punishing the heinous.

Punishment and medicine should never resemble each other, although in the sixth century B.C., Heraclitus paradoxically observed that doctors cut and burn us and we pay them for it.¹²³ We still conflate the punitive and palliative colloquially when we admonish the brave criminal to “take his medicine.” But now, with anesthesia, medicine need no longer be inherently painful, whereas punishment must be.

Lethal injection, however, unconscionably merges punishment with treatment. It bears re-emphasizing: *How we kill those we condemn should in no way resemble how we kill those we care for.* Doctors should not participate in executions, the standard argument goes, lest the public associate medicine with killing. We, too, condemn lethal injection as a method of execution, not only because it contaminates medicine by apparently employing medicine as punishment, but also because it cosmetizes and contaminates punishment by anesthesically medicalizing it.

After all, as Justice Scalia declared during oral argument in *Baze*, “this is an execution, not surgery.”¹²⁴

VII. CONCLUSION: KILLING THEM SOFTLY

“Can pain, which is a sensation, have any connection with a moral sentiment?”¹²⁵ Beccaria answered “No,” but at least he explicitly raised that question which every official participant in the debate today seems either to miss, assume away, or avoid.

119. *Baze v. Rees*, No. 07-5439, 2008 WL 1733259, at *13 (U.S. Apr. 16, 2008)

120. *Id.* at *14.

121. *Id.*

122. *Id.* at *41 (Breyer, J., concurring).

123. HERACLITUS, HERACLITUS: TRANSLATION AND ANALYSIS 25 § 58 (Dennis Sweet trans., Univ. Press of America, Inc. 1995).

124. Transcript of Oral Argument, *supra* note 42, at 16.

125. BECCARIA, *supra* note 11, at 44.

The vast majority of us would insist that nurses, psychoanalysts, and ministers act morally by alleviating pain. Can we not act morally, also, by inflicting pain? Retributivists say yes.

Most opponents and many death penalty supporters may think it macabre or sadistic ever to advocate painful death, much less to attempt to calibrate it: retributivists may legitimately argue for the punishment of a deserved death, abolitionists may concede, but surely no decent person could urge the painful punishment of dying. Pain and anguish must to some degree accompany punishment, they admit, but humane persons never use physical pain as an instrument of justice.

Emotive retributivists do connect pain with moral sentiments. Pain that the killer intentionally caused the victim later gives us just cause to bring pain upon him: "Retribution" comes from the Latin, literally "pay back."¹²⁶ The dictionary defines retribution as "deserved punishment for evil done, or, sometimes, reward for good done; merited requital."¹²⁷ Pain deserved cannot erase the harm, but it can help restore a balance.

We retributivists understand how appalled others feel to read this, but we, too, feel certain intuitively – not rationally, but really certain. Probably most of humankind shares this moral intuition that punishment must be painful to be punishment, and sometimes too, punishment must be very painful to be just.

If the U.S. Supreme Court someday outlaws pancuronium and potassium, then simply killing by a massive dose of lethal anesthetic would truly emancipate physical pain from punishment. Then it might seem as though Beccaria and other utilitarians, who condemn unnecessary pain, have won. But although Beccaria makes no mention of our rightful satisfaction at doing justice, expiation, or restoring balance to the world, this abolitionist patron-saint affirmatively called for non-lethal, but bodily, painful punishment above prison's total deprivation of liberty. "Some crimes relate to person, others to property," Beccaria declared.¹²⁸ "The first ought to be punished corporally."¹²⁹

Rejecting capital punishment absolutely, Beccaria necessarily rejected a painful punishment of death. He did advocate, however, state-imposed, non-capital, painful punishment as a proper re-

126. See, e.g., MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 7, at 947.

127. *Id.*

128. See BECCARIA, *supra* note 11, at 82.

129. *Id.*

sponse to crime. Consequently, the criminal and society would associate pain with crime and forego criminal temptation.¹³⁰ When the condemned himself has intentionally tortured helpless victims to death, how better to preserve some analogical connection short of torture than by that murderer's quick but painful death?

Of course, as Beccaria observes and Justice Stevens has echoed in *Baze*, a person's capacity to withstand unpleasant sensations limits our capacity to punish: "Ingenious cruelty multiplies the variety of torments, yet the human frame can suffer only to a certain degree, beyond which it is impossible to go, be the enormity of the crime ever so great."¹³¹

The Eighth Amendment outlaws torture as punishment. While pain may be limited by a human being's physical capacity to absorb it, our commitment to human dignity constitutionally limits justifiably painful punishment, to what a humane body politic can bear.

Baze's challenge made it to the U.S. Supreme Court. Michael Morales' stayed lethal injection in California, however, really helped launch this intense scrutiny.¹³² Michael Morales volunteered to do a favor for a cousin, who was jealous of his bisexual lover's girlfriend.¹³³ He carefully planned and rehearsed how to use a belt to strangle Terri Winchell, seventeen, by all accounts a lovely girl, who sang in the church choir and saw the best in people.¹³⁴ But the belt broke as Terri struggled for her life, tearing out her own hair in the process.¹³⁵ So Morales grabbed a claw hammer and beat her twenty-three times, ripping the flesh from her face.¹³⁶ Then, feeling it "a shame to waste a good piece of ass," Morales dragged this beautiful innocent girl, face-down across a road and into a vineyard, where he stripped off her clothing and raped her.¹³⁷ Then he stabbed her four times in the heart, stealing eleven dollars which he spent, celebrating that night on beer, wine, and cigarettes.¹³⁸

130. See *id.* at 79.

131. *Id.* at 102.

132. Louis Sahagun & Tim Reiterman, *Execution of Killer-Rapist is Delayed; Prison Warden Wanted More Time to Train the Doctors Who Were to Monitor the Procedure to Ensure that Michael Morales Felt No Pain*, L.A. TIMES, Feb. 21, 2006.

133. *People v. Morales*, 770 P.2d 244, 249-50 (Cal. 1989).

134. See Sahagun & Reiterman, *supra* note 132; Cal. Office of Victim Servs., *People v. Michael Angelo Morales: Background Information*, Feb. 2006.

135. See Sahagun & Reiterman, *supra* note 132.

136. See *Morales*, 770 P.2d at 270.

137. See Kevin Fagan, *Love Triangle Gone Vicious*, S.F. CHRON., Feb. 20, 2006.

138. See *id.*

If lethal injection works as designed, Morales will die painlessly. If the executioners botch it, this sadistic rapist murderer may feel intense pain and burning as the paralytic agent courses through his veins. He will suffer excruciating pain for a couple of minutes, until the potassium stops his heart and kills him.

“Let us consult the human heart and there we shall find the foundation of the sovereign’s right to punish,” Beccaria declared tellingly.¹³⁹ Intuitively and emotionally, we feel certain we have the right, if not the responsibility to painfully punish monsters such as Morales, because they deserve it. We rightly hate, yes hate, Morales and others like him.

Fitzjames Stephen, the great English judge and criminal law historian detested vicious criminals, and declared it “highly desirable” to design punishments “to give expression to that hatred.”¹⁴⁰ Even the great anti-retributivist, anti-pain utilitarian Beccaria, asserts the intuitive basis for punishment. Beccaria claims the right to punish painfully, but appropriately. Moral intuition dictates that some violent criminals deserved violent and painfully inflicted punishment.

Embracing human dignity as their primary value, retributivists like Adam Smith emphasize “a humanity that is more generous and comprehensive,” and “oppos[ing] to the emotions of compassion which they feel for a particular person, a more enlarged compassion which they feel for mankind.”¹⁴¹ Thus, unwarranted “mercy to the guilty is cruelty to the innocent.”¹⁴²

Michael Morales may deserve more than he can physically tolerate. It would violate the Constitution, and our own human dignity, to kill him as painfully as he deserves to die. Would it defile justice and human dignity, however, to intentionally inflict upon him a quick but painful death? Suppose Morales did not intend Terri Winchell’s prolonged suffering before she died. Suppose her feelings never crossed his mind. Callous, cold, wanton, and depraved, he did not care how she felt as he made her suffer a drawn out agonizing death. If Morales acted with such callous disregard, depraved indifference to his helpless victim’s excruciating pain, what poetic justice, at least to risk inflicting a painful death with a “botched” execution, displaying our own deliberate indifference.

Opponents may shrink in horror at these suggestions. But see where their moral logic takes them, and us along with them. Sup-

139. See BECCARIA, *supra* note 11, at 19.

140. See STEPHEN, *supra* note 6, at 82.

141. See SMITH, *supra* note 93, at 104.

142. See *id.*

pose we deny that justice ever requires a quick but painful death. Dr. Waisel, in the Mayo Clinic Proceedings called for physician participation to produce a "good death," by which he probably meant pain-free.¹⁴³ The Jewish Lawyers' amicus brief in *Baze* took it a step further, claiming Talmudic support for "the most beautiful death possible."¹⁴⁴ What could this mean, practically? A recent BBC documentary explored hypoxia: by breathing nitrogen, the condemned would die in a state of euphoria.¹⁴⁵

Why then merely a painless death? Do we owe Michael Morales and other sadistic rapist murderers a "beautiful death," an euphoric death? A Glasgow TV critic called me, "the scariest man I've ever seen on TV," for protesting that painless does not always equal a humane death, and that some people deserve a quick but painful death.¹⁴⁶

In 1972, the U.S. Supreme Court in *Furman*, struck down the death penalty across the U.S. as cruel because states so arbitrarily and haphazardly administered it.¹⁴⁷ Now we more carefully define capital crimes, specifying aggravating circumstances. We also more carefully select and instruct juries to balance the heinous crime against the criminal's tragic upbringing, to reach an informed moral decision as to whether the convicted murderer shall live or die.

When it comes to actually administering death, however, painlessly or not, decades later, arbitrariness continues. Such indifference violates human dignity when exercised indiscriminately. How unjust to equate Daryl Holton, who killed his children painlessly to make certain they would no longer suffer, with sadists like Charles Ng with his friend's basement torture chamber designed to make his victims suffer.¹⁴⁸

If we more nearly matched crime with punishment, we would design a pain-free death for those who killed their victims painlessly, while reserving a painful death for those who sadistically tortured their victims. Between the extremes, psychopaths kill with a

143. See Waisel, *supra* note 105, at 1073

144. See Brief for the AAJCI, *supra* note 18 (quoting Haim H. Cohn, *Capital Punishment*, in *ENCYCLOPEDIA JUDAICA* Vol. 4, 446 (2d ed. 2007).

145. See *Horizon: How to Kill a Human Being* (BBC2 television broadcast Jan. 15, 2008).

146. See David Belcher, *Portillo and the Ultimate Punishment*, *THE HERALD* (Glasgow, Scot.), Jan. 16, 2008, at F2.

147. See *Furman v. Georgia*, 408 U.S. 238 (1972).

148. Dan Barry, *Taking the Guilt out of the Death Penalty*, *N.Y. TIMES*, Sept. 9, 2007; Larry Hatfield, *Ng Jury to Consider Sentence: Found Guilty in 11 Deaths; Jurors Split on Death of S.F. Used Car Dealer*, *S.F. EXAMINER*, Feb. 25, 1999, at A4.

depraved indifference to any pain they might cause. For them and them alone, perhaps, the present lethal injection regime with its real risk of excruciating pain, otherwise easily avoided, may seem an appropriate like-kind response. Of course, as society greatly prefers to acquit the guilty than to convict the innocent, we should err on the side of pain-free executions when we are uncertain what the condemned deserves.

In the modern era, we have been shamed for desiring to inflict pain. We send the condemned to live on death row for decades administered by correction officers who keep things laid back, uniformly disavowing any mission to punish the worst of the worst. Officers and inmates alike consider it bad form, unsolicited, even to mention to the murderer the fate of his victims, to refer to the killings that condemned him to die.

Then, after decades living on death row, when it comes time to execute the condemned, by selecting a supposedly pain-free, bureaucratized ritual, we further disembodied their punishment of death. No photographs or video of the victim appear in the death chamber, no oral recounting of the victim's pain, no mention of the crime during the final execution scene.

In *Panetti*, recently reaffirming that a state may never execute an insane killer, the U.S. Supreme Court insisted that the condemned must be able to connect what he did to what we are about to do to him.¹⁴⁹ Ironically, from condemnation to execution, today's "enlightened progressives" subvert that same concern, by severing crime from punishment, for participants and observers. Finally, we sever punishment from pain, except for botched executions where we keep that connection but make it entirely haphazard, and in no way connected to justice. Refusing even to contemplate intentionally distinguishing those few who deserve to die a quick but painful death, instead states seem quite willing to randomly expose all the condemned to an undifferentiated risk of excruciating pain.

The time has come to reaffirm the inseparable connection of crime with punishment, and punishment with pain. Let us reject our self-administered disembodied anesthetic that saturates the whole process with an abstract sense of shame, and a numbing depersonalized air.¹⁵⁰ Face what we do, and acknowledge, with regret but without shame, that by executing a helpless human being, we keep covenants with the past.

149. *Panetti v. Quarterman*, 127 S. Ct. 2842, 2847 (2007).

150. See ROBERT JOHNSON, *DEATH WORK* (Roy Roberg ed., Brooks/Cole Publishing Co. 1990).

However objectionable in its effect, pancuronium acts as our perfect metaphor: it paralyzes all, severing emotions, severing the crime, disconnecting us from what we do, and why. We cannot see the executioner hidden in his private chamber behind a one-way mirror as he administers the paralytic agent or lethal drug. We disable the condemned from crying out in pain. We cannot hear him, and simply cannot bear responsibility for his death, even as we kill him. Responsibility, anger rests everywhere else.

The paralytic agent paralyzes us. The anesthetic anesthetizes us too.

Solon, the ancient lawgiver, declared that "in a well-governed state, citizens like members of the same body, should feel and resent each other's injuries."¹⁵¹ Yet we kill the condemned without pleasure, or pain, as if we must, without showing what we feel, if we feel at all.

So in the end, again, we retributivists, too, condemn lethal injection as the method of execution, not because it possibly causes pain, but because it certainly causes confusion, arbitrarily merging punishment and treatment, arbitrarily severing crime from punishment, pain from justice.

Justice Stevens had hoped that the Court's decision in *Baze* "would bring the debate about lethal injection as a method of execution to a close."¹⁵² This retributivist hopes that as executions resume and litigation continues, a real debate about pain and punishment may yet begin.

151. Attributed to Solon, the ancient Greek law giver. See ROBERT J. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS: THE GENESIS OF THE LEGAL PROFESSION* 60 (WM. W. Gaunt & Sons, Inc. 1994) (1927).

152. *Baze v. Rees*, No. 07-5439, 2008 WL 1733259, at *21 (U.S. Apr. 16, 2008) (Stevens, J., concurring).