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## Retribution Without Cruelty: The Supreme Court Considers an Eighth Amendment Challenge to Lethal Injections

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Wednesday, May. 17, 2006

On April 26, the U.S. Supreme Court heard argument in [Hill v. McDonough](#). The case involves convicted murderer Clarence Edward Hill's challenge to the constitutional validity of lethal injection ("LI"), the method of execution by which he is condemned to die.

More specifically, the Court will consider whether Hill may bring his challenge to LI as a lawsuit under [42 U.S.C. section 1983](#) - a federal civil rights statute. Hill has apparently used up the more conventional means of challenging his sentence through criminal appeals and petition for habeas corpus, so a Section 1983 claim might be his only chance.

However the Court rules on Hill's chosen approach to challenging his particular sentence, the issue of whether death by lethal injection violates the Eighth Amendment prohibition against cruel and unusual punishments is ripe for decision.

Arguments over the legitimacy of lethal injection, moreover, raise a still more fundamental question of what we mean to do when we "punish" a heinous murderer for his crimes. It is to this latter question that I now turn.

### Lethal Injection: Cruel and Unusual Punishment?

A number of courts around the country have begun to consider challenges to the constitutionality of executing condemned prisoners by the three-drug "cocktail"

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approach to lethal injection. This is the approach used by every one of the overwhelming majority of death-penalty states that have publicized their lethal injection protocols. The three drugs, in theory, anesthetize the target, paralyze his muscles, and stop his heart from beating, in that order.

According to a recently published study of lethal injection in the United States, however, a substantial proportion of prisoners executed by LI have experienced severe and excruciating pain, as well as suffocation, as they died. The new evidence suggests that because non-medical prison employees frequently administer the cocktail ineptly, the anesthesia regularly fails to accomplish its stated goal.

In response to such evidence, a number of judges have demanded that doctors participate in administering LI; a medical presence, judges hope, will assure that the condemned person, in every case, is truly unconscious by the time the lethal drugs begin to take effect.

When the process goes wrong, the prisoner arguably suffers "unnecessary" pain in violation of the Eighth Amendment ban on cruel and unusual punishments.

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To complicate matters further, the American Medical Association (AMA) Code of Ethics prohibits the sort of medical participation in executions that courts have started to demand. As a result, executions - in California and New Jersey, for example, - are delayed, potentially indefinitely, as state officials try mightily to recruit doctors willing to violate the AMA Code and help in administering the death penalty.

This is a growing problem, because every death-penalty state other than Nebraska, thirty-seven in all, executes by lethal injection.

### **How Much Pain is "Unnecessary"**

A tension emerges when one applies the Eighth Amendment ban on cruel and unusual punishments to the death penalty.

On the one hand, the primary purpose of executing a convicted criminal is to make him "suffer" punishment for a heinous crime (typically, murder). If there is no suffering at all, then one could argue that the State has not carried out the retributive goal of criminal justice: visiting upon the condemned his or her "just deserts." If a method of punishment in general (or of execution in particular) is too "humane," in other words, it might fail to fulfill its own *raison d'être*.

On the other hand, existing Eighth Amendment case law does not appear to allow the deliberate infliction of suffering on a criminal, beyond that which is necessary to carrying out the sentence. The typical penalty for crime in the United States, for example, is imprisonment, and imprisonment need not necessarily entail physical suffering.

In point of fact, a prison sentence inflicts terrible pain, not only because taking away a person's liberty is itself a grave deprivation, but also - and very much - because of the cruel and inhumane treatment that inmates receive at the hands of their fellow prisoners. The pervasiveness of sexual assault and rape in prison is so great, in fact, that references to the phenomenon have long represented a staple of stand-up comedy.

Like prison, the death penalty has for a significant period of time carried with it an official requirement of humane treatment. Indeed, many laypersons believe that lethal injection is the most humane method of execution, resembling as it does the way in which people help their loved ones to die (including beloved animal companions as well as human family members, despite the illegality of the latter practice). But the reality of excruciating pain, both psychological and, as it turns out, physical, has - as in the context of imprisonment - defied the theory.

### **What Is Punishment Supposed to Do?**

A major chasm between theory and practice, like the one that characterizes criminal punishments, gives rise to an obvious question: What exactly do we hope to accomplish when we sentence people to prison-time or death as punishment for their crimes?

If the goal were simply to protect society from dangerous people, without inflicting any suffering beyond that incidentally included in effective incapacitation, then the reality of prison rape, prison assault, and execution by suffocation would be inexplicable. It should not be impossible, after all, to prevent prisoners from raping each other, any more than it is impossible to prevent them from escaping.

And if, by contrast, the goal of punishment were instead, openly, to inflict a great deal of pain as retribution for evil conduct, then the suffering would be far more explicit and open: People might, for example, face sentences of beatings or amputations or suffer obviously painful ways of dying, such as beheadings or burnings at the stake.

It seems, however, that in the United States, the suffering inflicted in the process of criminal punishment is both the point of the penalty and a dirty little secret that we prefer not to acknowledge. We thus inflict terrible pain while washing our hands of responsibility for it. We do this by engaging in what one might call "deliberate ignorance."

We do not officially sentence people to rape or assault - in fact, if a state official such as a prison guard attacks an inmate, the inmate can sue the guard for violating his constitutional rights. Unofficially, however, we do sentence people to rape and assault, because we manage to do so little to change the fact that huge numbers of prisoners are raped, many of them contracting HIV in the process. Though it is difficult to obtain accurate figures, some studies estimate that one in every five prisoners in the United States suffers at least one rape during his incarceration.

Similarly, we do not sentence people to methods of dying that "sound" cruel or that, if carried out properly, would necessarily inflict a great deal of pain. But the reality is that the chemicals we inject into prisoners to cause them to die, in practice, cause great

suffering.

## The Larger Lesson

The Supreme Court may not choose, in *Hill*, to answer the question of whether lethal injection violates the Eighth Amendment; as noted above, Hill's raising this question by way of a Section 1983 claim is unusual. But when the Court does ultimately hear and decide this question, it is unclear what will happen. The Court might say that such executions are humane enough to pass muster, despite findings to the contrary, or it may require states to turn to other methods (like the electric chair or hanging) that raise their own cruelty issues.

Regardless of what the Court decides, however, we will continue to be guilty of unforgivable hypocrisy in the administration of our criminal justice system, as long as we pretend that we are engaged in something humane even as the toll of suffering and pain -- hidden in plain sight -- continues to rise, unabated.

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