

Chapter 5

Silencing the Voice of Pain

“Legal interpretation takes place in a field of pain and death” (Cover 1986, 1601). The law of the liberal state, Robert Cover observed, seeks to distance itself from the violence implicated in its very existence. To do so, to cite the example I explored in chapter 2, the law detaches the pronouncement of a death sentence from its imposition. Although less often noted, much the same end is achieved via the law’s endorsement of a culturally specific construction of pain. That account, occluding its own historicity, renders pain radically solipsistic and so effectively unintelligible. To the extent that this antipolitical construction has also been embraced by the foes of specific methods of execution and capital punishment more generally, within the academy as well as within the courtroom, it compromises their ability to render pain visible and so contestable. To trouble this construction, in this chapter, I suggest that pain might profitably be figured not as a brute unverifiable reality located exclusively within the hidden interior of the hurt body, but as a cultural artifact, indeed, as a sort of language. Doing so complements my earlier representation of the death sentence as a performative deed insofar as a discursive construction of pain also renders problematic the law’s efforts to contain the harm it does by separating word from deed, sentence from execution. As such, it advances the goal sought by Cover, that is, to indicate how pain circulates throughout the entire legal order.

Modernist Pain

In its modernist construction, pain is typically figured as a complex signal broadcast through the nervous system and carried from the site of bodily harm to the brain. For political purposes, it is important to recall that this is a historically specific conception. To see the point, one need

only consider Blaise Pascal's "Prayer to Ask God for the Good Use of Sickness":

Make me fully understand that the ills of the body are nothing else than the punishment and the encompassing symbol for the ills of the soul. O, Lord, let them be the remedy, by making me aware, through the pain that I feel, of the pain that I did not feel in my soul, deeply sick though it was and covered with sores. Because, Lord, the greatest sickness is insensibility. . . . Let me feel this pain sharply, so that I can make whatever is left of my life a continual penance to wash away the offenses I have committed. (Quoted in Morris 1991, 44)

On Pascal's Jansenist account, the body is conceived as a carnal envelope imprisoning the soul, and the body's pain is a sign of the just punishment endured by that irremediably diseased soul in virtue of the primal sin of Adam and Eve. As such, pain is to be greeted with resignation, but also with gratitude insofar as, and no doubt paradoxically to profane ears, it calls the sufferer to an awareness of the body's ultimate insignificance. Alternatively, as intimated by the etymological link joining the terms *excruciating* and *Crucifixion*, Catholic pain is sometimes spiritualized via its sublimation within the narrative of the Passion and death of Christ. On either formulation, the unintelligibility of the body's woes absent its theological construction is suggested by the lack of any separate entry for the term *pain* (*peine*) in the Catholic *Dictionnaire de théologie*, published between 1935 and 1972. In that compendium, discussion of what secular humanists would call *pain* is found partly under the entry *mal* (evil, adversity) and partly under *Providence*, thus suggesting the Catholic vacillation between, on the one hand, the formulation of pain as a foretaste of God's final retribution and, on the other hand, its formulation as a test of moral fortitude and hence as a token of eventual redemption (Rey 1995, 184).

On this theological account, explains Ivan Illich (1976), what was quite literally unthinkable was the belief that pain should or could be wholly eradicated through the intervention of any human agent, whether priest, politician, or physician. If pain is a mark of the corruption of nature, of which depraved humanity is undeniably a part, then it can no more be eliminated than can the human condition itself. Not sur-

prisingly, given this construction, throughout the eighteenth century and well into the nineteenth, European and American clergy played a major role in ministering to those in pain. Only after 1846, when a Boston dentist by the name of William Morton demonstrated that the vapor of diethyl ether could forestall the agonies of surgery, did the claims of physicians begin to supplant those of the clergy (see Pernick 1985). While the details of this conflict need not concern me, its results do. That we now think of pain as an unqualified evil, one that is to be entirely overcome, if at all possible, testifies to modern medicine's successful expropriation and colonization of this domain of experience.¹

On the face of it, the modern medicalized construction of pain is a straightforward matter. This is a rationalized construction in the Weberian sense, that is, in the sense that its formulation in the language of modern science entails the withering away of the traditional moral and religious vocabularies that once folded pain within the more comprehensive category of suffering. To the biomedical researcher, pain is understood not as a manifestation of some disorder or malady stitched into the very seams of the cosmos, but as an aversive effect occasioned by changes in various etiological mechanisms, including sensory receptors, afferent neuronal relays, and spinal-cord, midbrain, or higher cortical modulating systems. Read as an indicator of nociception, as a sign or symptom of injury or disease, modernist pain is to be professionally managed either by removing its cause or, failing that, by the administration of analgesia.

One might argue, as does Illich, that the resulting technological conception of pain evacuates it of all possible meaning:

When cosmopolitan medical civilization colonizes any traditional culture, it transforms the experience of pain. The same nervous stimulation that I shall call "pain sensation" will result in a distinct experience, depending not only on personality but also on culture. This experience, as distinct from the painful sensation, implies a uniquely human performance called *suffering*. Medical civilization, however, tends to turn pain into a technical matter and thereby deprives suffering of its inherent personal meaning. Cultures are systems of meanings, cosmopolitan civilization a system of techniques. Culture makes pain tolerable by integrating it into a meaningful setting; cosmopolitan civilization detaches pain from any

subjective or intersubjective context in order to annihilate it. Culture makes pain tolerable by interpreting its necessity; only pain perceived as curable is intolerable. (1976, 133–34)

Leaving aside the problematic distinction he draws here between the universal “painful sensation” and the culturally specific experience of it (to which I shall return in the final section of this chapter), and leaving aside his failure to recognize that modernist discourse does not so much evacuate pain of all sense as narrow its range of meanings to those that conform to the imperatives of biomedical intelligibility, Illich is quite right to suggest that when this vocabulary no longer appears to be one among many possible candidates for making sense of pain, and when those who speak this language come to believe that, in doing so, they are disclosing incontestable *facts* about the body in pain, what was once an inherently contestable sense-making discourse is effectively naturalized and so depoliticized. “Living in a society that values anesthesia,” he concludes, “both doctors and their potential clients are retrained to smother pain’s intrinsic question mark” (Illich 1976, 143).

But is the modernist medical construction of pain as internally coherent as Illich’s indictment intimates? Is it possible that this construction, no matter how successful at vanquishing its opponents, is nonetheless troubled by difficulties that can be publicly acknowledged only at the cost of calling into question the medical profession’s self-representation? To indicate why this may be so, let me begin with a standard biomedical definition of pain. The International Association for the Study of Pain (IASP) fixes the subject of its inquiry as follows: “Pain is an unpleasant sensory and emotional experience associated with actual or potential tissue damage or described in terms of such damage” (IASP 1979, 249). This definition, which is part of a more comprehensive attempt to formulate a standardized vocabulary for professional students of pain, represents a strategic attempt to negotiate some of its more vexing conundrums. Specifically, and as the phrase “actual or potential” intimates, this definition acknowledges that there is no necessary correlation between the extent of what the IASP calls “tissue damage” and the intensity or even the experience of pain. It is quite possible, for example, for someone to be in fierce pain without displaying any tissue damage, just as it is possible for someone to display severe tissue damage and yet feel no pain.

In their oft-cited *Handbook of Pain Assessment* (1992), Dennis Turk and Ronald Melzack commend the IASP on the grounds that its definition, precisely because it acknowledges the causal discontinuity between injury and pain, “underscores the inherent subjectivity of pain” (xi). That subjectivity, they continue, is a function of pain’s inaccessibility. While a physician may locate the cause of my pain (e.g., a wound) or its symptom (e.g., swelling), she cannot point to my pain per se (just as I cannot point to the color of a piece of paper); and, because pain can neither be identified with nor located neatly within any determinate embodied site, it would seem to follow that it must be something that resides in the ethereal and invisible domain of consciousness. Precisely because it is so located, anyone’s claim to be in pain is, strictly speaking, incorrigible in the sense that it cannot meaningfully be denied by another. (To see the point, consider the following exchange: You say, “I am in pain,” to which I respond: “No, you are mistaken.”)

But if indeed pain is radically solipsistic, as this exchange suggests, then it cannot help but pose awkward questions for those, like the members of the IASP, who are committed to its scientific analysis. For example, the absence of any isomorphic or linear causal relationship between bodily damage and pain mocks the hope, once entertained by medical researchers, of precisely mapping the pathways taken by neural impulses from the site of harm to the brain. Still more generally, it undermines medicine’s confidence in its ability to identify a physiological cause for every report of pain and so threatens to render some instances simply inexplicable. Tacitly acknowledging that the subjectivism of the definition they have endorsed cuts against their ability to articulate a scientific account of its operation, Turk and Melzack are quick to insist that, if inquirers are to “understand and adequately treat pain, we need to be able to measure it” (1992, xi). But this effort to recapture pain as a viable subject of positivist inquiry is quixotic at best, if only because different individuals who demonstrate the same sort of physical injury routinely offer radically incongruent statements concerning the intensity of their pain: “A number of cultural, economic, social, demographic, and environmental factors, along with the individual’s personal history, situational factors, interpretation of the symptoms and resources, current psychological state, as well as physical pathology, all contribute to the response to the question ‘How much does it hurt?’” (Turk and Melzack 1992, xi). Yet if that is so, if there is

“no simple thermometer that can objectively record how much pain an individual experiences” (5), then that person’s assessment of its intensity will tell us nothing about the “reality” of the harm suffered by the body and, as such, will take us nowhere in our efforts to get beyond pain’s solipsism.

Some biomedical researchers have responded to this dilemma, Turk and Melzack concede, by arguing on behalf of a strict behaviorist conception of pain: “In an effort to avoid the problems inherent in self-reports of pain severity, some investigators and many clinicians suggest that the report of pain should be ignored because it is a symptom rather than an objective sign that is believed to be more reliable and valid” (1992, 6–7). Persons in pain, adherents of this conception note, typically display a range of observable behaviors (e.g., moaning, limping, wincing, etc.). So as to avoid the puzzles encountered by formulations that read such conduct as an untrustworthy sign of pain that is itself inaccessible and unverifiable, the behaviorist account denies the privilege of reality to that which cannot be visibly confirmed and so concludes that such conduct *is* one’s pain. From this conclusion, it follows that operant conditioning that successfully eliminates these learned behaviors will, by definition, rid the sufferer of his or her pain. However, and leaving aside the problem posed by the cross-cultural variability of conventional pain behaviors, it is all too easy to imagine a situation in which all of the observable indicators are present without a person actually being in pain (as in a theatrical performance). And, if that is so, then the presence of pain behavior cannot be equated *with* the experience of pain *per se*, although it is often identified *by* such behaviors (see Turk and Flor 1987). In sum, whereas I can never be wrong when I claim that *I* am in pain, I can readily be in error when I make the same claim about another.

Caught between their endorsement of a subjectivist definition of pain and their objectivist requirement that it be a measurable public reality, Turk and Melzack seek to effect an epistemological compromise. In the last analysis, they concede, “anything that can be determined about the intensity of an individual’s pain is based on what the patient verbally or nonverbally communicates about his or her subjective experience” (1992, 5). However, they go on, one can offset the problematic implications of this reliance on the idiosyncratic by asking sufferers to quantify their pain and, more specifically, to rank it on a scale

of zero to ten. Yet this compromise is ultimately unsatisfactory, first, because the privatism of the scaling systems generated by diverse individuals is inconsistent with the very concept of measurement, and, second, because its quantitative reductionism cannot capture the qualitative dimensions that experientially distinguish this pain from that. True, one might respond to this latter deficiency by developing, as does the McGill-Melzack Pain Questionnaire (Melzack 1975), a series of terms that seek to tap into pain's qualitative dimensions (e.g., *burning*, *pinching*, *gnawing*, etc.). But, so long as one cannot determine the fidelity of these terms to the reality they are said to represent, except via the testimony of the sufferer, this strategy cannot satisfy the demands of a positivist epistemology that must presuppose the cognitive availability of a world of intersubjectively verifiable objects. If pain is ultimately whatever the individual sufferer says it is, and if it routinely frustrates efforts to delineate its operation in the terms of linear causality, then the possibility of rendering it a fit object of biomedical inquiry is compromised, perhaps irreparably. "Pain," concludes Arthur Kleinman, "eludes the [medical] discipline's organized explanatory systems as much as it escapes the diagnostic net of biomedical categories" (1992, 170).

Rebuttable Pain

What happens when the dilemmas inherent within the modernist construction of pain are imported within the domain of law, and, more particularly, what happens when such pain becomes a contested issue within the context of a lawful execution? Before moving directly to these questions, it is important to note that just as the construction of pain is historically and culturally specific, so too is the construction of its relationship to capital punishment. To see the point, one need only recall the familiar account, offered by Foucault in *Discipline and Punish* (1979), of the execution of the would-be regicide, Damiens, in 1757. That highly ritualized spectacle represented an awesome reaffirmation of compromised sovereign power. The success of that reaffirmation, whose purpose was to purge the body politic of its infected organ and thereby heal its remainder, demanded maximal intensification of the condemned's pain. Damiens's agony is rendered meaningful via its incorporation within a cosmological narrative concerning the status of

the monarch as the inviolable head of an interdependent body politic, which in turn references the king's standing as God's agent on earth. Propelled by that narrative, the pain of Damiens ramifies beyond the finite limits of his body, moving in one direction toward the temporal political order he sought to dismember, and in the other toward the eternal agonies his soul is certain to suffer in hell. The claims of the former are incarnated in the persons of the magistrate and the executioner, while the claims of the latter are embodied in the person of the priest. Neither articulates the construction of pain figured in the person of the physician.

The medicalization of pain is one of the distinguishing features of modern executions. In his comparative account of two state-sponsored killings in New York, the first in 1825 and the second in 1892, Michael Madow (1995) notes how questions that figured centrally in the latter were strikingly absent in the former. When James Reynolds was publicly hanged in New York City in 1825, the report offered by the *Commercial Advertiser* ended with this statement: "The cap was then drawn over his eyes and at a quarter before one o'clock while he was earnestly crying to God for pardon the drop fell and he was launched into eternity." As Madow notes, "[W]hat is interesting here is what was left *unreported*. Did Reynolds's neck vertebrae snap, killing him quickly? Or did he die a slow death by strangulation? Did he struggle? Did he suffer? We are not told. . . . It was Reynold's soul, not his body, that claimed the narrative's center" (486). By way of contrast, when Charles McElvaine was privately electrocuted at Sing Sing some sixty-six years later, physicians, not clergy, dominated the scene, and the questions posed by journalists assembled outside the penitentiary all presupposed this event's medicalized construction: "Exactly when did McElvaine die? When did he lose consciousness? Did he feel any pain? Was there any burning of the flesh?" (486).

On this account, the question of McElvaine's soul is eclipsed by that of his body; and, although no doubt the break from earlier sensibilities is not entire, his body is itself understood as something akin to the unambiguously demarcated biomechanical entity that appears self-evidently real to us today. This body's sense is derived not from the comprehensive domains of political or cosmological significance from which it has now been effectively amputated, but from its relationship to the individual person who bears this proper name. Over the course

of the nineteenth century, argues Alan Hyde (1997), "a distinctively modern body takes shape in legal and popular culture, a body that represents an individuated, human spirit that is the person inside it, a person that controls that body but is not identical to it" (9). On this neo-Cartesian understanding, it is the person, not the body, that commits crime, for the body cannot be ascribed any autonomous legal agency. Hence, when the state incarcerates that body, its aim is to deprive the person housed within, the fictive subject of law's imperatives, of its rights. Because that legal subject is not itself regarded as a material entity, as is the body, when the law punishes, its aim cannot be the infliction of pain *per se*. Accordingly, when any given punishment does in fact cause pain, modern liberal law confronts a dilemma it is ill-equipped to resolve. That dilemma is all the more pressing when the question of pain arises in the context of a death sentence. There, the aim of law is still to employ the palpable body as a means to the deprivation of abstract rights, and in this sense the body is incidental to the law's ultimate objective. What complicates this project, of course, is capital punishment's status as the last remaining penalty that accomplishes its purpose via the deliberate and direct infliction of harm upon the body. That imperative cannot help but coexist uneasily with the self-understanding of a liberal state, which, throughout the nineteenth and twentieth centuries, was ever more given to humanitarian pieties, and so ever more pressed by its own discourse to embrace the sentimental ideal of a killing that involves no pain.

The state's ability to occlude the suffering caused by this most dramatic manifestation of its monopolization of the means of violence is enhanced by the medicalized representation of pain as an effect caused by physiological injury and localized within the body's invisible confines. Just as the law teaches us to accept as real certain forms of violence, but to dismiss others (consider, e.g., the unproblematic status of domestic violence until recently), so too does a medicalized conception of pain encourage us to acknowledge certain forms of suffering, but to discount others. Most obviously, this conception will not call our attention to suffering that has no identifiable physiological cause (consider, e.g., the terror of knowing the precise moment when one is scheduled to die). Especially when joined to claims about its inherent subjectivity, which invites us to doubt the reality of others' suffering, the confinement of pain to the unseen interior of the body severs the relational

connections, truncates the lines of implication, that were far more apparent when "individuals" were understood as organs of a larger body politic and when the pain suffered by such organs was saturated with cosmological import. Accompanied by the removal of executions to the interior of penitentiaries, the transformation of executioners into impersonal bureaucratic officials, and the adoption of execution methods that leave the condemned body unmarked, the contemporary construction of pain contributes to the state's effort to reduce the likelihood that executions will generate disconcerting questions about the justice or legitimacy of the political order that mandates this punishment.

But matters are rarely if ever quite this simple. If, as I suggested in the previous section, the biomedical construction of pain is internally conflicted, do traces of that trouble sometimes surface within the law? More pointedly, what happens when an execution is bungled in a way that compels the law to confront the question of pain? To answer these questions, and to do so in a way that indicates how uncritical adoption of the modernist account of pain compromises the efforts of those who seek to render it conspicuous, in the remainder of this section, I explore the execution of Allen Lee Davis as well as the Florida Supreme Court case in which the corpse of Davis figured centrally.

Allen Lee Davis, nicknamed "Tiny," was convicted on three counts of first-degree murder in 1983 and sentenced to die; his victims included the pregnant Nancy Weiler, married to a Westinghouse executive, and their two daughters, Kristine, age nine, and Katherine, age five. Some fifteen years later, concerned about the ability of its seventy-four-year-old wooden electric chair to withstand Davis's 350 pounds, the state of Florida elected to build a new frame, although most of the original wiring system was retained. The following June, Governor Jeb Bush signed his first two death warrants, one for Davis and another for Thomas Provenzano, who was convicted in the shooting death of an Orange County bailiff during a hearing on a disorderly conduct charge. On July 8, 1999, just after 7:00 A.M., Davis was strapped into Florida's electric chair and, at 7:09, a private citizen who was paid \$150 and whose identity was hidden by a hood threw a switch that released an initial 1,500-volt charge for ten seconds, followed by a second jolt of 600 volts for 4.5 seconds, and, finally, another 1,500-volt blast for ten seconds. Davis, also hooded, was pronounced dead at 7:15.

Although no recent execution employing "Old Sparky" has gone

without comment, Florida's killing of Davis provoked a furor. Why it did so is indicated in the following account offered by the *St. Petersburg Times*:

Two muffled screams were heard from Davis just before the executioner threw the switch. Davis jolted back into the chair and clenched his fist, a sight common to Florida executions. . . . Blood appeared to pour from the mouth and ooze from the chest of Allen Lee "Tiny" Davis as he was hit with 2,300 [sic] volts. . . . By the time Davis was pronounced dead at 7:15 A.M., the blood from his mouth had poured out onto the collar of his white shirt, and the blood on his chest had spread to about the size of a dinner plate, even seeping through the buckle holds on the leather chest strap holding him to the chair. . . . The heavy bleeding was believed to be a first for 44 modern Florida executions. (July 8, 1999, 1)

At a press conference immediately following Davis's execution, a spokesperson for Governor Bush, Cory Tilley, announced to the assembled reporters that "nothing went wrong. The chair functioned as it was designed to function and we're comfortable that that worked" (*St. Petersburg Times*, July 8, 1999, 1). However, speaking for the Department of Corrections, Eugene Morris confessed that "the blood is not normal. . . . I've witnessed 15 and I've never seen blood" (*St. Petersburg Times*, July 9, 1999, 1). Uncertain what to make of these conflicting accounts, just eleven hours after Davis was pronounced dead, the Florida Supreme Court stayed the execution of Provenzano, who had been scheduled to die the following morning.

Because idiosyncratic human bodies are rarely as predictable as the law wishes them to be, executions always harbor the potential to unsettle the conventional understandings that otherwise stabilize the law's routinized authority. What rendered this particular event extraordinary, of course, was the blood that violated accustomed sensibilities concerning what belongs inside the body and what belongs on its outside. That crimson stream eluded the law's effort to contain the meaning of this execution, and it did so by transforming the corpse of Allen Davis into an unsettling puzzle. Did he suffer? If so, how much, for how long, and why? Pain, as I indicated in the previous section, is not self-announcing; it requires some mode of articulation in order to

make its appearance in the public world. But the import of that which is legible, in this instance, the blood of Allen Davis, is never self-evident. As such, it is subject to differential interpretation and therefore, at least potentially, a matter of political contest.

The terminus of this particular contest was announced by the Florida Supreme Court when, on September 24, 1999, it ruled that employment of the electric chair is not unconstitutional. Of limited interest to me is the specifically legal reasoning that drew the court, by a vote of four to three, to this conclusion. Suffice it to say that, citing *Gregg v. Georgia* (428 U.S. 153 [1976]) and *Louisiana ex rel. Francis v. Resweber* (329 U.S. 459 [1947]), the court argued that “in order for a punishment to constitute cruel or unusual punishment, it must involve ‘torture or a lingering death’ or the infliction of ‘unnecessary and wanton pain’” (*Provenzano v. Moore*, No. 95,973, Supreme Court of Florida [1999], 4). Because the record, on the court’s account, demonstrated that Davis died immediately and painlessly, execution by electrocution does not offend either of these tests. Of greater interest to me are the eight findings of fact that were generated by the circuit court as a result of its evidentiary hearing and then cited by the supreme court as the basis for its decision. Collectively, these findings enunciate the law’s effort to navigate the troubling uncertainty of Davis’s blood-stained shirt and, more specifically, its status as a possible trace of the pain that, in the last analysis, it will deny. Slightly abridged, those findings are as follows:

1. During the execution of Allen Lee Davis, the electric chair functioned as it was intended to function.
2. The cycles of voltage and amperage applied in the execution of Allen Lee Davis did not deviate from the execution protocol which was previously approved by the Florida Supreme Court.
3. The death of Allen Lee Davis did not result from asphyxiation caused by the mouth strap.
4. Allen Lee Davis did not suffer any conscious pain while being electrocuted in Florida’s electric chair. Rather, he suffered instantaneous and painless death once the current was applied to him.
5. The nose bleed incurred by Allen Lee Davis began *before* the electrical current was applied to him, and was not caused whatsoever by the application of electrical current to Davis.

6. The post-execution photographs of Allen Lee Davis indicate that the straps used to restrain Davis' body, specifically, the mouth strap and chin strap, may have caused Davis to suffer some discomfort. However, the straps did not cause him to suffer unnecessary and wanton pain, and the mouth strap was not a part of the electrical operation of the electric chair.
7. The use of a mouth strap to secure an inmate's head to the electric chair may be desirable, however, a smaller and/or redesigned mouth strap could accomplish the same purpose without raising the same issue involved here.
8. Execution inherently involves fear, and it may involve some degree of pain. That pain may include pain associated with affixing straps around the head and body to secure the head and body [to] the electric chair. However, any pain associated therewith is necessary to ensure that the integrity of the execution process is maintained. (*Provenzano v. Moore*, 2-3)

To ears untutored in the law, much like the naive eyes that first saw the videotape of Rodney King's beating by members of the Los Angeles Police Department, the initial accounts of Davis's execution most certainly testified to the reality of a body in torment. But, the court explains, after applying a method of analysis that in certain respects is very much like that employed by the defense attorneys who disaggregated the King footage into so many freeze-frame fragments, what the ears believe they hear and the eyes think they see are often poor guides to what the law knows about pain.

The initial strategy adopted by the circuit court to dispel the political awkwardness occasioned by Davis's blood consists of its effort to specify that fluid's exact point of origin and, in so doing, to check its capacity to seep into areas where the law might find its meaning more difficult to contain. Contrary to reports generated by eyewitnesses to Davis's execution, some of whom maintained that blood oozed from his mouth and/or his chest, autopsy reports introduced during the evidentiary hearing indicated that its sole source was his nose. Moreover, witnesses for the state testified, Davis was predisposed to nosebleeds because, for some time, he had been taking blood-thinning drugs, including aspirin and Motrin, as a remedy for the pain caused by severe osteoarthritis. The court thereby offers a scientifically intelligible

account for Davis's nosebleed, one that tacitly references the medical profession's status as minister to the body's woes and, by implication, the state's solicitude prior to his execution. Deflecting attention from the extraordinary circumstances of its production, this mundane explanation domesticates what might otherwise be taken as a disturbing signifier of barbarous violence.

Yet those circumstances cannot be altogether denied, and so, as a complement to its spatial localization, the circuit court seeks to temporally circumscribe Davis's blood as well. By emphatically insisting that the nosebleed "began *before* the electrical current was applied to him," the court implies that it should not be understood as an immanent part of the execution proper. The relevant statute mandates that "a death sentence shall be executed by electrocution" (Florida State Code, Title XLVII, Chapter 922.10). Therefore, strictly speaking, a consideration of Davis's nosebleed is irrelevant to an assessment of this method's constitutionality. By rendering legally inconsequential everything that occurs prior to the moment when the switch is finally thrown, the law effectively distances itself from the injury that Davis's blood so insistently proclaims. Having done so, the state can then concede that "the mouth strap and chin strap may have caused Davis to suffer some discomfort" (although the term *may* suggests the epistemological uncertainty of even that conclusion, and the term *discomfort* represents Davis's suffering as a minor irritation at best), without worrying that this acknowledgment will compromise its affirmation of this way of killing.

However, this strategy of disaggregating the act of killing into those components that are constitutionally salient and those that are not is not itself free of risk. If the blood in question "was not caused whatsoever by the application of electrical current to Davis" (does the court protest too much?), then what was its cause? As the court acknowledges, the broad leather strap circling the lower portion of Davis's head, covering his mouth, pushing up hard against his nostrils, buckled tightly behind his head, is the obvious culprit. But does that suggest, as those in dissent do, that the screams heard by several witnesses just prior to the first jolt of electricity were so many inarticulate protests against the onset of asphyxiation? And if that is so, should we conclude that deprivation of oxygen was a contributing cause of Davis's death? And if that is so, did the conduct of this execution vio-

late the terms of the statute that the state so carefully cited in its own defense just a moment ago? Should we determine that, because not one but two causes of death were involved, the execution of Allen Lee Davis was at least in part an act of lawless violence? To nip this series of questions in the bud, the circuit court asserts that "the mouth strap was not a part of the electrical operation of the electric chair." Doing so, and consistent with its initial strategy, it defines this apparatus in a way such that the specific part that may have occasioned some "discomfort" is adventitious to the act of killing and, as such, irrelevant to the execution of a lawful sentence by electrocution. (However, if the strap is indeed irrelevant in this sense, it is not clear why this court of law deems it appropriate to recommend specific technical modifications in its design.) Perhaps sensing that this semantic tactic is not altogether persuasive, and ignoring considerable contrary evidence introduced at the evidentiary hearing, the court simply declares as a categorical fact that "the death of Allen Lee Davis did not result from asphyxiation caused by the mouth strap."

What is almost entirely missing from the circuit court's findings of fact is any representation of Davis as what Alan Hyde calls "a sympathetic body" (1997, 199), as the sort of body that is dangerous to the law precisely because it invites intersubjective identification. Perhaps that sort of body makes an oblique appearance when, in the eighth finding, we are told that "execution inherently involves fear." But, given that such fear is not ascribed to Davis in particular, and given that all of the other findings reduce him either to the status of an abstract legal person (the figure that appears whenever the name *Allen Lee Davis* is invoked) or to a mindless corporeal container that bears no essential connection to the autonomous subject housed within (the figure that appears whenever the term *body* is invoked), his capacity to distract from the genuinely significant constitutional question is radically constrained: "While there has been much said about the Davis execution because of the blood which dripped from the inmate's nostril during this process," notes an impatient Justice Quince in his concurring opinion, "the real question here is whether or not the use of electrocution violates the 'evolving standards of decency' espoused by the U.S. Supreme Court" (*Provenzano v. Moore*, 17).

The task for the dissenters on the Florida Supreme Court is to fashion such a sympathetic body or, rather, to stitch together Davis's body

and mind so as to fashion an embodied person, and to do so in a way that makes his pain palpably real. Here, too, my interest is not in the specifically legal arguments that generate the conclusion that electrocution, because it causes undue pain and unnecessary mutilation, violates the cruel and unusual punishment clauses of the Florida and U.S. constitutions. Rather, my aim is to explore the strategies that are deployed in an effort to render plausible the contention, advanced by Justice Shaw in the most extensive of the three dissenting opinions, that Allen Lee Davis, "for all appearances, was brutally tortured to death by the citizens of Florida" (*Provenzano v. Moore*, 65). The foremost of these strategies consists of an effort to present the visual and auditory clues afforded by Davis before and after the administration of electrical current as incontestable indicia of pain. That effort proves ultimately unsuccessful, I suggest, because the arguments of electrocution's opponents are bedeviled by a modernist conception of pain, one that vacillates indeterminately between equally unpersuasive subjectivist and objectivist accounts of its nature.

Shaw's initial effort to make Davis's pain real involves ascribing to him the voice of an autonomous subject who, in speaking, seeks to make public a truth that is otherwise hidden within his body's interior: "After Davis' airflow had been blocked by the mouth-strap, the face-mask, and his own blood, Davis made several sounds under the face-mask which were described variously as muffled screams, moans, or yells, as if he were attempting to get the guards' attention" (*Provenzano v. Moore*, 49). Bolstered by the testimony of a forensic pathologist who, on the basis of an independent autopsy, concluded that death was at least partly caused by asphyxiation, Shaw attempts to ascribe to Davis a deliberate intent, specifically, to request relief from the agony of suffocation. But, as his "as if" reveals, there is no way to overcome the speculative nature of this conjecture and so to adduce this evidence as indubitable proof of Davis's pain. Shaw seeks to overcome this epistemological lacuna by citing in rapid succession testimony from four eyewitnesses to the execution. None, however, is able to provide Shaw the certainty he requires: one, for example, "heard what sounded like two screams from Davis," while another "heard two muffled sounds from Davis, which sounded like Davis was trying to say something" (*Provenzano v. Moore*, 49–50). Was Davis, as this second witness suggests, attempting to give his pain intelli-

ble linguistic form, say, in the form of a call *for* help? Or, as the first witness appears to imply, was Davis reduced to the status of a brute body that could do no more than cry out *in* pain? Or was John McNeill, utility supervisor at the Florida State Prison, closer to the mark when he testified that Davis “didn’t make any sounds that wasn’t normal. . . . He grunted then, all I heard, a grunt”? (*Provenzano v. Moore, Initial Brief of Petitioners*, Case Nos. 95,959, 95,973 [1999], 16 [hereinafter cited as *Initial Brief*]).

Given the modernist construction of pain, our perplexity in the face of these questions cannot help but remain unresolved. If Davis was in pain, just how severe was it? Given pain’s resistance to objective measurement, unlike determination of the precise number of volts that coursed through his body, we cannot say. Indeed, can we be sure that Davis, prior to the administration of electricity, endured *any* pain? Even if we concede that the indeterminate noises issuing from Davis’s body signified his suffering, given the absence of any necessary correlation between bodily harm and the experience of pain, is it not possible that the hurt Shaw thinks Davis sought to express had *no* pathophysiological cause, but instead was purely psychological in origin? And if that is so, then might we be tempted to say either that its cause was psychosomatic and so, from a biomechanical perspective, not quite real or, adding insult to alleged injury, that Davis was in some sense implicated in or even responsible for the production of his own pain? In sum, the attempt to treat Davis *as if* he were a conscious subject seeking to give voice to his suffering founders on the shoals of a solipsistic construction of pain that leaves us forever in doubt as to its reality. Not surprisingly, the supreme court’s majority exploits such skepticism in order to bolster its contention that Davis experienced no pain and, by implication, that the law is not an accomplice to torture.

Much the same sort of skepticism vitiates the second strategy deployed by those in dissent. Here, rather than seeking to ascribe a voice to Davis, his mute body is read for visual signs of its suffering. Crucial to this effort are the postexecution photographs that Justice Shaw appends to his opinion and then posts on the website of the state’s highest court. Such evidence, Shaw wants to believe, precisely because it is *not* a matter of discursive construction, precisely because it is not compromised by the ambiguities of language, will surely speak for itself:



Fig. 4. Postelectrocution photograph of Allen Lee Davis (1999). (*Provenzano v. Moore*, Supreme Court of Florida.)

The color photos taken by DOC show a ghastly post-execution scene: Davis is wearing a white shirt and dark pants and is restrained in the wooden chair by thick leather straps placed across his arms, legs, torso, and mouth; the electrical head-piece is attached to the top of his head with a leather strap that turns under his chin; a sponge placed under the head-piece obscures the entire top portion of his head down to his eyebrows; because of the width of the mouth-strap, only a small portion of Davis' face is visible above the mouth-strap and below the sponge, and that portion is bright purple and scrunched tightly upwards; his eyes are clenched shut and his nose is pushed so severely upward that it is barely visible above the mouth-strap; although the exterior openings of Davis' nostrils are partially visible, it appears as though the interior openings may be covered by the mouth-strap; a stream of blood pours from his nostrils, flows over the wide leather mouth-strap, runs down his neck and chest, and forms a bright red pool (approximately eight by twelve inches) on his white shirt. (*Provenzano v. Moore*, 51–52)

Although certainly powerful, *pace* Shaw, this visual evidence does not in fact speak for itself.² Were it to do so, then any reading of these photographs, including that offered by Shaw, would be superfluous and so he would find it unnecessary to affirm, as he does in the sentence immediately following, that “[t]he scene is unquestionably violent” (*Provenzano v. Moore*, 52). What Shaw presents as a transparent reproduction in words of what human eyes cannot help but see is in fact better understood as a sort of performative utterance, one that participates in constructing the reality it claims to describe. That this reality can be fashioned otherwise is indicated, most obviously, by the majority's quite different reading. Whereas Shaw seeks to transpose the violence he finds in this postexecution scene backward in time so that it infects the entire event from start to finish, the majority has no difficulty concluding that whatever signs of “violence” appear here are “accidental” and, as such, do not call into question the essential lawfulness of death by electrocution.

Similar difficulties compromise the various forms of biomechanical evidence that are adduced in order to certify the reality of Davis's status as a body in pain. That evidence is problematic because, in addition to

being hidden behind an opaque wall of flesh, its relevance to Davis can only be inferred. For example, the brief filed with the Florida Supreme Court by Provenzano's attorneys includes testimony from John Wikswo, who specializes in biological physics, biomedical engineering, and electrophysiology, and Donald Price, who wrote two chapters of *The Handbook of Pain Assessment*, cited in this chapter's first section. "It may be possible," Wikswo contends, "for an inmate to maintain consciousness for 15 to 30 seconds into the execution" (*Initial Brief*, 53). During this period, he concludes, the condemned "will" experience multiple forms of pain as skeletal muscles tetanize, as pain centers in the brain are directly stimulated, as respiratory muscles are paralyzed, and as carbon dioxide levels rise rapidly in the blood, producing a sensation akin to that of suffocation. The more circumspect Dr. Price, however, is obliged to concede that, although medical science can offer an account of the "effect of electricity on biological tissue" as well as an account of "what physiological reactions are likely to occur as a result," it cannot in the last analysis do more than affirm that Davis "almost certainly experienced intense or severe pain during his judicial electrocution" (*Initial Brief*, 43-44). Once again, the absence of any necessary connection between physiological injury and the experience of pain saps the capacity to declare what otherwise seems so patently true.

Eager to say something more definitive about Davis's suffering, Price shifts from invisible interior mechanisms to observable external indicators. "The behaviors that have been witnessed" on the part of the condemned during judicial electrocutions "are in many cases classic signs of pain in human beings, particularly given the context in which these behaviors are displayed. People moan, gasp for air, move their head from side to side and scream. Normally those behaviors are indicative of pain and even severe pain" (*Initial Brief*, 40). But Price's acknowledgment that the meaning of such behavior is not self-evident, that its import is contingent on an interpretation of the context within which it occurs, is precisely what denies him the ability to make the sort of emphatic claim that Justice Shaw requires. "People moan in their sleep," continues Price. "You wouldn't say that is pain; but if they are sitting in the electric chair and moaning, then it is much easier to infer the existence of pain" (*Initial Brief*, 40). Once again, this time from a behaviorist perspective, grasping the pain of another proves infernally elusive; its existence may be postulated on the basis of conduct and context, but its reality can never be affirmed beyond the shadow of a doubt.

The dilemma encountered in the effort to make Davis's pain real through an appeal to behavioral indicators takes one additional ironic twist that is worthy of note. When his body was undergoing examination as a preface to formal certification of death, several witnesses to the execution testified that Davis's chest, much like that of Westley Allan Dodd, dilated one or two times after the current was shut off for the final time. Those movements, hypothesized Steve Wellhausen, an employee of the prison, looked like someone "flexing their chest muscles or contracting their chest muscles" (*Initial Brief*, 21–22). If these movements can be construed as efforts at respiration rather than as reflex responses, then that would indicate that brain stem activity was still present (which is not altogether implausible since the human skull partly insulates the brain from electrical current and so may prevent it from causing instantaneous unconsciousness). Moreover, if, as some witnesses contended, Davis continued to bleed (as opposed to simply dripping residual blood from his nasal cavities) at the close of the execution, that would indicate that his heart was still beating. And if his brain and heart were still functioning, then it is possible that Davis retained some measure of consciousness and so was capable of experiencing pain even after the third jolt was completed. But if that is so, then how are we to explain the absence of any sort of aversive behavior on Davis's part during the intervals separating those three shocks? Surely, that indicates that he was not in pain. Or does it, given that electrical blasts of this magnitude stimulate each muscle to full contraction and so, in all likelihood, prevent the condemned from crying out or even moving when the current is stopped? In short, from the law's standpoint, one of the unanticipated virtues of electrocution as a method of execution, much like the anesthesia that renders unconscious those sentenced to die by lethal injection, may be its ability to suppress the behavioral evidence that might otherwise cause us to fret about a body in pain.

Given that it is possible to exhibit severe bodily damage and yet not be in pain, and given that it is possible to manifest all of the conventional signs of pain and yet not be in pain, the dissenters' invocation of various forms of behavioral evidence proves no more conclusive, no more immune to skeptical dismissal, than did the evidence teased from Davis's "voice." And, indeed, when all is said and done, perhaps Davis was simply faking it. Or, less cruelly, perhaps what bleeding heart liberals take to be unequivocal indicators of pain are nothing more than

muscular contractions caused by the application of intense electrical current. Are such speculations morally repugnant? Perhaps. But they are also essential to the integrity of a legal order that must deafen itself to the pain it cannot in good conscience justify. Only that, I assume, can explain the Fourth Circuit's cynical assertion, in a case dealing with the gas chamber, that "graphic descriptions of the death throes of inmates executed by gas are full of prose calculated to invoke sympathy, but insufficient to demonstrate that execution by the administration of gas involves the wanton and unnecessary infliction of pain" (*Hunt v. Nuth*, 57 F.3d 1327 [1995], 1337-38).

Political Pain

The appeal to pain, construed in modernist terms, cannot furnish significant leverage to those who would challenge capital punishment on the grounds that it inflicts what students of constitutional law call "wanton" or "unnecessary" pain.³ In light of that conclusion, in this final section, more suggestively than conclusively, I want to indicate how we might begin to temper the incapacities of this construction by reconsidering the relationship between pain and language; and to do that I return to what I take to be the most seductive contemporary meditation on this question, Elaine Scarry's *The Body in Pain* (1985). On the one hand, her account of this relationship is to be resisted. By endowing pain with a terrifying capacity to destroy all language, she renders it fundamentally incontestable and so not merely apolitical but even antipolitical. On the other hand, her account opens up political possibilities she herself does not recognize, and it does so by indicating how pain is sometimes transformed into language and, more specifically, the language of power.

Much of Scarry's analysis turns on what might be characterized as a hyperbolic rendering of the subjectivist account of pain:

[W]hen one speaks about "one's own physical pain" and about "another person's physical pain," one might almost appear to be speaking about two wholly distinct orders of events. For the person whose pain it is, it is "effortlessly" grasped (that is, even with the most heroic effort it cannot *not* be grasped); while for the person outside the sufferer's body, what is "effortless" is *not* grasping

it (it is easy to remain wholly unaware of its existence; even with effort, one may remain in doubt about its existence or may retain the astonishing freedom of denying its existence; and, finally, if with the best effort of sustained attention one successfully apprehends it, the aversiveness of the "it" one apprehends will only be a shadowy fraction of the actual "it"). So, for the person in pain, so incontestably and unnegotiably present is it that "having pain" may come to be thought of as the most vibrant example of what it is to "have certainty," while for the other person it is so elusive that "hearing about pain" may exist as the primary model of what it is "to have doubt." (1985, 4)

As I noted in chapter 4, the radical solipsism of pain is, on Scarry's account, a function of the fact that it, alone among interior states, has no referent beyond the body itself: "Though the capacity to experience physical pain is as primal a fact about the human being as is the capacity to hear, to touch, to desire, to fear, to hunger, it differs from these events, and from every other bodily and psychic event, by not having an object in the external world" (161). As such, the experience of pain is to be sharply distinguished from that of psychological suffering, which, "though often difficult for any one person to express, *does* have referential content, *is* susceptible to verbal objectification" (11). Acute physical pain, by way of contrast, encloses the sufferer within a private universe made all the more desperate by the realization that its agony points forever and only back upon itself.

Because pain is idiosyncratically nonreferential in this sense, Scarry continues, it is singularly unresponsive to the claims of linguistic articulation: "This objectlessness, the complete absence of referential content, almost prevents it from being rendered in language: objectless, it cannot easily be objectified in any form, material or verbal" (1985, 162). The impoverishment of our contemporary vocabulary of pain is, therefore, not a function of its modernist construction, nor of its interested appropriation by the profession of medicine, but of its ineluctable reality as "a pure physical experience of negation, an immediate sensory rendering of 'against,' of something being against one, and of something one must be against" (52). Because that experience of aversiveness is indeed so elemental, we should not be surprised to discover just how narrow is the range of cultural variability with respect to ways

of giving voice to pain. Its limited scope "expose[s] and confirm[s] the universal sameness of the central problem, a problem that originates much less in the inflexibility of any one language or in the shyness of any one culture than in the utter rigidity of pain itself: its resistance to language is not simply one of its incidental or accidental attributes but is essential to what it is" (5).

Pain, Scarry continues, does not merely resist linguistic articulation; it also destroys the capacity to speak. Granted, when pain is unrelenting but not all-consuming, it may monopolize language, becoming its only subject, via the discourse of complaint. However, when acute and unyielding, it aggressively demolishes the contents of consciousness and, in so doing, eliminates our capacity to project ourselves into an intersubjective world of shared meanings: "At first occurring only as an appalling but limited internal fact, it eventually occupies the entire body and spills out into the realm beyond the body, takes over all that is inside and outside, makes the two obscenely indistinguishable, and systematically destroys anything like language or world extension that is alien to itself and threatening to its claims" (1985, 55). As "the coherence of complaint is displaced by the sounds anterior to learned language" (54), what was once a person becomes something ever less recognizable as a human being, ever more exclusively defined by its entrapment within a vicious circle of corporeal torment.

With this account, I believe, Scarry has offered an eloquent articulation of the distinguishing features of what I have called "modernist" pain. Her insistence on "the ironclad privacy of the body" (1985, 60) and so pain's essentially unsharable character, her representation of it as uniformly aversive, her Cartesian distinction between psychological suffering and physiological pain, and, finally, her conviction that language must remain forever frustrated in its efforts to represent this invisible interior reality, all betray her endorsement of a cluster of modernist presuppositions that would have been more or less unintelligible, for example, to Blaise Pascal. Scarry, of course, must reject this reading of her argument since it entails representing as culturally and historically specific what she must deem acontextual and timeless in order to sustain her affirmation of pain's "universal sameness" and, more particularly, her insistence upon its utter absence of referential content. Scarry's essentialism in this regard becomes problematic in a specifically political sense when it is joined to her contention that "the

relative ease or difficulty with which any given phenomenon can be verbally represented also influences the ease or difficulty with which that phenomenon comes to be politically represented" (12). If pain is indeed characterized by the sort of all-consuming brute facticity ascribed to it by Scarry, then it is not clear how it can ever become a subject of political representation, let alone contestation. That unhappy conclusion cannot help but compromise the efforts of those, like Robert Cover, who seek to highlight the mutual imbrication of law and pain, but who at the same time are sufficiently taken with Scarry's argument to adopt it as their own (see Cover 1986, 1601–2).

Although I only allude to it here, one way to call into question Scarry's reading of the relationship between pain and language is to affirm what she must deny, that is, the extensive cross-cultural variability apparent in discourses of pain.⁴ The significance of that variability will be incompletely realized, however, so long as it remains informed by the realist distinction, implicit in most discussions of pain's cultural construction (and expressly affirmed by Ivan Illich [1976]), between the brute neurological reality of pain sensations and culturally specific experiences of them.⁵ So long as we endorse that distinction, we will be tempted to embrace Scarry's contention that, in speaking of pain, "the human voice must aspire to become a precise reflection of material reality" (1985, 9), to burrow beneath these various cultural articulations in order to discover the language that pain would itself speak, if only it could. Within a culture prone to scientism, that representationalist aspiration cannot help but bolster the medical profession's assertion of its own special competence to articulate the truth about pain, and the hegemonic pretense of that conviction, not the nature of pain itself, will make it exceedingly difficult to move toward a specifically political conception.

To enable such a conception, I propose that we begin by adopting a constructivist as opposed to a representationalist view of the relationship between language and pain. This is not to urge a simple discursive reformulation of the behaviorist account of pain, one that effectively equates the sentence "I am in pain" with the experience of being in pain or, still less plausibly, one that considers that sentence to be pain's cause. But it is to reject what Ludwig Wittgenstein (1953) called the "picture" theory of language, one that in this instance regards "pain" as an inert label that merely describes or expresses an

antecedent or extradiscursive object. To posit the reality of pain prior to or independent of language is still to posit that reality; and that very act of positing necessarily entails the invocation of a culturally specific and politically valenced construction of its alleged object. The work accomplished by that construction will go unrecognized so long as we forget, for example, that the figuration of pain as a mechanistic event caused by nociceptive impulses traveling along neural pathways between the site of tissue damage and the brain is less an indicator of pain's true nature than of the contemporary medical profession's success in defining that reality.

"We experience pain," contends David Morris, "only and entirely as we interpret it" (1991, 29). By this, I take Morris to be claiming that all vocabularies of pain are quasi-performative in the sense that they participate in fashioning the reality they are said to represent; and this is so regardless of whether one considers the words we cite to communicate the qualitative dimensions of pain (e.g., *sharp*, *searing*, *unbearable*, etc.), or the less nuanced but nonetheless meaningful sounds we make when pain more radically incapacitates (e.g., screaming, moaning, etc.). "[T]he manner in which pain is expressed—either in a reserved, contained fashion, or disclosed in an explosion of wails and moans—has a direct relation to the way in which pain is actually borne and, in the fullest sense of the term, to what is actually felt. The very act of proclaiming one's pain, beyond what is actually manifested and beyond the meaning it projects, has a direct effect on the reality of the experience without our being able to fully determine whether the actual expression brings relief by liberating, or perhaps amplifies the feeling through an echoing phenomenon" (Rey 1995, 4–5). If Roselyne Rey is correct in this regard, then perhaps we should reconsider Scarry's contention that pain is defined by and distinguished from all other phenomena by its radical absence of any referential content. If the language of pain is constitutive of its object, then it seems more plausible to suggest that its intelligibility, indeed its recognizability *as* pain, is a function of whatever referential content it acquires via its discursive formulation. The absence of any designation for what we would call "pain" in the *Dictionnaire de théologie*, to recall an example cited earlier, should be sufficient to unsettle our received conviction that what the body endures can be segregated from the categories that render that suffering meaningful.

To note the cultural variability of pain's discourses is useful because it causes us to question the apparent self-evidence of the English grammar of pain, especially as it informs the biomechanical conception. To give this insight a constructivist twist is still better because we are thereby prompted to ask how language fashions the reality it is thought to mirror. Together, these moves cast doubt on Scarry's contention that the possibility of pain's political articulation is essentially compromised by the recalcitrant character of the object to be afforded voice. That difficulty, on my account, has more to do with our modernist construction of pain, which occludes its political dimensions, than with the nature of pain per se. That these dimensions are recoverable is indirectly intimated by the etymology of the term itself. The English word *pain* derives from a Latin noun that originally bore the sense of punishment, tax, penalty, or fine (*poena*). Under the influence of Christianity, this term's associations with legal notions of wrongdoing and its rectification were partially displaced as it, although retaining the sense of punishment, came to refer more generically to an ineradicable mark of a sinful human condition. This, however, did not altogether eliminate the specifically legal sense of the term, a fact indicated by the presence in Old English of two terms (*pinian* and *peyne*), one of which suggested a notion of general suffering and the other punishment for crime. Only after 1500 did these terms acquire sufficient phonological similarity to merge into the single term *pain* (see Fabrega and Tyma 1976b). The gradual secularization of this abstract noun, especially via its medicalization in the nineteenth century, effectively extirpated all remaining associations with the concept of legal punishment.

Although no doubt too hasty, this etymological excursus hints at the possibility of recovering an expressly political account of pain. Ironically, Scarry herself realizes this possibility, if only in part, through her analysis of torture, which, she argues, involves the "transformation of body into voice" (1985, 45) or, more specifically, pain's translation into political power. The practice of torture subverts the categorical opposition between language and pain that Scarry must affirm for other purposes, and it does so in two ways. First, on her analysis, language can itself become a cause of pain, as it does during an interrogation: "The question, whatever its content, is an act of wounding; the answer, whatever its content, is a scream" (46). Second, and more important for my purposes, the body in pain can itself become something akin to a

discursive artifact, one that speaks of and affirms the totality of sovereign power:

While torture contains language, specific human words and sounds, it is itself a language, an objectification, an acting out. Real pain, agonizing pain, is inflicted on a person; but torture, which contains specific acts of inflicting pain, is also itself a demonstration and magnification of the felt-experience of pain. In the very processes it uses to produce pain within the body of the prisoner, it bestows visibility on the structure and enormity of what is usually private and incommunicable, contained within the boundaries of the sufferer's body. It then goes on to deny, to falsify, the reality of the very thing it has itself objectified by a perceptual shift which converts the vision of suffering into the wholly illusory but, to the torturers and the regime they represent, wholly convincing spectacle of power. The physical pain is so incontestably real that it seems to confer its quality of "incontestable reality" on that power that has brought it into being. (27)

In acknowledging torture's status as a language, Scarry effectively concedes that the pain occasioned by that meaningful practice is itself discursively mediated. Were that not the case, were pain as "monolithically consistent in its assault on language" (13) as she suggests elsewhere, then it would be unavailable for political appropriation in the interest of buttressing claims to incontestable power.

What I wish to ask in closing is whether there is any reason to believe, as Scarry apparently does, that pain can be politically appropriated *only* in the service of affirming state power. If, as she insists, recourse to torture is itself a sign of a regime's instability, is it possible that the pain implicated in the law's very existence might be rendered visible in a way that discloses the contestability of state power? That this possibility is unimaginable to Scarry is made clear when she contends that, if we are to prevent pain from being converted into a regime's fiction of power, without exception we must insist that it be referred back to the suffering human body: "The failure to express pain—whether the failure to objectify its attributes or instead the failure, once those attributes are objectified, to refer them to their original site in the human body—will *always* work to allow its appropriation

and conflation with debased forms of power; conversely, the successful expression of pain will *always* work to expose and make impossible that appropriation and conflation" (14; emphasis added). No matter how ethically commendable, what this claim fails to recognize is that so long as the pain referred back to the human body is construed in modernist biomedical terms, as state agents are all too quick to do, it will be rendered solipsistic, deniable, and immune to political engagement.

Scarry argues that "at particular moments when there is within a society a crisis of belief—that is, when some central idea or ideology or cultural construct has ceased to elicit a population's belief either because it is manifestly fictitious or because it has for some reason been divested of ordinary forms of substantiation—the sheer material factuality of the human body will be borrowed to lend that cultural construct the aura of 'realness' and 'certainty'" (1985, 14). Is it possible that our understanding of the normative status of pain within the law is itself a cultural construct that has now been "divested of ordinary forms of substantiation" and so become questionable? Is that not precisely what we would expect within a liberal political order that can no longer provide persuasive justification for the harm it inflicts upon those whose bodies, in the last analysis, are incidental to their status as juridical persons? Is it possible that the palpable body in pain, once an indispensable means of substantiating the state's claim to authority, now threatens to delegitimize that same claim? Is not the horror elicited by the blood shed by Allen Lee Davis an indication of just such a crisis? And if that is so, then how might Davis's blood become the sort of discursive artifact that raises questions not only about whether he did or did not experience pain, but also about the rightful status of that state's claim to impose death as its ultimate punishment?

As I noted in chapter 2, the troublesome implications of the violence that is integral to the liberal body politic are checked, in large measure, by demarcating and then policing the boundaries between the legislative institutions that adopt capital punishment statutes, the judicial organs that impose death sentences, and the executive officials that make live bodies dead; and, as I have tried to show over the course of this chapter, the security of these boundaries is reinforced by a biomedical conception of pain that locates suffering squarely within the opaque confines of the body's interior. If these insidiously complementary border projects are to be politicized, perhaps we ought not to insist

on “the sheer material factualness of the human body.” Perhaps, instead, we should affirm what Scarry elsewhere calls the body’s “referential instability” (1985, 121). To do so is not to argue that the body can be free of all referential content. Rather, it is to ask how the rationalized body of late modernity might be stripped of its apparent self-evidence as well as how that body’s suffering might begin to overflow the borders that now secure the antipolitical alliance of a medical profession that affirms its hegemonic authority over the meaning of pain and a state that affirms its monopolistic control over the means of legitimate violence.