

# The Pain of Others

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Amanda C. Pustilnik, [\*Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law\*](#), 97 **Cornell L. Rev.** 801 (2012).

Imagine an interrogation chamber, twenty-five years from now. Rather than a dungeon or a prison cell, this space resembles the radiology suite of a hospital. A detainee is strapped to a gurney, electrodes attached to strategic parts of his body, rolled into a functional magnetic resonance imaging (fMRI) scanner, and there held immobile for the duration of the interrogation. Whenever he refuses to answer a question or gives an answer believed to be untruthful or incomplete, the detainee receives an electric shock. As the interrogation intensifies, so does the pain. Suddenly, however, the interrogation stops. The signal has been given from the observation room that the subject's pain level has reached the threshold for "torture" established by the Geneva Convention.

What does it mean for criminal law, and for international humanitarian law, that we can see and measure the pain of others?

More generally, to what extent can scientific discoveries and technological advances solve (or dissolve) pressing moral debates?

The issue is so central to our intellectual lives today that it's become recursive, being staged at various levels of scale. At the level of world views, we have in this corner Team Atheism (usually brandishing the banner of science), and in that corner, Team Religion. At the level of institutional survival, it's about science, engineering, and the professional schools against the humanities. At the level of disciplines, we've had attempted beat-downs between physics and philosophy. Within philosophy (which is sharing territory these days with computational science), we have the mind-body problem and the Turing Test challenge. And at the level at which Amanda Pustilnik enters, we see Neuroscience squaring off against Ethics on the playing field of law.

As Pustilnik explains, advances in neuroimaging techniques, including the fMRI and the positron emission tomography (PET) scan, have made pain objective, rendering obsolete Elaine Scarry's [\*famous declaration\*](#) that pain is simultaneously the thing most existentially real (to the sufferer) and most existentially in doubt (to the observer). Observers can now look at the various areas of the brain activated by acute pain and tell, with relative certainty, whether the subject is experiencing pain or not. If fMRI measurements are repeated over time with various levels of stimulus, it should also be possible to tell what degree of pain the subject is experiencing.

These developments could, in theory, revolutionize a number of areas of law and policy. Pustilnik discusses two. First, in many states, homicide by means of "torture" – usually defined as the intentional infliction of "extreme" pain — is one basis for a first-degree murder charge. Could a defense attorney someday submit evidence that the pain caused the victim was not "extreme" enough to constitute torture? Could a prosecutor respond with fMRI evidence about the kind of pain experienced by the average (reasonable?) person in the defendant's situation?

Second, Pustilnik suggests that neuroscientific evidence could be mobilized in order to draw the line

between permissible and impermissible interrogation techniques. Many efforts to define torture in international conventions – as well as, Pustilnik notes, the infamous Bybee Memo justifying torture by U.S. officials in the detention center in Guantanamo Bay – turn on degrees of pain inflicted. Could science help set an objective standard for nations and their interrogators to abide by?

Ethicists fearing future unemployment will breathe a sigh of relief that Pustilnik's answer is "no." What's so satisfying about her argument, however, is not her conclusion that ethics still matter, but the way in which Pustilnik uses these neuroscientific advances as a way to explore the moral import of pain and, more generally, the significance of the body to moral and ethical judgments.

With respect to torture-murder, Pustilnik points out that courts have upheld convictions even when the victim was insensate. What we punish when we punish murder by torture is not the causation of a certain amount of suffering, but rather "the corrupt tastes and preferences of the \* \* \* murderer." But the physical suffering of the victim is not irrelevant to moral judgments, either. For instance, Pustilnik rejects attempts to define torture purely in terms of the level of power the interrogator holds over the interrogated. The right approach, Pustilnik argues, is "embodied morality." Embodied morality acknowledges that human relations are at least two-dimensional, physical and social. "Torture targets both of these. Focusing on pain measurement to the exclusion of torture's normative destruction of victims misses half the equation." Similarly, we know that the torture-murderer's tastes are "corrupt" precisely because of the pain they would cause a sentient human being.

Pustilnik goes further and examines how the two dimensions of human relations, the physical and the social, interpenetrate. Here she considers a second pair of case studies: Eighth Amendment challenges to the death penalty, and abortion. In both contexts, she argues that "[t]he terms of the debates themselves show that the appeal to pain – a transcendent signifier, a universal proxy for empathy, and a subject that evokes visceral and moral horror – is substantially strategic." From this perspective, the invocation of pain, the deepest symbol of the vulnerability of the body, signifies that we have entered a moral space. Death penalty advocates challenge the administration of potassium chloride and pancuronium bromide not solely because it is painful, but as a way of challenging the morality of the death penalty itself. Similarly, several states have passed "fetal pain" statutes, requiring that women seeking abortions be told that their fetus can experience pain. Pustilnik argues that the primary work such statutes do is symbolic: acknowledging a fetus's pain establishes it as a being to whom moral concern is due, thus undermining the moral foundation of abortion's legality.

Yet the amount of pain caused by these means of killing also plays a role, and not just the fact of pain itself. If a method of execution were completely painless there would be no basis for a legal challenge, and at the other extreme, if the method involved gratuitous pain it would clearly be unconstitutional. And, although Pustilnik asserts that anti-abortion advocates have ignored or rejected scientific evidence that fetuses do not feel pain until birth, the power of films such as "The Silent Scream" is in the suggestion that there is a truth in the body and its suffering. The existence or nonexistence of pain in general tells us there is a moral issue at hand; the measure of pain, the physical suffering of particular beings, is important for weighing the moral significance of the values at stake in each case.

The indissolubility of the physical and the social, Pustilnik shows, goes all the way down, into the scientific measurement of pain itself. Looking at the neuroscientific research, she notes that even our advances toward an "objective" measurement of pain have limits: a person's experience of pain is mediated not only by the body and the brain but by the mind. The same signals sent through the nerves may be received in the mind in different ways, depending on whether the subject is conscious or unconscious, fatigued or alert, happy or sad. The level of pain experienced also depends on how the subject interprets the meaning of the pain. David Morris, in [The Culture of Pain](#), has explored the hermeneutic dimension of pain, taking further the distinction Pustilnik notes between "nociception" (the

term for activation in the nerves that transmit pain signals) and the felt experience of “pain.” Pustilnik examines the possible sources of false positives and false negatives as observers try to link levels of nociception to levels of pain. The upshot is that our technician watching fMRI images from the control room of the interrogation center twenty-five years from now will still not be able to determine with perfect confidence whether the detainee is or is not experiencing pain.

Pustilnik concludes:

There is an ontological primacy to pain because it is through the suffering of the self that we understand the wrongfulness of causing gratuitous suffering to others; some of this is direct, empathic, and likely physiological. In a sense, such reasoning is grounded in the body’s physicality. And yet, it is also grounded in the body’s status within the nomos which is informed by—but not coextensive with—physiological experience. The experience of the body, both of self and “other,” is also contingent. Sociohistorical context defines which “others” are seen as sufficiently like the self such that their pain experience is credited as real; once categorized, they are deemed deserving of protection from pain. Since such questions as “who can suffer” and “whose suffering counts” define the membership of the community of empathic inclusion, they also define what degree of treatment toward particular legal subjects (whether humans, human fetuses, animals, conscious machines, and others yet to be named) is permissible.

In recent years, neuroscience and cognitive science have appeared to be laying siege to substantive criminal law. New developments in science and technology are poised to help lawyers and their experts predict wrongdoing, assess the responsibility of juveniles, assess culpability, distinguish lies from truth on the witness stand, and decode memories – not to mention helping the police detect illegal activity from afar. At the same time, Stephen Morse has noted in a droll formulation, the excitement generated by new scientific discoveries can lead to “[Brain Overclaim Syndrome](#).” Rather than seeing a competition between science and ethics or technology and law and weighing in on one side or the other, Pustilnik uses our increasing ability to see and manipulate the workings of the body as an occasion to deepen our insight into the links between body and mind, objective and subjective. The dimensions of the physical and the social, she shows, are the double strands of morality’s DNA. Criminal law necessarily must grapple with both.

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