**Justice or vengeance: is the death penalty cruel & unusual?**

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Does the three-drug cocktail used by the majority of states that impose the death penalty violate the Eighth Amendment to the Constitution, which prohibits "cruel and unusual punishment"? The Supreme Court recently heard arguments on this question in Baze v. Reese, a case in which the petitioners are Kentucky prisoners condemned to death. I had a clear picture of the legal question after reading the briefs. But I found myself pondering a larger moral question: Why should a decent society ban "cruel and unusual punishment" in the first place?

If you read only the briefs in Baze, you might get the sense that the purpose of the prohibition is narrow: to eliminate physical pain from punishment. The legal question is whether the Eighth Amendment prohibits all "unnecessary risk of pain and suffering" in the imposition of the death penalty, or simply the "substantial risk of wanton and unnecessary pain, torture, or lingering death." The prisoners claim that if the administration of the three-drug cocktail is botched, they will die in an excruciating fashion. Because this risk is unnecessary--it could, for example, be eliminated by using a single lethal overdose of barbiturates--it is also unconstitutional. The state responded by outlining the safeguards taken by Kentucky, arguing that the three-drug method does not impose a substantial risk of severe pain on the condemned prisoner.

I don't think that the purpose of the prohibition against cruel and unusual punishment can be reduced to the minimization of physical pain. History does not support such a claim. In prohibiting "cruel and unusual punishment," the American Bill of Rights (1791) echoed the English Bill of Rights (1689). In England, execution--often by hanging or another painful method--was a common punishment for many crimes well into the nineteenth century. Indeed, for some crimes, severe pain was part of the penalty. The English did not abolish drawing and quartering as a punishment for treason until 1814. Common punishments in colonial America for noncapital crimes included the stockade, the pillory, flogging, and branding. For many years, the infliction of physical pain, sometimes significant physical pain, was considered neither "cruel" nor "unusual."

So what is the purpose of a prohibition against "cruel and unusual punishment"? Here's my take: The conjunction "and" is important. If the state imposes penalties that are both cruel and unusual, it risks undermining the primary goal and rationale of those penalties: the communal exercise of retributive justice. As the image of the blindfolded woman holding a scale implies, retributive justice aims to restore balance to the community by imposing a cool, measured, and fair punishment on the transgressor. Theoretically, at least, the focus is positive: once the criminal has "paid his debt" to society, he is reintegrated into the fold--even if only in memory after his execution. A punishment that is both cruel and unusual doesn't further retributive justice. It does, however, advance two other objectives that are frequently confused with retributive justice: private revenge and social control through deterrence.

Cruel and unusual punishment satisfies the desire for private vengeance. We are all inclined to evaluate harms to ourselves and our loved ones as more serious, and deserving of more punishment, than injury to others. We see ourselves as unique and the injustices we suffer as uniquely horrible. So from the not-so-disinterested perspective of the victims and those who love them, a cruel-and-unusual punishment for a crime can easily seem quite fitting. It has taken humanity a long time to uncouple justice from vengeance. Biblical scholars remind us that the lex talionis was intended to be a limitation on punishment, not a call for greater harshness: only an eye for an eye, only a tooth for a tooth.

Cruel and unusual punishment is also used as an instrument of social control. My students are frequently surprised to discover that the utilitarian Jeremy Bentham, who was dedicated to promoting pleasure and avoiding pain, was a vigorous supporter of harsh and inexorable punishment for certain crimes. Why? Because harsh punishment publicly administered can function as an effective deterrent. The pain inflicted by cutting off one thief's hand is far outweighed by the pain avoided if a hundred potential thieves are deterred by the gory example.

How, then, should we think about Baze? From a moral perspective, the real question isn't whether the Eighth Amendment prohibits methods of execution that impose "unnecessary risk" of severe pain, or merely "a substantial risk" of severe pain. The question is whether the death penalty itself continues to serve the goals of retributive justice, rather than merely vengeance or deterrence. While the Supreme Court decided in the 1970s that the death penalty need not violate the Constitution, there is no reason that state legislatures cannot judge for themselves that it constitutes "cruel and unusual punishment." Times change, and with them our moral sentiments. If enough states abolish the death penalty, eventually the Constitution will catch up.

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