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Title: Putnam versus Scalia

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5/22/2017—It had been my intention to utilize Hillary Putnam, the analytic philosopher who died in 2016, as a foil in my opposition to the value skepticism of originalist and textualist methods of constitutional interpretation. I had assumed that Putnam would be helpful in a general way. After all, Putnam stood for the proposition that moral realism, at least of the internal variety, was possible. I had no idea how specific Putnam could be in his rejection of Justice Scalia's method of interpretation.

Without trying to be too precise, let us say that textualism, which was Justice Scalia's preferred term, stands for the attempt to interpret constitutional terms, such as "cruel and unusual punishments" by reference to their "original public meaning" at the time of the adoption of a particular constitutional text. It is fair to say that Justice Scalia wanted to interpret a term like cruel to mean what people then thought was cruel.

Imagine my surprise, then, to read in Putnam's book, *The Collapse of the Fact Value Dichotomy*, on page 73, that it is "a stupendous mistake" to try to define the descriptive meaning of a term by reference to what is usually associated with the notion or by normally accepted standards. Putnam's point is that language does not work that way. So, for example, it is reasonable for Socrates to argue that people often confuse rashness with courage. But, of course, the whole point of that criticism by Socrates is that people misunderstand what courage is.

Putnam is making the point, which others have made in the legal context in particular, that when the framers of the 8th amendment banned cruel and unusual punishments, they meant punishments that are actually cruel, rather than punishments that they considered to be cruel. That is because if they were writing and thinking like normal people, rather than like conservative judges.

Justice Scalia would respond that while it may be that this is how language works in general and in normal life, it cannot be this way for a judge in interpreting a Constitution. If the judge is free to call capital punishment cruel when the framers of the 8th amendment did not think so, then the judge rules rather than the law.

But Putnam's criticism addresses precisely this point. Anyone using language understands a connection between the description of a punishment as cruel and the evaluation of the punishment as cruel. It is not possible, and therefore it is not required by democratic theory, to try to interpret an evaluative aspect of cruelty as if it could be done in a value free way.

Instead of interpreting, Justice Scalia wishes to present a picture of various punishments when the word cruel is used. Wittgenstein in fact called this the picture theory of language. And he showed how inadequate it is to how language works. At some point, one must define what makes a punishment cruel. There is no way to do that without making a normative judgment.

This is just to point out that Justice Scalia above all else sought to avoid reasoning with regard to legal interpretation. A very strange position to take.